AUSTRALIAN DEFENCE FORCE PUBLICATION

EXECUTIVE SERIES

ADFP 06.1.1

(SECOND EDITION)

DISCIPLINE LAW MANUAL (PROVISIONAL)

VOLUME 2

THE AUSTRALIAN MILITARY COURT
Announcement statement—may be announced to the public.

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Sep 2007
AMENDMENT CERTIFICATE

Proposals for amendment of ADFP 06.1.1—*Discipline Law Manual, 2nd Edition* Volume 2 should be forwarded to:

Directorate of Military Discipline Law  
Defence Legal Division  
Department of Defence  
RGC–3–170  
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CHAPTER 1

INTRODUCTION TO MILITARY DISCIPLINE LAW

STATUS OF DRAFTING

1.1 This Chapter is in the process of being drafted.

SYNOPSIS

1.2 The intention is that this Chapter, which will be under 20 pages in total, will include a brief synopsis of the following matters:

   a. The purpose of military discipline,

   b. Jurisdiction of the Australian military discipline system,

   c. History and development of Australian military discipline system,

   d. Overview of the Australian military discipline system,

   e. An introduction to ADFP 06.1.1, Discipline Law Manual.
CHAPTER 2

OVERSIGHT OF THE AUSTRALIAN MILITARY DISCIPLINE SYSTEM

STATUS

2.1 This Chapter is in the process of being drafted.

2.2 In the interim, the previous DLM Volume 1, Chapter 12, has been incorporated as an Annex to this chapter to the extent relevant; namely, amended discussion covering the appeals to the DFDAT.

SYNOPSIS

2.3 The intention is that this Chapter will look in detail at civilian courts and tribunals and their jurisdiction with respect to appeals and other applications on disciplinary matters. It is intended that this Chapter will include a detailed discussion of:


b. Federal Court appeal options

c. The role of the Defence Force Ombudsman

d. The role of the Inspector-General of the Australian Defence Force (IGADF) and

e. Defence’s own internal administrative review processes and their relevance to disciplinary matters.

Annex:

A. APPEALS TO THE DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL
APPEALS TO THE DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

BACKGROUND

1. The Defence Force Discipline Act 1982 (DFDA) previously provided for the automatic review of all convictions and punishments imposed by Service tribunals. The DFDA also provided avenues of review on petition to a reviewing authority and review by a Service chief or the Chief of the Defence Force. These various kinds of reviews operated separately from appeals to the Defence Force Discipline Appeal Tribunal (DFDAT) under the Defence Force Discipline Appeals Act 1955 (DFDAA).

2. The principal differences between appeals and reviews is that reviews were available in relation to convictions and punishments imposed by all Service tribunals, and were conducted by officers in the Australian Defence Force (ADF) who are appointed for the purpose. On the other hand, appeals to the DFDAT were available only in relation to convictions by courts martial or Defence Force magistrates (DFM) and were heard by a tribunal consisting, usually, of not less than three judges appointed by the Governor-General.

3. On, and following 01 Oct 07, the avenues of review mentioned above only operate in relation to Summary authority trial matters. Unlike previous DFM and court martial trials, which were subject to review, trials by the Australian Military Court are not subject to the review options described above. As at 01 Oct 07, convictions, prescribed acquittals, and punishments and orders made by the Australian Military Court may, however, be subject to appeal to the DFDAT.

4. This chapter provides guidance on the avenues appeal from the Australian Military Court and the manner in which appeals may be initiated and are conducted. The background of the DFDAT, its constitution, and the eligibility and appointment conditions for of members of the DFDAT are described in Annexes to this Chapter. This chapter also provides commentary and guidance regarding references of questions of law, and appeals from the DFDAT, to the Federal Court of Australia.1

5. The key legislation associated with the DFDAT includes:

   a. Defence Force Discipline Act 1982 (Cth)
   b. Defence Force Discipline Appeals Act 1955 (Cth)
   c. Defence Force Discipline Appeals Regulations 1955

6. Further information and copies of DFDAT decisions and determinations, practice directions and forms may be found at the following web site:


Sittings of the Tribunal

7. The Tribunal may sit at such times and places, including places outside Australia, as the President determines.3 Sittings of the Tribunal must generally be held in public.4 In some cases the powers of the Tribunal may be exercised by a single member;5 usually, however, the Tribunal...
comprise an uneven number of members being not less than three in number of whom one is the President\(^6\) or the Deputy President.\(^7\)

### APEALs TO THE DFDAT - GENERAL

#### Who may appeal to the DFDAT

8. A person who has been convicted by the Australian Military Court, and a person who has been acquitted of a service offence on the grounds of unsoundness of mind\(^8\), may appeal to the DFDAT under the DFDAA, as of right.\(^9\)

9. However, appeals to the DFDAT that are not on a question of law, but a question of fact, may only be brought by leave of the Tribunal.\(^10\)

10. A convicted person may appeal against their conviction, or a punishment imposed or court order made in respect of a conviction.

11. A person acquitted by a Military Judge, based on a finding, either by a military jury or the military judge when sitting alone, that the accused, at the time of the act or omission the subject of a charge was suffering from such mental impairment as not to be responsible in accordance with the law, for that act or omission, may appeal against that prescribed acquittal. However, the person is not able to appeal to the DFDAT where the evidence of unsoundness mind was adduced by the defence.\(^11\)

12. The Director of Military Prosecutions may also appeal to the DFDAT against a punishment imposed, or a court order made, in respect of a conviction.\(^12\)

#### Powers of the DFDAT

13. Further detail is provided later in this Chapter regarding the determination of appeals made to the DFDAT.\(^13\) However, when considering who may lodge an appeal to the DFDAT it is relevant to briefly mention the powers than an appellant may seek the Tribunal to exercise.

14. In summary, where relevant, the Tribunal has power to.\(^14\)

   a. quash a conviction;\(^15\)
   b. quash a prescribed acquittal;\(^16\)
   c. substitute for a conviction:
      (1) a conviction for an alternative offence.\(^17\)

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\(^6\) Or a member qualified to be appointed as President.
\(^7\) DFDAA s 15
\(^8\) DFDAA s 4 ‘prescribed acquitted person’, and DFDA s 145
\(^9\) DFDAA s 20
\(^10\) DFDAA ss 20(2)
\(^11\) DFDAA ss 20(1) and (2)
\(^12\) DFDAA ss 20(4)
\(^13\) See paragraph XX-YY below.
\(^14\) See further discussion in Section 4 – Determination of Appeals
\(^15\) DFDAA ss 23(1)
\(^16\) DFDAA ss23(1)
(2) an acquittal on the grounds of unsoundness of mind;\textsuperscript{18} 

d. or order a new trial;\textsuperscript{19} 
e. in an appropriate case, refer a question of law to the Federal Court;\textsuperscript{20} or 
f. vary a punishment or a court order.\textsuperscript{21}

BRINGING OF APPEALS

Grounds of appeal

15. An appeal or application for leave to appeal to the Tribunal must specify the grounds relied on.\textsuperscript{22}

DFDAT Practice Directions

16. The DFDAT, at the time of drafting, has issued \textit{Practice Direction No.1, 23 August 2002}. Further to the DFDAA and DFD Appeal Regulations, the practice direction provides specific guidance and instruction in relation to:

a. the use of particular prescribed forms to lodge a notice, appeal or seek direction from the DFDAT, or abandon an appeal;

b. the preparation of an ‘appeal book’;

c. the provision of an outline of submissions;

d. the supply of a list of authorities referred to by counsel;

e. dress at a DFDAT hearing; and

f. the lodgement or delivery of notices or documents.

With whom appeals and notices may be lodged

17. In most cases, an appeal or application for leave to appeal should be lodged with the Registrar of the Tribunal or a Deputy Registrar or the officer commanding a unit of the ADF.\textsuperscript{23}

18. Additional provisions exist in relation to certain specific classes of appellants and the persons with whom notices of appeal may be lodged, including:

a. officers commanding a body, contingent or detachment on board a ship, other than a ship of the RAN, being a ship on board which is a body, contingent, or detachment of the Defence Force – for persons in custody on such ships;

\textsuperscript{17} DFDAA s 26
\textsuperscript{18} DFDAA ss 23(3)
\textsuperscript{19} DFDAA s 24
\textsuperscript{20} See Section 9 below.
\textsuperscript{21} DFDAA s 27
\textsuperscript{22} DFDAA ss 21(1)(a)
\textsuperscript{23} DFDAA s 21(1)(b); DFD Appeals Regulations, Reg 9.
b. the OIC of a Detention Centre – where the appellant is confined in the detention centre; and
c. the Governor of a Prison – where the appellant is confined in a civil prison.

19. Applications or appeals lodged with the abovementioned persons are to be forwarded to the Registrar.

20. The principal registry of the DFDAT for the lodgement of notices of appeal is in the ACT, and is contactable as follows:

Registrar
Defence Force Discipline Appeals Tribunal
C/- Federal Court of Australia
Commonwealth Law Courts Building
Childers Street
Canberra, ACT 2601

21. The Registrar is of the DFDAT is actually physically located in Melbourne, VIC. There are also Deputy Registrars are located in Sydney, Melbourne, Perth, Adelaide, and Hobart. Contact details for each of these other Registry offices are provided in Annex A.

Time limits on lodging appeals

22. An appeal, or application for leave to appeal must be lodged within an ‘appropriate period’, or where a further period is allowed by the Tribunal (either before or after the expiration of the specified appropriate period), that further period. The DFDAA specifies that an appellant must lodge their appeal or application for appeal within 60 days of:

a. the day of the conviction;
b. the day of the prescribed acquittal; or
c. the day the punishment or court order is made.

23. As observed above, the Tribunal may allow an extension of the statutory time limit on lodging appeals. The DFDAT Practice Direction provides Form 1 that may be used in applying for an extension of time to lodge an appeal or notice etc.

ATTENDANCE AND REPRESENTATION OF APPELLANT AT HEARINGS

Attendance of Appellant

24. An appellant is entitled to be present at the hearing of his or her appeal or of a matter preliminary or incidental to the appeal where the DFD Appeal Regulations so provide, or with leave of the Tribunal. Since the Regulations currently make no provision in this regard, attendance of the appellant at a hearing is, in fact, only with leave of the Tribunal. Leave may be granted by a single member of the Tribunal or by the Tribunal when fully constituted.
Representation of Appellant

25. An appellant may be represented at a hearing of his or her appeal before the Tribunal, or a matter preliminary or incidental to the appeal, by a legal practitioner. 28 A legal practitioner in this context means a barrister or solicitor of the High Court or of the Supreme Court of a State or Territory. In relation to a hearing by the Tribunal at a place outside Australia, a person who is authorised by law to practise as a legal practitioner at the place may represent an appellant. 29 A legal officer in the ADF, who is a legal practitioner as defined above, may represent an appellant at a hearing before the Tribunal.

Legal assistance to member appellants before the DFDAT

[UNDER DEVELOPMENT]

Legal aid provisions

26. DFD Appeal Regulations, Reg 11, sets out the process and timeframes applicable to the making of applications to the Tribunal for the granting of legal aid. In general, an application for legal aid should be made as soon after, or at least within 14 days, of lodging an appeal or application for leave to appeal.

27. Applicants must provide a statutory declaration setting out such information, as necessary, to enable the Tribunal to determine whether his or her means are insufficient to enable the conduct of an appeal or application for leave to appeal.

28. If the Tribunal is satisfied that the appellant has insufficient means, and that it is desirable in the interests of justice that legal aid should be granted, the Tribunal may approve the granting of legal aid. If such an order is made, the Attorney-General may arrange for one or more legal practitioners to represent the appellant.

Defence of Appeals

29. A Service chief is required to arrange the undertaking of the defence of an appeal by an ‘offender appellant’ (a convicted or prescribed acquitted etc) before the tribunal. 30 The Director of Military Prosecutions (DMP) has the statutory function of representing service chiefs in proceedings before the DFDAT. 31

Dress when appearing before the DFDAT

30. A legal practitioner appearing at a hearing of an appeal, or an application for leave to appeal before the Tribunal, shall appear in such dress as would be worn in the Court of Criminal Appeal or equivalent in the State or Territory where the hearing takes place. Therefore, counsel who would wear robes and/or a wig in those circumstances should wear robes and/or a wig in an identical manner. If the appellant is required to attend at the hearing, the appellant should wear uniform (that is dress of the day).

DETERMINATION OF APPEALS

Dismissing a frivolous or vexatious appeal by offender appellant

31. Where the Tribunal dismisses an appeal or application for leave to appeal (against a conviction, or punishment or court order), and is of the opinion that the appeal or application was frivolous or vexatious, it may order that any punishment of detention or imprisonment which had been imposed in

28 DFDAA ss 39(1)
29 DFDAA ss 39(4)
30 DFDAA s 42
31 DFDA ss 188GA(1)(d)
the proceedings to which the appeal or application relates be taken to commence on the day on which
the appeal or application is dismissed.32

Receiving new evidence

32. On hearing an appeal, the Tribunal is empowered to receive and consider evidence that was not
reasonably available at the trial, is likely to be credible and would have been admissible in the trial. If
the Tribunal considers that the conviction or prescribed acquittal cannot be supported having regard to
that evidence, it is required to quash the conviction or prescribed acquittal.33

Quashing of conviction etc.

33. The Tribunal must allow an appeal and quash a conviction or prescribed acquittal where it is of the
opinion that:

a. the conviction or prescribed acquittal is unreasonable or cannot be supported, having
regard to the evidence;

b. as a result of a wrong decision on a question of law, or of mixed law and fact, the
conviction or prescribed acquittal was wrong in law and that a substantial miscarriage
of justice has occurred;

c. there was a material irregularity in the course of the trial and that a substantial
miscarriage of justice has occurred; or

d. in all the circumstances of the case, the conviction or prescribed acquittal is unsafe or
unsatisfactory.34

Substitution of conviction for alternative offence

34. Where the Tribunal quashes a conviction of a person of a service offence, it may substitute a
conviction of another offence. The Tribunal must be satisfied that the Military Judge or military jury
could in the proceedings have found the person guilty of another service offence, that is been satisfied
beyond reasonable doubt of facts that proved that the person was guilty of the other offence.35 The
substituted conviction must be of an ‘alternative offence’ (within the meaning of DFDA s 142) in
relation to the original offence, or, a service offence with which the person was charged in the
alternative and in respect of which the Australian Military Court did not record a finding.

35. Where the Tribunal has substituted a conviction for the original conviction, it may impose a
punishment (or take any other action under Part IV of the DFDA) on the convicted person which could
have been imposed or taken by the Australian Military Court. However, the Tribunal may not impose a
punishment or make a reparation order with respect to the substituted conviction unless a punishment
had been imposed, or reparation order had been made, with respect to the original conviction.
Furthermore, the Tribunal may not impose a punishment which is more severe than the punishment
that was imposed for the original offence. Nor may it make a reparation order for an amount that
exceeds the amount of the reparation order in respect of the original offence.36

36. Where the Tribunal imposes a punishment of imprisonment or detention in respect of a substituted
conviction the punishment is deemed to commence from the time from which it would have
commenced if it had been imposed in the original proceedings.37

32 DFDA s 22
33 DFDA ss 23(2)
34 DFDA ss 23(1)
35 DFDA ss 26(1)
36 DFDA ss26(2)
37 DFDA ss 26(3)
Quashing conviction on the ground of ‘unsoundness of mind’

37. Where the Tribunal is satisfied that, at the time of the alleged offence, the convicted person was suffering from such unsoundness of mind as not to be responsible in law for his or her actions the Tribunal must:

a. allow the appeal and quash the conviction,

b. substitute for the conviction so quashed an acquittal on the ground of unsoundness of mind, and

c. direct that the person be kept in strict custody until the pleasure of the Governor-General is known. 38

38. The Tribunal may also quash a conviction where it appears that the Australian Military Court should have found that the convicted person by reason of unsoundness of mind was not able to understand the proceedings against him and accordingly was unfit to stand trial. Where the Tribunal quashes a conviction on this ground, it must also direct that the person be kept in strict custody at the pleasure of the Governor-General. 39

39. A Tribunal may not quash a conviction on the ground of unsoundness of mind if the conviction may be quashed on other grounds. 40

Ordering a new trial

40. Where the Tribunal quashes a conviction, or a prescribed acquittal, it may order a new trial if it considers that, in the interests of justice, the person should be tried again. 41 Pending the new trial, the Tribunal may make such further orders for the custody of the person as it thinks fit. 42

Consequences of quashed conviction and no new trial – deemed acquittal

41. Where the Tribunal quashes a conviction of a Service offence and does not order a new trial, the person is deemed to have been acquitted of the offence. 43 Similarly, where the Tribunal quashes a prescribed acquittal of a person of a Service offence and does not direct that the person be kept in strict custody at the pleasure of the Governor-General or order a new trial, the person is deemed to have been acquitted of the offence without qualification. 44

Varying a punishment or court order

42. In an appeal against a punishment or court order, the DFDAT, in its discretion, may confirm, quash or vary the punishment or order. The Tribunal may impose a different punishment or order. In the case of a punishment, the Tribunal may make a court order, and vice versa, in the case of a court order the Tribunal may impose a punishment.

43. The DFDAT is empowered, and constrained by Part IV of the DFDA in the same way as the Australian Military Court. 45

44. A punishment or court order imposed by the DFDAT has the same effect, and is enforceable in the same manner, as if it had been imposed by the Australian Military Court. 46

38 DFDA ss 23(3)
39 DFDA ss 23(4)
40 DFDA ss 23(5)
41 DFDA s 24
42 DFDA s 25
43 DFDA ss 41(a)
44 DFDA ss 41(b)
45 DFDA ss 27(3)
INCIDENTAL POWERS OF THE TRIBUNAL

Powers in relation to witnesses and evidence

45. For the purpose of hearing an appeal or application for leave to appeal, the Tribunal may take the following action:

a. appoint a person to receive evidence on behalf of the Tribunal;\textsuperscript{47}

b. summon a person, who would have been a compellable witness in the Australian Military Court trial, to give evidence and/or produce documents etc to the Tribunal or to a person appointed to receive evidence on its behalf;\textsuperscript{48}

c. receive evidence of a witness who is a competent but not a compellable witness on application, for example by the offender appellant, or husband or wife of the appellant etc;\textsuperscript{49}

d. appoint a special commissioner to conduct an examination or investigation in to a question requiring inquiry which cannot conveniently be conducted by the Tribunal, such as where a question involves a prolonged examination of evidence, requires scientific or a local investigation. The tribunal may act upon the opinion of the commissioner;\textsuperscript{50}

e. where a special knowledge of a matter is required for the proper determination of an appeal, appoint a person with special knowledge to act as assessor to the Tribunal,\textsuperscript{51} and

f. examine witnesses on oath or affirmation.\textsuperscript{52}

46. Witnesses or persons appointed to receive evidence or as a ‘special commissioner’ are paid allowances as fixed under the DFD Appeals Regulations. Regulation 22 thereof refers to Schedule 2 of the \textit{Public Works Committee Act 1969}, a copy of which is provided in DLM Volume 1.

Power to obtain report

47. On the hearing of an appeal, the Tribunal may, where it thinks it necessary or expedient in the interests of justice to do so, direct such steps to be taken as are necessary to obtain a report from the Military Judge of the Australian Military Court who heard the proceedings from which the appeal arose. In the report, the Military Judge may be required to give his or her opinion upon the case or upon a point arising in the case or to make a statement as to any facts the ascertainment of which appears to the Tribunal to be material for the purpose of determining the appeal.\textsuperscript{53}

\textsuperscript{46} DFDAA ss 27(2). For a discussion on the enforcement of punishments and orders made by the Australian Military Court, see DLM Volume 2, Chapter 7.

\textsuperscript{47} DFDAA ss 31(1)(a)

\textsuperscript{48} DFDAA ss 31(1)(b)

\textsuperscript{49} DFDAA ss 31(1)(c)

\textsuperscript{50} DFDAA ss 31(1)(d)

\textsuperscript{51} DFDAA ss 31(1)(e)

\textsuperscript{52} DFDAA s 33

\textsuperscript{53} DFDAA s 36
Warrants

48. The Tribunal may issue any warrant necessary for the enforcement of any action taken by it in relation to an appellant.\(^{54}\) Where the Tribunal issues a warrant for the commitment of a person to a prison or a detention centre, the warrant is deemed to be issued under DFDA s 170(1).\(^{55}\)

Restitution Order and Reparation Orders

49. The Tribunal may vary or annul a restitution or reparation order made by the Australian Military Court whether or not it quashes the conviction in respect of which the order was made. If the order is annulled, it has no effect. If the order is varied it takes effect as varied.\(^{56}\)

COSTS

50. Appeal by offender appellant allowed. Where the Tribunal allows an appeal it may, if it thinks fit, direct that the Commonwealth pay the costs incurred by the appellant in connection with his or her appeal, or in carrying out his or her defence against a charge or charge out of which the appeal arose.\(^{57}\)

51. Appeal or application dismissed. The Tribunal may order costs against an appellant where it dismisses an appeal application for leave to appeal. These costs may include the whole, or any part of the costs of the appeal or application, including allowances paid to a witness and the costs of copying or transcribing any documents for the use of the Tribunal.\(^{58}\)

52. Where the Tribunal dismisses an appeal by the Director of Military Prosecutions, it may, if it thinks fit, order the Commonwealth to pay to the offender appellant the whole, or any part of the costs of the appeal that were incurred by the offender appellant.\(^{59}\)

53. Enforcement of costs orders. DFD Appeal Regulations, Reg 13, provides that an order made for the payment of any costs may be enforced by either, or by combination of:

   a. the Commonwealth suing for and recovering the amount in a court of competent jurisdiction as if the amount were a debt due to the Commonwealth; or
   b. deducting the amount from any pay and allowances earned by the appellant as a member of the Defence Force.

54. Where an order is made against the Commonwealth, DFDA s 37(2) obliges the Minister for Finance to pay the offender appellant, out of moneys provided by the Parliament for the purpose, the sum directed to be paid.

\(^{54}\) DFDA ss 35(1)

\(^{55}\) DFDA ss 35(2). Such a warrant may commit a prisoner to a prison in a State or Territory, or a detainee to a detention centre. Further discussion on ‘warrants of commitment’ issued pursuant to DFDA s 170 can be found in DLM Volume 2, Chapter 7.

\(^{56}\) DFDA s 38

\(^{57}\) DFDA ss 37(1)

\(^{58}\) DFDA ss 37(3)

\(^{59}\) DFDA ss 37(1A)
OFFENCES IN RELATION TO THE TRIBUNAL

Offences

55. A person may be tried summarily in a civil court where he or she commits certain offences in relation to the Tribunal. These offences include:

   a. failure to attend the Tribunal or produce documents when summoned to do so,
   b. failure by a witness to continue in attendance or refusal by a witness to be sworn or to give evidence,
   c. wilfully insulting or disturbing the Tribunal,
   d. interrupting proceedings,
   e. seeking to influence improperly the Tribunal or a witness, or
   f. seeking to bring the Tribunal into disrepute.

Where a person is convicted of any of these offences he or she is liable to a fine of $1,000 or imprisonment for six months.

Contempt

56. Where a person commits an offence of the kind described above, he or she is also guilty of contempt of the Tribunal. The contempt is punishable by the Supreme Court of a State or Territory upon application by the Attorney-General. However, a punishment may not be imposed twice in respect of the same offence. The penalty the court is capable of imposing in respect of the contempt is that penalty which would have been applicable in respect of the offence constituting the contempt – that is, a maximum of a $1,000.00 fine or 6 months imprisonment.

REFERENCES AND APPEALS FROM THE TRIBUNAL TO THE FEDERAL COURT

References during hearings before the Tribunal

57. In the course of a hearing before the Tribunal, other than where it is constituted by a single member, the Tribunal of its own motion, or at the request of an appellant or The Director of military Prosecutions, may refer a question of law arising in the hearing to the Federal Court. The Full Court of the Federal Court may hear and determine such matters referred to it.

58. Pending determination of a question of law, the Tribunal may not give a decision to which the question is relevant. On receiving the opinion of the Federal Court, the Tribunal may not proceed or make a decision in a manner which is inconsistent with the opinion.

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60 DFDAAs 43-48.
61 DFDAAs 50
62 DFDAAs 51(7)
63 DFDAAs 51(6)
64 DFDAAs 51(1). The former requirement under the Courts Martial Appeals Act 1955, to obtain a certificate from the Attorney General before a matter could be referred to the Federal Court, is abolished.
65 DFDAAs 51(2), (3).
Appeals from decisions of the Tribunal

59. An appellant or the Director of Military Prosecutions may appeal to the Federal Court on a question of law involved in a decision of the Tribunal in respect of an appeal, other than a decision made by a single member.

60. The Full Court of the Federal Court may hear and determine the appeal and may make such orders as it thinks appropriate.66

61. An appeal must be lodged within 28 days of the day on which the person is supplied with a copy of the decision of the Tribunal; however, the Federal Court may allow and hear an appeal which is lodged out of time.67

Powers of the Federal Court in relation to Appeals

62. As identified above, the Federal Court is empowered to make such orders as it thinks appropriate in respect of an appeal from the Tribunal. The general powers of the Federal Court in passing judgement on an appeal are set out at s 28 Federal Court of Australia Act 1976. In particular, the Federal Court may make an order:68

a. affirming or setting aside the decision of the Tribunal;
b. remitting the case to be heard and decided again by the Tribunal in accordance with directions of the Court;
c. granting a new trial by the Australian Military Court; and
d. where the Court has set aside a decision of the Tribunal quashing a conviction or quashing a prescribed acquittal, reinstating a conviction or a prescribed acquittal.

63. In addition, it is worth noting that an appeal to the Federal Court will enliven powers of the Federal Court, and the Tribunal, to order, on such conditions (if any), a stay of any or all of the proceedings, or suspend the operation of an injunction or other order under the judgement appealed from.69

64. Also, the appellate powers of the Federal Court, where the appeal is against a sentence, include the power to increase or decrease the sentence.70

Custody orders and sending of documents to the Federal Court

65. Where a matter is referred to the Federal Court, whether as an appeal or a reference, the Tribunal may make appropriate custody orders in relation to the appellant. The Tribunal must also cause to be sent to the Court all documents and other records relating to the matter.71

Costs of appeals from the Tribunal

66. In accordance with s 43 Federal Court of Australia Act 1976, the Federal Court has jurisdiction to award costs in all proceedings before the court. The award of costs is at the discretion of the Court or Judge. Further detail may be provided by reference that Act, and to the Federal Proceedings (Costs) Act 1981.

66 DFDA ss52(4)
67 DFDA ss 52(1), (2), (3), (4).
68 DFDA ss 52(5)
69 Federal Court of Australia Act 1976 s 29
70 Federal Court of Australia Act 1976 ss 28(5)
71 DFDA s 53
Appeals from the Federal Court to the High Court of Australia

67. It is possible to appeal from a judgement of the Full Court of the Federal Court to the High Court of Australia, where the High Court gives special leave to appeal.\footnote{Federal Court of Australia Act 1976 s 33}

Appendix

1. THE DEFENCE FORCE DISCIPLINE APPEALS TRIBUNAL

2. DFDAT Practice Note No.1_2002
THE DEFENCE FORCE DISCIPLINE APPEALS TRIBUNAL

SECTION 1 – BACKGROUND AND ESTABLISHMENT OF THE DFDAT¹

1. In 1955, the Courts-Martial Appeal Tribunal was established under the Courts-Martial Appeals Act 1955. The Tribunal was later renamed the Defence Force Discipline Appeal Tribunal by the Defence Force (Miscellaneous Provisions) Act 1982. The Courts-Martial Appeals Act 1955 was also renamed to Defence Force Discipline Appeal Act 1955.

2. Prior to the introduction of the Tribunal in 1955 the armed forces had the ultimate review of courts-martial decisions. Internal procedures were adopted by the particular service involved (by which a decision was either confirmed or quashed). In all cases, an automatic review was made by the Judge Advocate General to ensure there was no illegality or miscarriage of justice. The service member involved could submit a petition seeking the quashing of the finding and the sentence. The petition was considered in private on written submissions only, in the absence of the service member, and no reasons needed to be provided for the decision.

3. The introduction of the Tribunal imposed on courts-martial similar standards of justice applicable in a court of criminal appeal.

4. The Defence Force Discipline Appeals Regulations prescribe some of the time limits and practices and procedures of the Tribunal, including for the granting of legal aid.

SECTION 2 – COMPOSITION OF TRIBUNAL

5. The DFDAT, formerly the Court Martial Appeal Tribunal, consists of a President, Deputy President and such other members as are appointed, by commission, by the Governor-General.²

6. There is a Registrar of the Tribunal, appointed by the Attorney-General and such deputies of the Registrar as are required, also appointed by the Attorney General³. As at the time of drafting this Annex, the Registrar is Ms Sia Lagos. The Deputy Registrars are Mr Graham Ramsey and Mr Martin Jan, Ms Caroline Edwards, Ms Patricia Christie, Mr Alan Parrott and Ms Jennifer Hedge.

SECTION 3 – ELIGIBILITY AND APPOINTMENT OF DFDAT PRESIDENT, DEPUTY PRESIDENT AND MEMBERS

7. A person is not qualified to be appointed as President or Deputy President unless he is a justice or a judge of a Federal Court or of the Supreme Court of a State or Territory.⁴

8. The prerequisite for an appointment as a member of the Tribunal, other than an appointment as President or Deputy President, is that a person be a judge of a superior court (that is, is qualified to be appointed as President) or is a judge of a District Court or County Court of a State.⁵

¹ Content from http://www.defenceappeals.gov.au/about.html
² DFDAA s.7(1), (2). The members are listed in the Commonwealth Government Directory
³ DFDAA s 19
⁴ DFDAA s.8(1).
⁵ DFDAA s.8(2).
SECTION 4 – THE REGISTRAR OF THE DFDAT

9. The Registrar has custody of the records of the Tribunal and of documents lodged with him or her or a Deputy Registrar. The principal registry of the Tribunal is located in the Australian Capital Territory. However, the actual Registrar is located in Melbourne. There are also Deputy Registrar offices in most other capital cities. Their contact details are provided below:

Victoria – Registrar and Deputy Registrar
Federal Court of Australia
Commonwealth Law Courts
305 William Street
Melbourne VIC 3000

New South Wales – Deputy Registrar
Level 16, Law Courts Building
Queens Square
SYDNEY NSW 2000
DX 613 SYDNEY

South Australia – Deputy Registrar
Federal Court of Australia
8th Floor, Grenfell Centre
25 Grenfell Street
ADELAIDE SA 5000
Postal Address: GPO Box 1350; ADELAIDE SA 5001

Tasmania – Deputy Registrar
Commonwealth Law Courts Building
Ground Floor, 39-41 Davey Street
HOBART TAS 7000
Postal Address: GPO Box 903J; HOBART TAS 7001

Western Australia – Deputy Registrar
Federal Court of Australia
Commonwealth Law Courts
Level 6, 1 Victoria Avenue
Perth WA 6000
Postal address: G PO Box A30; Perth WA 6001

SECTION 5 – SITTING OF THE TRIBUNAL

Sittings of the Tribunal

10. The Tribunal may sit at such times and places, including places outside Australia, as the President determines.6 Sittings of the Tribunal must generally be held in public.7 In some cases the powers of the Tribunal may be exercised by a single member,8 usually, however, the Tribunal must comprise an

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6 DFDAA s.14.
7 DFDAA s.18.
8 DFDAA s.17
uneven number of members being not less than three in number of whom one is the President\textsuperscript{9} or the Deputy President.\textsuperscript{10}

\textbf{11.} It is not necessary for each member of the Tribunal hearing a particular appeal to declare his or her opinion thereon or to be present when a reserved decision is given. Instead, the opinion of any one of the members may be reduced to writing and given by any other member at any subsequent sitting of the Tribunal.\textsuperscript{11}

\textbf{Sittings before a Single Member}

\textbf{12.} The powers of the Tribunal may be exercised by a single member with respect to:\textsuperscript{12}

\begin{itemize}
  \item[a.] the granting of leave to appeal to the Tribunal against a conviction or a prescribed acquittal;
  \item[b.] the extension of the period within which, under the DFDAA, an application for leave to appeal to the Tribunal is required to be lodged;
  \item[c.] the granting of legal aid to an appellant under the DFD Appeals Regulations;\textsuperscript{13}
  \item[d.] the granting of leave to an appellant to be present at the hearing of an appeal or matter under the DFDAA; and
  \item[e.] other matters as provided in s.17(1) of the DFDAA.
\end{itemize}

\textbf{13.} A person who is affected by a decision of a single member of the Tribunal may appeal to the Tribunal constituted by not less than thr

\textsuperscript{9} Or a member qualified to be appointed as President.

\textsuperscript{10} DFDAA s.15.

\textsuperscript{11} DFDAA s.15A.

\textsuperscript{12} DFDAA s.17.

\textsuperscript{13} See Regulation 11 of the DFD Appeals Regulations.
DFDAT PRACTICE NOTE NO.1_2002

Practice Direction No. 1 dated 23 August 2002

We, the President, Deputy President and Members of the Defence Force Discipline Appeal Tribunal, make the following Practice Direction No 1.

Dated 23 August 2002

P C Heerey J
President

Peter G Underwood J
Deputy President

D Mildren J
Member

K P Duggan J
Member

Definitions

1. In this Practice Direction, unless the context otherwise indicates-

"Act" means the Defence Force Discipline Appeals Act 1955 (Cth)

"appeal" includes application for leave to appeal and an application for extension of time for appeal

"appellant" includes an applicant for leave to appeal or for extension of time for appeal

"conviction" includes a prescribed acquittal as defined in s 4(1) of the Act

"Deputy President" means the Deputy President of the Tribunal

"Member" means a member of the Tribunal including the President or Deputy President

"President" means the President of the Tribunal

"Registrar" means the Registrar or a Deputy Registrar of the Tribunal

"Regulations" means the Defence Force Discipline Appeals Regulations 1957 (Cth)

"Tribunal" means the Defence Force Discipline Appeal Tribunal

Forms

2. The forms in the Schedule, or forms as near thereto as the circumstances permit, shall be used in all cases to which such forms are applicable.

Forwarding of documents to other party

3. Where any notice or document is lodged with the Registrar pursuant to the Act, the Regulations or this Practice Direction, the Registrar shall cause a copy thereof to be forwarded to any other party.

Notices of Appeal etc
4.

(1) A notice of appeal from a court martial or Defence Force Magistrate shall be in Form 1 as appropriate.

(2) A notice of appeal from a single Member of the Tribunal shall be in Form 1 as appropriate.

(3) An application for leave to appeal shall be in Form 1 as appropriate.

(4) An application for extension of time to appeal shall be in Form 1 as appropriate and shall be supported by affidavit setting out:
(a) the reasons why the appeal was not lodged in time;
(b) the grounds of the proposed appeal; and
(c) why such grounds have a reasonable prospect of success.

(5) All the foregoing documents shall be lodged with the Registrar, Defence Force Discipline Appeal Tribunal, c/- Federal Court of Australia, Commonwealth Law Courts Building, Childers Street, Canberra ACT 2601 or one of the persons specified in reg 9(1) of the Regulations.

Notice of Address for Service

5. Within 14 days of receipt of a notice of appeal or an application for leave to appeal or an application for extension of time for appeal a respondent shall lodge with the Registrar a notice of address for service in accordance with Form 2.

Directions

6.

(1) Any application seeking directions as to the conduct of an appeal (including the grant of legal aid pursuant to reg 11 of the Regulations) shall be made by an application in Form 3.

(2) Directions as to the conduct of an appeal may be given by a Member or the Registrar, whether or not such directions are sought by a party.

(3) For the purpose of giving, or considering whether to give, such directions a hearing may, if necessary, be held.

(4) A hearing may be conducted by video link or telephone.

Affidavits

7. An affidavit shall be in Form 4.

Preparation of Appeal Book

8.

1) The appeal book for the use of the Tribunal on an appeal shall unless otherwise directed be prepared by the respondent in such manner and in such number of copies as the Registrar shall direct.

(2) The appeal book shall contain only such material as is relevant to the appeal.

(3) Without prejudice to the generality of (2), the appeal book shall not include documents which are:
(a) not relevant to the issues to be argued on the appeal; or
(b) duplicates of other documents.

(4) The Registrar shall fix an appointment for the settling of the contents of the appeal book and give the parties reasonable notice of such appointment.
(5) The respondent shall, not less than 14 days before the appointment, lodge with the Registrar a list of proposed contents of the appeal book.

(6) The Registrar shall forward to the appellant a copy of the respondent's list of proposed contents.

(7) Upon receipt of a copy of the respondent's list of proposed contents the appellant shall lodge with the Registrar a list of any proposed additions to or deletions from the respondent's list.

(8) Unless the Registrar otherwise orders, it shall not be necessary for the parties to attend at the appointment but the Registrar may at any time, in relation to the contents of the appeal book:

(a) communicate with the parties; or
(b) direct the parties to communicate with each other.

(9) At the appointment to settle the appeal book the Registrar shall determine what documents and matter shall be included in the appeal book.

Listing of Appeal

9. The Registrar shall notify the parties of the date, time and place for the hearing of the appeal.

Outlines of Submissions

10. Each party shall prepare a written outline of that party's submissions on the appeal.

11. The outline of submissions shall contain concise statements of:

(1) the issues that the appeal presents;

(2) an outline of the argument to be presented on each issue, specifying the steps in the argument, and any legislation, reference to authority or finding of fact to be relied upon in support of each step;

(3) where there is to be a challenge to any findings of fact, the error (including any failure to make a finding of fact) should be identified, the finding which the party contends ought to have been made should be specified, and the reasons it is said that an error has been made should be given. Reference to the evidence intended to be relied upon in support of the argument should be supplied.

12. The appellant shall lodge with the Registrar an outline of submissions by 4 pm, 7 clear working days before the date of hearing of the appeal.

13. The respondent shall lodge with the Registrar an outline of submissions by 4 pm, 3 clear working days before the date of hearing of the appeal.

14. The Registrar shall forward each outline to the opposing party as soon as practicable after the receipt thereof.

15. The outline of submissions should not ordinarily exceed 10 pages of double spaced typing, unless leave is obtained from the Registrar to lodge a more lengthy document.

16. All references to the appeal book in the submissions should refer to the relevant page and the relevant part of the page, eg AB 27.5 - 28.2.

17. Similarly, references to authority should give the case name, citation and refer to the relevant paragraph or page and the relevant part of the page, eg A v B (1964) 112 CLR 210 at 212.5 to 212.7, C v D (1998) 196 CLR 318 at [14].

18. It is expected that the oral arguments will follow the outline of submissions. New issues, not included in the outline, may not be advanced on the hearing of the appeal except with the leave of the Tribunal.

Lists of Authorities
19. Each list of authorities and legislation should be divided into two parts. Part "A" should contain only the authorities and legislation from which passages are to be read. Part "B" should contain the authorities and legislation to which counsel might refer but from which passages are not to be read. The relevant sections of legislation should be specified.

20. The Tribunal will supply for its own use up to a maximum of ten of the cases in Part "A" of the list marked with a single asterisk where those cases are reported in the Commonwealth Law Reports, Federal Court Reports, Australian Law Reports, the authorised reports of the State or Territory where the appeal is to be heard, or are unreported Tribunal cases.

21. Counsel may identify in Part "A" five cases in addition to those referred to in paragraph 20 above to which they wish to refer to at some length. These cases are to be identified on the list by a double asterisk.

22. A party who intends to cite from a book or a case other than one referred to in the Reports in paragraph 20 above shall provide photocopies of the relevant parts of the book or the Report for the use of the Tribunal to be handed up during argument.

23. Three copies of the list of the authorities and legislation referred to in Part "A" should be lodged with the Registrar at the place where the appeal is to be heard not less than two working days before the date of hearing of the appeal. Copies of the Act, the Defence Force Discipline Act 1982 and the regulations thereunder need not be supplied.

Application to call further evidence

24.

1) Where an appellant intends to ask the Tribunal to consider further evidence pursuant to s 23(2) of the Act the appellant shall give to the Registrar written notice of such intention as soon as possible.

2) The notice shall include:
   (a) a brief summary of such evidence; and
   (b) a statement as to how it satisfies the requirements of paragraphs (a), (b) and (c) of s 23(2) of the Act.

3) Upon receipt of such notice the Registrar shall convene a directions hearing.

Abandonment

25. The appellant may, pursuant to reg 12 of the Regulations, lodge a notice of discontinuance of the appeal. The notice shall be in accordance with Form 5.

26. The Tribunal may, at the request of the respondent or of its own motion, give notice to an appellant that if some specified act, being an act necessary for the prosecution of the appeal, is not done within the time specified in the notice the appeal shall be deemed to be abandoned. The notice shall be in accordance with Form 6.

27. If the appellant does not appear, either personally or by counsel, at the time and place fixed for the hearing of the appeal the Tribunal (or a single Member when the Tribunal is so constituted) may declare that the appeal is deemed to be abandoned.

Dress

28. On the hearing of an appeal the dress for counsel shall be such as would be worn in the Court of Criminal Appeal or equivalent in the State or Territory where the hearing takes place.

Appellant in Custody

29. The certificate signed by the Registrar pursuant to reg 16 of the Regulations shall be in accordance with Form 7.

Notices

PROVISIONAL AS AT SEP 07 - PENDING FINAL PUBLICATION
30. A notice or document may be lodged or forwarded by:

(a) hand delivery;
(b) ordinary pre-paid post;
(c) fax; or
(d) e-mail.

Non-compliance

31. The Tribunal, a member of the Tribunal or the Registrar may excuse non-compliance with this Practice Direction on such terms as may be just.

Copies of legislation etc

32. Upon receipt of a notice of appeal, application for leave to appeal or application for extension of time for appeal the Registrar shall forward to the appellant, free of charge, a copy of the Act, the Regulations and this Practice Direction.

THE SCHEDULE

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<th>Form</th>
<th>Description</th>
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<td>Certificate as to appellant in custody</td>
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CHAPTER 3

INTRODUCTION TO THE AUSTRALIAN MILITARY COURT

CREATION OF THE AUSTRALIAN MILITARY COURT

Australian Military Court to Replace Courts Martial and Defence Force Magistrate Trials

3.1 The DFDA creates a court known as the Australian Military Court\(^1\). The Australian Military Court is a service tribunal\(^2\).

3.2 The Australian Military Court will ultimately replace system of courts martial and Defence Force magistrate trials. There will, however, be a transitional period during which both the Australian Military Court and the system of courts martial and Defence Force magistrate trials will co-exist.

AUSTRALIAN MILITARY COURT PROCEEDINGS

Venue

3.3 The Australian Military Court may sit at any place in or outside of Australia\(^3\).

3.4 The Australian Military Court may, at any stage of proceedings, order that the proceedings, or a part of the proceedings, be conducted or continued at a place specified in the order, subject to such conditions (if any) imposed\(^4\).

RECORD OF PROCEEDINGS

Keeping of Record of Proceedings.

3.5 The Australian Military Court is required to keep a record of its proceedings\(^5\). The record of proceedings is to include such particulars as are provided for by the Australian Military Court Rules\(^6\).

Publication of Record of Proceedings.

3.6 The Australian Military Court may order that the whole or a specified part of a record of proceedings is not to be published if it considers that such publication would be inappropriate\(^7\).

\(^1\) DFDA, ss 114(1).
\(^2\) DFDA ss 3(1). Also see DFDA s 114(1) at Note 2.
\(^3\) DFDA ss 117(1)
\(^4\) DFDA ss 117(2).
\(^5\) DFDA ss 148(1).
\(^6\) DFDA ss148(1). Also see: DFDA paragraph 149A(a)(xi).
\(^7\) DFDA ss 148(2).
3.7 The Australian Military Court may, in deciding whether or not publication would be inappropriate, take into account factors such as the following: the interests of security or defence of Australia; the proper administration of justice; public morals; or any other matter the Australian Military Court considers relevant.

Supply of Record of Proceedings.

[UNDER DEVELOPMENT]

JUDICIAL OFFICERS AND OTHER STAFF

Chief Military Judge and other Military Judges

3.8 The Australian Military Court consists of: the Chief Military Judge (who will nominate the Military Judge who will preside for a particular matter); and such other Military Judges as from time to time hold office in accordance with the Act\(^8\). The other Military Judges will include 2 full time Military Judges and up to 8 part-time Military Judges\(^5\).

3.9 Chief Military Judge. Annex A contains a detailed discussion of the Chief Military Judge, including the appointment of the Chief Military Judge and his/her roles and responsibilities.


Registrar of the Australian Military Court

3.11 The Australian Military Court also has a Registrar of the Australian Military Court\(^10\). Annex C contains a detailed discussion of the Registrar, including the appointment of the Registrar and his/her roles and responsibilities.

Other Staff

3.12 The Australian Military Court also has certain other staff, as necessary to assist\(^11\). The service chiefs make available defence members for this purpose\(^12\) and the Secretary of Defence makes available persons engaged under the \textit{Public Service Act 1999} for this purpose\(^13\).

3.13 The staff necessary to assist the Australian Military Court include staff required for the conduct of individual proceedings. Examples include: court recorders (although these are usually contractors, clerks, orderlies and escorts.

a. Annex D contains a detailed discussion of court recorders, including the appointment of court recorders and their roles and responsibilities.

b. Annex E contains a detailed discussion of clerks, including the appointment of clerks and their roles and responsibilities.

\(^8\) DFDA, ss 114(2)

\(^9\) DFDA ss 188AP(3).

\(^10\) DFDA s 188F

\(^11\) DFDA s 121.

\(^12\) DFDA ss 121(b).

\(^13\) DFDA s 121.
c. Annex F contains a detailed discussion of orderlies, including the appointment of orderlies and their roles and responsibilities.

d. Annex G contains a detailed discussion of escorts, including the appointment of escorts and their roles and responsibilities.

**OTHER KEY PLAYERS**

3.14 Other key players include: Superior Authorities, the Director of Military Prosecutions and the Director of Defence Counsel Services.

**Superior Authorities**

3.15 Annex H contains a detailed discussion of Superior Authorities, including the appointment of Superior Authorities and their roles and responsibilities.

**Director of Military Prosecutions**

3.16 Annex I contains a detailed discussion of the Director of Military Prosecutions, including the appointment of the Director of Military Prosecutions and his/her roles and responsibilities.

**Director of Defence Counsel Services**

3.17 Annex J contains a detailed discussion of the Director of Defence Counsel Services, including the appointment of the Director of Defence Counsel Services, his/her roles and responsibilities.

**JURISDICTION**

**Jurisdiction Generally**

3.18 The jurisdiction of the Australian Military Court is exercised by a single Military Judge\(^{14}\). This could be the Chief Military Judge or another Military Judge.

3.19 The Australian Military Court, constituted by a Military Judge, may sit and exercise the jurisdiction of the Court even if the Court, constituted by another Military Judge, is at the same time sitting and exercising the jurisdiction of the Court\(^ {15}\).

3.20 The Chief Military Judge will nominate the Military Judge who is to preside for a particular matter\(^ {16}\).

**Jurisdiction to Try**

3.21 The Australian Military Court has jurisdiction to try any charge against any person, subject to the following limitations\(^ {17}\):

3.22 **DFDA, section 63.** DFDA s 63 provides that, except with the consent of the Commonwealth Director of Public Prosecutions, DFDA proceedings shall not be instituted for certain offences.

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\(^{14}\) DFDA ss 116(1).

\(^{15}\) DFDA ss 116(2).

\(^{16}\) DFDA ss 118(2) and 118 (3).

\(^{17}\) DFDA, s 115.
3.23 Custodial Offences. The Australian Military Court does not have jurisdiction to try a charge for a custodial offence\(^{18}\).

Exercise of Jurisdiction to Try

3.24 A Military Judge may sit with a military jury to try a charge, or a Military Judge may sit alone to try a charge. This is determined by the ‘class’ of the offence.

3.25 Military Judge Sitting with Military Jury. A Military Judge will sit with a military jury (of either 12 or six members) in the following circumstances:

a. **Military Judge with Military Jury of 12 Members.** A Military Judge with a military jury of 12 members will try a matter if the offence is a ‘class 1’ offence\(^{19}\) (see below).

b. **Military Judge with Military Jury of Six Members.** A Military Judge with a military jury of six members will try a matter in the following circumstances:
   
   (1) **Charge is for a ‘Class 2’ Offence.** A Military Judge with a military jury of six members is to try a charge if the charge is for a ‘class 2’ offence\(^{20}\) (see below). The accused person can, however, elect to be tried by a Military Judge alone in these circumstances\(^{21}\).

   (2) **Charge is for a ‘Class 3’ Offence.** A Military Judge with a military jury of six members will try a charge if the charge is for a ‘class 3’ offence (see below) and the accused person elects to be tried by a Military Judge and a military jury\(^{22}\).

3.26 Where there is a military jury (of either 12 or six members) then, if, and to the extent that, the exigencies of service permit, a military jury will be constituted as follows:

a. **All Military Juries.** For all military juries, at least one member must hold a rank that is not lower than O-5 (Commander, Lieutenant Colonel or Wing Commander)\(^{23}\).

b. **Where the Accused Person is an Officer.** Where the accused person is an officer, a person is eligible to be a member, or a reserve member, of a military jury for the trial of the accused person if:

   (1) the person is an officer holding a rank that is not lower than the rank held by the accused person; and

   (2) the person has been an officer for a continuous period of not less than three years, or for periods that total no less than three years\(^{24}\).

c. **Where the Accused Person is a Defence Civilian.** Where the accused person is a defence civilian, a person is eligible to be a member, or a reserve member, of a military jury for the trial of the accused person if:

   (1) the person is an officer; and

\(^{18}\) DFDA, ss 115(2).

\(^{19}\) DFDA ss 132A(1) and DFDA paragraph 122(1)(a).

\(^{20}\) DFDA ss 132A(2) and DFDA paragraph 122(1)(b).

\(^{21}\) DFDA ss 132A(2).

\(^{22}\) DFDA ss 132A(3) and DFDA paragraph 122(1)(b).

\(^{23}\) DFDA ss 122(2) and (3).

\(^{24}\) DFDA ss 123(1) and (3).
(2) the person has been an officer for a continuous period of not less than three years, or for periods that total no less than three years.25

d. Where the Accused Person is not an Officer or a Defence Civilian. Where the accused person is not an officer or a defence civilian, a person is eligible to be a member, or a reserve member, of a military jury for the trial of the accused person if:

(1) the person is an officer; and

(2) has been an officer for a continuous period of not less than three years, or for periods that total no less than three years.26

e. Where the accused person is not an officer or a defence civilian, a person is also eligible to be a member, or a reserve member, of a military jury for the trial of the accused person if:

(1) the person holds a rank not lower than the naval rank of warrant officer, the army rank of warrant officer class 1 or the air force rank of warrant officer; and

(2) the person has held a rank not lower than the naval rank of warrant officer, the army rank of warrant officer class 1 or the air force rank of warrant officer for a continuous period of three years, or for periods that total no less than three years.27

These requirements apply only if, and to the extent that, the exigencies of service permit.28

3.27 There is no legislative requirement for a military jury to have a reserve member. The legislation does, however, contemplate there being reserve members.29

3.28 Military Judge Sitting Alone. A Military Judge sitting alone will try a charge in the following circumstances:

a. Charge is for a ‘Class 2’ Offence. A Military Judge sitting alone will try a charge if the charge is for a ‘class 2’ offence (see below) and the accused person elects to be tried by a Military Judge alone.30

b. Charge is for a ‘Class 3’ Offence. A Military Judge sitting alone will try a charge if the charge is for a ‘class 3’ offence (see below). The accused person can, however, elect to be tried by a Military Judge and a military jury.31 Should the accused person do so, it will be a military jury of six members.32

25 DFDA ss 123(1) and (3).

26 DFDA ss 123(2) and (3).

27 DFDA ss 123(2) and (3).

28 DFDA ss 122(3) and 123(2).

29 See, for example: DFDA s 123.

30 DFDA s132A(2).

31 DFDA s 132A(3).

32 DFDA s 132A(3).

33 DFDA paragraph 122(1)(b).
Classes of Offence

3.29 It is only in before the Australian Military Court, and only in relation to a trial, that the concept of classes of offence is relevant. In summary, there are three classes of offence as follows:

a. **‘Class 1’ Offences.** Class 1 offences are generally the most serious offences. Examples include: treason, murder, manslaughter, bigamy, rape, serious offences relating to operations against the enemy, most sexual offences and certain drug offences.

b. **‘Class 2’ Offences.** Examples of ‘class 2’ offences include: dangerous conduct, less serious drug offences and grievous bodily harm.

c. **‘Class 3’ Offences.** Examples of ‘class 3’ offences include: less serious offences relating to operations against the enemy, less serious assaults, property offences, certain fraud offences, negligent performance of duty, failure to comply with orders, insubordination and absences.

3.30 If the accused person is convicted, action must be taken under DFDA Part IV (imposition of punishments and orders). It will be the Military Judge who determines such action.

Jurisdiction to Take DFDA Part IV Action

3.31 If an Australian Military Court trial (be it a trial by a Military Judge and a military jury or a trial by a Military Judge sitting alone) results in a conviction, the Australian Military Court automatically has jurisdiction to take what is referred to as ‘DFDA Part IV action’ in relation to the convicted person. Indeed, it must do so. DFDA Part IV deals with the imposition of punishments and the making of orders.

3.32 In addition, the Australian Military Court has jurisdiction in relation to certain summary authority convictions.

Exercise of Jurisdiction to take DFDA Part IV Action

3.33 The jurisdiction of the Australian Military Court is exercised by a single Military Judge. This could be the Chief Military Judge or another Military Judge. The Australian Military Court, constituted by a Military Judge, may sit and exercise the jurisdiction of the Court even if the Court, constituted by another Military Judge, is at the same time sitting and exercising the jurisdiction of the Court.

3.34 In this context, the reference to the Australian Military Court is a reference to the Military Judge presiding. In other words, it is the Military Judge presiding who will take DFDA Part IV action. Accordingly, the Military Judge presiding will dismiss any military jury involved in the trial of the convicted person before proceeding to take DFDA Part IV action.

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34 DFDA ss 132F(1).
35 DFDA ss 132F(1).
36 DFDA ss 132F(1).
37 DFDA ss 116(1).
38 DFDA ss 116(2).
39 DFDA ss 132F(1) and DFDA ss 115(3) actually refer to the Australian Military Court, not a Military Judge, however, DFDA ss 114(2) states that "[t]he Australian Military Court consists of: (a) the Chief Military Judge; and (b) such other Military Judges as from time to time hold office in accordance with this Act". Accordingly, DFDA ss 132F(1) and DFDA ss 115(3), when read with DFDA ss 114(2), result in the conclusion that it is the Military Judge presiding in a particular matter who must take DFDA Part IV action in relation to the convicted person.
3.35 For Australian Military Court matters, there are a number of contempt offences that might be relevant. For example:

a. **Defence Act 1903, s 89, contempt of service tribunals, etc.** A civilian court would try this offence. A charge for this offence can be preferred against any person (that is, it does not have to be a defence member or a defence civilian and, indeed, rarely (if ever) would be\(^{40}\)). The provision states that:

(1) A person shall not:

(a) insult a member of a military jury, a Military Judge or a summary authority in or in relation to the exercise of his powers or functions as such a member, Judge or authority, as the case may be;

(b) interrupt the proceedings of a service tribunal;

(c) create a disturbance or take part in creating or continuing a disturbance in or near a place where a service tribunal is sitting; or

(d) do any other act or thing that:

   (i) in the case of the Australian Military Court – constitutes a contempt of that court; and

   (ii) in the case of a service tribunal other than the Australian Military Court – would, if the service tribunal were a court of record, constitute a contempt of that court.

Penalty: $1,000 or imprisonment for 6 months.

(1A) An offence under this section is an offence of strict liability.

[Note: For strict liability, see section 6.1 of the *Criminal Code*.]

(2) In this section, military jury, Military Judge and summary authority have the same respective meanings as they have in the *Defence Force Discipline Act 1982*.

b. **DFDA s 61, offences based on Territory offences, and appropriate territory offence;**

c. **DFDA s 53, contempt of service tribunal;** and

d. **DFDA s 60, prejudicial behaviour.**

3.36 The circumstances will determine which (if any) of these offences may be relevant in a particular case.

\(^{40}\) There are other offences that are relevant to defence members and defence civilians.
Annex:

A. CHIEF MILITARY JUDGE - APPOINTMENT, ROLES AND RESPONSIBILITIES
B. MILITARY JUDGES - APPOINTMENT, ROLES AND RESPONSIBILITIES
C. REGISTRAR OF THE AUSTRALIAN MILITARY COURT - APPOINTMENT, ROLES AND RESPONSIBILITIES
D. COURT RECORDER - APPOINTMENT, ROLES AND RESPONSIBILITIES
E. CLERK OF THE COURT - APPOINTMENT, ROLES AND RESPONSIBILITIES
F. COURT ORDERLY - APPOINTMENT, ROLES AND RESPONSIBILITIES
G. ESCORT - APPOINTMENT, ROLES AND RESPONSIBILITIES
H. SUPERIOR AUTHORITIES - APPOINTMENT, ROLES AND RESPONSIBILITIES
I. DIRECTOR OF MILITARY PROSECUTIONS - APPOINTMENT, ROLES AND RESPONSIBILITIES
J. DIRECTOR OF DEFENCE COUNSEL SERVICES - APPOINTMENT, ROLES AND RESPONSIBILITIES
CHIEF MILITARY JUDGE - APPOINTMENT, ROLES AND RESPONSIBILITIES

[UNDER DEVELOPMENT]
MILITARY JUDGES - APPOINTMENT, ROLES AND RESPONSIBILITIES

[UNDER DEVELOPMENT]
REGISTRAR OF THE AUSTRALIAN MILITARY COURT -
APPOINTMENT, ROLES AND RESPONSIBILITIES

[UNDER DEVELOPMENT]
COURT RECORDER - APPOINTMENT, ROLES AND RESPONSIBILITIES

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CLERK OF THE COURT - APPOINTMENT, ROLES AND RESPONSIBILITIES

[UNDER DEVELOPMENT]
COURT ORDERLY - APPOINTMENT, ROLES AND RESPONSIBILITIES

[UNDER DEVELOPMENT]
ESCORT - APPOINTMENT, ROLES AND RESPONSIBILITIES

[UNDER DEVELOPMENT]
SUPERIOR AUTHORITIES - APPOINTMENT, ROLES AND RESPONSIBILITIES

[UNDER DEVELOPMENT]
DIRECTOR OF MILITARY PROSECUTIONS - APPOINTMENT, ROLES AND RESPONSIBILITIES

[UNDER DEVELOPMENT]
DIRECTOR OF DEFENCE COUNSEL SERVICES - APPOINTMENT, ROLES AND RESPONSIBILITIES

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CHAPTER 4

JURISDICTIONAL CONSIDERATIONS

STATUS

4.1 This Chapter is in the process of being drafted.

SYNOPSIS

4.2 The intention is that this Chapter will include a brief synopsis of the following matters

a. jurisdiction of the Australian military discipline system

b. Australian case law (Federal and High Court of Australia) concerning military discipline jurisdiction

c. Policy considerations affecting the exercise of military discipline jurisdiction.
CHAPTER 5

AUSTRALIAN MILITARY COURT APPEALS

STATUS

5.1 There is currently no Australian Military Court appeal process from summary proceedings. It is intended that what is currently the Defence Legislation Amendment Bill 2007 will introduce this. Even assuming that the Bill is passed, however, the process itself will not commence before May 2008.

SYNOPSIS

5.2 The content of this Chapter will be dictated policy development following the passage of primary legislation and subordinate legislation. Most likely, this Chapter will mirror Chapter 5 and 6 and, accordingly, will look at pre-trial administration, pre-trial hearings and directions, the trial of appeals and post-trial administration.
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CHAPTER 6

AUSTRALIAN MILITARY COURT PROCEEDINGS

INTRODUCTION

6.1 The Australian Military Court’s jurisdiction to try a charge is triggered as a result of a referral by the Registrar. Such a referral is mandatory when requested by the Director of Military Prosecutions.

6.2 Once the Australian Military Court receives a referral of a charge for trial, there is pre-trial administration which will need to occur, there may be a requirement for pre-trial hearings and directions to be conducted, there will be the trial itself that will need to be conducted and there will be post-trial administration which will need to be attended to.

6.3 These matters, and the various roles and responsibilities of the Chief Military Judge, other Military Judges, the Registrar, the Director of Military Prosecutions and the prosecuting officer, the Director of Defence Counsel Services and the defending officer, the court recorder, the clerk, the orderly and the escort, are discussed in more detail below.

PRE-TRIAL ADMINISTRATION

Introduction

6.4 [UNDER DEVELOPMENT]

Chief Military Judge – Role and Responsibilities

6.5 Once the Australian Military Court receives a referral of a charge for trial, the Chief Military Judge will nominate the Military Judge who will preside.

6.6 [UNDER DEVELOPMENT]

Other Military Judges – Roles and Responsibilities

6.7 [UNDER DEVELOPMENT]

1 DFDA ss 118(1). See Chapter 9 for a detailed discussion of how the Director of Military Prosecutions becomes seized of a matter and the courses of action open to him/her when this occurs.

2 DFDA ss118(2).
Registrar – Roles and Responsibilities

6.8 The Registrar has no jurisdiction with respect to a matter prior to receiving a referral from the Director of Military Prosecutions.

6.9 [UNDER DEVELOPMENT]

Director of Military Prosecutions/Prosecuting Officer – Roles and Responsibilities

6.10 [UNDER DEVELOPMENT]

Director Defence Counsel Services/Defending Officer

6.11 [UNDER DEVELOPMENT]

Court Recorder – Roles and Responsibilities

6.12 [UNDER DEVELOPMENT]

Clerk – Roles and Responsibilities

6.13 [UNDER DEVELOPMENT]

Orderly – Roles and Responsibilities

6.14 [UNDER DEVELOPMENT]

Escort – Roles and Responsibilities

6.15 [UNDER DEVELOPMENT]

PRE-TRIAL HEARINGS AND DIRECTIONS

Introduction

6.16 [UNDER DEVELOPMENT]

Pre-Trial Hearing and Direction Procedures

6.17 [UNDER DEVELOPMENT]

6.18 Procedural Guide. Annex A is an Australian Military Court Pre-Trial Hearing and Directions Order of Procedure. It provides a step-by-step procedural guide to the legal practices and procedures, and the military courtesies, to be followed in pre-trial hearings and directions.
Chief Military Judge – Role and Responsibilities
6.19 [UNDER DEVELOPMENT]

Presiding Military Judge – Roles and Responsibilities
6.20 [UNDER DEVELOPMENT]

Registrar – Roles and Responsibilities
6.21 [UNDER DEVELOPMENT]

Director of Military Prosecutions/Prosecuting Officer – Roles and Responsibilities
6.22 [UNDER DEVELOPMENT]

Director Defence Counsel Services/Defending Officer
6.23 [UNDER DEVELOPMENT]

Court Recorder – Roles and Responsibilities
6.24 [UNDER DEVELOPMENT]

Clerk – Roles and Responsibilities
6.25 [UNDER DEVELOPMENT]

Orderly – Roles and Responsibilities
6.26 [UNDER DEVELOPMENT]

Escort – Roles and Responsibilities
6.27 [UNDER DEVELOPMENT]

THE TRIAL

Introduction
6.28 [UNDER DEVELOPMENT]
Trial Procedures

6.29 A trial by a Military Judge sitting with a military jury and a trial by a trial by a Military Judge sitting alone have many similarities. For the sake of simplicity, however, they will be deal with separately.

TRIAL BY MILITARY JUDGE AND MILITARY JURY

Rulings and Exercises of Discretion.

6.30 Where, in the Jervis Bay Territory, the law requires the judge in a trial by judge and jury to give a ruling or exercise a discretion, a Military Judge in a trial by Military Judge and military jury must give any such ruling and/or exercise any such discretion.

6.31 Where a Military Judge gives such a ruling, that ruling is binding on the military jury.

6.32 If, in the Jervis Bay Territory, the law requires the judge in a judge and jury trial to sit in the absence of the jury for any purpose in connection with the giving of a ruling or the exercise of a discretion, the Military Judge in a trial by a Military Judge and military jury must, for any purpose in connection with the giving of such a ruling, or the exercise of such a discretion, sit without the members of the military jury.

Pleas

Taking of Pleas.

6.33 At the commencement of the trial, before any evidence on the charge(s) is heard, the Military Judge is to ask the accused person whether he or she pleads guilty or not guilty to the charge(s). This is to occur in relation to all primary charges and stated alternative charges, and also in relation to statutory alternative offences, as follows:

a. For each primary charge, the accused person is to be asked whether he or she pleads guilty or not guilty to the charge.

b. If the accused person pleads guilty to the primary charge, the accused person will not be asked to plead to any stated alternative charges or have any statutory alternative offences put to them.

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3 DFDA ss 132C(1).
4 DFDA ss 132C(3).
5 DFDA ss 132C(3).
6 DFDA ss 132B(2)
If the accused pleads not guilty to the primary charge and there is a stated alternative charge, the accused person is to be asked whether he or she pleads guilty or not guilty to the stated alternative charge.

d. If the accused person pleads guilty to the stated alternative charge, the accused person will not have any statutory alternative offences put to them.

e. If the accused pleads not guilty to the primary charge, there is no stated alternative charge (or there is a stated alternative charge but the accused pleads not guilty to it) and there is a statutory alternative offence, then the accused is to be advised that there is a statutory alternative offence and asked whether he/she would like to enter a plea to it.

**Recording of Pleas**

**6.34** The Military Judge is to record all pleas (guilty or not guilty).

**6.35 Guilty Plea.** The Military Judge must record a plea of guilty in the following circumstances:

a. the accused person pleads guilty to the primary charge;

b. the accused person pleads guilty to a stated alternative charge and this plea is accepted;

c. the accused person pleads guilty to a statutory alternative offence and this plea is accepted;

d. The accused person withdraws a not guilty plea to a charge and pleads guilty to that charge.

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7. There is no legislative requirement to record a guilty plea. There is, however, a legislative requirement to substitute a guilty plea (see DFDA ss 132E(2)). There is also a legislative requirement to record not guilty pleas (see DFDA ss 132B(4)).

8. DFDA ss 132E(2).

9. Although there is no express legislative requirement to record a guilty plea in such circumstances, DFDA ss 132B(3) is of relevance in this context.

10. Although there is no express legislative requirement to record a guilty plea in such circumstances, DFDA ss 132E(1)(a) is of relevance in this context.

11. Although there is no express legislative requirement to record a guilty plea in such circumstances, DFDA ss 142(3) is of relevance in this context.

12. DFDA ss 132E(2).
AND the Military Judge is satisfied that the accused person understands the effect of the plea of guilty.\(^\text{13}\)

### 6.36 Not Guilty Plea.

The Military Judge must record a plea of not guilty in the following circumstances:

a. the accused person pleads not guilty\(^\text{14}\);

b. the accused person refuses to plead\(^\text{15}\);

c. the accused person does not plead intelligibly\(^\text{16}\);

d. the charge in question is a stated alternative offence, the accused pleads guilty, but the plea is not accepted\(^\text{17}\);

e. the offence in question is a statutory alternative offence, the accused pleads guilty, but the plea is not accepted\(^\text{18}\); or

f. the Military Judge is not satisfied that the accused person understands the effect of a plea of guilty\(^\text{19}\).

### 6.37 No Plea to be Recorded.

As discussed above, there are circumstances in which pleas will not be taken on stated alternative charges and statutory alternative offences. If no plea is taken then no plea is to be recorded.

\(^{13}\) In relation to subparagraph (a) (plea of guilty to primary charge) see DFDA ss132B(3) with respect to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. In relation to subparagraph (b) (plea of guilty to a stated alternative charge) see DFDA paragraph 132E(1)(a) read in conjunction with DFDA ss 132B(3) with respect to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. In relation to subparagraph (c) (plea of guilty to statutory alternative offence) see DFDA ss 142(3) read in conjunction with DFDA ss 132B(3) in relation to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. In relation to subparagraph (d) (withdrawal of not guilty plea and substitution of guilty plea) see DFDA ss 132E(2) in relation to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. The requirement for the Military Judge to be satisfied that the accused person understands the effect of the plea of guilty is discussed in more detail below.

\(^{14}\) DFDA paragraph 132B(4)(a).

\(^{15}\) DFDA paragraph 132B(4)(a).

\(^{16}\) DFDA paragraph 132B(4)(a).

\(^{17}\) DFDA paragraph 132E(1)(b).

\(^{18}\) Although there is not express legislative requirement to record a guilty plea in such circumstances, DFDA ss 142(3) is of relevance in this context.

\(^{19}\) DFDA paragraph 132B(4)(b).
Substitution of Pleas

6.38 Substitution of Guilty Plea with Not Guilty Plea. At any time before an accused person is convicted, they may substitute a guilty plea with a not guilty plea.

6.39 Substitution of Not Guilty Plea with Guilty Plea. The Military Judge must substitute for a plea of not guilty a plea of guilty in the following circumstances:

a. the accused person withdraws a not guilty plea to a charge and pleads guilty to that charge; and

b. the Military Judge is satisfied that the accused person understands the effect of that plea.20

Effect of Pleas

6.40 Guilty Plea. The Military Judge must convict the accused person in the following circumstances:

a. the accused person pleads guilty to the primary charge;21

b. the accused person pleads guilty to a stated alternative charge and this plea is accepted;22

c. the accused person pleads guilty to a statutory alternative offence and this plea is accepted;23 or

d. the accused person withdraws a not guilty plea to a charge and pleads guilty to that charge24.

AND the Military Judge is satisfied that the accused person understands the effect of the plea of guilty.25 If a person is convicted, action must be taken under DFDA Part IV (DFDA

20 DFDA ss 132E(2). The requirement for the Military Judge to be satisfied that the accused person understands the effect of the guilty plea is discussed in more detail below.

21 DFDA ss 132B(3).

22 DFDA paragraph 132E(1)(a). The acceptance of a plea of guilty to a stated alternative charge is discussed in more detail below.

23 DFDA ss 142(3). The acceptance of a plea of guilty to a statutory alternative offence is discussed in more detail below.

24 DFDA ss 132E(2).

25 In relation to subparagraph (a) (plea of guilty to primary charge) see DFDA ss132B(3) with respect to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. In relation to subparagraph (b) (plea of guilty to a stated alternative charge) see DFDA paragraph 132E(1)(a) read in conjunction with DFDA ss 132B(3) with respect to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. In relation to subparagraph (c) (plea of guilty to statutory alternative offence) see DFDA ss 142(3) read in conjunction with DFDA ss 132B(3) in relation to the requirement
Part IV deals with punishments and orders. Punishments and orders are discussed in more detail in Chapter 7.

6.41 **Not Guilty Plea.** As discussed above, the Military Judge must record a plea of not guilty in the following circumstances:

a. the accused person pleads not guilty;

b. the accused person refuses to plead;

c. the accused person does not plead intelligibly;

d. the charge in question is a stated alternative offence, the accused pleads guilty, but the plea is not accepted;

e. the offence in question is a statutory alternative offence, the accused pleads guilty, but the plea is not accepted; or

f. the Military Judge is not satisfied that the accused person understands the effect of a plea of guilty.

6.42 If the Military Judge records a plea of not guilty, guilt is then an ‘issue of fact’ and the Military Judge and the military jury must proceed to hear the evidence on the charge. In so far as this issue of fact is concerned, the burden of proof is on the prosecution. The prosecution must prove their case beyond a reasonable doubt. The hearing of evidence on the charge is discussed in more detail below.

No Plea

6.43 [UNDER DEVELOPMENT]

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26 DFDA ss 132F(1).

27 DFDA paragraph 132B(4)(a).

28 DFDA paragraph 132B(4)(a).

29 DFDA paragraph 132B(4)(a).

30 DFDA paragraph 132E(1)(b). The rejection of a plea of guilty on a stated alternative offence is discussed in more detail below.

31 Although there is not express legislative requirement to record a guilty plea in such circumstances, DFDA ss 142(3) is of relevance in this context.

32 DFDA paragraph 132B(4)(b). The requirement for the Military Judge to be satisfied that the accused person understands the effect of the guilty plea is discussed in more detail below.

33 DFDA ss 132B(4).
Acceptance of Plea of Guilty on Stated Alternative Charge.

6.44 Before the Military Judge can convict an accused person on the basis of his or her plea of guilty on a stated alternative charge, the Military Judge must accept the plea of guilty on the stated alternative charge.  

6.45 The Military judge can only accept a plea of guilty on a stated alternative charge if the Military Judge is notified by the Director of Military Prosecutions that the Director of Military Prosecutions does not object to the acceptance of the plea of guilty on the stated alternative charge.

6.46 In order to proceed to conviction, the Military Judge must still be satisfied that the accused person understands the effect of the plea of guilty.  

6.47 The Military Judge must record a plea of not guilty (and the Military Judge and the military jury must proceed to hear the evidence on the charge) in all other cases. Usually, this will be because the Director of Military Prosecutions does object to the acceptance of the plea of guilty on the stated alternative charge. 

6.48 In these circumstances, what is accepted (or rejected) is in effect the substitution of one charge for another. In other words, it is not the plea itself which is being accepted or rejected.

Acceptance of Plea of Guilty on Statutory Alternative Offence.

6.49 Before the Military Judge can convict an accused person on the basis of their plea of guilty on a statutory alternative offence, the Director of Military Prosecutions must consent to the acceptance of the plea of guilty on the statutory alternative offence.

6.50 In order to proceed to conviction, the Military Judge must still be satisfied that the accused person understands the effect of the plea of guilty.

6.51 The Military Judge must record a plea of not guilty (and the Military Judge and the military jury must proceed to hear the evidence on the charge) if the Director of Military Prosecutions does not consent to the acceptance of the plea of guilty on the statutory alternative offence.

6.52 In these circumstances, what is accepted (or rejected) is in effect the substitution of one charge for another. In other words, it is not the plea itself which is being accepted or rejected.

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34 DFDA paragraph 132E(1)(a).
35 DFDA paragraph 132E(1)(a).
36 DFDA paragraph 132E(1)(a) read in conjunction with DFDA ss 132B(3). The requirement for the Military Judge to be satisfied that the accused person understands the effect of the plea of guilty is discussed in more detail below.
37 DFDA paragraph 132E(1)(b).
38 DFDA paragraph 142(3)(c) refers to “the prosecution”. Before the AMC, this will always be the Director of Military Prosecutions.
39 DFDA paragraph 142(3)(c).
40 DFDA ss 132B(3). The requirement for the Military Judge to be satisfied that the accused person understands the effect of the plea of guilty is discussed in more detail below.
Military Judge to be Satisfied that the Accused Person Understands the Effect of a Guilty Plea.

6.53 The Military Judge may, in the case of a guilty plea, only convict an accused person if he or she is satisfied that the accused person understands the effect of the plea of guilty\(^{41}\).

6.54 The Military Judge must record a plea of not guilty (and the Military Judge and the military jury must proceed to hear the evidence on the charge) if he or she is not satisfied that the accused person understands the effect of a plea of guilty\(^{42}\).

Hearing of Evidence

6.55 If, in a trial by a Military Judge and a military jury, a Military Judge records a plea of not guilty, the Military Judge and the military jury must proceed to hear the evidence on the charge\(^{43}\).

Sufficiency of Evidence

6.56 Once the Military Judge and the military jury proceed to hear the evidence on the charge, the first thing that occurs is that the Military Judge will ask the prosecution to adduce their evidence\(^{44}\).

6.57 The Military Judge, after hearing the evidence on the charge adduced by the prosecution, may be required to rule on the sufficiency of evidence.

6.58 There are no circumstances in which the Military Judge is required to give a ruling on whether the evidence is sufficient to support the charge\(^{45}\).

6.59 There are, however, circumstances in which the Military Judge is required to give a ruling on whether the evidence is insufficient to support the charge\(^{46}\). These circumstances are as follows:

   a. the accused person has submitted that the Military Judge should give the ruling; or
   b. the interests of justice require that the Military Judge should give the ruling.

6.60 Even if a Military Judge is not required to rule on the sufficiency of the evidence, he or she may do so\(^{47}\). Other than the circumstances outlined above, however, there is no requirement for the Military Judge to make a ruling on the sufficiency or otherwise of the evidence\(^{48}\).

\(^{41}\) DFDA ss 132B(3) and DFDA ss 132E(2) (the applicable provision will depend on the circumstances of guilty plea).

\(^{42}\) DFDA paragraph 132B(4)(b).

\(^{43}\) DFDA ss 132B(4).

\(^{44}\) This is inferred from DFDA ss 132B(5) and (6).

\(^{45}\) DFDA ss 132E(4) read in conjunction with ss 132B(6).

\(^{46}\) DFDA ss 132E(3) read in conjunction with ss 132B(5).

\(^{47}\) DFDA ss 132B(5) and (6) and 132E(3) and (4).

\(^{48}\) DFDA ss 132E(3) and (4).
6.61 If the Military Judge, after hearing the evidence on the charge adduced by the prosecution, rules that the evidence is sufficient to support the charge, then the Military Judge and military jury must proceed with the trial. This is discussed below.

6.62 If the Military Judge rules that the evidence is insufficient to support the charge, the Military Judge must dismiss the charge.

Proceeding with Trial

6.63 [UNDER DEVELOPMENT]

Decision

6.64 Where a Military Judge with a military jury tries a matter, the military jury, sitting without any other persons present, must decide on guilt and, where relevant, soundness of mind.

6.65 Specifically, the military jury is responsible for deciding whether the accused person is guilty or not guilty and whether the accused person, at the time of the act or omission the subject of the charge, was suffering from such unsoundness of mind as not to be responsible, in accordance with law, for that act or omission.

6.66 In deciding on guilt and soundness of mind, the military jury’s decisions are to be made by unanimous agreement of the jury members, or by five-sixths majority agreement of the jury members if the following conditions are met:

   a. the jury has deliberated for at least eight hours;
   b. the jury does not have unanimous agreement after that time, but does have five-sixths majority agreement; and
   c. the Military Judge is satisfied that:

49 DFDA ss 132B(6).
50 DFDA ss 132B(5).
51 DFDA ss 124(4).
52 DFDA paragraph 124(1)(b).
53 DFDA paragraph 124(1)(a). Also see DFDA ss 145(4) and (5).
54 DFDA paragraph 124(1)(b).
55 DFDA paragraph 124(1)(a). Also see DFDA ss 145(4) and (5).
56 DFDA paragraph 124(2)(a).
57 DFDA paragraph 124(3)(c) actually refers to the Australian Military Court, however, DFDA ss 114(2) states that "[t]he Australian Military Court consists of: (a) the Chief Military Judge; and (b) such other Military Judges as from time to time hold office in accordance with this Act". Accordingly, these two provisions read together result in the conclusion that it is the Military Judge presiding in a particular matter who must be satisfied that the conditions specified in DFDA paragraph 124(3)(c) are met.
(1) the period of time for deliberation is reasonable, having regard to the nature and complexity of the case; and

(2) after examination on oath or affirmation of one or more of the jurors, it is unlikely that the jurors would reach unanimous agreement.

Finding

6.67 Potential Findings. A military jury may make three possible findings: guilty, not guilty, not guilty on the ground of mental impairment. There are also occasions on which no finding is reached. The circumstances leading to each of these findings (or no finding) are as follows:

a. Finding of Guilty. [UNDER DEVELOPMENT]

b. Finding of Not Guilty. [UNDER DEVELOPMENT]

c. Finding of Not Guilty on the Ground of Mental Impairment. Where, in a trial of a charge for a service offence that is to be tried by Military Judge and military jury, the military jury finds that the accused person, at the time of the act or omission the subject of the charge, was suffering from such mental impairment as not to be responsible, in accordance with law, for that act or omission, the jury shall find the accused person not guilty on the ground of mental impairment.

d. No Finding. [UNDER DEVELOPMENT]

6.68 Making of Findings. [UNDER DEVELOPMENT]

6.69 Recording of Findings. The requirement to record findings can be summarised as follows:

a. Finding of Guilty. If the military jury finds the accused person guilty, the Military Judge must record a finding of guilty.

b. Finding of Not Guilty. If the military jury finds the accused person not guilty, the Military Judge must record a finding of not guilty.

c. Find of Not Guilty on the Ground of Mental Impairment. If the military jury finds the accused person not guilty on the ground of mental impairment, the Military Judge must record that the accused was found not guilty on the ground of mental impairment.

d. No Finding to be Recorded. [UNDER DEVELOPMENT]

6.70 Effect of Findings. The effect of each finding (or no finding) can be summarised as follows:

58 DFDA paragraph 124(2)(b) and ss 124(3).

59 DFDA ss 145(4).
a. **Finding of Guilty.** If the military jury find the accused person guilty, the Military Judge must convict the person\(^{60}\).

b. **Finding of Not Guilty.** If the military jury finds the accused person not guilty, the Military Judge must acquit the person\(^{61}\).

c. **Finding of Not Guilty on the Ground of Mental Impairment.** If the military jury finds the accused person not guilty on the ground of mental impairment, the Military Judge must acquit the person of the charge on the ground of mental impairment\(^{62}\).

d. **No Finding.** [UNDER DEVELOPMENT]

**Conviction.**

6.71 **Circumstances in which Military Judge to Convict.** If the military jury find the accused person guilty, the Military Judge must convict the person\(^{63}\).

6.72 **Recording of Conviction.** If a Military Judge convicts a person, the Military Judge must record the conviction.

6.73 **Effect of Conviction.** If a person is convicted, the Australian Military Court (the Military Judge presiding) must take action under DFDA Part IV (imposition of punishments and making of orders) in relation to the convicted person\(^{64}\).

**Acquittal**

6.74 **Circumstances in which Military Judge to Acquit.** If the military jury finds the accused person not guilty, the Military Judge must acquit the person\(^{65}\).

6.75 **Recording of Acquittal.** If a Military Judge acquits a person, the Military Judge must record the acquittal.

6.76 **Effect of Acquittal.** [UNDER DEVELOPMENT]

**Acquittal on the Ground of Mental Impairment.**

6.77 **Circumstances in which Military Judge to Acquit the Ground of Mental Impairment.** If the military jury finds the accused person not guilty on the ground of mental impairment, the Military Judge must acquit the person of the charge on the ground of mental impairment\(^{66}\).

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\(^{60}\) DFDA ss 132B(8).

\(^{61}\) DFDA ss 132B(7).

\(^{62}\) DFDA ss 145(4).

\(^{63}\) DFDA ss 132B(8).

\(^{64}\) DFDA ss 132F(1).

\(^{65}\) DFDA ss 132B(7).

\(^{66}\) DFDA ss 145(4).
6.78 **Recording of Acquittal on the Ground of Mental Impairment.** If the Military Judge acquits the person of the charge on the ground of mental impairment, the Military Judge must record that the accused person was acquitted on the ground of mental impairment\(^{67}\).

6.79 **Effect of Acquittal on the Ground of Mental Impairment.** Where the accused person is acquitted of the charge on the ground of mental impairment, the Military Judge must direct that the accused person be kept in strict custody until the pleasure of the Governor-General is known\(^{68}\).

**Conclusion of Trial.**

6.80 Once the findings have been made, and any convictions and/or acquittals recorded, the trial is concluded. At this stage, the Military Judge will discharge the military jury. It should be emphasised that the military jury is not involved in the taking of DFDA Part IV action.

6.81 [UNDER DEVELOPMENT]

**Procedural Guide.**

6.82 Annex B is an Australian Military Court Trial Order of Procedure for trial by Military Judge sitting with a military jury. It provides a step-by-step procedural guide to the legal practices and procedures, and the military courtesies, to be followed in trials.

**Chief Military Judge – Role and Responsibilities**

6.83 [UNDER DEVELOPMENT]

**Presiding Military Judge – Roles and Responsibilities**

6.84 [UNDER DEVELOPMENT]

**Registrar – Roles and Responsibilities**

6.85 [UNDER DEVELOPMENT]

**Director of Military Prosecutions/Prosecuting Officer – Roles and Responsibilities**

6.86 [UNDER DEVELOPMENT]

**Director Defence Counsel Services/Defending Officer**

6.87 [UNDER DEVELOPMENT]

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\(^{67}\) DFDA ss 145(5).

\(^{68}\) DFDA s 145(5).
TRIAL BY MILITARY JUDGE.

Pleas

Taking of Pleas

6.92 At the commencement of the trial, before any evidence on the charge(s) is heard, the Military Judge is to ask the accused person whether he or she pleads guilty or not guilty to the charge(s). This is to occur in relation to all primary charges and stated alternative charges, and also in relation to statutory alternative offences, as follows:

a. For each primary charge, the accused person is to be asked whether he or she pleads guilty or not guilty to the charge.

b. If the accused person pleads guilty to the primary charge, the accused person will not be asked to plead to any stated alternative charges or have any statutory alternative offences put to them.

c. If the accused pleads not guilty to the primary charge and there is a stated alternative charge, the accused person is to be asked whether he or she pleads guilty or not guilty to the stated alternative charge.

d. If the accused person pleads guilty to the stated alternative charge, the accused person will not have any statutory alternative offences put to them.

69 DFDA ss 132D(2).
e. If the accused pleads not guilty to the primary charge, there is no stated alternative charge (or there is a stated alternative charge but the accused pleads not guilty to it) and there is a statutory alternative offence, then the accused is to be advised that there is a statutory alternative offence and asked whether he/she would like to enter a plea to it.

Recording of Pleas

6.93 The Military Judge is to record all pleas (guilty or not guilty).

6.94 Guilty Plea. The Military Judge must record a plea of guilty in the following circumstances:

a. the accused person pleads guilty to the primary charge;

b. the accused person pleads guilty to a stated alternative charge and this plea is accepted;

c. the accused person pleads guilty to a statutory alternative offence and this plea is accepted; or

d. the accused person withdraws a not guilty plea to a charge and pleads guilty to that charge.

70 There is no legislative requirement to record a guilty plea. There is, however, a legislative requirement to substitute a guilty plea (see DFDA ss 132E(2); There is also a legislative requirement to record not guilty pleas (see DFDA ss 132D(4)).

71 DFDA ss 132E(2).

72 Although there is no express legislative requirement to record a guilty plea in such circumstances, DFDA ss 132D(3) is of relevance in this context.

73 Although there is no express legislative requirement to record a guilty plea in such circumstances, DFDA ss 132E(1)(a) is of relevance in this context.

74 Although there is no express legislative requirement to record a guilty plea in such circumstances, DFDA ss 142(3) is of relevance in this context.

75 DFDA ss 132E(2).
AND the Military Judge is satisfied that the accused person understands the effect of the plea of guilty.  

6.95 Not Guilty Plea. The Military Judge must record a plea of not guilty in the following circumstances:

a. the accused person pleads not guilty;

b. the accused person refuses to plead;

c. the accused person does not plead intelligibly;

d. the charge in question is a stated alternative offence, the accused pleads guilty, but the plea is not accepted;

e. the offence in question is a statutory alternative offence, the accused pleads guilty, but the plea is not accepted; or

f. the Military Judge is not satisfied that the accused person understands the effect of a plea of guilty.

6.96 No Plea to be Recorded. As discussed above, there are circumstances in which pleas will not be taken on stated alternative charges and statutory alternative offences. If no plea is taken then no plea is to be recorded.

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76 In relation to subparagraph (a) (plea of guilty to primary charge) see DFDA ss132D(3) with respect to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. In relation to subparagraph (b) (plea of guilty to a stated alternative charge) see DFDA paragraph 132E(1)(a) read in conjunction with DFDA ss 132D(3) with respect to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. In relation to subparagraph (c) (plea of guilty to statutory alternative offence) see DFDA ss 142(3) read in conjunction with DFDA ss 132D(3) in relation to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. In relation to subparagraph (d) (withdrawal of not guilty plea and substitution of guilty plea) see DFDA ss 132E(2) in relation to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. The requirement for the Military Judge to be satisfied that the accused person understands the effect of the plea of guilty is discussed in more detail below.

77 DFDA paragraph 132D(4)(a).

78 DFDA paragraph 132D(4)(a).

79 DFDA paragraph 132D(4)(a).

80 DFDA paragraph 132E(1)(b).

81 Although there is not express legislative requirement to record a guilty plea in such circumstances, DFDA ss 142(3) is of relevance in this context.

82 DFDA paragraph 132D(4)(b).
Substitution of Pleas

6.97 Substitution of Guilty Plea with Not Guilty Plea. At any time before an accused person is convicted, they may substitute a guilty plea with a not guilty plea.

6.98 Substitution of Not Guilty Plea with Guilty Plea. The Military Judge must substitute for a plea of not guilty a plea of guilty in the following circumstances:

a. the accused person withdraws a not guilty plea to a charge and pleads guilty to that charge; and

b. the Military Judge is satisfied that the accused person understands the effect of that plea\(^{83}\).

Effect of Pleas

6.99 Guilty Plea. The Military Judge must convict the accused person in the following circumstances:

a. the accused person pleads guilty to the primary charge\(^{84}\);

b. the accused person pleads guilty to a stated alternative charge and this plea is accepted\(^{85}\);

c. the accused person pleads guilty to a statutory alternative offence and this plea is accepted\(^{86}\); or

d. the accused person withdraws a not guilty plea to a charge and pleads guilty to that charge\(^{87}\).

AND the Military Judge is satisfied that the accused person understands the effect of the plea of guilty\(^{88}\). If a person is convicted, action must be taken under DFDA Part IV (DFDA

\(^{83}\) DFDA ss 132E(2).

\(^{84}\) DFDA ss 132D(3).

\(^{85}\) DFDA paragraph 132E(1)(a).

\(^{86}\) DFDA ss 142(3).

\(^{87}\) DFDA ss 132E(2).

\(^{88}\) In relation to subparagraph (a) (plea of guilty to primary charge) see DFDA ss132D(3) with respect to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. In relation to subparagraph (b) (plea of guilty to a stated alternative charge) see DFDA paragraph 132E(1)(a) read in conjunction with DFDA ss 132D(3) with respect to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. In relation to subparagraph (c) (plea of guilty to statutory alternative offence) see DFDA ss 142(3) read in conjunction with DFDA ss 132D(3) in relation to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty. In relation to subparagraph (d) (withdrawal of not guilty plea and substitution of guilty plea) see DFDA ss 132E(2) in relation to the requirement for the Military Judge to be satisfied that the person understands the effect of the plea of guilty.
Part IV deals with punishments and orders. Punishments and orders are discussed in more detail in Chapter 7.

6.100 **Not Guilty Plea.** As discussed above, the Military Judge must record a plea of not guilty in the following circumstances:

a. the accused person pleads not guilty;

b. the accused person refuses to plead;

c. the accused person does not plead intelligibly;

d. the charge in question is a stated alternative offence, the accused pleads guilty, but the plea is not accepted;

e. the offence in question is a statutory alternative offence, the accused pleads guilty, but the plea is not accepted; or

f. the Military Judge is not satisfied that the accused person understands the effect of a plea of guilty.

No Plea

6.101 [UNDER DEVELOPMENT]

6.102 If the Military Judge records a plea of guilty, guilt is then an ‘issue of fact’ and the Military Judge must proceed to hear the evidence on the charge. In so far as this issue of fact is concerned, the burden of proof is on the prosecution. The prosecution must prove their case beyond a reasonable doubt.

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The requirement for the Military Judge to be satisfied that the accused person understands the effect of the plea of guilty is discussed in more detail below.

89 DFDA ss 132F(1).

90 DFDA paragraph 132D(4)(a).

91 DFDA paragraph 132D(4)(a).

92 DFDA paragraph 132D(4)(a).

93 DFDA paragraph 132E(1)(b).

94 Although there is not express legislative requirement to record a guilty plea in such circumstances, DFDA ss 142(3) is of relevance in this context.

95 DFDA paragraph 132D(4)(b).

96 DFDA ss 132D(4).
Acceptance of Plea of Guilty on Stated Alternative Charge.

6.103 Before the Military Judge can convict an accused person on the basis of his or her plea of guilty on a stated alternative charge, the Military Judge must accept the plea of guilty on the stated alternative charge.

6.104 The Military judge can only accept a plea of guilty on a stated alternative charge if the Military Judge is notified by the Director of Military Prosecutions that the Director of Military Prosecutions does not object to the acceptance of the plea of guilty on the stated alternative charge.

6.105 In order to proceed to conviction, the Military Judge must still be satisfied that the accused person understands the effect of the plea of guilty.

6.106 The Military Judge must record a plea of not guilty (and proceed to hear the evidence on the charge) in all other cases. Usually, this will be because the Director of Military Prosecutions does object to the acceptance of the plea of guilty on the stated alternative charge.

6.107 In these circumstances, what is accepted (or rejected) is in effect the substitution of one charge for another. In other words, it is not the plea itself which is being accepted or rejected.

Acceptance of Plea of Guilty on Statutory Alternative Offence.

6.108 Before the Military Judge can convict an accused person on the basis of their plea of guilty on a statutory alternative offence, the Director of Military Prosecutions must consent to the acceptance of the plea of guilty on the statutory alternative offence.

6.109 In order to proceed to conviction, the Military Judge must still be satisfied that the accused person understands the effect of the plea of guilty.

6.110 The Military Judge must record a plea of not guilty (and proceed to hear the evidence on the charge) if the Director of Military Prosecutions does not consent to the acceptance of the plea of guilty on the statutory alternative offence.

6.111 In these circumstances, what is accepted (or rejected) is in effect the substitution of one charge for another. In other words, it is not the plea itself which is being accepted or rejected.

97 DFDA paragraph 132E(1)(a).
98 DFDA paragraph 132E(1)(a).
99 DFDA paragraph 132E(1)(a) read in conjunction with DFDA ss 132B(3). The requirement for the Military Judge to be satisfied that the accused person understands the effect of the plea of guilty is discussed in more detail below.
100 DFDA paragraph 132E(1)(b).
101 DFDA paragraph 142(3)(c) refers to "the prosecution". Before the AMC, this will always be the Director of Military Prosecutions.
102 DFDA paragraph 142(3)(c).
103 DFDA ss 132D(3). The requirement for the Military Judge to be satisfied that the accused person understands the effect of the plea of guilty is discussed in more detail below.
Military Judge to be Satisfied that the Accused Person Understands the Effect of a Guilty Plea.

6.112 The Military Judge may, in the case of a guilty plea, only convict an accused person if he or she is satisfied that the accused person understands the effect of the plea of guilty\(^\text{104}\).

6.113 The Military Judge must record a plea of not guilty (and proceed to hear the evidence on the charge) if he or she is not satisfied that the accused person understands the effect of a plea of guilty\(^\text{105}\).

Hearing of Evidence

6.114 If, in a trial by a Military Judge, a Military Judge records a plea of not guilty, the Military Judge must proceed to hear the evidence on the charge\(^\text{106}\).

Sufficiency of Evidence

6.115 Once the Military Judge proceeds to hear the evidence on the charge, the first thing that occurs is that the Military Judge will ask the prosecution to adduce their evidence\(^\text{107}\).

6.116 The Military Judge, after hearing the evidence on the charge adduced by the prosecution, may be required to rule on the sufficiency of evidence.

6.117 There are no circumstances in which the Military Judge is required to give a ruling on whether the evidence is sufficient to support the charge\(^\text{108}\).

6.118 There are, however, circumstances in which the Military Judge is required to give a ruling on whether the evidence is insufficient to support the charge\(^\text{109}\). These circumstances are as follows:

   a. the accused person has submitted that the Military Judge should give the ruling; or

   b. the interests of justice require that the Military Judge should give the ruling.

6.119 Even if a Military Judge is not required to rule on the sufficiency of the evidence, he or she may do so\(^\text{110}\). Other than the circumstances outlined above, however, there is no requirement for the Military Judge to make a ruling on the sufficiency or otherwise of the evidence\(^\text{111}\).

\(^{104}\) DFDA ss 132D(3) and DFDA ss 132E(2) (the applicable provision will depend on the circumstances of guilty plea).

\(^{105}\) DFDA paragraph 132D(4)(b).

\(^{106}\) DFDA ss 132D(4).

\(^{107}\) This is inferred from DFDA ss 132D(5) and (6).

\(^{108}\) DFDA ss 132E(4) read in conjunction with ss 132D(6).

\(^{109}\) DFDA ss 132E(3) read in conjunction with ss 132D(5).

\(^{110}\) DFDA ss 132D(5) and (6) and 132E(3) and (4).

\(^{111}\) DFDA ss132E(3) and (4).
6.120 If the Military Judge, after hearing the evidence on the charge adduced by the prosecution, rules that the evidence is sufficient to support the charge, then the Military Judge must proceed with the trial. This is discussed below.

6.121 If the Military Judge rules that the evidence is insufficient to support the charge, the Military Judge must dismiss the charge.

Proceeding with Trial

6.122 [UNDER DEVELOPMENT]

Decision

6.123 [UNDER DEVELOPMENT]

Finding

6.124 Potential Findings. A military jury may make three possible findings: guilty, not guilty, not guilty on the ground of mental impairment. There are also occasions on which no finding is reached. The circumstances leading to each of these findings (or no finding) are as follows:

a. Finding of Guilty. [UNDER DEVELOPMENT]

b. Finding of Not Guilty. [UNDER DEVELOPMENT]

c. Finding of Not Guilty on the Ground of Mental Impairment. [UNDER DEVELOPMENT]

d. No Finding. [UNDER DEVELOPMENT]

6.125 Making of Findings. [UNDER DEVELOPMENT]

6.126 Recording of Findings. The requirement to record findings can be summarised as follows:

a. Finding of Guilty. If the Military Judge finds the accused person guilty, he/she must record a finding of guilty.

b. Finding of Not Guilty. If the Military Judge finds the accused person not guilty, he/she must record a finding of not guilty.

c. Find of Not Guilty on the Ground of Mental Impairment. If the Military Judge finds the accused person not guilty on the ground of mental impairment, the Military Judge must record that the accused was found not guilty on the ground of mental impairment.

d. No Finding to be Recorded. [UNDER DEVELOPMENT]

112 DFDA ss 132D(6).

113 DFDA ss 132D(5).
Effect of Findings. The effect of each finding (or no finding) can be summarised as follows:

a. **Finding of Guilty.** If the Military Judge finds the accused person guilty, he/she must convict the person\(^{114}\).

b. **Finding of Not Guilty.** If the Military Judge finds the accused person not guilty, he/she must acquit the person\(^{115}\).

c. **Finding of Not Guilty on the Ground of Mental Impairment.** If the Military Judge finds the accused person not guilty on the ground of mental impairment, the Military Judge must acquit the person of the charge on the ground of mental impairment.

d. **No Finding.** [UNDER DEVELOPMENT]

Conviction.

**Circumstances in which Military Judge to Convict.** If the Military Judge finds the accused person guilty, he/she must convict the person\(^{116}\).

**Recording of Conviction.** If a Military Judge convicts a person, the Military Judge must record the conviction.

**Effect of Conviction.** If a person is convicted, the Australian Military Court (the Military Judge presiding) must take action under DFDA Part IV (imposition of punishments and making of orders) in relation to the convicted person\(^{117}\).

Acquittal

**Circumstances in which Military Judge to Acquit.** If the Military Judge finds the accused person not guilty, he/she must acquit the person\(^{118}\).

**Recording of Acquittal.** If a Military Judge acquits a person, the Military Judge must record the acquittal.

**Effect of Acquittal.** [UNDER DEVELOPMENT]

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\(^{114}\) DFDA ss 132D(8).

\(^{115}\) DFDA ss 132D(7).

\(^{116}\) DFDA ss 132D(8).

\(^{117}\) DFDA ss 132F(1).

\(^{118}\) DFDA ss 132D(7).
Acquittal on the Ground of Mental Impairment.

6.134 Circumstances in which Military Judge to Acquit the Ground of Mental Impairment. If the Military Judge finds the accused person not guilty on the ground of mental impairment, the Military Judge must acquit the person of the charge on the ground of mental impairment.

6.135 Recording of Acquittal on the Ground of Mental Impairment. If the Military Judge acquits the person of the charge on the ground of mental impairment, the Military Judge must record that the accused person was acquitted on the ground of mental impairment.

6.136 Effect of Acquittal on the Ground of Mental Impairment. Where the accused person is acquitted of the charge on the ground of mental impairment, the Military Judge must direct that the accused person be kept in strict custody until the pleasure of the Governor-General is known.

Conclusion of Trial.

6.137 Once the findings have been made, and any convictions and/or acquittals recorded, the trial is concluded.

6.138 [UNDER DEVELOPMENT]


Chief Military Judge – Role and Responsibilities

6.140 [UNDER DEVELOPMENT]

Presiding Military Judge – Roles and Responsibilities

6.141 [UNDER DEVELOPMENT]

Registrar – Roles and Responsibilities

6.142 [UNDER DEVELOPMENT]

Director of Military Prosecutions/Prosecuting Officer – Roles and Responsibilities

6.143 [UNDER DEVELOPMENT]

Director Defence Counsel Services/Defending Officer

6.144 [UNDER DEVELOPMENT]
Court Recorder – Roles and Responsibilities

6.145  [UNDER DEVELOPMENT]

Clerk – Roles and Responsibilities

6.146  [UNDER DEVELOPMENT]

Orderly – Roles and Responsibilities

6.147  [UNDER DEVELOPMENT]

Escort – Roles and Responsibilities

6.148  [UNDER DEVELOPMENT]

POST-TRIAL ADMINISTRATION

Introduction

6.149  [UNDER DEVELOPMENT]

Chief Military Judge – Role and Responsibilities

6.150  [UNDER DEVELOPMENT]

Presiding Military Judge – Roles and Responsibilities

6.151  [UNDER DEVELOPMENT]

Registrar – Roles and Responsibilities

6.152  [UNDER DEVELOPMENT]

Director of Military Prosecutions/Prosecuting Officer – Roles and Responsibilities

6.153  [UNDER DEVELOPMENT]

Director Defence Counsel Services/Defending Officer

6.154  [UNDER DEVELOPMENT]
Court Recorder – Roles and Responsibilities

6.155 [UNDER DEVELOPMENT]

Clerk – Roles and Responsibilities

6.156 [UNDER DEVELOPMENT]

Orderly – Roles and Responsibilities

6.157 [UNDER DEVELOPMENT]

Escort – Roles and Responsibilities

6.158 [UNDER DEVELOPMENT]

Annex:

A. AUSTRALIAN MILITARY COURT - PRE-TRIAL HEARING - ORDER OF PROCEDURE

B. AUSTRALIAN MILITARY COURT - TRIAL BY MILITARY JUDGE WITH MILITARY JURY - ORDER OF PROCEDURE

C. AUSTRALIAN MILITARY COURT – TRIAL BY MILITARY JUDGE SITTING ALONE – ORDER OF PROCEDURE
AUSTRALIAN MILITARY COURT - PRE-TRIAL HEARING - ORDER OF PROCEDURE

[UNDER DEVELOPMENT]
AUSTRALIAN MILITARY COURT - TRIAL - ORDER OF PROCEDURE

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AUSTRALIAN MILITARY COURT - TRIAL BY MILITARY JUDGE
SITTING ALONE - ORDER OF PROCEDURE

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CHAPTER 7

AUSTRALIAN MILITARY COURT SENTENCING HEARINGS AND PART IV DFDA ACTION

IMPOSITION OF PUNISHMENTS AND MAKING OF ORDERS

INTRODUCTION

7.1 If an Australian Military Court trial (be it a trial by a Military Judge and a military jury or a trial by a Military Judge alone) results in a conviction, the Australian Military Court automatically has jurisdiction to take what is referred to as DFDA Part IV action in relation to the convicted person. Indeed, it must do so.

7.2 In addition, the Australian Military Court has jurisdiction in relation to certain summary authority convictions.

7.3 The Australian Military Court’s jurisdiction with respect to a conviction referred to it to take DFDA Part IV action is triggered as a result of a referral by the Registrar. Such a referral is mandatory where requested by the Director of Military Prosecutions.

7.4 Before taking DFDA Part IV action, the Military Judge presiding must hear evidence relevant to determining what action should be taken.

7.5 Once the Australian Military Court receives a referral of a charge for trial, planning begins for any DFDA Part IV hearings that may ultimately be required. Accordingly, there is pre-hearing administration which will need to occur. Similarly, once the Australian Military Court receives a referral of a conviction for the taking of DFDA Part IV action, there is pre-hearing administration which will need to occur.

7.6 Where the Australian Military Court becomes seized of a matter for the taking of DFDA Part IV action there may, in rare cases, be a requirement for pre-hearing hearings and directions to be conducted. There will also be the hearing itself that will need to be conducted and the post-hearing administration that will need to be attended to.

7.7 Admittedly, the procedures will generally be somewhat different if it is an Australian Military Court conviction in relation to which DFDA Part IV action is being taken as distinct from a conviction referred to it for the taking of DFDA Part IV action, however, the underlying considerations will be the same and will therefore be discussed together.

7.8 These matters, and the various roles and responsibilities of the Chief Military Judge, other Military Judges, the Registrar, the Director of Military Prosecutions and the prosecuting officer, the Director of Defence Counsel Services and the defending officer, the court recorder, the clerk, the orderly and the escort, are discussed in more detail below. Also discussed in more detail below are the available punishments and orders.

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1 DFDA ss 132F(1).
2 DFDA ss 132F(1).
3 DFDA ss 118(3).
4 In relation to an AMC conviction (or convictions) see DFDA ss 132F(2). In relation to a summary authority (superior summary authority or commanding officer) conviction (or convictions) see DFDA ss 115(4).
PRE-HEARING ADMINISTRATION

Introduction

7.9 [UNDER DEVELOPMENT]

Chief Military Judge – Role and Responsibilities

7.10 Where there has been an Australian Military Court trial, the same Military Judge will generally continue to preside in relation to the Part IV action.

7.11 Where the Australian Military Court receives a referral of a conviction for the taking of Part IV action, the Chief Military Judge will nominate the Military Judge who will preside.

Other Military Judges – Roles and Responsibilities

7.12 [UNDER DEVELOPMENT]

Registrar – Roles and Responsibilities

7.13 [UNDER DEVELOPMENT]

Director of Military Prosecutions/Prosecuting Officer – Roles and Responsibilities

7.14 [UNDER DEVELOPMENT]

Director Defence Counsel Services/Defending Officer

7.15 [UNDER DEVELOPMENT]

Court Recorder – Roles and Responsibilities

7.16 [UNDER DEVELOPMENT]

Clerk – Roles and Responsibilities

7.17 [UNDER DEVELOPMENT]

Orderly – Roles and Responsibilities

7.18 [UNDER DEVELOPMENT]

Escort – Roles and Responsibilities

7.19 [UNDER DEVELOPMENT]
PRE-HEARING HEARINGS AND DIRECTIONS

Introduction

7.20 [UNDER DEVELOPMENT]

Pre-Hearing Hearing and Direction Procedures

7.21 [UNDER DEVELOPMENT]

7.22 Procedural Guide. Annex A is an Australian Military Court Pre-DFDA-Part IV-Hearing Hearing and Directions Order of Procedure. It provides a step-by-step procedural guide to the legal practices and procedures, and the military courtesies, to be followed in pre-trial hearings and directions.

Chief Military Judge – Role and Responsibilities

7.23 [UNDER DEVELOPMENT]

Presiding Military Judge – Roles and Responsibilities

7.24 [UNDER DEVELOPMENT]

Registrar – Roles and Responsibilities

7.25 [UNDER DEVELOPMENT]

Director of Military Prosecutions/Prosecuting Officer – Roles and Responsibilities

7.26 [UNDER DEVELOPMENT]

Director Defence Counsel Services/Defending Officer

7.27 [UNDER DEVELOPMENT]

Court Recorder – Roles and Responsibilities

7.28 [UNDER DEVELOPMENT]

Clerk – Roles and Responsibilities

7.29 [UNDER DEVELOPMENT]

Orderly – Roles and Responsibilities

7.30 [UNDER DEVELOPMENT]

Escort – Roles and Responsibilities

7.31 [UNDER DEVELOPMENT]

PROVISIONAL AS AT SEP 07 - PENDING FINAL PUBLICATION
PART IV HEARING

Introduction

7.32 [UNDER DEVELOPMENT]

Hearing Procedures

7.33 [UNDER DEVELOPMENT]

7.34 Procedural Guide. Annex B is an Australian Military Court DFDA Part IV Hearing Order of Procedure. It provides a step-by-step procedural guide to the legal practices and procedures, and the military courtesies, to be followed in trials.

Chief Military Judge – Role and Responsibilities

7.35 [UNDER DEVELOPMENT]

Presiding Military Judge – Roles and Responsibilities

7.36 [UNDER DEVELOPMENT]

Registrar – Roles and Responsibilities

7.37 [UNDER DEVELOPMENT]

Director of Military Prosecutions/Prosecuting Officer – Roles and Responsibilities

7.38 [UNDER DEVELOPMENT]

Director Defence Counsel Services/Defending Officer

7.39 [UNDER DEVELOPMENT]

Court Recorder – Roles and Responsibilities

7.40 [UNDER DEVELOPMENT]

Clerk – Roles and Responsibilities

7.41 [UNDER DEVELOPMENT]

Orderly – Roles and Responsibilities

7.42 [UNDER DEVELOPMENT]
Escort – Roles and Responsibilities
7.43 [UNDER DEVELOPMENT]

POST-DFDA-PART IV-HEARING ADMINISTRATION

Introduction
7.44 [UNDER DEVELOPMENT]

Chief Military Judge – Role and Responsibilities
7.45 [UNDER DEVELOPMENT]

Presiding Military Judge – Roles and Responsibilities
7.46 [UNDER DEVELOPMENT]

Registrar – Roles and Responsibilities
7.47 [UNDER DEVELOPMENT]

Director of Military Prosecutions/Prosecuting Officer – Roles and Responsibilities
7.48 [UNDER DEVELOPMENT]

Director Defence Counsel Services/Defending Officer
7.49 [UNDER DEVELOPMENT]

Court Recorder – Roles and Responsibilities
7.50 [UNDER DEVELOPMENT]

Clerk – Roles and Responsibilities
7.51 [UNDER DEVELOPMENT]

Orderly – Roles and Responsibilities
7.52 [UNDER DEVELOPMENT]

Escort – Roles and Responsibilities
7.53 [UNDER DEVELOPMENT]

PROVISIONAL AS AT SEP 07 - PENDING FINAL PUBLICATION
**AVAILABLE PUNISHMENTS AND ORDERS**

7.54 It is only in accordance with DFDA Part IV and DFDA Schedule 2 that a punishment can be imposed\(^5\) or an order made. Refer to the following Chapter 8 for specific guidance in relation to sentencing considerations as well as notes on the specific punishments available to the AMC.

7.55 The Australian Military Court may impose a punishment or a combination\(^6\) of punishments but each punishment which is imposed must be in respect of a particular conviction and no other conviction.\(^7\)

**SENTENCING BY THE AUSTRALIAN MILITARY COURT**

**Following conviction at trial by Australian Military Court**

7.56 Where a person is convicted of a service offence by the Australian Military Court\(^8\), the Court must take action under Part IV in relation to the convicted person\(^9\). Before taking such action, the Court must hear evidence relevant to determining what action should be taken\(^10\).

7.57 Trial by the Australian Military Court may be by Military Judge alone, or by Military Judge sitting with a Military Jury. In relation to taking punishment action under DFDA Part IV, it must be noted that DFDA s 124 limits the functions of the military jury to determining guilt of an accused, and where relevant, determining whether the accused was suffering such unsoundness of mind as to not be responsible for the act / omission alleged. The military jury does not have a role to play in relation to sentencing.

**Following referral from a summary authority**

7.58 In addition to Part IV action taken following a conviction by the Australian Military Court, the Court also has jurisdiction to take Part IV action in relation to a conviction referred to it under DFDA ss 103(5). Where a convicted person elects IAW DFDA s 131 to be punished by the Australian Military Court, and the summary authority refers the conviction to the DMP, the DMP must request the Registrar to refer the conviction to the Australian Military Court to take action under Part IV. The Registrar is bound, IAW DFDA s 118(3) to refer the matter to the CMJ, who will nominate a Military Judge to take action in relation to the person.

**SENTENCING PRINCIPLES**

**General**

7.59 In determining punishment or other action under Part IV of the DFDA, the Australian Military Court must consider both the principles of sentencing applied by the civil courts, from time to time, and the need to maintain Service discipline.\(^11\)

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\(^5\) DFDA ss 67(1).

\(^6\) DFDA ss 3(1) defines ‘punishment’ as including a combination of punishments.

\(^7\) DFDA ss 66(1)

\(^8\) DFDA ss 132B(3) or (8), and ss 132D(3) or (8).

\(^9\) DFDA ss 132F(1)

\(^10\) DFDA ss 132F(2)

\(^11\) DFDA s 70.
Principles of sentencing applied by civil courts

7.60 The principles of sentencing applied by civil courts to which Australian Military Court must have regard include those set out in Part 1B Crimes Act 1914 (Cth). These general principles are summarised below:

a. The court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the case.

b. In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

   (1) the nature and circumstances of the offence;
   (2) other offences (if any) that are required or permitted to be taken into account;
   (3) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;
   (4) the personal circumstances of any victim of the offence;
   (5) any injury, loss or damage resulting from the offence;
   (6) the degree to which the person has shown contrition for the offence;
      (a) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
      (b) in any other manner;
   (7) if the person has pleaded guilty to the charge in respect of the offence—that fact;
   (8) the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences;
   (9) the deterrent effect that any sentence or order under consideration may have on the person;
   (10) the need to ensure that the person is adequately punished for the offence;
   (11) the character, antecedents, age, means and physical or mental condition of the person;
   (12) the prospect of rehabilitation of the person;
   (13) the probable effect that any sentence or order under consideration would have on any of the person's family or dependents.

c. In addition, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order.

d. A court must not take into account under the grounds listed above any form of customary law or cultural practice as a reason for:

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12 Relevant by reference to sentencing a person for a 'federal offence', see Crimes Act 1914.
13 Crimes Act 1914, s 16A.
14 In the DFDA context, this means all service offences.
(1) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or

(2) aggravating the seriousness of the criminal behaviour to which the offence relates.

7.61 In addition to those principles outlined above reflecting civil court sentencing consideration, the DFDA sets out a number of mitigating or aggravating factors that are required to be taken into account by the court. These include:

a. the person’s rank, age and maturity;

b. the person’s physical and mental condition;

c. the person’s personal history;

d. the absence or existence in the person’s case of previous convictions for service offences, civil court offences and overseas offences;

e. if the service offence involved a victim, the person’s relationship with the victim;

f. the person’s behaviour before, during and after the commission of the service offence; and

g. any consequential effects of the person’s conviction or proposed punishment.

7.62 Before imposing a fine on a convicted person, the court must take into account the financial circumstances of the person, and the effect of the fine on the person’s ability to meet any reparation orders,\textsuperscript{15} in addition to any other matters that the court is required or permitted to take into account.

7.63 Also, where the relevant offence of which the person was convicted was an offence against s 11.1 \textit{Criminal Code}, and the ‘attempt’ that constitutes the offence was voluntarily abandoned, the court should take that fact and the circumstances of the abandonment into account in mitigation.\textsuperscript{16}

\textbf{The need to maintain discipline in the Australian Defence Force}

7.64 In addition to the principles of sentencing applied in civil courts, a Australian Military Court, in determining what punishment to impose on a convicted person, must also have regard to the need to maintain discipline in the Australian Defence Force (ADF). In this matter, the officers who constitute Australian Military Courts are entitled to apply their own Service knowledge and experience to the circumstances of particular cases.

\textbf{PUNISHMENTS AVAILABLE TO THE AUSTRALIAN MILITARY COURT}

7.65 DFDA s 68 sets out the scale of punishments that may be imposed by a service Australian Military Court on a convicted person. However, in accordance with DFDA s 67, the only punishments which may be imposed by the Australian Military Court on a convicted person, are those specified in DFDA Schedule 2. Given that the Australian Military Court does not have jurisdiction to try a charge for custodial offences, DFDA s 68A and s 69C are not dealt with in this chapter. DLM Volume 3 (First Edition) deals with these matters.

7.66 In decreasing order of severity the punishments available to the Australian Military Court are:

a. imprisonment;

b. dismissal from the Defence Force;

\textsuperscript{15} DFDA ss 70(3)
\textsuperscript{16} DFDA ss 70(4)(b)
c. detention for a period not exceeding two years;
d. reduction in rank;
e. forfeiture of service for the purposes of promotion;
f. forfeiture of seniority;
g. fine, being a fine not exceeding:
   (1) where the convicted person is a member of the ADF — the amount of his or her pay for 28 days; or
   (2) in any other case—$500;
h. severe reprimand;
i. reprimand.

7.67 DFDA Schedule 2 further breaks down the punishments available to the Australian Military Court by reference to the class / type of convicted person, namely; either an Officer, member of the Defence Force who is not an officer, or person who is not a member of the Defence Force. The limitations affecting Australian Military Court punishment action are discussed further below.

LIMITATIONS ON PUNISHMENTS

7.68 The punishments which may be imposed by the Australian Military Court in any particular case may be limited by:

a. the offence - the maximum punishment which is specified in the provision creating the offence;
b. the class of convicted person – being either an Officer, a member of the Defence Force who is not an officer, or a person who is not a member of the Defence Force; and/or
c. the jurisdiction and power of the Australian Military Court granted by the DFDA.

7.69 Where a person is convicted by the Australian Military Court of a territory offence, the maximum punishment which may be imposed is the fixed punishment provided in the legislation creating the offence. For example, where a person is convicted of the Territory offence of assault occasioning actual bodily harm under the Crimes Act 1900 (ACT), he or she is liable to a maximum punishment of five years imprisonment.

7.70 Service offences (other than Territory offences) may only attract a maximum punishment not higher than that specified in the relevant section creating the offence. For example, where a person is convicted of a charge of assault under DFDA ss 33(b), the maximum punishment which may be imposed is imprisonment for 6 months.

7.71 Chapter 3 of this Volume sets out the relevant maximum punishments available in relation to those offences requiring trial by the Australian Military Court. The maximum punishments permitted in relation to offences capable of trial by a summary authority (those not covered in this Volume) are set out in DLM Volume 3.

7.72 The table below mirrors DFDA Schedule 2, and reflects the punishments available to the Australian Military Court depending on the status / class of the convicted person.

17 DFDA ss 61(4)
18 See discussion on the use of Territory offences in Chapter 3.
### TABLE 1

<table>
<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Convicted Person</strong></td>
<td><strong>Punishment</strong></td>
</tr>
</tbody>
</table>
| Officer | Imprisonment  
Dismissal from the Defence Force  
Reduction in rank  
Forfeiture of service for the purposes of promotion  
Forfeiture of seniority  
Fine of an amount not exceeding the amount of the convicted person’s pay for 28 days  
Severe reprimand  
Reprimand |
| Member of the Defence Force who is not an officer | Imprisonment  
Dismissal from the Defence Force  
Detention for a period not exceeding 2 years  
Reduction in rank  
Forfeiture of seniority  
Fine not exceeding the amount of the convicted person’s pay for 28 days  
Severe reprimand  
Reprimand |
| Person who is not a member of the Defence Force | Imprisonment  
Fine of an amount not exceeding $500. |

7.73 DFDA s 71 imposes specific limitations on the imposition of certain punishments. The following limitations are relevant for discussion in this chapter in light of the power of the Australian Military Court illustrated by Table 1 above:

a. **Imprisonment.** The Australian Military Court must not impose the punishment of imprisonment in respect of a conviction, unless the court also imposes, in relation to that conviction, the punishment of dismissal from the Defence Force.

b. **Detention.**

(1) **Reduction in rank of NCO.** The Australian Military Court must not impose the punishment of detention on a non-commissioned officer unless is also imposed the punishment of reduction in rank to below non-commissioned rank. Note: no specific requirement that the punishment of reduction in rank relates to the same conviction that resulted in the order of detention.

(2) **Age of convicted person.** If at the time of the conviction, the convicted person has not attained the age of 18 years, the Australian Military Court shall not impose the punishment of detention on the member of the Defence Force.

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19 See DFDA s 3 definition includes: a sailor ranked chief petty officer or lower, but not lower than leading seaman; a soldier ranked staff sergeant or lower, but not lower than lance-corporal; an airman ranked flight sergeant or lower, but not lower than corporal.
Combination with dismissal. The punishment of detention is not to be awarded on a member of the Defence Force that the Australian Military Court has also imposed the punishment of dismissal (in respect of the same, or any other conviction).

COMMENCEMENT OF PUNISHMENTS

7.74 A punishment awarded, or order made by the Australian Military Court takes effect forthwith and a punishment for a specific period begins to run from the beginning of the day on which it is imposed.\(^\text{20}\) Punishment for a specific period, constrained by those punishments available to the Australian Military Court, means imprisonment or detention for a specific period.

7.75 Contrary to previous arrangements, due to amendments made to DFDA s 172, none of the punishments or orders available to the Australian Military Court requires approval by another authority. As a consequence, for example, where the Australian Military Court imposes a punishment of dismissal, there is no delay in that punishment becoming effective. Therefore, from the time of the order, person ceases to be a member of the Defence Force.

7.76 This general rule is subject to other provisions of the DFDA; for example, where two or more punishments are to be cumulative they take effect one after the other in the order in which they are recorded\(^\text{21}\).

Effect of an order to ‘stay the execution of punishment’

7.77 If the Australian Military Court has imposed a punishment on a convicted person, and the person or the DMP notifies the court that he or she has appealed, or applied for leave to appeal, under the Defence Force Discipline Appeals Act 1955 against the conviction or punishment, then the Australian Military Court may order that the execution of the punishment is to be stayed in whole or in part pending the determination of the appeal\(^\text{22}\).

SPECIFIC NOTES ON PUNISHMENTS

IMPRISONMENT

General

7.78 To sentence a person to imprisonment is to order him or her to be deprived of his or her liberty by confinement. Imprisonment is generally to be regarded as a punishment of last resort where no other sanction would achieve the objectives contemplated by law.\(^\text{23}\).

7.79 In the case of a member of the ADF the punishment of imprisonment may serve two purposes: first, it may deter the commission of similar serious service offences by members of the ADF and, secondly, it may punish an offender in a manner which, in the opinion the Australian Military Court, is appropriate to the crime which has been committed. A third objective of imprisonment in the context of criminal offenders in the civilian community is the rehabilitation of offenders; however, this objective is not relevant, in a direct sense, to members of the ADF who are sentenced to imprisonment because such punishment must also be accompanied by the punishment of dismissal from the ADF.\(^\text{24}\) Where it is likely that a member of the ADF could be rehabilitated so as to render good service in the

\(^{20}\) DFDA ss 171(1)
\(^{21}\) DFDA ss 171(2)
\(^{22}\) DFDA ss 176(2)
\(^{23}\) Parliamentary Paper No. 123/80 —Law Reform Commission ‘Sentencing of Federal Offenders’ Part No. 15 AGPS.
\(^{24}\) DFDA ss 71(1)
future, it may be appropriate to impose the punishment of detention in lieu of imprisonment (see under 'Detention' below).

7.80 In all cases where a Australian Military Court imposes a sentence of imprisonment, the Australian Military Court must take into account the provisions of Part 1B of the Crimes Act 1914, which apply by virtue of DFDA s 72.

Life imprisonment

7.81 The punishment of life imprisonment is specified as the maximum punishment in relation to a number of the most serious service offences, including; aiding the while captured, committing an offence (eg. Communicating with the enemy) with intent to assist the enemy, mutiny in connection with operations against the enemy, or murder.

Imprisonment for a specific period

7.82 The Australian Military Court may impose imprisonment for a fixed period, not exceeding the maximum period provided by the legislation creating the offence.

Miscellaneous aspects of punishment of imprisonment

7.83 Where the Australian Military Court imposes a punishment of imprisonment for a specific period for a service offence and also a punishment of life imprisonment for another service offence, the punishments are to be concurrent.

7.84 Where the Australian Military Court imposes two or more punishments of imprisonment for a period they are to be served concurrently unless the court orders that the punishments be served cumulatively. However, where the Australian Military Court orders that the punishment be served cumulatively, the total period of imprisonment may not exceed the maximum period allowed for any offence of which the defendant has been convicted.

7.85 For example, if a Australian Military Court imposes imprisonment for two months in respect of one service offence and imprisonment for three months in respect of another service offence committed by the same person, the person will serve three months in prison unless the Australian Military Court orders that the punishments be served cumulatively, in which case he will serve five months in prison.

7.86 Where the Australian Military Court imposes a punishment of imprisonment on a convicted person who is already subject to a punishment of detention (whether or not such punishment has been suspended) the punishment of detention (or part of that punishment which has not been served) is remitted.

7.87 In accordance with Regulation 67, Defence Force Regulation (1952), a convicted person punished to imprisonment forfeits all salary and allowances that accrue to the member during the period that begins at the end of the day on which the member is convicted, and ends when the member ceases to serve the sentence or ceases to be a member, whichever occurs first.

25 DFDA s 15C
26 DFDA s 16B
27 DFDA ss 20(2)
28 DFDA s 61 and s 12 of Crimes Act 1900 (ACT) in its application to the Jervis Bay Territory.
29 DFDA ss 74(3)
30 DFDA ss 74(4)
31 DFDA ss 74(5)
32 DFDA s 82
7.88 Where a convicted person becomes unlawfully at large during the period of his or her imprisonment, the time during which the convicted person is unlawfully at large is deemed not to be time spent in serving that imprisonment.33

7.89 As discussed above at paragraph 7.20 (a), where the Australian Military Court imposes the punishment of imprisonment in respect of an conviction, the Australian Military Court must also impose the punishment of detention in relation to that conviction.

DISMISSAL FROM THE ADF

7.90 The punishment of dismissal is appropriate in a case where a member is convicted of a service offence which by its nature renders him or her unfit to continue serving in the ADF. Dismissal should normally be reserved for serious offences which are in themselves dishonourable (for example theft, fraud, indecent assault, selling drugs, violent assault and desertion) and is not normally appropriate for most purely service offences such as absence without leave.

7.91 Before imposing this punishment, the Australian Military Court should give careful consideration to whether the offender, if given a lesser punishment, is likely to become an effective member of the ADF. Where there are reasonable grounds for expecting the offender to be rehabilitated, the Australian Military Court should impose the punishment of detention (see below).

7.92 The Australian Military Court should also have regard to the fact that dismissal is a dishonourable form of discharge which may render a person ineligible for certain types of employment outside the ADF as well as being likely to cause immediate financial loss to the offender. Administrative consequences of being awarded the punishment of dismissal may include that a member is not entitled to a final removal to a discharge location and is not entitled to resettlement training.

DETENTION

General

7.93 The punishment of detention involves the confinement of an offender in military custody in one of the places authorised for the purpose.34 This punishment is intended to serve three purposes: to deter members of the ADF from committing further offences, to punish offenders and to rehabilitate offenders so that on completion of their time in detention they will be able to render further effective Service to the ADF. Detention should be imposed in preference to imprisonment unless an offender has already undergone one or more sentences of detention without effect.

7.94 The Australian Military Court is only able to impose the punishment of detention on a convicted member of the Defence Force who is not an officer. (See Table 1 above).

7.95 Detention shall not be imposed in conjunction with dismissal from the ADF35. Where the Australian Military Court imposes a punishment of imprisonment on a person who is already subject to a punishment of detention (whether or not the detention has been suspended) the punishment of detention is remitted.36

7.96 Detention cannot be imposed on a member who at the time of conviction has not attained 18 years of age.37

33 DFDA s 177
34 See DFD Regulation 5, and generally Division 2. Each Service chief has signed and issued extant instruments declaring various establishments as housing either Area, Unit or Corrective detention centres. These instruments are available in DLM Volume 1 (2nd Edition). See also Di(G) PERS 45-3 – ADF Detention Centres.
35 DFDA ss 71(3)
36 DFDA s 82
37 DFDA ss 71(2)
7.97 The Australian Military Court shall not impose upon a non commissioned officer whom it has convicted of a service offence a punishment of detention unless the Australian Military Court also imposes the punishment of reduction in rank to a rank below non-commissioned rank.  

Periods of detention

7.98 Where the Australian Military Court imposes two periods of detention in respect of separate service offences against a convicted person, they are to be served concurrently unless the Australian Military Court orders that the two periods are to be cumulative.

7.99 Where the Australian Military Court orders that the periods of detention are to be cumulative, the total period imposed may not exceed two years. The Australian Military Court’s powers of punishment are limited to the maximum punishment shown in DFDA Schedule 2 (Table 1 above).

7.100 Notwithstanding the maximum periods of detention allowed by law, as the nature of detention is extremely rigorous, it should not generally be imposed for a period longer than three months.

Suspension of detention

7.101 Where the Australian Military Court imposes a punishment of detention it may order the whole period to be suspended. While the suspension remains in force the punishment does not begin and may not be put into execution. In the event that the Australian Military Court imposes two or more punishments of detention in respect of two or more service offences, it may not make an order suspending one of the punishments and not the other.

7.102 A suspended punishment of detention may be a most effective way of dealing with a young offender who previously had a good record but who merits a severe punishment. Suspended sentences have a strong element of specific deterrence and may aid in rehabilitation.

Revocation/Remission of suspended detention

7.103 Where it would have had jurisdiction to have imposed detention, the Australian Military Court may revoke a suspension. In that event, the punishment will take effect as if imposed at the time of revocation.

7.104 Where a suspended punishment of detention has been imposed on a member of the ADF and the suspension has not been revoked, the punishment is remitted (that is, ceases to have effect) either when 12 months have elapsed from the date of suspension or when the person ceases to be a member of the ADF (whichever first occurs).

Forfeiture of salary and allowances in detention

7.105 While a member is undergoing the punishment of detention, he or she is only paid the rate of salary payable to a normal entry recruit undergoing basic recruit training (specified in Determination No. 6 of 1992 Salaries made under s 58H Defence Act 1903). The convicted member is paid no allowances, other than that provided for under Determination 2000/1 made under the s 58B Defence Act 1903. See Reg 68 of Defence Force Regulations (reprinted in DLM Volume 1 (Second Edition)).

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38 DFDA ss 71(1A)
39 DFDA ss 74(1) and (2)
40 DFDA s 78
41 DFDA ss 78(2)
42 DFDA s 80
43 DFDA s 81

PROVISIONAL AS AT SEP 07 - PENDING FINAL PUBLICATION
Administrative and financial consequences of detention

7.106 Also relevant for consideration in relation to the imposition of the punishment of detention will be the incidental or flow-on effects of the detention period on a member, for example in relation to their continued contribution to Superannuation, the impact of a period of detention on calculations of ‘effective service’ for the purposes of retention bonuses and medals etc.

REDUCTION IN RANK

General

7.107 The punishment of reduction in rank involves loss of status, loss of privileges (which are attached to the offender’s former rank) and financial loss and should only be imposed where the Australian Military Court is satisfied that the offender is unfit, by reason of the offence of which he or she has been convicted, to remain in his present rank.

7.108 DFDA s 68(2) enables the Chief of the Defence Force (or a Service chief) to make, by legislative instrument, rules with respect to the consequences, in relation to member of the Defence Force, of certain punishments; including the punishment of reduction in rank. The Defence Force Discipline (Consequences of Punishment) Rules, Rule 4 relates to reduction in rank and provides the following consequences:

a. the rank to which the member is reduced shall be that rank specified by the AMC the AMC, and

b. the AMC must specify the date or year from which the member’s seniority in that rank is to be calculated, not being a date or year later than the day or year respectively, on or in which the punishment is imposed.

7.109 In considering whether to impose reduction in rank, the Australian Military Court must have regard to the financial loss which is likely to follow as a consequence of the punishment and this should be specifically referred to in the Australian Military Court’s reasons for sentence. In some cases certain elements of this future financial loss may be accurately quantified. For example, where the relevant promotion rules specify that a minimum period of time must elapse after reduction in rank before a person can be re-promoted to his or her original rank, it is possible to calculate with reasonable accuracy the minimum direct financial loss which will be sustained by the offender.

7.110 Other elements of the total financial cost are not so easily quantified; for example, the loss of income caused to an offender because of his or her non-promotion to the next higher rank, when he or she might reasonably have expected to have been promoted, or the loss of pension entitlements. Where the loss is able to be assessed with reasonable certainty it should be; however, a Australian Military Court is not expected to put a figure on potential losses due to non-promotion etc although it may have regard to such matters in general terms. Where the financial loss to an offender is likely to be high the Australian Military Court should consider whether a substantial fine together with any other lesser punishments should be imposed in preference to reduction in rank.

Reduction in rank of officers

7.111 Officers may be reduced in rank only by the Australian Military Court. Normally, the Australian Military Court should not reduce an officer by more than one rank. However, where the Australian Military Court considers, in the circumstances of a particular case, that reduction by one rank is not sufficient (whether imposed as a single punishment or in conjunction with other punishments) it should consider imposing the punishment of dismissal.

7.112 Where an officer holds acting or temporary rank, he or she is deemed for the purposes of the DFDA to hold that rank.\(^{44}\) Thus where an officer holding acting rank one level above their substantive rank is reduced by one rank, he or she is reduced only to his or her substantive rank. In this situation it may, therefore, be appropriate to reduce the officer by two ranks so that in effect he or she will be one rank lower than his or her substantive rank. Additionally, where an officer holds a rank

\(^{44}\) DFDA ss 3(5), (6)
temporarily that is at least two ranks higher than his or her substantive rank, he or she may be reduced to an intermediate rank as a rank to be held temporarily.

**Reduction in rank of members other than officers**

7.113 Although there is no limit specified in the DFDA as to the rank to which such a member may be reduced, the policy of reducing by not more than one rank (as discussed in relation to officers) should generally be followed. Similarly, the guidelines for reduction in rank of members other than officers, who hold acting or temporary rank, are as discussed in paragraph 7.63.

**FORFEITURE OF SERVICE FOR THE PURPOSES OF PROMOTION**

7.114 Forfeiture of service for the purposes of promotion is intended to affect an officer's subsequent promotion where eligibility for promotion is based on service in rank. This punishment does not affect the pay of any officer on whom it is imposed. The punishment affects the rank held at the time of conviction. Where the whole of the officer's Service in that rank is affected, and service in the next lower rank also counts towards promotion, service in the lower rank may also be forfeited.

7.115 The Australian Military Court should state the period of service that is forfeited or specify a date that is to be deemed to be the commencing date of the officer's service in the rank; it is preferable to specify the latter to avoid errors in calculation.

7.116 Before imposing forfeiture of service for purposes of promotion, the Australian Military Court should be satisfied that the nature of the offence on which an officer has been convicted should preclude him or her from being considered for promotion for the time specified. The Australian Military Court should also have regard to the likely financial loss which will be sustained by the offender as a consequence of the punishment.

7.117 In cases where the officer's promotion was almost certain to have occurred on a known date, this financial loss may be assessed accurately. In other cases, where promotion is more uncertain, 'best and worst cases' in relation to promotion to the relevant rank may be considered in order to ascertain, in general terms, the likely extent of the financial loss. Where the financial loss suffered as a consequence of forfeiture of Service is likely to be high, the Australian Military Court should consider whether justice might not be done equally well by the imposition of a substantial fine. Another factor which the Australian Military Court should consider, in relation to forfeiture of service, is whether the trial and conviction of an officer of a service offence will not, of itself, have a significant adverse effect on his or her future promotion.

**FORFEITURE OF SENIORITY**

7.118 The punishment of forfeiture of seniority is intended to affect certain members' subsequent promotion where promotion is based on seniority. This punishment does not affect the pay of any member on whom it is imposed. The punishment only affects seniority in the rank held by the member at time of conviction. In imposing forfeiture of seniority, the Australian Military Court must specify the new seniority date, which is to be not later than the date on which the punishment was imposed.\(^{45}\) The matters which the Australian Military Court should consider before imposing this punishment are the same as those which apply to forfeiture of service for purposes of promotion (see paragraph 7.68).

7.119 Rule 5, Defence Force Discipline (Consequences of Punishment) Rules, relates to forfeiture of seniority and provides the following consequences:

- a. The punishment shall not affect the seniority of the member otherwise than in relation to the member's seniority in rank held by the member on conviction;

- b. The seniority forfeited by the member will be that seniority as accrued before the date or year (as required) specified by the AMC as being the day or year from which the member's seniority in that rank is to be calculated.

\(^{45}\) See DFD (Consequences of Punishment) Rules in DLM Volume 1 (Second Edition).
FINES

General

7.120 The Australian Military Court may impose a fine in accordance with the authorised punishments set out in Table 1 earlier in this chapter. The amount of the fine is to be determined by the Australian Military Court after consideration of all relevant aspects of the case, especially the offender’s capacity to pay (refer paragraph 7.9 above)\(^\text{46}\) and the need for the fine to have a punitive effect.

7.121 When imposing a fine, the Australian Military Court is required to specify the amount of money that is the amount of the fine\(^\text{47}\). The court may also specify whether the fine is to be payable in one sum or by instalments\(^\text{48}\).

7.122 Where the Australian Military Court imposes two or more fines in respect of two or more offences, the sum of the fines must not exceed the amount of the most severe fine that the Australian Military Court could impose on the offender for any one of the service offences of which he or she has been convicted\(^\text{49}\). Where two or more fines are awarded, it is not possible to order that the fines be paid concurrently.

Advantages and limitations

7.123 A fine has both a deterrent and punitive effect. It also has the particular advantages of being a punishment whose effect is immediately apparent to an offender and which can be varied in amount from a token sum in minor cases to a substantial sum (that is 28 days’ pay) in serious cases. A fine should not normally be imposed in conjunction with the punishments of imprisonment, dismissal, detention (unless the detention is suspended) or reduction in rank because of the severe financial effects which are involved in each of these punishments. Suspended sentences have a strong element of specific deterrence and may aid in rehabilitation.

Amount of a fine

7.124 DFDA Schedule 2 speaks of a fine amount in terms of a convicted person’s pay for a particular number of days. DFDA ss 3(9) provides that a reference to a convicted person’s pay for a specified number of days shall be read as a reference to an amount that is the product of:

a. The amount of pay applicable in relation to a class of persons in which the person is included (ascertained in accordance with the regulations) and;

b. The number of days specified.

7.125 Further to DFDA ss 3(10), DFD Reg 31, provides for the calculation of the daily rate of pay of convicted persons. The effect of the regulation is that reference should be had to the daily rate of pay that is payable to the convicted person in accordance with a determination made under Defence Act 1903 s 58B or s 58H as in force on the day the person was convicted.

7.126 For the purpose of calculating the daily rate of pay of a defence member who is not rendering continuous full time service, sub-regulation 31(b) provides that the daily rate of pay is that which would, if the person were rendering service other than continuous full-time service, be applicable pursuant to a determination made under Defence Act 1903 s 58B or s 58H as in force on the day the person was convicted.

7.127 Defence Act 1903 s 58H, distinguishes between a ‘salary’ and a ‘relevant allowance’ (which include service allowance per s 58F). Therefore, in calculating a payable salary, allowances are not

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\(^{46}\) DFDA ss 70(3)

\(^{47}\) DFDA ss 73(1)

\(^{48}\) DFDA s 85

\(^{49}\) DFDA ss 73(2)
included. It is the gross amount of salary that is used in calculating the daily rate of pay. Reference to Defence Force Remuneration Tribunal determinations can be had at http://www.dfrt.gov.au/.

7.128 No deductions such as taxation instalments, Superannuation or Rations and Quarters payments are taken into account when calculating the daily rate of pay. One consequence is that the daily rate of pay of a member is unchanged regardless of whether that member is serving on an overseas deployment that attracts allowances and tax-free pay.

7.129 To assist the AMC in considering relevant matters affecting a person’s capacity to pay a fine or reparation order, the Form PD108 Pre-Sentence Report is used. It is important to note that the amounts used on that form both reflect a person’s gross salary, plus allowances, any tax free pay etc – with a view to assessing a person’s overall capacity to pay, as well as enabling the specific calculation of the person’s daily ‘finable’ rate of pay (excluding allowances etc).

7.130 In contrast to the calculations required in relation to convicted defence members, DFDA Schedule 2 specified a $500 maximum fine amount for convicted persons who are not members of the Defence Force. .

Suspension of fines

7.131 The Australian Military Court may order that a fine be suspended, in whole or in part. The Australian Military Court may also order that fines of an amount not less than $100, which has been imposed on a person who is not a member of the ADF, be suspended.

7.132 When a suspension order is in force, the fine, or such part of it as is specified by the Australian Military Court, does not take effect.

7.133 Where a person convicted by the Australian Military Court is already subject to a suspended fine, and the court would have had jurisdiction to have imposed the original fine on the service offence, the Australian Military Court may revoke a suspension. Where a suspension order is revoked, the fine shall take effect at the time of the revocation.

Remission of suspended fine

7.134 Where a suspended fine has not been revoked, the punishment (or so much of the punishment that was suspended) is remitted (ie ceases to have effect) either when 12 months have elapsed from the date of suspension or when the person ceases to be a member of the ADF (whichever first occurs).

Recovery of fines etc

7.135 A fine imposed under the DFDA is payable to the Commonwealth. Where a fine has been imposed on a person under the DFDA or the Defence Force Discipline Appeals Act 1955, the amount that is due and payable may be recovered by deduction from any pay, wages or salary payable to the person by the Commonwealth. Administration of such recovery action is undertaken by ADF Pay in conjunction with a member’s Unit.

7.136 Where a fine or reparation is directed to be paid by instalments, and default is made in payment of any instalment, all instalments which remain unpaid become due and payable.

50 DFDA s 79
51 DFDA ss 79(2)
52 DFDA ss 79(3)
53 DFDA s 80
54 DFDA s 81
55 DFDA ss 85(2)
56 DFDA ss 174(1)
7.137 The amount of a fine may also be recovered by action in a civil court as a debt due to the Commonwealth. For this purpose, an authorised officer may issue a certificate stating the amount of the fine which is due and payable by a specified person, and that certificate is admissible as evidence in a civil court without further proof.57

**SEVERE REPRIMAND/REPRIMAND**

7.138 Severe reprimands and reprimands have historically been imposed as punishments on members of the ADF who were deserving of reproach but did not merit higher punishment. The distinction between the two punishments, as demonstrated by the scale of punishments provided in DFDA s 68 in decreasing order of severity, is that a severe reprimand is a more severe punishment after a fine, and a reprimand is the least severe punishment available to the Australian Military Court.

7.139 In the past, severe reprimands were imposable, generally, only on officers. Under the DFDA, however, a severe reprimand may be imposed on any member of the ADF. These punishments are not available in respect of persons who are not members of the Defence Force. The effect of these punishments varies according to the Service and rank of the offender. Although, in general it may be said that they are likely to have an adverse effect on a member’s future career and may also be taken into account by a service tribunal (The Australian Military Court of a Summary authority) in determining the punishment to be imposed on the person if convicted of a service offence on a later occasion.

**CONVICTION WITHOUT PUNISHMENT**

General

7.140 Instead of imposing a punishment on a convicted person, the Australian Military Court may make an order that the conviction be recorded as a conviction without punishment.58

7.141 Such an order may be made either unconditionally or on the condition that the convicted person gives an undertaking to be of good behaviour for a period of 12 months.59 In the latter case, the convicted person must actually agree to and formally give the undertaking.

Matters to be considered

7.142 In deciding whether to impose a conviction without punishment, the Australian Military Court should have regard to such matters as the character, previous record, age or health of the convicted person or to the trivial nature of the offence, the extenuating circumstances under which the offence was committed or to any other relevant matter.

7.143 A conviction without punishment may be appropriate in a case where a young soldier, sailor or airman has been convicted of a first offence of a minor nature. In such a case, provided that the Australian Military Court is of the belief that the offender is likely to have learned a salutary lesson as a consequence of being charged and convicted, it should normally order that a conviction be recorded without punishment. Whether such an order should be made on condition that the offender undertakes to be of good behaviour for 12 months is a question on which the Australian Military Court must exercise its discretion according to the circumstances of the case. As a general rule, an undertaking should not be required except in relatively serious cases or where there is some likelihood that the offender will not be of good behaviour in the future.

**Breach of undertaking to be of good behaviour**

7.144 DFDA s 76 provides that a person breaches an undertaking to be of good behaviour where he or she is convicted by a service tribunal of a service offence that was committed within 12 months of giving the undertaking. In this situation, the Australian Military Court may impose a punishment on the convicted person (or make an appropriate order under Part IV of the DFDA) in respect of the offence to which the undertaking related.

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57 DFDA ss174(2) and s 175
58 DFDA ss 75(1)
59 DFDA ss 75(2)
7.145 Before taking any action in relation to a breach of an undertaking to be of good behaviour, the Australian Military Court must be satisfied that, by reason of the commission of the later offence, the person has failed to be of good behaviour. If it is not satisfied that the later offence is sufficiently serious to constitute bad behaviour, the Australian Military Court should take no action in respect of the offence to which the undertaking related.

7.146 Where the Court is satisfied that the breach of the undertaking merits punishment the Australian Military Court should hear evidence relevant to the determination of what action should be taken in relation to the offence to which the undertaking related. In effect this means that the Australian Military Court should read the record of evidence taken at the trial of the offence, in order to ascertain the nature and circumstances of the offence, and may also hear evidence from witnesses who gave evidence at the trial. The offender may give evidence or call witnesses to give evidence on matters which are relevant to determination of punishment.

**RESTITUTION AND REPARATION ORDERS**

**Restitution**

7.147 Where a person is convicted of an offence involving the unlawful obtaining of property, the Australian Military Court may make appropriate orders, under DFDA s 83, for the restoration of the property to its rightful owner. Such orders, known as restitution orders, are restricted to property that is in the custody or control of the prosecution. Restitution orders may be made instead of, or in addition to imposing a punishment or ordering that a conviction be recorded without punishment etc.

**Circumstances in which restitution orders may be made**

7.148 Restitution orders may be made under the following circumstances:

a. If the whole or part of the unlawfully obtained property is in the custody or control of the prosecution, the Australian Military Court may order that it be repaid or restored to its rightful owner.60

b. If any property (other than money) is obtained by the conversion or exchange of any of the unlawfully obtained property, and is in the custody or control of the prosecution, the Australian Military Court may order that the property be delivered to the rightful owner of the unlawfully obtained property.61

For example, ‘X’ steals $100 from ‘Y’ and uses the money to purchase a wet suit; in due course the wet suit comes into the possession of the prosecution (probably because it forms part of the evidence in the case). Having convicted ‘X’ of stealing, the Australian Military Court may then make a restitution order directing that the wet suit be delivered to ‘Y’. This remedy is likely to be appropriate only in a small number of cases where the convicted person is unable to make monetary compensation by way of ‘reparation’. See below.

c. Where the convicted person exchanged the unlawfully obtained property for other property from an identified and innocent third person, the Australian Military Court may order that the unlawfully obtained property be restored to the original owner, and the property held by the Australian Military Court be returned to the third party.62

For example, ‘X’ steals a spear-gun from ‘Y’ and gives it to ‘Z’ in exchange for a wet suit; ‘Z’ is unaware that the spear-gun has been stolen. In due course, the wet suit comes into the control and custody of the prosecution. In this situation the Australian Military Court may, after convicting ‘X’ of stealing, order that when ‘Z’ has restored the spear-gun to ‘Y’ the wet suit is to be delivered to ‘Z’.

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60 DFDA ss 83(1)(a)
61 DFDA ss 83(1)(b)
62 DFDA ss 83(2)
Reparations

7.149 The Australian Military Court is empowered under DFDA s 84 to order a convicted person to make financial reparation of a just amount to a person who sustained loss or damage as a consequence of the offence. Such an order may be made instead of or in addition to imposing a punishment or for example, ordering that a conviction be recorded without punishment.

7.150 A reparation order may be made to compensate a person for loss of, or damage to property and to cover certain costs associated with personal injuries arising from the commission of the service offence by the convicted person, such as doctors' expenses and loss of wages. In effect, reparations are analogous to ‘special damages’ in a civil court in that they are intended to compensate a person for the actual and temporary loss which has in fact occurred. A reparation order cannot be made by way of ‘general’ compensation for, for example pain and suffering.

7.151 DFDA ss 84(4) specifically provides that, when assessing a convicted person’s liability for reparation, the Australian Military Court may have regard to a service offence that has been taken into account by the Australian Military Court when considering sentencing options in accordance with DFDA s 77.

7.152 Where a Serviceman is injured as a consequence of a service offence, the convicted person may be required to pay to the Commonwealth an amount by way of reparation to cover the cost of medical treatment given to the victim at Commonwealth expense. However, no reparation should be ordered for ‘loss of Service’ in respect of any period during which a Serviceman was unable to carry out his duties as a consequence of injuries caused by the convicted person.

7.153 Any order to pay reparations which is made by the Australian Military Court does not affect any other right or remedy that a person may have under the ordinary law in respect of any loss or damage occasioned by the service offence.

Damage / loss during a member’s duties

7.154 Where the offence nominally arises in the course of a member’s duties, reparation orders in favour of the Commonwealth, a Commonwealth insurer, or other entities that have sustained a loss raise particular issues.

7.155 For example, where any loss is covered by insurance, this may affect in whose favour a reparation order might be made, and not whether a reparation order should be made. A typical example would be a reparation order for the cost of repairing an ADF plated motor vehicle damaged where the charge arose out of events associated the member’s assigned duty. Paragraph 1.15 of Chief Executive Instruction 6.3 Loss of Public Property provides that:

“An official is liable for the full amount of the loss where it is established that they contributed to the loss or damage by misconduct or by a deliberate or serious disregard of reasonable standards of care”.

7.156 As a guide to applying this paragraph, the test set out in appendix E of the Legal Services Directions issued by the Attorney-General is of assistance. Based on that test, a reparation order should not be awarded where the member’s misconduct does not amount to conduct that involved ‘serious or wilful misconduct or culpable negligence’.

7.157 Consideration might also be had in these circumstances to the policy set out in paragraph 10.26 of the Defence Road Transport Instructions (DRTI), which states:

“ADF members … may be indemnified by the Commonwealth for property damage or personal injuries in the event of civilian litigation provided that the accident occurred while in course of duty, on an authorised journey and purpose, not under the influence of alcohol or drugs, the accident was not caused recklessly, deliberately or by criminal negligence or other misconduct”.

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63 A ‘person’ includes a body politic (eg the Commonwealth) or a corporation (Acts Interpretation Act s.22).

64 DFDA ss 84(5)
The DRTIs relate to accidents which occur ‘while in the course of duty or on an authorised journey and purpose’. Where loss is sustained in other than those circumstances, for example, outside the strict application of the DRTIs, the above quoted policy need only be used as a guide. In the above quoted paragraph, ‘criminal negligence’ is a higher standard than the mere negligence required for DFDA ss 43(3) or the expression ‘without due care and attention’ in DFDA s 40D.

Maximum Amounts Payable by Way of Reparation

The DFDA does not impose a specific limit on the Australian Military Court’s power to make reparation orders.

Execution and enforcement of restitution and reparation orders

A restitution order or a reparation order imposed by the Australian Military Court takes effect forthwith. The Australian Military Court may order the payment to be made either in one sum or by instalments. Where a person is directed to pay reparations by instalments and default is made in payment, all instalments then remaining unpaid thereupon become due and payable.

An amount that is due and payable under any reparation order may be recovered by deduction from pay, wages or salary payable to the person by the Commonwealth and may be paid to the person in whose favour the order was made. The amount may also be recovered by action in a civil court as a debt due to the person in whose favour the order was made.

Suspension of restitution or reparation orders

Restitution and/or restitution orders are automatically suspended until the expiration of the period during which an appeal or an application for leave to appeal may be made to the Defence Force Discipline Appeals Tribunal in accordance with the Defence Force Discipline Appeals Act 1955. If an application for leave to appeal or an appeal is duly lodged, the orders remain suspended until the application is finally dismissed or the appeal is finally determined or abandoned.

However, where title to the property in relation to which a restitution order has been made is, in the opinion of a reviewing authority, not in dispute, the reviewing authority may direct that the restitution order take effect immediately.

In the event that an appeal against the conviction in relation to which the order was made is successful, a restitution order or reparation order that has been suspended pending the appeal does not take effect.

Annex:

A. AUSTRALIAN MILITARY COURT PRE-DFDA-PART IV-HEARING HEARINGS AND DIRECTIONS ORDER OF PROCEDURE

B. AUSTRALIAN MILITARY COURT PART IV HEARING - ORDER OF PROCEDURE

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65 DFDA ss 84(3)
66 DFDA ss 174(3)
67 DFDA ss 174(2)(a)
68 DFDA ss 174(2)(b)
69 DFDA ss 173(1)(a)
70 DFDA ss 173(1)(b)
71 DFDA ss 173(2)
72 DFDA ss 173(3)
AUSTRALIAN MILITARY COURT PRE-DFDA-PART IV-HEARING
HEARINGS AND DIRECTIONS ORDER OF PROCEDURE

[UNDER DEVELOPMENT]
AUSTRALIAN MILITARY COURT PART IV HEARING - ORDER OF PROCEDURE

[UNDER DEVELOPMENT]
CHAPTER 8

LAW OF CRIMINAL RESPONSIBILITY

STATUS

8.1 This content of this Chapter is being reconsidered (and this may result in it being redrafted). For present purposes, the previous Volume 1, Chapter 5 (with minor amendments) has been used.

SYNOPSIS

8.2 This chapter introduces the basic concepts of criminal responsibility, explains the difference between physical and fault elements of offences, as well as discussed defences available to criminal liability.
CRIMINAL RESPONSIBILITY

SECTION 1 – INTRODUCTION

Nature of Defence Force Discipline Act 1982 (DFDA) Proceedings

8.3 Proceedings under the Defence Force Discipline Act 1982 (DFDA) are taken with a view to maintaining discipline in the Australian Defence Force (ADF). The nature of these proceedings is essentially criminal. DFDA proceedings are the means by which a determination is made as to the culpability of a defence member or defence civilian and if guilty, the mechanism by which penalties are imposed on the convicted person. In this context, and in its narrowest sense, criminal responsibility means liability to punishment. To say that a person is criminally responsible means that he or she is liable to punishment for having committed an offence.

General Principles

8.4 The general principles of criminal responsibility are now set out in Chapter 2 of the Criminal Code Act 1995 (Criminal Code). Chapter 2 of the Criminal Code codifies the principles of criminal responsibility applicable to Commonwealth offences. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created. The codification of these principles of criminal responsibility is intended to introduce more certainty into the interpretation of offence-creating provisions by encapsulating key legal principles in the Criminal Code and requiring legislation, such as the DFDA, that creates offences to be more precisely drafted and to reflect these principles.

8.5 The DFDA is a law of the Commonwealth and the Criminal Code applies to it. DFDA s.10 adopts the Criminal Code criminal responsibility provisions and applies them to all Service offences except for old system offences.

8.6 DFDA offences are broken up into parts known as physical elements and fault elements. Generally speaking, physical elements refer to the external elements of the crime and fault elements refer to the state of mind or fault of the defendant which must be proven for guilt to be established. A fault element will attach to each physical element of an offence unless the law creating the offence provides otherwise.

8.7 Physical elements are:

a. conduct;

b. a circumstance in which conduct occurs; or

c. a result of conduct.

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1 It was held in Re Tracey; Ex Parte Ryan (1989) 166 CLR 518 that s.110 of the DFDA does not allow a judicial power of the Commonwealth, although Mason CJ, Wilson and Dawson JJ said of the Service tribunal (which includes a summary authority) at 537:

“It is sufficient to say that no relevant distinction can, in our view, be drawn between the power exercised by a service tribunal and the judicial power exercised by a court.”

See also Hogan v Chief of Army [1999] ADFDAT 1.

2 Section 3.1(1). Fault elements and physical elements can be equated with the common law terms on mens rea and actus rea.

3 However, the law that creates the offence may provide that there is no fault element for one or more physical elements.

4 Sections 5.5 and 5.6 of the Criminal Code.
8.8 In the Criminal Code “conduct” means an act, an omission to perform an act, or a state of affairs. “Engage in conduct” means do an act, or omit to perform an act.

Conduct

8.9 The term “act” is not defined. Of the other elements of conduct “omissions” can only provide a foundation for criminal responsibility if the defendant has failed to comply with a legal obligation to act. Liability for a “state of affairs” is an expression that comes from the judgement of Brennan J in He Kaw Teh.\(^5\) The state of being in possession of something such as stolen property would be the most frequently encountered example of “state of affairs”.

Circumstance

8.10 Although circumstances are not defined in the Criminal Code, the Macquarie Dictionary defines it to be a “condition, with respect to time, place, manner, agent etc which accompanies, determines, or modifies a fact or event”. In most situations the conduct element of an offence will be accompanied by a circumstantial element. It is important to distinguish between conduct and circumstance because different fault elements will apply to each. So, for example, the offence of “obstructing a police member” under s.31 of the DFDA is constituted by the act of obstructing a person in circumstances where that person is a police member acting in the performance of his or her duty or the circumstance where the person is lawfully exercising authority under or on behalf of a Service police officer. The obstruction must be intentional but liability is strict with respect to either of the circumstances.

8.11 Elements of circumstance can also accompany the results of conduct, rather than the acts, omissions or states of affairs that accompany that conduct. In a charge of “assault” pursuant to s.33(a) of the DFDA there is the intentional act of the defendant (for example, moving his or her fist towards the victim’s head) and the result of that conduct is that the fist connects with the victim’s head in the circumstance that the victim does not consent to the result occurring. Recklessness, as discussed below, would apply to the circumstance of the offence and the result of the conduct.

Result of Conduct

8.12 Chapter 2 of the Criminal Code is silent on the topic of causation although a standard definition is utilised throughout the Code. That is that “a person’s conduct is taken to cause harm if it substantially contributes to harm”.\(^6\) It is also evident from the definitions of intention, knowledge, recklessness and negligence that the result of conduct may include anticipated results as well as actual results and anticipated circumstances as well as actual circumstances. Liability can be imposed for recklessness with respect to a risk that a result or circumstance will eventuate.

FAULT ELEMENTS

8.13 Fault elements are:

a. intention (on the part of the defendant);

b. knowledge (on the part of the defendant);

c. recklessness (on the part of the defendant); or

d. negligence (on the part of the defendant).

8.14 In order to find a person guilty of an offence, it is necessary to prove:

a. the existence of the relevant physical elements of the offence; and

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\(^6\) Section 146.2 of the Criminal Code. See also Royall v The Queen (1991) 172 CLR 378 at 398, 411 and 423.
b. one fault element for each physical element, unless the law creating the offence specifically provides otherwise.

8.15 In other words, a person who brings about the external physical elements of an offence contemporaneously with the appropriate fault element (without justification or excuse) commits the offence and is liable to punishment. The following Table briefly summarises the relevant fault elements and their application to the different physical elements.

<table>
<thead>
<tr>
<th>Fault Element</th>
<th>Physical Element</th>
<th>How Made Out</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intention</td>
<td>Conduct</td>
<td>He or she means to engage in that conduct.</td>
</tr>
<tr>
<td></td>
<td>Circumstance</td>
<td>He or she believes it exists or will exist.</td>
</tr>
<tr>
<td></td>
<td>Result</td>
<td>He or she means to bring it about or is aware it will occur in the ordinary course of events.</td>
</tr>
<tr>
<td>Knowledge</td>
<td>Circumstance</td>
<td>He or she is aware that it exists or will exist in the ordinary course of events.</td>
</tr>
<tr>
<td></td>
<td>Result</td>
<td></td>
</tr>
<tr>
<td>Recklessness</td>
<td>Circumstance</td>
<td>He or she is aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances known to him or her it is unjustifiable to take the risk.</td>
</tr>
<tr>
<td></td>
<td>Result</td>
<td>He or she is aware of a substantial risk that the result will occur and having regard to the circumstances known to him or her it is unjustifiable to take the risk.</td>
</tr>
<tr>
<td>Negligence</td>
<td>Any Physical Element</td>
<td>Such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that the physical element exists or will exist that the conduct merits criminal punishment.</td>
</tr>
</tbody>
</table>

Table 1

8.16 In summary, intention and negligence can be the fault element applicable to any physical element. Knowledge and recklessness can only be fault elements applicable to a physical element consisting of a circumstance or a result and recklessness cannot be the fault element for a physical element consisting of conduct.

Default Fault Elements

8.17 If legislation containing an offence does not specify a fault element for a physical element of the offence and it is not provided that strict/absolute liability applies, then s.5.6 of the Criminal Code supplies a “default” fault element. Unless the legislation expressly provides otherwise, intention is, by default, the fault element for any physical element that consists only of conduct. Note that although recklessness is the default fault element for physical elements consisting of result or circumstance, when used in this context, it is defined so as to include intention and knowledge as alternative applicable fault elements.

8.18 The “default” fault elements apply in the following way:

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7 Thabo Meli [1954] 1 All ER 373; Church [1966] 1 QB 59.
8 See discussion from paragraphs 5.69 to 5.80.
9 See Criminal Code s.5.6(1).
10 See Criminal Code s.5.6(2).
There are three separate statements of what amounts to intention corresponding to the three limbs of the definition of “physical element” in s.4.1(1) of the Criminal Code. Section 5.2 of the Criminal Code defines “intention” as follows:

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.”

When “intention” appears in the statutory language defining crimes, it is usually, though not exclusively, used with respect to a result. For example, DFDA s.47C – theft, requires an intention to produce the result of permanently depriving the owner of his or her property, and the crime of “murder” requires an intention to produce the result of killing or inflicting grievous bodily harm on another.

The words “is aware that it will occur in the ordinary course of events” in s.5.2(3) of the Criminal Code appears to mean to intend to bring about a result entailing actual foresight by the defendant of the certainty of that result being caused by the defendant’s conduct. Those words should be interpreted as “is aware that it will necessarily occur in the ordinary course of events” and not as “is aware that it may (or even probably will) occur in the ordinary course of events”.

The prosecution must prove that the defendant had the requisite intent. The defendant does not have to prove that he or she did not have that intent, although from a tactical point of view the defence will usually seek to adduce some evidence of this either by cross-examination of a prosecution witness or by the defendant’s own sworn evidence.

In the absence of admissions by the defendant, the relevant intent is usually inferred from the circumstances surrounding the alleged offence. The tribunal of fact has to determine, long after the event, what was in the defendant’s mind at the time of the commission of the offence.

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11 See Criminal Code s.5.2(3).

12 The “presumption” that a person “intends the natural consequences of his or her acts” was firmly rejected by the High Court of Australia in Parker v R (1963) 111 CLR 610, and it is extremely improbable that Parliament intended to alter the law as declared in that case.

Ulterior Intention

8.24 Some offences require an intention to achieve an objective which does not go to any circumstance or result and which forms part of the definition of the offence. An ulterior intention prohibits engaging in conduct with the intention to achieve a further objective. The act, omission or state of affairs is intentional because the defendant engages in that conduct with the intention of achieving that further objective. Because every offence requires proof of conduct, the ulterior intention is the fault element for the physical element of conduct. The act, omission or state of affairs is intentional because the defendant engages in that conduct with the intention of achieving that further objective. Although liability for offences such as these is established by the defendant’s objective, the achievement of the objective is not a physical element of the offence. Theft is a good example. The intention to permanently deprive the victim of their property is necessary in addition to the proof of appropriation of property belonging to another. Liability for the offence does not require that the person be permanently deprived of the property merely that the defendant has the intention to permanently deprive.

8.25 In summary, an ulterior intention offence is one where there is a requirement to prove an intention to achieve an objective which is not a physical element of the offence and the objective, whether or not achieved, is neither a result or circumstance specified in any offence and is quite distinct from the conduct it accompanies. A further example of such an offence would be pursuant to DFDA s.38(2), which provides for the offence of malingering with intent to avoid service. The act of malingering is the conduct element committed with the ulterior intent of avoiding service. There is no requirement that the service be avoided, just the intention to do so.

8.26 Ulterior intention is not defined in the Criminal Code so the meaning of intention should bear its ordinary common law meaning.

Knowledge

8.27 Section 5.3 of the Criminal Code defines “knowledge” as follows:

“5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.”

8.28 One cannot have “knowledge” of conduct, but only of circumstances or results. For example, under DFDA s.48(2) – looting, an offence is committed if a person received looted property knowing that its obtaining amounted to looting under DFDA s.48(1) (this is knowledge of a circumstance). Again, it seems that the words “will exist in the ordinary course of events” should be interpreted to mean “will necessarily exist in the ordinary course of events”, and not “will probably (or possibly) exist”. This is in contrast to receiving stolen property under DFDA s.47P(1) – receiving, where the offence is committed if the defendant knows or believes that the property was stolen.

8.29 It is important to note that, as in DFDA s.47P – receiving, there are other states of mind, apart from those considered here, that are used elsewhere in the DFDA (for example “reasonable belief” in s.101P and “reasonable grounds for suspecting” in s.101X). Parliament has clearly distinguished these states of mind from those upon which criminal liability is to be based, and they must never be allowed to replace the Criminal Code’s requirements for criminal guilt. For example, if the defendant suspects property was stolen, but does not know or believe that circumstance, the defendant cannot be convicted of receiving that property contrary to DFDA s.47P.

Recklessness

8.30 Section 5.4 of the Criminal Code defines “recklessness” as follows:
"5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element."

8.31 It is important to note that, under s.5.6(2) of the Criminal Code, recklessness is the default fault element for result or circumstance elements of offences. By expressly referring only to recklessness as to result and recklessness as to circumstance, the definition implicitly excludes the concept of recklessness as to conduct. This implication is confirmed by s.5.6(1) of the Criminal Code that provides that, by default, intention is the fault element for any physical element that consists only of conduct.

8.32 It is also important to recognise that the word “recklessness” has been, and is currently, used in many different ways in different legal contexts. For offences committed on or after 15 December 2001, do not rely on materials relating to recklessness unless they refer to s.5.4 of the Criminal Code.

Recklessness – Substantial Risk

8.33 To say that a risk was substantial, it is necessary to adopt the standpoint of an ordinary observer at the time of the allegedly reckless conduct, before the outcome was known. The risk is substantial if a reasonable observer would have taken it to be substantial at the time the risk was taken. The standard is very vague. Howard’s Criminal Law maintains the position that the requirement of substantial risk varies in stringency with the degree of social acceptance of the conduct which gave rise to the risk. If the conduct is without redemptive social value, anything in excess of a “bare logical possibility” is said to count as “substantial risk”. Another academic surveys a range of offences in which recklessness is the fault element and concludes that the meaning varies with the context of the application. “Some cases posit the probability test; others are satisfied with the possibility test.” Case law on what is “substantial” notes that the word is ambiguous and “is calculated to conceal a lack of precision”. There may be considerable litigation over this provision before a settled meaning emerges. As far as guidance in DFDA proceedings is concerned, it is suggested that “substantial” can be interpreted as meaning “of substance”, but does not require that the risk be exceptional or unusual.

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14 Criminal Code s.5.6(2) provides – “If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.”

15 Criminal Code s.5.6(1) provides – “If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.”


19 See for example DPP v Losurdo (1998) 44 NSWLR 618.
Like intention and knowledge, the definition of recklessness appears to have been intended to require proof of conscious awareness of risk of a particular result or circumstance. It is not enough to establish that the risk was obvious, well known or within the defendant's past experience. To be aware of a risk is to be conscious of it and in the absence of consciousness of risk, there is no recklessness.

**Recklessness – Justifiable Risk**

Conduct involving substantial risk will not amount to criminal fault if the risk was justifiable in the circumstances. In today’s technological society, people are accustomed to thinking in terms of “risks” and “risk assessment”, and are well acquainted with the idea of a “calculated risk”. So what is a “justifiable risk”? The Shorter Oxford Dictionary defines “justifiable” as “capable of being justified, or shown to be just”. Whether something is “just” or not is a matter of ethical judgment on which individual views can differ widely. In deciding whether an act is justifiable its social purpose or social utility may be important.

As contained in s.5.4 of the Criminal Code, a “justifiable risk” appears to be an objective concept. Would a reasonable person, placed in the circumstances in which the defendant found himself or herself, and having considered the risk of the particular proscribed result or circumstance, have taken that risk?

“One must ask whether in the circumstances a reasonable man having such [subjective] foresight would have proceeded with his conduct notwithstanding the risk.”

In the absence of case law explaining the concept, this seems to be the extent of the advice that can be offered on this aspect of the definition.

There is minimal case law relating to the question of justification. In *Crabbe*, which concerned recklessness as a fault element of murder, there was reference to the defence of necessity that might justify a surgeon’s decision to undertake a risky operation, which provided the only hope of prolonging the victim’s life. However claims that a risk is justified are rare.

The legislative choice of words is “it is unjustifiable to take the risk”. The question to be decided is whether it was possible to justify taking the risk having regard to the known circumstances, not whether the risk taking was actually justified. It is implicit that justification is considered at the time the circumstances are known, not being adjudged in hindsight. Given that “justifications” that are offered (and sometimes accepted) for the most appalling criminal acts (eg religious or ethnic hatreds as a “justification” for mass murder), a liberal interpretation of what may possibly amount to a justification could well render strict recklessness (as distinct from the extended form encompassing intention or knowledge) almost impossible for the prosecution to prove. Furthermore, since this is a decision on a question of fact, the trier of fact’s decision on the question will be next to impossible to challenge on appeal.

**Recklessness – Unjustifiable Risk**

Whether the recklessness is as to circumstance or as to result, the prosecution must prove beyond reasonable doubt that “having regard to the circumstances known to him or her, it is unjustifiable to take the risk” of the circumstance existing or the result occurring. This is a question of fact not a question of law. It is likely to pose enormous difficulties for summary authorities sitting as triers of fact and law, and for judge advocates in how they are to instruct the members of courts martial who decide questions of fact.

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22 (1985) 156 CLR 464.

23 See Criminal Code s.54.(3).
The only legislative guidance is provided in DFDA s.11(1) requiring a Service tribunal considering recklessness to “have regard to the fact that the member was engaged in the relevant activities in the course of the member’s duty or in accordance with the requirements of the ADF, as the case may be.” This guidance does not alter the definition of recklessness in the Criminal Code, nor does it limit the matters that the tribunal may take into account in determining whether a member was reckless or not.

It is impossible to define exactly what amounts to a justified risk, and there is often, in commercial enterprises (even more so in the ADF), a need to trade off risk to lives for community benefit. Where the trade off involves a blatant disregard for human life, liability for recklessness may well be warranted. Where the trade off is based on a well-grounded choice among competing alternatives, however, a reckless crime is not committed because the defendant has taken a justifiable risk.

The absence of “lawful justification or excuse” is an essential element of recklessness in crime. For example, not every fatal act done with the knowledge that death or grievous bodily harm will probably result is murder. The act may be lawful, that is, justified or excused by law. A surgeon who competently performs a hazardous but necessary operation is not criminally liable if the patient dies, even if the surgeon foresaw that his death was probable. As long as the procedure was carried out with the informed consent of the patient, there is no liability.

This concept raises a significant problem for those offences of express (or, more likely, implied) recklessness that allow for statutory defences of “reasonable excuse” or “lawful excuse”. These concepts may overlap with “lawful justification or excuse”. This gives rise to the problem of having the prosecution bear the burden of proving unjustifiability as a part of recklessness beyond reasonable doubt, whilst the defendant bears the burden of proving reasonable or lawful excuse on the balance of probabilities.

Negligence

Section 5.5 of the Criminal Code defines “negligence” as a fault element of offences to which it applies in the following terms:

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24 When referring to DFDA s.11 “Note 2” applies in relation to s.11(3) with the effect that the subsection refers to Chapter 2 of the Criminal Code and not the principles of common law as is stated in s.11(3).

25 DFDA s.11(3A) provides – “In particular, subsections (1) and (2) merely provide for matters to which a service tribunal must have regard in deciding whether a member was reckless, or negligent. They do not alter the definitions of recklessness and negligence in sections 5.4 and 5.5 of the Criminal Code.”

26 DFDA s.11(3B) provides – “Subsections (1) and (2) do not limit the matters to which a service tribunal may have regard.”

27 Howard’s Criminal Law (5Ed) at page 63, under the heading “Recklessness and justification”.

28 Criminal Code s.13.3(3) – A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.
5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.”

8.46 The required standard of care will be determined by the particular action to be performed. If, for example, the action is to flag unexploded ordnance on a firing range, the standard of care required will be that of a reasonable person who possesses the defendant’s experience and training and is required to perform that particular function. Failure to flag an unexploded shell lying on the surface in plain view would be a great falling short of that standard of care. Failure to flag a shell that has gone down a rabbit hole with no obvious disturbance to the soil would be a much lesser failure to meet the standard of care, possibly to the extent of not being negligent at all.

8.47 The standard of care is not the simple civil standard of doing something that a reasonable person would not do in the circumstances. Section 5.5 of the Criminal Code requires a great falling short of the standard of care and a high risk that a given physical element exists or will exist.

8.48 The standard of care in each case is to be determined as that which a reasonable person who was a member of the ADF with the same training and experience as the member charged, and was engaged in the relevant activities in the course of the member’s duty or in accordance with the requirements of the ADF. However, whilst a Service tribunal must have regard to these factors, they do not alter the definition of negligence in s.5.5 of the Criminal Code.

8.49 “Negligence” also requires that the defendant’s conduct entailed a high risk that some particular result would occur (ie the failure to flag the shell resulting in the shell not being accounted for). It is essential to be able to identify the element of high risk.

8.50 If paragraphs (a) and (b) of the definition of negligence are made out, it follows that the defendant’s conduct “merits criminal punishment”. The Judge Advocate General (JAG) has advised that the word “such” must be given its full effect, expressly qualifying each of the standard of care and the degree of risk, which in combination give the defendant’s conduct the character which merits criminal punishment.

8.51 Proof that there has been a great departure from the requisite standard of care and that there was a high risk that the relevant physical element does or will exist, will not inevitably mean that conduct merits criminal punishment (although in practical terms that will generally be the case). The tribunal must still determine as a matter of fact whether those elements in combination are such as to merit criminal punishment for the offence charged.

8.52 The JAG has advised:

"Nor is it sufficient to prove that there has been simply a falling short of the requisite standard of care: it must be a "great" falling short, that is one which is significant, unusual in degree, or extreme. And it must be of such a degree as, in combination with such a high risk that the physical element exists or will exist, ..., as to merit criminal punishment."

Subparagraph (a) of the definition of negligence in s.5.5 of the Criminal Code will be the main focus of the inquiry. Each case needs to be considered on its merits and is to be determined in the light of all facts and circumstances, including the objective circumstances, as well as the defendant’s subjective
circumstances (including his or her experience, level of training, physical condition and capabilities) that existed at the time of the offence.

It is important to note that the defence of mistake under s.9.1 of the Criminal Code does not apply where the fault element in respect of a physical element is negligence.32

**Meriting**

8.53 In a JAG advice provided on 9 Jul 02, the issue of meriting criminal punishment was considered in conjunction with an offence of negligent discharge of a weapon pursuant to DFDA s.36A(2). The JAG advised that it was “… essential to recognize that the degree of negligence which is required for a conviction is related to and is dependent upon, the particular offence. That is because the section postulates that it be such as to merit criminal punishment for the offence.”33

8.54 The JAG discussed negligence in the context of the offence of negligent discharge as follows:

“The maximum punishment is 6 months’ imprisonment, but might be as minor as a reprimand. The offence is not contained in criminal legislation of general application, but in a statute the purpose or object of which is the maintenance of discipline in the Defence Force. The offence does not require proof of death nor injury to person or property. Conduct involving those consequences would be charged (either under the civil law equivalent or the DFDA) as culpable homicide or, eg negligently dangerous behaviour (section 36(3) DFDA) where the maximum punishment would be 2 years’ imprisonment; negligently causing a service ship to be hazarded or lost (section 39(3) DFDA) for which the maximum punishment is 6 months’ imprisonment; negligent destruction of or damage to service property (section 43(3) DFDA) – 6 months’ imprisonment.”34

8.55 It is clear that the JAG’s interpretation of these words is that “meriting criminal punishment” means meriting the punishment statutorily provided for the relevant provision. The matter was also considered in the Defence Force magistrate (DFM) trial of SGT B on 27 March 2003. The DFM presiding over that trial said, having concluded that the requirement in s.5.5 of the Criminal Code that the conduct merits criminal punishment for the offence is a separate and additional requirement, that is a specific element of the offence. He added:

“...I think that it will generally follow as a matter of logic that where a Tribunal is satisfied that there has been a great departure from the standard of care combined with a high risk that the relevant physical element will exist, that the resultant conduct will merit criminal punishment.”

**Negligence – Pre-Criminal Code Authorities**

8.56 The Criminal Code has introduced a single exclusive definition of negligence that is applicable to all offences under the DFDA of which negligence is an element. The concept of negligence is now defined in specific language which must be applied in all cases. Past court decisions on negligence including the decision of the Federal Court in the case of Lamperd35 should be considered carefully before being relied upon to interpret the Criminal Code concept of negligence. The JAG has advised:

29 DFDA s.11(2).

30 DFDA s.11(3A). When referring to DFDA s.11 “Note 2” applies in relation to s.11(3) with the effect that the subsection refers to Chapter 2 of the Criminal Code and not the principles of common law as is stated in s.11(3).

31 JAG Advice of 9 Jul 02 in the matter of SPR G and SPR W at paragraph 39.

32 This is discussed in greater detail in Sections 2 and 3 of this Chapter.

33 JAG Advice of 9 Jul 02 in the matter of SPR G and SPR W at paragraph 40.

34 JAG Advice of 9 Jul 02 in the matter of SPR G and SPR W at paragraph 41.

“Some aspects of the reasoning of the Full Court in Lamperd are still apt. For example, not all criminal offences depending on negligence require proof of the same high degree of negligence; much less is there any absolute rule that the degree of negligence to be proved is always that required to establish a charge of manslaughter (see Lamperd at 375 and the cases there cited). Even though section 5.5 has application to Commonwealth offences generally, it is a matter of construing the particular offence-creating statute in each case. Furthermore, where there is ambiguity, that construction which would promote the purpose or object underlying the statute is to be preferred to one which would not promote that purpose or object (section 15AA Acts Interpretation Act 1901 (Cth)).”

Burden of Proof

8.57 Prosecution. The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged (s.13.1 of the Criminal Code). In other words, the prosecution must prove the physical and, if necessary, the fault elements that make up the offence (s.3.2 of the Criminal Code).

8.58 Defence Evidential Burden. In general, a defendant who wishes to deny criminal responsibility, on the basis of the range of statutory defences in Part 2.3 of the Criminal Code, bears an evidential burden in relation to that matter. Evidential burden means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (s.13.3 of the Criminal Code). Part 2.3 of the Criminal Code lists a number of defences. An evidential burden of proof rests on the defendant who chooses to raise them. If the defendant discharges the evidential burden, the prosecution then has the onus of disproving the matter beyond reasonable doubt.

8.59 Defence Legal Burden. By virtue of s.13.4 of the Criminal Code a legal burden of proof rests on the defendant if the law expressly:

a. States that the burden of proof in relation to the defence is a legal burden; or
b. Requires the defendant to prove the matter; or
c. Creates a presumption that the matter exists unless the contrary is proved by the defendant.

8.60 In the case of the DFDA, the Act creates statutory defences for many offences. The onus of proof of these defences is cast on the defendant and the DFDA notes that a legal burden, that is, proof on the balance of probabilities applies (s.13.5 of the Criminal Code). For example, DFDA s.44(3) – losing Service property, provides a statutory defence to the charge. Subsection 44(3) provides “It is a defence if the person proves that he or she took reasonable steps for the safe-keeping of the lost property”. The note to DFDA s.44(3) states “The defendant bears a legal burden in relation to the matter in sub-section (3).”

PHYSICAL ELEMENTS

Voluntary Conduct

8.61 Conduct can only be a physical element of an offence if that conduct is voluntary, that is, if it is a product of the will of the person whose conduct it is. Examples of conduct that is not voluntary are a spasm, convulsion or other unwilling bodily movement, an act performed during sleep or unconsciousness, or an act performed during impaired consciousness depriving the person of the will.
to act. For offences consisting only of a state of affairs (such as possession of a drug), the state of
affairs is only voluntary if it is one over which the person is capable of exercising control. If the
defendant’s act was not voluntary, it cannot constitute the physical element of an offence, and no
further consideration of fault elements is required.

8.62 For example, where the offence charged is murder and the killing occurred as a result of a
shot fired at the victim, the physical act which caused the shot to be fired is the act of pulling the
trigger of the firearm used after the weapon had been appropriately pointed or aimed. The
prosecution must prove that the defendant’s pulling of the trigger was voluntary; that it was the product
of defendant’s will. The same situation will apply in the case of unauthorised or negligent discharge of
a weapon under DFDA s.36A where the physical act that caused the weapon to discharge was the
pulling of the trigger. The onus is on the prosecution to prove that the pulling of the trigger was voluntary and intentional, in this case even if the defendant was, for example in the case of negligent
discharge, not necessarily aware that the pulling of the trigger would cause the weapon to discharge. These issues will usually not be in dispute. There are cases, however, where the pulling of a trigger
may be a reflex, or accidental act, not consciously intended as, for instance, when the trigger is pulled
when the person fell, although in the case of the discharge of a weapon, one would have to look at the
circumstances of why the safety catch had not been applied. There are other cases where the issue
is whether the pulling of the trigger occurred during a state of automatism, or in circumstances in
which the defendant did not act voluntarily, as, for instance, where the defendant committed the act as
the result of some physical force, or threat of physical force.

8.63 A cardinal principle of the criminal law is that before a defendant can be convicted of a
criminal offence he or she must have had at the relevant time the physical ability to control his or her
conduct. In practice this principle is rarely called into question. If, however, there are sufficient
grounds for believing that the conduct charged was done while the defendant was acting in a state of
automatism or, perhaps, hypnosis, hypoglycaemia epilepsy, or as a reflex action upon being attacked
by a swarm of bees or wasps, the prosecution will have failed to prove beyond reasonable doubt that
the physical element in question was voluntary.

SECTION 2 – CASES WHERE FAULT ELEMENTS ARE NOT REQUIRED

Strict, Absolute and Special Liability

8.64 The Criminal Code clarifies the position concerning which offences require a fault element
(such as intention, knowledge, recklessness or negligence) to be proved for a physical element of an
offence, and which offences do not. Those offences that do not require proof of a fault element are
called strict liability and absolute liability offences. These types of offences are not new to the law, but
prior to the Criminal Code identifying them was generally a difficult matter of construing the legislation
that created the offence. Under the new provisions of the DFDA, sections creating offences of strict
or absolute liability are now clearly identified by a statement within the section that creates the offence
identifying the offence, and or any of its fault elements, as one which attracts either strict liability or
absolute liability.

8.65 The term “special liability provision” is defined in the dictionary to the Criminal Code. It
means a provision in the Criminal Code that applies absolute liability to one or more (but not all) of the
physical elements of an offence, or that it is not necessary for the prosecution to prove that a
defendant knew a particular thing, or believed a particular thing. The Criminal Code changes the old
law in that it now specifically applies special liability provisions to ancillary offences, such as aiding or
abetting the commission of an offence. The aspects of criminal responsibility applying to ancillary
offences will be explained in the discussion on those offences, which follow.

39 See Criminal Code s.4.3.
40 See Criminal Code s.4.2(5).
41 See Kay v Butterworth (1945) 61 TLR 192.
8.66 Strict Liability is defined at s.6.1 of the Criminal Code, which provides:

“6.1 Strict Liability

(1) If a law that creates an offence provides that the offence is an offence of strict liability:

(a) there are no fault elements for any of the physical elements of the offence; and

the defence of mistake of fact under section 9.2 is available.

(2) If a law creates an offence provides that strict liability applies to an particular physical element of the offence:

(a) there are no fault elements for that physical element; and

the defence of mistake of fact under section 9.2 is available in relation to that physical element.

The existence of strict liability does not make any other defence unavailable.”

8.67 To prove a person guilty of a strict liability offence the prosecution must firstly prove the existence of the physical element that attracts strict liability. No fault element needs to be proved at all in respect of that physical element, however the defendant must be proved beyond reasonable doubt to have voluntarily performed the physical element.

8.68 Sometimes, a defendant will argue that the physical elements were performed whilst he or she was acting under a mistaken (but reasonable) factual belief. The defendant will bear an evidential burden of proving that he or she had a mistaken but reasonable belief about these facts. If the defendant discharges this burden,\(^{43}\) the prosecution must be able to prove, beyond reasonable doubt, that the defendant did not, at or just before the time of the conduct constituting the physical element, have a reasonable but mistaken belief in the existence of facts, which, if true, would not constitute an offence.\(^{44}\) Further discussion of this defence can be read at the specific heading within Section 3 of this chapter. Of course, other defences (such as necessity) will still be available to a person charged with a strict liability offence.\(^{45}\)

8.69 A good example of the concept of strict liability as defined in s.6.1(1) of the Criminal Code is found in DFDA s.24 – absent without leave. The physical element of being “absent without leave”\(^{46}\) is subject to strict liability.\(^{47}\) In other words, the offence is complete if the defendant is absent at any time he or she was required to be on duty, if the defendant was not granted leave to be absent. The prosecution need prove nothing else unless the defendant raises a defence of mistake of fact as defined in s.9.2 of the Criminal Code. For example, the defendant might say that he or she had always reported for duty at a certain time, which was later discovered to be after the correct reporting time. This might happen say, when the defendant first reports for duty during stand-down, and the error in the defendant’s belief is not discovered until full manning is once again achieved. If the defendant mistakenly and reasonably held a belief that the later reporting time applied, then the defendant is not guilty of the offence. If, however, the correct reporting time can be shown by the prosecution to have been brought to the attention of the defendant, then it would not be honest or reasonable for the defendant to believe that a later reporting time applied.

\(^{43}\) See Criminal Code s.13.3.

\(^{44}\) See Criminal Code s.9.2.

\(^{45}\) See Criminal Code s.6.2(3).

\(^{46}\) See DFDA s.24(1).

\(^{47}\) See DFDA s.24(2).
8.70 DFDA s.24(3) also provides a defence for a defendant who can show, on the balance of
probabilities, that his or her absence was due to circumstances not reasonably within that member’s
control. For example, acts of God, road accidents and injuries not contributed to by the member are
matters not reasonably within the member’s control.

8.71 Other legal defences (for example duress or necessity) also affect the question of whether
the physical element was performed voluntarily. These defences will be discussed later in this
chapter.

8.72 The same considerations apply for an offence where there are more than one physical
element, and strict liability attaches to one or more, but not all of those physical elements (see for
example DFDA s.25 – assaulting a superior officer). Strict liability attaches only to the physical
element that the person assaulted was a superior officer. This is an example of an offence in which
strict liability is found in part, but not the whole offence. The first physical element of assaulting a
person still requires proof that the defendant also had the fault element of intention to perform the
conduct that results in the assault on the victim.

Absolute Liability

8.73 Absolute liability is defined in s.6.2 of the Criminal Code, which provides:

“6.2 Absolute liability

(1) If a law that creates an offence provides that the offence is an offence of absolute liability:

(a) there are no fault elements for any of the physical elements of the offence; and

the defence of mistake of fact under section 9.2 is unavailable.

(2) If a law that creates an offence provides that absolute liability applies to a particular
physical element of the offence:

(a) there are no fault elements for that physical element; and

the defence of mistake of fact under section 9.2 is unavailable in relation to that physical
element.

(3) The existence of absolute liability does not make any other defence unavailable.”

8.74 The essential difference between offences of strict and absolute liability is that for absolute
liability offences the defence of mistake of fact is not available. As a consequence, the maximum
penalty available will generally be less. A good example of an absolute liability offence is found in
DFDA s.44 – losing Service property. This is an offence of the kind described in s.6.2(2) of the
Criminal Code. This offence has two physical elements. The first being losing any property and the
second being that the property was issued to the member or entrusted to the member’s care, in
connection with the member’s duties. Absolute liability attaches to the physical element in DFDA
s.44(1)(a), that of losing the property. That means that if the property cannot be produced or located
when required, the member to whom it was issued or entrusted to, is absolutely liable for that loss.
Once the defendant is proved to have lost property, subject to s.44(3) and the other requirements in
s.44 being satisfied, his or her own belief or knowledge as to the circumstances in which the property
was issued to him or her is irrelevant.

8.75 If, however, the defendant can prove on the balance of probabilities that he or she took
reasonable steps for the safe-keeping of the property, or, raise some evidence (that the prosecution
cannot disprove) that the property was stolen from him at the point of a gun (the defence of duress), then he or she will not be found guilty of the offence.

Special Liability and Ancillary Offences

8.76 Chapter 2, Part 2.4 of the Criminal Code contains provisions which extend the general principles of criminal responsibility to include offences of attempt (s.11.1), complicity and common purpose (s.11.2), innocent agency (s.11.3), incitement (s.11.4) and conspiracy (s.11.5). These provisions are called ancillary offences. The offence of being an accessory after the fact is also an ancillary offence.52

SECTION 3 – CIRCUMSTANCES IN WHICH THERE IS NO CRIMINAL RESPONSIBILITY

8.77 Part 2.3 of the Criminal Code sets out the defences that are available to a defendant in DFDA proceedings in addition to the statutory defences found in various DFDA offence provisions. The following Divisions are covered in Part 2.3:

a. Division 7 – Circumstances involving lack of capacity;

b. Division 8 – Intoxication;

c. Division 9 – Circumstances involving mistake or ignorance; and

d. Division 10 – Circumstances involving external factors.

8.78 Detailed discussion of these defences can be found later in this chapter. The defence known as “defence of superior orders”, provided for in DFDA s.14 is retained and is also discussed later in this chapter.

MENTAL IMPAIRMENT

8.79 Section 7.3 of the Criminal Code deals with mental impairment and provides as follows:

“7.3 Mental Impairment

(1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence the person was suffering from a mental impairment that had the effect that:

(a) the person did not know the nature and quality of the conduct; or

the person did not know that the conduct was wrong (that is the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or

the person was unable to control the conduct.”

8.80 A person is not criminally responsible for the commission of an offence if, at the time the offence was committed, the person suffered from a mental impairment, which precluded criminal responsibility. Mental impairment has no effect on culpability unless, as a consequence of the impairment, the person:

a. did not know the nature and quality of the conduct constituting the offence; or

51 Criminal Code s.6.2(3) continues to allow the existence of other defences even for absolute liability offences.

52 See definitions in DFDA s.3(13) and the dictionary definition of “ancillary offences” in the Criminal Code.
b. did not know that the conduct was wrong; or

c. was unable to control their conduct.

8.81 Section 7.3(1) is based on the principles derived from the rules propounded by the House of Lords in *McNaghten*.\(^\text{53}\) In summary, the McNaghten rules, which prior to 15 December 2001 applied under the DFDA, are as follows:

a. Every man is presumed to be sane, and possess a sufficient degree of reason to be responsible for his crime, until the contrary is proved to the satisfaction of the jury (or in a military context, the members of a Service tribunal).

b. To establish a defence on the ground of insanity, it must be shown that, at the time of committing the criminal act, the defendant was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he or she was doing, or if he or she did know this, not to know that what he or she was doing was morally wrong.

c. Where a criminal act is committed by a person under some insane delusion as to the surrounding facts, which delusion conceals from him the true nature of the act he or she is doing, he or she will be under the same degree of responsibility as if the facts had been as he imagined them to be.

8.82 The McNaghten rules have been extended, however, by the provision of an excuse for a person whose conduct was beyond their control, as a consequence of mental impairment. This seems to be a direct copy of the Griffith provisions which have always included this third capacity. The first of the tests for determining criminal responsibility in s.7.3(1) paraphrases the first of the McNaghten rules, which simply requires proof that the defendant did not know the nature and quality of their conduct. The second of the tests amplifies the original McNaghten requirement that the mental impairment deprives the defendant of knowledge that the conduct was wrong. The third test allows mental impairment as an excuse when the effect of the impairment is that the defendant could not control his or her conduct. Howard notes that the third limb has been rarely of use because the capacity to not control actions must be as a result of “mental disease” which has, in the past, not been held to include personality or impulse-control disorders.

8.83 In this section “mental impairment”\(^\text{54}\) includes senility, intellectual disability, mental illness, brain damage and severe personality disorder. Mental illness is a reference to an underlying pathological infirmity of the mind, whether of long or short duration, and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli.\(^\text{55}\) However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur. The question of whether a person was suffering from a mental impairment is one of fact.\(^\text{56}\) Psychiatric evidence would be essential in such a case.

8.84 A defendant who seeks to establish this defence has an evidential burden of proving that he or she suffered from a mental impairment that had the effects set out in s.7.3(1). Once the defendant has discharged this burden, the prosecution bears the legal burden of disproving that the defendant relevantly suffered from a mental impairment. A mental impairment defence must be proved on the balance of probabilities and the burden rests on the proponent of the defence whether it is the prosecution (having sought leave to do so) or the defence.

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\(^\text{53}\) (1843) 10 Cl & F 200; 8 ER 718.

\(^\text{54}\) Section 7.3(8).

\(^\text{55}\) Section 7.3(9).

\(^\text{56}\) Section 7.3(2).
8.85 Where mental impairment is an issue at a summary trial, the summary authority must refer the matter to a convening authority. For trials by court martial or DFM, attention is drawn to the fact that there is a distinction in procedure between mental impairment affecting the defendant at trial and mental impairment affecting the defendant at the time of the alleged event but not at the date of trial.

INTOXICATION

8.86 The history of intoxication and criminal responsibility has taken an interesting course. It was in the case of DPP v Beard that the House of Lords established the common law position on intoxication by setting out the rule that a defendant could use evidence of self-induced intoxication to show that he or she did not have the intent for “specific intent” crimes, but is not allowed to use evidence of self-induced intoxication to show that he or she did not have the intent required for “basic intent” offences. This was followed in the case of DPP v Majewski.

8.87 The Australian common law diverged from that of England. The Code jurisdictions of Queensland, Tasmania and Western Australia, as well as New South Wales followed the English approach of dividing crimes into those where intoxication may be taken into account and those in which evidence of intoxication is irrelevant. In Queensland and Western Australia intoxication may be considered for crimes that have an “intention to cause a specific result” as an element of the offence, the Tasmanian provision simply refers to the element of “specific intent” essential to constitute the offence and in New South Wales, self-induced intoxication may only be taken into account in relation to whether the defendant “had the intention to cause the specific result necessary for an offence of specific intent.” The leading common law decision in Australia relating to intoxication is R v O’Connor.

8.88 The majority of the High Court refused to follow Majewski because the distinction between crimes of specific intent and basic intent lacks logic and the outcome would provide an unjustifiable exception to fundamental common law principles. In 1997 the common law in relation to intoxication in O’Connor was criticised in the case of Small v Noa Nadraku Kurimalawi, where the defendant was acquitted on charges of assaulting two women because of his state of intoxication.

8.89 Section 8.2(1) of the Criminal Code provides that self-induced intoxication can only be considered in relation to a fault element of basic intent. It reformulates the English common law distinction in Majewski between offences of basic intent and specific intent, however the provisions are significantly different in their effects from the English common law. The relevant provision is as follows:

57 See sections 145(1) and (3) of the DFDA.
58 See s.145(2) of the DFDA.
59 See sections 145(4) and (5) of the DFDA.
60 [1920] AC 479.
62 Criminal Code (Qld) s.28 and Criminal Code (WA) s.28.
63 Criminal Code (Tas) s.17(2).
64 Crimes Act 1900 (NSW) s.428C.
65 (1980) 146 CLR 64.
66 R v O’Connor (1980) 146 CLR 64 at p 104.
67 ACT Magistrates’ Court No CC97/01904, 22 October 1997.
“8.2 Intoxication (offences involving basic intent)

(1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.

(2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

(3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.

(4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.

(5) A person may be regarded as having considered whether or not facts existed if:

(a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and

(b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.”

Using Intoxication as “a Defence”

8.90 The Criminal Code states that self-induced intoxication cannot be considered when assessing whether conduct was voluntary or not. Intoxication may be relevant to determining whether the defendant possessed the fault element in relation to the prescribed conduct, but only if the conditions set out in the Criminal Code are satisfied. These conditions, and intoxication in general, are discussed in the following paragraphs.

Types of Intoxication

8.91 The Criminal Code distinguishes between two types of intoxication. They are self-induced intoxication and “involuntary” intoxication. The distinction provides the essential basis upon which Service tribunals will either exclude evidence of intoxication or impose the standard of reasonable and sober conduct when determining criminal liability. For example, liability for negligence is determined by reference to “a reasonable person who is not intoxicated”. The distinction between self-induced and involuntary intoxication also provides a basis for a defence which has no common law equivalent.

8.92 Intoxication is self-induced unless it came about involuntarily, or as a result of fraud, a sudden or extraordinary emergency, accident, reasonable mistake, duress or force. The inclusion of accidental intoxication provides an additional ground for arguing that intoxication was not self-induced.

68 Criminal Code s.4.2(6) provides – “Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary”.

69 Criminal Code s.8.5 states that intoxication that is not self-induced is “involuntary”. In the context of intoxication however, involuntariness does not correspond with the s.4.1 definition of conduct which is “not voluntary”.

70 See Criminal Code s.8.3(1).

71 See Criminal Code s.8.1. It will be on a very rare occasion that such defences will be available.
Intoxication Offences Involving Basic Intent

8.93 In general, evidence of intoxication is admissible and relevant when fault is in issue. It is likely to prove particularly compelling when the prosecution must prove recklessness. As normally cautious individuals are often prepared to take substantial risks when intoxicated, it is usually safe to infer from evidence of intoxication that the defendant discounted known risks for the sake of some immediate benefit or self-satisfaction. When intention is in issue, in offences involving violence to the person or property, the tendency for alcohol to reduce inhibitions against aggression will usually tend to support the prosecution argument that the defendant meant to inflict harm.

When Evidence of Intoxication can be Considered on the Issue of Fault Relating to Circumstance and Result

8.94 As previously discussed, the physical elements of an offence are conduct, circumstance and result of conduct. The Criminal Code provisions on intoxication require a distinction to be drawn between the conduct elements of an offence and circumstance and result of conduct elements. When evidence of intoxication would have a logical relevance to proof of intention, knowledge, recklessness, negligence or any other fault element relating to an incriminating circumstance or result of conduct, a Service tribunal must give consideration to that evidence. Evidence that the defendant was intoxicated can support a denial of intention, knowledge or recklessness or support an assertion that an incriminating result or circumstance was accidental rather than intended or consciously risked.

8.95 Evidence of self-induced intoxication is not to be considered when the prosecution must prove intention with respect to the conduct element being an act, an omission or a state of affairs. This is the effect of the rule that evidence of self-induced intoxication must be disregarded when “basic intent” is in issue. Basic intent is merely the fault element of intention in its application to the conduct constituting an offence. In most offences, the prohibition of certain conduct will usually require proof of accompanying circumstances or results in order to constitute the offence. The practical effect of s.8.2(1) appears to be confined to offences which do not require proof of fault with respect to result of conduct. There are some further qualifications in ulterior intent offences.

8.96 Evidence of intoxication can be admitted when deciding whether the defendant acted with an ulterior intention. Ulterior intention is discussed in detail at paragraphs 5.22 To 5.24, however, in summary such offences require proof that the defendant engaged in the proscribed conduct with the intention of achieving some further objective and that the object of the offender’s intention is neither a result nor a circumstance specified in the definition of the offence. The use of the defence of intoxication is restricted to offences that are not a variety of basic intent on the basis that “intention” in the definition of “basic intent” is identical to “intention with respect to conduct” in s.5.2(1) which provides that “a person has intention with respect to conduct if he or she means to engage in that conduct”.

8.97 Consideration of evidence of self-induced intoxication can be used to support a contention that the conduct was accidental. Section 8.1(3) is an exception to the general rule that evidence of self-induced intoxication is irrelevant when the defendant claims that the conduct was unintentional. There is no defence of accident in the Criminal Code – the defendant’s claim that the conduct was accidental is simply a denial that the conduct was intentional. It does however allow the defendant to put forward evidence of intoxication to support a claim that the conduct was unintentional because it was an accident. The subsection makes a clear differentiation between a denial of intention based on a claim of mistake of fact and a denial based on a claim of accident, permitting reliance on the defence for accident but not for mistake. There is a difference between hitting a superior officer by mistake than by accident. The one who hits by accident does not intend to hit at all but the one who does so by mistake intended to hit but made a mistake as to whether the person was a superior officer.

8.98 However, consideration of the existence of a mistake of fact allows the admission of evidence of self-induced intoxication. Section 8.2(4) is limited in its application applying only to offences of strict liability. A defence of reasonable mistake of fact will be unsuccessful if the mistake is not reasonable.

72 See Criminal Code s.5.2(1).
Negligence as a Fault Element

8.99 Where negligence is a fault element, in determining liability regard is to be had to the standard of a reasonable person who is not intoxicated. An exception arises where the intoxication is not self-induced and is involuntary. If intoxication is not self-induced reference may then be had to the standard of the reasonable person intoxicated to the same extent as the person charged with the offence. As it is clear that intoxication has a tendency to diminish awareness of risks, evidence that the defendant was intoxicated will certainly help to establish the deviation from standards of reasonable care required for negligence.

8.100 If there is evidence of involuntary intoxication, the defendant must be judged by the standard of a "reasonable person intoxicated to the same extent as the person concerned". It is more than likely that expert evidence would be required to mount such a defence.

Relationship of Intoxication to Other Defences

8.101 Intoxication may be relevant in terms of the operation of other defences. For example, can someone who is drunk, who breaks into a house honestly (though drunkenly) believing that house to be his own, be found liable for an offence? The Criminal Code provides that if any part of the other defence is based upon actual knowledge or belief, intoxication may be considered when determining whether that belief existed. An exception arises if any part of a defence is based on reasonable belief. In determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

8.102 If the person’s intoxication was not self-induced and a reasonable belief is part of the other defence, then regard must be had to the standard of a reasonable person intoxicated to the same extent as the person. If every physical element of an offence has a fault element of basic intent and any part of the defence is based on actual knowledge or belief, then self-induced intoxication cannot be considered in determining whether the knowledge or belief existed.

Burden of Proof

8.103 Although intoxication is colloquially referred to as a defence, it is clear that the prosecution bears the burden of disproving, beyond reasonable doubt, that intoxication was relevant, once the defendant has discharged the evidential onus.

Intoxication-based DFDA Defences

8.104 Certain provisions of the DFDA make intoxication an offence. Section 32, for example, makes it an offence to be intoxicated while on guard or on watch. The term intoxication used in that section is given a special meaning by DFDA s.32(5):

"For the purposes of this section, a person is intoxicated if, and only if, the person's faculties are, because of the person being under the influence of intoxicating liquor or a drug (other than a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the person is unfit to be entrusted with the person's duty or with any duty that the person may be called on to perform."

8.105 A similar definition applies to the offence created by DFDA s.37 – intoxicated while on duty.

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73 See Criminal Code s.8.3.
74 See Criminal Code s.8.4(1).
75 See Criminal Code s.8.4(2).
76 See Criminal Code s.8.4(2).
77 See Criminal Code s.8.4(3).
78 See Criminal Code s.8.4(4).
8.106 A different definition of intoxication applies with respect to DFDA s.40 – driving while intoxicated. Section 40(1)(b) refers to a person being under the influence of intoxicating liquor or a drug to such an extent as to be incapable of having proper control of the vehicle.

Intoxication and Territory Offences

8.107 Jervis Bay Territory Acceptance Act 1915 s.4AA provides that Chapter 2 of the Criminal Code does not apply in relation to a law of the ACT in force in the Jervis Bay Territory by virtue of s.4A of the Jervis Bay Territory Acceptance Act. The practical consequence of this is that Chapter 2 of the Criminal Code does not apply to Territory offences comprising an offence punishable under the Crimes Act 1900 of the ACT in its application to the Jervis Bay Territory. DFDA s.61(6) was enacted to ensure that this position was not put in doubt through the enactment of DFDA s.10.

8.108 Consequently, the Criminal Code Part 2.3 – Circumstances in which there is no criminal responsibility, does not apply to Territory offences which rely on the Crimes Act 1900 ACT in its application to the Jervis Bay Territory.

8.109 The ACT has enacted its own Criminal Code. This is similar, but not exactly the same as, the Commonwealth Criminal Code. In connection with offences created pre-2003, most of the ACT Criminal Code provisions in Chapter 2 – General principles of criminal responsibility, will not apply until 1 January 2006. However, s.10 immediately applies certain provisions of Chapter 2, including those relating to intoxication.

8.110 From 1 January 2003 the ACT Criminal Code provisions relating to self-induced intoxication will apply to those Territory offences. Self-induced intoxication was, however, the subject of earlier legislation applying in the Jervis Bay Territory. Because of the difficulties in determining which law applies to Territory offences the history of the relevant legislation is set out below.

8.111 The chronology is as follows:

a. 13 April 1998 – the Commonwealth Criminal Code provisions relating to intoxication took effect.

b. 9 March 2000 – the ACT Crimes Act 1900 was amended by the insertion of specific provisions dealing with self-induced intoxication. In the renumbered format of the legislation, these provisions were at Part 14 and comprised sections 337 to 339. In effect, Part 14 of the ACT Crimes Act 1900 provided that evidence of self-induced intoxication could not be considered in determining whether an act or omission that is an element of an offence was intended or voluntary. While Part 14 of the ACT legislation is consistent with the Commonwealth Criminal Code intoxication provisions, it is not precisely the same.

c. 2 October 2001 – s.4AA of the Jervis Bay Territory Acceptance Act 1915 commenced. As indicated at paragraph 5.110, s.4AA provides that Chapter 2 of the Commonwealth Criminal Code does not apply in relation to a law of the ACT in force in the Jervis Bay Territory by virtue of s.4A of the Jervis Bay Territory Acceptance Act.

d. 1 January 2003 – the intoxication provisions of the ACT Criminal Code came into effect and Part 14 (the intoxication provisions) of the ACT Crimes Act 1900 was repealed.

8.112 From this chronology, it is clear that in so far as self-induced intoxication is concerned, in connection with Territory offences comprising an offence punishable under the Crimes Act 1900 of the ACT in its application to the Jervis Bay Territory:

a. Prior to 13 April 1998, the common law provision as stated by the High Court in R v O’Connor79 prevailed.

79 (1980) 146 CLR 64.
b. From 2 October 2001 to 1 January 2003, the ACT Crimes Act 1900 provisions at Part 14 applied.

c. That from 1 January 2003, the ACT Criminal Code provisions apply.

8.113 The position that prevailed however, from 13 April 1998 until 2 October 2001 is unclear. On one view, the Commonwealth Criminal Code provisions prevailed for this period and, where inconsistent with the intoxication provisions introduced into the ACT Crimes Act 1900 on 9 March 2000, would have prevailed. However, the Commonwealth DPP (who is responsible for prosecutions in the Jervis Bay Territory) considers that the ACT law, incorporated into the law of the Jervis Bay Territory, was unaffected by the passage of the Commonwealth Criminal Code intoxication provisions, even prior to the commencement of s.4AA of the Jervis Bay Territory Acceptance Act 1915. It appears that the issue is yet to be determined by a court.

CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE

8.114 Sections 9.1 and 9.2 of the Criminal Code deal with circumstances where mistake or ignorance can be utilised as defences:

“9.1 Mistake or ignorance of fact (fault elements other than negligence)

(1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:

(a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and

the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.

(2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.”

“9.2 Mistake of fact (strict liability)

(1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:

(a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and

had those facts existed, the conduct would not have constituted an offence.

A person may be regarded as having considered whether or not facts existed if:

(a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and

he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Note: Section 6.2 prevents this section applying in situations of absolute liability.”

PROVISIONAL AS AT SEP 07 - PENDING FINAL PUBLICATION
8.115 Prior to the Criminal Code, mistake of fact was relevant to criminal responsibility in a number of ways. It could impede proof of mens rea, could activate a defence that did not manifest itself in the objective circumstances of the offence such as self-defence and where it arose in the context of statutory offences such as Proudman v Dayman. 80

8.116 Reasonable mistake of fact 81 preserves the fundamental principle that a defendant is innocent until guilt is proved beyond reasonable doubt. A defendant is not guilty if he or she did the acts constituting the offence under a mistaken but reasonable belief about facts, which had they existed, would have rendered the act innocent. The defence has no application to a physical element of an offence when intention, knowledge, recklessness or negligence must be proved for that element. Ignorance, no matter how reasonable or understandable in the circumstances, is no excuse. Although mistake and ignorance tend to fuse in general usage, the Criminal Code quite clearly provides that a person cannot be mistaken about facts unless the person has initially considered whether the facts existed or not. The intention of the provision is to impose what could be classified as a duty of inquiry in circumstances where conduct might result in the commission of a strict liability offence. The resulting tension between the recognition of a defence based on reasonable mistake and the denial of any defence based on reasonable ignorance is apparent in the further qualification of that distinction in s.9.2(2). If the situation in which the offence occurred had arisen on a previous occasion, a consideration of the facts on that occasion will absolve the defendant from the need to consider the facts again, when the offence occurred. For example, standing orders prohibit male trainees from entering the female lines. A male defendant is found in the hall of the female lines by the duty NCO. When questioned he says that he thought they were the male lines. This would raise the issue of mistake of fact. Some of the issues that might go to the reasonableness include how long the trainee had been at the unit and the type of signage.

8.117 The defence of mistake of fact requires a mistaken belief about facts, which are in some way, inconsistent with the existence of the circumstance or result, which makes the conduct an offence. The most common applications of the defence occur in cases where the mistake relates to circumstantial elements of the offence charged. Reasonable mistakes about circumstantial elements of an offence often concern present or past facts. Chapter 2 of the Criminal Code envisages that liability will be imposed, on occasion for conduct, which only becomes criminal at a later time, when an incriminating circumstance comes into existence. The effects of criminal conduct are often long delayed and it is quite possible that the incriminating circumstance may not occur until long after the acts or omissions that constitute the conduct element of the offence. Strict liability may also be imposed for results of conduct. When liability is imposed for results or future circumstances, a defence of reasonable mistake of fact will depend on the defendant’s beliefs relating to precautions or preventative factors. Reasonable mistake of fact will provide a defence for a defendant who was convinced, on reasonable grounds, that the incriminating result could not occur.

8.118 The requirement of a fault element does not necessarily mean that the defendant must have been aware of the moral or legal wrongfulness of his or her conduct. Ignorance of these matters is usually no defence. The law does not presume that everyone does know the law, but the law cannot permit the defendant to escape the legal consequences of an act by saying that the defendant did not know he or she was breaking the law. Similarly, although moral considerations have had a profound influence on the development of the criminal law, the fact that the defendant believed his or her conduct was morally right is generally irrelevant if the facts necessary to impose criminal responsibility are proved. However, a belief that actions were morally right may become relevant to the question of the appropriate sentence if the defendant is found guilty of an offence.

8.119 The defence is not available unless the defendant’s conduct would not have been a criminal offence, had the mistaken belief been true. A reasonable mistake, which merely goes to the nature or degree of the criminal offence, is no excuse. The requirement of a reasonable mistake implies the existence of a measure or standard of reasonableness. Because the defence of reasonable mistake requires evidence that the defendant “considered whether or not facts existed”, the question of whether or not a mistake was reasonable must depend on the circumstances in which that

80 (1941) 67 CLR 536.

81 The mistake must be about facts, not the law. There is no excuse for mistake of law.
consideration must take place. It is implied that the mistake must be one which it was reasonable to make in the circumstances.

8.120 Under the Criminal Code, ignorance of the law is no excuse, unless the Code so provides or the ignorance or mistake negates a fault element that applies to a physical element of an offence.\(^{82}\) A person can be criminally responsible for an offence against an Act of Parliament even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of that Act that directly or indirectly creates the offence or directly or indirectly affects the operation of the offence.\(^{83}\) However, the person will not be criminally responsible if the ignorance or mistake negates a fault element that applies to a physical element of the offence.\(^{84}\)

8.121 The same rules apply to ignorance of subordinate legislation.\(^{85}\) However, there is an added exemption from liability if, at the time of the conduct, copies of the subordinate legislation have not been made available to the public or to persons likely to be affected by it, and the person could not be aware of its content even if he or she exercised due diligence.\(^{86}\) If this defence is raised the defendant will have the evidential burden and thereafter if discharged the prosecution will have the responsibility of negating it beyond reasonable doubt.

### DURESS

8.122 Section 10.2 of the Criminal Code provides that a person is not criminally responsible for an offence which occurs while he or she is acting under duress.

\[
\text{“10.2 Duress} \\
(1)\text{A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.} \\
(2)\text{A person carries out conduct under duress if and only if he or she reasonably believes that:} \\
(a)\text{a threat has been made that will be carried out unless an offence is committed; and} \\
\text{there is no reasonable way that the threat can be rendered ineffective; and} \\
\text{the conduct is a reasonable response to the threat.} \\
(3)\text{This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.”}
\]

8.123 Duress excuses a person who is forced to commit an offence by threats. There is no restriction of the type of threatened harm however it is limited to circumstances where:

a. a person reasonably believes that a real threat will be carried out unless an offence is committed; and

\(^{82}\) See Criminal Code s.9.3 and s.9.4.

\(^{83}\) See Criminal Code s.9.3(1).

\(^{84}\) See Criminal Code s.9.3(2)(b).

\(^{85}\) Criminal Code s.9.4(1) – “subordinate legislation” means an instrument of a legislative character made directly or indirectly under an Act, or in force directly or indirectly under an Act: Criminal Code s.9.4(3).

\(^{86}\) See Criminal Code s.9.4(2)(c).
b. there is no reasonable way that the threat can be rendered ineffective or unavoidable; and

c. the conduct is a reasonable response to the threat in consideration of all of the circumstances.

8.124 The Criminal Code implicitly provides that people confronted by a threat of harm will sometimes have to endure the threat rather than accede to the demand and commit the offence.

8.125 It is clear that threats of death or grievous bodily harm would satisfy duress, though the Criminal Code defence of duress is not limited to such threats. The explanatory memorandum to the Criminal Code quotes Yeo:87

"Once a person is under the influence of a threat, whatever he or she does depends on what the threaten demands. The crime demanded might be trivial or serious but it has no necessary connection with the type of threat confronting the defendant. Policy reasons would, however, insist on a requirement that the defendant’s response was reasonably appropriate to the threat."

8.126 The major limitation which applies to the use of the defence of duress is that it does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out. Additionally, the defence does not apply where there is a reasonable means of rendering the threat ineffective. Although duress is colloquially referred to as a defence, it is clear that the prosecution bears the burden of disproving, beyond reasonable doubt, that duress was relevant, once the defendant has discharged the evidential onus.

CLAIM OF RIGHT

8.127 Section 9.5 of the Criminal Code reads:

(1) A person is not criminally responsible for an offence that has a physical element relating to property if:

(a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and

the existence of that right would negate a fault element for any physical element of the offence.

(2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.

(3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

8.128 The most common instances where claim of right bars liability are those where the charge of theft is defeated on the ground that property was appropriated by the defendant in pursuit of a mistaken claim of ownership. Section 9.5 includes two quite distinct claim of right provisions, only one of which is a defence in the context of it excusing the commission of an offence. In s.9.5(1), which applies to offences which include a “physical element relating to property”, a claim of right defeats liability if it would “negate a fault element” for a physical element of an offence. Reliance on this particular limb of the provision would most likely occur when offences of dishonesty are in issue, particularly DFDA s.47C, where the defence could negate the fault element applicable to the physical element of “property belonging to another person”.

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87 Yeo, “Private Defences, Duress and Necessity” (1991) 15 Crim LJ 139 at 143.
8.129 In its second limb of s.9.5(2), claim of right goes beyond mere denial of fault. It provides a true defence which is limited in its application to offences which don’t include any physical elements relating to property or the use of force against another.

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<td>Claim based on mistaken belief about proprietary or possessory right</td>
<td>Claim based on mistaken belief about proprietary or possessory right</td>
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<td>Limited to offences which don’t involve the use of force against a person</td>
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Table 3

8.130 There is some interpretative difficulties with s.9.5(1). It is meant to confine criminal responsibility when a mistaken belief about a proprietary or possessory right is inconsistent with the imputation of fault. However, what it does state is that claim of right bars criminal responsibility if the existence of the right, which the defendant wrongly believed to exist, would be inconsistent with the imputation of fault.

**Claim of Right and Offences of Dishonesty**

8.131 Section 47A of the DFDA provides as follows:

“47A. For the purposes of this Subdivision, dishonest means:

(a) dishonest according to the standards of ordinary people; and

known by the defendant to be dishonest according to the standards of ordinary people.

Note: In the case of the offence of theft, see also section 47D.”

8.132 Section 47B of the DFDA provides as follows:

“47B. In a prosecution for an offence against this Subdivision, the determination of dishonesty is a matter for the trier of fact.”

8.133 The DFDA definitions of dishonesty are taken from the definition of dishonesty in s.130.3 of the Criminal Code. That definition is a statutory redaction of the English common law criteria for dishonesty frequently described as the *Ghosh* test. The test has caused some controversy in Australia where the High Court refused to accept its application in the offence of conspiracy to defraud. Irrespective of that decision the Criminal Code and the DFDA now adhere to a position similar to the decision in *Ghosh*. In view of that determination of dishonesty there are three quite distinct ways in which a defendant might claim that a mistake about proprietary or possessory rights barred criminal responsibility:

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a. When the defendant exercises a mistaken claim of right to the property in question. If the defendant takes property thinking that he owns it, the prosecution may be unable to prove the fault element with respect to the requirement that the property was owned by another.

b. When the conduct of the defendant does not violate the ordinary person’s standards of honesty and dishonesty. A person who believes that they have a proprietary or possessory right against another person may take other property in satisfaction of that right. Although the taking may have been without the owner’s consent, it seems possible that a Service tribunal might conclude that the taking is not dishonest by the standards of ordinary people.

c. When the defendant is unaware that their conduct does violate ordinary standards of dishonesty. Since dishonesty requires proof that the defendant knew his or her conduct would violate ordinary standards, it is possible that a misguided belief in the right to pursue a proprietary or possessory right might cause a defendant to be blind to the fact that their conduct violated ordinary standards.

8.134 In none of these instances is reliance on claim of right strictly necessary to support the defendant’s denial of guilt. The defendant who does not seek to excuse an offence, alternatively denies that an offence took place at all. The first is a straightforward denial of fault and the second is a denial of a circumstantial element of the offence and the third is a denial of fault.

8.135 Belief in the existence of a right is no defence to a claim of dishonesty unless the belief actually negates the fault element of the offence. It is quite possible for a person to act in response to an alleged claim of right in circumstances where ordinary people would regard their actions as dishonest. Consequently it is possible for a person to commit an offence of dishonesty where the conduct is prompted by a claim of right, that is a consequence of the fact that the claim of right has no effect unless it negates the fault element, for example in a case of theft, knowledge that the conduct is dishonest according to the standards of ordinary people.

8.136 Section 9.5(2) provides for a true claim of right defence which extends further than negation of the relevant fault element in offences which do not relate to the use of force or violation of property rights. Consequently it can deny liability even if it is strict or absolute. The defence is available where the offence does not require proof of a physical element relating to property or relate to the use of force against a person and the defendant’s conduct arises out of the exercise of proprietary or possessory rights that the defendant mistakenly believes to exist. The restriction of the defence to offences which do not include a physical element which relates to property and the requirement that it arises out of the exercise of proprietary or possessory rights is different to the Australian common law position.

8.137 The defence of claim of right does not negate criminal responsibility for an offence that relates to the use of force against a person. A defendant who attacks another in the mistaken belief that the attack is necessary for the exercise of proprietary or possessory rights cannot resort to the claim of rights as a defence to a charge of assault.

SUPERIOR ORDERS

8.138 Generally speaking, a person who commits what would otherwise be a crime cannot raise as a defence that he or she was only carrying out an order. There are very good reasons for this rule and they have been discussed since the Nuremburg trials. The common law has never encouraged blind submission to superior authority.90

90 See generally Fairall and O’Connor Criminal defences, Butterworths, Sydney, 3rd Ed.
8.139 DFDA s.14 provides as follows:

“14. Act or omission in execution of law etc.
A person is not liable to be convicted of a service offence by reason of an act or omission that:
(a) was in execution of the law; or
(b) was in obedience to:
(i) a lawful order; or
(ii) an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful.”

8.140 There are no English decisions that clearly set out the law relating to the availability of superior orders as a substantive defence. The High Court held in A v Hayden91 “superior orders are not and have never been a defence in our law”. In relation to military personnel, Will J said in the early case of “Keighly v Bell92 that:

“the better opinion is that an officer or soldier acting under the orders of his superior not being necessarily or manifestly illegal would be justified by his orders”.

8.141 DFDA s.14 overcomes the limitation identified by the High Court and codifies the principles outlined in the case of Smith.93 Smith’s case was a South African case where Solomon JP stated:

“If a soldier honestly believes he is doing a duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer.”94

8.142 His statement was a compromise between the extreme views that were put to the court, namely that:

“absolute, implicit and unquestioning obedience is required from a soldier in complying with the orders of a commanding officer”95

on the one hand and:

“that a soldier is only bound to obey lawful orders and is responsible if he obeys an order that is not strictly legal”.96

8.143 Smith was followed in the later South African case of Cellier97 where it was held that during martial law a soldier might justify the shooting of a prisoner by raising the defence of a superior order. The onus of proving that the orders were not manifestly illegal fell to the defendant. The principles in Smith’s case and in DFDA s.14, to the extent that they are based on the possibility of a defence

91 See generally Fairall and O’Connor Criminal defences, Butterworths, Sydney, 3rd Ed.
92 (1886) 176 ER 781.
93 (1900) 17 SC 561.
94 Smith (1900) 17 SC 561 at p 568.
95 Smith (1900) 17 SC 561 at p 566.
96 Smith (1900) 17 SC 561 at p 567.
97 [1903] High Court of the Orange River Colony 1.
arising from an error of law, do not sit comfortably with the cases in which it has been stated *ignorantia juris nemenem excusat* (ignorance of the law is no excuse).  

8.144 The onus of causing the defence of superior orders rests on the defendant, but it is only an evidential onus. If the evidential onus is satisfied, the prosecution must then prove that the relevant elements in s.14 of the DFDA do not apply, such proof to be beyond reasonable doubt.

8.145 Academic commentary has suggested that the defence of superior orders may be relevant as a collateral matter in certain property offences. Since a claim of right may be based on mistake or ignorance, the theory is that since it is necessary to prove theft to negative a claim of right, there may be circumstances in which a person acting under superior orders may believe it is his right to do what would otherwise be theft.

**INTERVENING CONDUCT OR EVENT**

8.146 Section 10.1 of the Criminal Code provides for the defence of intervening conduct or event.

"10.1Intervening conduct or event

(1) A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:

(a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and

(b) the person could not reasonably be expected to guard against the bringing about of the physical element."

8.147 The defence of intervening conduct or event is limited in its application to physical elements of offences for which strict or absolute liability is imposed. Although the prosecution is not required to prove fault with respect to the physical element of the offence in question, criminal responsibility is not incurred if that element resulted from other conduct of another person or an event over which the defendant could not be expected to exert control. The Criminal Code follows the common law formulation of the offence as set out in the judgement of Bray CJ in *Mayer v Marchant*:  

"It is a defence to any criminal charge to show that the forbidden conduct occurred as a result of an act of a stranger, or as the result of non-human activity, over which the defendant had no control and against which he or she could not reasonably have been expected to guard."

8.148 This defence can be utilised when any physical element of an offence – an act, omission, state of affairs, circumstance or result of conduct – is caused by or as a result of an external event or conduct of another. It is quite clear that the requisite *intervening* event or conduct was not meant to confine the use of the defence to conduct or acts which “come between” the conduct of the defendant and other physical elements of the offence. It can also be founded upon the failure to take expected action by a third party.

**SUDDEN OR EXTRAORDINARY EMERGENCY**

8.149 Section 10.3 of the Criminal Code provides for the defence of sudden or extraordinary emergency:

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98 See generally Fairall and O’Connor Criminal defences, Butterworths, Sydney, 3rd Ed.

99 (1973) 5 SASR 567.
“10.3 Sudden or extraordinary emergency

(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.

(2) This section applies if and only if the person carrying out the conduct reasonably believes that:

(a) circumstances of sudden or extraordinary emergency exist; and

committing the offence is the only reasonable way to deal with the emergency; and

the conduct is a reasonable response to the emergency.”

8.150 The defence of sudden and extraordinary emergency applies if, and only if, the person carrying out the conduct reasonably believes that circumstances of sudden or extraordinary emergency exist and committing the offence is the only reasonable way to deal with the emergency and the conduct is a reasonable response to the emergency.

8.151 This section is similar to s.25 of the Queensland Criminal Code and is broader than the common law defence of necessity which formerly applied under the DFDA. Section 25 of the Queensland Criminal Code provides:

“Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise.”

8.152 Like the defence of duress, the circumstance of emergency and the response to the circumstance are both subject to an objective test. There are three objective criteria, each of which applies the concept of reasonableness as a limit on the defence. They are that:

a. The emergency must be real or could be reasonably believed to be real;

b. The commission of the offence was the only reasonable way to deal with the emergency; and

c. The defendant’s response to the emergency was reasonable in consideration of all the circumstances.

8.153 A sudden emergency is one which is unexpected. This has been held to include loud noise at the back of a car while it is being driven, being told that horses have escaped onto a public road which is causing a danger to cars driving by and being chased by another car. An extraordinary emergency, it has been suggested, may not entail suddenness or unexpectedness. Bronitt and McSherry suggest the emergency may extend over a period of time such as living in a war zone, or being adrift in the high seas.

8.154 The defence would cover situations such as a fire in a barracks room. A soldier who broke a window in order to escape the fire would not be liable for the damage to the window, due to the fact that breaking the window was done as a response to a sudden or extraordinary emergency.

100 Bronitt and McSherry op cit at 330. See generally the section in Bronitt and McSherry’s work on this area of the law.

101 McHenry v Stewart (unreported) Court of Appeal of Western Australia, 14 December 1976.


8.155 The traditional view was that the defence of necessity (the common law equivalent of sudden and extraordinary emergency) did not extend so as to permit the taking of a human life. That view may no longer be good law since the cases concerning the separation of conjoined twins. Whatever the view of the common law, there are no restrictions on the taking of human life implied into the defence of sudden and extraordinary emergency.

8.156 The defence may be combined with the defence of mistake of fact. So, in R v Warner, where the defendant mistakenly believed he was being pursued by someone of whom he was scared, the Court of Criminal Appeal held that the defence of sudden or extraordinary emergency, combined with the defence of mistake of fact should have been left to the jury.

8.157 Although sudden or extraordinary emergency is colloquially referred to as a defence, it is clear that the prosecution bears the burden of disproving, beyond reasonable doubt, that the sudden or extraordinary emergency was relevant, once the defendant has discharged the evidential onus.

SECTION 4 – DEFENCES TO ASSAULT BASED CHARGES

Consent

8.158 The absence of consent is usually a matter to be proved by the prosecution in a charge of assault or sexual assault and it may be relevant to some other offences as opposed to being a “defence” to a criminal offence. Notwithstanding this, the general rule is that if the victim consents to the application of force, it is not an assault. However, a person cannot consent to an assault that is likely or intended to cause actual bodily harm, unless the act falls within a recognised lawful exception such as surgery, tattooing, ear-piercing or violent sports. Although this position is clearly established at common law, the same is not true for the Code states. The position has been taken that, absent a specific provision of the Code, which states that a person may not consent to bodily harm, no common law presumption to this effect should be imported. In the case of sport, consent would be implied to contact that was authorised by the rules of the game, but not contact that was not authorised (much less prohibited) by the rules. There is also implied consent to the ordinary physical contact of everyday life or physical contact between two persons as part of normal social interaction.

8.159 For assaults that are not intended to cause actual bodily harm, or harm other than of a merely transient kind, proof of non-consent by the victim is one of the physical elements of the offence. It is also necessary to prove, as one of the fault elements of the offence, that the defendant either knew, or was reckless as to, the victim’s non-consent. Consent cannot be validly obtained by threats, force or fraud. Submission does not equal consent.

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106 Assault has not been defined in the Criminal Code, so the common law still applies to the various assault-based offences in the DFDA.
107 Consent is irrelevant in some sexual offences such as incest, indecent assault of a child etc.
108 Such as theft – DFDA s.47E(1).
109 R v Brown [1994] AC 212. It follows that in cases of serious assault not falling within a recognised exception, the absence of consent is not an element of the actus reus.
110 Pallante v Stadiums Pty Ltd (No 1) [1976] VR 331; Williams v Wills (1977) 74 LSJS 450.

PROVISIONAL AS AT SEP 07 - PENDING FINAL PUBLICATION
SELF-DEFENCE

8.160 The law relating to self-defence, as it existed under the common law, has been replaced by the Criminal Code. An understanding of the previous law will be of benefit in construing the Code provisions.

8.161 Prior to the commencement of the Code, the principles of self-defence applicable to DFDA offences were the same as those applying to offences under the common law. The law was stated by the High Court in Zecevic112 to be whether the defendant believed, upon reasonable grounds, that it was necessary in self-defence to do what he did.113

8.162 If the defendant had the required belief and there were reasonable grounds for it, or if the Service tribunal is left in a reasonable doubt about either element, then the defendant is entitled to an acquittal. In other words, the prosecution must exclude, as a reasonable possibility, that the defendant held the belief or that there were reasonable grounds for it.114

8.163 The test has two elements. The subjective element is the belief of the defendant that it was necessary to do what he or she did. The objective element (which also has a subjective component) is that there were reasonable grounds for the defendant to have the belief. The Zecevic test represented a change in the common law. In particular, self-defence was not confined to an unlawful attack and it no longer applied as a partial defence to murder (in cases of excessive force).

Criminal Code Section 10.4

8.164 The principles of law relating to self-defence are now contained in the Criminal Code. The main provision is s.10.4:

“10.4 Self-defence

(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:

(a) to defend himself or herself or another person; or
to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
to protect property from unlawful appropriation, destruction, damage or interference; or
to prevent criminal trespass to any land or premises; or
to remove from any land or premises a person who is committing criminal trespass;

and the conduct is a reasonable response in the circumstances as he or she perceives them.


113 162 CLR at p. 661.

(3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:

(a) to protect property; or

(b) to prevent criminal trespass; or

(c) to remove a person who is committing criminal trespass.

(4) This section does not apply if:

(a) the person is responding to lawful conduct; and

(b) he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

**Criminal Code Section 10.4(1)**

8.165 Section 10.4(1) provides that a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence. Conduct is defined in s.4.1 as "an act, an omission to perform an act or a state of affairs". It is unlikely that an omission or state of affairs could be the relevant conduct for self-defence, having regard to s.4.3.

**Criminal Code Section 10.4(2)**

8.166 Section 10.4(2) provides "if and only if he or she believes the conduct is necessary". This is the subjective element corresponding to the common law test as expounded in *Zecevic*. Thereafter a number of situations are set out. Paragraph (a) is the most common situation; the application of force by the defendant "to defend himself". Note that no minimum level of offensive threat or violence is stipulated, although the conduct must be a 'reasonable response' to the offensive threat or violence.

8.167 The other requirement is that "the conduct is a reasonable response in the circumstances as he or she perceives them". This is the objective element corresponding to the common law test in *Zecevic*.

8.168 Section 10.4(2)(c) applies self-defence to the protection of property. It is not clear that self-defence applied to the protection of property at common law.115

**Criminal Code Section 10.4(3)**

8.169 Section 10.4(3) exempts self-defence from cases of death or serious injury in respect of property offences. To ensure that the section did not apply to an accident, the word "intentional" was added. The need to do so is not apparent. If the defendant caused death or serious harm by accident, he would lack the fault element. "Really serious injury" was deliberately not defined. It is intended for it to be interpreted as equivalent to grievous bodily harm. Note that serious harm is defined in the dictionary.

**Criminal Code Section 10.4(4)**

8.170 Section 10.4(4) removes self-defence if the sub-section is satisfied. Lawfulness is used here in the sense of authorised or justified by law, not conduct for which an attacker may not be legally responsible, such as the acts of a child or lunatic. The intention is clear enough, namely that the defendant could not rely on self-defence if he was resisting a wrongful (but lawful) arrest, even when he knew he was innocent (and had been arrested by mistake).

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It is important to keep in mind that self-defence only becomes an issue if the elements of the offence have been proved. If the Service tribunal is not satisfied of that, there is no need to consider self-defence.

In the context of criminal proceedings, the defence can be used in at least three senses. First, as a means of raising a reasonable doubt as to an element of the offence (physical or fault). Secondly, as an excuse which absolves the defendant from criminal responsibility, not because the elements of the offence have not been proved, but because the excuse has not been disproved by the prosecution. Thirdly, it may refer to an affirmative defence whereby the defendant must prove, on the balance of probabilities, the existence of certain facts. If these facts are proved, then the defendant is absolved of criminal responsibility. Self-defence falls within the second category. An example of the third category is DFDA s.29(3).

Disproving self-defence, in a case where self-defence arises because the evidential burden is satisfied, becomes an additional task of the prosecution to prove beyond reasonable doubt that:

- the defendant did not believe the conduct was necessary; or
- the conduct was not a reasonable response in the circumstances as he or she perceived them; or
- the defendant was responding to lawful conduct and he or she knew it.

Burden of Proof

Section 13.3 of the Criminal Code imposes an evidential burden on the defendant in respect of self-defence. Note that self-defence may still be an issue although it is not relied upon by the defendant (even if it is expressly disavowed); s.13.3(4). For example, suppose there is a fight in the mess during which the victim is injured, allegedly by the defendant. The defendant may be arguing mistaken identity – that the prosecution evidence is insufficient to prove that the defendant was the offender. If in the course of the prosecution case evidence is called that is sufficient to make self-defence an issue, then the Service tribunal must consider whether the prosecution has disproved self-defence, even where the defence case is directed to raising a doubt about identity, rather than self-defence.

Relevant Act

The question is not whether the defendant genuinely and reasonably held a belief that he or she had to defend himself somehow. One must look at the act which constitutes the offence and pose the subjective and objective questions in respect of that act.

Proportionality

Proportionality is primarily determined by applying the objective element. A great disproportion between the conduct and the threat is evidence that the conduct was not a reasonable response. Disproportion may also cast doubt upon whether the defendant actually believed that the use of such force was necessary.

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117 Which is evidence that suggests as a reasonable possibility that the defendant was acting in self-defence – s.13.4(6).

Objective Element

8.177 The objective element has a subjective component based upon the circumstances “as he or she perceives them”. Note that this is not the same as a reasonable person in the same situation as the defendant.\(^\text{119}\)

Perception

8.178 Perception can be affected by, inter alia, fatigue, alcohol or drugs,\(^\text{120}\) illness, previous beliefs,\(^\text{121}\) even lighting conditions. An unresolved question is whether the subjective perception extends to delusions.\(^\text{122}\) It has been argued that a delusion is not based upon the actual circumstances and therefore perception must be limited to an appreciation, however distorted or mistaken, of an action that in fact occurred.\(^\text{123}\)

Intoxication and Self-defence

8.179 Section 8.2(1) of the Code removes self-induced intoxication from consideration in the determination of a fault element.\(^\text{124}\) But as self-defence is separate from that question, and only arises if the elements of the offence have been proven, the section has no direct bearing on the application of self-defence to an intoxicated defendant.

8.180 How self-defence is affected by s.8.4 is a matter of interpretation. Under s.8.4(1)\(^\text{125}\) intoxication may be considered in determining whether, as part of a defence, an actual belief existed. However, s.8.4(4)\(^\text{126}\) removes self-induced intoxication from consideration in the determination of whether that belief existed if the offence is one of basic intent (as defined).

8.181 The removal of intoxication from consideration in respect of the elements of an offence of basic intent is the subject of several sections of the Criminal Code. It may have been intended to make the law correspond with the position in the United Kingdom, as stated in DPP v Majewski.\(^\text{127}\) It is yet to be determined whether the provisions on intoxication have that effect.

8.182 Section 8.4(4) raises questions on interpretation, such as the meaning of “defence”. It is not clear if it means all three senses as stated above, or just the first meaning.

8.183 In addition to the prima facie conflict between sections 8.4(1) and 8.4(4), there are other conflicts. It is apparent that Parliament did not intend to exclude all defences which may be based

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\(^{120}\) See R v Conlon (1993) 69 A Crim R 92.

\(^{121}\) Such as what the defendant had been told about the physical prowess or aggressive disposition of the victim; R v Masters (1986) 24 A Crim R 65.

\(^{122}\) A delusion was held to be relevant to self-defence in R v Walsh (1991) 60 A Crim R 419 in respect of a provision in similar terms to s.10.4.

\(^{123}\) R v Kurtic (1996) 85 A Crim R 57 at p. 64.

\(^{124}\) Criminal Code s.8.2(1) provides – “Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed”.

\(^{125}\) Criminal Code s.8.4(1) provides – “If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed”.

\(^{126}\) Criminal Code s.8.4(4) provides – “If in relation to an offence: (a) each physical element has a fault element of basic intent; and (b) any part of a defence is based on actual knowledge or belief; evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.

upon the belief of an intoxicated defendant, having regard to s.8.2(4). Without some restriction, s.8.4(4) would conflict with s.8.2(4), which permits consideration of intoxication in determining a defendant’s (mistaken) belief, even in respect of offences of basic intent. The scope of s.8.4(4) is made more uncertain having regard to s.8.2(3). It is easy to think of examples of accidental contact by an intoxicated defendant. See the commentary on intoxication for further guidance.

Mental Impairment

8.184 The mental impairment provisions may exclude self-defence based upon a delusion. If s.7.3(7) of the Criminal Code applies, all other defences are excluded. It depends upon the delusion being within the definition of mental impairment (ie mental illness). If the delusion does fall within the definition, then the Service tribunal must return a special verdict of not guilty because of mental impairment. Ordinarily a delusion, caused by an external factor such as alcohol or drugs, would not fall within the definition.

Proximity of Danger

8.185 There is no requirement that the threat is imminent or that the attack has commenced. Therefore pre-emptive force is not excluded. However, if the attack is not imminent, it will be easier for the prosecution to prove that the defendant lacked the subjective belief or that his conduct was not a reasonable response.

Retreat

8.186 There is no requirement that the defendant retreat. The failure to do so is a fact to be taken into account in assessing whether the prosecution have negatived self-defence.

Provoked Assaults

8.187 The section could apply to a defendant even if he or she initiated the attack. For example, suppose there is a dispute in a mess where the defendant wrongfully punches the victim. The victim then reaches for a breadknife and lunges at the defendant. The sudden use of deadly force may well make self-defence an issue if the defendant further injures the victim.

8.188 However, it will be a rare case where a defendant can rely upon self-defence to an attack he or she provoked.

“A person may not create a continuing situation of emergency and provoke a lawful attack upon himself and yet claim upon reasonable grounds the right to defend himself against attack.”

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128 Criminal Code s.8.2(4) provides – “This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed”.

129 Criminal Code s.8.2(3) provides – “This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental”.

130 Criminal Code s.7.3(7) provides – “If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence”.

Mixed Motives

8.189 At common law it is not necessary that self-defence be the sole state of mind of the defendant.\(^{132}\) He or she could be partly motivated by malice, but still be acquitted through the prosecution failing to disprove self-defence. The position under the Criminal Code is not clear.\(^{133}\)

Necessity

8.190 A person defending himself from a threatened attack who has to react instantly to imminent danger cannot be expected to weigh precisely the exact measure of defensive action which is required.\(^{134}\)

Provocation and Excessive Self-defence

8.191 Provocation and excessive self-defence are common law doctrines that could, in certain circumstances, reduce the criminal liability of a defendant from murder to manslaughter. Neither doctrine has been included in the Criminal Code and therefore neither is now applicable to the DFDA.

SECTION 5 – EXTENSION OF CRIMINAL RESPONSIBILITY

8.192 Part 2.4, Division 11 of the Criminal Code provides for a range of circumstances where a defendant may be deemed to have committed an offence, or may have committed a special type of offence (an ancillary offence),\(^{135}\) in circumstances where the defendant has not otherwise committed one of the substantive offences in the DFDA.

8.193 In accordance with s.3(13) of the DFDA, sections 11.1, 11.4 and 11.5 of the Criminal Code, and s.6 of the Crimes Act (1914) are incorporated into the DFDA as ancillary offences. The definition of ‘service offence’ under s.3 of the DFDA includes ancillary offences as defined, and the operation of these provisions is such as to create separate offences under the DFDA with their own penalty provisions. In a practical sense then, though a defendant is charged with, for example, s.11.4 of the Criminal Code and s.47C of the DFDA – incitement to commit theft, they are convicted on s.11.1 of the Criminal Code, as incorporated by s.61 of the DFDA, and punished in accordance with the provisions in s.11.1 of the Criminal Code.

8.194 In addition, sections 11.2 and 11.3 of the Criminal Code operate in such a manner as impute the actions of another person as though the defendant were acting as that third person committing the conduct. Therefore, a member who aids a third person to commit a theft may be charged under s.11.2 of the Criminal Code and s.47C of the DFDA – aiding the theft of property, and if the elements of s.11.2 are made out then they are deemed to have personally committed a s.47C offence and would then be convicted on s.47C and punished in accordance with the provisions in s.47C of the DFDA. This would not be charged as a DFDA s.61 offence.


\(^{133}\) Note that s.10.4(2) states “if and only if”. These words were not in the original draft. This raises the question of whether the words “if and only if” mean that if a defendant has mixed motives self-defence is inapplicable. See the dictionary definition of “only”. Another interpretation is that the words “and only if” reinforce “if” to make it abundantly clear that para’s (2)(a)-(e) are the only circumstances in which self-defence may apply.

\(^{134}\) \textit{Palmer} [1971] AC 814 at 831-832; \textit{Zecevic} at 662-663.

\(^{135}\) See s.3(13) of the DFDA.
Section 11.1(1) of the Criminal Code provides, in part, that:

"11.1 Attempt

(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and punishable as if the offence attempted has been committed."

Attempt is not defined in the Criminal Code. An attempt to commit an offence occurs when an offender intends to, and takes steps, to a sufficient degree to commit an offence but does not, for whatever reason, manage to complete the commission of the offence. The mere intention to commit a crime does not constitute an attempt.

In the case of *R v Donnelly* Turner J outlined the types of cases, which may fall for consideration as attempts to commit offences. He said:

"He who sets out to commit a crime may in the event fall short of the complete commission of that crime for any one of a number of reasons.

First, he may of course simply change his mind before committing any acts sufficiently overt to amount to an attempt.

Second, he may change his mind but too late to deny that he got as far as an attempt.

Third, he may be prevented by some outside agency from doing some act necessary to complete the commission of the crime – as when a police officer interrupts him while he is endeavouring to force the window open, but before he has broken into the premises.

Fourth, he may suffer no such outside interference, but may fail to complete the commission of the crime through ineptitude, inefficiency or insufficient means. The jemmy which he has brought with him may not be strong enough to force the window open.

Fifth, he may find that what he is proposing to do is after all impossible – not because of insufficiency of means, but because it is for some reason physically not possible, whatever means be adopted. He who walks into a room intending to steal, say, a specific diamond ring, and finds that the ring is no longer there but has been removed by the owner to the bank, is thus prevented from committing the crime which he intended and which, but for the supervening physical impossibility imposed by events he would have committed.

Sixth, he may without interruption do every act which he set out to do but may be saved from criminal liability by the fact that what he has done, contrary to his own belief at that time, does not after all amount in law to a crime."

The scenarios outlined by Turner J were later considered by Lord Hailsham in *Haughton v Smith*. Regarding those six types of cases, Lord Hailsham held that there was no criminal attempt in the first case, that there was in the second, and assuming that the proximity test had been passed, there was a criminal attempt in the third case. Lord Hailsham held likewise in the fourth case that assuming the proximity test had been passed, a criminal attempt had been committed.

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136 Acts must be more than preparatory, this is discussed later.


139 *Haughton v Smith* [1973] 3 All E.R. 1109 at p. 1115.

PROVISIONAL AS AT SEP 07 - PENDING FINAL PUBLICATION
The fifth case is now dealt with pursuant to s.11.1(4) of the Criminal Code, which states that:

“11.1 Attempt

(4) A person may be found guilty even if:

(a) committing the offence is impossible; or

(b) the person actually committed the offence attempted.”

The ineptitude or adoption of insufficient means by the defendant to fulfil the attempted offence will not prevent a conviction for attempt. In *R v Collingridge* 140, it was open to find the defendant guilty of attempted murder where he threw a live wire into the bath when the current in the wire was too weak to harm the person in the bath.

In relation to the sixth type of case, Turner J found that there could not be a criminal attempt to commit an act, which if completed would not have amounted to a crime. This proposition is reflected in the opening words of s.11.1(1) of the Criminal Code, which refers to a person attempting to commit an offence. This means an attempt to commit an offence at law. Accordingly, a person cannot be convicted of an offence of attempted unlawful entry if he were caught by a passer-by trying to break into a house, if the house belonged to the person who was trying to break in because he or she had lost his or her keys, or, even more unusually, did not realise it was their own house.

A person may be found guilty of attempting to commit an offence even if the offence was actually committed.141 The charging of an offence of attempt, rather than the substantive offence, should not be done to try and make the prosecution case easier. Such a course is only justified when there is a real reason to doubt that the central offence has been committed.

Pursuant to Criminal Code s.11.1(6) any defences, limitations or qualifying provisions that apply to the offence attempted also apply to the offence of attempting to commit that offence. Likewise, pursuant to Criminal Code s.11.1(6A), any special liability provisions that apply to an offence also apply to the offence of attempting to commit that offence.142 If the offence attempted has any “special liability provisions”, then those provisions apply to the offence of attempting to commit the offence.143 Special liability provisions are the provisions that provide for absolute liability to one or more (but not all) of the physical elements of the offence, or provide that it is not necessary for the prosecution to prove that the defendant knew a particular thing or believed a particular thing to be found guilty of the offence.144 In other words, no greater proof is required against the person attempting the offence with special liability provisions, than is required to prove the commission of the offence.

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140 (1976) 16 SASR 117.

141 See Criminal Code s.11.1(4)(b).

142 See Criminal Code s.11.1(3A).

143 See Criminal Code s.11.1(6A).

144 See Criminal Code Dictionary.
Preparatory Conduct

8.204 Sub-section 11.1(2) of the Criminal Code requires that:

11.1  Attempt

(2) For the person to be guilty, the person’s conduct must be more than merely preparatory to the commission of the offence. The question of whether the conduct is more than merely preparatory to the commission of the offence is one of fact.”

8.205 There have been a number of different tests postulated to ascertain if a person’s conduct has progressed to a stage where it can be said that it amounts to an attempt and not merely preparation. This question, which is one of degree, is to be decided by the trier of fact.

8.206 The obtaining of rope, stupefying drugs and a car with the intention of kidnapping a person and then doing nothing more is preparatory conduct. In *Hope v Brown*¹⁴⁵ the defendant was found not guilty of a charge relating to the over-pricing of meat. The defendant had prepared over-priced tickets with which he had intended to mark the meat. He then put the tickets in a draw in his butcher’s shop. This conduct was held to be preparatory and not sufficient to amount to an attempt.

8.207 Conversely, in *R v Williams; Ex Parte Minister for Justice and A-G*¹⁴⁶ it was held that the pinning down of a naked woman, striking her and touching her on the genital region whilst saying he was going to have her, was an attempted rape and not merely acts of preparation. This case canvassed a number of the proximity tests but failed to adopt one to the exclusion of others. Stable J¹⁴⁷ stated:

“The first step along the way of criminal intent is not necessarily sufficient and that final step is not necessarily required. The dividing line between preparation and attempt is to be found somewhere between the two extremes; but as to the method by which it is determined the authorities give no clear guidance.”¹⁴⁸

COMPLICITY AND COMMON PURPOSE

8.208 Section 11.2(1) of the Criminal Code provides that:

“11.2  Complicity and common purpose

(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.”

8.209 Accordingly, a defence member or defence civilian who aids, abets, counsels or procures another to commit an offence, is taken to have committed the offence and may be charged as if they committed it themselves and be tried by a Service tribunal.

8.210 An “accessory” is the generic term to describe anyone that aids, abets, counsels or procures another to commit an offence. The person who physically perpetrates the offence is called the principal.

8.211 Historically, the common law distinguished between two types of accessory, those who were present at the principle’s crime, who were said to “aid and abet”; and those who were not present, who

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¹⁴⁵ [1954] 1 WLR 250; 1 All E.R. 330 (CCA).
¹⁴⁶ [1965] Qd R 86.
¹⁴⁷ Approving a statement by Salmond J in *R v Baker*.
¹⁴⁸ [1965] Qd R at 102.
were said to “counsel and procure”. These distinctions are now obsolete and there is no distinction to be drawn between accessories that were present or absent.

8.212 The ordinary meaning of the word “aid” is to “give help, support or assistance” to the principal offender.\(^{149}\) Abet means to “incite, instigate or encourage”.\(^{150}\) The common law meaning of these words continue to have relevance in their interpretation under the Criminal Code.

8.213 A person is considered to be aiding and abetting, with the intention of helping the principal, if, for example, he or she stands outside a premises as a look-out (to warn the principal if anyone comes along); or if he or she provides the principal with the disguise and gun to rob the credit union on base; or if he or she waits around the corner of the credit union being robbed so as to help the principal escape. A further example of an accessory is a person who holds a victim from behind to assist the principal who is assaulting the victim.

8.214 The word “counsel” has been held to be the equivalent to instigates\(^{151}\) or to advise or solicit,\(^{152}\) whilst “To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.”\(^{153}\)

8.215 To constitute aiding and abetting, some assistance or encouragement must be given and the defendant must intend that assistance or encouragement in the sense that he or she knows that what he or she is doing will have a tendency to assist or encourage the acts which constitute or result in the crime. Inactivity may sometimes constitute encouragement, particularly when a person refrains from exercising a right he or she has to intervene. His or her passivity may then constitute a positive encouragement to another to continue in some unlawful activity. This is clearly relevant when a superior officer refrains from intervening and the junior members are aware that the superior officer is aware of their conduct.

8.216 For a person to be guilty as an accessory under s.11.2, the principal whom he or she aided, abetted, counselled or procured to commit the offence must have actually committed the offence. Further, it must be shown that the actions of the accessory did in fact aid, abet, counsel or procure the principal to commit the offence.\(^{154}\)

8.217 A person is not guilty of being an accessory if, before the offence was committed, he or she terminated his or her involvement in assisting the principal and took all reasonable steps to prevent the commission of the offence.\(^{155}\) What will count as taking all reasonable steps will vary according to the case but examples might be discouraging the principal offender, alerting the proposed victim, withdrawing goods necessary for committing the offence (for example the get-away car) and/or giving timely warning to the police.\(^{156}\)

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\(^{149}\) R v Giorgi and Romeo 7 A Crim R 305.

\(^{150}\) Supra per Zelling J at p. 316.

\(^{151}\) R v Baker (1909) 28 NZLR 536.

\(^{152}\) R v Calhaem [1985] QB 808.


\(^{154}\) See Criminal Code s.11.2(2).

\(^{155}\) See Criminal Code s.11.2(4).


PROVISIONAL AS AT SEP 07 - PENDING FINAL PUBLICATION
Fault Element

8.218 Sub-section 11.2(3) of the Criminal Code provides that:

“11.2 Complicity and common purpose

(3) For the person to be guilty, the person must have intended that:

(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.”

8.219 It must be shown in s.11.2(3)(a) that the defendant knew that the principal had in his or her mind the commission of an offence, and that he or she intended and knew that his or her conduct would encourage or assist the principal in carrying out the offence. Recklessness will not suffice as a fault element in this subsection.

8.220 In s.11.2(3)(b) the fault element of recklessness is applicable in cases where the principal commits an offence, being one which the defendant did not intend the principal to commit. What must be shown is that the defendant knew and intended his or her conduct to assist the principal in the commission of an offence and that he or she was reckless as to what offence the principal would commit. That is, he or she was aware (having regard to the circumstances known to him or her) of the substantial risk that an offence other than the one he or she intended would be committed and he or she nevertheless, took an unjustifiable risk and assisted the principal. Thus, a person who aids another to commit an armed robbery will also be guilty of murder if the other person commits murder and the first person had foreseen a substantial risk of that occurring, and it was unjustifiable to take that risk.

8.221 If the offence, which the defendant aids, abets, counsels or procures another to commit, has any “special liability provisions”, those provisions will apply to the offence of aiding and abetting, counselling or procuring that offence. Special liability provisions were discussed earlier in this chapter. They apply absolute liability to one or more (but not all) of the physical elements of the offence, or provide that it is not necessary for the prosecution to prove that the defendant knew a particular thing or believed a particular thing to be found guilty of the offence. Once again, this provision of the Criminal Code appears to have a purpose of ensuring that proof of the ancillary offence is not any more difficult to prove than the principal offence.

Innocent Agency

8.222 Section 11.3 of the Criminal Code provides:

157 Other than in cases where the defendant is instigating the commission of a crime.

158 See Criminal Code s.11.296).

159 See the Dictionary in the Criminal Code definition of “special liability provision”.
“11.3 Innocent agency

A person who:

(a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and

(b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;

is taken to have committed that offence and is punishable accordingly.”

8.223 This section attaches liability to a procurer\(^{160}\) who instigates, encourages or assists another to perpetrate acts which constitutes a crime in circumstances where the person physically carrying out the acts does not attract liability. For example, it may be that the second mentioned person lacks the relevant fault element to be guilty of the offence. In this situation the procurer is not an accessory, as the second person had not committed the crime in the capacity of the principal.\(^{161}\) The procurer is not the principal either, because he or she did not physically perpetrate the acts constituting the offence.

8.224 In this scenario, the common law doctrine of innocent agency treats the person procured (the innocent agent) to commit the offence as the mere instrument, albeit a human one of the procurer’s will. The doctrine deems the procurer\(^{162}\) to be the principal in the commission of the offence. This common law doctrine is now reflected in s.11.3 of the Criminal Code. For example, if the procurer successfully encourages another to take a bag containing heroin on an international trip, the person who takes the bag without knowing that it contains heroin, commits the physical element of importation of a prohibited drug. He cannot be guilty of the offence, as he does not know that the bag contains heroin. The procurer who urged the innocent agent to take the bag is taken to have committed that offence and is punishable accordingly.

**Incitement**

8.225 Sub-section 11.4(1) of the Criminal Code provides:

“11.4 Incitement

(1) A person who urges the commission of an offence is guilty of the offence of incitement.”

8.226 This offence is designed to deter people from committing acts, which have the potential to cause or encourage another to commit a crime.

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\(^{160}\) See the definition of “procure” at paragraph 5.210.

\(^{161}\) Because he or she lacks the relevant knowledge or intention to commit the crime.

\(^{162}\) Provided that he or she possessed the necessary fault element.
8.227 The words “urges the commission of an offence” are not defined in the Criminal Code. The word “urges” covers a broad range of acts which include the proposing, encouraging, suggestion, persuasion or the spurring on of another, to commit an offence.  

8.228 The fault element requires the defendant to intend that the offence incited be committed, noting that special liability provisions may apply to the principal offence. Special liability provisions are the provisions that provide for absolute liability to one or more (but not all) of the physical elements of the offence, or provide that it is not necessary to prove that the defendant knew a particular thing or knew or believed a particular thing.

8.229 For example, to prove a charge of incitement in relation to DFDA s.44 – losing Service property, the prosecution must prove that the defendant urged a member not to take proper safeguards for the protection of the Service property with the intention that the person would lose that property. But, as absolute liability attaches to loss of property, the defendant need not have urged the person who ultimately took the Service property.

8.230 The penalties scheme for an offence of incitement is set out in s.11.4(5). Those penalties vary depending on the maximum penalty for the substantive offence. For example, if the maximum penalty for the incited offence is life imprisonment, the maximum punishment for incitement of that offence is 10 years imprisonment. If the offence is punishable by a term of imprisonment of less than 10 years, the maximum punishment for incitement of that offence is either 3 years imprisonment or the maximum term of imprisonment for the offence incited, which ever is the lesser. If imprisonment is not a penalty prescribed for the incited offence, the penalty for incitement of that offence is a fine not exceeding the maximum fine available for the offence incited.

Conspiracy

8.231 Conspiracy is an offence that is completed once two or more persons enter into an agreement to commit an offence with at least one party to the agreement intending that the offence will be committed, and at least one party to the agreement has committed an overt act pursuant to the agreement.

8.232 Section 11.5 of the Criminal Code provides that a person may be found guilty of conspiracy to commit an offence even if committing the offence is impossible or the only other party to the agreement is a body corporate. A person cannot be found guilty of an offence of conspiracy to commit an offence if all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with that acquittal, or the alleged conspirator is a person for whose benefit or protection the offence exists.

163 In many cases urging and counselling is s.11.2(1) overlap.
164 See Criminal Code s.11.4(2).
165 See Criminal Code s.11.4(4A).
166 See the Dictionary in the Criminal Code definition of “special liability provision”.
167 See Criminal Code s.11.4(5)(a).
168 See Criminal Code s.11.4(5)(d).
169 See Criminal Code s.11.4(5)(e).
170 See Criminal Code s.11.5(2).
171 See Criminal Code s.11.5(3).
172 See Criminal Code s.11.5(4).
8.233 The term “overt act” requires explanation. The overt act must be proved beyond a reasonable doubt, and it must relate directly to the conspiracy charged if it is to be admissible against a person or persons charged with a conspiracy. It is not to be confused with preparatory acts, discussed earlier in the section on attempts. Evidence of an overt act might be buying paint in connection with a car-stealing operation. It might also be found in a finding of guilt for another substantive offence, which was committed to put the conspiracy agreement into effect. Evidence of an overt act is also evidence that goes to proving the agreement that is said to constitute the conspiracy, because the overt act must be referable to the conspiracy. An example is when it is said that two or more persons have conspired to say, commit an armed robbery. That the fact that a person is found guilty of stealing a rifle may be evidence of an overt act in furtherance of the conspiracy to commit armed robbery. It may also only be evidence that the person is a thief, rather than a robber or conspirator. There must be reasonable evidence of pre-concert between the conspirators before that evidence would be admissible against one or all of them.173

8.234 Since the essence of conspiracy is the agreement to commit a crime, rather than just possessing a joint intention that a crime be committed, the offence continues for as long as the agreement exists.174 A conspirator can leave the conspiracy agreement, but must be shown to have taken all reasonable steps to prevent the commission of the offence that was the subject of the conspiracy if he is to avoid conviction.175 This would usually and logically include telling the relevant authorities of the agreement to commit the offence, if it could not otherwise be stopped, and there were no plausible reason not to tell the authorities.

8.235 As in the other ancillary offences, a person can commit an offence of conspiring to commit an offence that contains special liability provisions.176

8.236 Generally, conspiracy should not be charged where a substantive charge is available.177 In any event, proceedings for a conspiracy under the Criminal Code require the consent of the Director of Public Prosecutions.178

8.237 It is essential that the prosecution is able to particularise the words, actions or other evidence said to give rise to the conspiracy.179

Accessories after the Fact

8.238 DFDA s.3(13)(b) defines an ancillary offence as an offence against s.6 of the Crimes Act 1914. Section 6 of the Crimes Act 1914 provides:

“Any person who receives or assists another person, who is, to his knowledge, guilty of any offence against a law of the Commonwealth, in order to enable him to escape punishment or to dispose of the proceeds of the offence shall be guilty of an offence.”

173 Mai & Tran v R 60 A Crim R 49; Ahern v R (1988) 165 CLR 87 at 100; Tripodi v R (1961) 104 CLR 1 at 7.
175 See Criminal Code s.11.5(5).
176 See Criminal Code s.11.5(7A).
178 See Criminal Code s.11.5(8).
179 R v Mok (1987) 27 A Crim R 438, per Hunt J at 441.
8.239 An accessory after the fact assists not in the perpetration for the offence, but in helping the principal to escape apprehension or punishment. Examples include concealing evidence of the commission of a crime, such as removing evidence of counterfeiting or concealing homicide by burying the body; helping a thief to dispose of stolen goods by buying them or finding a buyer for them; changing engine numbers on a stolen car; giving clothes to or harbouring a fugitive; or misleading the police by supporting the principal's false alibi. In a Service context this may mean providing a hide out for and/or lying for a member so as to prevent the Service police from catching him or her for an offence against DFDA s.24.

8.240 For a defence member or defence civilian to be guilty of being an accessory after the fact, it must be shown that he or she knew that the principal had committed an offence and that he or she acted with the knowledge that his or her acts would assist the principal. Acts, which have the purpose to assist the principal are sufficient, even if they are not in fact successful.

8.241 The prosecution must show that the principal offence was in fact committed. It has been held that it is not sufficient to prove the commission of the offence through the tendering of a certificate of conviction or a confession or admission by the principal. Accordingly, the prosecution must call the Service police member who investigated the principal’s case to give evidence about the commission of the crime and the identity of the principal named in the certificate of conviction.

8.242 There can however be a conviction for an accessory after the fact even though the principal is not charged. This situation might arise where the principal has fled the jurisdiction or has died prior to a conviction being recorded against him.

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180 *R v Levy* [1972] 1 KB 158; 7 Cr App R 61.


184 Note also s.358AG of the *Crimes Act 1900*, creating an offence of harbouring, maintaining or employing another person, knowing the latter to have escaped from lawful custody or detention in respect of a law of the Territory, a State or another Territory.

185 *R v Kirkby* (1988) 105 A Crim R. A certificate of conviction will be *prima facie* evidence that the offence was committed.


CHAPTER 9

LAW OF EVIDENCE

STATUS

9.1 This content of this Chapter is being reconsidered (and this may result in it being redrafted). For present purposes, the previous Volume 1, Chapter 6 (with minor amendments) has been used.

SYNOPSIS

9.3 This chapter is based on the previous DLM Volume 1, Chapter 6 material. However, amendments have been made to focus the introductory remarks on the law of evidence applicable in AMC proceedings by virtue of the DFDA. Also, amendments have been made to describe the role of the Military Judge in making determinations in relation to the admissibility of evidence in AMC trials.
THE LAW OF EVIDENCE

The Nature of Evidence

9.2 The law of evidence consists of the rules and principles which govern the proof of the facts in issue at a trial. 'Facts in issue' are those which the prosecutor or accused must prove in order to be successful. What the facts in issue are in a given case is determined first by substantive rules of law, secondly by the charge and plea and, thirdly, by the manner in which the case is conducted.

9.3 The purpose of evidence led by the prosecution is to establish, to the required standard of proof, the elements of the offence. The purpose of evidence led by the accused is to disprove the truth of facts alleged by the prosecution, or to establish exculpatory facts or a defence to the charge.

9.4 The first part of the rules of evidence is concerned with relevance, namely, whether the evidentiary material could rationally affect the assessment of the probability of the existence a fact in issue. Evidence is relevant if it that tends to prove or disprove a matter in issue. Relevant evidence is admissible before the Australian Military Court, unless it is excluded by a specific rule or statute.

9.5 In addition to the test of relevance, there are specific technical rules of law which govern the admissibility of evidence. Not every piece of relevant evidence is necessarily admissible. Under these rules, evidence may be excluded because it is untrustworthy (for example, hearsay), or might operate unfairly against the accused (for example, prior convictions), or because a better class of evidence is available (for example, a rule which excludes oral evidence of the content of some written documents). In certain cases there are rules as to the quantity of evidence required (for example, corroboration in perjury and similar prosecutions). Evidence may also be excluded for reasons of public policy (for example, improperly or illegally obtained evidence).

RULES OF EVIDENCE: AUSTRALIAN MILITARY COURT PROCEEDINGS

9.6 Evidence Act 1995 (Cth). Under the Defence Force Discipline Act 1985 (DFDA) s 146(1), the rules of evidence in force in the Jervis Bay Territory, namely the rules of evidence applicable in proceedings before a court of the Australian Capital Territory, apply in relation to proceedings before the Australian Military Court as if it were a court of the Jervis Bay Territory and the proceedings were criminal proceedings in the Territory. Since 18 April 1995, the Evidence Act 1995 (Cth) (Evidence Act) has applied in relation to all proceedings in a court of the Australian Capital Territory.

9.7 Other applicable laws of evidence. The Evidence Act is not the only source of evidence law which applies in ACT court proceedings and, hence, in proceedings before the Australian Military Court. The Evidence Act is stated not to affect the operation of particular laws.

9.8 In circumstances where there is an absence of an applicable statutory provision, the common laws of evidence will apply. While, subject to those particular laws, the Act is a comprehensive statement of the law on the admissibility of evidence, it does not deal with every matter that may be regarded as a matter of evidence law.

9.9 The Evidence Act provides for a hierarchy of laws that apply in ACT court proceedings, and which will therefore apply in proceedings before a Australian Military Court, as follows:

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1 See Waight and Williams, Evidence Commentary and Materials, 4th edition, p1.
2 See Jervis Bay Territory Acceptance Act 1975, ss 4A and 4D.
3 Evidence Act 1995, ss 4(1).
4 See Evidence Act ss. 8 and 9.
5 And on some other areas, eg. the competence and compellability of persons as witnesses in proceedings: see Evidence Act s.12.
6 Evidence Act s 8
a. Provisions of the Evidence Act 1971 (ACT) (the ACT Evidence Act) prescribed by the Evidence Regulations (Cth), other Commonwealth Acts (except sections 68, 79 80 and 80A of the Judiciary Act 1903), the Corporations Law and the ASC Law, other ACT Acts, ACT Ordinances and any Imperial Act or State Act in force in the ACT and ACT or Commonwealth regulations in force on 18 April 1995 (but only for so long thereafter as they are not amended)

PREVAIL OVER

b. The Evidence Act 1995 (Cth)

PREVAILS OVER

c. To the extent of any inconsistency, provisions of the ACT Evidence Act that are not so prescribed, sections 68, 79 80 and 80A of the Judiciary Act 1903 (including the common law applied by those provisions), ACT or Commonwealth regulation made or amended since 18 April 1995, rules and any other instruments of a legislative character.

9.10 Thus, for example, in the event of any inconsistency between a provision of Part XA of the ACT Evidence Act, prescribed by r.4 of the Evidence Regulations, and the Evidence Act, the provisions of Part XA of the ACT Evidence Act prevail.

9.11 Further, nearly all Commonwealth Acts (for example, any provision of the DFDA) prevails, in the event of any inconsistency, over the Evidence Act.

9.12 Lastly, pursuant to regulation 29 of the Defence Force Discipline Regulations, Schedule 1 of those Regulations modifies provisions of the Evidence Ordinance (read: Act) 1971 ACT in its application to proceedings before Service tribunals – including the Australian Military Court.

9.13 Determination or ruling on evidence. In an AMC trial by military judge and military jury, the military judge must determine any question of admissibility of evidence. Any such ruling is binding on the military jury.

Scope of Evidence

9.14 The principal matters with which the rules of evidence are concerned may be classified as follows:

a. what must be proved;

b. by which side proof must be given (burden of proof);

c. to what standard proof must be given (standard of proof);

d. who may give evidence (competence and compellability of witnesses);

e. the form in which evidence may be given;

f. matters on which evidence is not required: formal admissions, judicial notice and presumptions;

\[7\] Other than ss. 76F(1), (3) and 76G(4) of that Act: see r.4(c) of the Evidence Regulations.

\[8\] DFDA ss 132C(1)

\[9\] DFDA ss 132C(4).
g. what questions need not be answered and what documents need not be produced (privilege of witnesses);

h. the principal rule concerning the admissibility of evidence – the relevance rule;

i. the hearsay rule and exceptions;

j. the admissibility of opinions as evidence;

k. character of the accused, character of other witnesses and the character of the victim;

l. identification evidence;

m. improperly or illegally obtained evidence;

n. discretionary exclusion of evidence;

o. the examination of witnesses; and

p. the quantity of evidence required in certain cases - corroboration.

PROVING AN OFFENCE

Establishing guilt / culpability

9.15 In AMC proceedings, as in all criminal proceedings, the prosecution must prove all the physical elements of the offence and, in relation to each physical element where a fault element is required, one such required fault element. Those physical and fault elements must be attributed to the accused person.

9.16 Whilst proof of the relevant physical and fault elements is necessary for a conviction, where an accused person successfully establishes a defence, exception, exemption, justification etc, it may not be sufficient. A detailed discussion of criminal liability concepts is provided in DLM Volume 2, Chapter 4.

Disproving allegations

9.17 Except where the burden of proof is on the accused or the accused makes a special plea he or she is not bound to adduce any evidence. He may seek simply to repudiate the prosecution case, by cross-examination of prosecution witnesses, by criticism of the weight of evidence and by submissions of law as to its validity.

9.18 If the accused does adduce evidence it must be relevant; that is, it must rationally effect (directly or indirectly) the assessment of the existence of a fact put in issue by his or her plea of 'not guilty' in the proceeding.

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11 See under burden of proof at paragraph 6.25.

12 eg. a previous acquittal or conviction; see DFDA s.144.

The Legal Burden of Proof - Prosecution

9.19 As discussed above, in a trial before the Australian Military Court, where an accused pleads not guilty, the prosecution must prove every element of an offence relevant to the accused's guilt.\(^{14}\) They must prove the existence of the matter or truth of the fact alleged.

9.20 Further, where the defence discharges their ‘evidential burden’ in relation to a matter raised by them, the prosecution bears the burden of disproving the matter.

Standard of Proof - Prosecution

9.21 The prosecution must discharge their legal burden of proof ‘beyond reasonable doubt’.\(^{15}\)

9.22 If, when a Australian Military Court has heard and considered the totality of the evidence, it is not satisfied beyond reasonable doubt as to the guilt of the accused he is entitled to be acquitted, for the prosecution will have failed to discharge its the burden.

9.23 If, at the close of its case, the prosecution has not adduced sufficient evidence from which the Australian Military Court could find beyond reasonable doubt the accused guilty of the offence with which he or she has been charged, the charge should be withdrawn from the tribunal which should be directed to return a verdict of not guilty.

Evidential Burden of Proof - Defence\(^{16}\)

9.24 In general, a defendant who disputes / denies criminal responsibility (relying on a provision in Part 2.3, other than s 7.3, of the Criminal Code) bears an evidential burden in relation to that matter. Likewise, where a defendant relies on an exception, exemption, excuse, qualification or justification provided by the law creating an offence, the defendant bears an evidential burden in relation to that matter.

9.25 An evidential burden is the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. The Evidence Act, ss141(2), provides that the court is to find the case of the defendant proved if it is satisfied that it is proved on the balance of probabilities.

9.26 It is a question of law whether an evidential burden has been discharged.

9.27 It is important to note also, that a law may impose on the defendant a legal burden of proof, and standard of beyond reasonable doubt where the law expressly specifies the burden in relation to a particular matter, or requires the defendant to prove the matter, or creates a presumption that a matter exists unless the contrary is proved.\(^{17}\)

Burden of Proof in Relation to Unsoundness of Mind and Diminished Responsibility and other Defences

9.28 Under DFDA s.12(3), the burden of proving unsoundness of mind or diminished responsibility is on the defence where it raises either issues. Under that provision, the defence also has the burden of proving any defences which are set out in the relevant statutory provision relating to the offence with which he or she has been charged.


\(^{15}\)Criminal Code Act 1995, Schedule – The Criminal Code, s 13.2; Evidence Act ss141(2).

\(^{16}\)Criminal Code, ss 13.3

\(^{17}\) Criminal Code, ss13.4 and 13.5
9.29 The burden of proof resting on the defence in such cases is lower than that which lies on the prosecution and is discharged by proof on the balance of probabilities.18

9.30 In trials by Australian Military Court the question of insanity is determined by majority vote. In the event of equality of votes on the question whether the accused was suffering from such unsoundness of mind as not to be responsible for his criminal acts, the Australian Military Court must find that the accused was suffering from such unsoundness of mind (DFDA s.133(5)).

Justification, Excuse, Proof or Alibi

9.31 There is no burden of proof imposed on an accused to establish an issue affording justification or excuse such as consent, accident, self-defence,19 duress, insanity, automatism or drunkenness. So also if provocation is raised as an issue in a trial for murder20 or if an accused puts forward an alibi as an answer to a charge.21

9.32 Where these issues are raised, the burden remains on the prosecution to prove beyond reasonable doubt that the accused is guilty of the charge alleged against him.

STANDARD OF PROOF

9.33 The usual way of describing the two standards of proof applicable to criminal proceedings is 'proof beyond reasonable doubt' and 'proof on the balance of probabilities'.

9.34 As noted earlier in relation to the burden of proof, the prosecution is bound to prove the guilt of the accused beyond reasonable doubt. However, where the accused raises an affirmative defence such as unsoundness of mind or diminished responsibility, he is required to give proof only on the 'balance of probabilities'. Many attempts have been made to define these two standards with greater particularity but these attempts have not generally been successful.

Proof Beyond Reasonable Doubt22

9.35 In the 1950s some English judges attempted to explain the meaning of the expression 'proof beyond reasonable doubt', but the High Court of Australia has expressed strong disapproval of their efforts and of the efforts of Australian courts who have made similar attempts. In Green v R23 Barwick C.J. said:

'A reasonable doubt is a doubt which the particular jury entertained in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances. It is that ability which is attributed to them which is one of the virtues of our mode of trial: to their task of deciding facts they bring to bear their experience and judgement.'

9.36 Because attempts to explain the term to juries (and to courts martial) have met with judicial disapproval, it is probably safe to say only that the words must be given their plain English meaning in the circumstances of the particular case.

9.37 It is also true to say that this standard of proof imposes a heavy onus on the prosecution which if not discharged will result in the acquittal of the accused. The presumption that an accused is

18 DFDA s.12(2); see also Evidence Act s.141(2).
19 See Plomp v R [1963] 110 CLR 234.
22 see also Evidence Act s.141(1) and 13.2 Criminal Code.
innocent of a charge applies in every case and can be rebutted only where the prosecution has proved its case to the high standard of being beyond reasonable doubt.

**Proof on Balance of Probabilities**

**9.38** Fewer problems have arisen in formulating a standard of proof which applies to the accused when he bears the burden of proof.

**9.39** However, the phrase ‘balance of probabilities’ does have its dangers. It may suggest that to satisfy the standard one need only introduce enough evidence to disturb a balanced set of scales. But in fact party A gives a little evidence and party B none, the balance may not necessarily be tipped in A’s favour. Party A’s evidence may be considered, in the light of other evidence, improbable; and failure to contradict an assertion does not necessarily make it credible.

**9.40** As one writer has said: ‘What is being weighed in the balance is not quantities of evidence but the probabilities arising from that evidence and all the circumstances of the case’.24

**Standard of Proof for Evidentiary Determinations**

**9.41** The standard of proof for findings of fact necessary for deciding whether evidence should be admitted or not admitted in a proceeding, and for deciding any other question arising under the Evidence Act, is set out in Evidence Act s.142 as follows:

‘Admissibility of evidence: standard of proof

142(1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding:

(a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or

(b) any other question under this Act;

have been proved if it is satisfied that they have been proved on the balance of probabilities.

(2) In determining whether it is so satisfied, the matters the court must take into account include:

(a) the importance of the evidence in the proceeding; and

(b) the gravity of the matters alleged in relation to the question.’

**9.42** Section 142 provides for a ‘variable’ standard of proof to apply to evidentiary determinations. In making findings of fact within the section, a tribunal is to find a fact proved if it is satisfied it has been proved on the balance of probabilities. In determining whether it is so satisfied, the tribunal must take into account ‘the importance of the evidence in the proceeding’ and ‘the gravity of the matters alleged’ in relation to the evidentiary determination.

**9.43** This ‘variable’ standard of proof enables a flexible standard of proof to apply so that in an appropriate case - for example, when it is alleged that the making of an admission has been influenced by a threat of violence - a higher standard of proof might apply than in relation to an evidentiary determination on some other issue in the proceeding.

**9.44** The evidentiary standard, however, in Evidence Act s.142 applies 'except as otherwise provided by the Act'. Some provisions in the Act provide their own evidentiary standard in relation to a finding of fact necessary for determining the admissibility of evidence.25
EVIDENCE FROM WITNESSES - COMPETENCE AND COMPELLABILITY

General

9.45 Evidence Act s 12 provides that, except as otherwise provided by the Act, every person is competent to give evidence, and a person who is competent to give evidence about a fact is compellable as a witness. Competence relates to a person’s ability to give evidence, whereas compellability relates to whether a person may be subject to being required to give evidence.

9.46 The Evidence Act provides a number of qualifications, exceptions and privileges that may mean that a person is not competent, or not compellable, or neither competent nor compellable.26

9.47 Grounds on which a witness may not be competent to give evidence about a fact are:

a. Lack of a person’s capacity
   (1) to understand a question about a fact;
   (2) to give a rational reply to a question;
   (3) to understand the requirement to give truthful evidence; or
   (4) where an incapacity, such as deafness or muteness, can not be overcome.

b. Status of the witness as;
   (1) a judge or juror; or
   (2) a defendant in a criminal trial.

9.48 Grounds on which a witness may not be compellable are:

a. Status of the witness as:
   (1) the sovereign, Governor General, Governor of a State, Administrator of a Territory, or foreign sovereign or Head of State;
   (2) a member of a House of an Australian Parliament; or
   (3) the spouse, de-facto spouse, parent or child of a defendant.

b. Where substantial cost or delay would be incurred in overcoming a person’s incapacity to hear, understand or reply to questions, and adequate evidence is available on the particular matter the person was due to address as a witness.


25 Examples include:
Evidence Act s.57, which enables a court to, among other things, find evidence relevant if its relevance depends upon the court making a finding and it is reasonably open to make that finding;
Evidence Act s.87, which enables a court to admit a representation of a person as an admission of a party if it is reasonably open to find that the representation was made in one of a number of stated circumstances.
In the case of each of these provisions, the Australian Military Court must nevertheless determine in the course of the proceeding whether or not to accept evidence admitted under the lower ‘reasonably open to find’ standard.

26 Evidence Act 1995 (Cth), s 13 – s 19.
There are specific rules, presumptions, discretions or limitations, and procedures that apply to each of the above exceptions to the general presumption of competence and compellability. Some of these rules etc are discussed in more detail below.

### Competence

**9.50** Competence to give either sworn or unsworn evidence is presumed, until the contrary is proved.\(^{27}\)

**9.51** It is noteworthy that the words of Evidence Act s 12 allow a court to decide that a person is competent to give evidence about particular facts, but not others.\(^{28}\) Also, the issue of competence to give sworn evidence may be overcome where a person is permitted to give unsworn evidence.

**9.52** Where a witness is competent to give evidence about certain facts, but not others, that witness may be compelled to give such evidence, subject to the limitations mentioned above at 6.49, and the potential to overcome certain incapacities where compellability of certain persons.

**9.53** **Persons suffering an incapacity – mental or physical.** A person is not competent to give sworn evidence if he or she is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence, see Evidence Act s 13(1).

**9.54** A person is not competent to give either sworn or unsworn evidence about a fact if he or she is incapable of giving a rational reply to a question about the fact, see Evidence Act s 13(3). A young child may, for example, be not competent to give evidence about a fact about which he or she can only be asked abstract or inferential questions. The child may, however, in those circumstances, remain competent to give evidence about which he or she can be asked a single factual question.\(^{29}\)

**9.55** Evidence Act sections 13(4) and 14 provide exceptions for a person who is physically incompetent. A person is not competent to give evidence about a fact if he or she is incapable of hearing or understanding, or of communicating a reply to, a question about the fact and the incapacity cannot be overcome. Pursuant to Evidence Act s 14, if the incapacity can be overcome, but only with substantial cost or delay, the person is not compellable to give evidence on a particular matter where adequate evidence has been or will be given on that matter.

**9.56** **Unsworn evidence.** A person who is not competent to give sworn evidence under the Evidence Act s.13(1) may be competent to give unsworn evidence in certain situations. Under the Evidence Act s.13(2) such a person may be competent to give unsworn evidence if the Australian Military Court is satisfied the person understands the difference between the truth and a lie, the tribunal tells the person it is important to tell the truth and the person indicates, by responding appropriately when asked, that he or she will not tell lies in proceedings.

**9.57** **The Defendant / Accused.** An accused is not competent to give evidence as a witness for the prosecution.\(^{30}\) However, an accused is competent to give evidence in his or her defence. In a trial before the Australian Military Court, the accused may elect to give evidence in his or her own defence, or remain silent.

**9.58** **Military Judge, members of Military Jury.** The Military Judge and, where relevant, members of the Military Jury, are not competent to give evidence in the proceedings of the Australian Military Court in which they are so acting. However, a member of the military jury is competent to give evidence about matters affecting the conduct of the proceeding – such as the application of the laws

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\(^{27}\)Evidence Act s.13(5).

\(^{28}\) Odgers, *Uniform Evidence Law*, 5\(^{th}\) Ed, 1.2.40, p 34.

\(^{29}\) See extract from Evidence Act 1995 reproduced in DLM Volume 1

\(^{30}\)Evidence Act s.13(2).
relating to the military jury. A Military Judge is not compellable to give evidence about a particular AMC Trial in which they sat as the Military judge, unless the Court give leave.

Compellability

9.59 Associated Defendants (Accomplices, Co-Accused). An 'associated defendant' is not compellable to give evidence for or against an accused in proceedings before the Australian Military Court unless he or she is being tried separately from the accused. An 'associated defendant' is a person who is being prosecuted for an offence that arose in relation to the same events as those in relation to which the offence for which the accused in the proceeding before the Australian Military Court is being prosecuted arose, or relates to, or is connected with, that offence. The Australian Military Court must satisfy itself that an 'associated defendant', who is called as a witness in his or her joint trial with the accused before an Australian Military Court, is aware that he or she is not compellable to give evidence for or against the accused.

9.60 Accused's Spouse and Family. Evidence Act s.18 enables a person who is, when required to give evidence as a witness for the prosecution, the spouse, de facto spouse, a parent or child of the accused, to object to giving evidence as such a witness in proceedings before the Australian Military Court.

9.61 A person who is a spouse etc of the accused cannot object to giving evidence if the accused has been charged under the DFDA with certain offences relating to children and domestic violence offences: an offence against a provision of Part III or IIIA of the (ACT) Crimes Act 1900 (being an offence against a child under the age of 16 years), an offence against sections 133, 134, 135, 139 or 140 of the (ACT) Children Services Act 1986 or an offence that is either a domestic violence offence within the meaning of the (ACT) Domestic Violence Act 1986 or an offence under section 27 of that Act.

9.62 The Australian Military Court must uphold an objection by a person who is a spouse etc of the accused to giving evidence if it finds that:

a. there is a likelihood that harm would, or might, be caused to the person or to his or her relationship with the accused if the person gives evidence; and

b. the nature and extent of the harm outweighs the desirability of the evidence being given.

9.63 A person who is a spouse etc of the accused can only object before giving evidence or as soon as practicable after he or she becomes aware of his or her right to object. The Australian Military Court must satisfy itself that a person who appears to have a right to object under s.18 is aware of the effect of s.18 as it may apply to him or her.

31Evidence Act s.16(1).

32Evidence Act s.13(3)

33A co-accused in a joint trial, or an accomplice being tried separately from the accused, is each an 'associated defendant'.

34Evidence Act s.17(4).

35Evidence Act s.19.

36Evidence Act s.18(3).

37Evidence Act s.18(4).
Other Persons

9.64 In the unlikely event that a member of a House of an Australian Parliament is called as a witness before a Australian Military Court, the member is not compellable if attending to give evidence would prevent his or her attendance at a sitting of that House, a joint sitting of that Parliament or a meeting of a committee of that House or that Parliament of which he or she is a member. \(^{38}\) Also, none of the Sovereign, the Governor-General, a State Governor, an Administrator of a Territory or a foreign sovereign or Head of State of a foreign country is compellable to give evidence before the Australian Military Court, \(^{39}\) nor is a person who is or was a judge in an earlier proceeding to give evidence about that proceeding, unless the tribunal gives leave. \(^{40}\)

THE FORM IN WHICH EVIDENCE MAY BE GIVEN

9.65 The proof of facts in issue and facts relevant to the issue may be established by direct evidence or circumstantial evidence. The means by which such evidence is given may be one or more of the following: oral evidence, documentary evidence or real evidence. Each of these terms is explained below.

Direct Evidence

9.66 Direct evidence is an assertion made by a witness in court offered as proof of the truth of any fact asserted by him, including his own mental or physical state at a given time. For example, if in the hearing of a charge of ‘driving under the influence of intoxicating liquor’ a witness stated, ‘I saw A.B. (the defendant) driving motor car No AAA-000 south in George Street’, that would be direct evidence because it is an attestation of two facts in issue, perceived by the witness, that is, that the accused was the driver of a motor vehicle.

Circumstantial Evidence

9.67 If the only evidence that could be given of facts in issue were testimony, admissible hearsay, documents and things, many claims would fail for want of adequate proof.

9.68 The limited scope of the evidence provided by documents and things is obvious enough, and it is not often that every fact in issue was perceived, either by a witness, or else by the maker of a statement which is admissible under an exception of the rule against hearsay.

9.69 At some stage, resort almost always has to be had to ‘circumstantial evidence’. Such evidence is evidence of any fact (sometimes called an ‘evidentiary fact’, or ‘fact relevant to the issue’) from the existence of which the Australian Military Court may infer the existence of a fact in issue (sometimes called the ‘principal fact’). A typical instance is afforded by the statement of a witness at a trial for murder that he saw the accused carrying a bloodstained knife at the door of the house in which the deceased was found mortally wounded. \(^{41}\)

9.70 Circumstantial evidence is receivable in criminal as well as in civil cases. Indeed, the necessity of admitting such evidence is more obvious in criminal case, where the possibility of proving the matter charged by direct and positive testimony of eye-witnesses or by conclusive documents is much more rare than in civil cases. Where such evidence is not available, the Australian Military Court is permitted to infer from the facts proved other facts necessary to complete the elements of guilt or to establish innocence.

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\(^{38}\)Evidence Act s.15(2). If a member of a House of the Commonwealth Parliament is called, see s.14(1) of the Parliamentary Privileges Act 1987 (Commonwealth).

\(^{39}\)Evidence Act s.15(1).

\(^{40}\)Evidence Act s.16(2).

\(^{41}\)Cross on Evidence, 4th Australian edition, paragraph 1100.
Oral Evidence

9.71 Oral evidence is that given by word of mouth in the witness box. It is evidence of a matter perceived by the witness with one of his five senses. Oral evidence may be divided into assertions of fact or of hearsay and may be given as direct evidence or circumstantial evidence. Direct evidence has been explained in paragraph 6.60; hearsay evidence is discussed at paragraph 6.143 et seq.

Documentary Evidence

9.72 Documentary evidence is evidence as to the contents of a document. In relation to a Australian Military Court, a document is any record of information, and includes:

a. anything on which there is writing;
b. anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
c. anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
d. a map, plan, drawing or photograph.

9.73 Before a document can be admitted into evidence, some basic rules must be observed:

a. evidence of its contents must be adduced in the proceedings (see paragraph 6.71 et seq.); and
b. it must be shown to be relevant because it has been duly executed or adopted or otherwise connected with a particular person.

Additionally, like all other evidence, the contents of the document must be otherwise relevant and must not be inadmissible by virtue of other rules of evidence.

9.74 As a general rule, it is not acceptable for either the prosecution or the defence to simply 'table' a document during a summary hearing. It is necessary for documentary evidence to be formally admitted. The normal procedure is for an appropriate witness to be called and for either the prosecution or the defence to seek to have the documents admitted into evidence through the testimony of that witness.

9.75 When the prosecution wishes to tender a Service police record of interview containing an admission made by an accused to the Service police then the record of interview must have been signed by the accused. The normal procedure to formally admit the record of interview into evidence is to call one of the Service police officers who conducted the interview as a prosecution witness to testify as to how the record of interview was compiled, that he or she saw the accused sign the record of interview (if that is the case) and, subject to any objections as to admissibility by the defence, the document can then be admitted into evidence. In the absence of an order by the tribunal made with the consent of the defence dispensing with application of any one or more relevant provisions of the Evidence Act to evidence of the record of interview, it is not acceptable for the prosecution to simply tender the record as evidence without calling a witness to testify as to its admissibility.

42 Evidence Act Dictionary Part 1, definition of 'document'.

43 Evidence Act s.86.

44 The consent of the accused is ineffective unless the accused has been advised to consent by his or her lawyer or the tribunal is satisfied that the accused understands the consequences of giving the consent: see Evidence Act s.190(2).
9.76 In proceedings before the Australian Military Court, a document certified by a commanding officer to be a copy of a general order is evidence of that order unless the contrary is proved.\textsuperscript{45} The term 'general order' includes Defence Instructions, and formation, standing and routine orders.\textsuperscript{46}

The ways in which documentary evidence may be adduced

9.77 A party may adduce evidence of the contents of a document before the Australian Military Court by tendering:

- the original document;\textsuperscript{47}
- a purported copy of the document purportedly produced by a device (for example, a photocopier, fax machine or a word processor) that reproduces the contents of documents;\textsuperscript{48}
- if the contents of the document is a record of words capable of being reproduced as sound (for example, a tape-recording) or in a code (for example, shorthand notes), a purported transcript of the words;\textsuperscript{49}
- if the document is an article or thing on or in which information is stored in such a way that it cannot be used by the tribunal unless a device is used to retrieve, produce or collate it, a document purportedly produced by the device (for example, computer output of information on a computer disk or tape, a document produced by an optical disk reader of information recorded on an optical disk);\textsuperscript{50}
- a business record that is a purported copy of, extract from or summary of the document, or a purported copy of such an extract or summary;\textsuperscript{51}
- if the document is a public document within the meaning of the Evidence Act,\textsuperscript{52} a purported copy of the document purportedly printed by the Government Printer or the relevant government or official printer, by authority of the relevant government or administration concerned or by authority of an Australian Parliament or a House or a committee of such a Parliament;\textsuperscript{53}
- if the document is not available to the party\textsuperscript{54} or the existence or contents of the document are not in issue in the proceeding before the tribunal, a copy, extract from or summary of the document or by adducing oral evidence of its contents.\textsuperscript{55}

\textsuperscript{45} Reg. 27 of the DFD Regulations.
\textsuperscript{46} DFDA s.3(1).
\textsuperscript{47} Evidence Act s.48(1) (introductory words).
\textsuperscript{48} Evidence Act s.48(1)(b).
\textsuperscript{49} Evidence Act s.48(1)(c).
\textsuperscript{50} Evidence s.48(1)(d).
\textsuperscript{51} Evidence Act s.48(1)(e).
\textsuperscript{52} Evidence Act Dictionary Part 1, definition of 'public document'.
\textsuperscript{53} Evidence Act s.48(1)(f).
\textsuperscript{54} Evidence Act Dictionary Part 2, clause 5.
\textsuperscript{55} Evidence Act s.48(4).
9.78 A party may also adduce evidence of the contents of a document by adducing evidence of an admission about the contents of the document, although that evidence may only be used in respect of the case of the adducing party and the party who made the admission.\(^{56}\)

9.79 A notice requirement applies where the party intends to adduce evidence of the contents of a document that is overseas by tendering a copy document, transcript, a document produced by a device, a business record or an officially printed document: a party can only do so if it serves on each other party to the tribunal proceeding a copy of the document it intends to tender in the proceeding not less than 28 days beforehand.\(^{57}\)

9.80 A party against whom documentary evidence has been adduced may make certain requests to the tendering party to produce documents, be permitted to examine and test documents and to require persons involved in the production, maintenance or control of documents to be called as witnesses where its authenticity, identity or admissibility is at issue.\(^{58}\)

9.81 A party may apply to the Australian Military Court for a direction that it be permitted to adduce evidence of the contents of 2 or more documents in the form of a summary.\(^{59}\) A tribunal may only make such a direction if it is satisfied it would not be possible to conveniently examine the evidence because of the volume or complexity of the documents and the party has served on each other party a copy of the summary disclosing the name and address of the person who prepared it and given each other party a reasonable opportunity to examine or copy the documents in question.

**Real Evidence**

9.82 Real evidence is the evidence afforded by the production of physical objects (for example, the murder weapon) for inspection or other examination by the court.

9.83 The connection between such objects and facts in issue in a proceeding has to be established by other evidence (for example, a witness testifying where and when the murder weapon was found\(^ {60}\)).

9.84 A document is not usually classified as real evidence. Usually it is the contents of a document that is relevant. However, in certain circumstances it may be regarded as real evidence. For example, in a charge of stealing a document, the document is the material object stolen and would therefore be ‘real evidence’.

9.85 Real evidence may involve the question of ‘views’. The purpose of a view is to enable the court to examine an object which could not conveniently be brought into a court room. For example, in a case involving the alleged hazarding of a ship, it may be desirable that the tribunal have a view of the bridge of the ship of a similar class. The tribunal may draw any reasonable inference from what it observes on the view.\(^ {61}\)

**MATTERS ON WHICH EVIDENCE IS NOT REQUIRED**

9.86 It has been said in relation to criminal trials:

\(^{56}\)Evidence Act ss. 48(1)(a) and 48(3).

\(^{57}\)Evidence Act s.49.

\(^{58}\)See Evidence Act Part 4.6 Division 1 (sections 166 to 169)

\(^{59}\)Evidence Act s.50.

\(^{60}\)Ligertwood, Australian Evidence, 2nd edition, paragraph 7.13.

\(^{61}\)Evidence Act s.54
'Whenever there is a plea of not guilty, everything is in issue, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent.'

9.87 In the light of this statement it might be thought that everything which is relevant to a fact in issue in a criminal trial must be proved by evidence and that the court cannot be assumed to have knowledge of anything in connection with the case.

9.88 In practice, of course, this is not the case, as there are categories of matters of which evidence is not required.

9.89 These categories include ‘formal admissions’, ‘fact agreements’ and ‘judicial notice’, which will be briefly discussed in the succeeding paragraphs. It is also appropriate to discuss presumptions in this context of matters not requiring strict proof.

**Formal Admissions**

9.90 Section 67 of the ACT Evidence Act as substituted by Schedule 1 of the DFD Regulations provides:

‘Admission by accused person

67. In proceedings before a Australian Military Court, if the person charged with an offence makes an admission of a fact or other matter the Australian Military Court may accept the admission as sufficient evidence of that fact or other matter without further proof unless the tribunal is satisfied that it would be unfair to the person to accept the admission.’

9.91 This provision, which will mainly concern uncontroversial matters, is designed to expedite proceedings, thus enabling the tribunal to decide a case on limited issues of fact and saving time and expense.

9.92 At the Australian Military Court, it is desirable that the content of the proposed admission be discussed with the military judge in the absence of the members of the court. The military judge should then decide whether or not it would be unfair to the accused person to accept the admission. To ensure accuracy in complicated matters the proposed admission may be reduced to writing and signed by the prosecutor, defending officer and the accused.

9.93 As to the effect of making formal admissions in relation to a comparable provision (s.404 of the *Crimes Act 1900* (NSW)), see *R v Longford* (1970) 17 FLR at p.38.

**Fact agreements**

9.94 Evidence Act s.191 provides:

‘Agreements as to facts

191.(1)In this section:

“agreed fact” means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.

(2) In a proceeding:

(a) evidence is not required to prove the existence of an agreed fact; and

(b) evidence may not be adduced to contradict or qualify an agreed fact; unless the court gives leave.

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(3) Subsection (2) does not apply unless the agreed fact:

(a) is stated in an agreement in writing signed by the parties or by lawyers representing the parties and adduced in evidence in the proceeding; or

(b) with the leave of the court, is stated by a party before the court with the agreement of all the other parties.'

9.95 Section 191 is also designed to expedite a proceeding, by limiting issues of fact and saving time and expense. It enables a party to agree not to dispute a fact in a proceeding without making an admission about the fact.

9.96 Where parties have agreed not to dispute a fact, and the requirements of subsection 191(3) have been satisfied, evidence may not be adduced to prove, contradict or qualify the fact unless the tribunal gives leave.

Judicial Notice

9.97 Judicial notice means the acceptance by a fact-finding tribunal (for example, the Australian Military Court) of the truth of a fact without requiring proof of that fact.

9.98 Judicial notice is taken of Commonwealth, State and Territory law, including some subordinate laws, and certain knowledge that is not reasonably open to question.

9.99 Evidence Act s.143(1) provides that proof is not required about the provisions and coming into operation of Commonwealth, State and Territory Acts; Territory Ordinances; Imperial Acts in force in Australia; Commonwealth, State or Territory regulations, rules or by-laws; Proclamations or orders of the Governor-General, a State Governor or Territory Administrator made under a Commonwealth, State or Territory Act, a Territory Ordinance or an Imperial Act in force in Australia; or Commonwealth, State or Territory subordinate legislation required by law to be published or notified in a government gazette.

9.100 Evidence Act s.144 provides that proof is not required about knowledge that is not reasonably open to question and is either:

a. common knowledge generally or in the locality in which the proceeding is being held; or

b. capable of verification by reference to a document the authority of which cannot reasonably be questioned.

9.101 Examples of knowledge that is not reasonably open to question that is common knowledge generally would be the current Prime Minister of Australia, that hostilities in World War I ended upon the signing of the Armistice at 11 am on the 11th day of November 1918, or that Tokyo is in Japan. Knowledge of that kind that is common knowledge in the locality in which the proceeding is being held will include prominent landmarks in the locality (for example, the locality of the Opera House, the Harbour Bridge, or Wynyard Station).

9.102 Examples of knowledge that is not reasonably open to question and is capable of verification by reference to a document the authority of which cannot reasonably be questioned will include knowledge about times of sunset or sunrise or weather conditions at a particular place at a particular time (capable of verification from meteorological documents), or knowledge about the location of a particular landmark (capable of verification from certain topographic or oceanographic maps).
9.103 The person or persons constituting the Australian Military Court may require knowledge about which proof is not required in any way they think fit, but must give each party to the proceeding before the tribunal such opportunity to make submissions and to refer to relevant information about the acquiring and taking into account of such knowledge as is necessary to ensure that the party is not unfairly prejudiced.

9.104 There are, also, occasions when statutes require courts to take judicial notice of facts. For example, by virtue of DFDA s.147, the Australian Military Court may take judicial notice of ‘all matters within the general Service knowledge of the tribunal or of its members’. Thus, evidence need not be given as to the relative ranks of officers, as to the general duties, authorities and obligations of different members of the Defence Force or generally as to any matter which an officer may reasonably be expected to know.

Presumptions

9.105 Evidence may not be required where on proof of one fact the existence of another fact can be presumed.

9.106 ‘Conclusive presumptions’, most commonly created by statute, are irrefutable.

9.107 A rebuttable presumption of law is one which requires a court to find that the presumed fact exists unless sufficient evidence to the contrary is adduced. For example, an accused is presumed to be sane unless he adduces evidence and satisfies the court by proof on the balance of probabilities that he is not; in other words the presumption of sanity is rebuttable by evidence to the contrary.

9.108 Presumptions of fact may also arise in criminal proceedings; in other words, on proof of fact A the court must find fact B to be proved unless evidence to the contrary is adduced. For example, in relation to a charge of stealing, the common law presumes that recent possession of property is evidence either that the person in possession stole the property or received it knowing it to have been stolen. If an accused fails to give an explanation as to how he came by the goods the court may convict him of stealing or receiving.

9.109 Presumptions of fact arising under statute may also facilitate the proof of particular facts by parties in proceedings. So, Evidence Act s.150(3) presumes, unless the contrary is proved, that a document purportedly signed by the holder of an office under an Australian or foreign law in his or her official capacity was signed in that capacity by the office holder holding the relevant office when the document was signed.

9.110 Most presumptions apply ‘unless the contrary is proved’. In other words, they must be rebutted by proof to the contrary (for example, the presumption under Evidence Act s.150(3) would be rebutted by evidence proving that the office holder did not hold the office at the time the document was signed).

9.111 However, some presumptions facilitating the proof of particular facts by parties need not be rebutted but may be displaced quite easily: an example of such a presumption is one that is able to be displaced ‘unless evidence sufficient to raise doubt about the presumption is adduced’. Such a

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63Evidence Act sections 144(2) and (4).

64For example, s.27 of the (ACT) Children’s Services Act 1986 presumes a child who has not attained the age of 8 years for all purposes to be incapable of committing an offence (on proof that a child is, say, 7 years old, it is presumed the child is incapable of committing an offence).

65Trainer v The King (1906) 4 CLR 126.


67An example of such a presumption includes Evidence Act s.160(1) which presumes, unless evidence sufficient to raise doubt about the presumption is adduced, a postal article sent by prepaid post addressed to a person at a
presumption does need to be rebutted, but can be displaced by credible evidence that is not consistent with the matter that would (otherwise) be presumed. If the presumption is displaced, the Australian Military Court will make findings of fact relevant to the matter solely on the basis of the probative value of the evidence before it on that matter.

PRIVILEGE OF WITNESSES

Privilege Against Self-incrimination or Self-Exposure to a Penalty

9.112 Evidence Act s.128 contains rules about the giving of evidence that would incriminate a witness, or expose him or her to a penalty.

9.113 The general rule is that a witness, other than the accused who gives evidence about a fact in issue, must not be required to give particular evidence if he or she objects that the evidence may tend to prove he or she has committed an offence or is liable to a penalty arising under law.

9.114 However, except in the case of self-incrimination with respect to an offence or civil penalty arising under foreign law, the Australian Military Court may require the witness to give the particular evidence if the interests of justice require that he or she do so. In such a case, the tribunal must cause the witness to be given a certificate in respect of the evidence.

9.115 Except where the tribunal requires the witness to give the evidence, if it finds there are reasonable grounds for the objection, the tribunal must give the witness the option not to give the particular evidence, or to give the evidence and to receive a certificate. If the witness chooses to give the evidence, the tribunal must cause the witness to be given such a certificate in respect of the evidence.

9.116 The tribunal must also cause the witness to be given such a certificate where the witness gives the particular evidence after his or her objection has been overridden and, after the evidence has been given, the tribunal finds there were reasonable grounds for the objection.

9.117 The effect of a certificate given under section 128 is that the evidence in respect of which the certificate has been given, and evidence of any information or document or thing obtained as a direct or indirect consequence of the witness having given evidence, cannot be used against the witness in any proceeding before an Australian court (including a person or body authorised by Australian law to hear, receive and examine evidence), except in a criminal proceeding in respect of the falsity of the evidence.

Family Privilege

9.118 Apart from certain offences relating to children and domestic evidence offences, a Australian Military Court may uphold an objection by a person who is the spouse, de facto spouse, a parent or a child of the accused to giving evidence as a witness for the prosecution in proceedings under the DFDA.

Legal Professional Privilege

9.119 On objection by a person, evidence must not be given that would result in the disclosure of certain confidential communications made, or the contents of certain confidential documents prepared,
for the dominant purpose of either (a) the provision to the person by a lawyer of legal advice or (b) the provision to the person of professional legal services relating to litigation.

9.120 The categories of protected confidential communications and documents is narrower in situation (a) than situation (b).

9.121 A confidential communication in situation (a) must have been made between the person and the lawyer, or 2 or more lawyers for the person. In situation (b), the confidential communication can have been between the person and someone else, or a lawyer acting for the person and someone else (that is, the category of projected communications in situation (b) extends to client/lawyer communications with a third party).

9.122 A confidential document in situation (a) must have been prepared by the person or the lawyer. In situation (b) the confidential document can have been prepared by some other person (that is, the category of protected documents in situation (b) extends to documents prepared by a third party).

9.123 From the defending officer's point of view, it is essential to remember that it is not his or her privilege but the accused person's. The privilege cannot be waived except with the authority of the accused.

9.124 If a party to a proceeding before the Australian Military Court is not represented in the proceeding by a lawyer, evidence must not be given on objection by the party that would result in the disclosure of a confidential communication made between the party and someone else, or the contents of a confidential document prepared by or for the party, for the dominant purpose of preparing for or conducting the proceeding.

9.125 The privileges set out above do not apply in certain situations and may on occasions be lost. An exception to the privileges which might occasionally apply in a proceeding before a Australian Military Court is the exception in Evidence Act s.123 in favour of an accused in a criminal proceeding. In a criminal proceeding, which will include a proceeding before the Australian Military Court, s.123 enables an accused to adduce evidence of most communications or documents otherwise protected by the privileges. Section 123 does not enable an accused person to adduce evidence that would result in the disclosure of a confidential communication made between an associated defendant and a lawyer acting for that person in connection with the Prosecution of that person or the contents of a confidential document prepared by an associated defendant or a lawyer acting for that person in connection with the Prosecution of that person. The exception in s.123 may enable an accused to adduce evidence of a communication or a document contained in a prosecutor's brief.

Religious Confessions

9.126 Evidence Act s.127 entitles a member or former member of the clergy to refuse to divulge a religious confession or that such a confession was made.

70 Evidence Act s.118.

71 Evidence Act s.119.

72 See Tuckiar v R [1934] 52 CLR 335.

73 Evidence Act s.120.

74 See Evidence Act sections. 121 to 126.

75 DFDA s.146(1)(b).

76 A term ‘associated defendant’ bears the same meaning as it does in Evidence Act s.13(3). A co-accused in a joint trial, or an accomplice being tried separately from the accused, is each an ‘associated defendant’.
9.127 A religious confession is one made by a person to a member of the clergy in that member's professional capacity according to the ritual of the church or the religious denomination concerned (for example, one received by a priest of the Catholic Church in the sacrament of Penance).

9.128 The privilege is one that belongs to the member of the clergy: it is, under s.127, immaterial whether the person who made the confession wants it divulged.

9.129 The privilege does not, however, extend to a communication involved in a religious confession that was made for a criminal purpose (for example, where the member of the clergy and person are conspiring to commit a criminal offence and are using the ritual of the church or religious denomination concerned to attract privilege to the communication).

Physician and Patient

9.130 No privilege exists in respect of confidential communications between a doctor and his patient (although it is often thought otherwise).

Exclusion of Evidence in the Public Interest

9.131 Division 3 of Part 3.10 of the Evidence Act prohibits in the public interest particular kinds of evidence being adduced in proceedings. The rules, in sections 129, 130 and 131 of the Act, apply whether or not a party has made an objection to the giving of the evidence in the proceeding.

9.132 Two of the provisions, sections 129 and 131, provide rules prohibiting the giving of particular kinds of evidence that would seldom be called in proceedings before a Australian Military Court: rules, in s.129, prohibiting evidence of the reasons for a decision or of the deliberations of a judge, arbitrator or juror in a proceeding and, in s.131, prohibiting evidence of settlement negotiations.

9.133 It is conceivable that the operation of the other provision, section 130, may arise in proceedings before the Australian Military Court.

9.134 Evidence Act s.130(1) enables a Australian Military Court to direct that information or a document that relates to matters of state not be adduced as evidence if the public interest in admitting the information or document into evidence is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document.

9.135 Information or a document that relates to matters of state includes information or a document which would prejudice the security or defence of Australia if it were adduced as evidence.

9.136 Under s.130(1), the Australian Military Court must balance the respective public interests in preserving secrecy or confidentiality (that is, the public interest that harm should not be done to Australia by adducing the information or document as evidence) against the public interest in admitting the information or document into evidence (that is, the public interest in the administration of justice not being frustrated by the withholding of relevant evidence). If the public interest in preserving secrecy or confidentiality in relation to the information or document outweighs the public interest in admitting the information or document in evidence, the Australian Military Court may direct that the information or document not be adduced as evidence.

9.137 In deciding whether to make a direction, the Australian Military Court must take into account:

a. the importance of the information or document in the proceedings;

b. whether the party seeking to adduce evidence of the information or document is an accused or the prosecutor and, if an accused is seeking to adduce the evidence, whether the direction is to be made subject to the condition that the prosecution be stayed;

c. the nature of the Service offence or defence to that offence to which the information or document relates, and the nature of the subject matter of the proceedings;
d. the likely effect of adducing evidence of the information or the document and the means available to limit its publications;

e. whether the substance of the information or document has already been published.

9.138 In taking into account the means available to limit publication of evidence of the information or document, a President of an Australian Military Court or an Australian Military Court would have regard to his or her powers under DFDA s.140(2) to order members of the public to be excluded from the proceedings or to order that no report be made of the whole or a specified part of the proceedings.

THE PRINCIPAL RULE CONCERNING THE ADMISSIBILITY OF EVIDENCE: THE RELEVANCE RULE

The Relevance Rule

9.139 Evidence adduced by the prosecution or an accused in a proceeding before the Australian Military Court must be relevant.

9.140 Subsection 56(1) of the Evidence Act sets out the relevance rule, which is the principal rule concerning the admissibility of evidence in proceedings. It provides that:

‘56(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.’

9.141 The corollary of the rule is stated in s.56(2), which provides that:

‘(2) Evidence that is not relevant in the proceeding is not admissible.’

9.142 Thus, if the evidence is relevant it is admissible in the proceeding, unless another provision of the Evidence Act excludes it: if evidence is irrelevant it is not admissible in the proceeding.

9.143 Whether or not evidence is relevant is determined by section 55 of the Act.

Section 55 states that:

‘55(1) The evidence that is relevant in a proceeding is evidence that, if accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.’

9.144 The test in s.55 requires only a minimal logical connection between particular evidence and a fact in issue in the proceeding. If the evidence, if it were accepted (which, of course, it may not be), could rationally affect the assessment of the probability of such a fact it is relevant and, by virtue of s.56(1), admissible in the proceeding unless another provision of the Act excludes it. The effect may be direct (for example, because it is an assertion by a person who saw the occurrence of a fact in issue in the proceeding) or indirect (for example, where the Australian Military Court is asked to infer the existence of a fact in issue from circumstantial evidence adduced in the proceeding).

9.145 While only a minimal logical connection between particular evidence and a fact in issue is required, marginally probative evidence may be excluded under s.135 of the Act where its probative value is substantially outweighed by the danger that it might cause or result in undue waste of time.

Provisional Relevance

9.146 The relevance of some evidence may depend upon the acceptance of other evidence. For example, the relevance of evidence of the contents of a document will usually depend on proof of the authenticity of the document. Also, the relevance of much circumstantial evidence may depend upon other evidence in the proceeding.
If the determination of whether evidence is relevant depends upon the tribunal making another finding, Evidence Act s.57(1) enables the tribunal to find the evidence is relevant if it is reasonably open to make that other finding, or it may find the evidence is relevant subject to the admission of further evidence at a later stage of the proceeding that will make it reasonably open to make that other finding.

In the example given of evidence of the contents of a document, if the relevance of the evidence depends upon the tribunal making a finding that the document is authentic, the tribunal may find the evidence relevant if it is reasonably open to find that the document is authentic. Alternatively, the tribunal may find the evidence is relevant subject to further evidence being admitted that will make it reasonably open to find that the document is authentic (for example, in the case of a document that has been signed, evidence connecting the making of the document with the person who has apparently signed it).

THE HEARSAY RULE

As explained above, logically relevant evidence is admissible in a proceeding before a Australian Military Court, unless another provision of the Evidence Act excludes it.

One of the most frequently arising exclusionary rules in the law of evidence is the rule against hearsay.

Under Evidence Act s.59(1), the rule against hearsay (described throughout the Act as 'the hearsay rule') is in the following terms:

'59. (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.'

The hearsay rule applies to evidence of a representation that is a previous representation made by a person.

The term 'representation' is given an extended meaning in the Evidence Act and includes an express or implied representation (whether oral or in writing), a representation inferred from conduct (for example, a person can make a representation by pointing, or by nodding assent to what someone else has said), or a representation not intended to be communicated or not in fact communicated (for example, an entry in a diary).

The term 'previous representation' is given a special meaning by the Evidence Act. It is defined to mean:

'a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced'.

Thus, every statement made by a person, except when actually giving oral testimony before the Australian Military Court in the proceeding concerned, and every statement contained in a document, is a 'previous representation' for the purposes of the hearsay rule.

The hearsay rule only applies to evidence of a previous representation made by a person. A representation made by a machine or a device is not a representation made by a person, and so will not be excluded by the hearsay rule. Examples of a representation made by a machine would include some statements contained in an activity sheet generated by a fax machine.

77Evidence Act Dictionary Part 1, definition 'representation'.
78Evidence Act Dictionary Part 1, definition of 'previous representation'.
79A question may (often) arise whether the machine is generating the representation, or merely reproducing a representation entered into the machine by a person.
9.157 The hearsay rule only applies to evidence of a previous representation made by a person to prove the existence of a particular fact (the fact that the person intended to assert). So the rule does not apply where evidence of the representation is admissible to prove some other fact than the existence of the fact the person intended to assert (for example, where it is admissible to prove, simply, that the representation was made). For example, consider where Mr B asserts to Mr A that he (B) is Napoleon. The hearsay rule applies to A's evidence about B's assertion on the question of whether or not B is Napoleon: A's evidence of B's assertion is not admissible on that question. On the other hand, the rule does not apply to A's evidence about B's assertion on the question whether or not B made the assertion to A, if that question is relevant (for example, on the issue of B's sanity).

9.158 It is sometimes said that evidence of a representation infringes the hearsay rule if it is adduced for a hearsay purpose (that is, to prove the existence of the particular fact asserted by the representation). Where the evidence is adduced for some other purpose (for example, to prove the representation was made), it is sometimes said that evidence of the representation is adduced for a non-hearsay purpose.

9.159 A useful common law example of the distinction between use of evidence of representation for a (impermissible) hearsay purpose and (permissible) use of evidence for a non-hearsay purpose is the well-known case of Subramaniam v The Public Prosecutor.\(^80\)

9.160 In Subramaniam, the accused was charged with the unlawful possession of ammunition and his defence was that he was acting under duress from terrorists who had captured him. At first instance the trial judge rejected as hearsay his evidence of conversations with the terrorists relevant to establish the duress. The Privy Council reversed that decision on the basis that the evidence was not adduced as to the truth of what was actually alleged or asserted by the terrorists but to show Subramaniam's state of mind. The Privy Council said:

‘Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes. ...’

9.161 This evidence, if believed, could have satisfied the court that duress was brought to bear upon the appellant. His evidence of his conversations with the terrorists was adduced for a non-hearsay purpose: that is, not to prove the existence of a fact asserted by the terrorists (that they would carry out their threats), but to prove that the threats were made, that question being relevant to the issue of the appellant's state of mind.

9.162 Finally, the hearsay rule only applies to evidence of a previous representation made by a person to prove the existence of a fact that the person intended to assert by the representation. Thus, an unintended assertion, that is, a representation not intended to be assertive of the facts it is adduced to prove, does not infringe the hearsay rule. An unintended assertion can be one that is an oral (or written) representation, or one that is an unintended assertion by conduct. An example of an unintended assertion that is an oral representation would be a case in which efforts were made to establish X's presence at a particular place by calling a witness to swear that he heard Y say ‘Hello X’ at that place. An unintended assertion by conduct would be seeking to prove that beer at a hotel was of poor quality by calling a witness to testify that patrons of the hotel had left glasses of beer undrunk after tasting it. In neither case is the assertion being used to prove the existence of a fact intended to be asserted by the representation by the person who made the representation. In the first example cited, Y's representation is an unintended assertion about the identity of the person to whom Y is speaking. In the second example, each patron's assertion by conduct is an unintended assertion that the beer is bad.

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\(^80\) (1956) 1 W.L.R. 965.
9.163 Unintended assertions can, in some circumstances, be reliable as evidence. People do not generally say ‘Hello X’ in order to deceive passers-by that X is there and patrons of hotels do not normally buy beer only to leave it undrunk.

EXCEPTIONS TO THE HEARSAY RULE

General

9.164 Logically relevant evidence that infringes the hearsay rule will nevertheless be admissible in a proceeding before the Australian Military Court of it falls within an exception to the hearsay rule set out in the Evidence Act.

9.165 The exceptions to the hearsay rule in the Evidence Act fall into four categories: evidence relevant for a non-hearsay purpose;

a. evidence relevant for a non-hearsay purpose;

b. admissions;

c. ‘first-hand’ hearsay representations,81 and

d. more remote hearsay.82

9.166 Under the Evidence Act s.61, none of the exceptions in Part 3.2 of the Act permit use of a previous representation to prove the existence of a fact intentionally asserted by the representation if the person who made the representation was not, at the time it was made, incapable of giving a rational reply to a question about the fact. So if, at the time a person makes a representation, he or she is psychologically incompetent to give evidence (for example, because he or she is a young child or a person with an intellectual disability: see paragraphs 6.44-6.46), evidence of the person's representations cannot (with one exception) be used under one of the exceptions to the hearsay rule.

9.167 The one exception is the exception to the hearsay rule for evidence of a contemporaneous representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind. Thus, to take an example, evidence of a young child, or a person whose capacities are affected by an intellectual disability, saying ‘my chest hurts’ can be used as evidence to prove the existence of pain the child or person was experiencing at that time even though the child or person was at that time psychologically incompetent to give evidence.

EVIDENCE RELEVANT FOR A NON-HEARSAY PURPOSE

9.168 Section 60 of the Evidence Act provides an exception to the hearsay rule in the following terms:

‘60. The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.’

9.169 The exception in s.60 permits hearsay use of evidence that has been admitted because it is relevant for a non-hearsay purpose. Thus, if a party can get a representation admitted into evidence for a non-hearsay purpose, it can be used for a hearsay purpose as well.

9.170

81 The concept of 'first-hand' hearsay is discussed below.

82 Unlike the exceptions for a 'first-hand' hearsay representation, the exceptions in this category apply whether or not the representation was made by a person who had personal knowledge of the fact the person intended to assert by the representation.

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Another example is where a witness has made a prior statement that is inconsistent with his or her testimony. If his or her testimony was about a fact in issue in the proceeding, the prior statement is relevant both for a hearsay and non-hearsay purpose. The prior statement is relevant for a hearsay purpose because it can (clearly) be used to prove the existence of a fact in issue in the proceeding. The statement is also relevant for a non-hearsay purpose because its relevance does not only relate to its truth, but also to the fact that the witness has given two inconsistent accounts of the same event or events. The fact that the witness has previously given a different account of the event or events from what he or she has said in the witness box reflects on the believability of the testimony he or she has given.

The effect of the exception in s.60 is that if the prior statement is admitted because it is relevant for a non-hearsay purpose (for example, because it is relevant to the credibility of the witness), it can also be used for a hearsay purpose (that is, to prove the existence of a fact in issue that the witness intentionally asserted by the statement).

Yet another example of evidence admitted for a non-hearsay purpose is evidence of a prior consistent statement of a witness admitted as being relevant to the credibility of evidence the witness has given. Where, for example, a prior inconsistent statement of a witness has been admitted, the tribunal may give leave under Evidence Act s.108(3) to adduce evidence of a prior consistent statement of the witness. If the witness's prior consistent statement has been admitted as being relevant to credibility (a non-hearsay purpose) it can also be used to prove the existence of a fact in issue that the witness intentionally asserted by the statement.

The hearsay does not apply to evidence of an admission if it is ‘first-hand’ (see paragraph 6.173). There are other requirements which also must be satisfied before evidence of an admission is admissible in a Australian Military Court proceeding, and evidentiary rules in relation to questioning.

An admission is defined in the Evidence Act to mean:

‘... a previous representation that is:

a. made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and

b. adverse to the person’s interest in the outcome of the proceeding.’

So 'first-hand' evidence of a single previous representation made by a person that turns out to be adverse to the person’s interest in a Australian Military Court proceeding to which the person is or becomes a party is admissible as an exception to the hearsay rule.

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83 Leave may also be given under Evidence Act s.108(3) to adduce evidence of a witness's prior consistent statement where it is or will be suggested that evidence given by the witness has been fabricated, reconstructed or is the result of a suggestion: see Evidence Act s.108(3)(b).

84 Evidence Act s.81(1).

85 Evidence Act Dictionary Part 1, definition of ‘admission’.

86 The meaning of the term 'previous representation' is discussed above.

87 If the previous representation is not adverse to the person's interest in a proceeding (for example, if it is exculpatory), it may be admissible under other exceptions to the hearsay rule.
9.177 Not only is evidence of the single previous representation that is an admission admissible as an exception to the hearsay rule, but also evidence of some other previous representation\(^{88}\) made at or about the time the admission was made to which it is reasonably necessary to refer to understand the admission.\(^{89}\)

'First-hand' Evidence of an Admission

9.178 As mentioned at paragraph 6.169, the hearsay rule does not apply to evidence of an admission if it is 'first-hand'. Evidence of the admission must be given orally by a person who saw, heard or otherwise perceived the admission being made or it must be a document in which the admission is made.\(^{90}\) An admission is not made in a document unless the representation that is the admission was written, made or otherwise produced by the person who made the admission, or the person recognised the representation as his or her own representation by signing, initially or otherwise marking the documents.\(^{91}\)

Vicarious Admissions

9.179 The definition of 'admission' in the Evidence Act requires that an admission must be made by a person who is or becomes a party to proceedings before the Australian Military Court.

9.180 However, an admission may also be made on behalf of a party: a representation made by a person may be a vicarious admission of another person who is a party to a proceeding.\(^{92}\)

9.181 The Australian Military Court can admit evidence of a representation made by a person as an admission of another person who is a party if it is reasonably open to find:

a. that the person had authority to make statements on behalf of the party in relation to the matter concerned;

b. the representation was made by an employee or agent about a matter within the scope of his or her employment or authority; or

c. the representation was made in furtherance of a common purpose with the party.

9.182 Once the evidence is admitted, the Australian Military Court must nevertheless determine in the course of the proceeding whether the representation of the person is an admission of the party to the proceeding (that is, it must decide whether or not to accept that the representation was made by a person who had authority etc).

Use of an Admission in Respect of the Case of a Co-accused

9.183 In the case of a joint trial before the Australian Military Court, the hearsay rule applies to evidence of an admission of one accused in respect of the case of another co-accused.\(^{93}\) The co-accused may, however, consent to use of the other accused's admission in respect of its case, but consent cannot be given in respect of part only (for example, only the favourable part) of that accused's admission.\(^{94}\)

\(^{88}\)The meaning of the term 'previous representation' is discussed above.

\(^{89}\)Evidence Act s.81(2).

\(^{90}\)Evidence Act s.82.

\(^{91}\)Evidence Act Dictionary Part 2, clause 6.

\(^{92}\)Evidence Act s.87.

\(^{93}\)Evidence Act s.83(1).

\(^{94}\)Evidence Act ss. 83(2) and (3).
Requirements to be Satisfied before Evidence of an Admission is Admissible

9.184 As mentioned above, there are other requirements which must be satisfied before evidence of an admission is admissible in Australian Military Court proceedings. This is in addition to the requirement that evidence of an admission, to be an exception to the hearsay rule, must be 'first-hand' (see paragraph 6.173).

Requirements under the DFDA

9.185 Some specific DFDA requirements apply, such as under Part III Division 3 of the DFDA (see the discussion of DFDA sections 101J, 101JA and 101K. See also, in relation to DFDA s. 101ZB.

Admissions Influenced by Violence etc

9.186 If an accused in a Australian Military Court proceeding against whom evidence of an admission has been adduced raises an issue about whether the admission or its making were influenced by violent, oppressive, inhuman or degrading conduct towards any person, or by a threat of such conduct, evidence of the admission is not admissible unless the tribunal is satisfied the admission and its making were not so influenced.95

9.187 Once the issue is raised by the accused, the onus lies with the prosecution to satisfy the tribunal that the admission and its making was not influenced by violent etc. conduct or a threat of such conduct.

Reliability of Admissions etc

9.188 Evidence of an admission made by an accused in the course of official questioning by an investigating official, or as a result of an act of another person (for example, a commanding officer) who was able to influence the decision whether the prosecution of the accused should be brought or continued, is not admissible unless the circumstances in which the admission was made make it unlikely that the truth of the admission was adversely affected.96 The onus of showing that the evidence is admissible lies upon the party adducing it.

9.189 The matters that a Australian Military Court must take into account in deciding whether the truth of an admission was adversely affected include any relevant condition or characteristic of the accused (including his or her age, personality and any disability to which the person is or appears to be subject). A condition or characteristic of the accused would include one to which he or she was subject temporarily at the time of questioning (for example, intoxication, fatigue).

9.190 If the admission was made in response to questioning, the Australian Military Court must also take into account the nature of the questions, the manner in which they were put, and the nature of any threat, promise or other inducement made to the accused.

Two further rules: evidence in relation to questioning

9.191 Two evidentiary rules also apply in relation to questioning of persons. These rules apply in addition to those set out above.

Unsigned records of interview

9.192 First, if evidence of an admission made by an accused is sought to be given in the form of a record in writing of an interview with the accused that was prepared by or on behalf of an investigating official, the record is not admissible unless the accused has acknowledged it as a true record by signing, initialling or otherwise marking it.97 Oral evidence of the admission can, however, be given by

95 Evidence Act s.84.

96 Evidence Act s.85.

97 Evidence Act s.86.
a person (including the investigating official) who heard the admission being made (see paragraph 6.173).

Unfavourable Inferences from Silence during Questioning

9.193 Second, an inference unfavourable to a party must not be drawn in an Australian Military Court proceeding from a failure or refusal by the party or another person to answer a question or respond to a representation during official questioning. For example, an inference must not be drawn that a party did not answer one or more questions put to him or her during an interview by an officer investigating a Service offence because he or she believed he or she was guilty of the Service offence concerned. The obligation not to draw unfavourable inferences extends to partial silence in the course of an interview.

9.194 Evidence of the failure or refusal is inadmissible in the Australian Military Court proceeding if the only use that could be made of the evidence is to draw an inference that is unfavourable to the party.

'FIRST-HAND' HEARSAY REPRESENTATIONS

General

9.195 Part 3.2 Division 2 of the Evidence Act provides for exceptions to the hearsay rule for evidence of a 'first-hand' hearsay representation.

9.196 A 'first-hand' hearsay representation is a representation made by a person who had personal knowledge of the fact he or she intended to assert by the representation: that is, his or her knowledge of that fact was based (or might reasonably be supposed to have been based) on his or her own perception, and not on a representation made by some other person about that fact.

9.197 In the situation where a representation concerns an event, a 'first-hand' hearsay representation is a representation made by a person who witnessed the event. For example, if X saw Y fire a gun at Z, his representation that 'Y fired the gun at Z' is a 'first-hand' hearsay representation: X's knowledge of the fact he or she intended to assert by the representation (that Y fired the gun at Z) was based on his or her own perception, and not on a representation made by some other person about that fact.

9.198 In a Australian Military Court proceeding, the exceptions to the hearsay rule for evidence of a 'first-hand' hearsay representation vary depending upon whether or not the person who made the representation is available to give evidence in the proceeding about the fact he or she intended to assert by the representation and, if the person is not available, whether evidence of the representation is adduced by an accused in the proceeding.

9.199 When a person is not available to give evidence about a fact is set out in clause 4 of Part 2 of the Dictionary at the end of the Evidence Act. A person is not available to give evidence about a fact if he or she has died, is not competent to give evidence or cannot lawfully give evidence about the fact or, despite all reasonable steps having been taken, cannot be found or cannot be compelled to give evidence. A person is also not available to give evidence about a fact if the Evidence Act prohibits the evidence being given.

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88Evidence Act s.89(1). The prohibition does not apply where the failure or refusal to answer or respond is a fact in issue in the proceeding: see Evidence Act s.89(3).

89Evidence Act s.62.
Evidence of a 'First-hand' Hearsay Representation where the Maker is not Available to give Evidence

9.200 If the person who made the 'first-hand' hearsay representation is not available to give evidence of the fact he or she intended to assert by the representation, there are exceptions to the hearsay rule\(^{100}\) for evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made if the representation was:

a. made under a duty to make that representation or to make representations of that kind;\(^{101}\)

b. made when or shortly after the fact the person intended to assert by the representation occurred and in circumstances that make it unlikely that the representation is a fabrication;\(^{102}\)

c. made in circumstances that make it highly probable that the representation is reliable;\(^{103}\) or

d. against the interests of the person who made it at the time it was made.\(^{104}\)

9.201 In addition to the exceptions set out above, there is also an exception\(^{105}\) for evidence of a 'first-hand' hearsay representation made by a person who is not available to give evidence of the fact he or she intended to assert by the representation where the representation was made in the course of giving evidence in an earlier proceeding and the accused in the Australian Military Court proceeding cross-examined the person who made the representation in the earlier proceeding, or had a reasonable opportunity to do so.\(^{106}\) Evidence of the representation need not be given by a person who 'saw, heard or otherwise perceived' the representation being made: it can be given by producing a transcript or recording of the representation authenticated by the person, court or other body to which it was made, (if applicable) the registrar or other proper officer of such a court or body or the person or body responsible for producing the transcript or recording.\(^{107}\) In a joint trial before a Australian Military Court, evidence of the representation made in the earlier proceeding cannot be used against a co-accused who did not cross-examine or have a reasonable opportunity to cross-examine the person who made the representation in the proceeding.\(^{108}\)

\(^{100}\) The exceptions do not apply unless reasonable notice in writing to adduce the evidence has been given to each other party to the Australian Military Court proceeding.

\(^{101}\) Evidence Act s.65(2)(a).

\(^{102}\) Evidence Act s.65(2)(b).

\(^{103}\) Evidence Act s.65(2)(c).

\(^{104}\) Evidence Act s.65(2)(d). A representation is taken to be against the interests of the person who made it if it tends to damage his or her reputation, incriminate him or her or show he or she is liable in an action for damages (see Evidence Act s.65(7)).

\(^{105}\) This exception also does not apply unless reasonable notice in writing to adduce evidence that has been given to each other party to the Australian Military Court proceeding.

\(^{106}\) Evidence Act s.65(3). An accused is taken to have had a reasonable opportunity to cross-examine the person who made the representation in the earlier proceeding if he or she could reasonably have been present at a time when cross-examination might have been conducted and, if present, could have cross-examined that person (see Evidence Act s.65(5)).

\(^{107}\) Evidence Act s.65(6).

\(^{108}\) Evidence Act s.65(4).
In addition to the exceptions set out above, there is a further exception where evidence of a 'first-hand' hearsay representation is adduced by an accused. The hearsay rule does not apply to oral evidence of a 'first-hand' hearsay representation adduced by an accused that is given by a person who saw, heard or otherwise perceived the representation being made, or to a document so far as it contains the 'first-hand' hearsay representation or some other representation to which it is reasonably necessary to refer to understand the 'first-hand' hearsay representation.

If an accused adduces evidence of a 'first-hand' hearsay representation about a matter, the hearsay rule also does not apply to evidence of another representation about the matter adduced by another party that is given by a person who saw, heard or otherwise perceived the representation being made.

The exceptions to the hearsay rule set out above do not apply to evidence adduced by a party unless that party has given reasonable notice in writing complying with Evidence Act s.67(3) and regulation 5 of the Evidence Regulations to each other party to the proceeding of his or her intention to do so.

The requirement that notice in writing of an intention to adduce the evidence should be reasonable applies both to the timing of the notice and the content of the notice.

Notice must, under Evidence Act s.67(2), be given in accordance with any regulations or rules of court made for the purpose of s.67.

Evidence Act s.67(3) and regulation 5 of the Evidence Regulations set out the requirements in relation to the content of notices.

A notice must state:

a. the particular provisions of Part 3.2 Division 2 of the Evidence Act on which the notifying party intends to rely in arguing that the hearsay rule does not apply to the evidence, and particulars of the facts on the basis of which it is alleged that the person who made the 'first-hand' hearsay representation referred to in the notice is not available to testify concerning the fact to be proved the representation;

b. the substance of evidence of the 'first-hand' hearsay representation the notifying party intends to adduce and, so far as they are known to the party, the substance of all other relevant representations made by the person who made the 'first-hand' hearsay representation; and

c. so far as they are known to the notifying party, particulars of the date, time, place and circumstances at or in which the 'first-hand' hearsay representation or other relevant representations were made and the names and address of the person by whom and to whom they were made.

If the notice refers to a 'first-hand' hearsay representation that is in writing, a copy of the document, or a relevant portion of the document, containing the representation must be attached to the notice and the notice must identify the document unless the identity of the document is apparent on the face of a copy of the whole of the document attached to the notice.

While there is no requirement that a specified period of notice must be given, timeliness of the notice would be relevant to whether reasonable notice in writing has been given.

The Australian Military Court may, on the application of a party, direct that one or more exceptions to the hearsay rule apply to evidence adduced by a party despite a party’s failure to give reasonable notice in writing. The direction may be subject to conditions.

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109 Evidence Act s.65(8). This exception also does not apply unless reasonable notice in writing to adduce evidence that has been given to each other party to the Australian Military Court proceeding.

110 Evidence Act s.65(9).
In deciding whether to give a direction, the Australian Military Court must take into account -

a. the extent to which the direction would be likely to add unduly to, or to shorten, the length of the hearing;

b. the extent to which to give the direction would be unfair or to a witness;

c. the importance of evidence of the 'first-hand' hearsay representation;

d. the nature of the proceeding; and

e. the power of the tribunal (if any) to adjourn the hearing or to make another order or give a direction in relation to the evidence. 111

Evidence of a 'First-hand' Hearsay Representation when the Maker is Available to Give Evidence

If the person who made the 'first-hand' hearsay representation is available to give evidence of the fact intended to be asserted by the representation, the hearsay rule, with one exception, does not apply to evidence of the representation given by the person (or by someone who saw, heard or otherwise perceived it being made) if, when the representation was made, the occurrence of the fact intended to be asserted by the representation was fresh in the memory of the person who made it. 112 If evidence of the representation is given by a person other than the person who made it, the person who made the representation must be called to give evidence in the Australian Military Court proceeding.

The one exception is that the hearsay rule continues to apply to evidence of a 'first-hand' hearsay representation that was made for the purpose of indicating evidence the person could give in a proceeding, unless the representation concerns the identity of a person, place or thing. 113 Thus, the hearsay rule continues to apply to a witness's proof of evidence, but does not apply to evidence of an identification made by a witness (for example, a statement made by the witness identifying a person during the conduct of an identification parade).

A document containing a 'first-hand' hearsay representation of a person must not be tendered before the conclusion of the evidence in chief of the person who made the representation, unless the Australian Military Court gives leave. 114

Other exceptions to the hearsay rule apply whether or not the representation was made by a person who had personal knowledge of the fact the person intended to assert by the representation.

111 Evidence Act s.192.

112 Evidence Act s.66(2).

113 Evidence Act s.66(3).

114 Evidence Act s.66(4).
9.217 Several of these exceptions provide exceptions for some representations in business records\(^{115}\) and in documents recording messages transmitted by fax, e-mail, telegram, lettergram or telex.\(^{116}\) There is also an exception for certificates or other documents given evidentiary effect by regulations made under an Act.\(^{117}\)

9.218 The hearsay rule does not apply to evidence of a representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind at the time he or she made the representation.\(^{118}\) For example, if a person experiencing pain in his or her chest says 'my chest hurts', his or her statement can be used to prove the existence of pain he or she was experiencing at that time.

9.219 The hearsay rule also does not apply to some evidence of reputation concerning certain relationships and a person's age and to some evidence of reputation concerning a public right or a general right.

9.220 The hearsay rule does not apply to evidence of reputation that is adduced by an accused concerning -

a. whether a person was married (either at a particular time or any time);

b. whether a man and a woman cohabiting at a particular time were married to each other at that time;

c. a person's age; or

d. family history or family relationship,

if the accused has given reasonable notice in writing to each other party of his or her intention to adduce the evidence or it tends to contradict evidence of that kind that has been admitted.\(^{119}\)

9.221 The hearsay rule also does not apply to evidence of reputation concerning a matter described above that is adduced by the prosecutor if it tends to contradict evidence of that kind that has been admitted.\(^{120}\)

9.222 The hearsay rule also does not apply to evidence of reputation adduced by an accused concerning the existence, nature or extent of a public right (that is, a right that affects the entire public, for example, whether a road is a public road) or a general right (that is, a right that affects a class of persons, for example, the inhabitants of a particular district).\(^{121}\) The hearsay rule also does not apply to evidence of reputation of that kind adduced by the prosecutor if it tends to contradict evidence of that kind that has been admitted.\(^{122}\)

\(^{115}\)Evidence Act ss. 69 and 70.

\(^{116}\)Evidence Act s.71.

\(^{117}\) Evidence Act s.59(3).

\(^{118}\)Evidence Act s.72.

\(^{119}\)Evidence Act s.73(1) and (2).

\(^{120}\)Evidence Act s.73(3).

\(^{121}\)Evidence Act s.74(1).

\(^{122}\)Evidence Act s.74(2).
General: The Opinion Rule

9.223 Another frequently arising exclusionary rule in the law of evidence is the rule relating to opinion evidence.

9.224 Evidence Act s.67 sets out the general exclusionary rule for opinion evidence (described throughout the Act as 'the opinion rule'). Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

9.225 The effect of the opinion rule is that a witness must give a plain account of the actual perception of his physical senses, devoid of inference, evaluation, interpretation or belief. In general a witness must say what he or she saw and heard and may not say what he or she thought or believed.

9.226 Frequently arising exceptions to the opinion rule include:

a. lay opinion;

b. opinion based on specialised knowledge ('expert opinion evidence').

Other exceptions to the opinion rule include evidence relevant otherwise than as opinion evidence.

9.227 Since the commencement of the Evidence Act, opinion evidence is admissible, if it falls within an exception to the opinion rule, on a matter of common knowledge or on an ultimate issue in a proceeding.

EXCEPTIONS TO THE OPINION RULE

Lay Opinion

9.228 The opinion rule does not apply to evidence of an opinion expressed by a person that is based upon what the person saw, heard or otherwise perceived about a matter or event if evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.123

9.229 This exception for lay opinion recognises that a strict application of the opinion rule ‘can disturb ordinary speech patterns by demanding testimony as to ‘fact’ rather than ‘opinion’ when very often the difference between the two is of little moment ... [when] ... [i]f a witness is constantly interrupted by objections and requests for reformulations of his testimony in terms of less inferential language, he may well lose his group on what precisely he is saying’.124

9.230 Frequently, lay opinion may be accepted on matters of measurement (for example, quantity, weight, time, distance, velocity, size) or on 'short-hand' convenient descriptions of events (for example, he took up the stance of a boxer). Other matters on which lay opinion evidence may be admissible include: value, measure, form, age, strength, heat, cold, sickness and health; questions also concerning various mental and moral aspects of humanity such as disposition and temper, anger and fear, excitement, veracity, general character and so on.

123Evidence Act s.78.

Opinion Based on Specialised Knowledge ('Expert Opinion Evidence')

9.231 The opinion rule does not apply to evidence of an opinion of a person with specialised knowledge based on his or her training, study or experience if the opinion is wholly or substantially based on that knowledge. In the following paragraphs, such a person is referred to as 'an expert'.

9.232 Such an expert is permitted to give opinion evidence to assist the tribunal to draw the appropriate inference from the facts it finds in the proceeding.

9.233 An expert qualifies to give evidence under this exception to the opinion rule if he or she has 'specialised knowledge based on his or her training, study or experience'. Formal qualifications are unnecessary, relevant training or experience will suffice.

9.234 The specialised knowledge need only be 'based on the person's training, study or experience'. There is no requirement that the knowledge must also relate to a recognised field of expertise, nor to a particular subject matter.

9.235 There is also no requirement under the exception for expert opinion evidence that the opinion be about a matter outside the range of knowledge of the members of the tribunal (see paragraph 6.240).

9.236 The facts on which an opinion of an expert is based will ordinarily concern a matter or event that is admitted or is in issue in the tribunal proceeding. For example, in a court-martial arising out of the grounding of a naval vessel, an expert may give opinion evidence concerning navigational procedures appropriate to the weather conditions that existed when the vessel was grounded. If the expert's opinion was based on weather conditions different to those that existed at that time, evidence of the expert's opinion will be irrelevant and, therefore, not admissible in the proceeding.

9.237 Occasionally, the expert's knowledge (such as data published by other experts) that he or she uses to draw an inference from facts concerning a matter or event at issue in a proceeding may be challenged. Thus that knowledge may itself be raised as an issue in the proceeding. Ordinarily evidence is not required of such knowledge. However, if it becomes an issue in a proceeding (for example, if the published data which the expert has used to draw an inference is challenged, say, as a matter of debate within the relevant scientific or academic community), evidence of the expert's opinion that is based on that knowledge runs the risk of exclusion under Evidence Act s.135 if evidence of the knowledge is not given in the proceeding, or is only given by the expert whose opinion evidence has been adduced (rather than by, in the example given, the other experts whose published data has been challenged).

9.238 The Australian Military Court is not bound to accept the evidence of an expert even if it is uncontradicted. However, because such evidence may have some probative value, the tribunal must not disregard it totally in determining questions of fact. Where there is conflicting evidence given by such persons who have been called on behalf of the prosecution and the defence, the court

125 Evidence Act s.79.
126 Evidence Act s.56(2).
127 Section 135 enables the Australian Military Court to exclude evidence 'if its probative value is substantially outweighed by the danger that the evidence might ... be unfairly prejudicial to a party ... or cause or result in undue waste of time'. The evidence may be unfairly prejudicial to a party, or may cause or result in undue waste of time, if it is necessary for the tribunal to determine the probability of the existence of a fact upon which the opinion evidence is based in circumstances where either no evidence of the fact is called or such evidence as there is before the tribunal cannot be tested upon cross-examination. Exclusion of the opinion evidence in these circumstances should not be automatic, but should be considered by the tribunal on a case-by-case basis taking into account, with other relevant matters, the reasonableness of requiring a party to call further evidence in the proceeding.

128 Minister v Ryan (1963) 9 LGRA 112.
must decide the weight to be attached to each version of the evidence whilst bearing in mind that such witnesses often have a tendency to espouse the cause of the party by whom they are called.

**Evidence of Expert Opinion Evidence by Certificate**

9.239 Evidence of an expert opinion can be adduced by tender of a certificate signed by an expert which sets out his or her opinion.

9.240 The procedure, set out in Evidence Act s.177, provides a means by which unchallenged expert opinion may be adduced without the need to call the expert as a witness in the proceeding. The party tendering the certificate must have first served on each other party written notice and a copy of the certificate.\(^{130}\) a party so served may by written notice require the party intending to tender the certificate to call the expert to give evidence in the proceeding.\(^ {131}\) The certificate is not admissible as evidence if such a requirement is made.\(^ {132}\)

**Operation of the Exception for Expert Opinion Evidence in Cases of Intoxication**

9.241 It is likely that the exception to the opinion rule for expert opinion evidence will enable opinion evidence about a person's sobriety to be given by a person with experience of observing others under the influence of intoxicating liquor. However, the evidence of such a person would only extend to the fact of intoxication, not to whether the person was 'under the influence ... to such an extent as to be incapable of having proper control of [a] vehicle\(^{133}\) or his or her 'faculties [were] ... so impaired that [he or she was] unfit to be entrusted with [his or her] duty'.\(^ {134}\)

9.242 In relation to the issue of intoxication, blood tests and breathalyser readings are not of themselves evidence of drunkenness or intoxication but may be given in evidence in cases of prosecutions for the particular statutory offences in respect of which such tests or readings are accorded the evidentiary effect of a statutory presumption, for example, driving a vehicle whilst having a percentage of alcohol in the blood equal to or in excess of the prescribed statutory percentage. Coupled with expert evidence about the reliability of the tests or readings and about the nature and relevance of the evidence so obtained to the issue of the intoxication, evidence of those tests or readings may become admissible on the issue of intoxication.\(^ {135}\)

**Evidence Relevant Otherwise than as Opinion Evidence**

9.243 The opinion rule does not apply to evidence of an opinion that is admitted other than to prove the existence of a fact about the existence of which the opinion was expressed.\(^ {136}\)

9.244 Under this exception evidence of the opinion may be used to prove a fact asserted by the opinion if evidence of the opinion is admitted because it is relevant for another purpose. If, for example, the expression of an opinion is a fact in issue because it is relevant to an accused's state of knowledge (where, for example, in a prosecution for an offence against DFDA s.34(3) for negligent operation of a weapon, evidence is given by a weapons technician that he or she had informed the accused that the weapon would perform as predicted under stated conditions), evidence of the opinion

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\(^{130}\)Evidence Act s.177(2). A 21 day time period, capable of being abridged by the tribunal, applies: Evidence Act s.177(3).

\(^{131}\)Evidence Act s.177(5).

\(^{132}\)Evidence Act s.177(6).

\(^{133}\)DFDA s.40.

\(^{134}\)DFDA s.37.


\(^{136}\)Evidence Act s.77.
may be used to prove a fact asserted by the opinion (for example, that the weapon would perform as predicted under those conditions).

**Opinion Evidence on a Matter of Common Knowledge**

9.245 Under Evidence Act s.80, evidence of an opinion is not inadmissible only because it is about a matter of common knowledge. Thus, it is not necessary that the topic upon which an expert witness proposes to give opinion evidence is one outside the range of knowledge of members of the tribunal.

**Opinion Evidence on an Ultimate Issue in a Proceeding**

9.246 Evidence Act s.80 also provides that evidence of an opinion is not inadmissible only because it is about a fact in issue or an ultimate issue. Thus, an expert may be asked a question about an issue that the tribunal itself must decide (for example, in a prosecution for an offence against DFDA s.32 for being drunk on watch, in which the person charged is ‘deemed to be drunk if ... [his or her] faculties are so impaired that [he or she] is unfit to be entrusted with [his or her] duty or with any duty [he or she] may be called upon to perform’, an expert may give an opinion about the accused’s fitness for duty, as defined, even though this is a question which must be determined by the tribunal).

**Opinion Evidence in Certain Official Documents**

9.247 Evidence of an admission is not inadmissible where the opinion is contained in a certificate or other document given evidentiary effect by regulations made under an Act.\(^\text{137}\)

**CHARACTER EVIDENCE**

**General**

9.248 For convenience, character evidence is first discussed in relation to evidence concerning the character of an accused in an Australian Military Court proceeding.

9.249 Most of the rules that apply to an accused also apply in relation to evidence of the character of other persons (for example, witnesses in the proceeding, the victim of the alleged offence). The differences, where character is relevant to a fact in issue in the proceeding, are set out in paragraph 6.278.

9.250 The rules that apply to character evidence depend upon the use to which the evidence is sought to be put in the proceeding.

9.251 This Section of the Chapter discusses the rules that apply when evidence of the character of a person is relevant to a fact in issue in the Australian Military Court proceeding.

9.252 If the only use to which the evidence can be put is to discredit evidence a witness has given in the proceeding, then the rules in Evidence Act Part 3.7 apply. Those rules are discussed in the context of rules that apply in relation to the cross-examination of witnesses.

9.253 If, however, character evidence is relevant to a fact in issue in the proceeding, one or both of Parts 3.6 or 3.8 of the Evidence Act apply.

9.254 Evidence Act Part 3.6 applies when evidence of a person’s character is relevant to a fact in issue because the evidence is to be used for a tendency reasoning\(^\text{138}\) or a coincidence reasoning purpose.\(^\text{139}\)
9.255 Special rules, contained in Evidence Act Part 3.8, apply when the accused adduces evidence of his or her own good character.

**EVIDENCE OF AN ACCUSED'S CHARACTER, REPUTATION OR PAST CONDUCT THAT IS RELEVANT TO A FACT IN ISSUE**

**General**

9.256 Except where an accused puts his or her own good character in issue, it is not permissible for evidence to be adduced that tends to show the accused is a person of bad character or reputation for the purpose of leading to the conclusion that he or she is a person likely to have committed the offence with which he or she has been charged.

9.257 However, the prosecution, or another accused in a proceeding, may adduce evidence of the accused's character to seek to establish a fact an issue in a proceeding by either a process of tendency reasoning or coincidence reasoning.

**Tendency Reasoning**

9.258 Tendency reasoning is the process of inferring that a person did a particular act or had a particular state of mind from evidence that he or she has or had a tendency to act in a particular way or to have a particular state of mind. The tendency of a person to act in a particular way or to have a particular state of mind may be established either by the past conduct of the person (for example, a tendency to carry out threats of violence may be proved by evidence of past occasions on which the person has occasioned threatened violence) or by evidence of character or reputation (that the person is a violent person, or has a reputation for violence).

9.259 Tendency may not necessarily relate to a tendency to act in some criminal or morally reprehensible way. Habit, and standard business or work practices, are also instances of a tendency to act in a particular way. One example of tendency reasoning is inferring that a person went to work by a particular route on a particular occasion from evidence that he or she regularly went to work by that route.

9.260 Special rules for the admission of tendency evidence are contained in Evidence Act Part 3.6.

9.261 Tendency evidence is evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, that a party seeks to have adduced to prove that the person has or had a tendency to act in a particular way or to have a particular state of mind.

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137 Evidence Act s.76(2).

138 Tendency reasoning is a process of inferring that a person did a particular act or had a particular state of mind from evidence that he or she has or had a tendency to act in a particular way. Evidence of such a tendency will vary from case to case, but may be in the form of evidence of past conduct of the person, or of his or her character or reputation.

139 Coincidence reasoning is a process of inferring that a person did a particular act or had a particular state of mind from the improbability that 2 or more events of a similar kind occurred coincidentally.

140 The evidence may be direct evidence of the accused's character or reputation, evidence of his or her past conduct (including the accused's past criminal acts or convictions) or evidence of a tendency the accused has or had to act in a particular way or to have a particular state of mind.
9.262 The special rules in Part 3.6 do not apply if the character, reputation, conduct or tendency of a person is a fact in issue in the proceeding.\footnote{Evidence Act s.94(3). For example, in a civil context, the rules in Part 3.6 do not apply to evidence of the reputation of the plaintiff in defamation proceedings.} If, however, the evidence is admissible for some other purpose (for example, if the evidence of conduct etc. is both a fact in issue and a fact from which other facts may be inferred by tendency reasoning) it cannot be used for a tendency reasoning purpose unless the special rules in Part 3.6 have been satisfied.\footnote{Evidence Act s.95.}

9.263 The special rules in Part 3.6 do not apply to expert opinion evidence about an accused adduced by a co-accused in a proceeding,\footnote{Evidence Act s.111(1). An example, in a common law context, of evidence to which s.111(1) applies is the evidence of the psychologist adduced by the co-accused King about the character of co-accused Lowery in \textit{Lowery v. R} [1974] AC 85.} or to evidence adduced to prove that such evidence should not be accepted.\footnote{Evidence Act s.111(2).}

9.264 The special rules in Part 3.6 that must be satisfied are:

\begin{enumerate}
\item a. reasonable notice in writing complying with subregulation 6 of the Evidence Regulations must be given by the party intending to adduce the evidence to each other party to the proceeding of his or her intention to do so;\footnote{Evidence Act sections 97(1)(a) and 99.}
\item b. the evidence must have significant probative value,\footnote{Evidence Act s.97(1)(b).} either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence; and
\item c. if the evidence is about an accused and is adduced by the prosecution other than to explain or contradict tendency evidence adduced by the accused, the probative value of the evidence must substantially outweigh any prejudicial effect it may have on the accused.\footnote{Evidence Act s.101.}
\end{enumerate}

9.265 The Australian Military Court may, on the application of a party, direct that particular evidence is admissible despite a party's failure to give reasonable notice in writing.\footnote{Evidence Act sections 97(2)(a) and 100(1).} The direction may be subject to conditions and may be given at or before the hearing of the proceeding. The application may be made by a party either before or after the time by which the party would be required to give, or have given, notice.

9.266 In deciding whether to give a direction, the Australian Military Court must take into account:

\begin{enumerate}
\item a. the extent to which to give the direction would be likely to add unduly to, or to shorten, the length of the hearing;
\item b. to extent to which to give the direction would be unfair to a party or to a witness;
\item c. the importance of the tendency evidence;
\item d. the nature of the proceeding;
\end{enumerate}
Reasonable notice in writing is not required if the tendency evidence is adduced to explain or contradict tendency evidence adduced by another party.\(^{150}\)

The requirement that notice in writing of an intention to adduce tendency evidence should be reasonable applies both to the timing of the notice and the content of the notice. Under Evidence Act s.99, notice must be given in accordance with any regulations or rules of court made for the purposes of that section. Subregulation 6(1) of the Evidence Regulations sets out requirements in relation to the content of notices.\(^{151}\) While no requirements relating to the period of notice which must be given are set out, timeliness of the notice would be relevant to determine whether reasonable notice in writing has been given.

**Coincidence Reasoning**

Coincidence reasoning is the process of inferring that a person did a particular act or had a particular state of mind from the improbability that certain events occurred coincidentally.

Coincidence evidence for the purposes of the Evidence Act is 'similar fact' evidence (that is, evidence of the occurrence of 2 or more events that are 'substantially and relevantly similar ... [occurring in] circumstances [that] ... are substantially similar') that is adduced for a coincidence reasoning purpose. The Act does not impose special requirements in relation to evidence other than similar fact evidence that is adduced for a coincidence reasoning purpose.

An example, in a common law context, of coincidence evidence that is adduced for a coincidence reasoning purpose is the famous 'baby-farming' case: *Makin v Attorney-General for New South Wales*.\(^{152}\) In *Makin*, the accused husband and wife were charged with the murder of a child given to them for adoption for a fee. The child's body had been found buried in the garden of a house which the accused occupied. The defence was that the child had died from natural causes. Evidence was admitted that 12 other children had been given to the accused on like terms for adoption and that their corpses had been found in the gardens of other houses they occupied. The finding of the 13 corpses in the grounds of houses occupied by the accused gave rise to an inference that their connection with the corpses was not coincidental.

Special rules for admission of coincidence evidence adduced for a coincidence reasoning purpose are contained in Evidence Act Part 3.6.

The special rules that must be satisfied are:

a. reasonable notice in writing complying with subregulation 6(1) of the Evidence Regulations must be given by the party intending to adduce the evidence to each other party to the proceeding of his or her intention to do so;\(^{153}\)

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\(^{149}\)Evidence Act s.192.

\(^{150}\)Evidence Act s.97(2)(b).

\(^{151}\)A notice must state the substance of the evidence the notifying party intends to adduce and, if the evidence consists of or includes evidence of the conduct of a person, particulars of other information (the date, time, place and circumstances at or in which the conduct occurred and the names and addresses of persons who witnessed it) so far as they are known to the party.

\(^{152}\)[1894] AC 56.

\(^{153}\)Evidence Act ss. 98(1)(a) and 99.
b. the evidence must have, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, significant probative value;\(^{154}\) and

c. if the evidence is about an accused and is adduced by the prosecution other than to explain or contradict coincidence evidence adduced by the accused, the probative value of the evidence must substantially outweigh any prejudicial effect it may have on the accused.\(^{155}\)

9.274 The Australian Military Court may, on the application of a party, direct that particular coincidence evidence is admissible despite a party’s failure to give reasonable notice in writing.\(^{156}\) The direction may be subject to conditions and may be given at or before the hearing of the proceedings. The application may be made by a party either before or after the time by which the party would be required to give, or have given, notice.

9.275 In deciding whether to give a direction, the Australian Military Court must take into account:

a. the extent to which to give the direction would be likely to add unduly to, or to shorten, the length of the hearing;

b. to extent to which to give the direction would be unfair to a party or to a witness;

c. the importance of the coincidence evidence;

d. the nature of the proceeding;

e. any power of the tribunal to adjourn the hearing or to make another order or give a direction in relation to the evidence.\(^{157}\)

9.276 Reasonable notice in writing is not required if the coincidence evidence is adduced to explain or contradict coincidence evidence adduced by another party.\(^{158}\)

9.277 The requirement that notice in writing of an intention to adduce coincidence evidence should be reasonable applies both to the timing of the notice and the content of the notice. Under Evidence Act s.99 notice must be given in accordance with any regulations or rules of court made for the purpose of that section. Subregulation 6(2) of the Evidence Regulations sets out requirements in relation to the content of notices.\(^{159}\) While no requirements relating to the period of notice which must be given are set out, timeliness of the notice would be relevant to determine whether reasonable notice in writing has been given.

**Character Evidence to Rebut Evidence of Good Character Adduced by an Accused**

9.278 Special rules, contained in Evidence Act Part 3.8, apply when an accused adduces evidence of his or her own good character.

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154Evidence Act ss.98(1)(b).

155Evidence Act s.101.

156Evidence Act ss.98(3)(a) and 100(2).

157Evidence Act s.192.

158Evidence Act ss.98(3)(b).

159A notice must state the substance of the evidence of the occurrence of the events the notifying party intends to adduce and particulars of other information (the date, time, place and circumstances at or in which each event occurred and the names and addresses of persons who witnessed each event) so far as they are known to the party.
9.279 Other exclusionary rules set out in the Evidence Act (including the hearsay rule and the opinion rule) do not apply to evidence adduced by an accused to prove, either generally or in a particular respect, that he or she is a person of good character. An accused may adduce evidence of this kind with a view to persuading the tribunal that as a person of good character, he or she is unlikely to have committed the offence with which he or she has been charged in the proceedings.

9.280 Where an accused has adduced evidence to prove he or she is a person of good character, evidence to rebut such evidence is admissible. Rebuttal evidence is only admissible to the extent that the accused has adduced evidence of his or her own good character: if the accused has adduced evidence of his or her character only in a particular respect then only evidence limited to that respect is admissible in rebuttal.

9.281 Evidence Act Part 3.8, therefore, allows an accused to put part only of his or her character in issue. For example, an accused who may have a reputation for dishonesty may put his good character in issue in relation to 'never having acted indecently to a woman' without putting his character generally in issue.

**EVIDENCE OF THE CHARACTER, REPUTATION OR PAST CONDUCT OF OTHER PERSONS (FOR EXAMPLE, OTHER WITNESSES, THE VICTIM OF AN ALLEGED OFFENCE) THAT IS RELEVANT TO A FACT IN ISSUE**

**General**

9.282 Occasionally, the character of a person other than an accused may be relevant to a fact in issue in a proceeding because it is to be used for a tendency reasoning or a coincidence reasoning purpose. For example, the issue of self-defence may be raised by the accused, who may wish to adduce evidence of the past conduct of the victim, or someone else, to prove a tendency of the victim or that other person to act in a violent way.

9.283 The rules in relation to the admission of tendency evidence and also coincidence evidence about a person other than the accused are the same as for an accused except that the requirements set out at paragraph 6.259(c) for tendency evidence and at paragraph 6.268(c) for coincidence evidence will not apply to evidence about a person other than an accused.

**Evidence (Including Tendency Evidence) of Sexual Reputation of a Complainant in Sexual Assault Cases**

9.284 In ACT courts (and, hence, before Australian Military Courts) in proceedings relating to sexual offences, evidence (including tendency evidence) concerning the sexual reputation of the complainant is inadmissible. No evidence may be adduced without the leave of the judge (or military judge) of the sexual experience of the complainant with a person other than the accused. Moreover, the judge (or military judge) may not grant leave for any evidence to be adduced or any question to be asked of the complainant in connection with his or her sexual experience with persons other than the accused unless: an application for leave is made to the military judge in the absence of the court; and, the military judge is satisfied that a refusal to allow the evidence to be adduced or the question to be asked would prejudice the fair trial of the accused person.

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160 Evidence Act s.110(1).
161 Evidence Act s.110(2).
162 Evidence Act s.110(3).
163 In this respect, Part 3.8 reverses the rule in *R v Winfield* (1939) 27 Cr App Rep 139 that a person cannot 'put half of his or her character in issue'.
164 s.76G(1), G(2), G(3) of the (ACT) Evidence Act 1971.
IDENTIFICATION EVIDENCE

General

9.285 Evidence Act Part 3.9 contains special rules about the admissibility of visual identification evidence relating to an accused adduced by the prosecution.

Visual identification evidence adduced by the prosecution

9.286 Under Evidence Act s.114 evidence adduced by the prosecution of an assertion made by a person that:

a. the accused was, or resembles a person who was, present at or near a place where the offence was committed or an act connected with the offence was done at or about the time that the offence was committed or the act was done; and

b. is based wholly or partly on what the person saw at that place and time; and

c. is not 'picture identification evidence',

is not admissible unless:

d. an identification parade that included the accused was made before the assertion was made; or

e. it would not have been reasonable to have held such a parade; or

f. the accused refused to take part in such a parade;

and the assertion was made without the person having been intentionally influenced to identify the accused.

9.287 In deciding whether it was reasonable to hold an identification parade, the Australian Military Court must take into account:

a. the kind and gravity of the offence;

b. the importance of the evidence;

c. the practicality of holding an identification parade having regard, among other things, to the manner and extent of and reason (if any) for any failure to cooperate in the conduct of the parade, and to whether the assertion was made at or about the time of the commission of the offence (for example, if the witness happened to encounter and recognise the accused soon after the offence was committed); and

d. the appropriateness of holding an identification parade having regard, among other things, to any relationship between the accused and the person who made the assertion (for example, it would be inappropriate to hold an identification parade if the accused was well-known to the witness);

but must not take into account the availability of pictures or photographs that could be used in making identifications.\footnote{Evidence Act ss. 114(3) and (6).}

9.288 It is presumed that it would not have been reasonable to have held an identification parade if:

\footnote{Evidence Act ss. 114(3) and (6).}
a. it would have been unfair to the accused to have held such a parade; 166

b. if the accused refused to take part in a parade unless a lawyer acting for him or her or some other person was present and there were reasonable grounds to believe it was not reasonably practicable for such a lawyer or person to be present. 167

**Picture Identification Evidence Adduced by the Prosecution**

9.289 Evidence Act s.115 provides three exclusionary rules for evidence adduced by the prosecution of an assertion made by a person that:

a. the accused was, or resembles a person who was, present at or near a place where the offence was committed or an act connected with the offence was done at or about the time that the offence was committed or the act was done; and

b. is based wholly or partly on what the person saw at that time and place;

c. was made wholly or partly by the person examining pictures or photographs kept for the use of police officers. 168

Such evidence is referred to in the Act as ‘picture identification evidence’.

9.290 None of the three exclusionary rules apply to evidence adduced by the prosecution to contradict or qualify picture identification evidence adduced by the accused.

9.291 The first exclusionary rule is that picture identification evidence adduced by the prosecution is not admissible unless the pictures or photographs examined did not suggest that they were pictures or photographs of persons in police custody. 169

9.292 The second exclusionary rule is that picture identification evidence adduced by the prosecution is not admissible if the accused was in the custody of an officer of the police force investigating the commission of the offence with which the accused has been charged and the picture of the accused was made or the photographs of the accused was taken before the accused was taken into that custody. 170 The rule does not apply if the accused's appearance had changed significantly between the time the offence was committed and the time the accused was taken into that custody or if it was not reasonably practicable to make a picture or take a photograph of the accused after he or she was taken into that custody. 171

9.293 The third exclusionary rule is that picture identification evidence adduced by the prosecution is not admissible if the accused was in the custody of an officer of the police force investigating the commission of the offence with which the accused has been charged when the pictures or photographs were examined unless -

a. the accused refused to take part in an identification parade; or

b. the accused's appearance had changed significantly between the time the offence was committed and the time the accused was taken into that custody; or

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166 Evidence Act ss.114(4).

167 Evidence Act s.114(5).

168 ‘Police officer’ is defined in the Dictionary at the end of the Act as a member of the Australian Federal Police or a member of the police force of a State or Territory, it does not include Service police officers.

169 Evidence Act s.115(2).

170 Evidence Act s.115(3).

171 Evidence Act s.115(4).
c. it would not have been reasonable to have held an identification parade that included the accused.\textsuperscript{172}

9.294 This rule ensures that where an accused is in custody at the time pictures or photographs are examined, an identification parade (rather than examination of pictures or photographs) should be the primary means of obtaining visual identification evidence relating to an accused.

\textbf{IMPROPERLY OR ILLEGALLY OBTAINED EVIDENCE}

\textbf{General}

9.295 The Australian Military Court is in certain circumstances prohibited from admitting improperly or unlawfully obtained evidence, and evidence obtained in consequence of an impropriety or a breach of the law.

9.296 The prohibition in respect of improperly obtained evidence, and evidence obtained in consequence of an impropriety, arises under Evidence Act s.138.

9.297 The prohibition in respect of unlawfully obtained evidence, and evidence obtained in consequence of a breach of the law, arises both under Evidence Act s.138 and, in cases where a provision of Part VI of the DFDA has been contravened, DFDA s.101ZB. While not completely free from doubt, it is likely that, in the case of evidence obtained in (or in consequence of) a contravention of a provision of DFDA Part VI, both Evidence Act s.138 and DFDA s.101ZB will apply to the evidence.

\textbf{Evidence Obtained Improperly or Unlawfully (Except in Contravention of a Provision of DFDA Part VI)}

9.298 Evidence Act s.138(1) provides that evidence obtained improperly or in contravention of an Australian law, or in consequence of an impropriety or in contravention of an Australian law, is not to be admitted unless the desirability of admitting it outweighs the undesirability of admitting evidence obtained in the particular way it was obtained.

9.299 Once evidence is shown to have been obtained improperly or unlawfully, or in consequence of an impropriety or breach of the law, the onus is on the party seeking to have the evidence admitted to satisfy the Australian Military Court that the evidence should be admitted.

9.300 Evidence Act sections 138(2) and 139 set out several occasions when evidence is, for the purpose of s.138(1), taken to have been obtained improperly.

9.301 Under Evidence Act s.138(2) an admission made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning -

\begin{itemize}
  \item[a.] did or failed to do an act in the course of questioning which he or she knew, or ought to have known, was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
  \item[b.] made a false statement in the course of questioning which he or she knew, or ought to have known, was false and likely to cause the person being questioned to make an admission.\textsuperscript{173}
\end{itemize}

9.302 Under Evidence Act s.139, evidence of a statement made or act done by a person during questioning by an investigating official is in certain circumstances taken to have been obtained improperly if the person was not cautioned. Section 139 may on occasions apply in a Australian Military Court proceeding if evidence is adduced of a statement made or act done by a Service

\textsuperscript{172}Evidence Act s.115(5).

\textsuperscript{173}Evidence Act s.138(2).
member (or some other person) during questioning by a police officer (an AFP special member or 
member or a State or Territory police force member) or a person appointed under Australian law (a 
law of the Commonwealth, a State or a Territory) whose functions include functions in respect of the 
prevention or investigation of offences (this includes DFDA investigating officers).174

9.303 In determining, for the purpose of the Evidence Act s.138(1), whether the desirability of 
admitting improperly or unlawfully obtained evidence outweighs the undesirability of admitting such 
evidence, the Australian Military Court must take into account the probative value of the evidence, its 
importance in the proceeding, the nature of the Service offence with which the accused has been 
charged, the gravity of the impropriety or contravention of law, whether it was deliberate or reckless or 
contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil 
and Political Rights, whether any other proceeding is likely to be taken in relation to it and the difficulty 
(if any) of obtaining the evidence without the impropriety or contravention.175

Evidence obtained in contravention of a provision of DFDA Part VI

9.304 While not completely free from doubt, it is likely that both Evidence Act s.138 and DFDA 
s.101ZB will apply to evidence obtained in contravention of a provision of DFDA Part VI or in 
consequence of such a contravention of Part VI.

9.305 Therefore if, for example, evidence was obtained in or in consequence of a contravention of 
DFDA Part VI (for example, if the accused made an admission during questioning by a Service police 
officer when the accused had not been cautioned in circumstances in which the Service police officer 
was obliged to have done so under DFDA s.101D), the Australian Military Court must consider 
whether either of Evidence Act s.138(1) or DFDA s.101ZB requires it not to admit the evidence.

9.306 There is a difference in emphasis between the two tests in DFDA s.101ZB and Evidence Act 
s.138. Under s.101ZB(1) the tribunal must be satisfied that the admission of the evidence 'would 
substantially benefit the public interest in the administration of justice': under s.138 the tribunal must 
consider the admission of the evidence to be desirable, albeit to such an extent that it outweighs 'the 
undesirability of admitting [the] evidence'. The former provision also specifically requires the tribunal to 
consider any prejudice resulting from admission of the unlawfully obtained evidence in the proceeding 
on persons other than the accused.

9.307 At a procedural level, DFDA s.101ZB, but not Evidence Act s.138(1), requires an objection to 
be taken to the admission of the evidence. If it becomes apparent during the course of a proceeding 
that evidence has been obtained in or in contravention of a provision of DFDA Part VI, the tribunal 
must consider whether Evidence Act s.138(1) requires it not to admit the evidence, whether or not a 
party has formally objected to the evidence. In practice, it is likely in most cases that once a tribunal 
has drawn to attention its obligation to consider whether particular evidence is required not to be 
admitted under s.138, an objection will be made under s.101ZB.

DISCRETIONARY EXCLUSION OF EVIDENCE

General

9.308 Even if the admissibility rules under the Evidence Act have been satisfied in relation to a 
particular item of evidence, the Australian Military Court may refuse to admit the evidence in the 
proceeding.

9.309 The power to do so arises under three separate provisions of the Evidence Act.

9.310 The first is section 135 of the Evidence Act, which applies irrespective of the party that 
adduced the evidence in the proceeding.


175 Evidence Act s.138(3).
9.311 The second and third provisions are sections 90 and 137 of the Evidence Act. They apply to evidence adduced by the prosecution. Section 90 applies to evidence of an admission adduced by the prosecution in a proceeding, while section 137 applies to any evidence adduced by the prosecution.

**General Discretion: Section 135 of the Evidence Act**

9.312 Under Evidence Act s.135, the Australian Military Court may refuse to admit a particular item of evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, misleading or confusing, or cause or result in undue waste of time.

9.313 Section 135 is part of the Evidence Act's treatment of the issue of relevance. The effect of the relevance rule, and more particularly the test of relevance in section 55 of the Act, is to provide that all logically relevant evidence is admissible in a proceeding.

9.314 The power to refuse to admit evidence that might unfairly prejudice a party enables a court, and therefore a Australian Military Court, to exclude from a proceeding evidence that, because 'it appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish or triggers other mainsprings of human action', may cause the tribunal to make its decision on a basis unconnected to the issues in a case. This power would seldom arise in relation to evidence adduced by the prosecution, because Evidence Act s.137 requires a tribunal to exclude such evidence if its probative value is outweighed by the danger of unfair prejudice to the defendant.

9.315 One occasion when the possible exercise of the power to refuse to admit evidence that might be misleading or confusing may arise is when evidence is adduced that, while logically relevant, may be given much more significance by the tribunal than it deserves (for example, evidence, in the prosecution of a member under DFDA s.35 for negligently performing a duty, of remedial measures taken by the member following the incident in relation to which he or she has been charged).

9.316 The power to refuse to admit evidence that might cause or result in undue waste of time enables a tribunal to refuse to admit marginally relevant evidence.

9.317 The onus is on the party seeking exclusion of the evidence under Evidence Act s.135 to show that the danger the evidence might be unfairly prejudicial to a party etc. substantially outweighs the probative value of the evidence.

9.318 The Australian Military Court may limit the use to be made of evidence if there is a danger that a particular use may be unfairly prejudicial to a party, or misleading or confusing.

**Discretion to Exclude Prosecution Evidence of an Admission: Section 90 of the Evidence Act**

9.319 Under Evidence Act s.90, the Australian Military Court may refuse to admit evidence of an admission adduced by the prosecution, or refuse to admit it to prove a particular fact, if having regard to the circumstances in which it was made it would be unfair to an accused to use the evidence.

9.320 Unlike the situation when the tribunal is looking at an admission which has been improperly obtained, exclusion on this ground focuses upon the effect of use of the evidence upon a particular accused, rather than upon the desirability (or otherwise) of admitting the evidence.

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177 For discussion of the relevance rule,


179 See paragraphs 6.138-6.139.

180 Evidence Act s.136.
9.321 The particular circumstances in which an admission was made may be, of course, both improper and result in unfairness to an accused: evidence of an admission may be at risk of exclusion on either ground. Brennan J (as he then was) in Duke v. The Queen (1988) 63 ALJR at 141 gave ‘...[t]rickery, misrepresentation, omission to inquire into material facts lest they be exculpatory, cross-examination going beyond clarification of information voluntarily given, or detaining a suspect or keeping him in isolation without lawful justification' as examples of conduct that might justify exclusion of evidence under the common-law equivalents of either ground.

Exclusion of Prejudicial Evidence Adduced by the Prosecution: Section 137 of the Evidence Act

9.322 Under Evidence Act s.137, the Australian Military Court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused. This requirement, which reflects a trial judge’s discretion under the common law to reject prosecution evidence that is more prejudicial than probative, protects an accused from evidence that is logically relevant and otherwise admissible: evidence which may be misused by a jury or may give rise to bias against an accused (for example, prosecution evidence of particularly graphic photographs of the deceased in a murder trial, which might influence the jury against an accused). The requirement applies not only to prosecution evidence of an admission, but to all evidence adduced by the prosecutor in an Australian Military Court proceeding.

EXAMINATION OF WITNESSES

Preliminary Matters

9.323 The procedure at a criminal trial involves the elucidation of facts by means of questions put by parties or their representatives to witnesses summoned to give evidence. In general outline, the procedure for receiving evidence is that each witness is subjected to examination-in-chief by the party who has called that witness and then to cross-examination by the opposing party. The witness may then be re-examined by the first party about matters arising out of evidence the witness gave in cross-examination and, by leave of the Australian Military Court, other questions may be put to the witness on re-examination.

Witness to be Sworn

9.324 Every witness must be sworn or affirmed, except a person who is incapable of understanding that in giving evidence he or she is under an obligation to give truthful evidence. Such a person may give unsworn evidence in some situations.181 Also, a person who has been summoned to produce documents may be permitted to hand over the documents to the court without being sworn - unless a party wishes to place evidence on the court record in relation to those documents, in which case he or she may insist that the person be sworn.

Order of Witnesses

9.325 Witnesses may be called in any order except that when an accused is to give evidence he or she should be called before any other defence witness.182 In practice, witnesses remain out of court until called to give evidence, so that each witness may be examined out of the hearing of the other witnesses on the same side who are to be later examined. Experts may be permitted to remain in court before giving evidence,183 especially if they are required to comment on matters already given in evidence.

9.326 Before discussing in detail the examination of witnesses, it is necessary to consider the important rules relating to the reviving of memory by a witness before or during the trial.

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181 Evidence Act s.13(2) and paragraphs 6.47 - 6.48.
182 R v Smith (Joan) [1968] 1 W.L.R. 636; also see Item 45 of Appendix 2 to Chapter 9.
Reviving Memory

9.327 A witness may use a document to try to revive his or her memory before giving evidence or, if the Australian Military Court gives leave, in the course of giving evidence.

9.328 If a witness has used a document (or a thing) to try to revive his or her memory otherwise than while giving evidence, the Australian Military Court may, at the request of a party, direct that the document (or thing) be produced to the party. If the direction is not complied with (without reasonable excuse), the tribunal may refuse to admit evidence given by the witness about a fact concerning which the witness so tried to revive his or her memory.

9.329 Once a witness is in the witness box, he or she must not use a document to try to revive his or her memory about a fact or opinion unless the Australian Military Court gives leave.

9.330 In deciding whether to give leave, the tribunal must take into account:

a. whether the witness can recall the fact or opinion adequately without using the document;

b. whether so much of the document as the witness proposes to use is (or is a copy of) a document that was written by the witness, or was found by him or her to be accurate, at a time when the events recorded in it were fresh in his or her memory.

9.331 A document need not have been written or checked contemporaneously or soon after the relevant event occurred, although it is more likely that events will be fresh in a person's memory soon after they occurred.

9.332 If a witness has used a document to try to revive his or her memory about a fact or opinion, the witness may, with leave of the tribunal, read aloud as part of his or her evidence so much of the document as relates to the fact or opinion.

\[184\] Evidence Act s.34(1).

\[185\] Evidence Act s.34(2).

\[186\] Evidence Act s.32.

\[187\] Evidence Act s.32(2).

\[188\] Evidence Act s.32(3).
9.333 In deciding whether to give leave to read the document aloud, the Australian Military Court must take into account:

a. the extent to which to give leave would be likely to add unduly to, or to shorten, the length of the hearing;

b. the extent to which to give leave would be unfair to a party or to a witness;

c. the importance of the evidence the witness will give;

d. the nature of the proceeding; and

e. any power of the tribunal to adjourn the hearing or to make another order or to give a direction in relation to the evidence.\(^{189}\)

9.334 There may be occasions when a matter is not controversial (for example, a doctor reading from his or her patient records) or factual accuracy is important (for example, a police officer giving measurements taken at the scene of an accident\(^{190}\)) when it is desirable that a witness should be able to give his or her evidence by reading notes.

9.335 If a witness has used a document to try to revive his or her memory in the course of giving evidence, the Australian Military Court may, at the request of a party, direct that so much of the document as relates to the Australian Military Court proceeding is produced to that party.\(^{191}\) Calling for production of the document or inspection of the document when produced does not require the party to tender the document, nor entitle the producing party to tender it.\(^{192}\) If the party to whom the document is produced cross-examines the witness about a prior inconsistent statement in the document, the Australian Military Court can give directions about its use and admit it, unless the document is inadmissible.\(^{193}\)

**EXAMINATION-IN-CHIEF**

9.336 The object of examination-in-chief is to obtain testimony in support of the version of the facts in issue or relevant to the issue for which the party calling the witness contends.\(^{194}\)

9.337 In this section we will be concerned with the putting of leading questions in examination in chief and the cross-examination of one's own witness.

**Leading Questions**

9.338 A leading question is one which either directly or indirectly suggests a particular answer or assumes the existence of a disputed fact concerning which the witness has not yet testified. An example of the first type would be: ‘Did you see the electrician lay the cables the wrong way?’ An example of the second type of question would be: ‘After the accused fired the gun what did he then do?’ (if put to a witness who has not testified that the accused had fired the gun).

\(^{189}\)Evidence Act s.192.

\(^{190}\)A member of the Australian Federal Police or a police force of a State or Territory may in some situations give evidence in chief for the prosecution by reading or being led through a written statement the officer previously made: see Evidence Act s.33.

\(^{191}\)Evidence Act s.32(4).

\(^{192}\)Evidence Act s.35.

\(^{193}\)Evidence Act ss. 45(3) and (4).

\(^{194}\)Cross on Evidence, 4th Australian edition, paragraph 17140.
9.339 A leading question may not be put to a witness in examination in chief (or in re-examination) unless:
   a. the Australian Military Court gives leave;
   b. the question relates to an introductory matter or a matter not in dispute;
   c. where all the parties to the proceeding other than the party examining the witness are represented by a lawyer and no objection to the question is made;
   d. in the case of a question put to a person with specialised knowledge based on his or her study, training or experience, the question is put for the purpose of obtaining the person's opinion on a hypothetical statement of facts, being facts in respect of which evidence has been or is intended to be given.195

9.340 Leading questions are inadmissible because of the danger that they allow collusion between the person asking them and the witness or because they assume the existence of facts which are not in evidence. Frequently, leading questions are put in such a form that the witness has to answer merely 'Yes' or 'No', and in the simplicity of this answer the full truth may not emerge. It is not true, however, that because a question may be answered 'Yes' or 'No' it is necessarily a leading question, although often it will be.

Cross-examining One's Own Witness

9.341 A party may, with leave of the Australian Military Court, question his or her own witness as though the party were cross-examining the witness about:
   a. evidence the witness has given that is unfavourable to the party;
   b. a matter of which the witness may reasonably be supposed to have knowledge about which it appears to the tribunal that the witness is not in examination in chief making a genuine attempt to give evidence; or
   c. whether the witness has at any time made a prior inconsistent statement.196

With the leave of the tribunal, the party so questioning such a witness may question him or her about matters relevant to his or her credibility.197

9.342 Questioning a witness with that leave is to take place before other parties cross-examine the witness, although the tribunal may give directions about the order in which the parties may question the witness.198

195 Evidence Act s.37(1).
196 Evidence Act s.38(1).
197 Evidence Act s.38(3).
198 Evidence Act ss. 38(4) and (5).
In deciding whether to give leave or a direction, the Australian Military Court must take into account:

a. whether the party gave notice at the earliest opportunity of his or her intention to seek leave; and

b. the matters on which and the extent to which the witness has been, or is likely to be, questioned by another party.\(^{199}\)

### CROSS-EXAMINATION

#### The Object of Cross-examination

The object of cross-examination is two-fold, first to elicit information concerning facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted, and, secondly, to cast doubt upon the accuracy of the evidence-in-chief given against such a party.\(^{200}\) Anything which is relevant to the issues or the witness's credit is permissible whether it be to test and attack the opponent's case or to obtain evidence in support of the cross-examiner's case.

A cross-examiner's attack on a witness may be on a very wide front, including inaccurate observation, unreliable memory, bias and general credit. Furthermore, as a general rule, a cross-examiner may ask leading questions.

If, in a crucial part of the case, a party intends to ask the court to disbelieve the evidence of a witness for an opponent, the witness should be challenged when in the witness-box, or, at least it should be made plain while the witness is in the box that his or her evidence is not accepted.\(^{201}\) For example, in a case where identification of the accused is in issue and a witness has asserted that he or she saw the accused at a certain relevant time, the cross-examiner must make it clear to the witness, either by putting it directly to the witness that he or she is mistaken or lying, or by the nature of the cross-examination, that the evidence is not accepted. Failure by the cross-examiner to do this may allow the cross-examiner's opponent to recall the witness, so that the opponent has a full chance to put the witness's evidence on the matter before the court.\(^{202}\) In determining the weight to be attached to the witness's evidence, the court may take the failure to cross-examine into account.\(^{203}\)

Usually abstention from cross-examination indicates that the evidence-in-chief is accepted or, at all events, not controverted. On the other hand, it may indicate that the evidence-in-chief is regarded as irrelevant or so inherently implausible that it is not worthwhile wasting time on it.

In these paragraphs of Section 11 we will be concerned with the putting of leading questions in cross-examination, the power of the Australian Military Court to disallow improper questions and some other statutory and ethical restraints upon cross-examination.

We will also deal with the rules in Evidence Act Part 3.7 which set out:

a. when an accused can be cross-examined on a matter that is relevant only to the credibility of evidence he or she has given in Australian Military Court proceedings; and

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\(^{199}\)Evidence Act s.38(6).

\(^{200}\)Cross on Evidence, 4th Australian edition, paragraph 17430.

\(^{201}\)The Rule in *Browne v Dunn* (1893) 6 R 67; Seymour v Australian Broadcasting Commission [1977] ACLD 511.

\(^{202}\)Evidence Act s.46. Also see r 19 of the DFD Rules.

b. admissibility rules relating to evidence that is relevant only to the credibility of evidence a witness has given in such a proceeding.

Leading Questions

9.350 A leading question is one which either directly or indirectly suggests a particular answer or assumes the existence of a disputed fact concerning which the witness has not yet testified.\(^{204}\)

9.351 A leading question may be asked in cross-examination, subject to a power in the Australian Military Court to disallow it or direct the witness not to answer it.\(^{205}\)

9.352 If the tribunal is satisfied that the facts would be better ascertained if leading questions were not used, it must disallow a leading question or direct the witness not to answer it.\(^{206}\)

9.353 In deciding whether to disallow a question or give a direction, the tribunal must take into account the extent to which:

a. evidence given by the witness in examination in chief is unfavourable to the party who called him or her;

b. the witness has an interest consistent with an interest of the cross-examining party;

c. the witness is sympathetic to the party conducting the cross-examination (either generally or about a particular matter);

d. the witness's age, or any mental or physical disability to which he or she is subject, may affect his or her answers.\(^{207}\)

9.354 One situation when the Australian Military Court may consider exercising its power to disallow etc a leading question put in cross-examination is when a co-accused in a joint trial before the tribunal is seeking to lead evidence from a witness called by another co-accused. If, for example, the witness has given evidence that is favourable to the cross-examining co-accused, the fact-finding process of the tribunal might be assisted by a departure from the general rule that leading questions may be asked in cross-examination.

Improper Questions

9.355 The Australian Military Court may disallow, or inform the witness that he or she need not answer, a question put to a witness in cross-examination, that is misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.\(^{208}\)

9.356 In deciding whether to disallow a question or give a direction, the tribunal must take into account any relevant condition or characteristic of the witness (such as age or education) and any mental or physical disability to which the witness appears to be subject.\(^{209}\)

\(^{204}\)See, in relation to examples of leading questions.

\(^{205}\)Evidence Act s.42(1).

\(^{206}\)Evidence Act s.42(3).

\(^{207}\)Evidence Act s.42(2).

\(^{208}\)Evidence Act s.41(1).

\(^{209}\)Evidence Act s.41(2).
Other Statutory and Ethical Restraints upon Cross-examination

9.357 The operation of Evidence Act s.128, which provides protection to witnesses against self-incrimination or self-exposure to a penalty, may arise in the context of the cross-examination of a witness.

9.358 Other statutory restraints upon cross-examination of a witness may arise in the context of the cross-examination of a witness that is relevant only to the credibility of evidence he or she has given in a proceeding.

9.359 For ethical reasons a defending officer should not impugn a witness’s character unless it is necessary to do so as part of the accused’s case and the imputations are well founded, or the officer intends to call evidence in support of the imputations. Judicial discretion will not permit ‘trap’ questions, double-barrelled or vague ones, or questions such as ‘Have you stopped beating your wife?’ when they proceed on an assumption which has neither been put to or accepted by the witness. Nor should questions be asked which amount only to comment.

Cross-examination as to Credit

9.360 Cross-examination of a witness as to credit has been explained in the following terms:

‘Questions asked of a witness about his conduct in some matter merely collateral to facts in issue are permitted if they go to his credit. That is ... because if what is insinuated is admitted by (the witness) that may suggest that he is not to be believed on his oath. It is not that he is said to be a discreditable person: it is that, because of this, his testimony may be incredible. When lawyers speak of conduct or character as going to the credit of a witness, they use the word “credit” in relation to credibility, his veracity, not in the sense of his worthiness.’

9.361 Matters which go to the credit of a witness include prior statements which are inconsistent with present testimony; specific contradictions, that is, proving that a fact asserted by a witness is untrue; bias; character and lack of capacity to observe, remember or recount the matters testified about.

9.362 Evidence Act Part 3.7 provides:

a. rules setting out when an accused can be cross-examined on a matter relevant only to evidence he or she has given;

b. admissibility rules relating to evidence that is relevant only to the credibility of evidence a witness has given.

9.363 The rules in Part 3.7 apply only to evidence that is relevant only to credit. Evidence is relevant only to the credibility of evidence a witness has given in a proceeding if the only use to which it can be put in the proceeding is to discredit evidence the witness has given. Such evidence must not be relevant to the existence of a fact in issue in the proceeding (other than because of the veracity of a witness testifying about the fact).

When an Accused may be Cross-examined on a Matter Relevant only to Credit

9.364 The accused is in a special position in relation to cross-examination on a matter that is relevant only to determine the credibility of evidence he or she has given.

9.365 Evidence Act s.104 contains rules about when an accused can be cross-examined upon such a matter, whether by the prosecutor or another accused in the proceeding.

9.366 Unless the evidence is about whether the accused:

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210 Based on Rules 36, 37 and 38 of the ACT Barristers Rules.

211 Wren v Emmett Contractors (1969) 43 ALJR 213 per Windeyer J.
a. is biased or has a motive to be untruthful;

b. is or was unable to be aware of or recall matters to which his or her evidence relates; or

c. has made a prior inconsistent statement,

the prosecutor cannot cross-examine an accused about a matter relevant only to the credibility of evidence he or she has given in the proceeding unless the Australian Military Court has given leave.

**9.367** When leave is required, it must not be given unless the accused has adduced evidence in the proceeding that:

a. tends to prove he or she is a person of good character, either generally or in a particular respect; or

b. has been admitted and tends to prove a witness called by the prosecutor has a tendency to be untruthful.

**9.368** For the purpose of the leave requirement, an accused has 'adduced' evidence in the proceeding if he or she has actually given the evidence, led it from another witness he or she has called in the proceeding or has elicited it when cross-examining a witness called by another party (including the prosecutor). Evidence is not adduced from a witness when a suggestion is merely put to the witness during cross-examination but is not admitted by the witness.

**9.369** Before leave can be given in circumstances where the accused has adduced evidence that tends to prove a witness called by the prosecutor has a tendency to be untruthful, the evidence must be relevant solely or mainly to the credibility of evidence the witness has given in the proceeding. The evidence must also not be evidence of conduct relating to the events in relation to which the accused is being prosecuted or the investigation of the offence with which the accused is being prosecuted. That is, an accused does not 'throw away his or her shield' when it is suggested, for example, that a prosecution witness has lied in the course of giving evidence about the events that are the subject of the charge, or that a confession allegedly made by the accused was fabricated.

**9.370** An occasion when a Australian Military Court might need to decide whether leave might be given would arise when the evidence adduced by the accused tends to prove that the prosecution witness lied on some occasion unconnected with the proceedings (for example, during the prosecution of some other person for some other Service offence).

**9.371** In deciding whether to give leave, the Australian Military Court must take into account:

a. the extent to which to give leave would be likely to add unduly to, or to shorten, the length of the hearing;

b. the extent to which to give leave would be unfair to a party or a witness;

c. the importance of the evidence sought to be obtained by cross-examination of the accused;

d. the nature of the proceeding;

e. any power of the tribunal to adjourn the hearing or to make another order or give a direction in relation to the evidence.\(^{212}\)

**9.372** In joint trials before the Australian Military Court, an accused cannot cross-examine a co-accused about a matter relevant only to the credibility of evidence that the co-accused has given in the proceeding unless the tribunal gives leave. Leave cannot be given unless the co-accused has given

\(^{212}\)Evidence Act s.192.
evidence adverse to the accused who is seeking leave to cross-examine and the evidence has been admitted in the proceeding.

9.373 The Australian Military Court must take into account the matters stated above in deciding whether to give leave.

9.374 It could be expected that on most occasions leave would be given. The general principle is that an accused should be able to put his or her defence in its entirety.213

Admissibility Rules Relating to Evidence that is Relevant only to Credit

9.375 Evidence Act Part 3.7 also sets out admissibility rules relating to evidence that is relevant only to the credibility of evidence a witness has given.

9.376 Those rules differ depending upon whether the evidence is adduced upon cross-examination of the witness or if it is adduced from some other person to rebut evidence given by the witness (for example, when a cross-examining party wishes to contradict evidence given by a witness on a matter relevant to the credibility of evidence the witness has given).

Evidence Adduced in Cross-examination of a Witness

9.377 Evidence adduced in the cross-examination of a witness that is relevant only to the credibility of evidence the person has given is admissible only if it has substantial probative value.214

9.378 In deciding whether the evidence has substantial probative value, the Australian Military Court must take into account:

a. whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when under an obligation to tell the truth; and

b. the period that has elapsed since the acts or events to which the evidence relates were done or occurred.215

An obligation to tell the truth, in this context, includes both a legal and moral obligation to tell the truth. A person could not, for example, be considered to be under an obligation to tell the truth on some social occasions (for example, during drinks in the Other Rank’s Canteen celebrating a win in an inter-unit sporting fixture).

Evidence Adduced in Rebuttal

9.379 If a witness denies (for example, during cross-examination) the substance of evidence that is relevant only to the credibility of evidence a witness has given in the proceeding, the evidence is admissible if it is adduced otherwise than from the witness and it tends to prove he or she:

a. is biased or has a motive to be untruthful;

b. has been convicted of an offence;

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213 See, in relation to an occasion within a civil context when leave may be refused, paragraph [104.8] of the Evidence Act 1995.

214 Evidence Act s.103(1).

215 Evidence Act s.103(2).
c. has made a prior inconsistent statement;
d. is or was unable to be aware of matters to which his or her evidence relates; or
e. has knowingly or recklessly made a false representation while under an obligation imposed by or under an Australian law or a law of a foreign country to tell the truth.  

Each of these matters is discussed in the succeeding paragraphs.

S.106(a) - the Witness is 'Biased or has a Motive to be Untruthful'

9.380 Evidence that tends to prove a witness is biased or has a motive to be untruthful may include where the witness has given or received a bribe, or where it is alleged that a witness had said to police that, if compelled to give evidence, he or she would lie in order to avoid offending the accused.

S.106(b) - Prior Convictions of the Witness

9.381 Very seldom would a conviction for a traffic offence satisfy the requirement under Evidence Acts s.103 that the evidence has substantial probative value: hence the occasion for the operation of Evidence Acts s.106(b) in relation to traffic offences would rarely arise.

S.106(c) - Prior Inconsistent Statements of the Witness

9.382 Evidence Act s.43(2) permits a cross-examining party to adduce evidence of a prior inconsistent statement made by a witness if, during cross-examination, the cross-examining party informed the witness of enough of the circumstances of the making of the statement to identify it and drew the witness’s attention to the inconsistency. If a record of the statement is contained in a document, the document need not have been shown to the witness.

S.106(d) - the Witness’s Inability to be Aware of Matters to which his or her Evidence Relates

9.383 Examples of a matter that would fall within Evidence Act paragraph 106(d) is any physical incapacity of the witness.

S.106(e) - the Witness 'has Knowingly or Recklessly made a False Representation while under an Obligation Imposed by an Australian Law or a Law of a Foreign Country to tell the Truth'

9.384 Unlike the situation where the evidence is adduced in cross-examination (see paragraph 6.372), an obligation 'imposed by or under an Australian law or a law of a foreign country' to tell the truth will not include a moral obligation. Examples of occasions when a person is under an obligation 'imposed by or under' such a law to tell the truth include, but are not limited to, when the person gives evidence under oath in a proceeding before a court, or signs a statutory declaration.

216Evidence Act s.106.

217eg. Attorney-General v Hitchcock (1847) 1 Exch 91, 154 ER 38.


219Evidence Act s.43(1)(b).

220See, for example, the statement by Lord Pearce in Toohey v Metropolitan Police Commissioner [1965] AC 595 at 608 that '[i]f a witness purported to give evidence of something which he believed he had seen at 50 yards, it must surely be possible to call the evidence of an oculist to the effect that the witness could not possibly see anything at a greater distance than 20 yards ....'
The Effect of Cross-examination as to Credit

9.385 Apart from the situation where Evidence Act s.60 applies, if a cross-examiner succeeds in destroying a witness's credit that does not entitle a court to find as established the opposite of what that witness asserted. To quote a well-known passage:

‘If by cross-examination to credit you prove a man's oath cannot be relied on, and he has sworn that he did not go to Rome on May 1, you do not, therefore, prove that he did go to Rome on May 1; there is simply no evidence on the subject.’

221 Hobbs v Tinling & Co Ltd [1929] K.B. 1, 21 per Scrutton L.J.

RE-EXAMINATION

9.386 The purpose of re-examination is to clear up any ambiguity or uncertainty in the answers given in cross-examination and is permissible in every case where the answers or account given in cross-examination would, if left unexplained or uncompleted, not constitute the whole truth. A witness may be questioned in re-examination about matters arising out of evidence he or she gave in cross-examination: other questions may not be put to the witness unless the Australian Military Court gives leave.

9.387 The same rules in relation to leading questions that apply in examination in chief apply in re-examination.

9.388 In some cases the operation of Evidence Act s.108(3) might arise on re-examination of a witness. Under s.108(3) evidence of a prior inconsistent statement of a witness is admissible if the tribunal has given leave to adduce the evidence, where:

a. evidence of a prior consistent statement has been admitted; or

b. it is or will be suggested that evidence given by the witness has been fabricated, reconstructed or is the result of a suggestion.

RE-OPENING A CASE AND EVIDENCE IN REBUTTAL

9.389 It is a general rule of law that no party may split its case, but there are several exceptions to this rule. The rule applies to an accused person, as well as to the prosecution, but few problems arise in the case of an accused.

9.390 The two most frequently occurring situations where a party may seek to lead further evidence after his case has closed are: ‘re-opening’ and ‘evidence in rebuttal’.223

9.391 A party may be permitted to re-open his case to meet an objection that some formal proof of a matter that really does not admit of denial has been overlooked, provided that re-opening the case is necessary in the interests of justice.224 Leave to re-open should be limited to technicalities; for example, tendering of subordinate legislation or, in a Court of Marine Inquiry, proof that the defendant had a Master's Certificate.225

221 Hobbs v Tinling & Co Ltd [1929] K.B. 1, 21 per Scrutton L.J.


223 See Waight and Williams, Evidence Commentary and Materials, 4th edition, p 331

224 See r.19(3) of the DFD Rules.

225 In Re Kendrick (No. 2) (1903) 28 V.L.R. 472.
9.392 Evidence in rebuttal may be adduced by a prosecutor by leave of the Australian Military Court on any matter raised by the defence where the requirement for such evidence was not reasonably foreseeable or could not properly have been adduced before the accused presented his or her defence. The prosecutor should be permitted to adduce evidence in rebuttal only in exceptional circumstances and when it is reasonably clear that the accused will not be unfairly prejudiced by the admission of that evidence.

CORROBORATION

General: Abolition of Most Corroboration and Corroboration Warning Requirements

9.393 Evidence Act s.164(1) provides that '[i]t is not necessary that evidence on which a party relies be corroborated'.

9.394 Subsection 164(2) provides that Evidence Act s.164(1) 'does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a similar or related offence'. Also, Evidence Act s.164(1) will not affect a requirement by another (Commonwealth) Act that evidence be corroborated.

9.395 Evidence Act s.164(3) abolishes any rule of law or practice requiring corroboration warnings: subject to other provisions of the Act, if there is a jury it is not necessary that a judge warn the jury that it is dangerous to act on uncorroborated evidence or give a direction relating to absence of corroboration.

Corroboration with Respect to Perjury or a Similar or Related Offence

9.396 'The common law ... provide[s] that a person should not be liable to be convicted of perjury ... solely upon the evidence of one witness as to the falsity of any statement alleged to be false ... The rule is strictly confined to proof of the falsity of the statement [R v. Linehan [1921] VLR 58; R v. Allsop (1899) 24 VLR 812...].'

9.397 Corroboration means confirmation or support and it must take the form of a separate item of evidence implicating the accused. It can consist of the testimony of a second witness about the falsity of the statement, but the evidence of a second witness is not essential. For example, corroboration can consist of an admission of the accused that the statement was false.

9.398 A person's statement in court may also be held to corroborate the case against him.

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226 in relation to alibi evidence see DFDA s 145A.


228 An example of a 'similar or related offence' is an offence against s.35 of the Crimes Act 1914 (Cth.).

229 For example, s.94(7) of the Marriage Act 1961 (bigamy): see Evidence Act s.8(1).

230 Evidence Act s.165, for example, provides that in certain circumstances a judge must warn a jury about the dangers of evidence that is of a kind that may be unreliable. Where there is a jury and a party so requests, the judge must warn the jury that such evidence may be unreliable, inform the jury of the matters that may cause the evidence to be unreliable and warn the jury about the need for caution in determining whether to accept the evidence and what weight to give it. The judge need not give a warning if there are good reasons for not doing so.


232 See Cross, paragraph 15020, sixth sentence. Other examples of corroborative evidence in relation to the offence of perjury are also discussed by Cross at paragraph 15020.

CHAPTER 10

COURSES OF ACTION OPEN TO THE DIRECTOR OF MILITARY PROSECUTIONS

INTRODUCTION

10.1 The Australian Military Court’s jurisdiction to try a charge is triggered as a result of a referral by the Registrar. Such a referral is mandatory when requested by the Director of Military Prosecutions\(^1\). The Registrar has no jurisdiction with respect to a matter prior to receiving such a referral from the Director of Military Prosecutions.

10.2 An Australian Military Court trial (triggered by a referral by the Registrar which, in turn, is triggered by a request by the Director of Military Prosecutions) is a course of action which is always open to the Director of Military Prosecutions when a matter is referred to him/her for an Australian Military Court trial.

10.3 Other courses of action which may be open to him/her, depending on the circumstances, include: referral to a superior summary authority for trial, referral to a commanding officer for trial, a direction that the charge not be proceeded with\(^2\).

10.4 Having regard to the courses of action open to him/her in a given situation, the Director of Military Prosecutions will take into consideration matters such as the following when deciding upon the most appropriate course of action: the jurisdiction of each relevant service tribunal, each relevant service tribunal’s powers of punishment, the nature and complexity of the charge, the nature and complexity of the evidence, any relevant exigencies of service that may exist, the requirement to proceed to trial without undue delay.

AVENUES OF REFERRAL TO THE DIRECTOR OF MILITARY PROSECUTIONS

10.5 The Director of Military Prosecutions may become seized of a matter, and required to make a decision about the future of the charge(s) or matter via a number of different avenues. In summary, the ways in which matters come before the Director of Military Prosecutions (the available courses of action in each circumstance are set out in detail below) are:

a. referral of a charge/matter by the Governor-General;

b. where the Federal Court of Australia orders a new trial of a service offence brought before it;

c. upon an order by the Defence Force Discipline Appeal Tribunal that a new trial take place of a person for a charge before the Tribunal;

d. where a DFDA reviewing authority orders a new trial of a person;

e. following referral of a matter from a Military Judge;

f. referral of a charge by a summary authority; and

g. referral of a charge from the Commanding Officer (or officer superior to the CO) of a person who has been charged before any summary authority dealing.

\(^1\) DFDA ss 118(1).

\(^2\) DFDA s103.
h. The Director of Military Prosecutions becomes aware of an alleged service offence (for example, through a brief of evidence presented by the Australian Defence Force Investigation Service) and prefers a charge of his/her own initiative.

**REFERRAL BY THE GOVERNOR-GENERAL.**

10.6 The Director of Military Prosecutions becomes seized of a charge potentially for Australian Military Court trial upon a referral by the Governor-General. This referral is to be in writing. Such a referral may be made where the Governor-General is satisfied by the certificate in writing of at least two medical practitioners that a person has become of sound mind and is fit to be tried. This will be relevant where the Governor-General has previously ordered, in writing, that the person be detained in safe custody because they were not considered to be of sound mind and were therefore not considered fit to stand trial. This, in turn, may occur upon a referral by the Military Judge presiding. Once the Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it. The courses of action open to him/her are as follows:

a. **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial. If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.

b. **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial. This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA ss 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA ss 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge. A referral by the Director of Military Prosecutions to a Superior Summary Authority for

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3 DFDA ss 194(7).
4 DFDA ss 194(7).
5 DFDA ss 194(7).
6 DFDA ss 194(1), read with 145(2) and (5) and 158(3), outlines the circumstances in which this could occur.
7 DFDA ss 145(2) and (5) actually refer to the Australian Military Court, not a Military Judge, however, DFDA ss 114(2) states that "[t]he Australian Military Court consists of: (a) the Chief Military Judge; and (b) such other Military Judges as from time to time hold office in accordance with this Act". Accordingly, DFDA ss 145(2) and (5), when read with DFDA ss 114(2), result in the conclusion that it is the Military Judge presiding in a particular matter who would make any such referral.
8 DFDA ss103(1).
9 DFDA s103(1)(c). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).
10 DFDA ss 5A(a).
11 DFDA ss 103(1)(b).
12 DFDA ss 103(1)(b).
13 DFDA ss 103(1)(b).
trial can only be made where the charge is within the jurisdiction of a superior summary authority to try\textsuperscript{14}. The Director of Military Prosecutions will take into consideration a superior summary authority’s powers of punishment, the nature and complexity of the charge and the nature and complexity of the evidence when deciding whether to refer a charge to a superior summary authority to try. The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

c. **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial\textsuperscript{15}. This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA ss 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment\textsuperscript{16}; or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA ss 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge\textsuperscript{17}. Of course, such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try\textsuperscript{18}. The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

d. **Direct that the Charge not be Proceeded with.** The Director of Military Prosecutions may direct that the charge not be proceeded with\textsuperscript{19}. The effect of such a direction is that proceedings against the accused person are stayed. The accused person is not deemed to have been acquitted of the offence charged\textsuperscript{20}. There are a number of circumstances in which such a direction may be given. For example, where the Director of Military Prosecutions is of the opinion that there is insufficient evidence to support the charge. A direction that the charge be not proceeded with may also be made where it is otherwise in the interests of justice to do so\textsuperscript{21}. For example, the direction may be given in a case where several persons are charged with the same offence and it is desirable for one co-accused to give evidence for the prosecution against another co-accused. It may also be in the interests of justice to direct that a charge be not proceeded with where there has already been a summary trial on the same events\textsuperscript{22}.

**FEDERAL COURT ORDERS A NEW TRIAL**

10.7 The Director of Military Prosecutions becomes seized of a charge potentially for retrial where a retrial is ordered by the Federal Court. Once the Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it\textsuperscript{23}. The courses of action open to him/her are as follows:

\textsuperscript{14} DFDA ss 103(1)(b).
\textsuperscript{15} DFDA ss 103(1)(b).
\textsuperscript{16} DFDA ss 103(1)(b).
\textsuperscript{17} DFDA ss 103(1)(b).
\textsuperscript{18} DFDA ss 103(1)(b).
\textsuperscript{19} DFDA ss 103(1)(a).
\textsuperscript{20} DFDA ss144(4)(c)
\textsuperscript{22} See Re Beresford (1952) 46 Cr. App. Rep. 1 (death caused by motor accident; summary trial for dangerous driving, subsequent charge of manslaughter pursuant to coroner’s inquest).
\textsuperscript{23} DFDA ss103(2).
a. **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial.\(^{24}\) If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.\(^{25}\)

b. **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial.\(^{26}\) Such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try.\(^{27}\) The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

c. **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial.\(^{28}\) Such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try.\(^{29}\) The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

d. **Not Proceed with New Trial.** The Director of Military Prosecutions may not direct that the charge not be proceeded with.\(^{30}\) However, the Director of Military Prosecutions is not required to proceed with a new trial of a person unless he/she is satisfied that there is sufficient cogent evidence to justify a new trial of the person.

**DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL ORDERS A NEW TRIAL**

10.8 The Director of Military Prosecutions becomes seized of a charge potentially for retrial where a retrial is ordered by the Defence Force Discipline Appeal Tribunal. Once the Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it.\(^{31}\) The courses of action open to him/her are as follows:

a. **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial.\(^{32}\) If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.\(^{33}\)

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\(^{24}\) DFDA s103(2)(d). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).

\(^{25}\) DFDA ss 5A(a).

\(^{26}\) DFDA ss 103(2)(c).

\(^{27}\) DFDA ss 103(2)(c).

\(^{28}\) DFDA ss 103(2)(c).

\(^{29}\) DFDA ss 103(2)(c).

\(^{30}\) DFDA ss 103(3).

\(^{31}\) DFDA ss 103(2).

\(^{32}\) DFDA ss 103(2)(d). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).

\(^{33}\) DFDA ss 5A(a).
b. **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial\(^{34}\). Such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try\(^{35}\). The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

c. **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial\(^{36}\). Such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try\(^{37}\). The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

d. **Not Proceed with New Trial.** The Director of Military Prosecutions is not required to proceed with a new trial of a person unless he/she is satisfied that there is sufficient cogent evidence to justify a new trial of the person.

### REVIEWING AUTHORITY ORDERS A NEW TRIAL

10.9 The Director of Military Prosecutions becomes seized of a charge potentially for retrial where a retrial is ordered by a reviewing authority. Once the Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it\(^{38}\). The courses of action open to him/her are as follows:

a. **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial\(^{39}\). If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.\(^{40}\)

b. **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial\(^{41}\). Such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try\(^{42}\). The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

c. **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial\(^{43}\). Such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try\(^{44}\). The Director of

\(^{34}\) DFDA ss 103(2)(c).
\(^{35}\) DFDA ss 103(2)(c).
\(^{36}\) DFDA ss 103(2)(c).
\(^{37}\) DFDA ss 103(2)(c).
\(^{38}\) DFDA ss103(2).
\(^{39}\) DFDA ss 103(2)(d). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).
\(^{40}\) DFDA ss 5A(a).
\(^{41}\) DFDA ss 103(2)(c).
\(^{42}\) DFDA ss 103(2)(c).
\(^{43}\) DFDA ss 103(2)(c).
\(^{44}\) DFDA ss 103(2)(c).
Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

d. **Not Proceed with New Trial.** The Director of Military Prosecutions is not required to proceed with a new trial of a person unless he/she is satisfied that there is sufficient cogent evidence to justify a new trial of the person.

**REFERRAL BY A MILITARY JUDGE**

10.10 The Director of Military Prosecutions becomes seized of a charge potentially for trial upon a referral by a Military Judge. Once the Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it. The courses of action open to him/her are as follows:

a. **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial. If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.

b. **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial. This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment; or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge. Of course, such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try. The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

c. **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial. This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers

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45 DFDA ss 141(8). DFDA ss 141(8) actually refers to the Australian Military Court, not a Military Judge, however, DFDA ss 114(2) states that "[t]he Australian Military Court consists of: (a) the Chief Military Judge; and (b) such other Military Judges as from time to time hold office in accordance with this Act". Accordingly, DFDA ss 141(8), when read with DFDA ss 114(2), result in the conclusion that it is the Military Judge presiding in a particular matter who would make any such referral. This is supported by DFDA ss 141(7).

46 DFDA ss103(1).

47 DFDA ss 103(1)(c). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).

48 DFDA ss 5A(a).

49 DFDA ss 103(1)(b).

50 DFDA ss 103(1)(b).

51 DFDA ss 103(1)(b).

52 DFDA ss 103(1)(b).

53 DFDA ss 103(1)(b).
the accused person may be unfit to stand trial by reason of mental impairment\(^{54}\); or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge\(^{55}\). Of course, such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try\(^{56}\). The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

d. **Direct that the Charge not be Proceeded With.** The Director of Military Prosecutions may direct that the charge not be proceeded with\(^{57}\). The effect of such a direction is that proceedings against the accused person are stayed. The accused person is not deemed to have been acquitted of the offence charged\(^{58}\). There are a number of circumstances in which such a direction may be given. For example, where the Director of Military Prosecutions is of the opinion that there is insufficient evidence to support the charge. A direction that the charge be not proceeded with may also be made where it is otherwise in the interests of justice to do so\(^{59}\). For example, the direction may be given in a case where several persons are charged with the same offence and it is desirable for one co-accused to give evidence for the prosecution against another co-accused. It may also be in the interests of justice to direct that a charge be not proceeded with where there has already been a summary trial on the same events\(^{60}\).

### REFERRAL BY SUMMARY AUTHORITY

**10.11** The term “summary authority” includes a superior summary authority, a commanding officer or a subordinate summary authority\(^{61}\). A referral to the Director of Military Prosecutions from a summary authority of a charge for trial may occur in a number of different circumstances. In summary, these different circumstances, and the courses of action open to the Director of Military Prosecutions in each case, are as follows:

a. **Referral from a Summary Authority Trying a Charge in “the interests of justice”**. The Director of Military Prosecutions becomes seized of a charge potentially for trial upon a referral from a summary authority trying a charge in “the interests of justice”\(^{62}\). Once the Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it\(^{63}\). The courses of action open to him/her are as follows:

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54 DFDA ss 103(1)(b).
55 DFDA ss 103(1)(b).
56 DFDA ss 103(1)(b).
57 DFDA ss 103(1)(a).
58 DFDA ss 144(4)(c)
60 See Re Beresford (1952) 46 Cr. App. Rep. 1 (death caused by motor accident; summary trial for dangerous driving, subsequent charge of manslaughter pursuant to coroner’s inquest).
61 DFDA ss 3(1).
62 DFDA ss 130(5).
63 DFDA ss 103(1).
(1) **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial\(^{64}\). If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.\(^{65}\)

(2) **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial\(^{66}\). This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment\(^{67}\); or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge\(^{68}\). Of course, such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try\(^{69}\). The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

(3) **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial\(^{70}\). This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment\(^{71}\); or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge\(^{72}\). Of course, such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try\(^{73}\). The Director of Military Prosecutions will take into consideration a commanding officer’s powers of punishment, the nature and complexity of the charge and the nature and complexity of the evidence when deciding whether to refer a charge to a commanding officer to try. The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

\(^{64}\) DFDA ss 103(1)(c). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).

\(^{65}\) DFDA ss 5A(a).

\(^{66}\) DFDA ss 103(1)(b).

\(^{67}\) DFDA ss 103(1)(b).

\(^{68}\) DFDA ss 103(1)(b).

\(^{69}\) DFDA ss 103(1)(b).

\(^{70}\) DFDA ss 103(1)(b).

\(^{71}\) DFDA ss 103(1)(b).

\(^{72}\) DFDA ss 103(1)(b).

\(^{73}\) DFDA ss 103(1)(b).
(4) **Direct that the Charge not be Proceeded With.** The Director of Military Prosecutions may direct that the charge not be proceeded with\(^74\). The effect of such a direction is that proceedings against the accused person are stayed. The accused person is not deemed to have been acquitted of the offence charged\(^75\). There are a number of circumstances in which such a direction may be given. For example, where the Director of Military Prosecutions is of the opinion that there is insufficient evidence to support the charge. A direction that the charge be not proceeded with may also be made where it is otherwise in the interests of justice to do so\(^76\). For example, the direction may be given in a case where several persons are charged with the same offence and it is desirable for one co-accused to give evidence for the prosecution against another co-accused. It may also be in the interests of justice to direct that a charge be not proceeded with where there has already been a summary trial on the same events\(^77\).

**b. Referral from a by summary authority where summary authority considered that the accused person may be unfit to stand trial by reason of mental impairment.** The Director of Military Prosecutions becomes seized of a charge potentially for trial upon a referral from a summary authority where the summary authority considers that the accused may be unfit to stand trial by reason of mental impairment\(^78\). Once the Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it\(^79\). The courses of action open to him/her are as follows:

1. **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial\(^80\). If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force\(^81\).

2. **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial\(^82\). This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment\(^83\); or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission.

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\(^74\) DFDA ss 103(1)(a).

\(^75\) DFDA ss 144(4)(c)


\(^77\) See Re Beresford (1952) 46 Cr. App. Rep. 1 (death caused by motor accident; summary trial for dangerous driving, subsequent charge of manslaughter pursuant to coroner’s inquest).

\(^78\) DFDA ss 145(1).

\(^79\) DFDA ss 103(1).

\(^80\) DFDA s 103(1)(c). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).

\(^81\) DFDA ss 5A(a).

\(^82\) DFDA ss 103(1)(b).

\(^83\) DFDA ss 103(1)(b).
the subject of the charge. Of course, such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try. The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

(3) **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial. This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment; or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge. Of course, such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try. The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

(4) **Direct that the Charge not be Proceeded With.** The Director of Military Prosecutions may direct that the charge not be proceeded with. The effect of such a direction is that proceedings against the accused person are stayed. The accused person is not deemed to have been acquitted of the offence charged. There are a number of circumstances in which such a direction may be given. For example, where the Director of Military Prosecutions is of the opinion that there is insufficient evidence to support the charge. A direction that the charge be not proceeded with may also be made where it is otherwise in the interests of justice to do so. For example, the direction may be given in a case where several persons are charged with the same offence and it is desirable for one co-accused to give evidence for the prosecution against another co-accused. It may also be in the interests of justice to direct that a charge be not proceeded with where there has already been a summary trial on the same events.

c. **Referral by a summary authority trying a charge on the ground of the accused person possibly having been mentally impaired at the time of the act or omission the subject of the charge.** The Director of Military Prosecutions becomes seized of a charge potentially for trial upon a referral from a summary authority trying the charge on the ground of the accused person possibly having been mentally impaired at the time of the act or omission the subject of the charge. Once the

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84 DFDA ss 103(1)(b).
85 DFDA ss 103(1)(b).
86 DFDA ss 103(1)(b).
87 DFDA ss 103(1)(b).
88 DFDA ss 103(1)(b).
89 DFDA ss 103(1)(b).
90 DFDA ss 103(1)(a).
91 DFDA ss.144(4)(c)
93 See Re Beresford (1952) 46 Cr. App. Rep. 1 (death caused by motor accident; summary trial for dangerous driving, subsequent charge of manslaughter pursuant to coroner's inquest).
94 DFDA ss 145(3).
Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it. The courses of action open to him/her are as follows:

1. **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial. If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.

2. **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial. This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment; or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge. Of course, such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try. The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

3. **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial. This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment; or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge. Of course, such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try. The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

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95 DFDA ss 103(1).
96 DFDA ss 103(1)(c). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).
97 DFDA ss 5A(a).
98 DFDA ss 103(1)(b).
99 DFDA ss 103(1)(b).
100 DFDA ss 103(1)(b).
101 DFDA ss 103(1)(b).
102 DFDA ss 103(1)(b).
103 DFDA ss 103(1)(b).
104 DFDA ss 103(1)(b).
105 DFDA ss 103(1)(b).
(4) **Direct that the Charge not be Proceeded With.** The Director of Military Prosecutions may direct that the charge not be proceeded with. The effect of such a direction is that proceedings against the accused person are stayed. The accused person is not deemed to have been acquitted of the offence. There are a number of circumstances in which such a direction may be given. For example, where the Director of Military Prosecutions is of the opinion that there is insufficient evidence to support the charge. A direction that the charge be not proceeded with may also be made where it is otherwise in the interests of justice to do so. For example, the direction may be given in a case where several persons are charged with the same offence and it is desirable for one co-accused to give evidence for the prosecution against another co-accused. It may also be in the interests of justice to direct that a charge be not proceeded with where there has already been a summary trial on the same events.

d. **Referral from a superior summary authority or a commanding officer trying a charge where powers of punishment believed insufficient.** The Director of Military Prosecutions becomes seized of a charge potentially for trial upon a referral from a superior summary authority or a commanding officer trying a charge where powers of punishment believed to be insufficient. Once the Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it. The courses of action open to him/her are as follows:

(1) **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial. If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.

(2) **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial. This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment; or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s

106 DFDA s 103(1)(a).
107 DFDA s 144(4)(c)
109 See Re Beresford (1952) 46 Cr. App. Rep. 1 (death caused by motor accident; summary trial for dangerous driving, subsequent charge of manslaughter pursuant to coroner’s inquest).
110 DFDA s 131A.
111 DFDA ss 103(1).
112 DFDA s 103(1)(c). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).
113 DFDA ss 5A(a).
114 DFDA ss 103(1)(b).
115 DFDA ss 103(1)(b).
145(3) because of possible mental impairment at the time of the act or omission the subject of the charge\textsuperscript{116}. Of course, such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try\textsuperscript{117}. The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

(3) **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial\textsuperscript{118}. This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment\textsuperscript{119}, or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge\textsuperscript{120}. Of course, such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try\textsuperscript{121}. The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

(4) **Direct that the Charge not be Proceeded With.** The Director of Military Prosecutions may direct that the charge not be proceeded with\textsuperscript{122}. The effect of such a direction is that proceedings against the accused person are stayed. The accused person is not deemed to have been acquitted of the offence charged\textsuperscript{123}. There are a number of circumstances in which such a direction may be given. For example, where the Director of Military Prosecutions is of the opinion that there is insufficient evidence to support the charge. A direction that the charge be not proceeded with may also be made where it is otherwise in the interests of justice to do so\textsuperscript{124}. For example, the direction may be given in a case where several persons are charged with the same offence and it is desirable for one co-accused to give evidence for the prosecution against another co-accused. It may also be in the interests of justice to direct that a charge be not proceeded with where there has already been a summary trial on the same events\textsuperscript{125}.

e. **Referral from a superior summary authority or a commanding officer trying a charge following an election by the accused.** The Director of Military Prosecutions becomes seized of a charge potentially for trial upon a referral from a superior summary authority or commanding officer trying a charge following an election by the

\textsuperscript{116} DFDA ss 103(1)(b).
\textsuperscript{117} DFDA ss 103(1)(b).
\textsuperscript{118} DFDA ss 103(1)(b).
\textsuperscript{119} DFDA ss 103(1)(b).
\textsuperscript{120} DFDA ss 103(1)(b).
\textsuperscript{121} DFDA ss 103(1)(b).
\textsuperscript{122} DFDA ss 103(1)(a).
\textsuperscript{123} DFDA ss144(4)(c)
\textsuperscript{125} See Re Beresford (1952) 46 Cr. App. Rep. 1 (death caused by motor accident; summary trial for dangerous driving, subsequent charge of manslaughter pursuant to coroner's inquest).
accused. Once the Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it. The courses of action open to him/her are as follows:

1. **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial. If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.

2. **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial. This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment, or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge. Of course, such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try. The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

3. **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial. This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment, or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge. Of course, such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try. The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

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126 DFDA ss 131(4).
127 DFDA ss 103(1).
128 DFDA ss 103(1)(c). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).
129 DFDA ss 5A(a).
130 DFDA ss 103(1)(b).
131 DFDA ss 103(1)(b).
132 DFDA ss 103(1)(b).
133 DFDA ss 103(1)(b).
134 DFDA ss 103(1)(b).
135 DFDA ss 103(1)(b).
136 DFDA ss 103(1)(b).
137 DFDA ss 103(1)(b).
(4) **Direct that the Charge not be Proceeded With.** The Director of Military Prosecutions may direct that the charge not be proceeded with\(^{138}\). The effect of such a direction is that proceedings against the accused person are stayed. The accused person is not deemed to have been acquitted of the offence charged\(^{139}\). There are a number of circumstances in which such a direction may be given. For example, where the Director of Military Prosecutions is of the opinion that there is insufficient evidence to support the charge. A direction that the charge be not proceeded with may also be made where it is otherwise in the interests of justice to do so\(^{140}\). For example, the direction may be given in a case where several persons are charged with the same offence and it is desirable for one co-accused to give evidence for the prosecution against another co-accused. It may also be in the interests of justice to direct that a charge be not proceeded with where there has already been a summary trial on the same events\(^{141}\).

f. **Referral resulting from a superior summary authority dealing.** The Director of Military Prosecutions becomes seized of a charge potentially for trial upon a referral from a summary authority dealing with the charge\(^ {142}\). Such a referral could occur in a number of circumstances. Examples include: the superior summary authority has no jurisdiction to try the charge (the most common reason). Once the Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it\(^{143}\). The courses of action open to him/her are as follows:

1. **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial\(^ {144}\). If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.\(^{145}\)

2. **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial\(^ {146}\). This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment\(^{147}\); or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s

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\(^{138}\) DFDA ss 103(1)(a).

\(^{139}\) DFDA ss144(4)(c)


\(^{141}\) See Re Beresford (1952) 46 Cr. App. Rep. 1 (death caused by motor accident; summary trial for dangerous driving, subsequent charge of manslaughter pursuant to coroner’s inquest).

\(^{142}\) DFDA ss 109(b).

\(^{143}\) DFDA ss 103(1).

\(^{144}\) DFDA s103(1)(c). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).

\(^{145}\) DFDA ss 5A(a).

\(^{146}\) DFDA ss 103(1)(b).

\(^{147}\) DFDA ss 103(1)(b).
145(3) because of possible mental impairment at the time of the act or omission the subject of the charge. Of course, such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try. The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

3) **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial. This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment; or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge. Of course, such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try. The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

4) **Direct that the Charge not be Proceeded With.** The Director of Military Prosecutions may direct that the charge not be proceeded with. The effect of such a direction is that proceedings against the accused person are stayed. The accused person is not deemed to have been acquitted of the offence charged. There are a number of circumstances in which such a direction may be given. For example, where the Director of Military Prosecutions is of the opinion that there is insufficient evidence to support the charge. A direction that the charge be not proceeded with may also be made where it is otherwise in the interests of justice to do so. For example, the direction may be given in a case where several persons are charged with the same offence and it is desirable for one co-accused to give evidence for the prosecution against another co-accused. It may also be in the interests of justice to direct that a charge be not proceeded with where there has already been a summary trial on the same events.

g. **Referral resulting from a commanding officer dealing.** The Director of Military Prosecutions becomes seized of a charge potentially for trial upon a referral from a commanding officer dealing with the charge. Such a referral could occur in a number of circumstances. Examples include: the commanding officer has no...

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148 DFDA ss 103(1)(b).
149 DFDA ss 103(1)(b).
150 DFDA ss 103(1)(b).
151 DFDA ss 103(1)(b).
152 DFDA ss 103(1)(b).
153 DFDA ss 103(1)(b).
154 DFDA ss 103(1)(a).
155 DFDA ss 144(4)(c)
157 See Re Beresford (1952) 46 Cr. App. Rep. 1 (death caused by motor accident; summary trial for dangerous driving, subsequent charge of manslaughter pursuant to coroner's inquest).
158 DFDA ss 110(1)(d).
jurisdiction to try the charge (the most common reason). Once the Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it\(^{159}\). The courses of action open to him/her are as follows:

(1) **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial\(^{160}\). If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.\(^{161}\)

(2) **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial\(^{162}\). This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment\(^{163}\), or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge\(^{164}\). Of course, such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try\(^{165}\). The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

(3) **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial\(^{166}\). This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment\(^{167}\), or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge\(^{168}\). Of course, such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try\(^{169}\). The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

\(^{159}\) DFDA ss103(1).

\(^{160}\) DFDA ss 103(1)(c). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).

\(^{161}\) DFDA ss 5A(a).

\(^{162}\) DFDA ss 103(1)(b).

\(^{163}\) DFDA ss 103(1)(b).

\(^{164}\) DFDA ss 103(1)(b).

\(^{165}\) DFDA ss 103(1)(b).

\(^{166}\) DFDA ss 103(1)(b).

\(^{167}\) DFDA ss 103(1)(b).

\(^{168}\) DFDA ss 103(1)(b).

\(^{169}\) DFDA ss 103(1)(b).
(4) **Direct that the Charge not be Proceeded With.** The Director of Military Prosecutions may direct that the charge not be proceeded with. The effect of such a direction is that proceedings against the accused person are stayed. The accused person is not deemed to have been acquitted of the offence charged. There are a number of circumstances in which such a direction may be given. For example, where the Director of Military Prosecutions is of the opinion that there is insufficient evidence to support the charge. A direction that the charge be not proceeded with may also be made where it is otherwise in the interests of justice to do so. For example, the direction may be given in a case where several persons are charged with the same offence and it is desirable for one co-accused to give evidence for the prosecution against another co-accused. It may also be in the interests of justice to direct that a charge be not proceeded with where there has already been a summary trial on the same events.

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**REFERRAL BY THE COMMANDING OFFICER (OR OFFICER SUPERIOR TO CO) OF THE ACCUSED PERSON – WITHOUT A SUMMARY AUTHORITY DEALING**

10.12 The Director of Military Prosecutions becomes seized of a charge potentially for trial, without that charge having been summarily dealt with, upon a referral from a superior officer to the commanding officer, or the actual commanding officer, of the accused person. Under DFDA ss 105A a charge (any charge) may be referred directly to the Director of Military Prosecutions (DMP). In these circumstances, there is no need for a summary hearing.

10.13 The intent of this provision is to allow for direct referrals to the DMP where there would be little or no benefit from a summary hearing. Examples of such circumstances include: prescribed offences, complex charges, circumstances where a summary authority would not have jurisdiction to try the charges (for example, due to the seniority of the accused) or where it would not otherwise be in the interests of justice to try or deal with the matter summarily.

10.14 DFDA ss 3(11) defines the term “commanding officer”. It should be noted, however, that the DFDA ss 105A references are not to any commanding officer, but to the commanding officer of the person charged with the service offence.

10.15 The referring officer, in deciding whether to refer a charge directly to the DMP, may base his/her decision solely on an assessment of the documents.

10.16 The DMP is statutorily independent and, except as provided for in the legislation (specifically, DFDA ss 5A), it is inappropriate for anyone outside that office to offer opinions or recommendations as to what course of action should be taken with respect to a charge referred under DFDA ss 105A. This means that the referring officer should make the referral using Form 64, **Referral of a Charge to the Director of Military Prosecutions**, without offering any opinions or recommendations as to what course of action should be taken. The Form 64 should, however, attach the original charge sheet and a copy of the brief of evidence.

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170 DFDA ss 103(1)(a).

171 DFDA ss144(4)(c)


173 See Re Beresford (1952) 46 Cr. App. Rep. 1 (death caused by motor accident; summary trial for dangerous driving, subsequent charge of manslaughter pursuant to coroner's inquest).

174 DFDA ss 105A(2).

175 This is not intended to be exhaustive. The Office of the Director of Military Prosecutions should be consulted in the event of doubt.
10.17 Once a charge has been referred to the DMP then, except in accordance with DFDA ss 103(1) it must not be dealt with.\(^{176}\)

10.18 Once the Director of Military Prosecutions becomes seized of a charge for trial in this manner, he/she is then required to make a decision with respect to the trial of it.\(^{177}\) The courses of action open to him/her are as follows:

- **Australian Military Court Trial.** The matter may be referred to the Australian Military Court for trial.\(^{178}\) If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.\(^{179}\)

- **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial.\(^{180}\) This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment;\(^{181}\) or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge.\(^{182}\) Of course, such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try.\(^{183}\) The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

- **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial.\(^{184}\) This option is not available where: the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(1) because the summary authority considers the accused person may be unfit to stand trial by reason of mental impairment;\(^{185}\) or the charge is one which has been referred to the Director of Military Prosecutions by a summary authority under DFDA s 145(3) because of possible mental impairment at the time of the act or omission the subject of the charge.\(^{186}\) Of course, such a referral can only be made where the charge is within the jurisdiction of a commanding officer.

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\(^{176}\) DFDA ss 105A(3).

\(^{177}\) DFDA ss 103(1).

\(^{178}\) DFDA ss 103(1)(c). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).

\(^{179}\) DFDA ss 5A(a).

\(^{180}\) DFDA ss 103(1)(b).

\(^{181}\) DFDA ss 103(1)(b).

\(^{182}\) DFDA ss 103(1)(b).

\(^{183}\) DFDA ss 103(1)(b).

\(^{184}\) DFDA ss 103(1)(b).

\(^{185}\) DFDA ss 103(1)(b).

\(^{186}\) DFDA ss 103(1)(b).
to try 187. The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

d. **Direct that the Charge not be Proceeded With.** The Director of Military Prosecutions may direct that the charge not be proceeded with 188. The effect of such a direction is that proceedings against the accused person are stayed. The accused person is not deemed to have been acquitted of the offence charged 189. There are a number of circumstances in which such a direction may be given. For example, where the Director of Military Prosecutions is of the opinion that there is insufficient evidence to support the charge. A direction that the charge be not proceeded with may also be made where it is otherwise in the interests of justice to do so 190. For example, the direction may be given in a case where several persons are charged with the same offence and it is desirable for one co-accused to give evidence for the prosecution against another co-accused. It may also be in the interests of justice to direct that a charge be not proceeded with where there has already been a summary trial on the same events 191.

**REFERRAL OF A BRIEF / MATTER PRIOR TO CHARGES BEING PREFERRED**

10.19 As discussed in Chapter 11, current ADF policy requires that certain matters are referred to the Director of Military Prosecutions prior to the initiation of any military discipline action; for example, where prescribed offences are disclosed in an investigation. The Director of Military Prosecutions is then able to take certain action, and may prefer charges of his/her own initiative 192.

10.20 Where the Director of Military Prosecutions prefers charges of his/her own initiative, he/she is then required to make a decision with respect to the trial of it 193. The courses of action open to him/her are as follows:

a. **Australian Military Court trial.** The matter may be referred to the Australian Military Court for trial 194. If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force 195.

b. **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial 196. Such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to

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187 DFDA ss 103(1)(b).
188 DFDA s 103(1)(a).
189 DFDA s.144(4)(c)
191 See Re Beresford (1952) 46 Cr. App. Rep. 1 (death caused by motor accident; summary trial for dangerous driving, subsequent charge of manslaughter pursuant to coroner’s inquest).
192 DFDA ss 87(1), ss87(1A) and ss 87(6).
193 DFDA ss 87(1)(c).
194 DFDA ss 87(1)(c)(ii). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).
195 DFDA ss 5A(a).
196 DFDA ss 87(1)(c)(i).
try197. The Director of Military Prosecutions will not usually refer a charge back to a superior summary authority who dealt with it in the first instance.

c. **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial198. Such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try199. The Director of Military Prosecutions will not usually refer a charge back to a commanding officer who dealt with the charge in the first instance.

**EFFECT OF DIRECTION TO NOT PROCEED WITH A CHARGE**

10.21 DFDA ss 144(4)(c) states that ‘a direction under s 103 that a charge be not proceeded with shall be deemed not to be an acquittal of the service offence the subject of the charge’. The person therefore remains liable to be tried by a service tribunal for the same offence or for an offence that is substantially the same offence.

**REFERRAL FOR DFDA PART IV ACTION**

**IMPOSITION OF PUNISHMENTS AND MAKING OF ORDERS**

10.22 The Australian Military Court’s jurisdiction in relation to a conviction referred to it for the taking of Part IV action (the imposition of punishments and the making of orders) is triggered by a referral by the Registrar. Such a referral by the Registrar is mandatory when requested by the Director of Military Prosecutions200.

10.23 The Director of Military Prosecutions is not required to consult with the relevant superior authority in this instance.

197 DFDA ss 87(1)(c)(i).

198 DFDA ss 87(1)(c)(i).

199 DFDA ss 87(1)(c)(i).

200 DFDA ss 118(3).
CHAPTER 11

PREFERRING CHARGES

OUTLINE

11.1 In addition to their liability under the ordinary criminal laws of the Commonwealth of Australia, the States and Territories, members of the Australian Defence Force (ADF) are subject to the Defence Force Discipline Act 1982 (DFDA). When serving overseas, members may also be subject to the criminal law of their host nation.

11.2 There are certain offences, ‘prescribed offences’ defined in DFDA s 104, which may not be tried by summary authorities. Therefore, if tried, those matters will be before the Australian Military Court (AMC). This Chapter provides information and commentary specifically in relation to charges for prescribed offences requiring trial by the Australian Military Court. Commentary and guidance in relation to the remaining DFDA offences, capable of trial by a summary authority, is found in DLM Volume 3 (Summary Proceedings).

11.3 This chapter contains the following material:

a. **ADF prosecution policy** – A discussion of extant policies within the ADF affecting the initiation of disciplinary action for, and the prosecution of service offences, namely: Defence Instruction (General) Personnel 45-4 – Australian Defence Force Prosecution Policy, and Director of Military Prosecutions (DMP) Directive 01/2007 – Prosecution Policy.

b. **Authority to charge & the charging process** – A discussion of the legal basis and authority of the DMP to prefer a DFDA charge; including

   (1) specific commentary regarding the involvement of the DMP in considering and preferring DFDA charges; and

   (2) the involvement and role of the command chain and ‘superior authorities’ in the charging process;

c. **Selecting and drafting a charge** – Commentary regarding parties involved in selecting and drafting charges, specifically for offences requiring AMC Trial;

d. **Limitations on charging for a ‘service offence’**

e. **Consequences of DFDA charges** – An outline of consequences for ADF members following charge or summons for an offence;

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⁠⁠⁠¹ s 106 (SUPSA), s 107 (CO), s 108 (SUBSA)
PROSECUTION POLICY

11.4 **Defence Instruction (General) Personnel 45-4 – Australian Defence Force Prosecution Policy** provides policy guidance to those who are responsible for making decisions regarding the prosecution of offences under the DFDA.

11.5 The DMP has also issued an internal policy, Directive 01/2007 – *Prosecution Policy*. However, that directive is only applicable to prosecutors posted to the Office of the DMP, and to legal officers representing the DMP by virtue of delegated functions or having been briefed to advise the DMP or prosecute a matter on behalf of DMP. While that Directive is in similar terms to the DI(G) above, person's appearing for and on behalf of the DMP should refer to the directive for guidance in relation to the exercise of the DMP discretion to prosecute under the DFDA.

11.6 In accordance with DFDA s 188GE, the DMP may issue directions or guidelines in relation to the prosecution of service offences. Those directions may apply to a person who is a DFDA investigating officer, and to any person who institutes or carries on prosecutions for service offences. That is, those directions will bind prosecutors at the summary level as well as legal officers acting before the AMC. No such directions have been issued at the time of drafting. When available, copies will be included in DLM Volume 1.

11.7 Reference should be made to the above resources before initiating a charge for a service offence. Some of the factors to be considered before commencing a prosecution by DFDA charge or issuing a summons include:

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 by the law; and
c. whether or not discretionary factors nevertheless dictate that charges should not be laid (or proceeded with) in the public interest.

11.8 The decision whether or not to prosecute or to proceed with a charge is the most important step in the prosecution process. A wrong decision to prosecute, or a wrong decision not to prosecute, may undermine confidence in the military discipline system. It is important therefore that these decisions be made carefully, impartially and without undue delay.

11.9 If there is any doubt concerning the decision to prosecute, advice should be sought from a legal officer.

AUTHORITY TO CHARGE

11.10 The decision to charge a member with a service offence is a command decision, although, in the appropriate circumstances, this decision may also be exercised by the Director of Military Prosecutions.\(^2\)

11.11 In the case of less serious service offences capable of summary Authority trial, the decision will be made by appropriate unit or command authorities who are best placed to determine the discipline needs of their unit, ship or establishment. Furthermore, in some circumstances, minor infringements of discipline may be dealt with by issuing an offender with an Infringement Notice rather than commencing formal proceedings before a Service tribunal.

11.12 In cases where investigations disclose more serious offences, including prescribed offences beyond the trial jurisdiction of a summary authority, the DMP will be involved in the charging process.

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\(^2\) DFDA s 87(1), 87(1A), 87(6).
11.13 Where the DMP is considering DFDA charges, a superior authority, appointed by CDF or a Service Chief, will be invited to represent the interests of the Defence Force to the DMP in relation to the charges being considered for AMC Trial.3

11.14 The decision to prosecute members for criminal offences in Australia (other than offences against the DFDA) will usually be made by relevant Commonwealth, State or Territory police or Directors of Public Prosecutions. Also, when alleged to have been committed in Australia, the consent of the Commonwealth Director of Public Prosecutions (DPP) is required before any DFDA proceedings in relation to certain offences IAW DFDA s 63.

11.15 The role and functions of the chain of command, the DMP, superior authorities, and the civilian prosecution agencies are explained in more detail below.

**Authorized members may prefer DFDA charges**

11.16 Where an ‘authorized member’ of the ADF believes on reasonable grounds that a person has committed a service offence, the authorized member may:

a. if the person is a Defence member, charge them; or

b. whether or not the person is a Defence member, summons the person.

11.17 An ‘authorized member’ for the above purposes means4:

a. a member of the ADF authorized in writing by a commanding officer to lay charges; or

b. the DMP.

11.18 A commanding officer may authorize a member of the Defence Force, or members included in a class of members.

**DMP as an ‘authorized member’**

11.19 In circumstances where the DMP acts pursuant to s 87(1), in addition to the ‘general’ authorized member powers in ss87(1)(a) and ss87(1)(b)5, the DMP may:

a. where the charge is within the jurisdiction of a SUPSA or CO, refer the charge(s) for trial IAW DFDA s 106 or s 107 respectively; or

b. request the Registrar to refer the charge to the Australian Military Court for trial.

**Types of offences**

11.20 **Minor offences.** In most situations where minor service offences are alleged, the person who investigates the offence will also be authorized to lay charges. A member should normally lay charges only against an offender who is junior to him or her in rank. Where all members authorized to lay charges are junior to the offender, an authorized officer of the superior unit or headquarters may lay the charge. If this is not practicable, the charge may be preferred by any person authorized to lay charges, and the defendant can then be ordered by his or her superior to appear before a summary authority.

11.21 **Prescribed offences.** Where allegations are made concerning more serious offences, including prescribed offences, DFDA investigations will usually be undertaken by ADFIS Investigators as required by Defence Instruction (General) ADMIN 45-2 Reporting and Investigation of Alleged Offences within the Australian Defence Organisation.

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3 DFDA s 5A.
4 DFDA s 87(6).
5 DFDA ss 87(1A)
At the completion of an investigation, recommendations regarding potential DFDA offences will be made to the member’s commander. Before Unit action is taken to prefer charges and initiate prosecution for prescribed offences, Defence Instruction (General) PERS 45-6 Director of Military Prosecutions – interim implementation arrangements, of 15 Aug 03, requires that commanders refer such matters to the DMP for legal advice. At that point, the DMP may either take action IAW DFDA ss87(1) or provide advice to unit Command and refer the matter back to the Unit.

**DIRECTOR OF MILITARY PROSECUTIONS INVOLVEMENT WITH DFDA CHARGES**

Defence Instruction (General) PERS 45-6 Director of Military Prosecutions – interim implementation arrangements, of 15 Aug 03 and DEFGRAM 292/2006 The Director of Military Prosecutions, The Registrar of Military Justice, Superior Authorities and Director Defence Counsel Services, of 13 Jun 06, provide the policy background for the involvement of the DMP in the DFDA charge and trial process. The DFDA also provides specific functions, powers and discretions to the DMP in relation to preferring charges and the prosecution of service offences.

In summary, the DMP may be involved in charging / considering service offence charges where, in accordance with Defence policy, investigations into or disclosing prescribed offences or other serious service offences (not prescribed) are referred to the DMP for legal advice by a Unit commander, prior to a person being charged. The courses of action available to the DMP where matters are referred to them following a charge are dealt with in detail in Chapter 10.

**Referral of a brief or matter to the DMP before a DFDA charge**

As discussed above in relation to DI(G) PERS 45-6, from 01 Jul 03, all investigations into or disclosing prescribed offences have been required to be referred to the DMP prior to any charges being preferred. Reporting and referral of matters to the DMP may come either from unit command or from a Defence Investigative Authority (DIA), who have taken carriage of an investigation IAW DI(G) ADMIN 45-2 Reporting and Investigation of Alleged Offences within the Australian Defence Organisation.

Following referral to the DMP, DI(G) PERS 45-6 prohibits commanders from preferring charges or taking any adverse administrative action with respect to those matters until DMP advice has been received and considered.

The DMP, upon forming an opinion on the evidence disclosed in the investigation in accordance with the guidelines in DI(G) PERS 45-4, may:

a. Determine that charges should be preferred or a summons issued and:
   
   (1) Refer the matter back to the member’s commander, recommending such action; or
   
   (2) Prefer a charge / issue a summons IAW power granted DMP at ss87 (see above);

b. Advise that the investigation does not support DFDA action and refer the matter back to the Unit; or

c. Recommend further investigation, referring the matter back to the Unit / Investigation agency.

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6 The continued application of DI(G) PERS 45-6, despite being overtaken by the 12 Jun 06 amendments to the DFDA, is confirmed by DEFGRAM 292/2006.
SUPERIOR AUTHORITIES AND THE INTERESTS OF THE ADF

11.28 Where the DMP is considering charges for possible trial by the AMC, an appropriate Superior Authority will be identified and invited to represent any ‘interest of the ADF in relation to the charges being considered’. Superior Authorities are appointed by position by CDF or a relevant service chief in accordance with DFDA s 5A. Whilst not generally limited by appointment in relation to any particular service, the DMP will endeavour to identify and contact a Superior Authority within the accused member’s chain of command.

Appointment of Superior Authority

11.29 CDF and each service chief have made appointments pursuant to DFDA s 5A. Copies of Instruments of Appointment are provided in DLM Volume 1.

Contact / Engagement

11.30 A superior authority may be contacted by the DMP to comment on charges being considered by the DMP either:

   a. Pre-charge, following referral of a matter to the DMP before any unit action / charge, or
   b. After a member has been charged, and either
      (1) following referral to the DMP pursuant to DFDA s 105A; or
      (2) following referral to the DMP during summary authority proceedings.

Role of Superior Authority

11.31 The DFDA does not specifically constrain a ‘superior authority’, nor does it define the scope of Superior Authority considerations in responding to an invitation by the DMP, other than prescribing the purpose of the Superior Authority as:

   “representing the interests of the Defence Force in relation to charges that are being considered by the Director of Military Prosecutions for possible trial by the Australian Military Court.”

11.32 In each case, the superior authority will be provided with a brief summary of the allegations against a particular member as well as draft charges under consideration. Other material of interest to a superior authority may include; the details of witnesses, anticipated length of any trial of the charges, and the involvement and details of any co-accused members.

11.33 In responding to contact from the DMP, or when deciding whether to contact the DMP in relation to a charge being considered by the DMP, relevant ADF interests for consideration by a superior authority may include:

   a. unit operational or exercise commitments which may affect the timing of any trial of the charges;
   b. the non-availability of the accused person and/or witness due to operational, exercise or other commitments;
   c. any severe time constraints or resource implications;
   d. wider morale implications within the ADF;
   e. potential operational security disclosure issues;
f. the anticipation of strong media interest;

g. the prior conduct of the accused person, including findings of any administrative inquiries concerning the accused person’s conduct;

h. whether or not there is a need to send a message of deterrence, both to the accused person and the ADF generally; and

11.34 Superior Authorities must be careful to avoid perceptions and/or allegations of command influence in the exercise of DMP discretion. Therefore, express direction or opinion in relation to whether a matter should proceed or not should be avoided. In addition, it would be inappropriate for a Superior Authority to comment on the legal merits of the case.

SELECTING AND DRAFTING CHARGES – DMP PROCESS AND GUIDELINES

11.35 As discussed above, all investigations into or disclosing prescribed offences, will be referred to the DMP for consideration. Therefore, any charges for those offences will be prepared and drafted by legal officers in the Office of the DMP.

11.36 Likewise, where a charge is referred to the DMP, and the DMP considers it necessary to amend the charge, any such amendment and redrafting will be performed by a legal officer within the Office of the DMP.

LIMITATION ON CHARGING SERVICE OFFENCES

General

11.37 A person should usually be charged as soon as practicable after the investigating officer, or another person authorized to lay charges, decides that a service offence has been committed and that there is sufficient evidence to support the charge against the alleged offender.

Persons in Custody – DFDA s 95

11.38 In cases where a member arrests a person under the DFDA, or receives into custody a person who has already been arrested under the DFDA, that member must take all reasonable steps to ensure that the arrested person is delivered into the custody of the officer who is responsible to the commanding officer for such custody. The commanding officer (or authorized officer delegate) must then ensure that either the arrested person is formally charged within 24 hours after the delivery into custody or released.7

Time Limitations8

Members Ceasing to Serve – DFDA s 96

11.39 A person who has ceased to be a member of the Defence Force or a defence civilian shall not be charged with a service offence unless:

a. the period since the person ceased to be a Defence member or defence civilian has not exceeded 6 months; and

b. The maximum punishment for the service offence is imprisonment for a period of 2 years or a punishment more severe than that.

7 DFDA s.95(2). Reporting requirements apply if the member is held in custody.
8 DFDA s 96.
11.40 **Members Transferred to the Reserve Forces.** A member who has transferred to the reserve forces does not cease to be a ‘member of the ADF’. Accordingly, the time limitation placed on charging members with service offences contained in DFDA ss 96(6) does not apply to members transferring to the reserve force. Nevertheless, the decision to proceed with charges must be made with respect to the ‘service nexus’ test; that is the disciplinary action substantially serves the purpose of maintaining or enforcing service discipline. The greater the period of time that has elapsed since the member ceased full time service, the weaker the ‘nexus’ may to be.

11.41 **General limit – 5 years.** In addition to the limitation discussed above with respect to ex-Defence members or ex-defence civilians, generally, a person is not to be charged with an offence against the DFDA if a period of five years has elapsed from the time when the offence is alleged to have been committed.

11.42 **Territory Offences.** Where the offence based on a territory offence pursuant to DFDA s 61, a person shall not be charged where the time that has elapsed since the commission of the offence equals or exceeds the period of time that would bar or prevent the institution of proceedings in a court exercising jurisdiction in or in relation to the Jervis Bay Territory for the relevant territory offence.

11.43 **Old system offences.** If the provisions of the previous service law were still in force, and the person could not be charged with the old system offence, then the person shall not be charged with or tried for the offence.

11.44 **No time limitation.** A person can be charged with the following offences at any time:

- a. DFDA s 15 – 16B
- b. DFDA s 20
- c. DFDA s 22
- d. Ancillary offences in relation to the above (a), (b) and (c).

**Pleading Parallel Offences/Multiplicity**

11.45 Under the DFDA, it is permissible to charge a defendant with two charges that have a common element. An example of this may occur in circumstances where a defendant is accused of assaulting a superior officer and the degree of the assault was such as to constitute actual bodily harm. To charge the defendant solely with DFDA s.25 – assaulting a superior officer will not permit the tribunal to recognise the degree of the assault; similarly, to charge with an offence against DFDA s.61 and Crimes Act 1900 (ACT) s.24 – assault occasioning actual bodily harm will not allow evidence to be considered with regard to the relative ranks of the defendant and the alleged victim. Charging both offences will permit both aggravating aspects to be considered by the tribunal. However, in circumstances in which charging parallel offences is considered, obtaining early legal advice is strongly advised as the law in this area is complex, and significant difficulties can arise in the sentencing process.

**Previous acquittal**

11.46 [UNDER DEVELOPMENT]
FORM AND CONTENT OF CHARGES

Charge Sheet

11.47 A charge against a defendant must be entered on a charge sheet. Each charge must allege one offence only and must consist of two parts: the statement of the alleged offence and the particulars of the act or omission constituting the offence. The statement of the alleged offence should refer to the statutory provision creating the offence, for example DFDA s.27, and a brief description of the offence, for example disobeying a lawful command.

General content / detail

11.48 As a general rule, a charge should include:

a. the defendant’s name and Service particulars, be set out in full;

b. the details of any other person mentioned in the particulars of the offence, such as the full name and relevant detail depending on the exact offence such as age, rank etc;

c. the date, time and place of the alleged offence specified; and

d. the legislative provision on which the offence is based;

e. all details and alleged facts relevant to each element of the offence.

11.49 Example charges for prescribed offences, set out in Chapter 12 generally contain a short statement of the alleged offence.

11.50 It is therefore not mandatory to draft the statement in accordance with the form shown in Schedule XX but any statement so drafted will be sufficient compliance with the DFDA.

11.51 An offence should be charged by using the words of the statute or the form which relate to it. In case of doubt, or where the form / template / statement of offence have been superseded, the words of the statute should be used13.

Particulars of offence

11.52 The particulars of an offence must contain a sufficient statement of the circumstances of the offence to enable the defendant to know what the prosecution intends to prove to establish that the defendant committed the offence. In every case the relevant section of the DFDA should be consulted in order to determine the elements that must be proved in order to substantiate the charge.

11.53 The prescribed offences created by the DFDA, for trial by AMC, are set out and discussed in Chapter 12. Detail regarding the remaining DFDA offences capable of trial by summary authority are set out and discussed in DLM Volume 3, Chapter 4.

11.54 An example of how a charge may be drafted is shown below:

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13 R v Aniba (1995) 83 A Crim R 224 (QLD CA)
DFDA s.47C — Theft

Being a defence member at RAAF Base Amberley on or about 6 December 2003, 822546 Private John Smith dishonestly appropriated property, being the sum of $495 belonging to Sergeant Alan Steven Jones 8753212 with the intention of permanently depriving Sergeant Jones of that property.

Inclusion of aggravating factors / circumstances

11.55 Where a fact or circumstance of aggravation is directly relevant to the selection of an offence for charging, and therefore directly affect the liability of an accused for a particular offence, the detail should be included in the charge.

11.56 However, where the detail is relevant only to sentencing discretion of the judge and legal consequence of the offence, then there is no requirement to include it in the particulars of the charge.

Overloading a Charge sheet

11.57 In *R v Ambrose* (1973) 1457 Cr App R 538, Lawson LJ at 540 said:

> “The court wishes it to be clearly understood that those who draft indictments should use common sense and should not put into indictments charges which are of such as trivial nature. Not only is it unfair, but it also tends to impede the doing of justice on more important aspects of an indictment. The ordinary man does not like, as he puts it, the book being thrown at someone…The ordinary man is right: it is not fair”.

Duplicity

11.58 Each charge on a charge sheet must only allege one offence. If a charge alleges more than one offence, it is bad for duplicity.

11.59 The rule against duplicity is succinctly stated in the following extract applied in *Walsh v Tattersall* (1996) 188 CLR 77:

> “The indictment must not be double; that is to say, no one count of the indictment should charge the defendant with having committed two or more separate offences. This rule, though simple to state is sometimes difficult to apply … duplicity in a count is a matter of form, not evidence.”

11.60 The practical application of the rule is well described in the case of *DPP v Merriman*. Lord Diplock said:

> “The rule against duplicity, viz that only one offence should be charged in any one count of an indictment … has always been applied in a practical, rather than in a strictly analytical way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the 18th century to charge them in a single count of an indictment.”

11.61 For example, each punch of a series of punches could constitute a separate assault, but they would not be charged as separate offences if they all formed part of the same transaction in the time and place of their commission. However, if for example, there was an assault involving three punches in the bar area, the complainant was then restrained by friends and moved away from the area and ten minutes later the defendant went back into the bar, found the complainant and punched him again, , the defendant could be charged with two separate assaults pursuant to DFDA s.33(a).
11.62 It would also be duplicitous to charge a defendant with a single count of assault when, for example, the defendant had punched the complainant three times, a friend intervened and then the defendant punched the friend. It could not be charged as X assaulting both A and B in the one charge sheet.

11.63 Another example relates to a charge of theft. If a defence member went into his neighbour’s barrack room on three separate occasions to steal a CD and ended up with three CDs, he would have committed three separate offences and should be charged with three offences. If the three offences were charged as one, the charge would be duplicitous. If, however, the defence member entered the barrack room once and stole three CDs he would be charged with one offence of stealing three CDs.

11.64 There are a number of instances in the DFDA where various acts are proscribed in the one offence provision. When those acts are included in one charge, the construction of the section determines if there is duplicity. In the case of Romeyko v Samuels,\(^{17}\) Bray CJ said:

“The true distinction, broadly speaking, it seems to me, is between a statute which penalises one or more acts, in which case two or more offences are created, and a statute which penalises one act if it possesses one or more forbidden characteristics. In the latter case there is only one offence, whether the act under consideration in fact possesses one or several of such characteristics. Of course, there will always be borderline cases and if it is clear that Parliament intended several offences to be committed if the act in question possesses more than one of the forbidden characteristics, that result will follow.”

11.65 A general rule in interpreting a section is that when the disjunctive “or” is used it is an indication of duplicity. For example, it has been held that under DFDA s 39, it would be duplicitous to charge a defendant with “recklessly causing or allowing” a ship to be hazarded\(^{18}\) when “causing” or “allowing” are completely separate acts. The same would apply to DFDA s 43 which proscribes destruction or damage to service property. A defendant could only “destroy” or “damage” the property but not do both.

11.66 However, not all instances of apparent duplicity are in fact bad, even though the disjunctive “or” is used. What has to be looked at is whether the “or” relates to the principal act which constitutes the offence. For example, DFDA s.47P proscribes the dishonest receiving of property knowing or believing that property to be stolen. The principal act is the “receiving” so it is not duplicitous to include the words “knowing or believing” in the charge.

11.67 A cure to duplicity is available to the DMP in DFDA s 141A, as well as at common law. In R v Orsos\(^{19}\), Grove J said (at 460):

“It is to be remembered that the rule against double indictment is a matter of form and not or evidence. It is directed to removing the unfairness of multiple allegations within a single count and the rule does not affect any entitlement which a prosecutor may have otherwise to charge the offences in separate counts”.

**ALTERNATIVE OFFENCES**

**Statutory alternatives**

11.68 DFDA s 142 provides that alternative offences to certain offences against the DFDA (other than ‘Territory offences’) are specified in Schedule 6 of the Act. For convenience they are also set out in the discussion of each offence in the ‘offences’ section of Chapter 12.

11.69 DFDA s 142 is designed to avoid the necessity for alternative charges to appear on the one charge sheet. Therefore, statutory alternative charges should not normally be preferred against a defendant.

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\(^{17}\) (1972) 2 SASR 529, at 552.

\(^{18}\) Victor v Chief of the Naval Staff DFDAT No 4 of 1991.

\(^{19}\) (1997) 95 A Crim R 457 (NSW CCA)
11.70 In an appropriate case a person may be convicted of attempting to commit a service offence (other than a DFDA s 61 offence), as an alternative to the service offence which has been alleged. As to what constitutes an attempt, see s.11.1 of the Criminal Code.

11.71 If the offence alleged is a ‘Territory offence’ under DFDA s 61, the person may be convicted of an alternative offence if, in a trial in a civil court in the Jervis Bay Territory, the court could convict the person of the same alternative offence. For example, on a charge of murder under s.61 of the DFDA and s.12 of the Crimes Act 1900 (ACT) in its application to the Jervis Bay Territory, it is open to a Service tribunal to convict on the lesser offence of manslaughter. Although statutory alternatives exist under the Crimes Act 1900 (ACT) they generally apply to offences not likely to be tried by service tribunals or to offences which are likely to be tried only outside Australia, for example murder or sexual offences. Where a ‘Territory offence’ is charged, it is necessary to examine the relevant legislation to ascertain whether there is a statutory alternative to that offence.

Alternative offence supported by facts

11.72 Where the facts of a case appear to support two charges, it is permissible to charge the member with both offences, the second being expressed ‘in the alternative’. For example:

**First Charge:** DFDA s.33(c) – Engaging in obscene conduct

Being a defence member at Main Street Singleton on 25 April 2002, 342786 Private J. Smith engaged in conduct that was obscene, by urinating in the gutter within the view of Joan Smith.

**Second Charge (in the Alternative to the First Charge)** – DFDA s.60 Prejudicial conduct

Being a defence member at Main Street Singleton on 25 April 2002, 342786 Private J. Smith engaged in conduct that was likely to bring discredit upon the Australian Defence Force by urinating in the gutter whilst wearing uniform.

11.73 Where a charge is expressed as an alternative to another charge, an accused may be found guilty of only one of the charges. Of course, the accused may be found not guilty of both charges.

11.74 If the defendant is charged with and intends to plead not guilty to an offence that has a statutory alternative, then he or she should be made aware that statutory alternatives may be considered by the AMC. The defendant may consider a guilty plea to an alternative offence.

CHARGING PROCESS - GENERAL

Charging - Defence Member believed to have committed service offence.

11.75 If the person is a Defence member, then IAW DFDA ss87(1)(a) the authorized member may:

a. charge the defence member with the service offence;

b. cause the person to be given a copy of the charge; and

c. order the person to appear before a summary authority at a specified time and place for a hearing.

11.76 Where a charge sheet contains multiple charges the defence member should be ordered to appear before the summary authority with jurisdiction to deal with the most serious of the charges, notwithstanding that some of the charges, taken alone, could be dealt with by a more junior summary authority.

Summons – whether or not person is Defence member.
11.77 Whether or not a person who is believed to have committed a service offence is a defence member, IAW DFDA ss87(1)(b) an authorized member may cause to be served upon that person a summons. Where a summons is served on a person under DFDA ss87(1)(b), then DFDA ss87(3) provides that the person shall be taken to have been charged with the offence.

11.78 The summons must detail the service offence that the person is alleged to have committed and require their appearance before a commanding officer at a time and place stated in the summons. This procedure will generally only be necessary where a Defence civilian or a reserve member is to be charged.

11.79 DFDA s 88 also provides a power of summons where an accused person is not present at a hearing before a service tribunal. These two provisions should not be confused.

Requirements of service – summons

11.80 Defence Force Discipline Regulation 34 provides that a summons for the purposes of DFDA ss87(2) shall be served in the following manner:

a. delivery to the person personally;

b. by leaving the summons at the last known place of residence of that person with some person apparently resident at that place and apparently not less than 16 years age; or

c. by leaving the summons at the last known place of business of that person; or if the person is carrying on business at two or more places, at one of those places with some person apparently in the service of that person and apparently not less than 16 years age.

CHARGING PROCEDURE

Preparation of Charge Sheet

11.81 Where the DMP decides to act as an authorized member IAW DFDA s 87 and charge or summons a person, the relevant charge should be entered on a charge sheet or summons, as applicable.

11.82 Where the DMP charges a defence member with an offence that will be referred to an appropriate summary authority, the charge should be entered on Part 1 of a Form PD 105 — Summary Proceedings Report. All relevant sections of the PD 105 should be completed, for example; details of witnesses and person preferring the charge. Copies of written statements by all material witnesses who are likely to be called to give oral evidence in support of the charge should be attached to the Form PD 105. Not more than one person may be charged on the one Form PD 105.

Caution

11.83 To ensure that any statements made by the offender can be used in subsequent proceedings, it is important to ensure that once a decision to charge a person with a service offence, or to issue a summons is made, the caution in the form prescribed by DFDA s 101D is administered by an investigating officer.

Method of Charging

11.84 The member authorized to lay charges is to order the person to attend at a specified time and place. The authorized member must then:
a. Read out the charge to the defendant;

b. Hand to the defendant a photocopy of the Form PD 105 (on the Web Forms system) and the statements prepared by witnesses;

c. Advise the defendant that he or she has certain rights and may make certain applications and that these form part of Form PD 105;

d. Advise the defendant that he or she may be represented at a hearing by a member of the ADF who is reasonably available and that he or she should make the necessary arrangements. If the defendant is unable to make such arrangements and requires assistance, he or she should report his or her difficulties to the person or persons responsible for arranging the conduct of summary proceedings, for example the Coxswain, RSM, CSM or WOD; and

e. order the defendant to appear before a designated summary authority at a specified time and place.25

11.85 Where the Director of Military Prosecutions prefers charges of his/her own initiative, he/she is then required to make a decision with respect to the trial of it26. The courses of action open to him/her are as follows:

a. **Australian Military Court trial.** The matter may be referred to the Australian Military Court for trial27. If this is the course of action selected then a referral by the Registrar is to be requested by the Director of Military Prosecutions. If considering this course of action, he/she may consult with the relevant superior authority. Whether or not the DMP contacts the relevant superior authority, that superior authority may of their own initiative contact the DMP to represent the interests of the Defence Force.28

b. **Superior Summary Authority Trial.** The Director of Military Prosecutions may refer the charge to a superior summary authority for trial29. Such a referral can only be made where the charge is within the jurisdiction of a superior summary authority to try30..

c. **Commanding Officer Trial.** The Director of Military Prosecutions may refer the charge to a commanding officer for trial31. Such a referral can only be made where the charge is within the jurisdiction of a commanding officer to try32.

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22 Form 1 to Schedule 2 of DFD Regs.

23 If the authorized member is not superior in rank to the offender, a suitable senior officer should give the order.

24 Where the defendant is in custody at the time of laying the charges, a further caution is required to be administered immediately by the investigating officer in charge, who may or may not be the member laying the charges.

25 If the authorized member is not superior in rank to the offender, a suitable senior officer should give the order.

26 DFDA ss 87(1)(c).

27 DFDA ss 87(1)(c)(ii). This requires a referral from the Registrar, however, this referral is mandatory where requested by the Director of Military Prosecutions (see: DFDA ss 118(1)).

28 DFDA ss 5A(a).

29 DFDA ss 87(1)(c)(i).

30 DFDA ss 87(1)(c)(i).

31 DFDA ss 87(1)(c)(i).

32 DFDA ss 87(1)(c)(i).
WITHDRAWING CHARGES

11.86 Once a charge has been preferred in accordance with the procedure outlined above, it cannot be withdrawn by the prosecutor or the person laying the charge before being dealt with.

AMENDMENT OF CHARGES

11.87 In addition to the powers conferred on the DMP by DFDA s 103, the DMP may also amend a charge referred to them. Where appears to the DMP, for any reason, that a charge should be amended, DFDA s 141A enables the DMP, at any stage when a charge is before him or her under s 103, to make such amendment as he or she things necessary. The power of amendment includes the addition of a charge or the substitution of a charge for another charge. The amendment must however be made without injustice to the accused person.

11.88 Where the DMP amends charges referred to him or her, this is separate from the DMP acting to charge or summons a person IAW DFDA s 87.

11.89 Slip Rule. Apart from the general power of amendment provided by s.141A of the DFDA, the ‘slip rule’ provides that a service tribunal may amend a charge sheet at any time during the hearing of proceedings in order to correct a mistake in the name or description of the defendant or a mistake which is attributable to clerical error. Minor amendments of this nature may be done by hand in the course of the proceedings. If it becomes necessary to make any other amendment to a charge sheet after the Form PD 105 has been issued to the defendant, any amendment should be considered and dealt with during proceedings before the Service tribunal. The defendant should be given notice of the proposed amendment.

CONSEQUENCES OF A CHARGE

Suspension from duty

11.90 Where a member of the Defence Force is charged with a service offence, an authorized officer may, by notice in writing served on the member, suspend the member from duty.

11.91 Service of the notice is as set out in the DFD Regulation 34, and involves either:

   a. delivery to the person personally;

   b. by leaving the summons at the last known place of residence of that person with some person apparently resident at that place and apparently not less than 16 years age; or

   c. by leaving the summons at the last known place of business of that person; or if the person is carrying on business at two or more places, at one of those places with some person apparently in the service of that person and apparently not less than 16 years age.

11.92 Instruments appointing ‘authorized officers’ for the purposes of DFDA s 98 are included in DLM Volume 1.

11.93 A member’s suspension ceases:

   a. at the time the members is notified that the charge is not proceeded with or the prosecution of the charge is abandoned; or

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33 DFDA s 141A(2)
34 DFDA s 98
35 DFDA s 98(3)
b. In any other case, on the termination of the proceedings before the service tribunal hearing the charge.

Effect of suspension

11.94 Where a member of the Defence Force is suspended from duty:

a. The member is not required to perform any duty of their office / appointment;

b. He member is not entitled to remuneration in for the duration of the period of suspension; unless

(1) The authorized officer, either following application by the member or otherwise, directs that the member will receive remuneration during the whole, or a specified part of the period of suspension.

11.95 A direction from the authorized officer may, however, only be given if the authorized officer is satisfied that the member is suffering, or has suffered, hardship as a result of the suspension. 36

11.96 The member is entitled to engage in employment outside the Defence Force during any period of suspension in respect of which the member is not receiving remuneration. 37

36 DFDA ss 100(4)
37 DFDA ss 100(6)
12.1 The Australian Military Court must try 'prescribed offences'. A summary authority may not try a prescribed offence.

12.2 A complete list of all offences requiring trial by the AMC is provided at Annex A. DFDA s 104 provides that 'prescribed offences' are:

a. offences against DFDA s 61 in relation to which the relevant territory offence is:
   (i) Treason, murder, manslaughter or bigamy; or
   (ii) An offence against s 51, 52, 53, 54 or 55 of the Crimes Act 1900 (ACT), in its application to the Jervis Bay Territory, as amended or affected by Ordinances in force in that Territory, namely:
      - s 51 – sexual assault in the first degree
      - s 52 – sexual assault in the second degree
      - s 53 – sexual assault in the third degree
      - s 54 – sexual intercourse without consent
      - s 55 – sexual intercourse with young person
   (iii) An offence prescribed for the purposes of DFDA ss104(a) [none so prescribed]
   (iv) An ancillary Territory Offence in relation to the Territory Offences above at (i), (ii) and (iii) above.

a. Offences prescribed by the DFD Regulations¹ for the purposes of s DFDA 104(b), namely:
   Service offences in respect of which a person is liable to more than 2 years imprisonment, other than:
   - ss 43(1) DFDA – (Intentionally) Destroying or damaging service property
   - s 47C DFDA - Theft
   - s 47P DFDA – Receiving
   - s 48 DFDA – Looting
   - s 52 DFDA – Giving false evidence

   and,

   The following specific offences:
   - s 18 DFDA – Endangering Morale
   - s 36 DFDA – Dangerous Conduct
   - s 39 DFDA – Loss of, or hazard to, service ship
   - s 58 DFDA – Unauthorized disclosure of information

b. A service offence that is an ancillary offence in relation to the offence above at (iii).

12.3 Annex B to this Chapter provides commentary, by offence, setting out the proofs relevant to each charge as well as the applicable defences available to accused persons.

¹ DFD Reg 44
Annex:

A. LIST OF PRESCRIBED OFFENCES
B. PRESCRIBED OFFENCES - PROOFS AND COMMENTARY
# LIST OF PRESCRIBED OFFENCES

**Defence Force Discipline Act 1982**

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<td>section 15</td>
<td>Abandoning or surrendering a (place) (post) (service ship) (service aircraft) (service armoured vehicle)</td>
</tr>
<tr>
<td>section 15A</td>
<td>Causing the capture or destruction of a (service ship) (service aircraft) (service armoured vehicle)</td>
</tr>
<tr>
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</tr>
<tr>
<td>subparagraph 15E (1) (b) (ii)</td>
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<tr>
<td>subparagraph 15E (1) (b) (iii)</td>
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</tr>
<tr>
<td>section 15F</td>
<td>Failing to carry out orders</td>
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<td>section 16</td>
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<tr>
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</tr>
<tr>
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<td>subsection 20 (1)</td>
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<tr>
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<td>Absence from place of duty with intention to avoid active service</td>
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<tr>
<td>subsection 22 (2)</td>
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| subsection 30 (2) | Assaulting a guard in connection with operations against the
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</tr>
<tr>
<td>subsection 39 (2)</td>
<td>Recklessly causing (loss of) (stranding of) (hazarding of) service ship</td>
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<td>Negligently causing (loss of) (stranding of) (hazarding of) service ship</td>
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<tr>
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<td>subsection 61 (3)</td>
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<tr>
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**Ancillary Offences – Application of the Criminal Code**

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</tr>
<tr>
<td>Division 11.4</td>
<td>Incitement to [name of offence against the Defence Force Discipline Act 1982 and Defence Force Discipline Regulations 1985]</td>
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<tr>
<td>Division 11.5</td>
<td>Conspiracy to commit [name of offence against the Defence Force Discipline Act 1982 and Defence Force Discipline Regulations 1985]</td>
</tr>
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</table>

**Ancillary Offences – Crimes Act 1914**

**Section 6 Accessory after the fact**

Any person who receives or assists another person, who is, to his knowledge, guilty of any offence against a law of the Commonwealth, in order to enable him to escape punishment or to dispose of the proceeds of the offence shall be guilty of an offence.

Penalty: Imprisonment for 2 years.
Ancillary Territory Offences

Refer above to Ancillary Offences, and Crimes Act 1914 Tables, and also below:

Criminal Code 2002 (ACT)

44 Attempt

(1) If a person attempts to commit an offence, the person commits the offence of attempting to commit that offence.

(2) However, a person commits the offence of attempting to commit an offence only if the person carries out conduct that is more than merely preparatory to the commission of the offence attempted.

(3) The question whether conduct is more than merely preparatory is a question of fact.

(4) A person may be found guilty of attempting to commit an offence even though—
   (a) it was impossible to commit the offence attempted; or
   (b) the person committed the offence attempted.

(5) For the offence of attempting to commit an offence, intention and knowledge are fault elements for each physical element of the offence attempted.

Note Only 1 of the fault elements of intention or knowledge needs to be established for each physical element of the offence attempted (see s 12 (Establishing guilt of offences)).

(6) However, any special liability provisions that apply to an offence apply also to the offence of attempting to commit the offence.

(7) Any defence, procedure, limitation or qualifying provision applying to an offence applies to the offence of attempting to commit the offence.

(8) If a person is found guilty of attempting to commit an offence, the person cannot later be charged with committing the offence.

(9) The offence of attempting to commit an offence is punishable as if the offence attempted had been committed.

(10) This section does not apply to an offence against section 45 or section 48 (Conspiracy).

47 Incitement

(1) If a person urges the commission of an offence (the offence incited), the person commits the offence of incitement.

Maximum penalty:
   (a) if the offence incited is punishable by life imprisonment—imprisonment for 10 years, 1 000 penalty units or both; or
   (b) if the offence incited is punishable by imprisonment for 14 years or more (but not life imprisonment)—imprisonment for 7 years, 700 penalty units or both; or
   (c) if the offence incited is punishable by imprisonment for 10 years or more (but less than 14 years)—imprisonment for 5 years, 500 penalty units or both; or
   (d) if the offence incited is punishable by imprisonment for less than 10 years, either or both of the following:
      (i) the lesser of the maximum term of imprisonment for the offence incited and imprisonment for 3 years;
      (ii) 300 penalty units; or

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(e) if the offence incited is not punishable by imprisonment—the number of penalty units equal to the maximum number of penalty units applying to the offence incited.

(2) However, the person commits the offence of incitement only if the person intends that the offence incited be committed.

(3) Despite subsection (2), any special liability provisions that apply to an offence apply also to the offence of incitement to commit the offence.

(4) A person may be found guilty of the offence of incitement even though it was impossible to commit the offence incited.

(5) Any defence, procedure, limitation or qualifying provision applying to an offence applies to the offence of incitement in relation to the offence.

(6) This section does not apply to an offence against section 44 (Attempt), section 48 (Conspiracy) or this section.

48 Conspiracy

(1) If a person conspires with someone else to commit an offence (the *offence conspired*) punishable by imprisonment for longer than 1 year or by a fine of 200 penalty units or more (or both), the person commits the offence of conspiracy.

(2) However, the person commits the offence of conspiracy only if—

(a) the person entered into an agreement with at least 1 other person; and

(b) the person and at least 1 other party to the agreement intend that an offence be committed under the agreement; and

(c) the person or at least 1 other party to the agreement commits an overt act under the agreement.

(3) Despite subsection (2), any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit the offence.

(4) The offence of conspiring to commit an offence is punishable as if the offence conspired had been committed.

(5) A person may be found guilty of the offence of conspiracy even though—

(a) it was impossible to commit the offence conspired; or

(b) the person and each other party to the agreement is a corporation; or

(c) each other party to the agreement is—

(i) a person who is not criminally responsible; or

(ii) a person for whose benefit or protection the offence exists; or

(d) all other parties to the agreement are acquitted of the conspiracy (unless to find the person guilty would be inconsistent with their acquittal).

(6) A person must not be found guilty of the offence of conspiracy to commit an offence if, before the commission of an overt act under the agreement, the person—

(a) withdrew from the agreement; and

(b) took all reasonable steps to prevent the commission of the offence conspired.

(7) A person for whose benefit or protection an offence exists cannot be found guilty of conspiracy to commit the offence.

(8) Any defence, procedure, limitation or qualifying provision applying to an offence applies to the offence of conspiracy to commit the offence.

(9) A court may dismiss a charge of conspiracy if it considers that the interests of justice require it to dismiss the charge.
(10) A proceeding for an offence of conspiracy must not be begun without the consent of the Attorney-General or the director of public prosecutions.

(11) However, a person may be arrested for, charged with, or remanded in custody or on bail in relation to, an offence of conspiracy before the consent has been given.
Abandoning or surrendering a post etc

1. Section 15 of the DFDA provides as follows:

'15 (1) A person who is a defence member or a defence civilian is guilty of an offence if:

(a) the person has a duty to defend or destroy a place, post, service ship, service aircraft or service armoured vehicle; and

(b) the person knows of that duty; and

(c) the person abandons or surrenders to the enemy the place or thing mentioned in paragraph (a).

Maximum punishment: Imprisonment for 15 years.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the Criminal Code.'

DEFINED EXPRESSIONS:

'aircraft' )
'charge' )
'defence civilian' )
'defence member' )
'enemy person' ) see s.3(1)
'service aircraft*' )
'service armoured vehicle'* )
'service ship'* ) * see the definition of Service property
'superior officer' )
'the enemy' )

EXAMPLE CHARGE:

DFDA s.15(1) Abandoning or surrendering a (place) (post) (Service ship) (Service aircraft) (Service armoured vehicle)

Being a defence member at ................. on ................. having a duty to defend the munitions compound in the XX Area of Operations, surrendered the compound to the enemy.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;
b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant had a specified duty to defend or destroy a specified place, post, Service ship, Service aircraft or Service armoured vehicle (in this case a munitions compound in the XX Area of Operations) (physical element of circumstance);

d. That the defendant knew of the specified duty in (c) (fault element of knowledge specifically provided for);

e. That the defendant abandoned or surrendered to the enemy the specified place, post, Service ship, Service aircraft or Service armoured vehicle in (c) (in this case a munitions compound in the XX Area of Operations) (physical element of conduct); and

f. That the defendant's conduct in (e) was intentional (default fault element of intention).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions, namely that they had a reasonable excuse for engaging in the alleged conduct. In this particular provision:

a. The defendant may raise the statutory defence under s.15(2) that he or she had a reasonable excuse for the conduct in (e); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: It seems that these offences can be committed only by the person in charge of the place etc at the time. Thus, these offences are unlikely to be committed by a defence civilian because a defence civilian normally will not have a duty to defend or destroy a place, Service ship, etc.
Causing the capture or destruction of a Service ship, aircraft or vehicle

2. Section 15A of the DFDA provides as follows:

‘15A(1) A person who is a defence member or a defence civilian is guilty of an offence if:

(a) the person engages in conduct; and

(b) the conduct causes the capture or destruction by the enemy of a service ship, service aircraft or service armoured vehicle;

(c) by engaging in the conduct, the person intends to bring about that result.

Maximum punishment: Imprisonment for 15 years.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the Criminal Code.’

DEFINED EXPRESSIONS:

‘aircraft’
‘charge’
‘defence civilian’
‘defence member’
‘enemy person’ see s.3(1)
‘service aircraft’
‘service armoured vehicle’
‘service ship’ see the definition of Service property
‘superior officer’
‘the enemy’

EXAMPLE CHARGE:

DFDA s.15A(1) Causing the capture or destruction of a (Service ship) (Service aircraft) (Service armoured vehicle)

Being a defence member at .................. on .................. did intentionally cause the capture by the enemy of a Service ship, namely HMAS NONESUCH, by providing enemy personnel with information concerning the deployment of HMAS NONESUCH.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct (in this case by providing enemy personnel with information concerning the deployment of HMAS NONESUCH) (physical element of conduct);
d. That the defendant’s conduct in (c) was intentional (default fault element of intention);

e. That the defendant’s conduct in (c) caused the capture (or destruction) by the enemy of a Service ship, Service aircraft or Service armoured vehicle (in this case a Service ship, namely HMAS NONESUCH) (physical element of result of conduct);

f. That the defendant intended the result in (e) (fault element of intention specifically provided for);

g. That the specified ship, aircraft or armoured vehicle was a Service ship, aircraft or armoured vehicle (physical element of circumstance); and

h. That the defendant was reckless as to (g) (default fault element of recklessness).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions, namely that they had a reasonable excuse for engaging in the alleged conduct. In this particular provision:

a. The defendant may raise the statutory defence under s.15A(2) that he or she had a reasonable excuse for the conduct in (c); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.
Aiding the enemy while captured

3. Section 15B of the DFDA provides as follows:

‘15B. (1) A person who is a defence member or a defence civilian is guilty of an offence if:

(a) the person is captured by the enemy; and
(b) the person serves with the enemy, aids the enemy in prosecuting hostilities or measures likely to influence morale or aids the enemy in any other manner that is not authorised by international law.

Maximum punishment: Imprisonment for life.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.'

DEFINED EXPRESSIONS:

‘aircraft’ )
‘charge’ )
‘defence civilian’ )
‘defence member’ )
‘enemy person’) see s.3(1)
‘service aircraft’* )
‘service armoured vehicle’* )
‘service ship’* ) * see the definition of Service property
‘superior officer’ )
‘the enemy’ )

EXAMPLE CHARGE:

DFDA s.15B(1) Aiding the enemy while captured

Being a defence member at ..................... on ..................... having been captured by the enemy, aided the enemy by serving with the enemy forces in prosecuting hostilities against the 5th Battalion, Royal Australian Regiment

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was captured by the enemy (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or
recklessness);

e. That the defendant served with the enemy, aided the enemy in prosecuting hostilities or measures likely to influence morale, or aided the enemy in any other manner that is not authorised by international law (in this case in prosecuting hostilities against the 5th Battalion, Royal Australian Regiment (physical element of conduct); and

f. That the defendant’s conduct in (e) was intentional (default fault element of intention).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions, namely that they had a reasonable excuse for engaging in the alleged conduct. In this particular provision:

a. The defendant may raise the statutory defence under s.15B(2) that he or she had a reasonable excuse for the conduct in (e); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Serves with or aids’. The defendant should be charged with serving with the enemy where there is evidence that the defendant served with the armed forces of the enemy; otherwise the defendant should be charged with aiding the enemy.

‘Measures likely to influence morale’. An example of this is broadcasting for the enemy on radio or television. The act must be likely to influence morale to the enemy’s advantage.

‘Not authorised by international law’. The kinds of activities upon which prisoners of war may lawfully be employed by the Detaining Power are set out in Part III, Section III of the Geneva Convention Relative to the Treatment of Prisoners of War.
Providing the enemy with material assistance

4. Section 15C of the DFDA provides as follows:

‘15C(1) A person who is a defence member or a defence civilian is guilty of an offence if the person provides the enemy with, or permits or enables the enemy to have access to, arms, ammunition, vehicles, supplies of any description or any other thing likely to assist the enemy.  

Maximum punishment: Imprisonment for life.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the Criminal Code.’

DEFINED EXPRESSIONS:

‘defence civilian’ )
‘defence member’ )
‘enemy person’ ) see s.3(1)
‘the enemy’ )

EXAMPLE CHARGE:

DFDA s.15C(1) Providing the enemy with material assistance

Being a defence member at ...................... on ............ assisted the enemy by providing ABC, an enemy soldier, with arms, namely one Steyr F88 rifle and six hand grenades.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant provided the enemy with, or permitted or enabled the enemy to have access to arms, ammunition, vehicles, supplies of any description or any other thing likely to assist the enemy (in this case one Steyr F88 rifle and six hand grenades) (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention);

Where the charge concerns ‘any other thing likely to assist the enemy’, there are two additional elements:

e. That the thing provided in (c) was likely to assist the enemy (physical element of circumstance); and

f. That the defendant was reckless as to the result in (e) (default fault element of
recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions, namely that they had a reasonable excuse for engaging in the alleged conduct. In this particular provision:

a. The defendant may raise the statutory defence under s.15C(2) that he or she had a reasonable excuse for the conduct in (c); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.
Harbouring Enemies

5. Section 15D of the DFDA provides as follows:

‘15D(1) A person who is a defence member or a defence civilian is guilty of an offence if:

(a) the person harbours or protects another person; and
(b) that other person is an enemy person; and
(c) that other person is not a prisoner of war; and
(d) the first-mentioned person knows that the other person is an enemy person.

Maximum punishment: Imprisonment for 15 years.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the Criminal Code.’

DEFINED EXPRESSIONS:

‘defence civilian’
‘defence member’ see s.3(1)
‘enemy person’

EXAMPLE CHARGE:

DFDA s.15D(1) Harbouring enemies

Being a defence member at ......................... on ................... protected XYZ, an enemy person who was not a prisoner of war, knowing that XYZ was an enemy person.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant harboured or protected another person in a specified manner (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention);

e. That the person harboured or protected in (c) was an enemy person (physical element of circumstance);

f. That the defendant knew the person harboured or protected in (c) was an enemy person (fault element of knowledge specifically provided for);

g. That the person harboured or protected in (c) was not a prisoner of war (physical
element of circumstance); and

h. That the defendant was reckless as to (g) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions, namely that they had a reasonable excuse for engaging in the alleged conduct. In this particular provision:

a. The defendant may raise the statutory defence under s.15D(2) that he or she had a reasonable excuse for the conduct in (c); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Enemy person’. This has a restricted meaning, see the definition in subsection 3(1).
Offences Relating to Signals and Messages

6. Section 15E of the DFDA provides as follows:

‘15E(1) A person who is a defence member or a defence civilian is guilty of an offence if:

(a) the person is engaged on service in connection with operations against the enemy; and

(b) the person:

(i) gives a false signal, message or other communication that the person knows to be false; or

(ii) alters or interferes with a signal, message or other communication; or

(iii) alters or interferes with apparatus for giving or receiving a signal, message or other communication.

Maximum punishment: Imprisonment for 15 years.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the Criminal Code.’

DEFINED EXPRESSIONS:

‘defence civilian’  )
‘defence member’ ) see s.3(1)
‘the enemy’ )

EXAMPLE CHARGES:

DFDA s.15E(1)(b)(i) Giving false communication

Being a defence member at .......................... on ................. while engaged on service in connection with operations against the enemy as the watch signalman in the Main Signals Office of HMAS BALDRIC, gave a false message, namely message ABC 1214567Z to HMAS BLACKADDER to alter course 90 degrees to starboard, knowing that message to be false.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was engaged on service in connection with operations against the enemy (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);
e. That the defendant gave a false signal, message or other communication (in this case message ABC 1214567Z to HMAS BLACKADDER to alter course 90 degrees to starboard) (physical element of conduct);

f. That the defendant’s conduct in (e) was intentional (default fault element of intention);

g. That the signal, message or other communication was false (physical element of circumstance); and

h. That the defendant knew that the signal, message or other communication was false (fault element of knowledge specifically provided for).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions, namely that they had a reasonable excuse for engaging in the alleged conduct. In this particular provision:

a. The defendant may raise the statutory defence under s.15E(2) that he or she had a reasonable excuse for the conduct in (e); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

DFDA s.15E(1)(b)(ii) Altering or interfering with communication

Being a defence member at ......................... on .................. while engaged on service in connection with operations against the enemy as the watch signalman in the Main Signals Office of HMAS BALDRIC altered a signal, namely, by changing the date time group of a signal to HMAS BLACKADDER from “210130Z Dec 03” to “220130Z Nov 03”.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was engaged on service in connection with operations against the enemy (in this case as the watch signalman in the Main Signals Office of HMAS BALDRIC) (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant altered or interfered with a signal, message or other
communication (in this case by changing the date time group of a signal to HMAS BLACKADDER from “210130Z Dec 03” to “220130Z Nov 03”) (physical element of conduct); and

f. That the defendant’s conduct in (e) was intentional (default fault element of intention).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions, namely that they had a reasonable excuse for engaging in the alleged conduct. In this particular provision:

a. The defendant may raise the statutory defence under s.15E(2) that he or she had a reasonable excuse for the conduct in (e); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

DFDA s.15E(1)(b)(iii) Altering or interfering with apparatus for giving or sending a signal etc

Being a defence member at ......................... on .................. while engaged on service in connection with operations against the enemy as the watch signalman in the Main Signals Office of HMAS BALDRIC interfered with the radio by removing the encryption card.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was engaged on service in connection with operations against the enemy (in this case as the watch signalman in the Main Signals Office of HMAS BALDRIC) (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant altered or interfered with an apparatus for giving or receiving a signal, message or other communication (in this case by interfering with the radio by removing the encryption card) (physical element of conduct); and

f. That the defendant’s conduct in (e) was intentional (default fault element of intention).
DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions, namely that they had a reasonable excuse for engaging in the alleged conduct. In this particular provision:

a. The defendant may raise the statutory defence under s.15E(2) that he or she had a reasonable excuse for the conduct in (e); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.
Failing to Carry Out Orders

7. Section 15F of the DFDA provides as follows:

`15F(1) A person who is a defence member or a defence civilian is guilty of an offence if:
(a) the person:
(i) is ordered by his or her superior officer to prepare for, or carry out, operations against the enemy; or
(ii) is otherwise under orders to prepare for, or to carry out, operations against the enemy; and
(b) the person does not use his or her utmost exertions to carry those orders into effect.

Maximum punishment: Imprisonment for 15 years.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the Criminal Code.'

DEFINED EXPRESSIONS:

‘defence civilian’
‘defence member’ see s.3(1)
‘the enemy’

EXAMPLE CHARGE:

DFDA s.15F(1) Failing to carry out orders

Being a defence member at ......................... on ................ having been ordered by his superior officer, Squadron Leader A. MacKenzie 8134578 to prepare for operations against the enemy by arming Tiger Moth aircraft no FC345 with Blackeye missiles by 1900hrs on 11 July 2002, did not use his utmost exertions to carry that order into effect in that he did not complete the task by the nominated time.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was either ordered by his or her superior officer to prepare for, or to carry out, specified operations against the enemy or is otherwise under orders to prepare for, or to carry out, specified operations against the enemy (in this case by arming Tiger Moth aircraft no FC345 with Blackeye missiles by 1900 hours on 11 July 2002) (physical element of circumstance);

d. That the defendant was reckless as to the fact of (c) (default fault element of
recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant did not use his or her utmost exertions to carry those orders into effect (physical element of conduct); and

f. That the defendant’s conduct in (e) was intentional (default fault element of intention).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

a. The defendant may raise the statutory defence under s.15F(2) that he or she had a reasonable excuse for the conduct in (e); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.
Imperilling the success of operations

8. Section 15G of the DFDA provides as follows:

15G(1) A person who is a defence member or a defence civilian is guilty of an offence if:
(a) the person engages in any conduct; and
(b) the conduct imperils the success of operations against the enemy.

Maximum punishment: Imprisonment for 15 years.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

**DEFINED EXPRESSIONS:**

‘defence civilian’
‘defence member’ see s.3(1)
‘the enemy’

**EXAMPLE CHARGE:**

**DFDA s.15G(1) Imperilling the success of operations**

Being a defence member at ......................... on ............... imperilled the success of operations against the enemy by making unauthorised calls on a mobile telephone during a period when her commanding officer had ordered electronic silence.

**PROSECUTION PROOFS:**

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing (or omitting to do) a specified act (in this case by making unauthorised calls on a mobile telephone during a period when her commanding officer had ordered electronic silence (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention);

e. That the defendant’s conduct in (c) imperilled the success of operations against the enemy (physical element of result of conduct); and

f. That the defendant was reckless as to the result in (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).
DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

a. The defendant may raise the statutory defence under s.15G(2) that he or she had a reasonable excuse for the conduct in (e); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.
Communicating with the enemy

9. Section 16 of the DFDA provides as follows:

'16(1) A person who is a defence member or a defence civilian is guilty of an offence if the person communicates with, or gives intelligence to, the enemy.

Maximum punishment: Imprisonment for 15 years.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the Criminal Code.'

DEFINED EXPRESSIONS:

‘defence civilian’
‘defence member’  ) see s.3(1)
‘the enemy’

EXAMPLE CHARGE:

DFDA s.16(1) Communicating with the enemy

Being a defence member at .................. on ..................... communicated with the enemy by means of an e-mail dated ................... which detailed the electronic countermeasures equipment fitted in HMAS ENTERPRISE.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant communicated with or gave intelligence to the enemy in a specified manner (in this case by means of an e-mail which detailed the electronic countermeasures equipment fitted in HMAS ENTERPRISE (physical element of conduct); and

d. That the defendant's conduct in (c) was intentional (default fault element of intention);

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

a. The defendant may raise the statutory defence under s.16(2) that he or she had a reasonable excuse for the conduct in (c); and
b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Intelligence’. This is not defined and has its ordinary meaning of information or news. But it seems that, in the context and having regard to the definition of ‘the enemy’ (see s.3(1)), the subject matter must be such as would or might be directly or indirectly useful to the enemy in the conduct of operations of war against Australia or an allied force or in the conduct of armed hostilities against the ADF or an allied force.

If there is doubt as to whether the information alleged to have been conveyed by the defendant to the enemy can properly be regarded as being intelligence, the defendant should be charged with communication with the enemy; the maximum penalty for both offences is the same.

If it can be proved that the defendant disclosed the information and that the information constituted intelligence, but there is insufficient proof that the defendant gave the intelligence to the enemy (either directly, or indirectly through a third party), consideration should be given to charging the defendant with an offence against s.58 (unauthorised disclosure of information).
Failing to report information received from the enemy

10. Section 16A of the DFDA provides as follows:

‘16A(1) A person who is a defence member or a defence civilian is guilty of an offence if:

(a) the person receives information from the enemy; and

(b) the person does not make the information known to proper authority; and

(c) the information is likely to be directly or indirectly useful in operations against the enemy; and

(d) the person knows or could reasonably be expected to know that the information is likely to be directly or indirectly useful in operations against the enemy.

Maximum punishment: Imprisonment for 15 years.

(2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the Criminal Code.’

DEFINED EXPRESSIONS:

‘defence civilian’ )
‘defence member’ ) see s.3(1)
‘the enemy’ )

EXAMPLE CHARGE:

DFDA s.16A(1) Failing to report information received from the enemy

Being a defence member at ................... on ................. .. failed to make known to a proper authority, namely his commanding officer, information obtained by interception of enemy naval broadcasts at ................ on ............ which he knew was likely to be directly useful in operations against the enemy.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant received specified information from the enemy (in this case information obtained by interception of enemy naval broadcasts at ....... on .......) (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant did not make the information received known to the proper
authority (in this case his commanding officer) (physical element of conduct);

f. That the defendant’s conduct in (e) was intentional (default fault element of intention);

g. That the information received was likely to be directly or indirectly useful in operations against the enemy (physical element of circumstance); and

h. That the person knew that the information was likely to be directly or indirectly useful in operations against the enemy (fault element of knowledge specifically provided for).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

a. The defendant may raise the statutory defence under s.16A(2) that he or she had a reasonable excuse for the conduct in (e); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Proper authority’. This expression is not defined. It seems that it means that authority (normally the intelligence officer, or where the defendant is a defence member, any superior officer, or where the defendant is a defence civilian, any officer) to whom, having regard to the status of the defendant and the circumstances in which the defendant was placed, the defendant could reasonably have been expected to have reported the information.
Offence committed with intent to assist the enemy

11. Section 16B of the DFDA provides as follows:

‘16B(1) A person who is a defence member or a defence civilian is guilty of an offence if:
(a) the person engages in conduct that constitutes an offence against any of sections 15 to
16A (other than section 15B or 15C); and
(b) the person engages in that conduct with intent to assist the enemy.

Maximum punishment: Imprisonment for life.

(2) In paragraph (1)(a), strict liability applies to the physical element of circumstance, that the
conduct constitutes an offence against the section concerned.

Note: For strict liability, see section 6.1 of the Criminal Code.’

DEFINED EXPRESSIONS:
‘defence civilian’
‘defence member’ see s.3(1)
‘the enemy’

EXAMPLE CHARGE:

DFDA s.16B(1) Committing the offence of [name of offence against section 15 to 16A (other
than section 15B or 15C)] with intent to assist the enemy

Being a defence member at .................. on .................. with intent to assist the enemy, engaged
in conduct that constituted an offence against DFDA section 15D namely protection of XYZ an enemy
person who was not a prisoner of war.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of
circumstance). In almost all circumstances the defendant will know and admit that
they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member
or a defence civilian (default fault element of recklessness). Recklessness can be
established by proving intention, knowledge or recklessness. In almost all
circumstances the defendant will know and admit that they are a defence member or a
defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing (or omitting to do) a specified act (in
this case by protecting XYZ an enemy person who was not a prisoner of war)
(physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention);

e. That the defendant’s conduct in (c) constituted an offence against any of sections 15
to 16A (but not section 15B or 15C) (physical element of circumstance);

f. That the defendant’s conduct in (c) imperilled the success of operations against the
enemy (physical element of result of conduct);

g. That the purpose of the defendant’s conduct in (c) was to assist the enemy (physical
element of circumstance); and

h. That the defendant intended the purpose in (f) (fault element of intention specifically provided for).

NOTE: There is no requirement for the prosecution to prove a fault element on the part of the defendant in relation to the physical element (e) as this is an element of strict liability under s.16B(2).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: **Ulterior Intention**: Some offences require an intention to achieve an objective which does not go to any circumstance or result and which forms part of the definition of the offence. This offence is one of ulterior intent. An ulterior intention prohibits engaging in conduct with the intention to achieve a further objective. The act, omission or state of affairs is intentional because the defendant engages in that conduct with the intention of achieving that further objective. Because every offence requires proof of conduct, the ulterior intention is that fault element for the physical element of conduct. Although liability for offences such as these is established by the defendant’s objective, the achievement of the objective is not a physical element of the offence. Ulterior intention is not defined in the Criminal Code so the meaning of intention should bear its ordinary common law meaning.
Leaving a post, abandoning equipment or otherwise failing to perform duty

12. Section 17 of the DFDA provides as follows:

‘17(1) A defence member is guilty of an offence if the member is engaged on service in connection with operations against the enemy and:

(a) the member:

(i) has a duty to be at a post, position or other place; and

(ii) leaves the post, position or place; or

(b) the member abandons his or her weapons or other equipment; or

(c) the member does not properly perform his or her duty in any other manner in attacking or defending against the enemy.

Maximum punishment: Imprisonment for 5 years.

(2) It is a defence if the member proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the Criminal Code.

(3) In this section:

equipment includes vehicles, ammunition, instruments and tools.’

DEFINED EXPRESSIONS:

‘defence member’ ) see s.3(1)
‘the enemy’ )
‘equipment’ see s.17(3)

EXAMPLE CHARGE:

DFDA s.17(1)(a) Leaving (post) (position) (place) in connection with operations

Being a defence member at ................. on .................. while engaged on service in connection with operations against the enemy left her post at the main gate of RAAF Base Wirraway Ammunition Depot.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was engaged on service in connection with operations against the enemy (physical element of circumstance);

d. That the defendant was reckless as to the fact that he or she was engaged on service
in connection with operations against the enemy (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant had a specified duty to be at a post, position or other place (in this case at the main gate of RAAF Base Wirraway Ammunition Depot) (physical element of circumstance);

f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

g. That the defendant left the post, position or place (physical element of conduct); and

h. That the defendant’s conduct in (g) was intentional (default fault element of intention).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

a. The defendant may raise the statutory defence under s.17(2) that he or she had a reasonable excuse for the conduct in (g); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: A post is not bounded by an imaginary line but includes, according to orders or circumstances, such surrounding area as may be necessary for the proper performance of the duties for which the person was posted. The offence of leaving post is committed when the person goes such a distance from his or her post that the person would be unable fully to perform the duty for which the person was posted. Similar reasoning applies in relation to a position or place.

The fact that the defendant had not been formally ordered to take up his or her post is immaterial provided evidence is given to prove that the defendant was reckless as to the fact that his or her duty required the defendant to be there (noting that recklessness can be established by proving intention, knowledge or recklessness).

In determining what in any particular case is a post, a Service tribunal may use its general Service knowledge.

A person who has not taken up the person’s post cannot leave it; failure to take up the person’s post is not an offence against this section but may be charged under s.32.

EXAMPLE CHARGE:

DFDA s.17(1)(b) Abandoning (weapons) (other equipment) in connection with operations

Being a defence member at .................... on ............................. while engaged on service in connection with operations against the enemy abandoned his weapons namely a F88 Steyr rifle serial number A8596098, a bayonet and a magazine containing ammunition.
PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was engaged on service in connection with operations against the enemy (physical element of circumstance);

d. That the defendant was reckless as to the fact that he or she was engaged on service in connection with operations against the enemy (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant abandoned his or her weapons or other equipment (physical element of conduct); and

f. That the defendant’s conduct in (e) was intentional (default fault element of intention).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

a. The defendant may raise the statutory defence under s.17(2) that he or she had a reasonable excuse for the conduct in (e); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: This offence is principally directed at a person who, when retreating, leaves their weapons or other equipment behind or throws them or it away. The expression ‘equipment’ is defined to include vehicles, ammunition, instruments and tools. In the circumstances, it seems that the reference to ‘the member’s’ weapons etc means the weapons etc which the defendant had for the time being in his or her possession or under his or her immediate control.

EXAMPLE CHARGE:

DFDA s.17(1)(c) Failing to properly perform duty in attacking or defending against the enemy

Being a defence member at .................... on ......................... while engaged on service in connection with operations against the enemy failed to transmit a message to Headquarters AST that RAAF Base Northland was under missile attack.
PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was engaged on service in connection with operations against the enemy (physical element of circumstance);

d. That the defendant was reckless as to the fact that he or she was engaged on service in connection with operations against the enemy (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant had a duty to perform in attacking or defending against the enemy (in this case notifying HQ AST of the missile attack) (physical element of circumstance);

f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

g. That the defendant did not properly perform the duty in (e) in any manner other than as set out in 17(1)(a) or (b) (physical element of conduct); and

h. That the defendant’s conduct in (g) was intentional (fault element – default fault element of intention).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

a. The defendant may raise the statutory defence under s.17(2) that he or she had a reasonable excuse for engaging in the relevant conduct; and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.
Endangering morale

13. Section 18 of the DFDA provides as follows:

'18(1) A person who is a defence member or a defence civilian is guilty of an offence if:
(a) the person spreads a report; and
(b) the report relates to operations against the enemy; and
(c) by spreading the report the person intends to create despondency or unnecessary alarm.

Maximum punishment: Imprisonment for 2 years.

(2) A person who is a defence member or a defence civilian is guilty of an offence if:
(a) the person is engaged on service in connection with operations against the enemy;
and
(b) the person spreads a report; and
(c) the report relates to operations against the enemy; and
(d) by spreading the report the person intends to create despondency or unnecessary alarm.

Maximum punishment: Imprisonment for 5 years.'

DEFINED EXPRESSIONS:

'defence civilian' ) see s.3(1)
'defence member' )
'the enemy' )

EXAMPLE CHARGE:

DFDA s.18(1) Endangering morale

Being a defence member at ................. on ................. with intent to create despondency amongst the members of her section spread a report that related to operations against the enemy, namely, that the enemy had received reinforcements and fresh supplies.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant spread a report as specified (physical element of circumstance);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention);

e. That the report relates to operations against the enemy (physical element of
circumstance);
f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);
g. That the purpose of the defendant’s conduct in (c) was to create despondency or unnecessary alarm (physical element of circumstance); and
h. That the defendant intended the purpose in (g) (fault element of intention specifically provided for).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: The particulars of the charge must detail the reports alleged to have been spread. It is not necessary that the reports be false; despondency or unnecessary alarm may also be caused by the spreading of true reports of unfavourable information. It is not necessary to show that any effect was produced by the reports; it would, however, seldom be expedient to try a person for these offences if the reports could not be shown to have had some effect.

Ulterior Intention: Some offences require an intention to achieve an objective which does not go to any circumstance or result and which forms part of the definition of the offence. This offence is one of ulterior intent. An ulterior intention prohibits engaging in conduct with the intention to achieve a further objective. The act, omission or state of affairs is intentional because the defendant engages in that conduct with the intention of achieving that further objective. Because every offence requires proof of conduct, the ulterior intention is that fault element for the physical element of conduct. Although liability for offences such as these is established by the defendant’s objective, the achievement of the objective is not a physical element of the offence. Ulterior intention is not defined in the Criminal Code so the meaning of intention should bear its ordinary common law meaning.

EXAMPLE CHARGE:

DFDA s.18(2) Endangering morale in connection with operations

Being a defence member at ..................... on ................... when engaged on service in connection with operations against the enemy, with intent to create unnecessary alarm spread a report that related to operations against the enemy, by saying to members of his unit ‘We haven’t got a hope in hell. We won’t have enough ammo. We’ll all be wiped out.’ or words to that effect.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;
b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian. If there is no admission, the prosecution must prove recklessness;
c. That the defendant was engaged on service in connection with operations against the
enemy (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant spread a report as specified (physical element of conduct);

f. That the defendant's conduct in (e) was intended to create despondency or unnecessary alarm (fault element of intention specifically provided for);

g. That the report in (e) related to operations against the enemy (physical element of circumstance); and

h. That the defendant was reckless as to (g) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: The particulars of the charge must detail the reports alleged to have been spread. It is not necessary that the reports be false; despondency or unnecessary alarm may also be caused by the spreading of true reports of unfavourable information. It is not necessary to show that any effect was produced by the reports; it would, however, seldom be expedient to try a person for these offences if the reports could not be shown to have had some effect.

Ulterior Intention: Some offences require an intention to achieve an objective which does not go to any circumstance or result and which forms part of the definition of the offence. This offence is one of ulterior intent. An ulterior intention prohibits engaging in conduct with the intention to achieve a further objective. The act, omission or state of affairs is intentioned because the defendant engages in that conduct with the intention of achieving that further objective. Because every offence requires proof of conduct, the ulterior intention is that fault element for the physical element of conduct. Although liability for offences such as these is established by the defendant’s objective, the achievement of the objective is not a physical element of the offence. Ulterior intention is not defined in the Criminal Code so the meaning of intention should bear its ordinary common law meaning.
Conduct after capture by the enemy

14. Section 19 of the DFDA provides as follows:

‘19(1) A defence member is guilty of an offence if:

(a) the member is captured by the enemy; and
(b) any reasonable steps are available to the member to rejoin his or her force; and
(c) the member does not take those steps.

Maximum punishment: Imprisonment for 5 years.

(2) A defence member is guilty of an offence if:

(a) the member and another person are captured by the enemy; and
(b) any reasonable steps are available to the other person to rejoin his or her force; and
(c) the member prevents or discourages the other person from taking those steps.

Maximum punishment: Imprisonment for 5 years.

(3) A defence member is guilty of an offence if:

(a) the member is captured by the enemy; and
(b) the member engages in conduct with the intention of securing favourable treatment for himself or herself; and
(c) the conduct is detrimental to other persons also captured by the enemy.

Maximum punishment: Imprisonment for 5 years.

(4) A defence member is guilty of an offence if:

(a) the member is captured by the enemy; and
(b) the member is in a position of authority over other persons also captured by the enemy; and
(c) the member ill-treats those other persons.

Maximum punishment: Imprisonment for 5 years.

DEFINED EXPRESSIONS:

‘defence civilian’ )
‘defence member’ ) see s.3(1)
‘the enemy’ )

EXAMPLE CHARGE:

DFDA s.19(1) Failing to rejoin force

Being a defence member at ..................... on ..................... having been captured by the enemy did not take reasonable steps that were available to him to rejoin his force by refusing to accept an offer of repatriation made by the enemy.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence
That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was captured by the enemy (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That reasonable steps were available to the defendant to rejoin his or her force (physical element of circumstance);

f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

g. That the defendant did not take the steps in (e) (physical element of conduct); and

h. That the defendant intended not to take the steps referred to in (e) (default fault element of intention).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: *Escape from the enemy is regarded as authorised by custom. A member of the ADF who is captured by the enemy has a duty to escape and return to his or her own forces. This duty is not absolute and it is an offence only if the member does not take reasonable steps that are available to the member to escape.*

EXAMPLE CHARGE:

**DFDA s.19(2) Preventing another rejoining (his) (her) force**

Being a defence member at ....................... on ................. having been captured by the enemy, discouraged 8123456 Private A.B. Bull, another person who had been captured by the enemy, from taking reasonable steps to rejoin her force when reasonable steps were available to Private Bull to rejoin her force.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the
prosecution must prove recklessness;

c. That the defendant and another specified person were captured by the enemy (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That reasonable steps were available to the other specified person to rejoin his or her force (physical element of circumstance);

f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

g. That the defendant prevented or discouraged the other person from taking the steps in (e) (physical element of conduct); and

h. That the defendant acted intentionally in relation to (g) (default element of intention).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: The law relating to the requirement for a captured person to rejoin his or her own force is as stated above.

The 'other person' need not be a member of the ADF; he or she may be a member of the armed forces of another country.

EXAMPLE CHARGE:

DFDA s.19(3) Securing favourable treatment to detriment of others

Being a defence member at ....................... on .............. having been captured by the enemy and with intent to secure favourable treatment for himself, reported the whereabouts of tools and supplies stored by other prisoners of war thereby causing those other prisoners to be severely punished by the enemy.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant is captured by the enemy (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or
recklessness);

e. That the defendant engaged in conduct (by doing or omitting to do a specified act) (physical element of conduct);

f. That the defendant's conduct in (e) was intentional (default fault element of intention);

g. That the purpose of the defendant's conduct was to secure favourable treatment for himself or herself (physical element of circumstance);

h. That the defendant intended the purpose in (g) (fault element of intention specifically provided for);

i. That the defendant's conduct in (e) was detrimental to other persons also captured by the enemy (physical element of result of conduct); and

j. That the defendant was reckless as to (g) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: This offence relates to behaviour by a prisoner of war which seeks amelioration of the member's conditions to the detriment of other prisoners of war. This behaviour may be, for example the reporting of plans of escape being made by others or the reporting of caches of food, equipment or arms. The behaviour must be detrimental to the defendant's fellow prisoners of war, for example by way of disciplinary punishment or special surveillance.

'Other persons so captured' need not be members of the ADF; they could be members of other armed forces or be civilians who are prisoners of war.

Ulterior Intention: Some offences require an intention to achieve an objective which does not go to any circumstance or result and which forms part of the definition of the offence. This offence is one of ulterior intent. An ulterior intention prohibits engaging in conduct with the intention to achieve a further objective. The act, omission or state of affairs is intentional because the defendant engages in that conduct with the intention of achieving that further objective. Because every offence requires proof of conduct, the ulterior intention is that fault element for the physical element of conduct. Although liability for offences such as these is established by the defendant's objective, the achievement of the objective is not a physical element of the offence. Ulterior intention is not defined in the Criminal Code so the meaning of intention should bear its ordinary common law meaning.

EXAMPLE CHARGE:

DFDA s.19(4) Ill-treating other persons over whom member has authority

Being a defence member at ................. on ................. having been captured by the enemy, ill-treated other persons over whom he was in a position of authority who were also captured by the enemy by withholding a part of their daily ration entitlement.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In
almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant is captured by the enemy (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant is in a position of authority over other persons also captured by the enemy (physical element of circumstance);

f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

g. That the defendant, by an act or omission, ill-treats the other persons mentioned in (e) (physical element of conduct); and

h. That the defendant’s act or omission in (g) was intentional (default fault element of intention).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: The source of the authority is not material. It may arise from the military rank or status of the defendant, through designation by the captor authorities or from voluntary election or selection by other prisoners of war for their self-government.

The ill-treatment must be real although not necessarily physical. Abuse of an inferior by inflammatory and derogatory words may, through mental anguish, amount to ill-treatment. To subject to improper punishment or to deprive of benefits would also amount to ill-treatment.

The ‘other persons’ need not be members of the ADF; they may be other armed forces or be civilians who are prisoners of war.
SECTION 2 - OFFENCES RELATING TO MUTINY, DESERTION AND UNAUTHORISED ABSENCES

Mutiny

Section 20 of the DFDA provides as follows:

20. (1) A defence member who takes part in a mutiny is guilty of an offence.

Maximum punishment: Imprisonment for 10 years.

(2) A defence member is guilty of an offence if:

(a) the member takes part in a mutiny; and

(b) the mutiny's object, or one of its objects, is the refusal or avoidance of duty or service in connection with operations against the enemy or the impeding of the performance of such a duty or service.

Maximum punishment: Imprisonment for life.'

DEFINED EXPRESSIONS:

‘defence member’)
‘mutiny’ ) see s.3(1)
‘the enemy’ )
‘Australian Defence Force’ ) see s.3(2)

EXAMPLE CHARGE:

DFDA s.20(1) Mutiny

Being a defence member at ............... on ............ took part in a mutiny in that he combined with Leading Seaman Hook M8124587 and Able Seaman Brown M8145378 to overthrow the lawful authority of Captain B. Bold M8234578 RAN, the Commanding Officer of HMAS INTREPID.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant took part in a mutiny (a mutiny being defined in the DFDA s.3(1) as a combination between persons who are, or of whom at least two are, ADF members):

(i) to overthrow lawful authority in the ADF or in an allied force (physical element of conduct); or

(ii) to resist such lawful authority in such a manner as to prejudice substantially the operational efficiency of the ADF or of, or of a part of, an allied force (physical element of conduct); and

d. That the defendant's conduct in (c) was intentional (default fault element of intention).
STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

EXAMPLE CHARGE:

DFDA s.20(2) Mutiny in connection with service against enemy

Being a defence member at .............. on ........... took part in a mutiny with the object of avoiding duty in connection with operations against the enemy in that he combined with Leading Seaman Hook M8124587 and Able Seaman Brown M8145378 to hold Captain B. Bold RAN M8234578, the Commanding Officer of HMAS INTREPID in custody in his cabin when contact with the enemy was imminent.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant took part in a mutiny (a mutiny being defined in the DFDA s.3(1) as a combination between persons who are, or of whom at least two are, ADF members):

(i) to overthrow lawful authority in the ADF or in an allied force (physical element of conduct); or

(ii) to resist such lawful authority in such a manner as to prejudice substantially the operational efficiency of the ADF or of, or of a part of, an allied force (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention);

e. That the object of the mutiny, or one of its objects was:

(i) the refusal or avoidance of duty or service in connection with operations against the enemy (physical element of circumstance); or

(ii) the impeding of the performance of such duty or service (physical element of circumstance); and

f. That the defendant was reckless as to the circumstance in (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Mutiny’. Subsection 3(1) defines two types of mutiny. One consists of a combination between persons to overthrow lawful authority in the ADF or in an allied force. The other consists of a combination between persons to resist lawful authority in the ADF or in an allied force in such a manner as to prejudice substantially the operational efficiency of the ADF or of, or of a part of, an allied force. In either case, the combination is between at least two persons who are members of the ADF.

The definition of mutiny is intended to exclude those forms of collective insubordination which, while
amounting to a resistance to lawful authority, are not formed to overthrow the authority or to substantially prejudice operational efficiency but are directed at such matters as poor food or living conditions, or at delays in repatriation or demobilisation after the conclusion of hostilities.

It is not necessary that the mutiny be successful (that is, that lawful authority be overthrown or that operational efficiency of the force be substantially prejudiced).

There must be the intention to take place in the mutiny and some action in furtherance of that intention. The action may be any step towards the mutiny (for example the making out or preparation of those who may be persuaded to join in, or the approaching of a third person to take part). The action may be positive (for example switching off lights, locking or barricading doors, a small arms party throwing down their arms) or negative (for example refusing to move when ordered, remaining in quarters when due to come on duty). The intention may be declared in words, inferred from acts done or inferred from surrounding circumstances.

The combination may be preconceived or it may be formed on the spot.
Failure to Suppress Mutiny

Section 21 of the DFDA provides as follows:

‘21.
(2) A defence member is guilty of an offence if:
(a) a mutiny is taking place or is intended; and
(b) the member knows that fact; and
(c) the member knows, or could reasonably be expected to know, that the mutiny’s object, or one of the objects, is:
   (i) the refusal or avoidance of duty or service in connection with operations against the enemy; or
   (ii) the impeding of the performance of such duty or service; and
(d) the member does not take reasonable steps:
   (i) to suppress or prevent the mutiny; or
   (ii) to report to proper authority without delay that the mutiny is taking place or is intended.

Maximum punishment: Imprisonment for 5 years.’

DEFINED EXPRESSIONS:
‘defence member’ ) see s.3(1)
‘mutiny’ )

EXAMPLE CHARGE:

DFDA s.21(2) Falling to suppress mutiny in connection with service against enemy

Being a defence member at ..................... on .............. knowing that a mutiny involving members of his section namely, Operations Flight No. 100 Squadron, was taking place and that the mutiny had as its object the avoidance of duty in connection with operations against the enemy, did not take reasonable steps to suppress or prevent the mutiny by reporting without delay to a proper authority, namely Wing Commander E. Easter 834598, the Commanding Officer No. 100 Squadron that the mutiny was taking place.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That a mutiny was taking place or was intended (a mutiny being defined in the DFDA s.3(1) as a combination between persons who are, or of whom at least two are, ADF members):
   (i) to overthrow lawful authority in the ADF or in an allied force (physical element of circumstance); or

PROVISIONAL AS AT SEP 07 - PENDING FINAL PUBLICATION
(ii) to resist such lawful authority in such a manner as to prejudice substantially the operational efficiency of the ADF or of, or of a part of, an allied force (physical element of circumstance);

d. That the defendant knew of the circumstance in (c) (fault element of knowledge specifically provided for);

e. That the object of the mutiny, or one of its objects was:

(i) the refusal or avoidance of duty or service in connection with operations against the enemy (physical element of circumstance); or

(ii) the impeding of the performance of such duty or service (physical element of circumstance);

f. That the defendant knew or could reasonably have been expected to have known about the circumstance in (e) (fault element of knowledge specifically provided for);

g. That the defendant did not take reasonable steps:

(i) to suppress or prevent the mutiny (physical element of conduct); or

(ii) to report to the proper authority without delay that the mutiny was taking place or was intended (physical element of conduct); and

h. That the defendant’s conduct in (g) was intentional (default fault element of intention).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: As to what constitutes a mutiny, see the commentary on s.20.

What constitutes reasonable steps will depend upon the status of the defendant and the circumstances. Mutiny is the most serious of all disciplinary offences and any member who learns of a mutiny or intended mutiny is under a high standard of duty to act.

The expression ‘proper authority’ is not defined. It is taken to mean the authority (normally a superior officer or a police member) to whom the member could, in the circumstances, reasonably be expected to report the mutiny or intended mutiny.
Section 22 of the DFDA provides as follows:

‘22.  (1)  A defence member is guilty of an offence if the member:
(a)  is on active service or has been warned for active service; and
(b)  without leave, and with the intention of avoiding that service, departs from, or does not attend at, his or her place of duty.

Maximum punishment:  Imprisonment for 5 years.

(2)  A defence member is guilty of an offence if:
(a)  the member is absent without leave; and
(b)  the member engages in conduct; and
(c)  the conduct manifests an intention to avoid active service.

Maximum punishment:  Imprisonment for 5 years.’

DEFINED EXPRESSIONS:

‘active service’ ) see s.3(1)
‘defence member’ )

EXAMPLE CHARGE:

DFDA s.22(1)  Absence from place of duty with intention to avoid active service

Being a defence member at ......................... on ............... having been warned for active service and with intent to avoid that service, departed without leave from her place of duty, namely, the Air Movements Office at RAAF Base Lancaster.

PROSECUTION PROOFS:

a.  That the defendant was a defence member (physical element of circumstance).  In almost all circumstances the defendant will know and admit that they are a defence member;

b.  That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness).  Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member.  If there is no admission, the prosecution must prove recklessness;

c.  That the defendant was on or had been warned for active service (physical element of circumstance);

d.  That the defendant was reckless as to the circumstance in (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e.  That the defendant was required to be at his or her place of duty as specified (physical element of circumstance);

f.  That the defendant was reckless as to the circumstance in (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

g.  That the defendant departed from, or did not attend at, his or her place of duty
(physical element of conduct);

h. That the defendant’s conduct in (g) was intentional (default fault element of intention);

i. That the defendant’s conduct in (g) was without the authority of anyone competent to give the defendant leave (physical element of circumstance);

j. That the defendant was reckless as to the circumstance in (i) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

k. That the purpose of the defendant’s conduct in (g) was to avoid active service in (c) (physical element of circumstance); and

l. That the defendant intended the purpose in (k) (fault element of intention specifically provided for).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

EXAMPLE CHARGE:

DFDA s.22(2) Absence without leave with intention to avoid active service

Being a defence member at __________________________ on ............. while absent without leave, engaged in conduct that manifested an intention to avoid active service in that he informed ........................ that he would not be returning to his unit and that he had obtained a visa to enter and remain in the USA with effect from ............. for a period of ........ months.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was required to be at his or her unit (or ship etc) as specified (physical element of circumstance);

d. That the defendant was reckless as to the circumstance in (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant was absent from his or her unit (or ship etc) as specified (physical element of circumstance);

f. That the defendant was reckless as to the circumstance in (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

g. That the defendant’s conduct in (e) was without the lawful authority of anyone competent to give the defendant leave (physical element of circumstance);

h. That the defendant was reckless as to the circumstance in (g) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);
i. That the defendant engaged in conduct by doing (or omitting to do) a specified act (physical element of conduct);

j. that the defendant’s conduct in (i) was intentional (fault element of intention specifically provided for);

k. that the defendant’s conduct in (i) manifested an intention to avoid active service (physical element of circumstance); and

l. that the defendant was reckless as to the circumstance in (k) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: The necessary intention for an offence against this section can be provided by some admission by the defendant or by inference from the defendant’s conduct (which includes any statements made by the defendant). For example, the state of the defendant’s kit, change of name, circumstances in which the defendant has been living, his or her engagement in civil employment or joining other armed forces, possession of a passport with a recent visa and length of absence are matters which may well support an inference that the defendant intended to desert.

No particular length of time can be specified as being sufficient to justify an inference that the defendant intended to desert nor is the mode by which the defendant is recovered (ie by being apprehended or by voluntarily surrendering) conclusive of intention to desert. Each case must be judged in the light of surrounding circumstances.

Ulterior Intention: Some offences require an intention to achieve an objective which does not go to any circumstance or result and which forms part of the definition of the offence. This offence is one of ulterior intent. An ulterior intention prohibits engaging in conduct with the intention to achieve a further objective. The act, omission or state of affairs is intentional because the defendant engages in that conduct with the intention of achieving that further objective. Because every offence requires proof of conduct, the ulterior intention is that fault element for the physical element of conduct. Although liability for offences such as these is established by the defendant’s objective, the achievement of the objective is not a physical element of the offence. Ulterior intention is not defined in the Criminal Code so the meaning of intention should bear its ordinary common law meaning.
OFFENCES RELATING TO INSUBORDINATION AND VIOLENCE

Assaulting a Guard

Section 30 of the DFDA provides as follows:

‘30.
(2) A person who is a defence member or a defence civilian is guilty of an offence if:
    (a) the person is engaged on service in connection with operations against the enemy; and
    (b) the person assaults another person; and
    (c) that other person is a member of the Defence Force or of an allied force; and
    (d) that other person is on guard duty.

Maximum punishment: Imprisonment for 5 years.’

DEFINED EXPRESSIONS:

‘allied force,’
‘defence civilian’ )
‘defence member’ ) see s.3(1)
‘the enemy’ )
‘person on guard duty’ see s.3(12)

EXAMPLE CHARGE:

DFDA s.30(2) Assaulting a guard in connection with operations against the enemy

Being a defence member at ............... on............... whilst engaged on service in connection with operations against the enemy assaulted 8564532 Private R.T. Jones, a guard on duty at the entrance to Military Headquarters Gove, by pushing him in the chest.

PROSECUTION PROOFS:

In relation to “defence member”:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

In relation to “operations against the enemy”:

c. That the defendant was engaged on service in connection with operations against the enemy (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);
In relation to “assault”:

e. That the defendant did an act to another person as specified (in this case that the defendant moved his or her hand towards Private Jones’ chest) (physical element of conduct);

f. That the defendant’s conduct in (e) was intentional (in this case that the defendant’s movement of his or her hand towards Private Jones’ chest was intentional) (default fault element of intention);

g. That the defendant’s conduct in (e) either resulted in infliction of force on the person in (e) or engendered in the person in (e) fear that force was about to be inflicted on him or her (in this case the defendant’s conduct in (e) resulted in infliction of force on the person in (e), that is the defendant’s hand connected with Private Jones’ chest (physical element of result of conduct);

h. That the person in (e) did not consent to the result in (g) (in this case Private Jones did not consent to the defendant’s hand connecting with his chest (physical element of circumstance);

i. That the result in (g) was unlawful (physical element of circumstance);

j. That the defendant was reckless as to the result in (g) (infliction of force or engendering of fear), the circumstance in (h) (lack of consent) and the circumstance in (i) (unlawfulness of the result) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

In relation to “the other person”:

k. That the person in (e) was a member of the ADF or of an allied force (physical element of circumstance);

l. That the person in (e) was on guard duty (physical element of circumstance); and

m. That the defendant was reckless as to the circumstance in (k) and the circumstance in (l) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Person on guard duty’ includes not only a person on guard duty at a particular post, but also a person who is posted or ordered to patrol for the purpose of protecting any person, premises, place, ship, aircraft, vehicle, etc; for the purpose of preventing or controlling access to or egress from any premises, place, etc; or for the purpose of regulating traffic by land or water.¹

‘Assault’²

¹ DFDA s.3(12).

² See para. 4.80
Person on Guard or on Watch

Section 32 of the DFDA provides as follows:

‘32.
(3) A defence member is guilty of an offence if the member:
(a) is engaged on service in connection with operations against the enemy; and
(b) is on guard duty or on watch; and
(c) engages in conduct that constitutes an offence against subsection (1).

Maximum punishment: Imprisonment for 5 years.

(4) Strict liability applies to paragraph (3)(c).

Note: For strict liability, see section 6.1 of the Criminal Code.

(5) For the purposes of this section, a person is intoxicated if, and only if, the person’s faculties are, because of the person being under the influence of intoxicating liquor or a drug (other than a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the person is unfit to be entrusted with the person’s duty or with any duty that the person may be called on to perform.

(6) It is a defence if a person charged with an offence under this section proves that he or she had a reasonable excuse for engaging in the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (6). See section 13.4 of the Criminal Code.’

DEFINED EXPRESSIONS:

‘charge’
‘defence member’ see s.3(1)
‘enemy person’
‘person on guard duty’ see s.3(12)

EXAMPLE CHARGE:

DFDA s.32(3) Committing the offence of [name of offence against paragraph 32(1)(a), (b), (c) or (d)] in connection with service against enemy

Being a defence member at ................ on ................ while being on watch and engaged on service in connection with operations against the enemy did leave his post as the starboard lookout before being regularly relieved.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was engaged on service in connection with operations against the enemy (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness,
noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant was on guard duty or on watch (physical element of circumstance);

f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

g. That the defendant engaged in conduct by doing (or omitting to do) a specified act (in this case by leaving his or her post as the starboard lookout before being regularly relieved) (physical element of conduct); and

h. That the defendant's conduct in (g) constituted an offence against s.32(1) (physical element of circumstance).

NOTE: There is no requirement for the prosecution to prove a fault element on the part of the defendant in relation to the physical element in (g) as this is an element of strict liability under s.32(4);

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

a. The defendant may raise the statutory defence under s.32(6) that he or she had a reasonable excuse for engaging in the relevant conduct; and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.
OFFENCES RELATING TO THE PERFORMANCE OF DUTY

Dangerous Conduct

Section 36 of the DFDA provides as follows:

36. (1) A person who is a defence member or a defence civilian is guilty of an offence if:
   (a) the person engages in conduct; and
   (b) the conduct is in or in connection with:
       (i) the operation, handling, servicing or storage; or
       (ii) the giving of directions with respect to the operation, handling, servicing or storage;

       of a ship, aircraft or vehicle or a weapon, missile, explosive or other dangerous thing or equipment; and
   (c) the conduct causes, or is likely to cause, the death of or grievous bodily harm to another person; and
   (d) the first-mentioned person knows of the matter mentioned in paragraph (c); and
   (e) where the person mentioned in paragraph (c) is an enemy person – the conduct is not in the execution of the first-mentioned person’s duty.

   Maximum punishment: Imprisonment for 10 years.

(2) A person who is a defence member or a defence civilian is guilty of an offence if:
   (a) the person engages in conduct; and
   (b) the conduct is in or in connection with:
       (i) the operation, handling, servicing or storage; or
       (ii) the giving of directions with respect to the operation, handling, servicing or storage;

       of a ship, aircraft or vehicle or a weapon, missile, explosive or other dangerous thing or equipment; and
   (c) the conduct causes, or is likely to cause, the death of or grievous bodily harm to another person; and
   (d) the first-mentioned person is reckless as to the matter mentioned in paragraph (c); and
   (e) where the person mentioned in paragraph (c) is an enemy person – the conduct is not in the execution of the first-mentioned person’s duty.

   Maximum punishment: Imprisonment for 5 years.

(3) A person who is a defence member or a defence civilian is guilty of an offence if:
   (a) the person engages in conduct; and
   (b) the conduct is in or in connection with:
       (i) the operation, handling, servicing or storage; or
       (ii) the giving of directions with respect to the operation, handling, servicing or storage;

       of a ship, aircraft or vehicle or a weapon, missile, explosive or other dangerous thing or equipment; and
   (c) the conduct causes, or is likely to cause, the death of or grievous bodily harm to another person; and
   (d) the first-mentioned person is reckless as to the matter mentioned in paragraph (c); and
   (e) where the person mentioned in paragraph (c) is an enemy person – the conduct is not in the execution of the first-mentioned person’s duty.

   Maximum punishment: Imprisonment for 5 years.
or equipment; and

(c) the conduct causes, or is likely to cause, the death of or grievous bodily harm to another person; and

(d) the first-mentioned person is negligent as to the matter mentioned in paragraph (c); and

(e) where the person mentioned in paragraph (c) is an enemy person – the conduct is not in the execution of the first-mentioned person’s duty.

Maximum punishment: Imprisonment for 2 years.’

DEFINED EXPRESSIONS:

‘aircraft’)
‘defence civilian’ see s.3(1)
‘defence member’)
‘enemy person’)
‘ship’)

EXAMPLE CHARGE:

DFDA s.36(1) Dangerous conduct with knowledge of consequences

Being a defence member at ....................... on ....................... as the non-commissioned officer responsible for servicing aircraft engine number CAC 79 omitted to ensure that the internal circlip was fitted to the engine in accordance with Special Technical Instruction ATAR/51 knowing that this omission was likely to cause grievous bodily harm to the pilot of the aircraft in which the engine was subsequently fitted.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing (or omitting to do) a specified act (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention);

e. That the conduct in (c) is in connection with:

   (i) the operation, handling, servicing or storage; or

   (ii) the giving of directions with respect to the operation, handling, servicing or storage;

   of a ship, aircraft or vehicle or a weapon, missile, explosive or other dangerous thing or equipment (physical element of circumstance);

f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

   g. That the defendant’s conduct in (c) caused, or was likely to cause, the death of or grievous bodily harm to another person (physical element of result of conduct);
h. That the defendant knew his or her conduct would have this result (fault element of knowledge specifically provided for);

i. Where the person in (g) is an enemy person, that the defendant’s conduct in (c) was not in the execution of the defendant’s duty (physical element of circumstance); and

j. That the defendant was reckless as to (i) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

EXAMPLE CHARGE:

DFDA s.36(2) Dangerous conduct with recklessness as to consequences

Being a defence member at ................ on ................ as the non-commissioned officer responsible for servicing aircraft engine number CAC 79 omitted to ensure that the internal circlip was fitted to the engine in accordance with Special Technical Instruction ATAR/51 and was reckless as to whether this omission was likely to cause grievous bodily harm to the pilot of the aircraft in which the engine was subsequently fitted.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing (or omitting to do) a specified act (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention);

e. That the conduct in (c) is in connection with:

(i) the operation, handling, servicing or storage; or

(ii) the giving of directions with respect to the operation, handling, servicing or storage;

of a ship, aircraft or vehicle or a weapon, missile, explosive or other dangerous thing or equipment (physical element of circumstance);

f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

g. That the defendant’s conduct in (c) caused, or was likely to cause, the death of or grievous bodily harm to another person (physical element of result of conduct);

h. That the defendant was reckless as to whether his or her conduct would have this result (fault element of recklessness specifically provided for);

i. Where the person in (g) is an enemy person, that the defendant’s conduct in (c) is not
in the execution of the defendant’s duty (physical element of circumstance); and

j. That the defendant was reckless as to (i) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

EXAMPLE CHARGE:

DFDA s.36(3) Dangerous conduct with negligence as to consequences

Being a defence member at .................... on .................... as the non-commissioned officer responsible for servicing aircraft engine number CAC 79 omitted to ensure that the internal circlip was fitted to the engine in accordance with Special Technical Instruction ATAR/51 and was negligent as to whether this omission was likely to cause grievous bodily harm to the pilot of the aircraft in which the engine was subsequently fitted.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing (or omitting to do) a specified act (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention);

e. That the conduct in (c) is in connection with:

   (i) the operation, handling, servicing or storage; or

   (ii) the giving of directions with respect to the operation, handling, servicing or storage;

   of a ship, aircraft or vehicle or a weapon, missile, explosive or other dangerous thing or equipment (physical element of circumstance);

f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

g. That the defendant’s conduct in (c) caused, or was likely to cause, the death of or grievous bodily harm to another person (physical element of conduct);

h. That the defendant was negligent as to whether his or her conduct would have this result (fault element of negligence specifically provided for);

i. Where the person in (g) is an enemy person, that the defendant’s conduct in (c) is not in the execution of the defendant’s duty (physical element of circumstance); and

j. That the defendant was reckless as to (i) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or
recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Likely’. This is not defined and has its ordinary meaning in the context. It has the meaning in relation to a probable outcome, of seeming as if it would happen rather than just possible. The word “likely” should not be construed to mean “more likely than not” or to assume a specific degree of mathematical probability not conveyed as a matter of ordinary language. On a charge that the defendant’s behaviour is likely to cause death or grievous bodily harm it is not necessary that another person has actually suffered death or grievous bodily harm.

‘Grievous bodily harm’. Grievous bodily harm is synonymous with ‘really serious bodily harm’. In Perks King CJ said: “If the meaning of ‘grievous’ is to be explained, the expression ‘really serious’ rather than ‘merely serious’ should be used”. Where the person intentionally causes death, a charge of murder should ordinarily be laid against the person instead of a charge under this subsection. Where the person intentionally causes grievous bodily harm, consideration should be given to laying a charge under DFDA s.61 and the Crimes Act, 1900 (ACT) in its application to the Jervis Bay Territory, s.19, against the person instead of a charge under this subsection.

Negligence. The first element of proving negligence must be the identification of an appropriate standard of care owed by the defendant to another person (or possibly, a class of persons). That standard will be determined by many things: the nature of the conduct being engaged in by the defendant, the inherent danger of that conduct, procedure manuals, safety instructions, the responsibility of the defendant for the conduct overall, the role of the actual or potential victim, etc. Once the standard is determined, it must be decided how far short of that standard the defendant’s conduct has fallen, for example did D slip on a floor made wet by spilling a drink and thereby cause a live shell to fall down a flight of stairs? In this example, the initial negligence (spilling the drink) is usually not a serious departure from the usual standard of care, but there is a high risk that such conduct, in an ammunition magazine, would be likely to cause death or grievous bodily harm.

As can be seen from this example, each additional fact adds to or detracts from the grounds on which a finding of criminal negligence could be made. It must also be observed that the requirements of subsections 5.5(a) and (b) are cumulative. Even if the shell had exploded, causing death or grievous bodily harm, it would appear that criminal negligence would not be established: despite proof of high risk (s.5.5(b)), the spilling of the drink is not “such a great falling short of the standard of care”, at least in the absence of clear safety instructions to the contrary. A conviction under s 36(3) can only be supported when there is both a serious departure from the requisite standard of care, AND a high risk of death or grievous bodily harm as a result of the act that amounted to that departure.

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5 (1986) 41 SASR 335 at 337.
6 See generally the offences in the Crimes Act 1900 (ACT) Part 2.
OFFENCES RELATING TO SHIPS, VEHICLES, AIRCRAFT AND WEAPONS

Loss of or Hazard to Service Ship

Section 39 of the DFDA provides as follows:

‘39. (1) A defence member is guilty of an offence if:
(a) the member engages in conduct; and
(b) the conduct causes or allows a service ship to be lost, stranded or hazarded; and
(c) the member intends that the conduct will have that result.
Maximum punishment: Imprisonment for 5 years.

(2) A defence member is guilty of an offence if:
(a) the member engages in conduct; and
(b) the conduct causes or allows a service ship to be lost, stranded or hazarded; and
(c) the member is reckless as to whether the conduct will have that result.
Maximum punishment: Imprisonment for 2 years.

(3) A defence member is guilty of an offence if:
(a) the member engages in conduct; and
(b) the conduct causes or allows a service ship to be lost, stranded or hazarded; and
(c) the member is negligent as to whether the conduct will have that result.
Maximum punishment: Imprisonment for 6 months.’

DEFINED EXPRESSIONS:
‘defence member’ ) see s.3(1)
‘service ship’ ) *see definition of ‘service property’

EXAMPLE CHARGE:
DFDA s.39(1) Intentionally causing (loss of) (stranding of) (hazarding of) Service ship

Being a defence member at .......... on .......... intentionally caused the loss of a Service ship by ordering Lieutenant O. Wilde M8123765, RAN, the Officer of the Watch, to take HMAS NONESUCH into waters less than 3 metres in depth.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct (by doing or omitting to do a specified act) (in this case by ordering Lieutenant Wilde to take HMAS NONESUCH into waters less than 3 metres deep) (physical element of conduct);
d. That the defendant's conduct in (c) was intentional (in this case that the defendant intended to give the order referred to in (c)) (default fault element of intention);

e. That the defendant's conduct in (c) caused or allowed a Service ship to be lost, stranded or hazarded (physical element of result of conduct);

f. That the defendant intended that his or her conduct in (c) would have the result in (e) (in this case that the defendant intended that the ship be stranded) (fault element of intention specifically provided for);

d. That the ship in (c) was a Service ship as specified (physical element of circumstance); and

e. That the defendant was reckless as to the circumstance in (g) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

EXAMPLE CHARGE:

**DFDA s.39(2) Recklessly causing (loss of) (stranding of) (hazarding of) Service ship**

Being a defence member at ............ on ............ recklessly caused a Service ship to be stranded by ordering Lieutenant O. Wilde M8123765, RAN, the Officer of the Watch of HMAS NONESUCH, to take that ship into unchartered waters within 1 mile of Cape Disaster.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing (or omitting to do) a specified act (in this case the defendant ordered Lieutenant Wilde to take HMAS NONESUCH into uncharted waters within 1 mile of Cape Disaster) (physical element of conduct);

d. That the defendant's conduct in (c) was intentional (in this case that he or she intended to give the order in (c)) (default fault element of intention);

e. That the defendant’s conduct in (c) caused (or allowed) a Service ship to be lost, stranded or hazarded (in this case to be stranded) (physical element of result of conduct);

f. That the defendant was reckless as to whether his or her conduct in (c) would have the result in (e) (in this case that the defendant was reckless as to whether his or her order that the ship be taken into uncharted waters would have the result that the ship be stranded) (fault element of recklessness specifically provided for);

g. That the ship in (c) was a Service ship as specified (physical element of circumstance); and

h. That the defendant was reckless as to the circumstance in (g) (default fault element of recklessness, noting that recklessness can be established by proving intention,
knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

EXAMPLE CHARGE:

DFDA s.39(3) **Negligently causing (loss of) (stranding of) (hazarding of) Service ship**

Being a defence member at .......... on .......... negligently caused a Service ship to be stranded by ordering Lieutenant O. Wilde M8123765, RAN, the Officer of the Watch of HMAS NONESUCH, to take that ship into unchartered waters within 1 mile of Cape Disaster.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing (or omitting to do) a specified act (in this case by ordering Lieutenant Wilde to take HMAS NONESUCH into uncharted waters within 1 mile of Cape Disaster) (physical element of conduct);

d. That the defendant's conduct in (c) was intentional (in this case that the defendant intended to give the order) (default fault element of intention);

e. That the defendant's conduct in (c) caused (or allowed) a Service ship to be lost, stranded or hazarded (in this case to be stranded) (physical element of result of conduct);

f. That the defendant was negligent as to whether his or her conduct in (c) would have the result in (e) (in this case that in giving the order the defendant was negligent as to the result that the ship would be stranded) (fault element of negligence specifically provided for).

g. That the ship in (c) was a Service ship as specified (physical element of circumstance); and

h. That the defendant was reckless as to the circumstance in (g) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: The particulars should allege only those matters which can be proved to have brought about the loss, stranding or hazarding in circumstances constituting negligence. Matters should not be alleged which of themselves, or in combination with other matters, were incapable of having caused the loss etc even though, in the given circumstances, they may have been capable of constituting negligence. In this regard it is therefore important to distinguish between the conduct which is likely to have brought about the incident and the conduct which, although constituting breaches of established or recommended navigational practice are not causally connected with the loss, stranding or hazarding.

For example, in a case arising from a collision between two ships, the failure by either commanding
officer to sound his ship's siren, after it had become apparent that collision was inevitable, should not be alleged as a particular of negligence. Similarly, in a case where a ship runs aground on an unknown or uncharted object in waters which were hitherto regarded as being well-charted, the particulars should not allege any conduct against the defendant which relies on knowledge by the defendant of the existence of the uncharted danger unless, in all the circumstances of the case, the defendant should have been aware of the probable existence of the danger. Even in these circumstances, consideration must be given to whether the conduct alleged did in fact contribute directly to the grounding or was merely incidental to it.

The particular conduct by the defendant which is alleged to constitute the offence should be set out concisely on the charge sheet. These particulars should not attempt to provide an outline of the evidence intended to be adduced by the prosecution, nor should they allege failure to comply with a general order—as this may amount to allegation of a separate offence under s.29 of the DFDA and be bad for duplicity.

‘Causes or allows’. These words are not defined however, they were defined in the now obsolete Manual of Naval Law as “causes or allows; the ordinary dictionary meaning must be given to these words (causes – effects or brings about, allows – permits) except that a person is not to be convicted of allowing an occurrence unless some act or omission on his part has contributed to it”. The behaviour of the defendant may consist of something done by the defendant or may consist of a failure by the defendant to act. It is only permissible to plead either ‘causes’ or ‘allows’ in a particular charge. A charge pleading both will be bad for duplicity.7

‘Loss’. This is not defined. It means total loss. A surface ship can be lost without necessarily being lost to view as, for example, when salvage operations for her recovery are abandoned. Salvage operations undertaken for the purpose merely of saving anything of value that may be in the hull, but not the hull itself, will not prevent a ship from being regarded as lost. A vessel which is wholly submerged and incapable of coming to the surface by her own efforts is lost within the meaning of this section.8

‘Stranded’. This is not defined. It is not sufficient to prove that the ship touched ground. It must be established that the ship ran aground or into some object affixed to the ground, such as a groyne, and remained fast for a time, rather than momentarily. A ship is not stranded if she scrapes over a shoal patch.9

‘Hazarded’. This is not defined. It has its ordinary meaning of being exposed to danger. When a large ship is brought into risk of collision with a small boat which could not endanger her, the large ship cannot be said to be hazarded.10 If the behaviour of the defendant caused or was likely to have caused death or grievous bodily harm to another person, consideration should be given to charging the defendant with an offence against s.36 (dangerous behaviour).

STATUTORY ALTERNATIVE OFFENCES AND ALTERNATIVE CHARGES.

Where a Service tribunal acquits a person of an offence under s.39(1) but is satisfied beyond reasonable doubt that the person is guilty of an offence under sections 39(2) or 39(3) it may convict on either of these offences. Similarly, a Service tribunal may convict on an offence under s.39(3) where it has acquitted the defendant under s.39(2). Where, however, a person is charged under s.39(3) no statutory alternative is provided by the DFDA. In this situation it may be appropriate to include a specific alternative charge on the charge sheet. For example, where an offence against s.39(3) for negligently stranding is alleged, and some doubt exists as to whether the ship remained fast for a time, it may be appropriate to charge in the alternative the offence of s.39(3) for negligently hazarding.

7 Victor v Chief of the Naval Staff DFDAT No 4 of 1991.
8 Based on a note to Naval Discipline Act, 1957 (Imp), s.19 (loss or hazarding of ship or aircraft) in the (Aust) Manual of Naval Law (1970).
9 See footnote 71.
10 See footnote 71.
Similarly, where the principal charge alleges that the defendant negligently caused the stranding or hazarding it may be appropriate to include an alternative charge of negligently allowing the stranding or hazarding (as the case may be). In fairness to the defendant, however, if an essential ingredient of the principal charge is unlikely to be able to be proved beyond reasonable doubt, the charge should not be alleged against the defendant and then 'backed-up' by an alternative charge. Instead, only the 2nd charge should be preferred, and therefore preferred as the principal charge.
Section 58 of the DFDA provides as follows:

‘58. (1) A person who is a defence member or a defence civilian is guilty of an offence if:
(a) the person discloses information; and
(b) there is no lawful authority for the disclosure; and
(c) the disclosure is likely to be prejudicial to the security or defence of Australia.

Maximum punishment: Imprisonment for 2 years.

(2) Strict liability applies to paragraph (1)(c).

Note: For strict liability, see section 6.1 of the Criminal Code.

(3) It is a defence if the person proves that he or she neither knew, nor could reasonably be expected to have known, that the disclosure of the information was likely to be prejudicial to the security or defence of Australia.

Note: The defendant bears a legal burden in relation to the matter in subsection (3). See section 13.4 of the Criminal Code.

DEFINED EXPRESSIONS:
‘defence civilian’ see s.3(1)
‘defence member’

EXAMPLE CHARGE:

DFDA s.58 Unauthorised disclosure of information

Being a defence member at .......... on ............... without lawful authority disclosed the operational parameters of the Austrad Radio System to ‘Australian Radio Quarterly’, the disclosure of which was likely to be prejudicial to the security of Australia.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant disclosed specified information (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention);

e. That there was no lawful authority for the disclosure in (c) (physical element of circumstance);

f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or
recklessness); and

g. That the disclosure was likely to be prejudicial to the security (or defence) of Australia (physical element of result of conduct).

NOTE: There is no requirement for the prosecution to prove a fault element on the part of the defendant in relation to (g) as this is an element of strict liability under s.58(3).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

a. The defendant may raise the statutory defence under s.58(3) that he or she neither knew nor could reasonably have been expected to have known that the disclosure of the information was likely to be prejudicial to the security or defence of Australia; and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Disclosure’. It seems that disclosure means making something known which was not known before; something which is not merely unknown but which the recipient cannot find out from any ordinary source. Thus military information which can be obtained from any public library cannot give rise to an offence under s.58.

It is not necessary for the information to have been disclosed to an enemy; if the information was intentionally given to the enemy, the defendant should be charged with an offence against s.16 (Communicating with the enemy).

In hearing or trying a charge against this section, it is advisable that the use of the powers under s.140(2) of the DFDA be carefully considered. The need for public justice must be balanced against the potential for future harm if potential evidence were to be presented in open court.
Dealing in or Possessing Narcotic Goods

Section 59 of the DFDA provides as follows:

‘59. (1) A person who is a defence member or a defence civilian is guilty of an offence if the person:

(a) is outside Australia; and
(b) sells, or deals or traffics in, narcotic goods; and
(c) knows the nature of the goods.

Maximum punishment: Imprisonment for 10 years.

(2) It is a defence to a charge under subsection (1) if the person proves that he or she had lawful authority for the conduct mentioned in paragraph (1)(b).

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the Criminal Code.

(3) A person who is a defence member or a defence civilian is guilty of an offence if the person:

(a) is outside Australia; and
(b) is in possession of narcotic goods; and
(c) knows that he or she possesses those goods and knows their nature.

Maximum punishment:

(d) if the offence is committed in relation to;
   (i) a substance other than cannabis; or
   (ii) a quantity of cannabis exceeding 25 grams in mass;

Imprisonment for 2 years; or

(e) if the convicted person is a member of the Defence Force and the offence is committed in relation to a quantity of cannabis not exceeding 25 grams in mass:
   (i) in the case of a first offence—a fine of the amount of the member’s pay for 14 days; or
   (ii) in the case of a second or later offence—dismissal from the Defence Force; or

(f) in any other case—a fine of $100.

(4) It is a defence to a charge under subsection (3) if the person proves that he or she had lawful authority for possessing the narcotic goods.

Note: The defendant bears a legal burden in relation to the matter in subsection (4). See section 13.4 of the Criminal Code.

(5) A person who is a defence member or a defence civilian is guilty of an offence if the person:

(a) is outside Australia; and
(b) administers to himself or herself narcotic goods other than cannabis

Maximum punishment: Imprisonment for 2 years.

(6) A person who is a defence member or a defence civilian is guilty of an offence if the person uses cannabis, whether within or outside Australia.

Maximum punishment:

(a) if the convicted person is a member of the Defence Force:
   (i) in the case of a first offence—a fine of the amount of the member’s pay for 14 days; or
(ii) in the case of a second or later offence - dismissal from the Defence Force; or
(b) in any other case—a fine of $100.

(7) A defence member is guilty of an offence if the member:
(a) is in Australia; and
(b) is in possession of a quantity of cannabis not exceeding 25 grams in mass; and
(c) knows that he or she possesses the cannabis and knows its nature.

Maximum punishment:
(d) in the case of a first offence - a fine of the amount of the member’s pay for 14 days; or
(e) in the case of a second or later offence - dismissal from the Defence Force.

(8) It is a defence to a charge under subsection (7) if the member proves that he or she had lawful authority for possessing the cannabis.

Note: The defendant bears a legal burden in relation to the matter in subsection (8). See section 13.4 of the Criminal Code.

(9) In this section:
cannabis means a cannabis plant, whether living or dead, and includes, in any form, any flower or fruiting tops, leaves, seeds, stalks or any other part of a cannabis plant or cannabis plants and any mixture of parts of a cannabis plant or cannabis plants, but does not include cannabis resin or cannabis fibre.
narcotic goods has the same meaning as in the Customs Act 1901.’

DEFINED EXPRESSIONS:
‘convicted person’ ) see s.3(1)
‘defence civilian’ ) see s.3(1)
‘defence member’ ) see s.3(1)
‘cannabis’ ) see s.59(9)
‘narcotic goods’ ) see s.59(9)
‘pay’ see s.3(9), (10)

EXAMPLE CHARGE:

DFDA s.59(1) (Selling) (dealing) (trafficking) in narcotic goods outside Australia

Being a defence member at RMAF Base Butterworth, Malaysia on ............ sold narcotic goods, namely morphine, to Leading Aircraftsman I. N. Payne 8212654, knowing the nature of the goods.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was outside Australia (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant sold, dealt or trafficked in goods as specified (physical element of
conduct);

f. That the defendant's conduct in (e) was intentional (default fault element of intention);

g. That the specified goods were narcotic goods (physical element of circumstance); and

h. That the defendant knew the goods were narcotic goods (fault element of knowledge specifically provided for).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

a. The defendant may raise the statutory defence under s.59(2) that he or she had lawful authority for the conduct in (e); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Narcotic goods’. A list of substances that comprise narcotic goods is set out in the Criminal Code s.314.4 and 314.6. These lists are extracted in Part 12 of Volume 2 of this Manual. The quantity of narcotic goods that is alleged to have been sold is not relevant to a charge under this subsection.

‘Sell’. The charge should allege the name of the person that the narcotic goods were sold to, or in circumstances where the purchaser is unknown and the charge is based on admissions made by the defendant, the charge can allege that the narcotic goods were sold to “an unknown person”

‘Weight’. It is really not necessary to particularise the weight of a narcotic in the charge when jurisdiction is not dependant on the weight. The weight should be alleged as part of the prosecution case because the quantity may be an aggravating circumstance of the offence. When alleging weight of a narcotic it is important that only the pure weight is referred to – what may appear to be 2 gms gross weight of a particular narcotic may only be 10% pure.
EXAMPLE CHARGE:

DFDA s.59(3) Possession of narcotic goods outside Australia

Being a defence member at ................. on ............ on board HMAS Adelaide on passage from Hong Kong to Singapore was, without lawful authority, in possession of narcotic goods, knowing that she possessed the goods and knowing their nature.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was outside Australia (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant was in possession of goods as specified (physical element of conduct);

f. That the defendant knew that he or she possessed the goods specified (fault element of knowledge specifically provided for);

g. That the specified goods were narcotic goods (physical element of circumstance); and

h. That the defendant knew the goods were narcotic goods (fault element of knowledge specifically provided for).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

a. The defendant may raise the statutory defence under s.59(4) that he or she had lawful authority for the conduct in (e); and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Narcotic goods’. A list of substances that comprise narcotic goods is set out in the Criminal Code s.314.4 and 314.6. These lists are extracted in Part 12 of Volume 2 of this Manual. The quantity of narcotic goods that is alleged to have been sold is not relevant to a charge under this subsection.

Weight’. It is really not necessary to particularise the weight of a narcotic in the charge when jurisdiction is not dependant on the weight. The weight should be alleged as part of the prosecution case because the quantity may be an aggravating circumstance of the offence. When alleging weight of a narcotic it is important that only the pure weight is referred to – what may appear to be 2 gms gross weight of a particular narcotic may only be 10% pure.
EXAMPLE CHARGE:

**DFDA s.59(5) Self administering narcotic goods other than cannabis outside Australia**

Being a defence member at Hickham Air Force Base, Hawaii, on ........ administered to himself narcotic goods, namely heroin.

**PROSECUTION PROOFS:**

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was outside Australia (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant administered to himself or herself specified goods (physical element of conduct);

f. That the defendant's conduct in (e) was intentional (default fault element of intention);

g. That the goods were narcotic goods other than cannabis (physical element of circumstance); and

h. That the defendant was reckless as to (g) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

**STATUTORY CRIMINAL CODE DEFENCES:**

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

**COMMENTARY:** 'Narcotic goods'. A list of substances that comprise narcotic goods is set out in the Criminal Code s.314.4 and 314.6. These lists are extracted in Part 12 of Volume 2 of this Manual. The quantity of narcotic goods that is alleged to have been sold is not relevant to a charge under this subsection.
OFFENCES BASED ON TERRITORY OFFENCES

Offences Based on Territory Offences

Section 61 of the DFDA provides as follows:

61. (1) A person who is a defence member or a defence civilian is guilty of an offence if
(a) the person engages in conduct in the Jervis Bay Territory; and
(b) engaging in that conduct is a Territory offence.

(2) A person who is a defence member or a defence civilian is guilty of an offence if:
(a) the person engages in conduct in a public place outside the Jervis Bay Territory; and
(b) engaging in that conduct would be a Territory offence, if it took place in a public place in the Jervis Bay Territory

(3) A person who is a defence member or a defence civilian is guilty of an offence if:
(a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and
(b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place).

(4) The maximum punishment for an offence against subsection this section is:
(a) if the relevant Territory offence is punishable by a fixed punishment - that fixed punishment; or
(b) otherwise – a punishment that is not more severe than the maximum punishment for the relevant Territory offence.

(5) Strict liability applies to paragraphs (1)(b), (2)(b) and (3)(b).

Note: For strict liability, see section 6.1 of the Criminal Code.

(6) To avoid doubt, section 10 of this Act does not have the effect that Chapter 2 of the Criminal Code applies to the law in force in Jervis Bay, for the purpose of determining whether an offence against this section has been committed.

Note: Section 10 of this Act applies Chapter 2 of the Criminal Code to the content of this section, but not to the content of the law in force in Jervis Bay. To determine, for the purposes of this section, whether Chapter 2 of the Code applies to Jervis Bay law, it is necessary to consult Jervis Bay law.'

DEFINED EXPRESSIONS:
‘defence civilian’
‘defence member’
‘public place’ see s.3(1)
‘relevant Territory offence’
‘Territory offence’

COMMENTARY: Section 61 creates a system where certain offences against the ordinary criminal law can be triable by Service tribunals. The offences relevant to this provision are acts or omissions which would be Territory offences if they took place in the Jervis Bay Territory. Subsection 3(1) defines a “Territory offence” for the purpose of the DFDA. Offences against the Commonwealth law in force in the Jervis Bay Territory includes offences against the Crimes Act 1914, the Criminal Code Act 1995 as well as offences against the criminal law of the ACT. Hence, s.61 is essentially a mechanism for expanding the jurisdiction under the DFDA to include Territory offences.

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An explanatory note has been included in s.61(6) that clarifies the application of the Criminal Code to the law in force in the Jervis Bay Territory for the purpose of determining whether an offence against s.61 has been committed. This note is necessary to confirm that whilst the content of Chapter 2 of the Criminal Code applies to s.61, it may not apply to the content of the law in force in the Jervis Bay Territory.

To determine, for the purposes of s.61, whether Chapter 2 of the Criminal Code also applies to Jervis Bay Territory law, it is necessary to consult Jervis Bay Territory law. For example, where a law of the Commonwealth is in force in the Jervis Bay Territory, Chapter 2 will apply to the Commonwealth law for the purposes of an offence under s.61. The effect of this is that a “Territory offence” is a “Service offence” and the Criminal Code will apply to criminal responsibility for the commission of such offences (for example, the Chapter 2 principles in relation to burden and standard of proof, and the Criminal Code defences). However, the interpretation of specific offences will be based on the law applicable to that offence, for example, for a charge of indecent assault the applicable law would be ACT law.

When you look at the construction of the new s.61 you will observe that paragraphs 61(1)(b), (2)(b) and (3)(b) are all physical elements of circumstance that engaging in particular conduct in the circumstances set out in those paragraphs constitutes a Territory offence. Subsection 61(5) applies strict liability to those physical elements of circumstance in paragraphs (1)(b), (2)(b) and (3)(b), that is strict liability applies to the element that the offence is a Territory offence.

What law does apply in the Jervis Bay territory? Most Commonwealth laws and the criminal law of the ACT. Both the Jervis Bay Territory and the ACT were once part of the State of NSW. When the ACT was excised from NSW on 1 January 1911 in order to provide for the seat of Government, the Commonwealth Parliament wanted to ensure that the national capital would have its own system of laws and that the pre-existing laws, namely that of the state of NSW, would continue to have effect in the Territory, subject to any ordinance made by the Governor General.

Section 4A(1) of the Jervis Bay Territory Acceptance Act provides that the laws in force in the ACT, so far as they are applicable to the Jervis Bay Territory and are not inconsistent with an Ordinance of the Commonwealth in relation to the Jervis Bay Territory, are in force in the Jervis Bay Territory as if the Jervis Bay Territory formed part of the ACT.

Section 4AA of the Jervis Bay Territory Acceptance Act 1915 provides that “Chapter 2 of the Criminal Code does not apply in relation to, or in relation to matters arising under, a law in force in the Territory because of section 4A”. Consequently Chapter 2 does not apply to Territory offences based on the criminal law of the ACT. DFDA s.61(6) was enacted to ensure that this position was not put in doubt through the enactment of DFDA s.10.

Criminal responsibility for offences based on the criminal law of the ACT committed after 1 January 2006 is governed by Chapter 2 of the Criminal Code 2002 (ACT).

For offences committed prior to 1 January 2006 see Annex E.

Framing of charges under s.61. Where it is intended to charge a person with a Territory offence under s.61 of the DFDA, the assistance of a legal officer must be obtained. In particular, a legal officer should be asked to advise upon the implications of the decision in Hoffmann.11 In that case, it was held that if the Territory offence is not ‘truly different’ in terms of the elements of the offence and the maximum punishment available, then the specific offence in the DFDA must be used. While this decision may not be consistent with some dicta in the High Court, it will usually be the best course of
action to act in accordance with the decision.

Proceedings under the DFDA are not to be taken an offence against s.61 when committed in Australia except with the consent of the Director of Public Prosecutions when the relevant Territory offence is:

a. treason, murder, manslaughter, bigamy or a related ancillary Territory offence;
b. an offence triable in the Jervis Bay Territory only with the consent of the Minister or the Director of Public Prosecutions;
c. an offence against sections 51-55 (inclusive) of the Crimes Act 1900 (ACT) in its application to the Jervis Bay Territory; and
d. an offence prescribed in the DFD Regulations.  

Pending the giving of consent for proceedings under the DFDA, and in accordance with Part V of the Act, a warrant for the arrest of the person for the offence may be issued, the person may be arrested and kept in custody or otherwise dealt with, and the person may be charged with the offence.

In view of the comprehensive range of specific Service offences created by the DFDA, it is probable that the need to charge offences under s.61 will be infrequent and will generally be restricted to certain serious offences. Some other offences of a less serious nature may also be charged under this section, for example, an offence against the Defence Act 1903 for wearing a Service decoration or a Service uniform when not entitled to do so.

However, a s.61 Territory offence may be used only where it is not substantially similar to a specific offence in sections 15-60, s.62 and s.101QA of the DFDA. If the Territory offence is not ‘truly different’ in terms of the elements of the offence and the maximum punishment available, then the specific offence in the DFDA must be used.

Example charges are set out for some of the offences which may be charged under s.61. Some comments on questions of proof or other matters relating to the elements of these offences have been included, however legal advice must be obtained for s.61 charges. Where it is intended to charge a person under s.61, reference should be made to relevant criminal law publications dealing with the offence the subject of the charge.

See Annex C for further detail of fraud offences previously found in the Crimes Act 1914 and

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12 DFDA s.63.
13 DFDA s.63(2).
15 The DFDA applies the criminal law of the ACT as it applies in the Jervis Bay Territory. Therefore, text on the NSW Crimes Act such as Watson, Blackman, Hosking: Criminal Law in New South Wales have little relevance to DFDA offences and should not be used to frame charges. Michael Ward: Criminal Law and Practice (ACT) Volumes I and II may be of assistance.
prosecuted under this section of the DFDA as “Territory offences”.
Act of Indecency Without Consent

Section 60 (Act of Indecency Without Consent) of the Crimes Act 1900 (ACT) provides as follows:

‘60. (1) A person who commits an act of indecency on, or in the presence of, another person without the consent of that person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 5 years.

(2) A person who, acting in company with any other person, commits an act of indecency on, or in the presence of, another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 7 years.’

EXAMPLE CHARGES:

DFDA s.61(2) Engaging in conduct in a public place outside the Jervis Bay Territory that is a Territory offence, being the offence of an act of indecency without consent, Crimes Act 1900 (ACT) s.60(1)

Being a defence member in a public place outside the Jervis Bay Territory namely at Glebe Park, Canberra on ……………. committed an act of indecency on (or in the presence of) 8542367 Corporal R. Thomas without the consent of 8542367 Corporal R. Thomas and knowing that 8542367 Corporal R. Thomas did not consent (or was reckless as to whether 8542367 Corporal R. Thomas consented).

DFDA s.61(3) Engaging in conduct outside the Jervis Bay Territory that is a Territory offence, being the offence of an act of indecency without consent, Crimes Act 1900 (ACT) s.60(2)

Being a defence member outside the Jervis Bay Territory at the Grand Hyatt Hotel, Melbourne on ……………. acting in company with another person, namely 8345798 Lieutenant D. Musgrove, committed an act of indecency on (or in the presence of) 8542367 Corporal R. Thomas without the consent of 8542367 Corporal R. Thomas and knowing that 8542367 Corporal R. Thomas did not consent (or was reckless as to whether 8542367 Corporal R. Thomas consented).

PROSECUTION PROOFS:

In relation to DFDA s.61(2):

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing an act outside the Jervis Bay Territory (in a place such as a hotel foyer that is a public place) (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention); and

e. That the defendant’s conduct in (c) constitutes a Territory offence (physical element of circumstance).

NOTE: There is no requirement for the prosecution to prove a fault element on the part of
the defendant in relation to (e) as this is an element of strict liability under s.61(5).

In relation to "Act of Indecency Without Consent": (Noting that this offence in the ACT does not have to be de-constructed in the same sense that Chapter 2 of the Criminal Code imposes on the DFDA.)

a. That the defendant committed an act of indecency;

b. That the defendant intended the act in (a);

c. That the complainant did not consent to the act of indecency; and

d. That the defendant either knew or was reckless as to whether the complainant did not consent.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Public place’. Is defined at s.3(1) of the DFDA however, whether or not a place is public is a matter of fact to be decided in each case. A "public place" is a place which members of the public in fact frequent. The point where it ceases to be a public place is where persons have to overcome physical obstructions or defy prohibitions, either express or implied, to gain access to the place. It is not relevant whether the place is publicly or privately owned, because, if in fact, members of the public are in the habit of going there, it is a public place. If the class of persons who may go there is restricted, whether or not it is a public place is a matter of degree. If only a restricted class of persons is permitted access such as a private club, it is a private place.

‘Indecency’. This is not defined in the Crimes Act however the term has been considered on numerous occasions in reported cases. “Indecent bears its ordinary meaning, and need not be further explained to a jury except to say that it has a sexual overtone”.16 In consideration of the definition of sexual intercourse, it is effectively anything less than sexual intercourse that has a sexual overtone.

In order to determine what constitutes an act of indecency under ACT criminal law, it is helpful to understand the definition of sexual intercourse because anything falling short of that could well be an act of indecency. Sexual intercourse (s.50 Crimes Act 1900 (ACT)) means:

a. 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;

b. 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;

c. the introduction of any part of the penis of a person into the mouth of another person;

d. cunnilingus; or

e. the continuation of sexual intercourse as defined in subparagraphs 1a, b, c or d.

The definition enlarges the concept of sexual intercourse. The perpetrator may either be a male or a female, as may the complainant. Whilst most of the forms of intercourse outlined in the section are plain enough, it is worth commenting that penetration of the vulva only is insufficient to amount to sexual intercourse for the purposes of the Crimes Act (ACT). This is different to other jurisdictions where penetration to any extent of the genitalia of any female person is sufficient.

For the purposes of the DFDA, the Crimes Act (ACT) definition must be used because of the particular definition of “Territory offence”. In the ACT full penetration of the vagina or anus is required. The definition of the term “vagina” has been considered in a number of cases,17 for the purposes of


distinguishing between sexual intercourse and an act of indecency. In 1997 in the case of the Queen v AG, Higgins J relied on evidence of a medical practitioner, ruled that penetration of the vagina had to be penetration past the hymen, and anything less was an act of indecency.

Another way of looking at it, as was done by the House of Lords in Court, is to say that an act is indecent when ordinary people would so describe it, in the light of prevailing standards of morality, and in light of whether the complainant has consented to the conduct in question. The latter is irrelevant at least to charges under sections 58 and 59 of the Crimes Act (ACT), since the "act of indecency" only relates to what is in the defendant's mind. In those cases, the physical element (actus reus) of the offence is the infliction of harm or the assault or threat on the complainant. The fault element (mens rea) is the defendant's intent to commit an act of indecency. The complainant's consent and the defendant's belief in the complainant's consent is irrelevant. Consent is, of course, relevant in both senses (to both the physical element and fault element) in s.60 of the Crimes Act (ACT). Glanville Williams puts it thus in "Textbook of Criminal Law", 2nd ed., p.231:

“An assault is not indecent if it is neither intended by the defendant nor interpreted by the other party as having a sexual purpose. The mental element of the defendant and his victim are not the only elements in an indecent assault. There must be an offence to customary standards of morality.”

Where physical contact is involved in the assault, by infliction or performance of the act, it will usually revolve around touching the complainant on or in the genital region (pants, crutch, thighs, buttocks) or breasts if female, or getting the complainant to touch the defendant in those regions. Where no touching is involved, it is usually an exposure of genitalia.

“Upon or in the presence of”. If the offence involves mere exposure, or even touching and the complainant remains unaware of the defendant's act there is no offence committed under sections 57, 58, 59, 60 and 61 of the Crimes Act (ACT). That was the case in Johnson where, a child welfare officer masturbated while caning two boys on the buttocks. The boys were unaware of this. There was no offence committed because it could not be said the offence was committed "upon or in the presence of" the boys if they were not aware of it. In the case of Francis it was held that no offence was committed if the defendant believed that the victim was unaware of his actions.

‘Without the consent of the other person’. The prosecution is obliged to prove that in fact the complainant did not consent to the act of indecency being committed on them. The prosecution must prove that the defendant knew that the complainant was not consenting or that he was reckless as to whether the complainant consented. A defendant is reckless if he or she knows that it is possible that a complainant is not consenting, yet proceeds with the act of indecency in any event. If the defendant is affected by alcohol it is relevant to the question of whether he or she adverted to the question of the complainant's consent.

‘Threat of violence’. Consent obtained or caused by the infliction of violence or force, or by a threat to inflict violence or force or to use extortion is no consent at all: s.67(1)(a), (b) and (c) of the Crimes Act (ACT). This applies if the complainant who apparently consents is the one to whom the violence or force is directed, or to whom the threat is made. It also applies if the violence or force is applied, or threatened to any other person who is present or nearby, if that violence, force or threat is the cause of the consent by the alleged complainant.

‘Threat to publicly humiliate’. Consent obtained or caused by a threat to publicly humiliate or disgrace, or to physically or mentally harass either the intended complainant, or anyone else, is no consent at all: s.67(l)(d). The threat must involve a "public" humiliation or disgrace, as opposed to a private humiliation or private disgrace. It is a moot point whether mere publication of some humiliating or disgraceful fact about the alleged complainant to some third person would be a "public humiliation or disgrace", or whether some wider publication to the world at large is envisaged by the paragraph. It is arguable that a threat to privately humiliate would be likely to negate consent as well as a public

19 (1968) SASR 32
20 (1988) 88 Cr App R 127
humiliation. A case may arise, for example, where the defendant gains the complainant’s submission by threats to expose her past to her employer, so she will lose her employment.

‘Intoxicating Liquor’. Consent caused by the effect of intoxicating liquor, drug, or anaesthetic is negated by s.67(1)(e) of the Crimes Act (ACT). The paragraph is more broadly expressed than the principles worked out at common law. In Lang,21 the question was not whether the complainant’s condition of mind was caused by intoxicating liquor, but rather, what was her state of mind. Did she, or did she not consent? Did she understand her situation and was she capable of making up her mind?

That is now not the law in the ACT. Consent caused by the effect of intoxicating liquor is negated. In other words, consent caused by alcohol is no consent at all. This may appear harsh on a seducer employing some of the traditional devices but if it is proved that consent is caused by intoxicating liquor or a drug or anaesthetic, then the conduct elements (actus reus) of the crime are made out.

The defendant will have to rely upon some reasonable doubt arising as to the fault element (mens rea), specifically doubt as to whether the defendant knew the complainant was not consenting, or doubt as to whether s/he was reckless as to whether the complainant was consenting.

‘Mistaken Belief as to Identity’. This is unlikely to be a consideration in cases of acts of indecency. However the considerations are the same as cases where sexual intercourse has taken place. In the case of Collins22, although a case of burglary rather than sexual assault, a young lady lay naked on her bed in an upstairs room. Collins ascended a ladder and peered into the lady’s room. She saw him and thought it to be her boyfriend, beckoned him in and they had sexual intercourse. The conviction for burglary was set aside because he had not entered the building "as a trespasser", a necessary ingredient in England of burglary.

In the ACT, the conduct element of the offence at least will have been made out against Collins, since her consent to sex was induced by the mistaken belief as to the identity of the person with whom she had sexual intercourse. Collins might also have trouble inducing a reasonable doubt that he was not at least reckless as to her consent.

21 (1975) 62 Cr App R 50.
22 (1973) QB 100.
Assault Occasioning Actual Bodily Harm

Section 24 (Assault occasioning actual bodily harm) of the Crimes Act 1900 (ACT) provides as follows:

‘24. A person who assaults another person and thereby occasions actual bodily harm is guilty of an offence punishable, on conviction, by imprisonment for 5 years.’

EXAMPLE CHARGE:

DFDA s.61(2) Engaging in conduct in a public place outside the Jervis Bay Territory that is a Territory offence, being the offence of assault occasioning actual bodily harm, Crimes Act 1900 (ACT) s.24

Being a defence member in a public place outside the Jervis Bay Territory at ................ on ............ assaulted Able Seaman D. Featherstone 8345897, by punching him in the right jaw, and thereby occasioning to him actual bodily harm, namely an undisplaced fracture of the right mandible.

PROSECUTION PROOFS:

In relation to DFDA s.61(2):

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing an act in a public place outside the Jervis Bay Territory (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention); and

e. That the defendant's conduct in (c) constitutes a Territory offence (physical element of circumstance).

NOTE: There is no requirement for the prosecution to prove a fault element on the part of the defendant in relation to (e) as this is an element of strict liability under s.61(5).

In relation to “assault occasioning actual bodily harm” (Noting that this offence in the ACT does not have to be deconstructed in the same sense that Chapter 2 of the Criminal Code imposes on the DFDA.)

e. That the defendant did a specified act which resulted in the infliction of force on the victim (in this case by punching Able Seaman Featherstone in the jaw);

f. That the defendant either knew his actions may inflict force on the complainant (in this case Able Seaman Featherstone) or was reckless as to whether his actions would;

g. That the other person did not consent;

h. That the infliction of force was unlawful; and

i. That the infliction of force has occasioned actual bodily harm on the complainant, namely the fracture of the mandible.

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STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Assault’.23

‘Actual Bodily Harm’. Traditionally actual bodily harm is any hurt or injury, whether permanent or otherwise which interferes with the health or comfort of the person assaulted. Pain is insufficient. Bruising and minor abrasions are at the margin.

23 See para. 4.80
Recklessly Inflicting Grievous Bodily Harm

Section 20 (Recklessly inflicting grievous bodily harm) of the Crimes Act 1900 (ACT) provides as follows:

’20. A person who recklessly inflicts grievous bodily harm on another person is guilty of an offence punishable, on conviction, by imprisonment for 10 years.’

EXAMPLE CHARGE:

DFDA s.61(3) Engaging in conduct outside the Jervis Bay Territory that is a Territory offence being the offence of recklessly inflicting grievous bodily harm, Crimes Act 1900 (ACT) s.20

Being a defence member outside the Jervis Bay Territory at Pearl Harbour in Hawaii on ................. did recklessly inflict grievous bodily harm on Leading Seaman G. R. Thompson 8904567, by kicking him in the head.

PROSECUTION PROOFS:

In relation to DFDA s.61(2):

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing an act outside the Jervis Bay Territory (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention); and

e. That the defendant’s act conduct in (c) would have been a Territory offence had it taken place in a public place in the Jervis Bay Territory (physical element of circumstance).

NOTE: There is no requirement for the prosecution to prove a fault element on the part of the defendant in relation to (e) as this is an element of strict liability under s.61(5).

In relation to “recklessly inflicting grievous bodily harm” (Noting that this offence in the ACT does not have to be deconstructed in the same sense that Chapter 2 of the Criminal Code imposes on the DFDA.)

j. That the defendant inflicted harm on the victim (in this case Leading Seaman Thompson);

k. That the specified act was intentional;

l. That the harm inflicted was grievous bodily harm; and

m. That the defendant was reckless as to the fact that his actions caused grievous bodily harm.

STATUTORY CRIMINAL CODE DEFENCES:
Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: ‘Inflict’. In Salisbury (1976) VR 452, the court held that an offence such as this did not necessarily involve an assault on the complainant by the defendant, and that inflict was not synonymous with “cause”:

“… harm may be inflicted … either where the accused has directly and violently ‘inflicted’ it by assaulting the victim, or where the accused has ‘inflicted’ it by doing something, intentionally, which, though it is not itself a direct application of force to the body of the victim, does directly result in force being applied violently to the body of the victim, so that he suffers grievous bodily harm.”

Consequently the situations contemplated by the section include cases of the laying of traps and the fright cases such as Royale.24

‘Grievous bodily harm’. Per King CJ in Perks25 notes:

Like White J I consider that the conventional expression “grievous bodily harm”, despite its somewhat archaic ring, should be adhered to. If the meaning of “grievous” is to be explained, the expression “really serious” rather than merely “serious” should be used.

This was approved by the High Court in Wilson.26 In addition “grievous bodily harm” includes any permanent or serious disfiguring of the person (s.4 Crimes Act).

‘Recklessly’ (note this is different to the DFDA). In this context, an act is done recklessly if there "was a realisation on the part of the accused that the particular kind of harm in fact done (that is, some physical harm but not necessarily the degree of harm in fact so done) might be inflicted (that is, may possibly be inflicted) yet he went ahead and acted" (per Hunt J in Coleman).27 In that case, the NSW Court of Criminal Appeal distinguished Crabbe,28 which stated that the foresight required for reckless murder is the foresight of the probability of death. Coleman states that the foresight required for recklessness in other statutory offences is the possibility of the prohibited result, or, in the case of reckless infliction of grievous bodily harm, the possibility of some physical harm.

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25 (1986) 41 SASR 335 at 337.
27 (1990) 19 NSWLR 467 at 475.
28 (1985) 156 CLR 464.
General Dishonesty

Section 135.1 (General Dishonesty) of the Criminal Code Act 1995 provides as follows:

‘Obtaining a gain

(1) A person is guilty of an offence if:
   (a) the person does anything with the intention of dishonestly obtaining a gain from another person; and
   (b) the other person is a Commonwealth entity.
   Penalty: Imprisonment for 5 years.

(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew that the other person was a Commonwealth entity.

Causing a loss

(3) A person is guilty of an offence if:
   (a) the person does anything with the intention of dishonestly causing a loss to another person; and
   (b) the other person is a Commonwealth entity.
   Penalty: Imprisonment for 5 years.

(4) In a prosecution for an offence against subsection (3), it is not necessary to prove that the defendant knew that the other person was a Commonwealth entity.

(5) A person is guilty of an offence if:
   (a) the person dishonestly causes a loss, or dishonestly causes a risk of loss, to another person; and
   (b) the first-mentioned person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring; and
   (c) the other person is a Commonwealth entity.
   Penalty: Imprisonment for 5 years.

(6) Absolute liability applies to the paragraph (5)(c) element of the offence.

Influencing a Commonwealth public official

(7) A person is guilty of an offence if:
   (a) the person does anything with the intention of dishonestly influencing a public official in the exercise of the official’s duties as a public official; and
   (b) the public official is a Commonwealth public official; and
   (c) the duties are duties as a Commonwealth public official.
   Penalty: Imprisonment for 5 years.

(8) In a prosecution for an offence against subsection (7), it is not necessary to prove that the defendant knew:
   (a) that the official was a Commonwealth public official; or
   (b) that the duties were duties as a Commonwealth public official.’

EXAMPLE CHARGE:

DFDA s.61(3) Engaging in conduct outside the Jervis Bay Territory that is a Territory offence being the offence of General Dishonesty, Criminal Code Act 1995 s.135.1(5)

PROVISIONAL AS AT SEP 07 - PENDING FINAL PUBLICATION
Being a defence member outside the Jervis Bay Territory at Townsville on 18 February 2002 did dishonestly cause a loss to the Commonwealth by purchasing 42 litres of unleaded petrol for his private motor vehicle on credit using Shell fuel credit card number 7056 7905 4981 1477 for the fuel account belonging to the 3rd Combat Service Support Battalion, thereby causing a loss to the Commonwealth in the amount of $35.98.

PROSECUTION PROOFS:

In relation to DFDA s.61(3)

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing (or omitting to do) an act outside the Jervis Bay Territory (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (default fault element of intention); and

e. That the defendant’s conduct in (c) would have been a Territory offence had it taken place outside the Jervis Bay Territory (physical element of circumstance).

NOTE: There is no requirement for the prosecution to prove a fault element on the part of the defendant in relation to (e) as this is an element of strict liability under s.61(5).

In relation to General Dishonesty – s.135.1(5):

a. That the defendant used a Shell fuel card to purchase petrol for his personal vehicle (physical element of conduct);

b. That the defendant’s conduct in (a) was intentional (default fault element of intention);

c. That the defendant’s conduct in (a) caused a loss (physical element of circumstance);

d. That the defendant either knew the loss would occur or knew that there was a substantial risk that the loss would occur (fault element of knowledge specifically provided for);

e. That the loss to the Commonwealth was dishonest according to the standards of ordinary people (physical element of circumstance); and

f. That the defendant was reckless as to the fact that the loss was dishonest according to the standards of ordinary people (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.
Commanding or Ordering a Service Offence to be Committed

Section 62 of the DFDA provides as follows:

‘62. A defence member is guilty of an offence if:

(a) the member commands or orders a person to engage in conduct; and
(b) the conduct would constitute the commission of a service offence.

Maximum punishment:

(c) if the last-mentioned offence is punishable by a fixed punishment—by that fixed punishment; or
(d) otherwise - a punishment that is not more severe than that maximum punishment for the last-mentioned offence.

(2) Strict liability applies to paragraph (1)(b).

Note: For strict liability, see section 6.1 of the Criminal Code.

DEFINED EXPRESSIONS:

‘defence member’ ) see s.3(1)
‘service offence’ )

EXAMPLE CHARGE:

DFDA s.62 Commanding or ordering commission of Service offence

Being a defence member at ................. on ............... as platoon commander, ordered the commission of a Service offence by ordering 8569874 Private J.L. Roger, a member of his platoon, to take property that had been left exposed or unprotected during operations undertaken by the ADF in aid of the civilian authorities in ............ (place) on ............... (date) which constituted an offence under subsection 48(1)(a) of the Defence Force Discipline Act 1982.

PROSECUTION PROOFS:

a. That the defendant was a defence member (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member;

b. That the defendant was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That the defendant gave a specified command or order to a person to engage in specified conduct (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (fault element – default fault element of intention); and

e. That compliance with the defendant’s command (or order) in (c) would constitute the commission of a Service offence (physical element of circumstance).

NOTE: There is no requirement for the prosecution to prove a fault element on the part of
the defendant in relation to the physical element (e) as this is an element of strict liability under s.62(2).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.
ANCILLARY OFFENCES AND EXTENSIONS OF CRIMINAL RESPONSIBILITY

Chapter 2 of the Criminal Code also makes provision for a defendant person to be charged with attempting to commit an offence, for complicity and common purpose, innocent agency, incitement and conspiracy to commit an offence.

Attempt

Section 11.1 of the Criminal Code provides as follows:

(1) A person who attempts to commit an offence is guilty of the offence of attempt to commit that offence and is punishable as if the offence attempted had been committed.

(2) For the person to be guilty, the person’s conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

(3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(3A) Subsection (3) has effect subject to subsection (6A).

(4) A person may be found guilty even if:
(a) committing the offence attempted is impossible; or
(b) the person actually committed the offence attempted.

(5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.

(6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(6A) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose), section 11.5 (conspiracy to commit an offence) or section 135.4 (conspiracy to defraud).

IMPORTANT NOTE:

Section 11.1(3) has two distinct effects when an defendant is charged with attempt:

a. **Fault must be proved with respect to each physical element of the principal offence.** Though the principal offence may dispense with fault requirements, such as in strict and absolute liability offences, strict and absolute liability have no application when an attempt to commit that offence is charged; and

b. **Fault in attempts is limited to intention and knowledge.** Though the principal offence requires recklessness or negligence with respect to one or more physical elements, liability for an attempt to commit an offence requires proof of intention or knowledge with respect to that element.
EXAMPLE CHARGES:

*Criminal Code Act 1995 s.11.1(1) and DFDA s.43(1) Attempt to destroy Service property*

Being a defence member at ................. on ............ did with intent attempt to destroy Service property, namely, one optical range finder, pattern no. ........ by striking it with a chipping hammer.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing a specified act, in this case by striking the optical range finder with a chipping hammer (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (in this case that the defendant intended to strike at the optical range finder with the chipping hammer and that the defendant intended to damage the optical range finder) (default fault element of intention);

e. That the property was Service property (physical element of circumstance); and

f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

a. The defendant may raise the statutory defence under s.43(4) that he or she had a reasonable excuse for the relevant act or omission; and

b. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: An attempt to commit an offence is punishable to the same extent as if the person actually committed the offence.

Whereas the common law proposed a variety of tests to determine when a criminal attempt begins, Chapter 2 of the Criminal Code simply asks “was the conduct of the defendant more than merely preparatory?” The question requires a conclusion of fact to be drawn in the light of all the circumstances of the case.

Chapter 2 also provides that a person can be convicted of an attempt though the completion of the
offence was impossible in the circumstances. Impossibility is also not a ground for concluding the conduct of the defendant was not sufficiently proximate to the completed offence. As long as it can be said that the defendant was attempting an offence known to the law, the Criminal Code makes no provision for a distinction between 'legal' impossibility and 'factual' impossibility.29

Offences of absolute or strict liability can be attempted. In offences which impose absolute or strict liability, the prosecution is not required to prove fault with respect to some or all of the physical elements of the offence. The rule is different when an attempt to commit one of these offences is charged: the prosecution must prove intention or knowledge with respect to each element of the offence attempted.

Section 11.1(6) provides that limitations or qualifications on liability for the principal offence should equally apply to the attempt so as to bar the possibility of conviction, however, for example in a charge of receiving under DFDA s.47P, there is a requirement for proof of dishonest receipt of 'stolen property knowing or believing the property to be stolen'. Although the principal offence requires proof that the property was stolen, it is unlikely that this requirement can be said to amount to a 'limitation or qualifying' provision which applies equally to the attempt.

When, for example, the liability for the offence relates to Service property, there can be no liability for the offence unless the Service connection is proved. Consequently, there is no liability for an attempt if the defendant had neither the intention to commit an offence relating to the subject matter protected by Federal law nor any related belief. If, for example, in the specimen charge the property had been damaged and there was a mistaken belief on the part of the defendant that it was Service property and it was not, then the offence would not have occurred. In that instance, the requirement of a Service connection is a 'limitation or qualifying provision which applies to the offence' and any attempt to commit that offence would fail.

Complicity and Common Purpose

Section 11.2 of the Criminal Code provides as follows:

(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2) For the person to be guilty:
   (a) the person’s conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
   (b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:
   (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
   (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(3A) Subsection (3) has effect subject to subsection (6).

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
   (a) terminated his or her involvement; and
   (b) took all reasonable steps to prevent the commission of the offence.

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.

(6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

EXAMPLE CHARGE:

Criminal Code Act 1995 s.11.2 and DFDA s.47C: Aiding and abetting a theft

Being a defence member at ................. on ................. aided and abetted 8347896 Private F.B. Healy in the commission of a service offence by acting as a lookout while 8347896 Private F.B. Healy dishonestly appropriated on Sony discman compact disc player belonging to 8123456 Corporal U.R. Rich with the intention of permanently depriving Corporal Rich of that property.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant engaged in conduct by doing a specified act (in this case he aided and abetted Private Healy by acting as a lookout for him) (physical element of conduct);

d. That the defendant’s conduct in (c) was intentional (in this case, that the defendant...
intended to aid and abet Private Healy) (fault element of intention specifically provided for);

e. That the defendant dishonestly appropriated the property belonging to Corporal Rich (physical element of circumstance); and

f. That the defendant was reckless as to the facts in (d) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCE:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: Offences against this section are not ancillary offences under the DFDA as defined. They are offences created by the extension of criminal responsibility that do not amount to a separate offence with a particular penalty provision; rather, they impute the acts of the defendant to amount to the commission of the charged Service offence. A defendant charged with an offence under the Criminal Code and DFDA s.47C can only be convicted of the offence under s.47C and suffer the penalties of that section.

The words ‘aid, abet, counsel or procure’ are the traditional formulation of complicity and do not involve a separate offence. The accomplice is convicted of the same offence as the principal offender and is liable to the same penalty as the principal. Complicity requires proof of fault with respect to each element of the principal offence. The prosecution must prove that the defendant intended to aid, abet, counsel or procure the commission of an offence.

Conduct will amount to aiding, abetting or counsel though it cannot be said to have caused the commission of the principal offence. To procure an offence does however mean that the offence has been caused or brought about.

Because accomplice liability is derivative rather than direct, the prosecution must prove the commission of the offence by the other person. Though proof of guilt is necessary, conviction of the other person is not a prerequisite for conviction of the accomplice. The accomplice can be convicted, though the other offender is never brought to trial or is acquitted.

Intention in complicity is intention ‘with respect to conduct’. It follows from s.5.2 (Intention) that the prosecution must establish that the accomplice meant to aid, abet or counsel the principal or procure the commission of an offence. Recklessness with respect to a risk or likelihood that conduct might provide aid or encouragement for example, is not a basis for conviction. The requirement of an intention to aid, abet, counsel or procure the commission of an offence by the principal does not have to refer to a specific offence. Liability as an accomplice occurs when the principal commits an offence ‘of the type’ which the accomplice meant to promote.

Liability as an accomplice is not incurred by a person who makes an effective withdrawal from the commission of the offence. Effective withdrawal means that the accomplice has to terminate their involvement in the offence and take all reasonable steps to prevent the commission of the offence. That statutory criteria for termination or withdrawal reflects the common law test proposed by Gibbs J in White v Ridley.\(^30\) The Model Criminal Code Officers’ Committee listed examples of what might amount to reasonable steps to prevent the commission of an offence: “... discouraging the principal offender, alerting the proposed complainant, withdrawing goods necessary for the commission of the crime (for example a getaway car) and/or giving a timely warning to the appropriate law enforcement authority”.\(^31\)

The requirement of reasonable steps is an implied concession that withdrawal or termination is still possible though attempts to prevent the offence prove to be ineffectual.

\(^{30}\) (1978) 21 ALR 661 at 669.

‘Acting in Concert’: At common law offenders who act in concert in the commission of an offence are said to be parties to joint criminal enterprise. The New South Wales Court of Criminal Appeal gave an authoritative statement of the doctrine in Tangye:32

“(1) … where two or more persons carry out a joint criminal enterprise, each is responsible for the acts of the other or others in carrying out that enterprise. …

(2) A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The understanding or arrangement need not be express …

(3) A person participates in that joint criminal enterprise either by committing the agreed crime itself or simply by being present at the time when the crime is committed …”

The essential defining element of the doctrine of acting in concert is that liability is taken to be direct rather than derivative. Because the conduct of each of the participants in a common or joint enterprise is attributed to all participants, all are said to be principal offenders.33 If A and B agree to steal property belonging to C, each is taken to have appropriated the property though one keeps watch and the other drives away.

**THIS DOCTRINE HAS NO EXISTENCE UNDER THE CODE.** The argument in support of the assertion is short and conclusive. The Criminal Code ‘contains all the general principles of criminal responsibility that apply to any offence’ (s.2.1 Purpose refers); it cannot be supplemented by extraneous principles imported from the common law. Liability under the Criminal Code requires proof of:

a. ‘such physical elements as are, under the law creating the offence, relevant to establishing guilt’ (s.3.2 Establishing guilt in respect of offences refers); or

b. conduct which matches the requirements of s.11.2 (complicity) and s.11.3 (innocent agency).

These possibilities exhaust the grounds for imputation of criminal conduct under the Criminal Code.

Complicity is a derivative form of liability and the doctrine of innocent agency is restricted to instances where criminal conduct is procured by the principal.

As the doctrine of joint criminal enterprise, or acting in concert, is taken to be a form of direct liability, it is incompatible with the structure of the Code.34

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33 Osland (1999) 159 ALR 170.
34 The Commonwealth Criminal Code Guide to practitioners page 263.
Innocent Agency

Section 11.4 of the Criminal Code provides as follows:

‘A person who:
  (a) has, in relation to each physical element of an offence, a fault element applicable to
  that physical element; and
  (b) procures conduct of another person that (whether or not together with conduct of the
  procurer) would have constituted an offence on the part of the procurer if the procurer
  had engaged in it;

is taken to have committed that offence and is punishable accordingly.’

NOTE: The principle of innocent agency permits conviction of an offender who uses another person
as an instrument to commit their offence.

Conduct of another person which constitutes a physical element of an offence may be attributable to a
defendant who procured the conduct. The principle applies whether the conduct of the agent
encompasses all or only some of the physical elements of the offence. If Corporal A induces Private B
to take goods from the room of Private C and bring them to him and Private B does so unwittingly, the
conduct of Private B is attributed to Corporal A. If Corporal A was dishonest, intending to deprive
Private C of the goods, the offence of theft is complete when the duped Private B collects the goods.

EXAMPLE CHARGE:

Criminal Code Act 1995 s.11.3 and DFDA s.47C Theft by Innocent Agency

Being a defence member at …………….. on ……………. dishonestly appropriated property, namely a
Nokia 3310 mobile telephone belonging to 8123456 Gunner G.K. Rich, with the intention of
permanently depriving Gunner Rich of that property.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of
  circumstance). In almost all circumstances the defendant will know and admit that
  they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member
  or a defence civilian (default fault element of recklessness). Recklessness can be
  established by proving intention, knowledge or recklessness. In almost all
  circumstances the defendant will know and admit that they are a defence member or a
  defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant procured a third party (innocent agent) to appropriate specified
  property (physical element of conduct);

d. That the defendant’s conduct in procuring the innocent agent to appropriate the
  property was intentional (default fault element of intention);

e. That the third party appropriated the property (physical element of conduct);

f. That the defendant intended that the third party would appropriate the property in (e)
  (default fault element of intention);

g. That the defendant’s purpose was to permanently deprive the other person of the
  property (in this case Gunner Rich) (physical element of circumstance);

h. That the defendant intended to permanently deprive the other person of the property
  (in this case Gunner Rich) (fault element of intention specifically provided for);
i. That the appropriation of property was dishonest according to the standards of ordinary people (physical element of circumstance) (see s.47A(a));

j. That the defendant knew that the appropriation was dishonest according to the standards of ordinary people (fault element of knowledge specifically provided for) (see s.47A(a));

k. That the property belonged to another person (physical element of circumstance); and

l. That the defendant was reckless as to (i) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCE:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: Offences against this section are not ancillary offences under the DFDA as defined. They are offences created by the extension of criminal responsibility that do not amount to a separate offence with a particular penalty provision; rather, they impute the acts of the defendant to amount to the commission of the charged Service offence. A defendant charged with an offence under the Criminal Code and DFDA s.47C can only be convicted of the offence under s.47C and suffer the penalties of that section.

Reliance on the principle of innocent agency does not require proof that the agent was innocent. Consequently it is an extension of the law of complicity and in particular of s.11.2(5) of the Criminal Code, which declares that liability as an accomplice can be incurred even though the principal offender has not been prosecuted or found guilty. That provision presupposes that proof of the guilt of the principal offender is a prerequisite for conviction of the accomplice, though the principal offender cannot be brought to justice. The principle of innocent agency dispenses with that presupposition, subject to one requirement: the defendant must be proved to have procured the conduct of the other as their agent.
Section 11.4 of the Criminal Code provides as follows:

‘(1) A person who urges the commission of an offence is guilty of the offence of incitement.
(2) For the person to be guilty, the person must intend that the offence incited be committed.
(2A) Subsection (2) has effect subject to subsection (4A).
(3) A person may be found guilty even if committing the offence incited is impossible.
(4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.
(4A) Any special liability provisions that apply to an offence apply also to the offence of incitement in respect of that offence.
(5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).’

Criminal Code Act 1995 s. 11.4(1) and DFDA s. 22: Incitement to desertion

Being a defence member at ................. on ............ did with intent to cause 874509 Corporal K.G. James to avoid service in connection with operations against the enemy incite Corporal James not to attend at his place of duty, namely, RAAF Base Richmond on ............

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That (in this case Corporal James) had been warned for active service (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

e. That (in this case Corporal James) did not have leave (physical element of circumstance);

f. That the defendant was reckless as to (e) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

g. That the defendant incited (in this case Corporal James) not to attend at his place of duty (physical element of conduct);

h. That the defendant’s conduct in (g) was intentional (fault element of intention specifically provided for);

i. That the defendant’s conduct in (g) manifested an intention for (in this case Corporal
James) to avoid active service (physical element of result of conduct); and

j. That the defendant was reckless as to (i) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness).

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: Incitement like attempt is a separate and distinct offence from the offence which is the subject of the incitement. Although like attempt, incitement is a preparatory offence, there is no impediment to conviction for incitement in circumstances where the principal offence has not been committed. In practice, however incitement which succeeds in its object will usually result in a finding of guilt on the principal offence as an accomplice.

A person who urges another to commit an offence with the intention that the offence be committed, is guilty of incitement. The Criminal Code formulation of this offence was intended to emphasise the necessity for proof that the activity of the defendant was meant to encourage the commission of the offence. Since the conduct element of incitement is urging another to commit an offence, it follows that the prosecution must prove that the offender meant to urge the other to commit an offence.
Section 11.5 of the Criminal Code provides as follows:

‘(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates has been committed.

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

(2) For the person to be guilty:

(a) the person must have entered into an agreement with one or more other persons; and

(b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

(2A) Subsection (2) has effect subject to subsection (7A).

(3) A person may be found guilty of conspiracy to commit an offence even if:

(a) committing the offence is impossible; or

(b) the only other party to the agreement is a body corporate; or

(c) each other party to the agreement is at least one of the following:

(i) a person who is not criminally responsible;

(ii) a person for whose benefit or protection the offence exists; or

(d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.

(4) A person cannot be found guilty of conspiracy to commit an offence if:

(a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or

(b) he or she is a person for whose benefit or protection the offence exists.

(5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:

(a) withdrew from the agreement; and

(b) took all reasonable steps to prevent the commission of the offence.

(6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.

(7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

EXAMPLE CHARGE:

*Criminal Code Act 1995 s.11.5(1) and DFDA s.59(1): Conspiring to sell narcotic goods outside Australia*
Being a defence member at ............. on ........... did conspire with Leading Seaman D.J. Fixx 8760986 and Able Seaman R.S. Trickery 8653267 without lawful authority while outside Australia to sell narcotic goods, namely, heroin, knowing the nature of the goods.

PROSECUTION PROOFS:

a. That the defendant was a defence member or a defence civilian (physical element of circumstance). In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian;

b. That the defendant was reckless as to the fact that he or she was a defence member or a defence civilian (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the defendant will know and admit that they are a defence member or a defence civilian. If there is no admission, the prosecution must prove recklessness;

c. That the defendant was outside Australia (physical element of circumstance);

d. That the defendant was reckless as to (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the defendant entered into an agreement to sell narcotic goods as specified (physical element of conduct);

f. That the defendant’s conduct in (e) was intentional (default fault element of intention);

g. That the specified goods were narcotic goods (physical element of circumstance); and

h. That the defendant knew the goods were narcotic goods (fault element of knowledge specifically provided for).

DFDA DEFENCES:

Some DFDA offences have their own integral defence provisions. In this particular provision:

n. The defendant may raise the statutory defence under s.59(2) that he or she had lawful authority for the conduct in (e); and

o. If raised, the defendant must prove this defence on the balance of probabilities.

STATUTORY CRIMINAL CODE DEFENCES:

Refer to DLM Volume 2, Chapter X - Criminal Responsibility.

COMMENTARY: Conspiracy, like incitement and attempt is an offence distinct from the principal offence which is the subject of the conspiracy. The essential element is the liability that an overt act towards the offence being committed and proof that the intention was shared, by at least one other person.

The physical element of the offence is entry into the agreement – conduct which involves of necessity, an intentional act. The act must be accompanied by an ulterior intention shared by at least one other party to the agreement, that an offence will be committed pursuant to the agreement.

Recklessness with respect to the risk that another party to an agreement might commit an offence in pursuit of agreed objectives is not sufficient for a conviction for conspiracy.

Offences of absolute and strict liability can be the subject of conspiracy however the prosecution must prove entry into an agreement with the intention that an offence will be committed, pursuant to the agreement. The requirement of intention extends to each physical element of the offence displacing strict or absolute liability.
There is no conspiracy if only one of those who enter into an agreement to commit an offence intends that it will be committed. Conspiracy requires proof of an overt act in pursuance of the conspiracy. Apart from the requirements that the overt act must be “overt” and done “pursuant to an agreement”, no criteria for identifying the overt act are specified. It is sufficient if the overt act is done by any party to the conspiracy. When an overt act is done by a person other than the defendant, it is a circumstantial element of the defendant’s liability. The requirement of the overt act has the consequence that there is an interval between the conspirator’s agreement and the first overt act in pursuance of the agreement, when the offence has not yet been committed. Withdrawal must be accompanied, however, by “reasonable steps to prevent commission of the offence.”
CHAPTER 13

IMPORTANT INFORMATION FOR THE ACCUSED

STATUS

13.1 This proposed Chapter is entirely new.

SYNOPSIS

13.2 TBA.