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DFDA LAW MANUAL

INTERIM EDITION

This document is issued for use by Defence personnel and is effective forthwith.

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FOREWORD

This document provides legal policy guidance regarding the use of the summary discipline system and is issued under my authority.

Four independent manuals have been promulgated to provide tailored policy guidance on the application of certain aspects of the summary discipline system:

- Disciplinary Infringement Manual (DIMAN)
- Summary Discipline Manual (SDMAN)
- Superior Tribunal Manual (SUPMAN)
- Defence Force Discipline Act Law Manual (DFDA LAWMAN)

This manual, first issued in 2019, remains an interim edition, reflecting the Chapter structure of the former ADFP 06.1.1 Discipline Law Manual.

It is intended that the DFDA LAWMAN be used as a reference document, primarily by legal officers, military police members and Unit discipline subject matter experts, for further legal guidance on use of the summary discipline system. It has been updated for consistency with the Summary Authority Rules 2019 and the Summary Discipline Manual.

I commend use of the DFDA LAWMAN to discipline specialists and look forward to its guidance being applied in order to achieve improvement in the operation of the summary discipline system.

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AMENDMENTS

s22

Amendment number	Amendment	Amendment type	Effective date
AL1	Chapter 11	Incorporated the content of DGMLS Directive 02/21; updated references	26 Nov 2021
AL2	Foreword Chapter 2 Chapter 4 Annex 4A Chapter 6 Annex 6A Annex 6C Annex 6D Chapter 8 Chapter 9 Chapter 10 Chapter 11 Chapter 12 Glossary	Amendments and inclusions made throughout to reflect the passage of the Discipline Legislation Amendment (Discipline Reform) Act 2021 and subordinate legislation. Key changes affect: - The disciplinary infringement scheme - Abolition of Subordinate Summary Authority - Changes to jurisdiction of Superior Summary Authority - Changes to punishment tables for summary authorities - Introduction of four new service offences	13 Dec 2022
AL2	Chapter 4, Annex 4A insert para 242 Chapter 4, Annex 4A insert paras 299 to 309 Chapter 4, Insert Appendix 4A1	Amendments to reflect changes made by the *Regulatory Powers (Standardisation Reform) Act 2021*	13 Dec 2022

CHAPTER 4

MANAGEMENT OF ALLEGED BREACHES OF DISCIPLINE AND INVESTIGATION OF SERVICE OFFENCES

INTRODUCTION

4.1 Command authority necessarily includes responsibility for the health, welfare, morale and discipline of assigned personnel. Disciplined behaviour is integral to the effective and efficient operation of the ADF as a professional fighting force. Discipline within the ADF is based on good training, self-discipline, high morale, and fair and just treatment.

4.2 Commanders are responsible for maintaining high standards of conduct and discipline. They should be prepared to investigate and deal with incidents as they occur, and to deliver impartial and fair outcomes to people who are subject to their authority. If left uncorrected, ill-discipline can undermine individual and collective morale.[64] Equally, if people are treated without appropriate consideration, care, and compassion, or if people are subject to procedures that lack transparency and timeliness, their confidence in commanders and the military discipline system will be undermined.

4.3 This Chapter provides general guidance regarding the management of allegations of misconduct amounting to breaches of discipline. Also discussed are the responsibilities of, and options available to, commanders upon becoming aware of an alleged breach of discipline.[65]

OUTLINE

4.4 This Chapter provides guidance on the following matters:

a. action following an allegation, occurrence or incident – assessment and reporting;

b. management of members and information – access to support services and legal assistance, privacy, support and welfare considerations;

c. options for commanders, such as:

(1) taking no formal action

[64] ADDP 1.0 - *Personnel* (August 2015), Chapter 1, paragraphs 1.47 – 1.50.

[65] The jurisdiction and purpose of the military discipline system established by the DFDA is introduced in Chapter 2. Expanding on this, the SDMAN emphasises the central role of commanders in the administration of unit discipline.

(2) taking disciplinary action, or referring the matter for investigation by the civilian authorities with a view to criminal action, and

(3) initiating administrative action.

4.5 Annex A to this Chapter contains detailed guidance regarding the investigation of breaches of discipline in accordance with the DFDA.

ACTION FOLLOWING AN SLLEGATION, OCCURANCE OR INCIDENT

4.6 Upon becoming aware of an allegation, incident or occurrence of misconduct, however described, obligations arise that affect ADF members and commanders. These obligations or responsibilities may be grouped into the following categories, without expressing priority or preference:

a. safety, health and welfare – of members, and other persons affected by Australian Defence Organisation (ADO) activities or present in ADO workplaces

b. security – of personnel and information, and

c. discipline of ADF members.

4.7 As a first step, appropriate action and measures should be taken to prevent the continuance of an offence, unlawful conduct, self-harm or other damaging or unacceptable behaviour. Relevant crime or incident scenes and evidence relating to the allegation, incident or occurrence should not be disturbed and must be recorded, as appropriate and practical in the circumstances. The assessment, notification and reporting steps outlined below will assist in this regard, particularly the early involvement of a relevant Defence Investigative Authority (DIA).[66]

Defence incident record

4.8 The IRMPOL provides guidance on the circumstances and procedures for conducting and completing a Defence Incident Record (DIR).

4.9 Following an occurrence (which can be any significant incident, allegation or problem) which a commander or supervisor considers requires investigation or inquiry, a DIR must be completed (via Webform Form AE530 – Defence incident record) as close as possible to the time of an incident, recording the circumstances of an incident as understood by the person making the record. A DIR is not an investigation.

4.10 Completion of a DIR helps a commander or supervisor ensure they have assessed an incident based on the information available to them at the time. It is

[66] Such as, but not limited to, the JMPU / ADFIS.

recognised that only a minimum of facts or information may be available at the time of completing a DIR. Nevertheless, it provides a contemporaneous record that will support informed review and accountability for Defence in the management of incidents.

4.11 The completion of a DIR does not limit or replace the need, as required, for incidents to also be recorded as:

a. a safety incident in Sentinel or on Form AE 527 – Sentinel event report;

b. a report of unacceptable behaviour using ComTrack;

c. an incident in the Army Incident Management System (AIMS);

d. a notifiable incident with mandatory notifications requirements to a DIA; or

e. any other mandated reporting requirements necessary under legislation or extant policy.

Fact finding[67]

4.12 'Fact finding' is a tool used to determine the content of a DIR (noting that an initial DIR should not be delayed merely to collect additional information) or to decide whether an incident is a notifiable incident, commanders and supervisors may wish to conduct 'fact finding', which is a process of collecting information to support decision-making.

4.13 Fact finding is ongoing throughout the whole decision-making process. Fact finding does not simply happen once, and a decision-maker should not assume that a single fact finding activity has provided enough information to make the decision. Fact finding is often an iterative process, where information gathered raises new questions, which are then answered through further fact finding.

Fact finding and its relationship with the DFDA

4.14 Matters that involve misconduct by ADF members may be dealt with as service offences under the DFDA. Decision-makers should be aware that there are particular legal requirements for investigating service offences, including providing cautions and giving witnesses a right to silence. Information gathered outside a DFDA investigation will be of limited use when charging or trying a service offence. Further, involvement by a CO or other DFDA summary authority in fact finding may have an effect on whether they are disqualified from trying a service offence under DFDA s 108A for reasons of bias.

[67] See Good Administrative Decision-Making Manual.

4.15 Accordingly, if the intent is to treat ADF misconduct as a service offence, care should be taken in fact finding outside of the DFDA investigation process.

4.16 Fact finding may be useful when deciding whether a matter should be reported or referred to a DIA (for example to meet the requirements of the IRMPOL). It may also be useful if dealing with a matter that involves both ADF and non-ADF personnel, and where there are issues to be addressed beyond an individual's misconduct.

4.17 Legal Officers may provide advice to decision-makers who have questions about the relationship with the DFDA.

Notification of Defence Investigative Authority

4.18 The IRMPOL and DI ADMIN 45-2 – *Incident Reporting and Management* outline the requirements for the reporting and management of notifiable incidents, along with how to determine whether an incident is notifiable.

4.19 Managers and commanders must report any notifiable incident immediately to a DIA. If there is doubt as to whether a matter is a notifiable incident, it should be reported. Managers and commanders reporting a notifiable incident to a DIA should note that this is a separate reporting action to the completion of a DIR.

4.20 For the purposes of notifiable incidents, DIA is defined as the Directorate of Investigations and Recovery within the Fraud Control and Investigations Branch (FCIB), JMPU / ADFIS, the three military police organisations of the Navy, Army and Air Force; and the Directorate of Security Intelligence and Investigations within the Defence Security and Vetting Service[68].

4.21 A commander or supervisor should determine whether an incident is, in fact, a notifiable incident.[69] In some instances, it will be clear without further deliberation or assessment that a report must be made to a DIA – for example, where an assault was witnessed. However, in other circumstances, a DIR will assist in determining the course of action to be adopted.[70] Commanders and supervisors should seek advice from a Legal Officer, as required.

4.22 Once notified, the relevant DIA will take carriage of a matter and decide whether to initiate an investigation in accordance with their operating procedures and applicable Defence policies. Key determining factors that will influence the action taken by a DIA will involve:

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[68] Annex 1A Definitions of IRMMAN.

[69] See Annex 1A Definitions of IRMMAN for what constitutes a notifiable incident.

[70] Specific guidance about the handling of particular allegations or incidents can be obtained via the FCIB webpage at: http://drnet/AssociateSecretary/AFCD/FCIB/DIR/Pages/default.aspx

a. the nature and seriousness of the allegation; and

b. the jurisdiction, mandate (or responsibility) and powers of the relevant DIA.

4.23 If a DIA determines that an incident is minor in nature and does not require investigation by a DIA, then the matter may be referred back to the commander or supervisor. In such circumstances, the commander or supervisor will deal with the matter, either with the support of a single-Service police organisation or using unit resources.

4.24 Additional guidance regarding matters of jurisdiction under the DFDA can be found in Chapter 2 of this Manual. Commanders should seek specialist advice from a legal officer, DIA, or the DMP where the selection of an appropriate course of action is complex given the nature or seriousness of the incident or allegation.

4.25 Further courses of action available to commanders are outlined from paragraphs 4.47 of this Chapter, and guidance regarding the conduct of DFDA investigations is included in Annex A.

Cross-over with safety and security matters

s22

s22 [redacted]

Criminal proceedings

4.65 Depending on the circumstances, nature and seriousness of the alleged breach of discipline, consultation may be required with civilian police and civilian prosecution authorities regarding matters of jurisdiction and whether it is possible and appropriate to proceed under the military discipline system, or whether the alleged breach should be referred to those civilian authorities for their action. In general, for matters that involve serious or complex service offences, JMPU / ADFIS will take carriage of any investigative action after notification, as discussed above, and will work closely with the DMP in relation to such decisions.[89]

s22 [redacted]

[89] See: Director of Military Prosecutions Prosecution Policy and DI ADMIN 45-2 – *Incident Reporting and Management.*

s22 

INVESTIGATION OF ALLEGED SERVICE OFFENCES

4.73 In addition to creating service offences and establishing service tribunals to try charges against persons accused of committing such offences, the DFDA provides for the investigation of service offences.

4.74 Investigations into alleged service offences may be undertaken by specialist investigators; being 'police members'[92] such as DIA staff from JMPU / ADFIS or the single-Service police organisations. However, the DFDA also contemplates other members of the ADF (other than police members) being engaged in the investigation of a service offence as 'investigating officers'.[93] In addition, the DFDA gives investigation related decision making authority to certain persons acting as 'authorised officers' for various provisions of DFDA Part V and Part VI.

4.75 The conduct of an investigation may affect the rights, liberties, and reputation of charged members, as well as impacting on witnesses and other persons involved in the alleged conduct, incident or occurrence. As such, the DFDA imposes obligations, as well as conditions and limitations, in relation to the exercise of investigation and decision-making powers, along with providing specific rights and protections to persons accused of service offences.

4.76 Annex A to this Chapter provides detailed guidance on the investigation of alleged service offences pursuant to the DFDA.

Annex:
A. INVESTIGATION OF SERVICE OFFENCES

[92] DFDA s 3(1) definition of 'police member'.

[93] DFDA s 101(1) definition of 'investigating officer' (see paragraph (b)).

ANNEX 4A

INVESTIGATION OF SERVICE OFFENCES

INTRODUCTION

"A good investigation starts with careful planning and preparation, a clear understanding of the parameters of the investigation, and with proper authority".[94]

1. This annexure provides guidance for Defence members who may be required to investigate an alleged service offence, and for individuals who may make decisions to authorise or approve certain investigative action under the DFDA.[95] It is intended to assist individuals in understanding their powers, the steps involved in an investigation, and the types of records that should be kept when carrying out an investigation.

2. The topics discussed in this annex include:

a. individuals involved in DFDA investigations and their powers

b. general advice relating to investigations

c. planning an investigation, and

d. specific investigative powers and considerations:

(1) custody – lawful and deemed

(2) questioning of persons

(3) identification of a suspect

(4) suspension of members under investigation

(5) arrest

(6) custody of persons prior to a conviction

(7) treatment of, and taking evidence from persons in custody, and

[94] *Investigating complaints – a manual for investigators*, NSW Ombudsman, Sydney, 2004 (hereafter referenced as 'NSW Ombudsman investigation manual').

[95] https://www.legislation.gov.au/Series/C2004A02711.

(8) search and seizure.

(9) charging a charged member

3. In reviewing and applying the guidance in this Annex, it is important to note that the DFDA has a specific purpose – the maintenance and enforcement of service discipline. In that regard, a distinction must be drawn from the outset between the powers and functions of civilian police investigators into alleged civilian offences and the powers and functions of persons carrying out DFDA investigations into alleged service offences. Like the tension experienced in relation to civilian criminal investigations, the DFDA recognises the need to maintain a proper balance between the protection of individual rights and liberties on the one hand, and the expectation and need for practical and effective enforcement of service discipline on the other hand.

INDIVIDUALS INVOLVED IN INVESTIGATIONS AND THEIR POWERS

4. To understand the process of an investigation, the roles of key individuals must be examined. The key individuals involved in DFDA investigations of service offences are:

a. investigating officers

b. police members

c. constables, and

d. authorised officers.

5. The DFDA gives separate and important roles and powers to individuals who perform these functions. Before considering their respective roles, powers and interactions, this section defines each key individual and provides an overview of their powers in relation to the investigation of service offences.

Investigating officer

6. **Definition.** An investigating officer is defined as “a police member or an officer, warrant officer or non-commissioned officer (not being a police member) engaged in the investigation of a service offence.”[96]

7. This definition is confined to military personnel, and does not include other civilian investigators.[97]

[96] DFDA s 101(1).

[97] *Commonwealth of Australia v Westwood* [2007] FCA 1282, 21 August 2007, paragraph 22.

8. **Role.** An investigating officer is responsible for the ethical, efficient and lawful investigation of alleged service offences. Their powers are set out in the DFDA and those powers relate directly to the purpose of maintaining and enforcing service discipline. The functions of an investigating officer may include questioning persons, gathering evidence and conducting searches. However, it is important to note that in most instances, the coercive powers of an investigating officer (discussed in detail below) rely on authority being given by an 'authorised officer'.

9. **Powers of an investigating officer.** An investigating officer has powers under the DFDA to, among other things:

a. **Question persons.** An investigating officer may question any witness or a charged member, whether the charged member is in custody or not, in the course of an investigation (See 'Questioning of persons' below for further information).[98]

b. **Take evidence.**[99] Where an investigating officer is authorised by an authorised officer, the investigating officer may take evidence from persons in custody (see 'Treatment of, and taking evidence from persons in custody' below for further information), including:

(1) prints of hands, fingers, feet or toes

(2) handwriting samples

(3) sound recordings of the voice

(4) photographs, and

(5) medical examinations and taking specimens from a person.

c. **Conduct identification parades.** An investigating officer may conduct identification parades[100] or show photographs[101] to establish whether a witness can identify a suspect in relation to an offence (see 'Identification of a suspect' below for further information).

[98]DFDA ss 101B, 101C, 101E, 101G and 101H.

[99]DFDA ss 101L(3), 101L(4) and 101Q.

[100]DFDA s 101N.

[101]DFDA s 101M.

d. **Conduct searches and seize items.**[102] An investigating officer may search a person, their clothing and property under their control, or land, premises, a ship, aircraft or vehicle, and seize items found during that search that relate to a service offence (See 'Search and Seizure' below for further information):

(1) with consent

(2) pursuant to a warrant issued by an authorised officer, or

(3) in circumstances of emergency.

Police member

10. **Definition.** As outlined above, a police member may act as an investigating officer in DFDA investigations. The term 'police member' is defined as "a service police officer or sailor, soldier or airman who is a member of a police corps or service".[103]

11. **Role and powers.** Given that the definition of investigating officer includes police members, a police member may play the same role, and exercise the same powers outlined above relating to investigating officers. In addition, the DFDA recognises the special role of police members and, for example, provides greater powers of arrest (not being bound by rank limits applicable to other Defence members) over any person when arresting without a warrant.[104] The DFDA also creates a specific offence where a person 'obstructs' a police member in the execution of his or her duties, or refuses to assist a police member where called upon to assist them in the performance of his or her duties.[105] The DFDA also recognizes the special position and skill of police members and places additional obligations on them, above those applicable to other investigating officers, for example in relation to the tape recording of oral admissions or confessions.[106]

12. Lastly, police members may also be required, after a trial resulting in a conviction and punishment of imprisonment or detention, to convey a convicted person to a prison or detention centre.[107]

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[102]DFDA s 101W.

[103]DFDA s 3(1).

[104]DFDA s 89(2)(d).

[105]DFDA s 31.

[106]DFDA s 101JA. See Chapter 4, Annex A at paragraphs 80 – 86 below.

[107]DFDA s 170.

Constable

13. **Definition.** A constable, for the purposes of the DFDA, is not a 'police member'. Rather, a constable is defined as a "member, or a special member, of the Australian Federal Police or a member of the police force of a State of Territory".[108]

14. **DFDA roles and powers.** Constables are not investigating officers. However, they may be involved in investigations, or execute certain powers relating to the investigation of service offences. The DFDA does not limit or restrict the actions that may be taken by a constable in accordance with a law of the Commonwealth (other than the DFDA), or State or Territory, for the purpose of investigating a service offence.[109] In addition to the powers potentially available to a constable under other legislation, a constable may, in accordance with the DFDA, arrest and detain a person who has escaped from custody, execute a warrant issued by an authorised officer and arrest a person (including entering any premises to do so – whereas an investigating officer is more limited),[110] or detain an arrested person at a civil detention facility in order to enable the person to be delivered to a police member or authorised officer.[111]

Authorised officer

15. **Definition.** An authorised officer is defined as "an officer, or an officer included in a class of officers, authorised, in writing, by the Chief of the Defence Force or a service chief for the purposes of the provision in which the expression occurs".[112]

16. In addition to the definition above, an authorised officer for the purposes of Part V of the DFDA includes a commanding officer.[113]

17. **Powers of an authorised officer.** The expression 'authorised officer' occurs in numerous contexts throughout the DFDA investigation provisions. Authorised officers play a key role in ensuring independence and oversight of many of the coercive powers exercised by an investigating officer. An authorised officer has, among others, the following powers relating to the investigation of service offences under the DFDA:

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[108]DFDA s 3(1).

[109]DFDA s 101ZC(b).

[110]DFDA s 91.

[111]DFDA s 94.

[112]DFDA s 3(1).

[113]DFDA s 86.

a. Administer oaths and affirmations. [114]Authorised officers play an important role in receiving attestations of truth and reliability of information presented by a person for the purposes of DFDA Parts V and VI

b. Warrant for arrest. An authorised officer may issue a warrant for the arrest of a person where he or she is satisfied that there are reasonable grounds for suspecting a person committed a service offence[115](see 'Arrest' below)

c. Receive arrested persons in to their custody. Where a person is detained, as an arrested person in a civil detention facility, an authorised officer may receive the person into their custody[116]

d. Search warrants. An authorised officer may issue a search warrant[117] (see 'Search and seizure' below)

e. Suspend member from duty. An authorised officer may suspend a member from duty where the member is charged with a service offence, civil court offence or an overseas offence, or where the member is under investigation on suspicion of having committed a service offence (see 'Suspension of member from duty on suspicion of offence' below), [118] and

f. Authorise the taking of evidence by an investigating officer. An investigating officer, who is an officer or warrant officer, may be authorised by an authorised officer to take, from a person in custody, evidence such as that listed above at paragraph 9(b) (see Treatment of, and Taking of Evidence From A Person in Custody' below).

Action to investigate a service offence under a law of the Commonwealth, a State or Territory

18. The provisions relating to the investigation of a service offence contained in DFDA Part VI , and outlined in this Annex, do not limit or restrict:

a. any action that may be taken in accordance with any other law of the Commonwealth or the law of a State or Territory for a purpose not connected with the investigation of a service offence, or

[114]DFDA s 86A and s101AA.

[115]DFDA s 90.

[116]DFDA s 94.

[117]DFDA s 101X.

[118]DFDA s 98.

b. any action that a constable,[119] or any other person who is not an investigating officer, may take, in accordance with any other law of the Commonwealth or the law of a State or Territory for the purpose investigating a service offence.

GENERAL ADVICE

19. An investigation is a "fact finding process to answer identified questions".[120] A DFDA investigation involves the collection and presentation of relevant material to a standard acceptable for use, if required, by competent ADF and civilian authorities. This section is designed to provide general advice to individuals involved in the investigation process, to identify common problems experienced in conducting investigations, and to offer practical tips to help ensure that DFDA investigations are undertaken lawfully.

20. **Understanding the role of an investigator.** The role of a person investigating a service offence is to ascertain all available relevant facts relating to the complaint and, at the conclusion of the fact finding process, make relevant recommendations.[121]

21. **Common investigation pitfalls.** Some of the common pitfalls affecting investigations include:

a. lack of planning

b. lack of clear investigation objectives

c. lack of objectivity by the investigator

d. reliance on unproven assumptions

e. failure to follow due process

f. failure to obtain all the relevant evidence which is available

g. failure to consider evidence

h. lack of resourcing

i. taking shortcuts, and

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[119] Read definition at paragraph 13 above.

[120] *The use of investigative planning in complex investigations,* David Bevan, Queensland Ombudsman (hereafter referenced as 'QLD Ombudsman guidance').

[121] NSW Ombudsman Investigation Manual.

j. failure to appropriately distinguish between an investigation and adjudication processes.

22. **Investigative practices.** To avoid the pitfalls outlined above, the following key investigative practices should be adopted by an investigating officer. These include:[122]

a. carrying out fair and impartial fact finding

b. the use of a systematic and comprehensive process

c. finding sufficient and reliable information to base opinions and recommendations on

d. making precise and detailed notes of facts and circumstances, and

e. accurately reporting outcomes.

23. **Recognise and avoid conflicts of interests.** It is important that investigations be conducted in an objective and impartial manner, without bias. This will help ensure that the investigation is not tainted as a result of any actual or perceived conflict of interest.

24. **Procedural fairness**[123]Procedural fairness focuses on ensuring that a fair and proper procedure is used when coming to a decision. Procedural fairness must be afforded throughout an investigation to individuals affected by the investigation. Providing procedural fairness benefits both the investigator as well as the person under investigation. Affording procedural fairness requires the investigating officer to:[124]

a. provide people with a reasonable opportunity to put forward their case

b. hear all parties and consider all submissions

c. make reasonable inquiries or investigations before making a decision

[122]Ibid.

[123] Refer to the Good Administrative Decision-Making Manual.

[124]NSW Ombudsman Investigation Manual.

d. act fairly and without bias, and

e. conduct the investigation without undue delay.

25. **Maintain confidentiality.** Confidentiality must be maintained throughout the investigation process. Maintaining confidentiality will: [125]

a. ensure minimal risk of harm to the parties involved

b. reduce the opportunity for evidence to become contaminated

c. encourage the participation of witnesses, and

d. protect the individual investigating from the possibility of an action in defamation.

26. **Maintain records.** An investigating officer should maintain accurate, comprehensive and accessible records throughout the investigation. Maintaining records will ensure the transparency and professionalism of the investigation. All documents should be stored in a manner that maintains their original condition.[126] Privacy and confidentiality requirements should also be met in relation to the safe keeping of those investigation records and the disclosure of information obtained during an investigation.

27. **Simplified rules of evidence do not affect investigation requirements.** The simplified rules of evidence which are now applicable to summary authority proceedings,[127] do not affect the strict requirements that apply to investigations. The summary authority must comply with the rules of natural justice,[128] so evidence obtained in contravention of, or in consequence of a contravention of, a provision of Part VI DFDA 'Investigation of Service Offences', may be excluded by a summary authority on the basis that to allow the evidence would prove to be manifestly unfair. For example, a search of private (not service) premises conducted without consent of the occupier, or questioning persons without first cautioning them, are practices that may undermine the admissibility of evidence, despite the simplified rules of evidence.

28. **Seek advice on complex issues.** Where complex issues arise, the investigating officer, including police members, should seek specialist advice from a

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[125] Ibid.

[126] Ibid.

[127] DFDA s 146A.

[128] DFDA s 146A(2)(a)(i).

senior qualified investigator (such as within JMPU / ADFIS or single service police members) or a Legal Officer within the affected chain of command.

PLANNING AN INVESTIGATION

29. Careful planning from the outset of an investigation will help the investigating officer to:

a. avoid difficulties later in an investigation

b. ensure accountability and transparency in the investigation, and

c. assist in establishing a sufficient record keeping process.

30. In order to achieve the above, it is beneficial for an investigating officer to plan out the investigation process. When planning an investigation, an individual should take into consideration the following steps:

a. **Identify the conduct or allegation.** An investigating officer must consider whether the incident, conduct or allegation referred to them may give rise to a suspicion that a service offence capable of a charge under the DFDA has been committed. As discussed in the Chapter 4 of this Manual, reviewing a Defence Incident Record (DIR) may assist in this regard. The discussion of military discipline jurisdiction in Chapter 2 will be relevant to determining whether the alleged offender is subject to the DFDA, and whether any applicable time limitations have expired, preventing DFDA action. Also, in terms of identifying potential service offences, an investigating officer should review Chapter 6. These steps are of fundamental importance, and are necessary to establish that a DFDA investigation is appropriate and can be conducted lawfully. Where the conduct or allegation does not fall within the jurisdiction of the DFDA, an investigating officer will be without power.

b. **Identify framework, powers and limitations applicable to the investigation.** An investigating officer should identify the source of their authority, their powers and the conditions and restrictions that apply to their investigation into the alleged conduct or event. This exercise will help to ensure that an investigating officer is acting within their authority under the DFDA. An investigating officer should consider the following:

    (1) **Applicable law and policies.** An investigating officer should familiarise themselves with the guidance, forms and processes in this Manual, which are all based on the DFDA. In addition, there are a number of Defence Instructions discussed in this Chapter that an investigating officer should be aware of, including the policies concerning military discipline jurisdiction, and liaison with Service police and JMPU /

ADFIS investigators.[129] Once an investigating officer understands the context in which they are acting, and is familiar with the laws applicable to their actions; they will be able to conduct a lawful investigation, consistent with command requirements and ADF policy.

(2) **Powers conferred on individuals involved in the investigation of service offences.** An investigating officer should recognise that the DFDA provides a range of powers to various individuals, capable of being exercised throughout the investigation of a service offence. These powers are discussed in detail in the remaining sections of this Annex. In order to plan an investigation, an investigating officer must realise that certain powers or investigative mechanisms are subject to specific pre-requisites, lead times and processes; for example, a requirement to gain authority from a CO or 'authorised officer' to conduct certain evidence taking procedures.

(3) **Guidance on investigations.** There are various sources of guidance that may relate to the investigation of a service offence, including this Manual, the SDMAN at chapter 4, Defence Instructions, other manuals or bulletins issued by JMPU / ADFIS or the Service Police organisations, as well as general public investigative guides such as those referenced in the footnotes to this Annex. Further assistance to investigating officers may be found via the website for the Joint Military Police Unit[130].

c. **Identify possible avenues of inquiry.** Having considered the alleged conduct, and become aware of the framework applicable to the investigation,[131] the next step in the planning process will involve an investigating officer considering what avenues of inquiry are relevant, and what investigation methods are available to pursue those inquiries. For example, an investigating officer should identify the existence of any crime scenes, witnesses, applicable orders or instructions, types of and potential locations of evidence. This will assist an investigating officer in determining whether any search warrants, medical examinations or summonses are required, for example, and will assist in prioritising certain investigative action.

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[129] DI ADMIN 45-2 *Incident reporting and management* and the IRMMAN; Read also Chapter 2 to this Manual.

[130] http://drnet/JCG/JMPU/Pages/JMPUHomepage.aspxJMPU / ADFIS.

[131] Note, it is not 'the investigating officer's investigation' – as this would connote a personal motive or interest. Rather, given the purpose of the DFDA, an investigating officer conducts an investigation for the purpose of maintaining and enforcing service discipline as a key element of command. DFDA investigations are conducted based on this much wider and command or operational based interest.

d. **Revisit the investigation plan often.** An investigation plan should be revisited often, and modified as a live document, for example where new avenues of inquiry become relevant, or where the availability of witnesses will affect the order of steps in the plan. By analysing and developing the plan as an investigation matures, an investigating officer will be able to map progress and track action undertaken, as well as demonstrate flexibility and responsiveness to emerging information. Also, the documentation of such action will help to ensure accountability and oversight of the investigation. As part of this process, an investigating officer should continually refer to the relevant legislative and policy framework, and the interests and instructions of commanders before undertaking each step in an investigation plan. This will ensure that the individual has the authority to undertake that next step, and doing so will not compromise the legitimacy of the investigation, or the disciplinary interests that the investigation is aimed at supporting, maintaining and enforcing.

31. Seek advice on complex issues. Where complex issues arise, an investigating officer (including police members) should seek specialist advice from a senior qualified investigator or a Legal Officer.

CONSIDERATIONS REGARDING THE EXERCISE OF SPECIFIC INVESTIGATIVE POWERS

Custody – lawful and deemed

32. In order to ensure that an investigating officer and, where relevant, an authorised officer, exercise their powers and discretions lawfully, it is crucial to understand that the status of a person subject to investigative action, as being either in custody (‘lawful custody’ or ‘deemed custody’), or not in custody, directly affects the scope of powers available to these key individuals. The distinction between circumstances where a person is in ‘lawful custody’, versus where a person is in ‘deemed custody’, will also affect the powers available to an investigating officer.

33. While the DFDA protects the rights and freedoms of persons with equal force whether they are in deemed or lawful custody, the main coercive powers relating to the gathering of evidence, such as taking prints (of fingers, hands, feet etc.), making recordings, or taking specimens from a charged member, depend primarily on the person being in ‘lawful custody’. This section will discuss these circumstances of custody in order to provide a basis for the commentary on the specific investigative actions or powers below.

34. **Custody.** A person is in custody if they are physically unable to leave a place; either because of physical restraint such as a locked door, or because it would be lawful for a person to use reasonable force to prevent a person from leaving the place. For the purposes of the DFDA, a person is in custody in respect of a service

offence if "the person is being detained as a person charged with a service offence or as a person arrested for, but not yet charged with, the service offence." [132]

35. **Lawful custody.** Where the DFDA uses the term 'lawful custody', it is taken to mean the circumstances of custody defined above. Therefore, where that term is used in this Annex, it is referring only to circumstances where a person is being detained as a person charged with a service offence, or where a person has been arrested for, but not yet charged with, the service offence. Lawful custody does not include circumstances of deemed custody.

36. **Deemed custody.** In addition to the two circumstances of 'lawful custody' above, the DFDA also deems a person to be in custody in respect of a particular alleged service offence where:[133]

a. a person is not in custody, but the person is in the company of an investigator where the investigator would not allow the person to leave, or where the investigator has given reasonable grounds for the person to believe that they could not leave, or

b. a person is in custody or undergoing detention or imprisonment in respect of another service offence, or is in custody for another reason, and an investigating officer believes that it is probable that the person committed the relevant service offence.

37. Deemed custody is not, necessarily, 'unlawful custody'. Rather, the effect of this provision is to extend to such persons some of the benefits, rights and protections of a person who is in 'lawful custody', without subjecting them to the greater range of investigative powers that operate in relation to persons in lawful custody.

38. Unless described as otherwise, the references in this Annex to 'custody' should be read as applying in the circumstances of 'deemed custody' in addition to the circumstances defined as 'lawful custody'.

39. **Rights of persons in custody.** The rights of a person in deemed custody are the same under the DFDA as that of a person in lawful custody. These rights include:

a. the right to be cautioned by an investigating officer prior to being asked to say or do anything[134]

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[132]DFDA ss 3(1) and 101(2).

[133]DFDA s 101(3).

[134]DFDA s 101C.

b. the right to access a friend, relative or legal practitioner, and have a legal practitioner present during questioning[135]

c. the right to access a list of Legal Officers in the relevant region, and to seek legal advice,[136] and

d. the right to be treated with humanity and with respect for human dignity while in custody.[137]

40. Each of these rights will be discussed in relation to the associated investigative action in the relevant section of this Annex below.

41. **Unlawful custody.** The protections and rights of individuals provided by the DFDA also apply to persons who are in 'unlawful custody', given that custody under the DFDA is defined to also include custody that was unlawfully commenced, or is being unlawfully continued.[138]

42. There is no power in the DFDA to physically detain a person pre-trial, without an arrest being affected. In addition, circumstances potentially giving rise to unlawful custody might include where:

a. a senior Defence member was arrested by a person junior in rank to them, who was not a service police member

b. a person is arrested for conduct that does not constitute an offence against the DFDA, or

c. a person was arrested where such a deprivation of liberty was not warranted given lack of emergency, lack of basis for a warrant etc.

43. While the custody itself may not be lawful, the person who is being detained is given the protections and rights that are given to persons who are in lawful or deemed custody.

[135]DFDA s 101E.

[136]DFDA s 101F.

[137]DFDA s 101H.

[138]DFDA s 101(4).

QUESTIONING OF PERSONS

Introduction

44. The purpose of an interview is to gather facts and sufficient information to confirm or deny the basis of a complaint.[139] This section examines the following specific topics:

a. questioning procedures

b. questioning a person in custody

c. questioning a person who is to be charged

d. questioning a person charged with a service offence

e. questioning persons charged with the same service offence (co-accused)

f. questioning minors, and

g. confessions and admissions.

General rules

45. An investigating officer may ask any person questions about an offence where the investigating officer believes that the person (whether a suspect or not) may be able to furnish information that may assist him or her in their investigation of the offence.[140]

46. **Right to silence in an 'interview'.** By asking a person questions in the course of investigating a service offence, the investigating officer is taken to be conducting an 'interview' for the purposes of the DFDA.[141] During an interview, a person has the right to silence, and when asked a question by an investigating officer, he or she is not obliged to answer.[142]

47. **Person in custody?** Depending on whether the person interviewed is 'in custody', the pre-requisite steps of self-identification, cautioning, and facilitating contact with a relative, friend or legal practitioner (all discussed below) will apply in addition to the person's general right to silence.

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[139]NSW Ombudsman Investigation Manual.

[140]DFDA s 101B.

[141]DFDA s 101(1).

[142]DFDA s 101B(2).

Questioning procedures

48. **Prior to the interview commencing.** Before the interview, it is important that the person being interviewed is clearly informed of the reason for the interview; however, at this stage it is not necessary to inform the person of all the relevant facts or allegations.[143]

49. **No privilege etc. afforded.** The investigating officer who is conducting the interview should avoid making any statements that could cause a person being interviewed to believe that he or she will obtain any privilege, concession or immunity as a result of participating in the interview.[144]

50. **Practical tips.** Some practical tips which could be used when interviewing a person include:

a. preparing a set of questions or lines of inquiry in advance to be used as a checklist

b. avoiding assumptions

c. being familiar, and complying with, any relevant legislation or approved procedures, and

d. gathering all relevant information, not just information that supports a complaint or allegation.

Questioning a person in custody

51. The DFDA imposes strict obligations on an investigating officer who is questioning a person in custody. The relative positions of the investigating officer and the person in custody, being one of power and freedom versus a position of confinement, make it important for there to be specific protections against abuse, or the receipt of tainted or weak evidence based on fear or coercion.

52. **Investigating officer to provide name and details prior to questioning.** An investigating officer must, when commencing an interview of a person in custody and before asking any questions or asking a person to do anything connected to the investigation of a service offence, inform the person being interviewed of the investigator's name and rank.[145]

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[143]NSW Ombudsman Investigation Manual.

[144]Ibid.

[145]DFDA s 101C(1).

53. **Caution requirements.** In addition, a person in custody must be cautioned prior to questioning. This should occur at, or shortly after, the time when a person comes into custody.[146] A formal caution is designed to safeguard and reinforce a person's right to silence. A failure to appropriately caution a person prior to questioning, when required, may affect the admissibility of any evidence obtained during the interview process in later DFDA proceedings.[147]

54. **Wording of caution.** The caution should be given as follows:[148]

'You do not have to say or do anything, but anything that you do say or do may be used in evidence.'

55. **Language of caution**. The caution must be given in, or translated into, a language with which the person being cautioned has reasonable fluency.[149]

56. **Record caution.** The caution does not need to be given in writing.[150] However, if practicable, an investigating officer is to tape record the giving of the caution and the person's response to the caution (if any).[151] If the caution, and any response, is not tape recorded, then in proceedings before a service tribunal, the prosecution must prove that it was not practicable to tape record the caution or response.[152]

57. **Communication with friend, relative or legal practitioner prior to questioning.** A person who is being, or will be, interviewed, and has been given a caution of the kind above, based on the fact that the person is in custody, is entitled to communicate with certain persons prior to being questioned or being asked to do anything by an investigating officer.[153] These particular rights and prerequisites are explained in detail below in the section titled 'Treatment of, and taking of evidence from persons in custody'.

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[146]DFDA s 101C(2).

[147]DFDA s 101ZB.

[148]DFDA s 101C(2).

[149]DFDA s 101C(2A).

[150]DFDA s 101C(2A).

[151]DFDA s 101C(2B).

[152]DFDA s 101C(2C).

[153]DFDA s 101E(1).

58. **Access to an interpreter.**[154] Where an investigating officer has reasonable grounds for believing that a person in custody is unable to communicate orally with reasonable fluency in the English language, due to an inadequate knowledge of the language or some physical disability, the investigating officer must not ask the person any questions or interview the person regarding the service offence unless:

a. a person who is competent to act as an interpreter is present during the questioning

b. the investigating officer questions the person in a language in which both the investigating officer and the person are able to communicate with reasonable fluency, or by any other means which the investigating officer and the person are able to communicate with reasonable proficiency, or

c. the investigating officer has reasonable grounds for believing that it is necessary to question the person otherwise than in accordance with this requirement, without delay, in order to avoid the danger of death or serious injury to any person or serious damage to property.

59. Where an interpreter is used, the person must be competent in the languages being used, and must be precise, impartial and timely in their interpretations.[155]

60. As the interview process may affect the person's rights and liberties (i.e. their right to silence or to contribute in a meaningful way to the investigation), the absence of an interpreter may result in unfairness. The person must be able to understand the questions asked by an investigating officer in order to be able to properly decide whether to answer the question or not and in what level of detail. In addition, if the person does not properly understand, or is unable to adequately communicate the answers, the integrity of the investigation process and the credibility of the evidence gained as a result of the interview may be undermined.

Questioning a person once a decision to charge or summons has been made

61. **Caution requirement.** When an investigating officer decides to charge or summons a person, or to recommend such action (to an authorised member or commander or supervisor), the investigating officer must not ask the person any questions, or request that the person do anything in connection with the investigation of the service offence, unless the investigating officer, or another investigating officer, cautions the person.[156]

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[154]DFDA s 101H(6).

[155]Refer to discussion of 'Interpreter' in Ross on Crime, 3rd edition, 2007, paragraph 643.

[156]DFDA s 101D.

62. This requirement applies regardless of whether the person has been cautioned previously in relation to the investigation of the relevant service offence. Where a person goes from simply being a person under interview, to being a suspect charged with an offence, it is important to remind the person of their right to remain silent and, in essence, to not incriminate themselves.

63. **Prescribed form of caution.** Where a decision to charge or summons a person has been made, the person who is to be charged or summonsed must receive a caution in the prescribed form set out in Form 5 'Caution to person charged or summoned' of the DFD Regulations.[157]

64. **Wording of caution.** The form of caution to be used by an investigating officer in these circumstances is:[158]

> *Pursuant to s 101D of the Defence Force Discipline Act 1982, you are cautioned that:*
>
> a. *you are not obliged to, but you may if you wish, answer any questions, or do anything, asked of you by an investigating officer, and anything said or done by you may be used in evidence*
>
> b. *you may communicate with a legal practitioner and have, as provided by Part VI of that Act, the assistance of a legal practitioner while you are being questioned, and*
>
> c. *you may, as provided in Part VI of that Act, communicate with a relative or friend.*

65. **Language of caution.** The caution must be given in, or translated into, a language in which the person being cautioned is able to communicate with reasonable fluency.[159]

66. **Record caution.** If practicable, the investigating officer is to tape record the giving of the caution, and the person's response to the caution (if any).[160] If the caution, and any response, is not tape recorded, then in any proceedings before a service tribunal, the prosecution must prove that it was not practicable to tape record the caution or response.[161]

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[157]DFD Regulation, s 43 and Form 5 in Schedule 1.

[158]DFDA s 101D(1)(a).

[159]DFDA s 101D(2).

[160]DFDA s 101D(3).

[161]DFDA s 101D(4).

Questioning of person charged with an offence

67. **Caution requirement.** Immediately after a person in custody is charged with a service offence,[162] the investigating officer in charge of an investigation is required to caution the charged member.[163] The caution is to be in a language in which the person is reasonably fluent, in writing, and if practicable, communicated orally.

68. **Wording of the caution.** The caution[164] should be given as follows:

> *'You are not obliged to, but you may if you wish, answer any questions, or do anything, asked of you by an investigating officer, and anything said or done by you may be used in evidence.'*

69. **Voluntary statements by charged member.** If a person who has been charged with an offence (either by way of arrest or summons) proposes to, or indicates a desire, preparedness or propensity to voluntarily make a statement, or commences to make a statement to an investigating officer, the investigating officer is required to caution the person before the person makes the statement, if practicable, otherwise as soon as practicable after the person begins to make the statement.[165]

70. **No further questioning.** After a person has been charged with an offence, an investigating officer is not permitted to ask the person any question relating to the alleged offence. However, an investigating officer may ask further questions: [166]

a. for the purpose of clearing up an ambiguity in an answer to a question asked before the person was charged or summoned, or in a statement made by the person, whether made before or after the person was charged or summoned, or

b. where it is necessary to assist the investigating officer in dealing with an emergency.

71. **Further questioning where new evidence is available to investigating officer.** The limitation above does not prevent an investigating officer from asking a person whether they wish to make a statement in relation to new evidence available to the investigating officer. However, consistent with the limitation above, the

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[162]Where a summons relating to a service offence has been served on a person, they are taken to have been charged with the service offence according to DFDA s 87(3).

[163]DFDA s 101S.

[164]DFDA s 101S.

[165]DFDA s 101T(4).

[166]DFDA s 101T(1).

investigating officer may not ask any further questions other than questions to clear up any ambiguities in any such statement made by the person regarding the new evidence. Before the investigating officer asks any question, the investigating officer is required either to caution the person, or to remind the person of the caution given when the person was charged (see paragraph 68 above).[167]

Questioning of persons charged with same offence – co-accused

72. **Written statements.** Where two or more persons have been charged with the same offence, making them co-accused, and one of the charged persons provides a written statement to an investigating officer relating to the offence, the investigating officer may provide a copy of the statement to each of the other charged persons. However, the investigating officer is not to read the statement to the other charged persons (unless they cannot read it or request that it be read), or invite them to comment on the statement.[168]

73. The term 'written statement', for the purposes of the relevant section of the DFDA, is defined to include a record in writing of an interview, which is in English or another language used by the charged person, and which has been acknowledged by the charged person to be a full and correct record of the interview.[169]

74. **Caution requirement.** If a charged person, who has been provided with a statement made by another charged person, voluntarily makes a statement to an investigating officer by way of comment on the other charged person's statement, the investigating officer is required to caution the person before the person makes the statement, if practicable. Otherwise, the charged person must be cautioned as soon as practicable after the person begins to make the statement.[170] This caution must inform the charged person that he or she is not obliged to make any statement, in the same form as that set out at paragraph 68 above.

Questioning minors

75. Where a minor (a person under the age of 18 years) is to be interviewed as a suspect in relation to a service offence, the requirements of MILPERSMAN, Part 7, Chapter 2—*Management and Administration of Defence Members Under 18 Years of Age* must be complied with.

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[167]DFDA ss 101T(2) and 101T(3).

[168]DFDA s 101U(1).

[169]DFDA ss 101U(4) and 101K(3).

[170]DFDA s 101U(3).

76. **'Interview representative'.**[171] MILPERSMAN states that a minor may only be interviewed under the DFDA in the presence of an 'interview representative'. The role of an interview representative is to provide a presence and support the minor during the interview. This role does not extend to providing legal advice, except in the case where the interview representative is a legal practitioner.

77. **Categories of 'interview representative'.** An interview representative can be:[172]

a. a parent of the minor, or a legal officer[173] acting for the minor

b. if a parent or legal officer is unavailable, an adult relative, or colleague of the minor who is acceptable to the minor, or

c. where no person described above is available, an independent adult who is acceptable to the minor.

78. Given the role of the interview representative is to provide support to the minor, it is important to emphasise that the 'minor' person has control over whether a particular adult is acceptable to them. Examples of interview representatives might include a divisional officer, an 'airman's friend', a case support officer, or section commander.

79. An interview representative must not interfere with lawful interview questioning. Doing so may result in the interview representative being excluded from the interview. Where the interview representative is excluded, the interview should be suspended until another interview representative is available.

80. Unless exceptional circumstances exist, such as where an interview is being conducted in an isolated location, the interview representative should be drawn from within the geographic proximity of the interview location. As such, he or she should be within two hours of the interview.

Confessions

81. **Definition.** A confession is 'a full acknowledgement of guilt made to another by a person suspected of committing a crime'.[174]

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[171]MILPERSMAN, Part 7, Chapter 2, paragraph 2.54.

[172]Ibid.

[173]A Legal Officer is an 'officer' who is a 'legal practitioner' – see DFDA s 3(1) definition.

[174]Definition of 'confession', Butterworth's Australian Legal Dictionary, Sydney, 1997, paragraph 245.

82. **A confession must be made voluntarily.** A confession is not admissible as evidence in service tribunal proceedings where it is made involuntarily.[175] A confession that is obtained by the use or threat of physical violence, or by the making of a promise, threat or other inducement likely to cause the person to make a confession that is untrue, is deemed not to be made voluntarily.[176]

83. **Confessions to police members – tape recording.** If a person who is being interviewed as a suspect (whether that person is under arrest or not), makes a confession or admission to a police member, the confession or admission is inadmissible as evidence against the person in proceedings for a service offence, unless the following procedure is followed:[177]

a. where reasonably practicable, the questioning of the person and anything said during that questioning was tape recorded,[178] or

b. if it was not reasonably practicable to tape record the confession or admission then:[179]

   (1) a record in writing of the things said by, or to the person, was made at the time of the interview, or as soon as practicable afterwards, either in English or in another language used by the person in the interview

   (2) the record was read to the person in the language used by him or her, as soon as practicable after the record was made, and a copy of the record was made available to the person

   (3) the person was given the opportunity to interrupt the reading of the record to draw attention to any errors or omissions in the record, and was given the opportunity at the end to draw attention to any errors in, or omissions from the record

   (4) the reading of the record, and anything said by the person during that reading, was tape recorded, and

   (5) before the record was read to the person, an explanation, in the form provided below, was given to the person.

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[175]NSW Ombudsman Investigation Manual.

[176]DFDA s 101J.

[177]DFDA s 101JA.

[178]DFDA s 101JA(1)(a). The definition of 'tape recording' is in DFDA s 101(1) and includes sound recording and video recording.

[179]DFDA s 101JA(1)(b).

84. Before reading the record to the person being interviewed, the following explanation should be given to him or her:[180]

> *"When you were interviewed by (insert name of police member), a written record was made of what you said, and what was said to you, in the interview. The record was made (insert either "at the time of the interview "or "as soon as practicable after the interview"). It is in (insert "English" or "the language you used at the interview"). You will be given a copy.*
>
> *I am now going to read it to you in (insert language), the language you used in the interview.*
>
> *You have the right to interrupt the reading at any time if you think there is something wrong with the record. At the end of the reading, you have the right to tell me about anything else you think is wrong with the record, as well as the things you mentioned during the reading.*
>
> *A tape recording will be made of the reading of the record and of everything you say, and everything said to you, during the reading and at the end. You will be given a copy of that tape recording and, if a transcript is made, a copy of that transcript."*

85. **Provision for copy of record of confession.** The person, or his or her legal representative, is entitled, without charge, to a copy of the recording of the confession or admission as follows:[181]

a. if the recording is a sound recording only, or a video recording only, the police member concerned must make the recording, or a copy of it, available to the person, or his or her legal representative, within 7 days after the making of the recording[182]

b. if both a sound recording and a video recording were made, the police member concerned must make the sound recording, or a copy of it, available to the person, or his or her legal representative, within 7 days after the making of the recording, and notify the person or his or her legal representative that an opportunity will be provided, on request, to view the video recording,[183] and

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[180]DFDA s 101JA(6).

[181]DFDA s 101JA(2).

[182]DFDA s 101JA(2)(a).

[183]DFDA s 101JA(2)(b).

c. if a transcript of the tape recording is prepared, the police member concerned must make a copy of the transcript available to the person, or his or her legal representative, within 7 days after the preparation of the transcript.[184]

86. **Exceptions to tape recording requirements.** The DFDA allows, in certain circumstances, for confessions or admissions made to a police member to be admissible as evidence, even where the tape recording requirements described above have not been complied with where:

a. **in the special circumstances of the case, admission of confessional evidence would not be contrary to the interests of justice.** Evidence of a confession or admission may still be admissible where the recording requirements have not been complied with, if the service tribunal is satisfied that, in the special circumstances of the case, admission of the evidence would not be contrary to the interests of justice.[185] This also applies in cases where there is insufficient evidence of compliance with the requirements; or

b. **it was not practicable to comply with the requirement to provide a copy of the recording.** A failure to provide the person, or his or her legal representative, with a copy of the recording of a confession or admission, or insufficient evidence of compliance, will not prevent the admissibility of the relevant confession or admission where a service tribunal is satisfied that it was not practicable to comply with the requirements.[186]

87. Confession to an investigating officer. Where a confession is made to an investigating officer, who is not a police member, of a 'serious service offence',[187] the following requirements apply:[188]

a. **Admissibility of confession.** The confession is not admissible against the person unless at least one of the following requirements is complied with:

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[184]DFDA s 101JA(2)(c).

[185]DFDA s 101JA(3).

[186]DFDA s 101JA(4).

[187]DFDA s 101(1) definition of 'serious service offence' – service offences punishable by a maximum punishment, or fixed punishment, of imprisonment for life or a period exceeding 6 months. This definition includes offences such as; 'Absence without leave' (DFDA s 24), 'Disobeying lawful command' (DFDA s 27) and 'Failing to comply with general order' (DFDA s 29), as well as other serious offences such as prescribed offences beyond the trial jurisdiction of a summary authority.

[188]DFDA s 101K(1).

(1) the interview is tape recorded by a multiple tape sound recorder, or if this is not available, a copy of the sound recording, is to be provided to the person as soon as practicable [189]

(2) at the time of the interview, or as soon as practicable thereafter, the interview is recorded in writing, in English, or in another language used by the person during the interview, and the record is acknowledged in the prescribed manner by the person to be a full and correct record. A copy of this record is to be provided to the person. Where the interview is in another language, the record is to be read to the person in that language before he or she acknowledges it,[190] or

(3) at the time of the interview, or as soon as practicable thereafter, the interview is recorded in writing, in either English, or in another language used by the person during the interview, of everything said in the interview. As soon as practicable, a record is to be read to the person, and a copy given to him or her. During the reading of the interview, the person is given an opportunity to interrupt the reading to deny or comment on the record. This process is recorded on a multiple tape sound recorder or conducted before an appropriate witness.[191]

b. **Reproduction of sound recordings.** Where sound recordings are made, the investigating officer is to hand one of the recordings to the person, inform the person that the other recording will be retained by the ADF, and may be used in evidence, and advise the person to make arrangements for the safe custody of his or her recording.[192] If the person requests, the investigating officer should provide reasonable facilities to the person or their legal practitioner to allow for a copy of the sound recording to be made.[193]

IDENTIFICATION OF A SUSPECT

88. **Identification evidence.** Identification evidence may be generated where a witness claims to have seen a suspect at a time, or perform an act, relevant to a service offence being investigated. An investigating officer may ask a witness to identify a suspect on the basis of their observations and recollection of events.

[189] DFDA s 101K(2).

[190] DFDA s 101K(3).

[191] DFDA s 101K(4).

[192] DFDA s 101K(5).

[193] DFDA s 101K(6).

However, identification evidence has frequently led to miscarriages of justice,[194] and therefore there are limits and conditions that apply to the generation of identification evidence. Also, the DFDA limits the methods and options available to an investigating officer. The topics covered in this section are:

a. identification parades

b. identification of a suspect who is in custody by means of photograph, and

c. identikit pictures.

Identification parades

89. An identification parade is used to determine whether a witness can identify a suspect, [195] from a group of persons, as a relevant person in relation to an offence or relevant act of an offence. Generally, an identification parade will involve a line-up of a sufficient number of similar looking people to enable a witness to attempt to identify a suspect, without assistance.[196]

90. **For an identification parade to be held, the suspect must agree to take part**. An investigating officer must not hold an identification parade unless the suspect has agreed to the parade, and, as a basis of that agreement, has been informed, in writing, in a language in which the suspect is reasonably fluent, that:[197]

a. the suspect may refuse to agree to the holding of the parade

b. if the suspect does not take part, evidence may be given in proceedings of an identification of the suspect by a witness viewing a photograph or series of photographs, or by a witness from having seen the suspect other than during the parade

c. if the suspect does take part, evidence may be given of:

(1) any identification of him or her by a witness

(2) any doubts expressed by the witness, and

(3) of any unfairness in conducting the parade, and

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[194] *Domican v R* (1992) 173 CLR 555, Butterworth's Australian Legal Dictionary, paragraph 565.

[195] DFDA s 101(1) definition of 'suspect'.

[196] Definition of 'identification parade', Butterworth's Australian Legal Dictionary, p. 565.

[197] DFDA s 101N(1).

d. the suspect may have a legal practitioner or other person of his or her choice present during the parade, if the legal practitioner or other person's presence can be obtained within a reasonable time.

91. An investigating officer must ask the suspect to acknowledge, by signing on a prescribed form (being DFD Regulations s 49, Form 8 in Schedule 1, *Acknowledgement of suspect in relation to the holding of an identification parade*), that the suspect has been informed of his or her rights (above). The importance of this acknowledgement is reinforced by the DFDA provision that creates a presumption that, if it becomes necessary for a service tribunal to determine whether the suspect had been informed of their rights, and the written acknowledgement has not been produced, then unless the contrary is proven, it is presumed that the person was not informed of their rights.[198]

92. **Conducting an identification parade.** In conducting an identification parade, the investigating officer responsible for the parade must:[199]

a. arrange and conduct the parade in a fair manner, so as to not unfairly prejudice the suspect

b. ensure that nothing in the arranging or conducting of the parade, suggests or is likely to suggest to the witness which of the persons taking part in the parade is the suspect

c. take at least one photograph (in colour if practicable), or a videotape recording, of the identification parade, and

d. record particulars of what happens during the parade, and (with their consent) the names, addresses and occupations of the persons (other than the suspect) taking part in the parade.

93. If the suspect requests, the investigating officer must provide the suspect with:[200]

a. a copy of a photograph taken in accordance with sub-paragraph 92(c) above

b. the ability to copy a videotape recording, if practicable, in sound, where one has been recorded of the identification parade, and

[198]DFDA s 101N(3).

[199]DFDA ss 101N(4) and 101N(5).

[200]DFDA s 101N(6).

c. a copy of the record of particulars of what happened during the identification parade (other than the names, etc. of persons included in the parade), made in accordance with sub-paragraph 92(d) above.

94. **No requirement for caution.** An investigating officer does not need to caution a person who has been asked and agreed to take part in an identification parade.[201]

Identification of a person in custody by photograph

95. Where a suspect is in custody in relation to a service offence, an investigating officer must not show a photograph of the person, or a series of photographs of persons including the suspect, to a witness for the purpose of ascertaining, or obtaining evidence of, the identity of a person in relation to an act or omission, unless:[202]

a. the suspect has refused to take part in an identification parade, or

b. the holding of an identification parade would be unfair to the suspect or impracticable in all the circumstances.

96. Where the above requirements are satisfied, and an investigating officer shows a photograph or series of photographs of persons to a witness, the investigating officer must not act unfairly towards a suspect, or suggest to the witness that a particular photograph is the photograph of a suspect, or of a person who is being sought by the police or by the Defence Force in relation to a civil court offence, overseas offence or a service offence.[203]

97. Also, an investigating officer must keep a record, noting each photograph or series of photographs that is shown to a witness. Where requested by a suspect, the investigating officer must provide the suspect with a copy of the record and give them a reasonable opportunity to inspect each photograph or the series of photographs shown to the witness.[204]

Identikit pictures

98. **What is an identikit picture?** A witness may be asked to assist an investigating officer in preparing an 'identikit picture' (also sometimes referred to as a

[201] DFDA ss 101C(3) and 101D(5).

[202] DFDA s 101M(1).

[203] DFDA s 101M(2)(a).

[204] DFDA ss 101M(2)(b) and 101M(2)(c).

'photofit picture') or a picture of a similar kind.[205] Such a picture is usually composed by an investigating officer, or possibly on behalf of an investigating officer by a person trained in the skill using either freehand sketching or computer generated imagery, from the description of a person's appearance given by a witness.[206]

99. **Compiling and using identikit pictures.** In generating an identikit picture, an investigating officer may show a witness a picture or series of pictures, in an attempt to assist the witness describe the features of the relevant person. If this process is adopted, and a suspect later comes into custody, the investigating officer in charge of the investigation must, unless it is impracticable, have the witness attend an identification parade in relation to the suspect.[207] Also, if the suspect is charged with the service offence, the investigating officer, upon application by the person, must provide details and particulars of the picture or series of pictures shown to a witness, and the comments (if any) of the witness concerning the pictures.[208]

100. **Limitation on use – suspect in custody.** Where a suspect is in custody, an investigating officer must not show an identikit picture, or picture of a similar kind, to a witness for the purpose of assisting the witness to describe the features of a relevant person in relation to a relevant act.[209]

101. **Exception to limitation – belief that another person is relevant to the service offence.** Where a suspect is in custody, and an investigating officer believes, on reasonable grounds, that a person who is not in custody is a relevant person in relation to the service offence, he or she may show a photograph of a person or a series of photographs of persons, to a witness to obtain evidence of the identity of the other person. Also, an investigating officer may use and show an identikit picture or a picture of a similar kind, to a witness in order to ascertain a description of the features of the other person.[210]

SUSPENSION OF MEMBER FROM DUTY ON SUSPICION OF OFFENCE

102. **Power to suspend.** An authorised officer may suspend a member of the Defence Force from duty where the authorised officer suspects, on reasonable

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[205]DFDA s 101M(4).

[206]Discussion of 'photofit' in Ross QC, *Ross on Crime*, 3rd edition, Thompson Lawbook Co., 2007, paragraph 859.

[207]DFDA s 101M(5).

[208]DFDA s 101M(6).

[209]DFDA s 101M(3).

[210]DFDA s 101M(7).

grounds, that the member has committed a service offence, and the authorised officer has ordered an investigation into the service offence.[211]

103. The term authorised officer includes a commanding officer,[212] and also includes those officers who receive the authority to make such decisions by virtue of an instrument of authorisation signed by their relevant Service Chief or the CDF.[213]

Decision to suspend a member under investigation

104. The decision to suspend a member suspected of having committed a service offence and is under investigation, is discretionary. Suspension is not an automatic consequence of being investigated. The power to suspend a member may be used when it is considered desirable, in all the circumstances, to suspend the member. That is, where it is desirable that the member should cease to attend his or her unit while the investigation is ongoing.

105. An authorised officer must afford procedural fairness to a member who is being considered for suspension. This may extend to involve a show cause process, however, in rare circumstances, due to operational imperatives, and in order to avoid frustrating the exercise of the suspension power or unduly detracting from the need to maintain or enforce discipline, a suspension decision may be imposed without affording such substantive procedural fairness.

106. The authorised officer should take into account factors, such as those listed below, in making their decision whether to suspend a member:

a. the need to maintain and enforce service discipline

b. the number, nature, circumstances and seriousness of the alleged offence(s)

c. the conduct of the member once identified as being a suspect

d. the possible impact of the member's continued presence in the workplace, particularly on the efficiency, morale and discipline of the member's unit and unit personnel

e. the possible impact on safety and security

f. the likelihood of the member repeating the alleged offence or committing other offences

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[211] DFDA s 98(2).

[212] Defined in DFDA ss 3(11) and 86.

[213] Instruments of Authorisation are updated from time to time, as required, and promulgated on the Defence Military Administrative and Discipline Law website on the Defence intranet.

g. available options to relocate or re-task the member and the practicality of these options

h. the impact on the member, including financially and on their physical and mental welfare and access to support services, and

i. any relevant information the member has provided to the decision maker.

107. **Written notice of suspension.** An authorised officer is required to provide written notice to a member suspended from duty.[214] To meet this requirement, an authorised officer should use Form B2 – *Suspension from duty of member suspected of having committed a service offence*.

108. **Service of notice of suspension**. The notice to suspend a member should be served in accordance with the requirements of the DFD Regulations.[215] The preferred means of service is to serve or have the notice served personally on the member. However, alternatively, a notice is taken to be served by:[216]

a. prepaying and posting the notice as a letter addressed to that person to the person's last known place of residence or business; or

b. leaving the notice at the last known place of residence or business of the person with someone aged no less than 16 years of age.

109. **Effect of suspension.** Where a member of the Defence Force is suspended from duty while under investigation for a service offence:

a. the member is not required to perform any duty of their office/appointment,[217] and

b. the member is entitled to remuneration for the duration of the period of suspension.[218]

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[214]DFDA s 98(2).

[215]DFDA s 98(6).

[216]DFD Regulations s 41.

[217]DFDA s 100(1).

[218]In contrast, where a member is suspended following being charged with a service offence, civil court offence, or overseas offence, or suspended following conviction of an offence of those descriptions, the member is not entitled to remuneration. See DFDA ss 100(2) and 100(3).

110. Despite being suspended, a CO remains responsible for the morale, safety and welfare of the suspended member in the same way that they are responsible for the other members within their command.[219]

111. **Suspension cease date.** The suspension of a member under investigation ceases on the completion of the investigation, unless the member is charged with a service offence.[220] Where the member is charged with a service offence, he or she may continue to be suspended (refer to Chapter 6: *Charging service offences for trial by Summary Authority* and Form B3 – *Suspension from duty of member charged with offence*).

ARREST

112. The right to liberty and freedom from arbitrary arrest has long been recognised and exists as a common law right. Therefore, the law prescribes specific limits that apply to circumstances where one person can arrest, and therefore restrict the liberty and freedom, of another person.

113. The term 'arrest' is defined as 'the seizure or touching of a person's body with a view to his or her restraint'.[221] The mere pronouncing of the words of arrest is not an arrest, unless the person sought to be arrested submits and goes with the arresting person.[222]

114. The purpose of arrest, at common law, is to bring an arrested person to the nearest police station so that they can be kept there under the protection of the officer in charge until released on bail or brought before a justice. In relation to a service offence, the purpose of arrest is to bring an arrested person to a CO, until the person is brought before a service tribunal. Arrest is permitted only in the strict circumstances contained in the DFDA. Unlike some Australian criminal law jurisdictions, arrest under the DFDA is not available for the purposes of questioning, or for the purposes of an investigation.

115. The DFDA establishes a presumption that the charge or order or summons process set out in DFDA s 87 prevails as the favoured and preferred mechanism of securing the attendance of a person before a service tribunal.[223] However, the power of arrest may be exercised either under a warrant issued by an authorised officer or,

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[219]Refer to discussion in Chapter 4, paragraphs 4.38-4.47.

[220]DFDA s 98(4).

[221]Definition of 'arrest' in Butterworth's Australian Legal Dictionary, Sydney, 1997.

[222]Watson, Blackmore & Hosking, *Criminal Law in New South Wales*, LBC, Sydney, 1996 at 2.33450.

[223]For example, before an arrest will be lawful, it must be determined that proceedings under s 87 against the person would not effectively achieve the purpose of arrest under warrant, or achieve a specifically listed purpose of arrest without a warrant.

in certain limited circumstances,[224] without warrant by a member of the Defence Force who has the power to arrest a person[225] (see below).

116. **DFDA powers of arrest.** Arrest under the DFDA may be carried out by:

a. a Defence member, or

b. a constable.[226]

117. Defence members and Defence civilians may be arrested in accordance with DFDA powers of arrest where they are suspected of having committed a service offence. However, each power of arrest varies in terms of its scope (who it applies to), the pre-requisite circumstances giving rise to the power of arrest, and who may carry out the actual arrest.

118. This section discusses the following DFDA powers of arrest:

a. arrest without warrant

b. arrest under warrant, and

c. general provisions relating to arrest, including:

(1) the power to enter premises

(2) the use of force in arrest, and

(3) avoiding delay in delivering an arrested person to a CO.

119. Matters relating to the custody and treatment of arrested persons, and their release from custody following arrest, are discussed from paragraph 152 of this Annex.

Arrest without warrant

120. The DFDA confers certain powers on members of the Defence Force to arrest, without warrant, either Defence members or Defence civilians. This power does not extend to arresting, without warrant, a person who is not a Defence member or Defence civilian.[227]

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[224]DFDA s 89(1).

[225]DFDA s 89(2).

[226]DFDA s 3(1) definition of 'constable' (being 'a member, or a special member, of the Australian Federal Police or a member of the police force of a State or Territory').

[227]DFDA s 89(4).

121. **Circumstances allowing arrest.** The power to arrest a Defence member or Defence civilian without warrant is strictly limited to circumstances where the person making the arrest believes, on reasonable grounds:[228]

a. that the other person has committed, or is committing a service offence

b. that the arrest of the other person is necessary for one, or more, of the following purposes:

(1) ensuring the person's appearance before a service tribunal

(2) preventing a continuation or repetition of the offence or the commission of a further service offence

(3) preventing the concealment, loss or destruction of evidence of, or relating to, the service offence, or

(4) for the purpose of preserving the safety or welfare of the person being arrested, and

c. that proceedings by way of ordering or summonsing the person to appear before a service tribunal under DFDA s 87 would not be effective to achieve the purpose(s) selected from the above at paragraph (b).

122. **Power of arrest without warrant.** The power of a member of the Defence Force to arrest another Defence member or a Defence civilian without a warrant will depend on:

a. the respective ranks of the Defence members;

b. the respective positions of the arresting member and the suspect;

c. the type of service offence concerned; and

d. whether the arresting member is a 'police member' (see paragraphs 10 – 12 above).

123. Specific powers of arrest are outlined below:

a. **Power of an officer.** An officer has the power to arrest:[229]

(1) a sailor, soldier or airman;

(2) any officer to whom he or she is a superior officer to; or

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[228]DFDA s 89(1).

[229]DFDA s 89(2)(a).

(3) a Defence civilian.

b. **Power of a Warrant Officer (WO) or a Non-Commissioned Officer (NCO).** A WO or NCO has the power to arrest a sailor, soldier or airman to whom he or she is a superior officer.[230]

c. **Power relating to ships or naval establishments**. A member of the regulating staff, the staff of the officer of the watch, or the staff of the officer of the day, of a ship or naval establishment, has the power to arrest any sailor.[231]

d. **Power of a police member or person exercising authority on behalf of service police officer.** A police member, or a person exercising lawful authority on behalf of a service police officer,[232] has the power to arrest any person, subject to the DFD Regulations.[233] The regulations limit this power such that a police member who is not an officer, and a person who is not an officer that is exercising authority on behalf of a service police officer, can only arrest an officer if the service offence is one of mutiny, or where the offence involves disorderly or violent behaviour. Also, where the person who is alleged to have committed a service offence is a Defence civilian, only an officer, a service police warrant officer, or a service police non-commissioned officer, or one of those persons exercising authority on behalf of a service police officer, will have a power of arrest over them.[234]

e. **Offences involving mutiny, or disorderly or violent behaviour.** Where the service offence is mutiny, or involves disorderly or violent behaviour, an officer has the power to arrest any officer, and a WO or a NCO has the power to arrest any other sailor, soldier or airman.[235]

124. These powers may be exercised personally, by ordering the alleged offender into arrest; or by giving an order to a third person to arrest the alleged offender.[236]

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[230]DFDA s 89(2)(b).

[231]DFDA s 89(2)(c).

[232]DFDA s 3(1) definition of 'service police officer' means an officer who is a member of a police corps or service, and includes a provost marshal and a deputy provost marshal.

[233]DFDA s 89(2)(d).

[234]DFD Regulations, s 42.

[235]DFDA s 89(2)(e).

[236]DFDA s 89(3).

125. **Power of a constable to arrest without warrant.** A person who is reasonably believed to be escaping from, or to have escaped from custody to which the person is still liable, may be arrested without warrant by a constable.[237]

Arrest under warrant

126. The DFDA allows an authorised officer to issue a warrant for the arrest of a person. The authorised officer must be satisfied that, on the information provided by oath or affirmation to him or her, that there are reasonable grounds for suspecting the service offence was committed by the person. Also, the authorised officer must believe that charging the person, by issuing a summons compelling appearance before a CO, or ordering the person to appear before a CO, would not be effective.[238]

127. The authorised officer must satisfy themselves that the intrusion being sought is justified – namely the arrest and custody of a charged member.

128. The issue of a warrant is not a 'judicial act'; rather it is an administrative act. The issuing officer, the 'authorised officer', must observe the principles of natural justice.

129. **Requirements before issuing warrant.** An authorised officer can issue a warrant only for the arrest of a person where: [239]

a. **An affidavit has been provided.** An authorised officer must be provided with an affidavit by an informant setting out the reasons for which the issue of the warrant is sought (including the reasons why it is believed that the person committed the offence and why proceeding by way of charge or summons would not be effective). Form B1 Affidavit should be used for this purpose

b. **A summons or order would not be effective**. The authorised officer must believe, based on reasonable grounds, that charging the person by issuing a summons or order under DFDA s 87 would not be effective

c. **Further information has been provided as required.** The authorised officer is to be provided with further sworn or affirmed information, as required, by an informant or some other person, regarding the reasons for which the warrant is sought, and

[237]DFDA s 89(5).

[238]DFDA s 90(1).

[239]DFDA ss 90(1) and 90(2).

d. **Reasonable grounds for a warrant exist.** The authorised officer must be satisfied, on reasonable grounds, to issue a warrant based on the information provided in the affidavit, and any further information.

130. Where an authorised officer issues a warrant for arrest, the authorised officer should indicate, in writing, on the affidavit, which of the reasons outlined in the affidavit or information he or she has relied upon in issuing the warrant.[240] The authorised officer should also include as notes any other reasons relied upon for issuing the warrant for arrest.[241]

131. **Form of warrant.** A warrant for arrest should specify the name of the person concerned, and the service offence that the person is alleged to have committed.[242] Further, the warrant should also include a date on which the warrant ceases to have effect.[243] To ensure compliance with legislative requirements, Form B7 *Warrant for arrest of person suspected of having committed service offence* should be used.

132. **Execution of warrant.** A warrant may be executed by a member of the Defence Force or a constable.[244] Further information is provided below regarding the use of force, and power to enter premises in executing a warrant for arrest issued under the DFDA.

General information

133. **Power of a constable to enter premises to arrest a person.** The DFDA provides a power for a constable to enter premises, by force if necessary, and to search those premises, for the purpose of arresting a person named in a warrant issued pursuant to the DFDA.[245]

134. A constable may enter premises at any time to arrest the person.[246] However, entering premises between the hours of 9pm and 6am is not authorised where the constable believes that it would be practicable to arrest the person, either on the premises, or at another location, at any other time.[247]

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[240]DFDA s 90(3).

[241]DFDA s 90(3).

[242]DFDA s 90(4).

[243]DFDA s 90(6).

[244]DFDA s 90(5).

[245]DFDA s 91(1).

[246]DFDA s 91(1).

[247]DFDA s 91(3).

135. The powers of a constable to enter premises described above (and the relevant limitations) also apply where a constable seeks to arrest a person, without a warrant, based on a belief, on reasonable grounds, that the person has escaped from custody.[248]

136. No such power has been provided under the DFDA for members of the Defence Force. That is, a member of the Defence Force does not have a right to forcibly enter premises to search for and arrest a person. Nevertheless, entry may occur with the consent of the owner or occupier.

137. The DFDA specifically limits other investigative powers by reference to 'service premises', for example s 101V for the purposes of 'search and seizure' powers in DFDA Division 6 of Part 5. However, such a limitation does not apply in relation to the power of entry given to a constable to arrest a person as discussed above.

138. **Use of force to arrest**. A constable or a member of the Defence Force may use force, as necessary, to arrest a person, or to prevent the escape of the person after they have been arrested. However, a person must not use more force, or treat the other person with greater indignity than is necessary to perform the arrest or prevent the escape.[249] In addition, a person:[250]

a. shall not, in performing an arrest, do anything likely to cause death or grievous bodily harm to the person being arrested, unless he or she believes, on reasonable grounds, that the doing of the act is necessary to protect life or prevent serious injury to any persons (including the person making the arrest), and

b. shall not, where a person is attempting to escape arrest by fleeing, do anything prohibited in paragraph (a) above, unless he or she has, if practicable, called the person to surrender, and he or she believes that the person cannot be apprehended by any other means.

Information to be provided to person arrested

139. **Reason for arrest.** A person is to be informed, at the time of their arrest, of the service offence for which he or she is being arrested.[251] This is not required where, due to the circumstances of the arrest, the arrested person ought to have known the offence; or the person makes it impracticable, because of his or her

[248]DFDA s 91(2).

[249]DFDA s 92(1).

[250]DFDA s 92(2).

[251]DFDA s 93(1).

actions, for the person making the arrest to inform him or her of the offence.[252] The person being arrested should be able to know what act or omission the arrest relates to. There is no need to cite the exact section or the precise elements of an offence. Rather, the particulars of the act or omission constituting the service offence should be notified to the person.

140. If the person making the arrest does so under the authority of a warrant and has the warrant in his or her possession, the person making the arrest should show it to the person being arrested. Otherwise, the person making the arrest should tell the person of the reason for the arrest, as discussed above, and ensure that the warrant is shown to him or her as soon as practicable.

141. **Caution.** A person who is arrested on suspicion of a service offence is taken to be in custody.[253] Therefore, the requirement to caution the arrested person arises (as discussed at paragraphs 51 onwards) in relation to questioning of persons in custody.[254] Also, the various rights and obligations discussed in the next section regarding the custody of persons prior to conviction will be relevant for consideration after the arrest of a person.

142. A formal caution is designed to safeguard and reinforce a person's right to silence. A failure to appropriately caution a person prior to questioning, where required, may affect the admissibility of any evidence obtained.[255] A caution may be given to a person at different stages of the investigative process and the caution given will depend upon the stage at which it is delivered.[256]

Dealing with an arrested person

143. **Delivery of an arrested person to a CO.** All reasonable steps should be taken to ensure the arrested person is delivered into the custody of a CO as soon as practicable after being arrested.[257] This does not mean delivery to the CO personally. The arrested person is to be brought to the person in the unit who is responsible to the CO for the custody of persons who have been arrested.[258] A key aspect of the

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[252]DFDA s 93(3).

[253]DFDA s 101(2).

[254]A person who is in custody should be cautioned as follows: 'You do not have to say or do anything, but anything that you do or say may be used in evidence.'

[255]DFDA s 101ZB.

[256]See paragraphs 54, 64 and 68 above.

[257]DFDA s 95(1).

[258]Explanatory Memorandum, Defence Force Discipline Bill 1982, paragraph 777.

handover of an arrested person is to ensure that they come within the authority of an officer who is authorised to take the action described below in paragraph 147.

144. **To ensure that there is no delay in dealing with an arrested person as required by DFDA s 95(2), it is highly advisable that COs have in place an authorisation in writing for an officer, or officers, who are able to perform the relevant functions following the arrest of a person under the DFDA.** It is very important that COs consider such an authorisation because if a decision is made to charge the arrested person, DFDA s 108A(1)(c) will prohibit a CO from trying a charge of a service offence if the CO was involved in the charging of the person.

145. Once the arrested person is delivered into the custody of a CO, the lawful authority of the arresting person ceases. That is, they have discharged their obligations. The CO becomes responsible for the treatment and custody of the arrested person. Custody is covered specifically in detail below. First though, the next few paragraphs explain the timelines and responsibilities of a CO after receiving an arrested person into their custody.

146. A person may be held in an ADF detention centre (a unit detention centre, an area detention centre, or a corrective detention centre),[259] or where there is no suitable place of detention controlled by the Defence Force, the person may be detained at a civil detention centre[260] (see 'Custody of Person Prior to Conviction' below).

147. **Avoidance of delay.** After the delivery of an arrested person into the custody of a CO, the CO, or an officer[261] authorised in writing by the CO,[262] must within 24 hours either:[263]

a. charge the person with a service offence, or

b. release the person from custody.

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[259]Refer to *Australian Defence Force Detention Manual (DETMAN)* and *DFD Regulations* Part 2 (specifically ss 7 and 9).

[260]DFDA s 94(2).

[261]Note that the person authorised by the CO **must** be an 'officer'. DFDA s 3(1) defines an 'officer' to be a person appointed as an officer of the Australian Navy (including Acting Sub-Lieutenant or Midshipman), the Australian Army or the Australian Air Force.

[262]Use Form H5—*Officer authorised to charge or release an arrested person or a person in custody*.

[263]DFDA s 95(2). It is important to note that in order to comply with the requirements of s 95(2) it is the CO, or the officer authorised in writing by the CO, who is responsible for either deciding to charge or release the arrested person. While the actual administrative processes involved can be carried out by other persons, the decision as to what action to take cannot be delegated to other persons.

148. **Charging an arrested person.** To ensure compliance with DFDA s 95(2)[264] where a decision is made to charge the arrested person with a service offence, the CO, or an officer authorised in writing by the CO, must:

a. be the person who makes the decision to charge the arrested person

b. administer a caution to the arrested person[265]

c. enter their details as the person preferring the charge(s) in the Form C2 – *Charge Sheet and Decision Record*

d. inform the arrested person of their details and authority to charge the arrested person

e. read the charge(s) out to the arrested person, and

f. provide a copy of the charge sheet to the arrested person.

149. Where a person is charged with a service offence, the CO is responsible for ensuring that the person is provided with a copy of the charge sheet.[266] This should usually occur at the time the arrested person is charged. A person who has been charged following arrest may be kept in custody. Where a charge has been laid, the CO should, as soon as practicable, commence proceedings to deal with the charge.[267] The charge should be dealt with by a summary authority that has jurisdiction to deal with the charge and the person[268] (refer to SDMAN and Chapter 8 of this Manual for guidance on summary authority proceedings).

150. At the time a person is charged with an offence under s 95(3) they are to be provided in writing:

a. a summary of the rights and obligations of the charged member substantially in accordance with Schedule 1 to the *Summary Authority Rules 2019* (SAR),

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[264]Note that the requirement for charging an arrested person under DFDA s 95(2) by the CO or an '**officer**' (emphasis added) authorised in writing by the CO, is different to the charging provisions under DFDA s 87 which permit an authorised '**member**' (emphasis added) to charge or summons a person. However, the requirement that there be 'reasonable grounds' for believing that a service offence has been committed also apply to the decision to charge under DFDA s 95(2)

[265]Read DFDA ss 101D(1) and 101D(2); DFD Regulations s 43 and Form 5 in Schedule 1

[266]DFDA s 95(3).

[267]DFDA s 95(4).

[268]A summary authority who was involved in the investigation of the service offence, the issuing of a warrant for the arrest of the person, or the charging of the person is disqualified from trying any charge against the person: *DFDA* s 108A.

b. the charges being preferred against them.

c. Related to those charges:

(1) the name of the offence and the section of the Act or regulations that refers to that offence,

(2) the elements of the alleged offence,

(3) any statutory defence available under the Ace or regulations in respect of the offence charged, and

d. the name and rank of the proposed prosecuting officer[269].

151. The charged member is also to be provided at the time of charging with a written summary of the case against them, recorded within the Form C2 – *Charge Sheet and Decision Record* which includes:

a. particulars of the charge,

b. an outline of the facts and circumstances relevant to the alleged conduct constituting the offence, and

c. a summary of the case the prosecuting officer is intending to rely upon to prove each element of the offence charged[270].

152. **Action to be taken within 48 hours of receiving a person into custody**. Where proceedings are not commenced to deal with the charge in relation to which the person is in custody within 48 hours of the person being delivered into the custody of the CO, the CO must report, in writing, to a superior authority[271] and the DMP, the reasons for the delay in commencing proceedings.[272]

153. **Person in custody for 8 days without charge being dealt with**. A further report must be made to a superior authority and the DMP by the CO where the person remains in the custody of the CO, and the charge has not been dealt with within 8 days.[273]

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[269] SAR r 6.

[270] SAR r 6.

[271] DFDA s 5A. Refer to the Instruments of Appointment of Superior Authorities by CDF and each Service Chief.

[272] DFDA s 95(4).

[273] DFDA s 95(5).

154. The referral of the charge from one summary authority to another is not sufficient to meet the requirements of this provision. The charge is deemed not to have been dealt with in those circumstances.[274] In other words, a summary authority must, as appropriate (depending on the dealing powers available to the summary authority),[275] either:

a. decide to try the charge

b. direct that the charge not be proceeded with, or

c. refer the charge to the DMP.

155. **Person in custody for 30 days without charge being dealt with.** If the charge has not been dealt with within 30 days, and the person continues to remain in the custody of the CO, the superior authority to whom the original report was provided, must notify the DMP and CDF, a Service Chief or an authorised officer,[276] that the charge has not been dealt with, and the reasons for the delay.[277] The CDF, Service Chief or authorised officer who receives that report must release the person, unless he or she is satisfied that it is proper that the person remain in custody.[278]

156. **Release from custody.** From the time a person comes into the custody of a CO, the CO, or an officer authorised in writing by the CO, may release the person from custody (the relevant forms and powers to impose conditions as part of a person's release are discussed below at paragraph 178). As with the decision to charge under DFDA s 95(2), the decision to release an arrested person must be that of the CO, or an officer authorised in writing by the CO, and their details must be entered on the appropriate Forms.

CUSTODY OF PERSONS PRIOR TO CONVICTION

General

157. **Custody**. 'Custody includes the elements of dominance and control of the liberty of a person, and the state of being guarded and watched to prevent escape.' Custody is generally defined as confinement; imprisonment; or being in the keeping or charge of officers of the law. [279]

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[274]DFDA s 95(6).

[275] Refer DFDA ss 109, 110 and 111.

[276]Refer to the Instruments of Authorisation by CDF and each Service Chief.

[277]DFDA s 95(8).

[278]DFDA s 95(9).

[279]Definition of 'custody' in Butterworth's Australian Legal Dictionary, Sydney, 1997.

158. In accordance with the DFDA, a person may be held in custody following arrest, pending charges being laid or following charges being laid prior to the hearing of a service offence. In these circumstances, the person can be thought of as a 'charged member'. Whereas, where a punishment of detention is imposed following a conviction, the person is referred to as a 'detainee', and is detained according to a warrant of commitment issued in accordance with DFDA s 170. The legal basis of the different circumstances where a person may exercise control over the liberty of another person, as either a charged member or a detainee, are quite distinct. This section deals with only the circumstances where a charged member is being held in custody in relation to a service offence, prior to conviction.

159. As stated in the previous section, the DFDA requires that where a member of the Defence Force arrests a person,[280] or receives a person into his or her custody, the person is to be delivered into the custody of a CO as soon as practicable.[281] Custody may occur at an ADF custodial facility (discussed below), or where no sufficient facility is available, a person may be detained in a civil detention centre (also discussed below).

160. A key reference, in addition to the DFDA, relating to the custody of charged members, is the *Australian Defence Force Detention Manual (DETMAN)*.

161. This section examines the custody of persons prior to conviction. The topics discussed in this section include:

a. forms relating to the administration of custody of persons under the DFDA

b. custodial facilities and detention facilities, and

c. the release of a person from custody, and the imposition of certain conditions or restrictions.

162. The rights of a person being held in custody, applicable standards of treatment, and specific powers and limitations relating to the gathering / taking of evidence from persons in custody (including by medical examination and compelling specimens) are dealt with in the next section.

Forms

163. In order to appropriately document the treatment of persons in custody (both in terms of recording the details of relevant decision makers, as well as recording the actions taken to detain or release persons, to retrieve or take evidence from persons in custody, and to also meet the requirements of the DFDA), there are a variety of

[280] Without warrant – only a defence member or defence civilian; Under a warrant – may be any person suspected of committing a service offence. Refer to previous section on Arrest.

[281] DFDA s 95(1).

forms for use within the military discipline system. The following forms relate to the custody of persons prior to a conviction for a service offence:

a. Form B8—*Certificate for detention of arrested person in civil detention facility*

b. Form B9—*Certificate for transfer of person in custody in civil detention facility*

c. Form B10—*Request to take evidence (prints, sound recording, handwriting, photographs)*

d. Form B11—*Approval to take evidence (prints, sound recording, handwriting, photographs)*

e. Form B12—*Notification to suspect of rights in relation to identification parade*

f. Form B13—*Consent to medical examination or taking of specimen*

g. Form B14—*Application for approval for medical examination or taking of specimen*

h. Form B15—*Approval of medical examination or taking of specimen*

i. Form B16—*Extension of period for destruction of medical report*

j. Form H1—*Appointment of officer in charge of detention centre*

k. Form H2—*Appointment of visiting officer*

l. Form H3—*Persons authorised to open correspondence in detention centre*

m. Form H4—*'Authorised person' in relation to custodial facility*

n. Form H4A— *'Authorised member' in relation to custodial facility*

o. Form H5—*Officer authorised to charge or release an arrested person or a person in custody*

p. Form H6—*Approval to give copy of prints or photographs of detainee to another person*, and

q. Form H7—*Suitability and category of detention centre.*

164. Some of these forms will be discussed in the next section regarding the rights and treatment of persons in custody, whereas others relate more closely to other parts of this Annex, such as the discussion above regarding the identification of suspects, or to other chapters of this Manual.

Custodial and detention facilities

165. In regards to the custody of a charged member, being a person who has been charged with a service offence, the DFDA uses the term 'custodial facility'. A custodial facility, for the purposes of DFDA s 95A, is a 'place or facility under the control of the Defence Force, at or in which, a person in custody on a charge is detained.'[282]

166. The DFDA also refers to 'detention centres'. The meaning of a detention centre, for the purposes of the DFDA, is 'a place, not being a prison, that is operated by the Defence Force as a place for the detention of persons on whom punishments of detention have been imposed'.[283] It does not relate to the custody of a charged member prior to conviction.

167. However, while the definitions of these two terms are important for consideration where the different terms are used in the DFDA, DETMAN extends the functions of ADF detention centres for use in holding charged members, as 'service persons under arrest' (SUA)[284](in the case of members of the Defence Force), as well as holding 'detainees'. Therefore, a custodial facility and a detention facility will, in most cases, be exactly the same physical premises, location or facility. The different status of a charged member and a detainee will, however, result in the application of different conditions, limitations, policies and authority to those individuals being held in the one facility. For example, a charged member will not be subject to the corrective programs designed for persons undergoing a punishment of detention.

168. **Types of detention centres**. An ADF detention centre will be operated as either:[285]

a. a unit detention centre

b. an area detention centre, or

c. a corrective detention centre.

169. Unit and area detention centres are local or regional facilities operated to cater for the short term custody or detention, generally of ADF members. The CO of the unit that operates a unit detention centre is the CO of the unit detention centre.

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[282]DFDA s 95A(4).

[283]DFDA s 3(1).

[284] Refer to paragraph 4(d) of DI(G) PERS 45-3 for the definition of a 'Service person Under Arrest' (SUA).

[285]DFD Regulations (ss 7 and 9) and DETMAN.

The local area commander or establishment commander operates an area detention centre.

170. **Suitability and category of detention centres.** A detention centre may be determined in writing, by the CDF, a Service Chief, or an authorised officer to be of a standard that is suitable for detaining a detainee for a specified period and being conducted as a specified category of detention centre (Refer to Form H7 – *Suitability and category of detention centre*).[286] Prior to the DFD Regulations, categories of detention centres were established by declaration.

171. The differences between the three types of detention facilities, as they relate to charged members or SUA, are the periods of time for which a person may be held in each facility according to DETMAN:

a. 7 days maximum in a unit detention centre

b. 14 days maximum in an area detention facility, and

c. 2 years in a Defence Force corrective detention centre.

172. For specific detail regarding the administration and conduct of ADF detention centres, including the functions of various officers or appointments affecting the day-to-day management of persons being held in those facilities, refer to —DETMAN.[287] The key point to note is where a person is held in custody following arrest, or as a person charged with a service offence, the person may be held in an ADF detention centre as a charged member, albeit not being subject to the corrective or remedial regime in place for detainees being held in those centres.

Detention in a civil detention facility

173. A person may be detained at a civil detention facility where:

a. a person is arrested under the DFDA by a constable, for such time as is reasonably necessary to enable the arrested person to be delivered into the custody of a police member or an authorised officer, or[288]

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[286]DFD Regulations ss 7 and 9. A detention centre is determined suitable to be operated as a unit, area or corrective detention centre depending on the period of time for which a person may be held in that facility. Under the previous DFD regulations 1985 (now repealed), categories of detention centres were established by declaration. A declaration is no longer required under the DFD Regulation. Past declarations by each of the Deputy Service Chiefs (as authorised officers) are provided in the Defence Force Discipline Instruments register. Under transitional arrangements, past declarations remain extant under the DFD Regulations until they are superseded.

[287]Single service instructions relating to the operation of detention centres are consolidated into DETMAN with effect 2020.

[288]DFDA s 94(1).

b. where a person has been arrested under the DFDA and is in the custody of a member of the Defence Force, and a CO or the senior member of the escort of the arrested person certifies, in writing, that it is necessary for the arrested person to be detained and that no suitable Defence premises for the person's custody are available.[289] Form B8 above should be used for this purpose.

174. A civil detention facility means a police station or any other premises in which persons in custody awaiting trial in a civil court may lawfully be detained.[290]

175. The police member or authorised officer who receives a person who was arrested under the DFDA from a constable, as noted above in sub-paragraph 173(a), is under the same obligations discussed above regarding avoiding delay in delivering the person to a CO (within 24 hours) so that the person can either be charged and have discipline proceedings commenced to deal with the charge (within 48 hours), or released from custody. Also, the delivery of the person to a CO ensures that they become subject to the various reporting obligations relating to their continued custody after arrest and charge.

176. **Time limit for civil detention.** A person who has been arrested under the DFDA may only be held in a civil detention facility for a period of 7 days.[291]

Release from custody

177. A person arrested under the DFDA may be released from custody at any time by the CO or an officer authorised, in writing, by the CO who has custody of the person (Refer to Form H5 – *Officer authorised to charge or release an arrested person or a person in custody*; and Form B9 – *Certificate for transfer of person in custody in civil detention facility*).[292]

178. **Conditions and/or restrictions on release.** Where a person has been charged with a service offence, the officer releasing the person from custody may impose such conditions and/or restrictions as the officer considers necessary, being conditions or restrictions of a kind authorised by the CDF or a Service Chief.[293] The

[289]DFDA s 94(2).

[290]DFDA s 3(1).

[291]DFDA s 94(2).

[292]DFDA s 95(2).

[293]DFDA s 97(1).

relevant extant CDF instrument permitted the following conditions and restrictions that may be imposed on a person being released from custody:[294]

a. the person shall not leave the unit, establishment or ship without the permission of the CO or a member of the Defence Force authorised by the CO

b. the person shall not enter such areas (if any) of the unit, establishment or ship as the CO specifies

c. the person shall, if required to do so by the CO or a member of the Defence Force authorised by the CO, report at specified places at specified times, and/or

d. the person shall not communicate, either directly or indirectly, or associate, with such person or persons as may be specified by the CO or a member of the Defence Force authorised by the CO.

179. An officer who imposes a condition or restriction may also vary or revoke any conditions or restrictions imposed.[295]

180. A condition or restriction ceases to have effect if:

a. a summary authority, or the DMP, directs that the charge not be proceeded with

b. the person is acquitted or convicted of the charge, or

c. the charge is dismissed.[296]

181. Where a person charged with an offence is released from custody, the person may not be taken into custody again in relation to the relevant service offence, unless the person breaches a condition or restriction imposed on him or her, or the person is arrested for another service offence.[297]

182. **Unlawful release.** A defence member is guilty of an offence under the DFDA where he or she intentionally allows a person to escape custody, releases the

[294]Refer to CDF Instrument of Authorisation – *Conditions and restrictions on persons charged with service offences and release from custody*, dated 28 June 2016.

[295]DFDA s 97(2).

[296]DFDA s 97(5).

[297]DFDA s 97(4).

person without authority, or intentionally facilitates the escape of the person from custody.[298]

TREATMENT OF, AND TAKING OF EVIDENCE FROM, A PERSON IN CUSTODY

Before questioning

183. **Cautioned and informed of rights**. When a person is in custody in respect of a service offence, before an investigating officer asks the person any questions, or asks the person to do anything, in relation to the offence, an investigating officer is required to:[299]

a. tell the person the investigating officer's name and rank;

b. caution the person that the person is not obliged to answer any questions or to do anything asked of the person, and that anything said or done by the person may be used in evidence; and

c. inform the person that the person may consult a legal practitioner, or communicate with a relative or friend, if the person wishes to do so (see further detail below).

184. **Access to a friend, relative or legal practitioner.** Subject to the exceptions below in paragraph 196, before starting questioning, an investigating officer must inform the person to be interviewed that he or she may communicate or attempt to communicate with a friend or relative in order to inform that person of his or her whereabouts, and a legal practitioner.[300]

185. A legal practitioner is a person who is enrolled as a barrister, a solicitor, or barrister and solicitor or a legal practitioner of a civil court.[301] This definition includes civilian lawyers as well as Legal Officers (being officers of the ADF who are legal practitioners). A person is entitled to communicate, or attempt to communicate, with a legal practitioner of the person's choice. Where this option is chosen, an investigating officer must arrange, or attempt to arrange, for that legal practitioner to be present during questioning.[302]

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[298]DFDA s 54.

[299]DFDA ss 101C(1) and 101C(2).

[300]DFDA s 101E(1).

[301]DFDA s 3(1) definition of 'legal practitioner'.

[302]DFDA ss 101E(1)(a) and 101E(1)(b).

186. Access to a legal practitioner is based on the basic right of a person to turn to their lawyer for advice, and serves to help a person know what they can do under the law, what is required or forbidden, and where they may be at risk. Access to legal advice is part of a properly functioning legal system, and it protects the rights of persons who are subject to or participating in the investigation of a service offence.

187. **Defer questioning while attempting communication.** Where the person who is to be interviewed chooses to communicate with a friend, relative, or legal practitioner, the investigating officer must defer the questioning, for a reasonable time, to allow the person to, or attempt to, make that communication. Where the person arranges for a legal practitioner to be present, the investigating officer must defer the questioning, for a reasonable time, to allow the legal practitioner to attend the questioning.[303]

188. These requirements to defer questioning require the investigating officer to defer the questioning only for a 'reasonable time'. An investigating officer is not obliged or required to delay the investigation for an unreasonable amount of time. The question of what period of time is 'reasonable' in order to make contact, or attempt to make contact, will depend on the facts of the case, such as the known or predicted location of the friend, relative or legal practitioner, or their ability to receive phone or other forms of communication (such as fax or e-mail) that are available to the investigating officer at the place of the interview or in the circumstances. The reasonable period of time allowed for the attendance of a legal practitioner at the relevant place in order to be present during questioning, will depend on things such as the location and proximity of the legal practitioner, and the availability of the legal practitioner (in relation to pre-existing obligations and appointments). These considerations are not intended to be exhaustive, and are intended only to provide assistance in interpreting and applying this requirement.

189. **Facilities for communication.** If a person wishes to communicate with a friend, relative or legal practitioner, the investigating officer must: [304]

a. as soon as practicable, give the person reasonable facilities to enable the person to communicate; and

b. where communicating with a legal practitioner, the investigating officer must allow the legal practitioner, or the clerk of the legal practitioner, to communicate with the person in circumstances in which, as far as practicable, the communication will not be overheard.

190. What is reasonable will be determined by reference to what facilities are available at the place and at the time that the communication is to be made, and any

[303]DFDA s 101E(1).

[304]DFDA s 101E(2).

limitations affecting access to those facilities, or applicable security and safety considerations.

191. The requirement that the communications are, as far as is practicable, conducted in private reflects the privileged nature of communications between a client and their lawyer.

192. **Legal practitioner present during questioning.** Where a person arranges for a legal practitioner to be present during questioning, the investigating officer must:[305]

a. allow the person to consult with the legal practitioner in private, and provide reasonable facilities for that consultation, and

b. allow the legal practitioner to be present during the questioning, and to give advice to the person, but only while the legal practitioner does not unreasonably interfere with the questioning.

193. **List of Legal Officers.** Given that a person in custody may not know a legal practitioner (whether a civilian lawyer or ADF legal officer), or may not be able to communicate with a legal practitioner of their choice, the DFDA requires that the person be given access to a list of legal officers (ADF officers who are legal practitioners) maintained in relation to the place of their custody.[306] This list is maintained by the DDCS on behalf of the CDF, and contains the names of legal officers (both permanent and reserve ADF officers) who have expressed a willingness to assist persons in custody. Predominately, these officers will be located in the same area, at or in the vicinity of the 'prescribed place'. A prescribed place is a suburb or locality, listed in the DFD Regulations by State or Territory, for the purpose of DFDA s 101F.[307]

194. Generally, each ADF detention centre, military or service police station and legal office would have access to the list of legal officers relevant to 'prescribed places'. An investigating officer should ensure that they have access to the list relevant to their location before commencing to question a person who is in custody in relation to a service offence.

195. Information regarding the list of Legal Officers can be sought from the DDCS DPN website.

196. **Exception to right to communicate with a friend, relative or legal practitioner**. The rights and procedures relating to a person's access to friends,

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[305]DFDA s 101E(3).

[306]DFDA s 101F.

[307]Refer DFDA s 101F(1), DFD Regulations s 44 and Schedule 2.

relatives or legal practitioners of the person's choice described above, do not apply where the investigating officer has reasonable grounds for believing that: [308]

a. compliance with the requirements is likely to result in an accomplice of the person taking steps to avoid apprehension;

b. compliance with the requirements is likely to result in the concealment, fabrication or destruction of evidence, or the intimidation of a witness; or

c. if the requirement relates to the deferral of questioning, the questioning is so urgent, having regard to the safety of other people, that it should not be delayed by compliance with the requirement.

197. **Preventing access to a legal practitioner.** If denying access on the grounds above results in preventing or delaying the person communicating with a legal practitioner of his or her choice, or preventing or delaying a legal practitioner of the person's choice attending at any questioning, the investigating officer must offer the services of another legal practitioner. Where the person accepts the offer of another legal practitioner the investigating officer must make necessary arrangements for communication between the person and the legal practitioner, and where requested, the attendance of the legal practitioner at the questioning.[309]

198. An investigating officer should use the list of legal officers maintained by DDCS at first instance, or may otherwise contact the legal officer with the responsibility for the unit or location where the custody and questioning is occurring, to obtain contact details of an alternative legal practitioner for the person to communicate with.

199. If a ground in paragraph 196(a) – (c) above relates to a thing done by or in relation to a legal practitioner, the exception to the requirement to allow a person to communicate with the legal practitioner of their choice only applies in exceptional circumstances, and the requirement must be complied with as soon as the exceptional circumstances cease to exist.[310] In addition, the exception to a person's right to communicate with a legal practitioner of the person's choice, and to arrange their attendance at any questioning, will only apply if an appropriate officer has authorised the application of the ground in paragraph 196(a) – (c) and has made a

[308] DFDA s 101G(1).

[309] DFDA s 101G (2).

[310] DFDA s 101G(3).

record of the investigating officer's belief.[311] An authorised officer is an officer of the rank of LTCOL(E) or higher of the same Service as the person being questioned.[312]

> *For example: A belief that an Army Private's contact with a legal practitioner is likely to result in an accomplice of the person taking steps to avoid apprehension will only justify non-compliance with the right of a person to contact a legal practitioner of their choice in exceptional circumstance. Also, a LTCOL or higher ranked officer must have authorised the application of the claimed belief in the circumstances. In such circumstances, the investigating officer must offer the services of another practitioner, and when the ground or circumstances no longer exist, must allow the person to communicate with the legal practitioner of their choice.*

Treatment of person in custody

200. **Humanity and dignity.** A person in custody is to be treated with humanity and dignity,[313] and not be subject to cruel, inhuman or degrading treatment.

201. Conduct causing injury or danger to life, limb or health (bodily or mental), or giving rise to a reasonable apprehension or fear of such injury or danger, may constitute cruelty.[314]

202. In addition to such conduct being a breach of the required standards of treatment of persons in custody under the DFDA, that conduct may also result in a member being liable to be charged with a service offence, or a civil court offence, as well as potentially being liable to pay monetary damages related to the mistreatment of a person in custody.

203. **Access to medical treatment.** Where a person in custody asks a member of the Defence Force, who is responsible for their custody, for medical treatment for an illness or injury, or the member themselves has reasonable grounds for believing that the person wishes or requires such medical treatment, the member is required to immediately take reasonable action, as is necessary, to have the medical treatment provided.[315]

204. **Access to facilities and refreshments.** A person in custody is to be provided with reasonable refreshments and reasonable access to toilet facilities and,

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[311]DFDA s 101G(4).

[312]DFDA s 101G(5).

[313]DFDA s 101H(1).

[314]Definition of 'cruelty' in Butterworths Australian Legal Dictionary, 2007.

[315]DFDA s 101H(3).

before being brought before a service tribunal, is to be provided with facilities to wash or shower, and the opportunity to obtain, and change into, other clothes.[316]

205. **Given the same rights as a 'detainee'.** A person who is being held in custody prior to the hearing of a service offence should be afforded the same rights afforded to a detainee under the DFDA. While not being subject to the same limitations or program of rehabilitation or correction, the person should, for example, be provided sufficient clean accommodation and meals to the same standard as other ADF members who are under detention are entitled, and also be given an opportunity to exercise and to read newspapers.[317]

Taking evidence (prints, voice recordings, handwriting or photographs) from a person in lawful custody

206. Power to take evidence. Where a person is in lawful custody in respect of a service offence, an investigating officer, who is an officer or warrant officer, may take, or cause to be taken:

a. prints of the person's:

(1) hands

(2) fingers

(3) feet, or

(4) toes

b. recordings of the person's voice

c. samples of the person's handwriting, or

d. photographs of the person.[318]

207. Power only available if investigating officer is an officer or warrant officer. The power to take evidence under DFDA s 101L from a person in lawful custody may only be exercised by an investigating officer who is an officer or warrant officer.[319]

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[316]DFDA ss 101H(4) and 101H(5).

[317]DFD Regulations ss 11 to 16.

[318]DFDA s 101L(1).

[319]DFDA s 101L(1).

208. An 'officer' for the purposes of the DFDA is a defence member appointed as an officer in the Royal Australian Navy (including the Australian Navy rank of acting sub-lieutenant or midshipman), Australian Army, or Royal Australian Air Force (including officer cadets of both the Army and Air Force).[320]

209. A 'warrant officer' is defined as a sailor, soldier or airman who holds the rank of warrant officer.[321]

210. **Reasons for taking evidence**. An investigating officer may only take, or cause to be taken, the evidence at paragraph 206 where he or she:[322]

a. reasonably believes that it is necessary for the purpose of:

(1) establishing who the person is

(2) identifying the person as the offender, or

(3) providing evidence relating to the offence

b. reasonably believes that the person has committed another service offence, and the evidence is to be taken for the purpose of identifying the person as the offender or providing evidence relating to that other offence, or

c. has the written consent of the person.

211. The limited grounds for justifying the taking of such evidence do not prevent or exclude an investigating officer from causing a photograph to be taken of the person who is in lawful custody where the person has agreed to an identification parade.[323]

212. In addition, the making of sound recordings of an oral confession made to a police member by a person, as required by DFDA s 101K, is still permitted.[324]

213. **Application to take evidence without consent.** In circumstances where the person does not voluntarily consent to the taking of the evidence sought by an investigating officer, an investigating officer may make an application to an authorised officer in person, or where this is not practicable, by telephone, for authority to take, or cause to be taken, by force if necessary, the evidence listed

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[320]DFDA s 3(1).

[321]DFDA s 3(1).

[322]DFDA s 101L(1).

[323]DFDA ss 101L(2) and 101N(5). Also refer to discussion of Identification parades in this Annex.

[324]DFDA s 101L(2). Also refer to discussion of 'Confession to a police member' in this Annex.

above. Form B10 *Request to take evidence (prints, sound recording, handwriting, photographs)* is used for this purpose.[325] The application may relate to:

a. a person who is in lawful custody in respect of a service offence; or

b. a person who has been charged (or summoned) pursuant to DFDA s 87.

214. **Reasonable force**. If authorised, an investigating officer may use such reasonable force as is necessary in taking the evidence listed at paragraph 206.[326]

215. **Approval to take evidence by authorised officer**. Given that the execution of the power to take evidence will result in the interference with or an invasion of a person's body, compelling them to do something, or resulting in the recording of their voice without their consent, the role of an authorised officer in independently considering the application is crucial. The authorised officer must independently consider the grounds (the facts and circumstances alleged in the application, and the credibility of that information) of the application relating to the belief of the investigating officer. The authorised officer plays an important check and balancing role in the process of providing lawful power to an investigating officer to take the requested evidence. The authorised officer does not merely rubber stamp the application, but must consider the information provided to them, and where necessary, request additional information before determining that it is proper in the circumstances to approve the taking of the evidence.

216. An authorised officer may approve the application, in writing, if the authorised officer thinks that it is proper in all the circumstances to do so. Form B11 *Approval to take evidence (prints, sound recording, handwriting, photographs)* is provided for use by an authorised officer. If approval is given by telephone, the authorised officer is required to cause the instrument of approval to be sent to the investigating officer,[327] to be kept on the investigation file. The authorised taking of the relevant evidence may be conducted despite the investigating officer not having received the hard copy of the form.

Medical examination or taking of specimens from person in lawful custody

217. **Power to arrange medical examination or taking of a specimen**. An investigating officer may arrange for a medical practitioner to examine, or to take a

[325]DFDA s 101L(3).

[326]DFDA s 101L(6).

[327]DFDA ss 101L(4) and 101L(5).

specimen from, a person in lawful custody. However, there are specific requirements and limitations that apply to this investigative action:[328]

a. **Belief of the investigating officer.** An investigating officer may only arrange for such action where the investigating officer believes, on reasonable grounds, that the examination of the person or analysis of the specimen is likely to provide evidence of, or related to, the service offence in relation to which the person is in custody

b. **Only a medical practitioner may examine or take the specimen**. A medical practitioner is defined as 'a person who is registered or licensed as a medical practitioner under a law of a State or Territory that provides for the registration or licensing of medical practitioners'.[329] Where the investigative action is taking place in relation to a person who is in custody outside Australia, the reference to medical practitioner includes a reference to a person who is registered or licensed as a medical practitioner under a law of that place or of a law of a prescribed place, that provides for the registration or licensing of medical practitioners.[330]

218. **Purpose of the examination or specimen must relate to 'the' service offence.** This power to arrange a medical examination or the taking of a specimen only exists for the purpose of providing evidence of, or in relation to, the specific service offence for which the person is in lawful custody. Unlike other investigative powers, this source of authority does not relate to providing evidence of another, different service offence:[331]

a. **Person consents, in writing**. One source of authority for an investigating officer to make the required arrangements for a medical examination or taking of a specimen is where the person consents to the examination or taking of the specimen.[332] A written record of the person's consent must be made (see paragraphs 219-220 below), and

b. **Action is approved by an authorised officer.** An alternative source of authority for an investigating officer to make the required arrangements is where an authorised officer approves the action.[333] Where approval of an

[328]DFDA ss 101Q(1) and 101Q(2).

[329]DFDA s 3(1).

[330]DFDA s 101Q(15). There are no 'prescribed places' in relation to s 101Q(15) at the time of publication.

[331]DFDA ss 101Q(1) and 101Q(2).

[332]DFDA s 101Q(1)(a).

[333]DFDA s 101Q(1)(b).

authorised officer is required, in the absence of the person's consent to the examination or taking of the specimen, the resulting power and scope of the authority given to the medical practitioner is specifically limited (as discussed below from paragraph 221).

219. **Medical examination or obtaining a specimen by consent**. Where an investigating officer seeks the consent of a person, the investigating officer must explain the purpose and conduct of the medical examination, or the taking of and analysis of the specimen. The investigating officer must explain to the person that they have the right to refuse to give their consent, and that an alternative source of authority for such action may be obtained if an authorised officer approves the action.

220. In order for the consent of the person to properly and lawfully justify the medical examination or specimen, the consent must be informed, and it must be given voluntarily. A person's consent should be recorded in Form B13 *Consent to medical examination or taking of specimen*.

221. Where consent is provided, the type and process of the resulting medical examination of, or the taking of a specimen from, the person who is in lawful custody, is not specifically limited by the DFDA, other than being for the purpose of securing evidence of, or relating to, the service offence for which the person is in lawful custody.

Medical examination or obtaining a specimen with approval of authorised officer

222. **Application for arranging examination or taking of a specimen**. Where an investigating officer seeks approval from an authorised officer to arrange for the medical examination of, or taking of a specimen from, a person in lawful custody, the application should be made in person and in writing. However, where this is not practicable, an application may be made by telephone.[334]

223. **Written request**. Using Form B14 *Application for approval for or taking of specimen* an investigating officer must set out the grounds (material facts and circumstances) for their belief that the medical examination of the person, or analysis of a specimen taken from the person, is likely to provide evidence of, or related to, the service offence in relation to which the person is in custody. The form also requires the investigating officer to specify the service offence for which the person is in custody.

224. **Telephone request**. If the application is made by telephone, the investigating officer should follow a procedure consistent with that set out below in relation to obtaining a search warrant by telephone (see paragraph 275).

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[334]DFDA s 101Q(3).

That is, the investigating officer should make a contemporaneous record of their application by filling out Form B14. Also, if the authorised officer approves the investigative action, the authorised officer must cause the instrument of approval (see paragraph 223) to be forwarded to the investigating officer to form part of the investigation case file.[335] The authorised taking of the relevant evidence may be conducted despite the investigating officer not having received the hard copy of the form.

225. **Approval of examination or taking of a specimen.** If the authorised officer is satisfied that the investigating officer has reasonable grounds for their belief, he or she may approve, by instrument in writing, the investigating officer taking steps to arrange for the medical examination of, or the taking of a specimen from, the person in lawful custody.[336] Form B15 *Approval of medical examination or taking of specimen* should be used for this purpose. The signed approval form must be provided to the investigating officer. Where the application was made by telephone, the authorised officer must forward the approval form to the investigating officer.[337]

226. The authorised officer must independently consider the grounds (the facts and circumstances alleged, and the credibility of that information) of the application and the investigating officer's belief. In considering an application, the DFDA provides that an authorised officer may take into account the physical health of the person to whom the application relates.[338]

227. **Role of authorised officer.** The authorised officer plays an important check and balancing role in the process of providing lawful power to an investigating officer to make arrangements for the conduct of a medical examination or the taking of a specimen from a person who is in lawful custody, where the person's consent has not been given, and the interference with the person would otherwise be unlawful. The authorised officer does not merely rubber stamp the application, but must consider the information provided to them and where necessary, request additional information, before determining that it is proper in the circumstances to approve the investigative action.

228. **Scope of approval by authorised officer.** The authority granted by an authorised officer who approves action by an investigating officer to arrange a medical examination or the taking and analysis of a specimen, only relates to an examination of a kind, or the taking of a specimen, that is reasonably necessary for

[335]DFDA s 101Q(5).

[336]DFDA s 101Q(4).

[337]DFDA s 101Q(5).

[338]DFDA s 101Q(4C).

the purpose of obtaining evidence relating to the presence or absence of a 'narcotic substance' in the blood or urine of the person.[339]

229. **Definition of narcotic substance.** Narcotic substance is a defined term, and for the purpose of investigative action, has the same meaning given to that term in the *Customs Act 1901* (which is consistent with the definition of the term when it is used in the context of an offence against DFDA s 59 for dealing in, possession of, or administering a narcotic substance as a 'prohibited drug').

230. It is crucial for investigating officers and medical practitioners to be aware that the limitation only affects the type or method of examination used for obtaining such evidence. This limitation does not limit the potential discovery or use of other evidence during an authorised examination or analysis. For example, if an approved and authorised examination or analysis is carried out, and as a part of an analysis of a specimen, evidence of the presence of 'cannabis'[340] is obtained and certified by an analyst, that evidence may be used in service tribunal proceedings.

231. **Right of person in custody to have a chosen medical practitioner present.** Where consent or approval has been obtained, before taking action to arrange for a medical practitioner to examine the person or to take a specimen from the person, an investigating officer must ask the person whether they wish to have a medical practitioner of their choice present during the examination, or the taking of a specimen.[341]

232. Where a person wishes to have a medical practitioner of his or her choice present, an investigating officer must provide reasonable facilities to allow the person to arrange the medical practitioner's presence and, where practicable, to arrange for the examination or the taking of a specimen to be at a time when the medical practitioner can be present.[342]

233. However, this right of a person in lawful custody, and obligation on the investigating officer, does not apply where an investigating officer believes, on reasonable grounds, that delaying the examination or the taking of a specimen until the chosen medical practitioner can be present, will result in the evidence being lost or destroyed or may otherwise disappear.[343]

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[339]DFDA s 101Q(4A).

[340]DFDA s 59(9).

[341]DFDA s 101Q(6).

[342]DFDA s 101Q(6).

[343]DFDA s 101Q(7).

234. **Carrying out the examination or taking of a specimen.** The person in lawful custody remains entitled to be treated with respect, humanity and dignity. The investigative action may occur at the place of custody or at another location, for example the hospital or practice of the medical practitioner. Where it is required to transport the person who is in lawful custody, the investigating officer may use the amount of reasonable force, as is necessary, to take the person to the medical practitioner.[344] A service tribunal has the power to exclude medical evidence where this has been obtained through unreasonable force or inhuman treatment.[345] At the completion of the process, either of the following records should be produced:

a. **Medical examination report.** There are various forms of medical report that may be provided to an investigating officer, depending on who carries out the medical examination. The form should allow the medical practitioner to record the results of their examination of a person in lawful custody; and

b. **Certificate or report of analysis of specimen.** Depending on the type of analysis required in respect of a specimen obtained under this power, a variety of forms or documents purporting to be a certificate of analysis, provided and signed by an appropriately licensed analyst, may be provided to an investigating officer. These documents will form part of the investigation case file, and may be used as evidence in service tribunal proceedings.

235. **Copy retained by investigating officer.** The investigating officer must obtain a copy of the relevant report, certificate or record for their investigation case file.

236. **Copy of report etc. to be provided to person in custody.** Where the person in lawful custody requests a copy of a report or certificate, he or she is to be provided with a copy of the report of the examination, or a copy of the report or certificate of analysis of the specimen taken.[346]

237. **Destruction of medical report or report of analysis.** Both the person having custody of the original report of an examination or the analysis, and any investigating officer in possession of a copy of the relevant report, must destroy the report where:[347]

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[344]DFDA s 101Q(8).

[345]DFDA s 101Q(13)(b).

[346]DFDA s 101Q(11).

[347]DFDA s 101Q(9).

a. no proceedings are instituted in relation to the service offence, or a related service offence against a person within 12 months after the examination, or taking of the specimen

b. the 12 months referred to above are extended by an authorised officer pursuant to DFDA s 101Q(10), and no proceedings are instituted within the extended period of time, or

c. proceedings in respect of the service offence or a related service are instituted within the required period, and the person is acquitted of the offence, or the charge is dismissed.

238. **Medical examination or taking of specimen at request of the person for the purpose of treatment.** DFDA s 101Q does not prevent a medical practitioner from examining, or taking a specimen from, a person in lawful custody at the request of that person, or for the purposes of treating the person.[348]

239. **Offence to refuse medical examination or the taking of a specimen.** A person who is in lawful custody is guilty of a service offence where:[349]

a. an investigating officer has arranged for a medical examination, or the taking of a specimen, of that person

b. the person has given consent, or an authorised officer has approved the examination, or taking of a specimen

c. the investigating officer has informed the person that refusal or failure to submit to the examination, or taking of a specimen, will constitute an offence, and

d. after being informed, the person refuses or fails to submit (without reasonable excuse), to the examination; or the person fails to submit to, or do an act necessary to enable, a specimen to be taken.

SEARCH AND SEIZURE

Introduction

240. The DFDA confers powers on an investigating officer to search persons, property, premises, aircraft, ships and vehicles. However, the powers of search under the DFDA are subject to precise controls and limitations, consistent with the specific purpose and object of the DFDA as relating to the maintenance and enforcement of military discipline. Before undertaking a search, or seizing things, an

[348]DFDA s 101Q(13)(a).

[349]DFDA s 101QA (1).

investigating officer must understand and comply with the relevant DFDA provisions that relate to the circumstances of the planned search, and to the authority to be exercised by the investigating officer.

241. This section covers the following topics:[350]

a. search of persons

b. search of service land, premises, ships, aircraft, or vehicles, and

c. seizure of 'things' during a search.

242. Information about searches under the *Regulatory Powers (Standard Provisions) Act 2014* (RPA)[351] is in Appendix 1 to Annex 4A The DFDA triggers the RPA to allow appointed members of the Defence Force or Defence APS employees (rather than investigating officers) to enter premises under an investigation warrant or with consent of the occupier and to exercise investigation powers under the RPA for the purposes of gathering material relating to the contravention of service offences.[352] In practice, these RPA powers may be used by certain qualified Military Police members and a limited number of other Defence personnel, who are appointed by CDF, to carry out searches and seize items from non-service land or premises and to obtain evidence from third parties such as bank records, real estate records, phone records and CCTV footage.

243. **In what circumstances can an investigating officer conduct a search?** There is no general unlimited power of search, or entry and search, and seizure. A person, their home and their property are presumed to be protected and free from unlawful intrusion. By exception, the DFDA (similar to other criminal laws across Australia) provides lawful authority for, and powers of search to, an investigating officer:

a. pursuant to a search warrant[353]

b. where an investigating officer lawfully takes a person into custody in respect of a service offence[354]

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[350] Connected with each power of search is an incidental power to seize certain items found during the course of a search. The power to seize things will be discussed in relation to each specific power of search in this section.

[351] *Regulatory Powers (Standard Provisions) Act 2014* (Cth).

[352] DFDA s 101ZAA.

[353] DFDA ss 101X and 101Y.

[354] DFDA s 101P.

c. with the consent of the person,[355] or

d. in an emergency.[356]

244. Each of these powers of search, and the related powers of an investigating officer to seize things found during a search, is discussed below.

245. The DFDA also provides other powers of search (to an authorised member, rather than an investigating officer) in relation to a person who is in custody on a charge of a service offence in a custodial facility.[357] This power of search is discussed last in this section, and is distinct from the other powers of search described above as it does not relate directly to the investigation of a service offence.

246. **Who may be searched?** An investigating officer must be aware of the limits that apply to their authority under the DFDA. The powers of search granted to an investigating officer are necessarily limited by the scope of the authority granted by the DFDA over particular individuals. For example, the DFDA permits the arrest without warrant only of Defence members or Defence civilians,[358] therefore only those persons may be searched in circumstances where the power of search is incidental to that power of arrest. In contrast, an arrest warrant may permit the arrest of a person who is suspected of having committed a service offence,[359] and therefore the incidental power of search may be exercised against that broader category of persons. Also, the specific language of each DFDA provision that provides a power of search may limit the authority of an investigating officer to search a person depending on their status. For example, DFDA s 101W(1)(c), which relates to a search conducted after obtaining consent, only provides that a search may be conducted after obtaining consent of 'the defence member or defence civilian, as the case may be, to the search'. Also, emergency powers of search provided by DFDA ss 101Z(1)(a) and 101Z(2) only affect defence members or defence civilians.

247. **What land, premises, ships, aircraft, or vehicles may be searched under the DFDA?** Depending on the power of search being exercised, it is crucial for an investigating officer to know whether they are empowered to enter and search only service land, premises or vehicles etc., or whether they are able to enter and search private land, premises etc. The sources of authority for these different powers of entry and search are explained below. Under DFDA ss 101V(2) and 101V(3), an

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[355]DFDA ss 101W(1)(c) and 101ZA.

[356]DFDA s 101Z.

[357]DFDA s 95A.

[358]DFDA s 89.

[359]DFDA s 90.

investigating officer is generally limited to searching only service land, premises, vehicles etc. An investigating officer may enter and search private premises, including married quarters, or a private ship, aircraft or vehicle, only where the occupier of the land or premises, or the person in charge of the ship, aircraft of vehicle, has given written consent to the entry.

248. For the purposes of the DFDA search and seizure powers, it is important to note that married quarters (despite being provided by the Defence Force, and generally being on service establishments) are not considered to be service land or premises.

249. In order to properly define the scope of the search powers, the following definitions provided by the DFDA are relevant:

a. **Service land** – is land (including a building or other structure) used or occupied by the Defence Force, an allied force, or an institution of the Defence Force or an allied force.[360]

   (a) An **allied force** means a force of another country that is acting in co-operation with the Defence Force.[361]

   (b) An **institution**, in relation to the Defence Force or an allied force, means: a mess, club, band, canteen or other institution.[362]

b. **Service ships, aircraft or vehicles** – includes those ships, aircraft or vehicles used by, or in the possession of or under the control of the Defence Force, an allied force, or an institution of the Defence Force or an allied force.

250. **Seizure of a thing connected with a service offence.** A power to seize things as part of a search is a power for an investigating officer to physically take possession of a thing, by force if necessary, and remove it from the person, land, premises, vehicle etc. Oral announcement of an intention to seize a thing is not enough to affect a seizure. There must be a physical act of dominion over a thing, leaving it in no doubt (to a reasonable observer) that the investigating officer has seized the thing. For the purposes of search and seizure powers under the DFDA, a thing connected with a service offence is:[363]

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[360]DFDA s 3(1) definition of 'service land'.

[361]DFDA s 3(1) definition of 'allied force'.

[362]DFDA s 3(1) definition of 'institution'.

[363]DFDA s 101V(1).

a. a thing with respect to which a service offence has been committed[364]

b. a thing that will provide evidence of the commission of the service offence,[365] or

c. a thing that was used, or intended to be used, for the purpose of committing the service offence.

251. Where a thing is seized by an investigating officer, the investigating officer becomes responsible for the transport, storage and care of the thing.

Forms relating to searches

252. The following forms should be used, where relevant, in relation to searches under the DFDA:

a. Form B1 – *Affidavit*

b. Form B4 – *Information for search warrant*

c. Form B5 – *Search warrant – land, premises, ship, aircraft and vehicle*

d. Form B6 – *Search warrant – person, clothing of, or property in custody of person*, and

e. DFD Regulations – Form 9 in Schedule 1 – *Acknowledgement of consent to search*.

Search under a warrant

253. A search warrant, being a document issued by a person with power to do so, may authorise the search of a person, premises, property etc. which would otherwise be unlawful. The DFDA sets out a procedure to be followed by the authorised officer in issuing a warrant. Failure to comply with the procedure and to meet the standards required will result in the warrant being declared invalid.[366]

254. The DFDA requires that specific information is included in a search warrant, reflecting the purpose of the warrant. A warrant cannot be general in nature. It must contain sufficient details to enable the authorised officer, as well as the person being searched or the occupier of land or premises or the person in charge of the ship,

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[364] For example, a stolen item, or an item recording a false particular, or a piece of service property which has been damaged.

[365] For example, a document recording plans or notes of an offence, a photo, video or sound recording capturing the events of an offence, a register or log book.

[366] *Smith v McLaughlin* (1999) 103 A Crim R 285, discussed in *Ross on Crime*, 3rd Ed, 2007, p. 1031.

aircraft or vehicle, to understand the purpose of the warrant, and whether particular things are relevant to the alleged offence. Also, the DFDA sets specific limits on the powers of search granted to an investigating officer under a warrant. This section discusses the procedure required to obtain a warrant, and the powers of search granted by a warrant and applicable limits.

255. A search warrant may be issued by an authorised officer, permitting an investigating officer to conduct a search, and to seize things connected with a service offence found during the search. An authorised officer may, by warrant, authorise an investigating officer to search:

a. a defence member or defence civilian (and clothing being worn by, or property under the immediate control of the person), or

b. service land, or service premises (not including married quarters), or service ships, aircraft or vehicles.[367]

256. **Process for obtaining a search warrant.** In order for an investigating officer to obtain a search warrant, an investigating officer must apply to an authorised officer (an officer specifically authorised for the purpose of DFDA s 101X)[368] for the authorised officer to issue a warrant.

257. The investigating officer must provide information provided by an informant (being a written document; usually an affidavit or some other form)[369] to the authorised officer which contains information provided on oath or affirmation.[370]

258. The authorised officer is required to consider the information provided to them and must be satisfied that there are reasonable grounds for issuing the warrant. Only if there are reasonable grounds can a warrant be issued.[371] The requirement that the issuing authority (i.e. the authorised officer) independently consider the grounds (the facts and circumstances alleged, and the credibility of that information) for the suspicion held by an investigating officer, plays an important check and balancing role in the process of providing lawful powers to enable the interference with a person, or intrusion onto land, premises, ship, aircraft or vehicle. The authorised officer does not merely rubber stamp the application, but must

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[367]See definition of service land, service premises and service ships, aircraft and vehicles, at paragraph 244.

[368]Authorised officers (either individual officers, or officers included in a class of officers) are appointed by CDF and each Service Chief.

[369]Form B1 is a template of an Affidavit. Form B4 is also used as a template for recording information presented to an authorised officer to seek a search warrant.

[370]DFDA s 101AA. The form of oath and affirmation is provided at s 40 and Form 4 in Schedule 1 to the DFD Regulations.

[371]DFDA s 101X(3)(b).

consider the information provided to them and where necessary, request additional information before determining that reasonable grounds exist to justify the issuing of a search warrant.

Warrant to search Defence member or Defence civilian

259. **Process**. Where the investigating officer is seeking a warrant to search a Defence member or Defence civilian, the information must allege that there are reasonable grounds to suspect that a thing of a particular kind, connected with a particular service offence, may be found:

a. on the Defence member or Defence civilian, or

b. in clothing being worn by, or

c. property under the immediate control of the person.

260. The information provided to the authorised officer should therefore address the following points:

a. what thing (specific or type) is being searched for, by providing a description according to which the 'thing' may be identified

b. the nature of the alleged service offence the thing is connected with

c. where the investigating officer, or other informant, believe the thing may be found, and

d. the facts or evidence that forms the basis of their belief.

261. An authorised officer may require additional information to that originally provided before making their decision whether to issue a warrant or not.[372] Where the authorised officer is satisfied that there are reasonable grounds to issue a search warrant, the authorised officer may issue the warrant. Form B6: *Search warrant – person, clothing of, or property in custody of person* is for use by an authorised officer.

262. The investigating officer named in the warrant may, with such assistance as he or she thinks necessary, and by reasonable force if necessary, search the Defence member or Defence civilian (or their clothing or property) for things of the kind specified in the warrant.[373] The investigating officer may seize anything found in

[372]DFDA s 101X(1).

[373]DFDA s 101X(1)(a).

the course of the search that the investigating officer believes, on reasonable grounds, to be connected with the service offence.[374]

263. **Information contained in search warrant authorising the search of a Defence member or Defence civilian**. The DFDA requires such a search warrant to contain:[375]

a. a statement of the purpose for which the warrant is issued

b. a reference to the nature of the service offence in relation to which the search is authorised

c. a description of the kind of things authorised to be seized, and

d. a date (not being later than one month after the day on which the warrant is issued) on which the warrant ceases to have effect.

Warrant for the search of land, premises, ships, aircraft, or vehicles

264. **Process**. Where the investigating officer is seeking a warrant to search service land, service premises, a service ship, aircraft or vehicle, the information provided to an authorised officer must allege that there are reasonable grounds to suspect that a thing of a particular kind, connected with a particular service offence, may be found:[376]

a. at that time (the time of making the application), or

b. within the next following 24 hours:

(1) upon service land

(2) upon or in service premises

(3) on a service ship

(4) on a service aircraft, or

(5) in a service vehicle.

265. The information provided to the authorised officer should therefore address the following points:

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[374]DFDA s 101X(1)(b).

[375]DFDA s 101X(4).

[376]DFDA s 101X(2).

a. what thing (specific or type) is being searched for, by providing a description according to which the 'thing' may be identified

b. the nature of the alleged service offence the thing is connected with

c. the location that the investigating officer, or other informant, believe the thing may be found, and

d. the facts or evidence that forms the basis of their belief.

266. An authorised officer may require additional information to that originally provided before making their decision whether to issue a warrant or not.[377] Where the authorised officer is satisfied that there are reasonable grounds to issue a search warrant, the authorised officer may issue the warrant. Form B5: *Search warrant – land, premises, ship, aircraft and vehicle* is available to be used by an authorised officer.

267. The investigating officer named in the warrant may, with such assistance as he or she thinks necessary, and by force if necessary:[378]

a. enter upon the land or upon or into the premises, ship, aircraft or vehicle

b. search the land, premises, ship, aircraft or vehicle for things of the kind described in the warrant, and

c. seize things of that kind he or she believes, on reasonable grounds, to be connected with the service offence.

268. **Information contained in search warrant authorising the search of land, premises, ships, aircraft, or vehicles**. The DFDA requires such a search warrant to contain:[379]

a. a statement of the purpose for which the warrant is issued

b. a reference to the nature of the service offence in relation to which the entry and search is authorised

c. whether entry is authorised to be made at any time of the day or night, or only during specified hours of the day or night

d. a description of the kind of things authorised to be seized, and

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[377] DFDA s 101X(1).

[378] DFDA s 101X(2).

[379] DFDA s 101X(4).

e. a date (not being later than one month after the day on which the warrant is issued) on which the warrant ceases to have effect.

Execution of search warrant

269. **Search of person, clothing, property.** A search involves an affront to the dignity and privacy of the individual. Depending on the nature of the search, the degree of affront to a person involved will vary. An investigating officer acting in accordance with a warrant to search a defence member or defence civilian, may require a person to remove any clothing that the person is wearing, and if the person refuses, the investigating officer may remove the clothing.[380]

270. While the DFDA authorises an investigating officer to use necessary force in searching a person or their clothing or property,[381] the use of force is strictly interpreted given that the search represents an interference with a legal right to be free from interference. Therefore, any force involved in, for example, an investigating officer removing the clothing of a person being searched, must be reasonable in the circumstances and proportionate to the level of any resistance or refusal by the person being searched.

271. A person must only be searched by, and in the presence of, a person who is of the same sex as them.[382] A member of the opposite sex must not conduct, or be present, when a person is being searched.

272. **Entry and search of land, premises, ship, aircraft or vehicle**. An investigating officer can be authorised to use necessary force to enter onto or in land, premises, a ship, aircraft or vehicle, and conduct a search.[383] While the DFDA does not expressly or impliedly set out how an investigating officer is to gain entry in order to conduct a search, the permission to use force in executing a search warrant is construed strictly. The force must be reasonable and the investigating officer is not simply free to act as he or she sees fit.[384]

273. To illustrate this point, if an investigating officer is authorised to gain access to a building, the warrant will not be considered to permit the authorised officer to blow up part of the building or destroy a wall of the building with a bulldozer simply to gain access, although it would usually justify an investigating officer gaining access

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[380]DFDA s 101X(6).

[381]DFDA s 101X(1)(a).

[382]DFDA s 101X(7).

[383]DFDA s 101X(2).

[384]Refer to *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281; 100 A Crim R 281; discussed in *Ross on Crime*, 3rd ed, 2007, p. 1033.

to the premises by using necessary force to break open a door or window. However, if access to a key to the door via a watch keeper, security guard or duty officer will facilitate entry to the building, within a timeframe reasonable in the circumstances, and while still maintaining the efficiency and integrity of the investigation process, using force to break open a door or window may not be considered reasonable and necessary.[385]

274. **Scope of search**. A search authorised under a warrant must be confined in kind and scope to that which is necessary to find the things for which the search is authorised, on the person or in the clothing or property described, or on the land or in the premises, ship, aircraft or vehicle described in the warrant.[386] Otherwise, the search and seizure will be unlawful, in which case the investigating officer will be ordered to return the seized property, and will potentially be liable to pay damages to the owner for trespass or the wrongful seizure and detention of the things.

275. **Seizing things not described in search warrant**. In certain circumstances, an investigating officer may seize things which are outside the description of the things specified in the search warrant. Where an investigating officer finds things during the conduct of a search which are not specified, or of a kind described in the search warrant, he or she may seize these things, where he or she believes on reasonable grounds that the thing is:[387]

a. connected with the service offence (the nature of which is described in the warrant), or

b. is connected to another service offence; and

   (1) seizing the thing will prevent its concealment, loss or destruction, or

   (2) seizing the thing will prevent its use in committing, continuing or repeating a service offence.

Obtaining a search warrant by telephone

276. Where there are reasons of urgency, an investigating officer may make an application to an authorised officer to obtain a search warrant by telephone.[388] An authorised officer may issue a search warrant following such an application by phone

[385]For judicial discussion, see *Crowley v Murphy* (1981) 52 FLR 123; 34 ALR 496 (FCA); discussed in *Ross on Crime*, 3rd edition, 2007, p. 1033.

[386]See discussion on *'can police take anything they find relating to another crime'* in Ross on Crime, 3rd edition, 2007, pp. 1032-1033.

[387]DFDA s 101X(5).

[388]DFDA s 101Y(1).

where the authorised officer is satisfied that there are reasonable grounds for issuing the warrant.

277. **Process**. Before making an application, the investigating officer must prepare an information. Form B4: *Information for search warrant* is used for this purpose. The investigating officer must outline the grounds on which the warrant is being sought in that document.[389] The information provides a contemporaneous and timely documentary record of the material facts and circumstances that form the basis of the investigating officer's belief and suspicion at the time of making the application for the warrant.

278. While ordinarily an information must be sworn or affirmed, given the circumstance of urgency associated with a telephone warrant, the investigating officer may make the application before the information has been sworn or affirmed.[390] This recognises that there may not always be ready access to an appropriately appointed or authorised person to witness and administer the oath or affirmation in the circumstances.

279. The authorised officer who receives the phone call and application from an investigating officer is required to consider the terms of the information provided to them and prepared by the investigating officer. If the authorised officer requires further information from the investigating officer, the authorised officer must seek that information and consider it in conjunction with the original information.

280. If the authorised officer believes that there are reasonable grounds for issuing a search warrant, he or she should complete and sign a search warrant form, as if the application had been made by writing under DFDA s 101X.[391] That is, the authorised officer must complete Form B5 or B6 (depending on the nature and purpose of the warrant sought).

281. **Issuing the telephone search warrant.** Where the authorised officer issues a search warrant by telephone, the following must occur:[392]

a. the authorised officer informs the investigating officer of:

(1) the terms of the search warrant (that is the nature, purpose, and scope of the warrant, including the additional relevant details required depending on the nature of the warrant – for example the name of the person, a description of the kind of things the subject of the search

[389]DFDA s 101Y(2).

[390]DFDA s 101Y(2).

[391]DFDA s 101Y(3).

[392]DFDA s 101Y(4).

permission, the location of land, premises or aircraft, ship or vehicle, authorised time of entry, the date and time of expiry of the warrant and so on)

(2) the date on which, and the time at which, the warrant was signed, and

b. the authorised officer is to record on the warrant form, his or her reasons for granting the warrant, and

c. the investigating officer must also:

(1) complete a search warrant in the terms confirmed and provided to him or her by the authorised officer, and

(2) write on the search warrant:

(a) the name of the authorised officer, and

(b) the date on which, and the time at which, the warrant was signed.

282. As is demonstrated by the requirements above, both the investigating officer and the authorised officer must have in their possession, and complete, the relevant form of warrant.

283. **Original documentation to be provided to authorised officer.** Within one day following the expiry date of a warrant, an investigating officer must send his or her copy of the search warrant form completed by them (as required above, at the time the authorised officer confirms the warrant by phone) and the information, duly sworn or affirmed to the authorised officer who signed the warrant.[393] In the time elapsed since the urgent telephone application, the investigating officer must have the information sworn on oath or affirmed.

284. Upon receipt of the warrant form and information from the investigating officer, the authorised officer must attach those records to their signed warrant.[394]

285. Where the two warrant documents (that prepared by the investigating officer and that prepared and signed by the authorised officer) are in the same terms, the warrant signed by the authorised officer is deemed to be authority for the search, seizure or entry that the warrant authorised.[395]

[393]DFDA s 101Y(5).

[394]DFDA s 101Y(6).

[395]DFDA s 101Y(7).

286. **Compliance with the requirements.** It is the duty of an investigating officer to comply with the requirements of the DFDA provisions that relate to the exercise of investigative powers. While an investigating officer does not commit a service offence by failing to comply with an investigative provision,[396] non-compliance will likely affect the admissibility of evidence obtained as result of, or consequential upon, the breach.

287. Where it is material, if the above process and requirements are not complied with, and the warrant signed by the authorised officer is not presented (where required) in any action or proceedings in a civil court or service tribunal, the court or tribunal (as the case may be) will presume that the search, seizure or entry was not authorised.[397] In such a circumstance, evidence obtained as a result of the search may be excluded on the basis that it was illegally obtained due to the failure to comply with the specific and strict requirements of the investigation provisions contained in the DFDA.[398]

Search of arrested persons

288. **Power to search a person taken into lawful custody.** When taking a person into lawful custody, an investigating officer may search the person, the clothing that the person is wearing, and any property in the person's immediate control, where the investigating officer believes, on reasonable grounds, that a search is necessary to:[399]

a. establish whether the person has concealed on him or her, a weapon or other article capable of being used to inflict death or bodily injury, or to assist the person to escape from custody, or

b. prevent the concealment, loss or destruction of evidence of or relating to the offence for which the person is in custody.

289. This power of search is related to the authority of an investigating officer to take persons into lawful custody, for example pursuant to an arrest warrant issued under DFDA s 90, or without warrant where permitted.

290. **No power to remove clothing**. Unlike conducting a search under a warrant, or in emergencies, the power to search a person being taken into custody does not

[396]DFDA s 101(6).

[397]DFDA s 101Y(8).

[398]DFDA s 101ZB.

[399]DFDA s 101P(1).

allow an investigating officer to require the person to remove any clothing that the person is wearing.[400]

291. **Power to seize things**. When conducting a search of a person being taken into custody, an investigating officer may seize:[401]

a. any weapon or other thing capable of being used to inflict death or bodily injury, or to assist the person to escape from custody

b. any thing that the investigating officer has reasonable grounds to believe is a thing:

(1) with respect to which a service offence has been committed,

(2) that will afford evidence of the commission of a service offence, or

(3) that was used, or is intended to be used, for the purpose of committing a service offence.

Search with consent under DFDA

292. An alternative source of authority for an investigating officer to conduct a search (and seize items during that search) is where a search, or the entry and search, as the case requires, is conducted with the consent of:

a. the Defence member or Defence civilian who is to be personally searched, or will have their clothing or property under their immediate control searched[402]

b. the occupier of service land or service premises, or the person in charge of the service ship, aircraft or vehicle, as the circumstances require,[403] or

c. the occupier of land or premises, or the person in charge of a ship, aircraft or vehicle not covered by sub-paragraph (b) above – that is, private land, private premises (including married quarters) or a private ship, aircraft or vehicle.[404]

[400]DFDA s 101P(2).

[401]DFDA s 101P(3).

[402]DFDA s 101W(1).

[403]DFDA s 101W(2).

[404]DFDA s 101W(3).

293. Consent will operate as an alternative basis for a search by an investigating officer. Consent to a search cannot be a passive act or based on inference. Consent to a search must be recorded as an affirmative acceptance, and will not exist where a person merely stands by or acquiesces while a search is conducted. There must be a voluntary agreement, based on an understanding of what an investigating officer seeks to do (search, or enter and search, and seize things found).

294. Voluntariness is a crucial element of the process involved in obtaining the consent of a person. It must be the will of the person to permit the search. Their will must not be overborne, whether by threats, duress, inducements or some other form of coercion. A search, or entry and search, conducted where a person's consent is shown to have been involuntary will be unlawful.[405]

295. **Process and requirement of obtaining consent.** Before an investigating officer obtains consent, the investigating officer must inform the relevant person that he or she may refuse to give consent.[406]

296. If consent is not given, the investigating officer will be limited to the other lawful mechanisms authorising a search, namely pursuant to a warrant, in circumstances of an emergency (below at paragraph 309), or upon taking the person in to custody (see 'Search of arrested persons' or 'Search of persons in custodial facility' above).

297. **Acknowledgement.** If the relevant person gives consent, the investigating officer must ask the person to acknowledge, on the prescribed form (DFD Regulations Form 9 in Schedule 1 – *Acknowledgement of consent to search*):

a. that the investigating officer has informed the person that he or she may refuse to give consent;

b. that he or she has voluntarily consented; and

c. the date and time of consent.[407]

298. The importance of this completed acknowledgement form is emphasised by DFDA s 101ZA(4), which provides that, where it is material in proceedings of a civil court or service tribunal for the court or tribunal to be satisfied that person voluntarily consented to a search, or entry and search as the case may be, if the signed acknowledgement form is not produced in evidence, the court or tribunal shall presume that, unless the contrary is proved, that the person did not give voluntary

[405] DFDA s 101ZA(3).

[406] DFDA s 101ZA(1).

[407] DFDA s 101ZA(2) and DFD Regulations s 50.

consent. Therefore, once signed, the Form should be secured and retained as part of the investigation case file.

Investigation powers, after entry to premises with consent, under the *Regulatory Powers (Standard Provisions) Act 2014* (RPA)

299. Appendix 4A1 provides specific information with regards to investigation powers under the RPA. The information below is a summary only, and reference should be had to the more complete guidance in Appendix 4A1.

300. Investigation powers under the RPA are only exercisable by persons who are 'authorised persons'.[408] These 'authorised persons' are trained and qualified Military Police or other Defence personnel who are specifically appointed by CDF or IGADF. If a circumstance arises that leads to consideration of using investigation powers under the RPA, legal advice should be sought.

301. The RPA allows 'authorised persons' to enter a premises with consent[409]. When obtaining consent, authorised persons should provide the occupier with information in written form on the investigation powers and the occupier's rights and obligations. This is not a legal requirement under the RPA, however, providing such information is good practice and minimises legal risk.

302. Once consent is obtained, the authorised person can exercise the investigation powers including search of the premises; inspections, examinations, measuring and testing of evidential material[410]; photographing and taking of video of both evidential material and premises[411], and the operation of electronic equipment if there are reasonable grounds for believing it may contain evidential material.[412] It also empowers authorised persons to put evidential material into documentary form (such as printing material)[413] or to transfer that material to a storage device[414] and remove the documents and storage device from the premises.

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[408] *Regulatory Powers (Standard Provisions) Act 2014 (Cth)* (RPA) s 42.

[409] RPA s 49(a).

[410] RPA s 49(c).

[411] RPA s 49(d).

[412] RPA s 50(1).

[413] RPA s 50(2)(b).

[414] RPA s 50(2)(c).

303. When entry to a premises is by consent[415] under the RPA, there are no powers to:

a. search any person - the RPA relates to 'premises'[416] only

b. seize evidential material – this power is only available if the search is conducted under an investigation warrant[417]

c. secure electronic equipment for up to 24 hours to obtain expert assistance with operating it - this power is only available if the search is conducted under an investigation warrant.[418]

304. If a requirement to seize evidential material or seek expert assistance in relation to electronic equipment is anticipated in relation to a search under the RPA, then the 'authorised person' should consider obtaining an investigation warrant.[419]

305. Consent to enter the premises under the RPA can be given by the occupier of the premises[420] and that consent can be withdrawn at any time.[421]

Factors for consideration when considering entry and search by consent

306. Both the DFDA and RPA enable searches of private premises to be conducted by consent. As occupiers may withdraw their informed consent at any time, there is a risk that the search may be required to cease prior to completion and evidence may be lost as a result. Investigating officers and authorised persons should consider this risk before determining the most appropriate course of action.

307. Other factors that need to be considered include:

a. Whether a person is an authorised person under the RPA - the RPA legislation cannot be used unless a person is authorised by CDF or IGADF.[422]

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[415] RPA s 55.

[416] RPA s 4.

[417] RPA s 49(a) and (b).

[418] RPA s 51.

[419] RPA s 49(b).

[420] RPA s 55.

[421] RPA s 55(3) and (5).

[422] DFDA s 101ZAD(2).

b. Whether seizure of the item is significant to the investigation process - whilst the DFDA enables an 'investigating officer' to search and seize by consent[423] an 'authorised person' under the RPA has the power to search but not seize evidential material if they have entered the premises on the basis of consent by the occupier.

c. The RPA provides a legislative framework for an authorised person to undertake a number of actions in relation to the premises being searched by consent, and the evidential material located, such as taking photographs, conducting examinations and tests. These powers are broadly articulated in paragraph 301 above and further detailed in Appendix 4A1. Consideration should be given by the authorised person as to whether the use of these powers under the RPA will provide a greater benefit to the investigation process.[424] However, in the event that the occupier does not want these actions to occur, it remains open to them to withdraw their consent to enter the premises.

308. Legal advice should be sought in the event of any uncertainty about whether the search should be conducted under the DFDA or the RPA.

Searches in emergencies

309. By their very nature, the powers of search (and connected powers to stop persons, ships, aircraft or vehicles, as well as the powers to enter upon land, premises, ships, aircraft or vehicles) discussed below that relate to emergencies, are subject to specific prerequisites and triggers. In summary, these powers are associated with:[425]

a. circumstances of seriousness or urgency, where immediate search or entry is justified without the authority of a warrant

b. the possession of, or location of an offensive weapon – being a thing made or adapted for use for causing death or bodily injury, or intended for such a use,[426] and

[423] DFDA s 101W(3).

[424] These actions may be conducted during searches by consent under the DFDA, as actions reasonably incidental to the statutory power to conduct such searches; however, they are not explicitly provided for in the DFDA and may be objected to by the occupier.

[425] DFDA s 101Z.

[426] Defined in DFDA s 101Z(6).

c. the possession of, or location of a thing connected with a serious service offence.[427]

310. **Circumstances of seriousness and urgency requiring and justifying immediate search, or entry and search.**[428] Where an investigating officer believes on reasonable grounds that it is necessary to search a Defence member or Defence civilian (or clothing worn by, or property in the immediate control of such a person), or to enter and search land, premises, a ship, aircraft or vehicle, in order to seize a thing connected with a service offence, to prevent the concealment, loss or destruction of the thing, or to prevent the use of the thing in committing, continuing or repeating a service offence, an investigating officer may so search a person, or enter and search those places, vehicles etc.

311. In order for this emergency power of search, or entry and search, to be exercised, the seriousness and urgency of circumstances must require and justify immediate search, or entry and search, without the authority of a warrant.

312. The purpose or object of this power of search - to prevent the concealment loss or destruction of a thing connected with a service offence, or to prevent the use of the thing in committing, continuing or repeating a service offence - has a direct relationship with the threshold test that the prevailing circumstances must 'require and justify an immediate search'. The requirement must be so immediate that compliance with the procedures associated with gaining a search warrant - even the streamlined procedures associated with gaining a telephone warrant - would not allow the purpose of the emergency search to be achieved.

313. Where an investigating officer searches a Defence member or Defence civilian pursuant to this emergency power, the investigating officer may require a person to remove any clothing that the person is wearing, and if the person refuses, remove the clothing.[429] However, a person must be searched by an investigating officer of the same sex, and any other persons present must also be of the same sex as the person being searched.[430]

314. The following limitations also apply to this power of search:

a. **Only service land or premises.** The reference to land or premises above is limited to service land or service premises on service land (other than

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[427]DFDA s 101(1) definition of 'serious service offence' – being a service offence punishable by a maximum punishment, or a fixed punishment, of imprisonment for life or a period exceeding 6 months.

[428]DFDA s 101Z(1).

[429]DFDA s 101Z(4).

[430]DFDA s 101Z(5).

premises in Australia occupied by, or comprising, married quarters).[431] The above emergency power to enter and search is limited, and does not permit an investigating officer to enter and search private land or premises on private land, or married quarters.

b. **Only service ships, aircraft or vehicles.** The reference to a ship, aircraft or vehicle above, is limited to service ships, service aircraft or service vehicles.

315. **Defence member or Defence civilian carrying an offensive weapon, or thing connected with a serious service offence.** An investigating officer may stop a Defence member or Defence civilian, search them (and the clothing being worn by them or the property in their immediate control), and where they believe on reasonable grounds that the person is, without lawful authority or reasonable excuse, carrying an offensive weapon, or anything connected with a serious service offence, the investigating officer may seize any such weapon or thing found in the course of the search.[432]

316. **Offensive weapon or thing connected with a serious service offence in a service ship, aircraft or vehicle.** An investigating officer may stop, enter and search a service ship, aircraft or vehicle, and seize an offensive weapon or thing connected with a serious service offence where they believe on reasonable grounds that such a weapon or thing is in the ship, aircraft or vehicle.[433]

Search of person in custody at custodial facility

317. A person who is charged with a service offence, and is held in custody at a custodial facility,[434] may be searched by an authorised member, where an authorised person believes that it is necessary.[435]

318. **Necessary appointments.** Given that this power of search relates directly to the security and discipline of a custodial facility, the following definitions apply to this power of search:[436]

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[431]DFDA s 101V(2).

[432]DFDA s 101Z(2).

[433]DFDA s 101ZA(3).

[434]Defined in *DFDA* s 95A(4) as 'a place or facility under the control of the Defence Force, at or in which a person in custody on a charge is detained'. This may include an ADF detention centre, or another facility being used for the purpose of detaining such a person.

[435]*DFDA* s 95A(1).

[436]*DFDA* s 95A(4).

a. an **authorised person** in relation to a custodial facility, is a member of the Defence Force appointed by the CO in relation to the custodial facility, in writing, as an individual or as a member of a class of members of the Defence Force, to be an authorised person in relation to the custodial facility. Form H4 is used for such purposes, and

b. an **authorised member** in relation to a custodial facility, is a member of the Defence Force appointed by the CO in relation to the custodial facility, in writing, as an individual or as a member of a class of members of the Defence Force, to be an authorised member in relation to the custodial facility. Form H4A is used for such purposes.

319. The existence and currency of these appointments are a prerequisite for the conduct of a search under this provision of the DFDA. Therefore, wherever a detention centre is declared to exist, the CO of that facility should ensure that standing appointments of authorised persons and authorised members exist in order for this power of search to be lawfully exercised.

320. **Reasons for search.** The authorised person may authorise the search of the person, and the person's clothes, to determining whether the person is concealing:[437]

a. a weapon or other thing capable of inflicting death or bodily injury, or assisting him or her to escape from custody; or

b. anything that is likely to affect the security or discipline of the custodial facility.

321. **Conduct of the search.**[438] The following factors are relevant to the conduct of the search:

a. **Same sex.** The authorised member who is directed by an authorised person to conduct a search must be the same sex as the person being searched. The witnesses to a search must also be of the same gender as the person being searched

b. **Two witnesses.** The search of a person in custody at a custodial facility by an authorised member, must be conducted in the presence of at least two other persons who are authorised persons, or authorised members, in relation to the facility

[437]DFDA s 95A(1).

[438]DFDA ss 95A(2) and 95A(3).

c. **Witnesses must be authorised members or authorised persons.** The search must not be conducted in the presence of a person who is not an authorised person, or authorised member, in relation to the facility

d. **Removal of clothing.** In conducting a search, an authorised member may require the charged member to remove any clothing that he or she is wearing. If the charged member refuses, the authorised member may remove the clothing

e. **Use of force.** An authorised member may use such reasonable force that is necessary to conduct the search, and

f. **Seizure of things.** An authorised member may seize any weapons or other thing capable of inflicting death or bodily injury, or assisting him or her to escape from custody, or anything that is likely to affect the security or discipline of the custodial facility.

CHARGING AN ACCUSED PERSON

322. At the time that a charged member is charged with an offence under DFDA ss 87(1) or 95(3), or is served with a summons under DFDA s 87(3), they are to be provided in writing with the following materials:

a. a summary of the rights and obligations of the charged member substantially in accordance with SAR Schedule 1,

b. the charges being preferred against them.

c. related to those charges:

(1) the name of the offence and the section of the Act or regulations that refers to that offence,

(2) the elements of the alleged offence,

(3) any statutory defence available under the Act or regulations in respect of the offence charged, and

d. the name and rank of the proposed prosecuting officer[439].

323. The charged member is also to be provided at the time of charging with a written summary of the case against them, recorded within the Form C2 – *Charge Sheet and Decision Record,* which includes:

a. particulars of the charge,

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[439] SAR r 6.

b. an outline of the facts and circumstances relevant to the alleged conduct constituting the offence, and

c. a summary of the case the prosecuting officer is intending to rely upon to prove each element of the offence charged.[440]

[440] SAR r 6.

APPENDIX 4A1

INVESTIGATION POWERS UNDER THE *REGULATORY POWERS (STANDARD PROVISIONS) ACT 2014*

Introduction

324. The search and seizure powers contained in Annex 4A are limited in their scope to being carried out by an investigating officer on service land, or service premises (not including married quarters), or service ships, aircraft or vehicles.[441] However, section 101ZAB of the DFDA provides that service offences are also subject to investigation under Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014* (RPA). Part 3 of the RPA provides a further set of investigation powers that may be exercised by authorised persons in Defence, including certain Military Police members, who are appointed by CDF or the IGADF. Legal advice should be obtained if consideration is being given as to whether powers under the DFDA or RPA should be used.

325. The investigation powers under the RPA are parallel, and supplementary, to those already outlined in Annex 4A and extends to civilian premises. These powers are necessary to permit the gathering of new forms of evidence and from 'off-base' locations. For example, in the case of more serious offences such as an alleged fraud, possible evidence may be revealed by bank statements, real estate records or information stored on personal electronic devices. The investigation powers may be exercised once consent to enter the premises has been obtained from the occupier of the premises, or by executing an investigation warrant.

326. The investigation powers under the RPA, which can be used for the investigation of all service offences,[442] are outlined as follows:[443]

a. Enter and search for evidence

b. Seize evidence

c. Inspect, examine, test and take measurements on evidence

d. Record still or moving images of the searched premises or evidence

e. Take equipment and materials required to conduct the investigation onto the premises

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[441] DFDA s 101V.

[442] DFDA s 101ZAB.

[443] RPA s 49.

f. Operate electronic equipment found on the premises, including using an electronic storage device, if it is suspected they contain evidence

g. Seize the above pieces of electronic equipment

h. Transfer evidence on electronic equipment to documentary form or onto an electronic storage device, and remove it from the premises

i. Secure electronic equipment where expert assistance is required to access the evidence.

327. All of the investigation powers above are available for searches under an investigation warrant. However, if the search is being conducted after consent to enter the premises has been obtained from the occupier, the investigation powers are more limited.

Persons involved in RPA searches and their powers

328. The key persons involved in searches under the RPA are:

a. **Authorised applicants.** Authorised applicants have the power under the DFDA to apply to the issuing officer for an investigation warrant under the RPA.[444] An authorised applicant is a specified member of the ADF, or specified APS employee, or specified class of ADF members or APS employees, who is appointed by CDF or the IGADF.[445] This will usually be ADF member/s occupying specific positions within the Joint Military Policing Unit, IGADF or other discrete agencies identified within Defence. They must have suitable qualifications, training or experience.[446]

b. **Authorised persons.** Authorised persons can exercise investigation powers after entering premises with occupier's consent or under an investigation warrant issued under the RPA. An authorised person is a specified member of the ADF, or specified APS employee, or a specified class of ADF members or APS employees, who is appointed by CDF or the IGADF.[447] They must have suitable qualifications, training or experience.[448] Authorised person functions will ordinarily be carried out by trained, qualified and appointed members of the Military Police or IGADF investigators. Authorised

[444] RPA ss 70 and 71.

[445] DFDA s 101ZAD.

[446] DFDA ss 101ZAD(3) and (4).

[447] DFDA s 101ZAD.

[448] DFDA ss 101ZAD(3) and (4).

persons must carry an identity card at all times when exercising their investigation powers.[449]

c. **Issuing officer.** Issuing officers issue investigation warrants and make orders regarding retaining things seized during a search. Issuing officers can be a magistrate or a Judge of the Federal Court or Federal Circuit and Family Court who has both consented to act as an issuing officer and whose consent is currently valid.[450] A magistrate can be at the Federal or State/Territory level.[451] The powers of an issuing officer under the RPA are given to them in a personal capacity, not as a court or a member of a court.[452] However, they retain the same protection and immunity as if they were exercising the power as the court or a member of the court. Magistrates and judges are not required to exercise issuing officer powers under the RPA; it is a matter for their discretion as to whether they choose to be available to exercise these powers.

d. **Relevant Chief Executive.** Relevant chief executives or their delegates will issue identity cards to authorised persons[453] and will have responsibility for things seized during a search. These responsibilities include returning the seized thing, applying to an issuing officer to retain a seized thing for a further period, or disposing of the seized thing if they are unable to return it.[454] CDF and the IGADF are relevant chief executives; however, they can delegate their powers and functions to an APS EL1 (or higher) or to an officer at the O-5 level or higher.[455] The delegate must comply with any directions issued by CDF or the IGADF when exercising the powers or functions.[456]

e. **Persons Assisting.** If reasonably necessary, the authorised person may be assisted by other persons to exercise the investigation powers.[457] The person assisting may exercise the same powers, and perform the same

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[449] RPA s 76.

[450] DFDA s 101ZAB(5).

[451] See *Acts Interpretation Act 1901 (Cth)* s 16C(2)(b).

[452] RPA s 75.

[453] RPA s 76.

[454] RPA ss 66, 67 and 68.

[455] DFDA s 101ZAB(6) and (7).

[456] DFDA s 101ZAB(9).

[457] DFDA s 101ZAB(11); RPA s 23.

function or duty, as the authorised person.[458] When they do so it is taken as if the authorised person exercised the power or performed the function or duty.[459] The person assisting must act in accordance with any direction given by the authorised person.[460]

Entry to premises with consent

329. Authorised persons can enter premises and exercise investigation powers without obtaining an investigation warrant, if the occupier has given consent for them to enter the premises.[461]

330. **Process and requirement of obtaining consent.** Before an authorised person obtains consent, the authorised person must inform the occupier of the premises that they may refuse to give consent.[462] The authorised person must show the occupier their identity card before, or as soon as reasonably practicable after, entering the premises.[463] The authorised person should provide the occupier of the premises with information in written form on the investigation powers and the occupier's rights and obligations. This is not a legal requirement under the RPA, however, providing such information is good practice and minimises legal risk.

331. Consent to enter the premises cannot be a passive act or based on inference. Consent to entry must be recorded as an affirmative acceptance, and will not exist where a person merely stands by or acquiesces while an authorised person enters the premises. There must be a voluntary agreement, based on an understanding of what an authorised person seeks to do.

332. Voluntariness is a crucial element of the process involved in obtaining the consent of a person. It must be the will of the person to permit entry. Their will must not be overborne, whether by threats, duress, inducements or some other form of coercion. Entering premises where a person's consent is not voluntary is unlawful.[464]

333. **Duration of consent.** The occupier may specify that consent is limited to entry during a particular period.[465] If the consent is not limited to a particular period then the authorised person can enter and search the premises until the consent is

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[458] RPA s 53.

[459] RPA s 53.

[460] RPA s 53.

[461] RPA s 48 and 49(a).

[462] RPA s 55(1).

[463] RPA 55(6).

[464] RPA s 55(2).

[465] RPA s 55(3).

withdrawn.[466] The authorised person must leave the premises if the consent is withdrawn.[467]

334. If consent is not given, or is withdrawn, the authorised person will need to obtain an investigation warrant in order to enter the premises and exercise investigation powers (see below at paragraph 18 onwards).

335. **Evidence of consent.** Written consent is not required by law; however, documented evidence of consent is useful in the event that the legality of the entry and exercise of investigation powers is challenged in future proceedings. A contemporaneous entry in the authorised person's notebook should be made that records the information the authorised person provided to the occupier and the date and time that consent was given.

336. **Available investigation powers.** The following investigation powers are available if the entry is with consent:

a. Search the premises and any thing on the premises for the evidential material the authorised person suspects on reasonable grounds may be on the premises[468]

b. Inspect, examine, take measurements of or conduct tests on evidential material found during the search[469]

c. Take photographs or video footage of the premises or evidential material[470]

d. Operate electronic equipment on the premises, including using any compatible electronic storage device, where the authorised person suspects that the electronic equipment or storage device is or contains evidential material[471] and believes they can operate it without damaging that equipment.[472] This includes the power to:

    (1) Put evidential material in documentary form (i.e. printing materials) and remove those documents from the premises[473]

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[466] RPA s 55(4).

[467] RPA s 55.

[468] RPA s 49(a).

[469] RPA s 49(c).

[470] RPA s 49(d).

[471] RPA s 50(1).

[472] RPA s 50(3).

[473] RPA s 50(2)(b).

(2) Transfer electronic copies onto the authorised person's storage device (or onto a storage device on the premises if agreed to in writing by the occupier)[474] and remove from the premises

e. Be accompanied by, and make use of, an animal (for example a military police dog) to assist the authorised person in entering the premises, or in exercising powers.[475]

337. **Unavailable investigation powers.** The following powers are not available for where the entry is with consent (ie. they are only available where the entry is under an investigation warrant):

a. Seize evidential material.[476]

b. Securing electronic equipment for up to 24 hours to obtain expert assistance with operating it.[477]

338. Seizure is not available under the RPA where entry is authorised because of the occupier's consent, rather than an investigation warrant.[478] If it is anticipated seizure of evidential material will be required during a search, then an investigation warrant should be obtained under the RPA[479] or, alternatively where available, search with consent should be conducted under DFDA Part VI.[480] It is of note that an investigation warrant issued under the RPA enables the seizure of equipment, disk, tape or other storage device that an authorised person has reasonable grounds to believe contains evidential materials[481] only if it is not practicable to either put the material into documentary form[482] or transfer the material to a storage device.[483] It is recommended legal advice is sought on this issue.

339. **Factors for Consideration.** Both the DFDA and RPA enable entry to premises with consent. As occupiers may withdraw their informed consent at any

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[474] RPA s 50(2)(c).

[475] DFDA s 101ZAC. This provision would allow, for example, the use of canine explosives detection capability and canine drug detection capability in searches of premises during investigations of service offences.

[476] RPA s 49(a) and (b).

[477] RPA s 51.

[478] RPA s 48(a) and (b).

[479] RPA s 48(b)

[480] DFDA s 101W(3).

[481] RPA S 50(2)(a)

[482] RPA S 50(4)(a)

[483] RPA S 50(4)(a)

time, there is a risk that the search or other exercise of investigation powers may be required to cease prior to completion and evidence may be lost as a result. Investigating officers and authorised persons should consider this risk before determining the most appropriate course of action. Other factors that need to be considered include:

a. Whether a person is an authorised person under the RPA - the RPA legislation cannot be used unless a person is authorised by CDF or IGADF.[484]

b. Whether seizure of the item is significant to the investigation process - while the DFDA enables an 'investigating officer' to search and seize with consent,[485] an 'authorised person' under the RPA has the power to search but not seize evidential material when exercising investigation powers after entry by consent.

c. The RPA provides a legislative framework for an authorised person to undertake a number of actions in relation to the premises being entered with consent and the evidential material located, such as taking photographs, conducting examinations and tests. Consideration should be given by an authorised person as to whether the use of these powers under the RPA framework will provide a greater benefit to the investigation process.[486] In the event that the occupier does not want these actions to occur, it remains open to them to withdraw their consent to enter the premises.

SEARCHES UNDER INVESTIGATION WARRANT

340. An investigation warrant under the RPA may be appropriate where the occupier has not consented to the entry, or it is likely evidential material will need to be seized. The RPA ***does not authorise any use of force against a person*** for the purpose of executing investigation warrants.

Process for obtaining an investigation warrant

341. An authorised applicant can make an application for an investigation warrant[487] to an issuing officer.[488] The application must relate to an investigation

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[484] DFDA s 101ZAD(2)

[485] DFDA S 101W(3)

[486] These actions may also be conducted during searches with consent under the DFDA, as actions reasonably incidental to the statutory power to conduct such searches; however, they are not explicitly provided for in the DFDA and may be objected to by the occupier.

[487] RPA s 70.

[488] DFDA s 101ZAB(5).

which is a service offence.[489] This application may take the form of an *Affidavit for an Investigation Warrant* [Form J1] and will be sworn or affirmed before an issuing officer. If the issuing officer is satisfied that reasonable grounds exist for suspecting that there is, or within 72 hours there will be, evidential material pertaining to the service offence, they may issue the warrant.[490]

342. **Affidavit requirements.** When completing the affidavit, the authorised applicant must have sufficient detail to describe the premises, provide significant background detail about the investigation, and particularise the evidential material.[491] The authorised applicant must have reasonable grounds for suspecting the evidential material will either afford evidence of, or will be intended to be used in connection with, a service offence. The affidavit is relied upon by the issuing officer to satisfy themselves (or otherwise) of the reasonable grounds outlined in the preceding paragraph, in support of the warrant.

343. **Obtaining a search warrant via telephone or other electronic means.** An authorised applicant may make application by telephone or other electronic means to an issuing officer for a warrant which is either urgent or where the authorised applicant believes that a delay, caused by the application being made in person, would lead to the effective frustration of the warrant.[492] For example, where advance notice to the occupier of the warrant may result in the destruction or removal of evidential material. While an application may be made by telephone, the authorised applicant is still required to prepare the *Affidavit for an Investigation Warrant* [493] [Form J1] before applying for the warrant, but may swear or affirm the affidavit after making the application, if necessary. The issuing officer will determine whether the application is one which is urgent and issue the warrant if appropriate.[494] It is an offence if the authorised applicant produces a form of warrant that has materially different terms to the one signed by the issuing officer by telephone or electronic means.[495] Further details are in the offences section below.

344. **Use of animals.** If necessary, the authorised applicant should consider the use of animals, such as a military police dog, during the execution of the investigation warrant. If appropriate, the affidavit should address the reasons or

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[489] DFDA s 101ZAB(1).

[490] RPA s 70.

[491] RPA s 39.

[492] RPA s 71(1).

[493] RPA s 71(3).

[494] RPA s 71(4).

[495] RPA s 73.

justification to use an animal to assist in entering or searching the premises.[496] The investigation warrant must state whether the authorised person named in the warrant is authorised to be accompanied by, and make use of, an animal and what type of animal is authorised to be used. [497]

Execution of the warrant.

345. **Process.** An authorised person [498] may execute the warrant, assisted by other persons, if that assistance is both necessary and reasonable.[499] The authorised person must be in possession of the warrant at all times from commencement of executing the warrant.[500] Before entering the premises the authorised person must announce that they are authorised to enter the premises and show their identity card.[501] However, this announcement is not required if immediate entry is necessary to ensure the safety of a person[502] or to ensure that the effective execution of the warrant is not frustrated.[503] This could arise, for instance, where there are reasonable grounds for believing that active steps are being undertaken inside the premises to conceal or destroy evidential material. In this latter case of immediate entry, the authorised person must, as soon as practicable after entering the premises, show their identity card to the occupier.[504]

346. The authorised person must, as soon as practicable, provide the occupier or their representative with a copy of the warrant[505] and inform them of their rights and responsibilities. This includes their right to observe the execution of the warrant[506] without impeding its execution and providing the authorised person and any person assisting the authorised person with reasonable facilities and assistance for the effective exercise of their powers.[507]

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[496] DFDA s 101ZAC(2).

[497] DFDA s 101ZAC(4).

[498] Authorised person is a person appointed under DFDA s 101ZAD(2) by CDF and is in possession of an Identity Card issued under RPA s 76.

[499] DFDA s 101ZAB(11).

[500] RPA s 57.

[501] RPA s 56.

[502] RPA s 56(2)(a).

[503] RPA s 56(2)(b).

[504] RPA s 56(3).

[505] RPA s 58(2).

[506] RPA s 62(1).

[507] RPA s 63.

347. **Investigation Powers.** When executing the investigation warrant the authorised person, and any person assisting, may exercise investigation powers. Investigation powers include the power to search for and seize evidential material specified in the warrant.[508] An authorised person may inspect, examine, take measurements or conduct tests on the evidential material located or seized[509] using equipment and materials as is required. The authorised person may also take photographs or electronic recordings of either the premises or evidential material.[510]

348. **Use of force.** Use of force against a ***person*** is not authorised for the purpose of executing the warrant. When exercising the investigation powers, the authorised person or person assisting the authorised person may use force against ***things*** as is necessary and reasonable in the circumstances.[511] For example, using force to enter a locked office area to search for an office computer, where entry to that area has been refused, could be considered reasonable. However, it would be unreasonable to forcibly open a locked briefcase if the evidential material being searched for is a desktop computer.

349. **Electronic equipment.** During the execution of an investigation warrant, if an authorised person believes, on reasonable grounds, that electronic equipment contains evidential material they may:

a. operate or use it [512]

b. seize it,[513] or

c. transfer the evidential material contained on it to a documentary form or onto a storage device and remove the document or storage device from the premises.[514]

350. An authorised person can only 'operate' electronic equipment or 'transfer' evidential material it is believed on reasonable grounds that such activities can be carried out without damage to the equipment.[515]

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[508] RPA s 49(b).

[509] RPA s 49(c).

[510] RPA s 49(d).

[511] DFDA s 101ZAB(12).

[512] RPA s 50(1).

[513] RPA s 50(2)(a).

[514] RPA s 50(2)(c).

[515] RPA s 50(3).

351. An authorised person can only 'seize' electronic equipment if it is not practicable to place the evidential material contained on the electronic equipment into a documentary form or transfer it to a storage device.[516]

352. Other than operating or seizing electronic equipment, or transferring the evidential material to a storage device, an authorised person may secure electronic equipment that is on the premises being searched if they suspect on reasonable grounds that:

a. the equipment contains evidential material indicated on the warrant

b. expert assistance is required to operate that equipment, and

c. the evidential material may be destroyed, altered or interfered with if the equipment is not secured.

353. In such a case, the equipment may be locked away, guarded or secured by any other means.[517]

354. When securing electronic equipment, an authorised person must give notice to the occupier stipulating their intention to secure the equipment for a period of up to 24 hours.[518] This period can be extended by application to an issuing officer, after notice is provided to the occupier of the authorised person's intent to make such an application.[519] The issuing officer may grant the extension if they are satisfied it is necessary to prevent evidential material from being destroyed, altered, or otherwise interfered with.[520]

355. **Seizing things not described in investigation warrant.** While lawfully upon premises executing a search warrant, the authorised person may seize a thing that is not evidential material mentioned in the warrant if there are reasonable grounds to believe that the thing is evidential material of another kind and the authorised person reasonably believes that seizure is necessary in order to prevent its concealment, loss or destruction.[521] An example of this would be if the warrant listed hard copy paper bank records as evidential material, however, during the search the authorised person found electronic versions of the bank records. They could still be seized as, despite not being specified in the warrant, they would be classified as evidential material of another kind.

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[516] RPA s 50(4).

[517] RPA s 51.

[518] RPA s 51(3).

[519] RPA ss 51(5) and (6). The occupier is entitled to be heard in relation to that application.

[520] RPA s 74.

[521] RPA s 52(2)(b)(i).

356. If, while conducting a search, an authorised person finds evidential material relating to a different service offence, or to a criminal offence, they cannot seize it. Unless the evidential material is specified in the investigation warrant it cannot be seized, apart from the limited exception outlined in paragraph 355 This is more restrictive than search warrants under section 101X of the DFDA, where investigating officers can seize things they believe on reasonable grounds are connected with a service offence, even if they are not specified in the warrant.[522]

357. **Copies of seized things to be provided.** The authorised person must provide a copy of a thing or information seized if requested to do so by the occupiers or the occupier's representative and the thing or information can be readily copied.[523]

358. **Receipts for seized things.** The authorised person must provide a receipt for a thing seized.[524]

359. **Requirement to return seized things.** Things seized under an investigation warrant must usually be returned to the person from whom it was seized, or to the owner if that person is not entitled to possess it, when the earliest of the following three events occurs:

a. the reason for the thing's seizure no longer exists

b. it is decided that the thing is not to be used in evidence

c. 60 days has passed since the thing was seized.

360. **Exceptions to returning seized things.** The requirement to return seized things does not apply if there is a contrary order of a court, or if the thing is forfeited or forfeitable to the Commonwealth or is subject to a dispute as to ownership. Further, the relevant chief executive is not required to take reasonable steps to return a thing within 60 days if:

a. proceedings in connection with the seized thing have commenced and are yet to be completed

b. an extension of time has been ordered by an issuing officer, or

c. the Commonwealth is otherwise lawfully authorised to retain, destroy, dispose of or deal with the thing.[525]

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[522] DFDA s 101X(5).

[523] RPA s 64.

[524] RPA s 65.

[525] RPA s 66(2), (3).

361. **Extension of time for returning seized things.** The relevant chief executive may apply to an issuing officer for an order permitting the retention of a seized thing for a further period.[526] Before making the application, the relevant chief executive must take reasonable steps to discover who has an interest in the retention of the thing and notify them of the proposed application. Any person notified is entitled to be heard in relation to the application. The issuing officer may make an order that the thing continue to be retained for a maximum period of three (3) years. Before making the order the issuing officer must be satisfied that the thing needs to be retained for the purposes of an investigation of the contravention of a service offence, or to enable evidence to be secured for the prosecution of a service offence.

362. **Disposal of seized things.** The relevant chief executive may dispose of a seized thing if they have taken reasonable steps to return the thing to a person and either the person cannot be located, or has refused to take possession of the thing.[527] The relevant chief executive may dispose of the thing in such a manner as they believe is appropriate. In some limited circumstances, the person may be able to obtain compensation from the Commonwealth for the thing disposed of.[528]

POWERS TO ASK QUESTIONS AND SEEK PRODUCTION OF DOCUMENTS

363. If entry to premises is conducted with the occupier's consent, an authorised person may ***ask*** the occupier to answer questions and produce documents relating to evidential material, but the occupier has no obligation to answer the questions or produce the requested documents.[529]

364. If the search is conducted under an investigation warrant, an authorised person may ***require*** any person to answer questions and produce documents that are relevant to evidential material.[530] These powers may be particularly useful when evidence such as bank statements, real estate records, CCTV footage and phone records need to be investigated, and may significantly reduce the time needed to conduct a search.

365. A person who does not comply with an authorised person's requirements to answer questions or produce documents during execution of an investigation warrant commits an offence[531] unless:

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[526] RPA s 67.

[527] RPA s 68.

[528] RPA s 69.

[529] RPA 54(2).

[530] RPA s 54(3).

[531] RPA s 54(4).

a. the person does not possess the information or document and they have taken all reasonable steps available to obtain it but have been unable to obtain it.[532]

b. answering the question or producing the document might incriminate the person or make them liable to a penalty[533]

c. the answer to the question or the document is subject to legal professional privilege.[534]

d. The DFDA Part VI provisions governing search and seizure under warrant, outlined in Annex 4A, do not contain a similar power or offence.

OCCUPIER'S RIGHTS AND RESPONSIBILITIES

366. The RPA creates the following rights and responsibilities for the occupier of the premises (or their representative) subject to an investigation warrant:

a. The right to observe the execution of a warrant if they are present at the time. However, this right ceases if the occupier or another person impedes the execution of the warrant.[535]

b. The responsibility to provide reasonable facilities and assistance to authorised persons and persons assisting. If the occupier or their representative fails to do so then they commit an offence.[536]

367. **Compensation for damaged electronic equipment.** If electronic equipment is damaged or the data contained on it is corrupted during the investigation then the owner of the equipment or user of the data is entitled to reasonable compensation.[537] The damage or corruption must be due to insufficient care being taken by the person operating the equipment, or in selecting who should operate the equipment. The Commonwealth and the owner or user should agree on a reasonable compensation amount; however, if this does not occur then the owner or user may institute court proceedings. When determining what amount of compensation is reasonable, regard must be had to whether the occupier of the premises, or their employees or agents, provided any appropriate warning or guidance on the operation of the equipment.

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[532] RPA s 54(4).

[533] RPA s 47(1).

[534] RPA s 47(2).

[535] RPA s 62.

[536] RPA s 63.

[537] RPA s 61.

368. **Copies of seized things.** The occupier of the premises, or their representative, may request a copy of the thing or information seized from the premises.[538] However, this only applies to documents, films, computer files, information on a storage device, or other things that can be readily copied. The authorised person must comply with the occupier's request, unless possession of the thing or information could constitute an offence.

OFFENCES

369. This section outlines offences that apply to authorised persons under the RPA, and occupiers of premises, or persons on premises, during execution of an investigation warrant.

370. **Identity cards.** All authorised persons must be issued with an identity card by the relevant chief executive.[539] If an authorised person ceases to be an authorised person they must return their identity card to the relevant chief executive within 14 days. If they do not return the identity card within that time frame then they commit an offence.[540] This is an offence of strict liability.

371. **Offence relating to warrants by telephone, fax etc.** When an investigation warrant is obtained by telephone, fax, or other electronic means then the authorised applicant will not have the original copy of the warrant signed by the issuing officer. They must instead complete a form of warrant in the same terms as the original and send it to the issuing officer. As there is the potential for abuse of this process, the RPA contains an offence provision[541] that the authorised applicant must not:

a. state in the warrant the name of an issuing officer unless they were the issuing officer that signed the warrant.

b. state in the warrant a matter that they know is materially different to the terms of the warrant signed by the issuing officer.

c. try to execute, or present, a warrant to another person that they know is materially different from the terms of the warrant signed by an issuing officer.

d. try to execute, or present, a warrant to another person when they know that no warrant in those terms has been completed and signed by an issuing officer.

e. give an issuing officer a form of warrant that is not the same as the one they tried to execute.

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[538] RPA s 64.

[539] RPA s76(1)

[540] RPA s 76(3).

[541] RPA s 73.

372. **Failing to answer a question or produce a document.** If any person on the premises fails to answer any question, or produce any document, relating to evidential material of the kind specified in an investigation warrant, then they commit an offence.[542] The exceptions are self-incrimination, legal professional privilege, or if the person does not possess the information or document and has taken all reasonable steps to obtain it and has been unable to.

373. **Failing to provide facilities and assistance.** If the occupier of premises (or their representative) fails to provide reasonable facilities and assistance so that the authorised person and any persons assisting can carry out their investigation, then they commit an offence.[543] This only applies to entry and search under an investigation warrant.

[542] RPA s 54(5).

[543] RPA s 63.