DIRECTOR OF MILITARY PROSECUTIONS

Report for the period
1 January to 31 December 2016

Department of Defence

Director of Military Prosecutions

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Office of the Director of Military Prosecutions
Department of Defence
13 London Circuit, PO Box 7937
Canberra BC ACT 2610

Senator the Hon Marise Payne
Minister for Defence
Parliament House
CANBERRA ACT 2600

Dear Minister,

As Director of Military Prosecutions I submit the report herewith as required by section 196B of the *Defence Force Discipline Act 1982,* covering the period from 1 January to 31 December 2016.

Yours sincerely,

JA Woodward
Brigadier
Director of Military Prosecutions
Australian Defence Force

18 April 2017

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Table OF ABBREVIATIONS USED IN REPORT

ABBREVIATIONS	DESCRIPTION
AACP	Australian Association of Crown Prosecutors
AB	Able Seaman
ACT	Australian Capital Territory
ACTDPP	Australian Capital Territory Director of Public Prosecutions
ADF	Australian Defence Force
ADFIS	Australian Defence Force Investigative Service
APS	Australian Public Service
CAPT	Captain
CIOG	Chief Information Officer Group
CJA	Chief Judge Advocate
CJOPS	Chief of Joint Operations
CMDR	Commander
CPL	Corporal
CPO	Chief Petty Officer
CSM	Command Sergeant Major
CTH	Commonwealth
DHA	Defence Housing Australia
DFDA	Defence Force Discipline Act
DFDAT	Defence Force Discipline Appeal Tribunal
DFM	Defence Force Magistrate
DMP	Director of Military Prosecutions
DPP	Director of Public Prosecutions
DRIO	Digital Record of Interview
DRN	Defence Restricted Network
DSN	Defence Secret Network
FLGOFF	Flag Officer
FSGT	Flight Sergeant
GCM	General Courts Martial
GPCAPT	Group Captain
IAP	International Association of Prosecutors
ICT	Information Communication Technology

IT	Information Technology
ISSP	
LS	Leading Seaman
MAJ	Major
MAJGEN	Major General
MEAO	Middle East Area of Operations
MWD	Member with Dependents
NCO	Non Commissioned Officer
ODMP	Office of the Director of Military Prosecutions
PTE	Private
RAAF	Royal Australian Air Force
RCM	Restricted Courts Martial
RMJ	Registrar of Military Justice
RSM	Regimental Sergeant Major
SGT	Sergeant
TPR	Trooper
WO1	Warrant Officer Class One
WO2	Warrant Office Class Two
WTTS	Weapon Training Tests

DIRECTOR OF MILITARY PROSECUTIONS

AUSTRALIAN DEFENCE FORCE

REPORT FOR THE PERIOD

1 JANUARY TO 31 DECEMBER 2016

DIRECTOR'S OVERVIEW

1. I am pleased to present the Director of Military Prosecutions (DMP) Annual Report for the period 1 January to 31 December 2016, my second since being appointed as the DMP by the Minister of Defence on 1 July 2015.

2. As provided for in the *Defence Force Discipline Act 1982* (DFDA) the DMP is responsible for carrying on prosecutions for Service offences in proceedings before a court martial or Defence Force magistrate; to represent the Service Chiefs in proceedings before the Defence Force Discipline Appeal Tribunal (DFDAT); to seek the consent of the Director of Public Prosecutions as required by s 63 of the DFDA; to make statements or give information to particular persons or to the public relating to the exercise of powers under the DFDA; to do anything incidental or conducive to the performance of any of these functions; and to perform such other functions as are prescribed by the regulations. The DMP must also fulfil his or her legal mandate in a fair, impartial and independent manner.

3. The Australian public expect that members of the Australian Defence Force will comply with Australian law, military law and international law. The maintenance of discipline is the responsibility of the chain of command and is crucial for operational effectiveness. The military justice system is designed to support the maintenance of discipline and respect for the rule of law.

4. Military prosecutors fulfil a vital role in the military justice system by determining when charges should be preferred against defence members and then prosecuting cases according to law.

5. The Office of the DMP (ODMP) is unique in comparison to other State, Territory and Commonwealth prosecution agencies in that prosecutors are directed to post into the office, generally without any prior advocacy experience. The expectation is that

once admitted to practice, any lawyer can become an advocate, but that is far from the truth. The mere thought of appearing in a courtroom for the first time can be daunting for any lawyer, particularly when many are not there by choice. This is compounded by the fact that many officers are posted out of my office just at the time that they are becoming competent in appearing as advocates.

6. I am endeavouring to influence the individual Services to create a career path for permanent ADF legal officers through the military justice sphere, so those lawyers who want to be advocates, can be posted in and out of the office and then ultimately be trained as judge advocates and Defence Force magistrates. Currently there appears to be little recognition of officers, by the Service career management agencies, who wish to focus their careers in the military justice arena. With the centralisation of much of the discipline law work undertaken by ADF legal officers to my office, it has also become apparent that the principal means by which knowledge and experience of the discipline system is gained by permanent legal officers is through a posting as a prosecutor.

7. Another factor worthy of note is that the independence of the prosecutor carries with it great responsibility. A prosecutor may be called upon to make unpopular decisions and often to stand up against entrenched command interests. As a case involving one of my predecessors has shown, the prosecutor has the unique distinction of making decisions that are unpopular in many areas of the Defence Force, the returned services associations and the general public. Prosecuting is not a posting for those lawyers yearning for popularity.

8. Many of these factors place permanent legal officers at a significant disadvantage when they appear in trials by court martial or before a Defence Force magistrate, particularly where the accused has almost unlimited legal assistance at Commonwealth expense, enabling him or her to brief very experienced counsel from the Reserve.

9. In this, its tenth year of operation, the Office of the DMP has completed another year of significant achievement, against a backdrop of general dissatisfaction by the Services at the current state of the military justice system.

10. As recorded in this report, appeals before the DFDAT are at record level; however, the number of trials before Superior Service tribunals has dropped. This is the result of several factors, including a decision not to proceed with prosecutions relating to certain ICT-related offending because of the lack of proper investigative capacity within the Defence Force, decisions to refer matters to the Services for administrative action, where such a course seemed appropriate and the referral of purely disciplinary matters back to unit level where there is capacity to deal with them.

11. The most significant features of 2016 are as follows:

a. the Defence Force magistrate trial of TPR W, which is reported at greater length in the case notes section of this report, was a catalyst for the current military justice review;
b. the DFDAT decision in *Williams v Chief of Army;*
c. a marked increase in the number of cases that involve accused persons asserting mental health issues either as a factor that influenced the offending, their capacity to participate in a trial, or post-conviction in mitigation;
d. prosecution of the first 'upskirting' case under the newly created provision of s 61B of the *Crimes Act 1900*; and
e. increased use of Victim Impact Statements, particularly in sexual offence proceedings.

12. There was also an increase in the number of prosecutions for low-level sexual misconduct perpetrated by males on subordinate female members of the Defence Force. Such offences alleged sexual misconduct by male senior NCOs or officers, ranging from squeezing breasts, squeezing or grabbing buttocks, touching female genitalia, threatening failure if there was a

refusal to engage in a sexual relationship, inappropriate or suggestive messages using the Lync instant messaging system, filming a naked female showering, and viewing a naked female showering by peering under the adjoining partition between the showers.

13. Many of the incidents referred to have been committed in training establishments. It is apparent from the briefs of evidence I have received, that other incidents go unreported because the complainant does not believe that he or she will be believed and many just want to move on with their careers away from the training establishment, and away from the alleged perpetrator. Excessive consumption of alcohol is a recurring feature of this offending, however many of the offences appear to be systematic and planned occurrences over an extensive period of time, and in some circumstances perpetrated on a number of subordinate females.

14. *Pathway to Change: Evolving Defence Culture* was published in March 2012 as Defence's five-year strategy for cultural change and reinforcement. In its final year of implementation, it appears to me, based on the matters we have received, that complainants now feel that they have greater empowerment to report alleged sexual misconduct. Complainants appear to believe that command and the military justice system are a means to take appropriate action against alleged perpetrators. Furthermore, although there has been an increase, when one considers the size of the Defence Force, and the fact that it is predominantly male, compared to the general community the level of offending is low.

15. As prosecutors, we never lose sight of the fact that it is the Defence community and the chain of command that we serve. The chain of command wants more than a fair and efficient ODMP; it wants an ODMP in which it can have confidence; and an ODMP which it knows has strong commitment maintenance of service discipline. The ODMP has served the Australian Defence Force well for 10 years and I am sure we will continue to do so.

INTRODUCTION

16. Section 196B of the *Defence Force Discipline Act 1982* (Cth) (DFDA) obliges the Director of Military Prosecutions of the Australian Defence Force, as soon as practicable after 31 December each year, to prepare and give to the Minister for Defence, for presentation to the Parliament, a report relating to the operations of the DMP for that year. The report must:

a. set out such statistical information as the DMP considers appropriate; and
b. include a copy of each direction given or guideline provided under subsection 188GE(1) during the year to which the report relates, and a copy of each such direction or guideline as in force at the end of the year.

17. This report is for the 12-month period to 31 December 2016.

18. The position of DMP was established by s 188G of the DFDA, and commenced on 12 June 2006. The office holder must be a legal practitioner of not less than five years' experience, and be a member of the Permanent Navy, Regular Army or Air Force, or a member of the Reserves rendering full-time service, holding a rank not lower than Commodore, Brigadier or Air Commodore.[1]

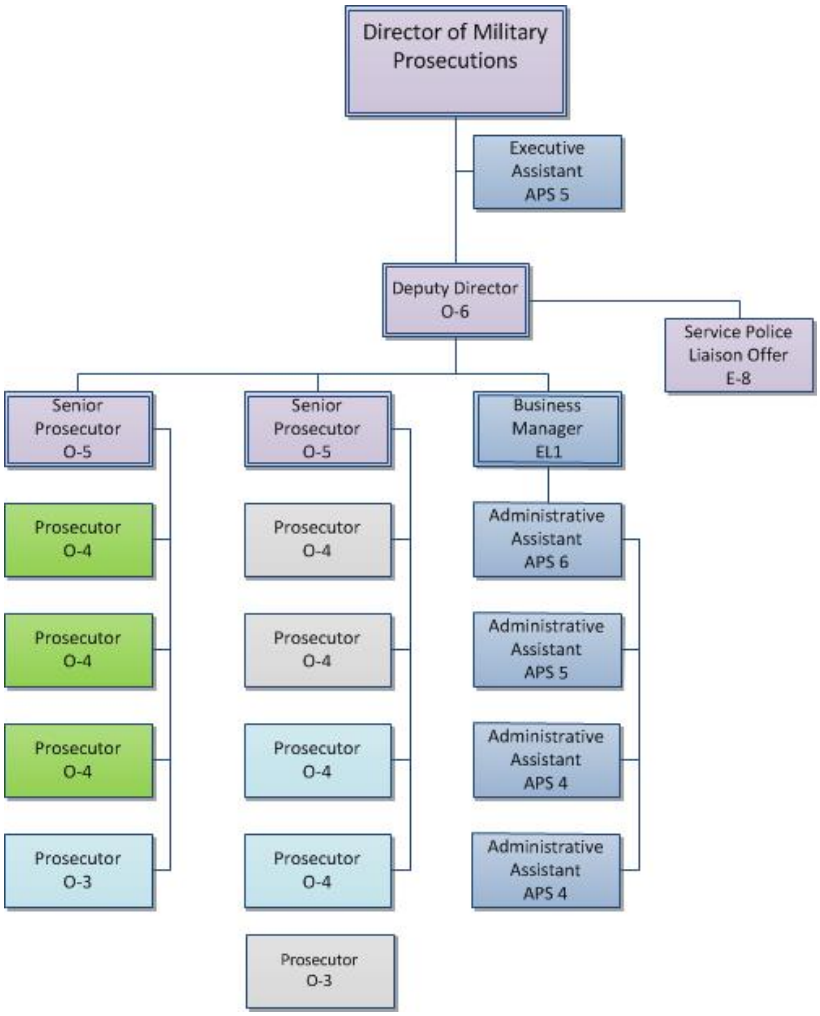
19. Former appointments to the position of DMP have been:

a. Brigadier Lynette McDade (July 2006 – July 2013)
b. Brigadier Michael Griffin AM (August 2013 – January 2015)
c. Group Captain John Harris SC – Acting DMP - (January 2015 – June 2015)

[1] DFDA s 188GG

ORGANISATIONAL STRUCTURE

20. The office structure during the reporting period was as follows:



21. During the reporting period, I had a Deputy Director at the 06 level who was appointed by the Minister of Defence to act as the DMP in my absence. The Deputy Director had the responsibility of assisting me with the management of the Office, with particular emphasis on providing a high degree of leadership of the office's staff and ensuring the effective deployment of

resources. There are two senior prosecutors who are responsible for the administrative management of those prosecutors who work directly to them.

22. I met weekly with all prosecutors to receive an update on all ongoing matters and to provide direction for their future management. The whole office also met weekly to discuss matters of current concern, including legal and procedural issues, and administrative matters. Continuing legal education sessions were often conducted during these weekly meetings.

23. One Navy billet at the rank of Lieutenant Commander remained vacant during the reporting period. Further, staffing levels fluctuated markedly as prosecutors were either deployed on operations or on courses at the request of their parent Service, attending professional prosecutorial on-the-job training or on approved leave.

24. At the commencement of the reporting period, two prosecutors had already deployed on OPERATION OKRA and OPERATION ACCORDIAN, each for a period of six months. Those positions were carried as vacancies until those prosecutors returned to the office. In early October 2016, a Squadron Leader and a Lieutenant Commander deployed. The RAAF provided considerable support to backfill against the absence of the Squadron Leader.

25. Although the loss of personnel for deployment and professional training represents a considerable deficit of manpower in a comparatively small organisation, I am mindful that such opportunities broaden both the operational and professional experience of full-time legal officers. The release of legal officers for deployment is essential and unavoidable based on the scale of current military operations, however, I have indicated to the three Services that I will resist the release of multiple legal officers in the future without other support being made available to mitigate their absence.

Reserve Force

26. The Reserve has been utilised in a number of cases where the complexity of the trial precluded the permanent prosecutors from carrying out the prosecution, or when staff resources were such that the Reserve was required to maintain the level of trial commitment.

27. The Reserve has provided an invaluable source of mentoring for more junior prosecutors and I commenced utilising Reservists who regularly appear as defence counsel. By doing so I believe they will have a better understanding of the way that the ODMP operates; a move that I believe also promotes transparency within the jurisdiction.

Civilian staff

28. When I commenced my tenure, of the six civilian APS positions in my office, three staff were temporarily acting in higher duties positions and two other positions were vacant. After assessing prosecution operations, particularly in the context of the First Principles Review, I commenced an overhaul of internal processes with a view to achieving reduced timelines in bringing matters to trial and generating resource efficiencies in the conduct of trials. As part of this overhaul, a review was undertaken to assess the work being undertaken by APS staff compared against the applicable Defence APS Standard Classification of Occupation profiles.

29. The review concluded that, while there is sufficient APS resources to meet the work of my office, work was not distributed consistently with the roles and responsibilities stipulated by the applicable profile. The review has assisted the restructure of my office operations to enable greater focus on reducing case timelines, and I am now in the process of a recruitment round to fill all vacant roles and recruit permanently to positions currently being filled temporarily. I am grateful for the assistance provided by the Directorate of Workforce Supply

within the Workforce Planning Branch of Defence People Group, particularly, Ms Traci Rogers and her team who conducted the work value review.

Office relocation

30. I have reached the conclusion that the location of the Office at 13 London Circuit, Canberra City, is unsuitable. While independent from the chain of command, my office performs a function on behalf of command, namely, the prosecution of Service offences for command in order to maintain discipline in the ADF. Each prosecution requires extensive engagement with Service headquarters, ADF units, Service career management agencies, the ADF Investigative Service (ADFIS), other military justice functions, and Defence enabling support. Relocation of the Office to a Defence precinct will provide considerable efficiency.

31. Additionally, the office has a critical vulnerability of its ICT support while it remains in the current location. The computer bandwidth is very small and I have been advised by all ICT support staff in the Executive Support team that our office has the slowest and most ineffective computer system in Defence. Our computer systems often fail and this means that work is delayed. I have been advised that there is no long-term ICT solution and the current situation cannot be remediated.

32. Theses ICT difficulties have been referred to by my predecessors in successive Annual Reports. The 2011 and 2012 reports referred to persistent information technology problems. These issues can affect the ability of the office to fulfil its functions in a timely manner. The ICT support has deteriorated in the 18 months since I have been DMP and the concern is that it will continue to deteriorate further, so that the office cannot rely on the DRN system.

33. The office also lacks the physical security of a defence establishment. There is no capability to have Defence Secret Network (DSN) terminals in the office which causes many difficulties when classified material forms part of a brief of evidence. Material has to be stored at locations remote to this office and prosecutors have to work without the support of the office.

34. For these reasons, I am pursuing relocation with a preference for Brindabella Park. Brindabella Park is attractive because of the proximity to ADFIS, who provide the majority of the briefs of evidence for ultimate prosecution before Service tribunals, and proximity to the Service career management agencies who provide material and information relevant to the conduct of trials. Furthermore, the majority of my staff travel frequently throughout Australia for trials before courts martial and Defence Force magistrates so proximity to the airport would be a cost-saving measure.

35. At present, the lease on the current location has been extended and the need for relocation, before the conclusion of that option has been identified. Options are being identified to utilise the current office space as a staging centre with an aim to move my office before the end of the lease.

POLICY, TRAINING AND OUTREACH

PROSECUTION POLICY

36. In prosecuting matters, I act on behalf of the Service Chiefs. Prosecutors in the civilian case law have been called ‘ministers of justice’, a phrase which sums up the unique position of the prosecutor in the criminal justice system. Prosecutors must always act with fairness and detachment with the objectives of establishing the whole truth and ensuring a fair trial.

37. In making decisions in the prosecution process, prosecutors are guided by the procedures and standards which the law requires to be observed, and in particular by the Prosecution Policy promulgated by me. The Policy is available on the website of the Office and is appended to this report.

38. To promote transparency and to raise awareness of these factors and the related topics included in the policy, the policy is also published via the Defence restricted Network (DRN), is being distributed as a hard copy booklet and is available on the internet.

39. During the reporting period, no undertakings have been given to any person pursuant to s 188GD of the DFDA (relating to the power to grant immunity from prosecution); nor have any directions or guidelines been given in relation to the prosecution of Service offences to investigating officers or prosecutors pursuant to s 188GE of the DFDA.

TRAINING

40. Military prosecutors are posted by the Services to their prosecution positions for a limited period of time; usually two to three years. As such, the training they receive must support both their current posting as military prosecutors as well as their professional development as military lawyers and officers.

41. The brevity of an officer's posting with the ODMP requires a significant and ongoing organisational commitment to provide him or her with the formal training, supervision and practical experience necessary to develop the skills, knowledge, confidence and judgement that are vital for their role as military prosecutors.

42. During the reporting period, all new prosecutors were provided with one-on-one instruction and in-house training. New prosecutors will always 'second chair' a more experienced prosecutor in a trial, to learn some of the idiosyncrasies of the military justice system before they appear for the first time on their own. A more experienced prosecutor will always assist a less

experienced one during their first trials. As I stated in my Overview, the posting system means that often prosecutors are at the point of becoming confident in the courtroom appearances at the precise time when they are posted out of the ODMP.

43. Courses completed by prosecutors during the reporting period included mandatory ADF Legal Training Modules as well as general Service courses, including the pre-requisite promotion courses.

44. In conjunction with continuing legal education subjects provided by the ACT Law Society, a range of training was also provided in-house by prosecutors and other subject matter experts. This training assisted prosecutors to meet their mandatory continuing legal education requirements.

45. The benefit to the wider ADF of having permanent ADF legal officers post through ODMP cannot be overstated. Without a posting to ODMP, permanent legal officers have very limited exposure to the discipline system beyond the summary level. The difference in the practical knowledge and understanding of the jurisdiction between permanent officers who have been posted to ODMP (or have had similar criminal law experience), and those who have not, is pronounced.

46. Additionally, prosecutors learn the art of persuasion and advocacy in a way that legal officers who primarily undertake advisory work within staff environments are never exposed to. The demands placed on prosecutors to plan, react and respond in the execution of the prosecution case during the trial are significant. The trial work of prosecutors is also closely scrutinised, including through the trial review processes under the DFDA. This means that unlike the staff advisory environment many ADF legal officers face within units and headquarters, almost every legal argument or proposition advanced by a prosecutor is tested, either within the trial or after the trial upon review.

OUTREACH

ACT Law Society

47. During the reporting period and in accordance with s 188GQ of the DFDA, all legal officers at ODMP either held or obtained an ACT Practising Certificate, and completed the mandatory legal ethics training provided to all Defence legal officers. Most prosecutors attended training conducted by the ACT Law Society in order to complete their 10 required Compulsory Professional Development Points. Members of my staff are also on the ACT Law Society Military Justice and Young Lawyers committees.

Australian Association of Crown Prosecutors

48. Since 2007, ODMP prosecutors have been admitted as members of the Australian Association of Crown Prosecutors (AACP). The AACP is comprised of Crown or State prosecutors from every Australian jurisdiction and some jurisdictions in the Pacific region.

49. The AACP Conference was held in Canberra during the reporting period and staff from the ODMP assisted staff from the Office of the ACT Director of Public Prosecutions in organising the conference. It involved a good mix of the military and civilian environments, particularly on the social occasions during the conference. One of the evening social functions was held in the Officers' Mess at the Royal Military College. The keynote speaker at the conference dinner was the current Chief Judge Advocate, MAJGEN Ian Westwood AM.

50. I presented a paper at the conference on some of the interesting difficulties I encounter prosecuting in the unique military jurisdiction.

International Association of Prosecutors

51. The Office is an organisational member of the International Association of Prosecutors (IAP). The IAP is a non-governmental and non-political organisation. It promotes the effective, fair, impartial and efficient prosecution of criminal offences through the application of high standards and principles, including procedures to prevent or address miscarriages of justice.

52. The IAP also promotes good relations between prosecution agencies and facilitates the exchange and dissemination of information, expertise and experience.

53. In September 2016 I attended the IAP conference, scheduled by the IAP, in Dublin, Ireland. It was also the inaugural meeting of the International Association of Military Prosecutors. The theme of the conference was the relationship between the prosecutor and the investigator. I presented a paper at the conference entitled '*Aussie Mateship and Regimental Amnesia – Misplaced Loyalty and Obstacles Getting to the Truth in the Australian Military Discipline System*'.

Asia Pacific Military Justice Workshop

54. The Deputy DMP represented me at the Asia Pacific Military Justice Workshop at the National University of Singapore, in September 2016. The aim of the workshop was to explore developments in military justice systems in the Asia Pacific region from a comparative perspective.

55. Attendees participated in a series of roundtable discussions on aspects of military justice in national legal systems and also in deployed environments. The program focused on execution of military justice which provided an opportunity for consideration of the influence of civilian criminal law and procedure on national discipline systems including in relation to sentencing and choice of forum

56. The Deputy Director gave a presentation that built on the theme of my presentation to the IAP annual conference concerning the difficulties faced by military prosecutors when witnesses give evidence that is not expected, because they have either lied, been 'mistaken' or are unable to recall. The presentation focused attention on the fact that the ADF's discipline system adopts a civilian criminal law investigatory model when elements of an inquisitorial framework may well be more suited to meeting the needs of modern military discipline.

Secondment to the Office of the Director of Public Prosecutions for the Australian Capital Territory

57. During the reporting period one of my senior prosecutors was seconded, and continues to be seconded, to the Office of the Director of Public Prosecutions for the Australian Capital Territory (ACTDPP). This enables prosecutors to develop advocacy skills above what they can gain while working in such a small jurisdiction of military justice. This will continue to be an ongoing arrangement with the ACTDPP. I remain greatly indebted to Mr Jon White SC (DPP) for providing this opportunity.

Internal (Department of Defence) Liaison

58. During the reporting period, I reported to the Minister, the Chief of the Defence Force and the Service Chiefs on a quarterly basis. The reports contained information for the reporting period on new briefs of evidence referred to ODMP, the outcomes of briefs closed, the number of trials before Defence Force magistrates (DFMs), restricted courts martial (RCM) and general courts martial (GCM), referrals to the Registrar of Military Justice (RMJ) and included statistics giving a general overview of matters referred to the DMP.

ADF Investigative Service

59. During the reporting period, ODMP liaised on a frequent basis with the Provost Marshall ADF, GPCAPT Roberts and his staff

at the ADFIS concerning the relationship between the two offices, means to reduce the timelines in relation to briefs of evidence and the requests for further information in relation to briefs of evidence. The relationship between the two offices continues to be effective and productive. A significant factor which assists the ongoing relationship is the fact that the legal officer at ADFIS was formerly a military prosecutor.

60. The staff of the ODMP supported the continuation of training provided by ADFIS to its investigators. These sessions are an important professional development tool for the ADFIS investigators. This support is seen as an invaluable tool to maintain the professional relationship that currently exists and builds a strong professional relationship with new investigators. I regard the relationship between ADFIS, service police and ODMP as crucial in ensuring the efficient and effective disposal of service discipline matters.

61. The ODMP has a duty prosecutor roster and the prosecutor allocated to the roster at any particular time regularly provides advice to investigators about the legal aspects of their investigations.

Command

62. I am cognisant that while my office and the execution of my duties under the DFDA are statutorily independent, the prosecution function is exercised on behalf of command and for the vital purpose of maintaining service discipline. My continued goal is to ensure that the operations of ODMP support command and the efficient maintenance of service discipline, and I will continue to engage with commanders at unit and formation level in order to deepen my understanding of relevant issues affecting command. I have engaged with command on an ongoing basis during the reporting period to endeavour address any lack of confidence that such officers may have in the military justice system.

63. Prior to assuming command, each Service requires officers to complete pre-command courses. Each pre-command course has a military justice component delivered by staff from the Military Law Centre. Staff from my office provided considerable support to these courses during the reporting period. I consider this training support a vital link in engaging with commanders and providing them with greater understanding about my office.

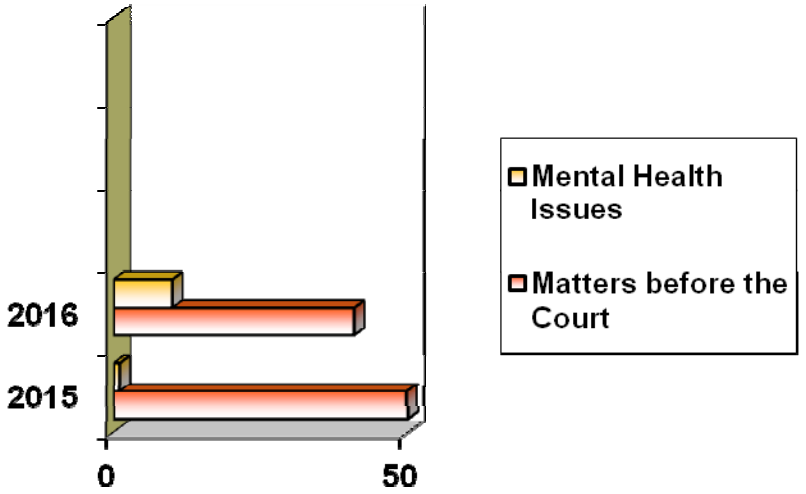
64. Senior Army staff members from my office have provided training at every CSM and RSM course that has been held since March 2016.

SIGNIFICANT ISSUES

Mental Health Issues

65. During the reporting period, I have observed an increasing number of ADF members reporting mental health issues, either at the time of investigation by military investigators, at the time of being charged with offences under the DFDA; and/or during sentencing post-conviction.

66. The following graph shows how these type of matters have increased over the past two years.



67. The most common representation made by or on behalf of the ADF member is that the mental health problem was a causal factor in the alleged offending and therefore an excuse for the conduct; or that, because of a mental health condition, the prosecution should not proceed; or that the mental health condition warrants leniency in imposing punishment.

68. When the DFDA was enacted in 1982, provision was made for the circumstance where an accused person was found to be suffering from unsoundness of mind such that they were unable to stand trial. The provision was consistent with what was then in place in most civilian criminal jurisdictions in Australia, in providing that, where an accused was unable to understand the proceedings against them and therefore unfit to stand trial, the accused would be held at the pleasure of the Governor-General indefinitely.

69. Most jurisdictions have considerably advanced their mental health legislative provisions and now have separate sentencing regimes directed towards rehabilitation and mental health treatment as opposed to a punitive detention regime. In the ADF's discipline jurisdiction, however, there has been no change from what was originally enacted. The applicable provision is s 145 of the DFDA.

70. In addition to providing for indefinite detention where an accused is unfit to plead, it also provides that where an accused is found to have suffered a mental impairment at the time of the offence such that they could not form the requisite intent to commit the offence. In that circumstance, the accused receives a prescribed acquittal and is also detained indefinitely.

71. The degree of mental impairment required to meet the very high legal threshold of s 145 is extensive and I understand there has never been a case where an ADF member has been detained under this provision. The provision is clearly antiquated and in need of reform, and I commented to this effect in my 2015 Annual Report.

72. When an ADF member who is charged with disciplinary offences reports mental health issues either at the time of investigation, when charged, or when appearing before a Service tribunal, the only means of dealing with the issue are (i) under DFDA s 145; or (ii) by me taking into account the mental health issue in the course of determining whether to proceed with charges.

73. All cases referred to me where the ADF member represents a mental health problem are complex and require detailed and very careful consideration.

74. There are several steps that can occur in determining whether a prosecution should commence. As part of the prosecution decision-making process, I am required to consult with senior commanders appointed as Superior Authorities in order to consider the Service interests in proceeding with charges.

75. In circumstances where an accused person raises mental health problems, I will seek information from command as to whether the individual is likely to be medically discharged, is undergoing treatment in a medical facility, or is otherwise categorised as fit for military duty. I then consider this information as part of my prosecutorial decision-making process.

76. From time to time, defending officers will make representations to me seeking that I exercise my prosecutorial discretion not to proceed with charges, or that I proceed with lesser charges than the case otherwise warrants on the basis that the accused has a mental health condition. In these circumstances, I will not rely on a mere assertion in a letter from the defending officer without the benefit of seeing a medical report prepared by the appropriate category of health professional.

77. My recent practice has been such that where an ADF member is to be medically discharged on psychological grounds

and is alleged to have committed offences, I will consider the nature and gravity of the conduct in reaching a decision on whether or not to proceed. If the alleged offences are relatively minor, there may be no Service interest in proceeding with a prosecution under the DFDA. Conversely, where the allegations are serious, I may be more likely to proceed with a prosecution.

78. I accept that being investigated and/or prosecuted for discipline offences can be a stressful experience which may cause the accused significant anxiety. That said, discipline is a fundamental element of military service in the ADF, including for personnel who have mental health problems. Apart from the limited circumstance where DFDA s 145 applies, the mental health problem will almost always not be a legal excuse for contravening the law. I am encouraged by the Chief of Army's approach to this issue in his recent directive concerning mental health and discipline.

79. In a number of recent cases, accused persons through their defending officers have provided letters prepared by health professionals from garrison health facilities to support their submissions as to mental health problems. This can range from reports as to moral culpability from the time of offending through to fitness to appear before a service tribunal. It appears that these practitioners have little experience with the military justice system and do not understand the implications of their diagnoses.

80. I have engaged with Commander Joint Health and Surgeon General Australian Defence Force and the Director General of Mental Health concerning the appropriate way forward in the absence of legislative reform. This includes establishing a regularised process for medico-legal reports that covers the authoring doctor's knowledge, training and experience upon with the opinion is based. It is proposed that reports would include details of training and professional qualifications and scoping the potential use of treatment plans as part of the Service interest in diverting the mentally unwell ADF member from the military discipline system where the circumstances of the offending and

the offender warrant such an approach. The treatment plan could provide some certainty that the ADF member will not engage in similar misconduct in the future.

81. In a recent case, a soldier who was to be charged for a number of fraud offences was undergoing a mental health treatment program. After organising for defence counsel to be appointed, discussions between my office, the chain of command, and the treating medical professionals, enabled the coordination of both the disciplinary process and his treatment in the most optimum manner achievable in such circumstances. I see a wider application of this cooperative approach as the basis for the way ahead in this area.

82. This is an area that desperately needs legislative reform, not only because of the growing prevalence of mental health issues, but because of the gross inadequacy of the existing legislative provisions in the DFDA.

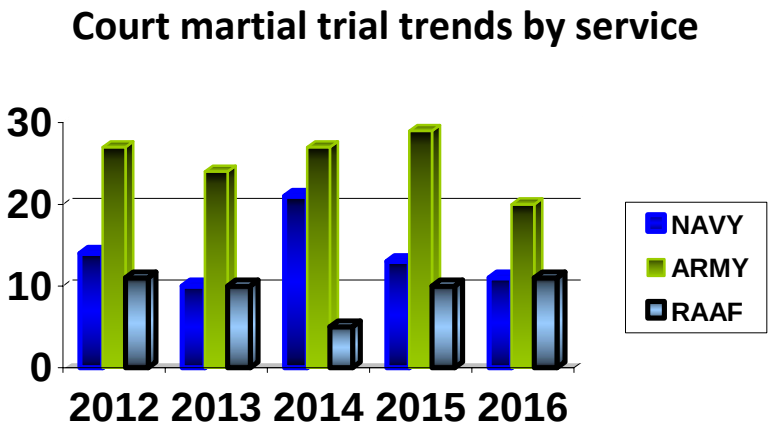
MILITARY JUSTICE PROCEEDINGS

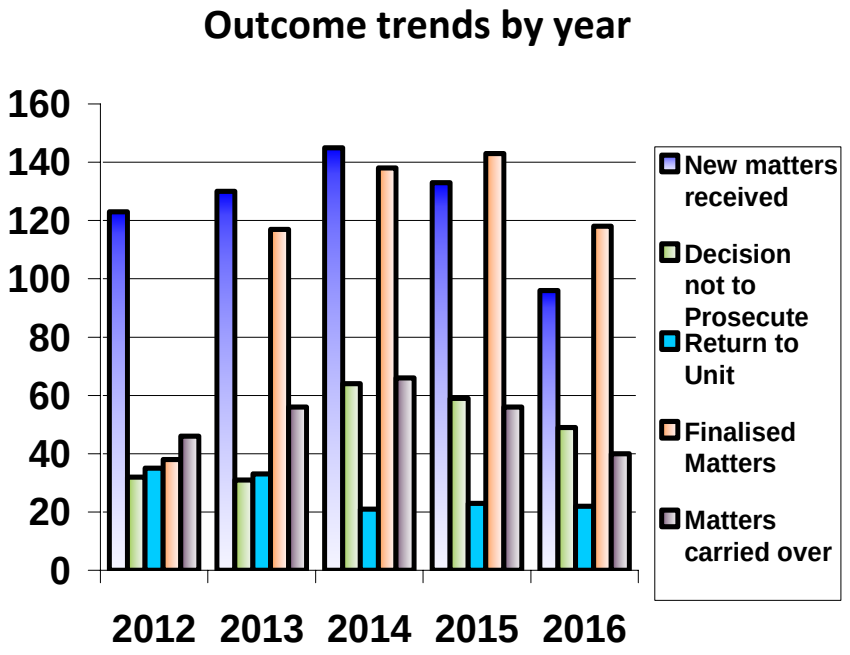
83. During the reporting period military prosecutors appeared in several different types of judicial proceedings related to the military justice system. These included trials by DFM, RCM and appeals from DFM trials and courts martial to the Defence Force Discipline Appeal Tribunal (DFDAT).While I have appeared in the majority of the matters before the DFDAT, some matters have been briefed out to counsel in the Reserve because they involve matters that traversed material that I dealt with in my previous role as a judge advocate and Defence Force magistrate.

84. During the reporting period, 95 new matters were referred to the ODMP. In eight of those matters, members elected to have their matters heard by court martial or DFM. Thirty-six DFM hearings and three RCM hearings were conducted. Forty-nine matters were not proceeded with due to the determination that there was no reasonable prospect of conviction, or that to prosecute would not have served the

purpose of maintaining or enforcing service discipline. Twenty-two matters were referred back to units for summary disposal.

85. As at 31 December 2016, ODMP had 47 open matters. The below graphs show trending matters over the last five years.





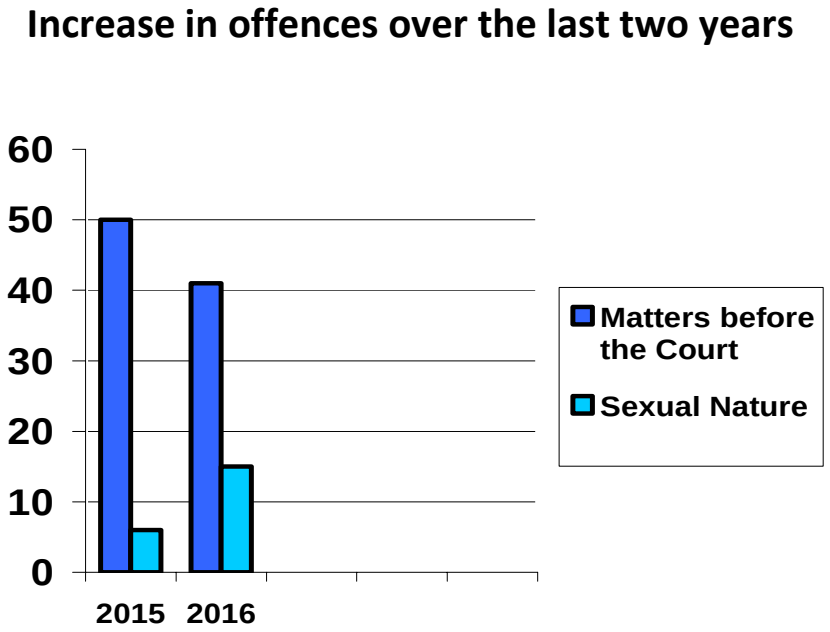
86. When a brief of evidence is received from ADFIS, the service police or unit investigation, or when a matter comes to the ODMP as a direct referral from a Commanding Officer or by the election of the accused, a military prosecutor is assigned to conduct a review of the case. Following that review the prosecutor prepares a brief to me, with recommendations, in order for me to determine how the matter should be disposed.

87. It is a matter for me, as the DMP, to choose the mode of trial for each accused. Courts martial are expensive to convene, but are necessary in cases where the offending has a particular Service connection, or in serious cases that may, if the trial results in a conviction, require the exercise of the greater powers of punishment available to a general court martial (GCM). A DFM and a RCM have the power to impose a maximum sentence of imprisonment of up to six months, whereas a GCM can, subject to the maximum sentence for a particular offence, pass a sentence anywhere up to imprisonment for life.

88. The cases discussed below are a sample of matters dealt with during the reporting period.

SEXUAL OFFENCES AND SEXUALLY-RELATED CONDUCT

89. As I indicated earlier in my report, there has been an increase in the prosecution of low-level sexual misconduct. The nature of sexual offences and their impact on complainants and the Defence community make the handling of allegations of sexual offences particularly sensitive and challenging. The DFDA has no specific offences related to sexual assault, so such offences have to be imported into the DFDA from the *Crimes Act 1900* (ACT) by means of s 61 of the DFDA. The majority of offences dealt with under the DFDA are acts of indecency. The more serious offences are generally dealt with by the civilian authorities unless such offending occurs overseas, where the Australian courts have no jurisdiction.



90. As sexual offences are often difficult to investigate, the perceived credibility of the complainant is important. However, how credibility is judged can be susceptible to social forces.

91. A fundamental feature of criminal trials in Australia, as well as those within the military justice system, is that the accused person is regarded as innocent until the prosecution can prove beyond reasonable doubt that they are guilty of the particular offence in question. In order to ensure that innocent people are not convicted, the criminal and military justice system dictates that the right of an accused to fairness during the investigation phase, the course of the trial and during any subsequent appeal, is essential. This notion of fairness does not traditionally involve separate consideration of fairness to anyone else and, in particular, the complainant. These factors often contribute to why the complainant (in most cases, a woman) will not report a sexual offence and why a complainant may withdraw the complaint prior to trial or determine that they don't want to continue with their complaint.

92. Before I make a decision to prosecute any sexual offence I prefer all complainants to be spoken to by a prosecutor so that they can be told about the process, the difficulties associated with the process, and state their views and attitude about the commencement of the prosecution.

93. Sexual offences are notoriously difficult to prosecute, both in the civilian community and within the military justice system, and results indicate that the prosecution of a sexual related offence before a Superior Service tribunal, that results in a conviction, is likely to be limited to a relatively small proportion of reported offences overall. That is consistent with the number of convictions in the civilian community.

94. The case of X is indicative of this.

X

95. The prosecution case for the matter of X, before a DFM, involved an instructor forming a prohibited relationship with a trainee. The case ultimately involved competing versions of events between the trainee and a witness, who was the best friend of the accused. For the DFM to accept the trainee's version of events about the relationship, he considered that he had to reject the accused's best friend's evidence.

96. In assessing any two competing versions of events, the tribunal has to consider the law, the evidence and the reliability and credibility of each witness. Further, in a case where there is only one prosecution witness attesting to a fact, the law requires an additional level of scrutiny to be applied to that witness's evidence. It has to be scrutinised with great care and this will usually mean that all the inconsistencies in that witness's version of events will be carefully weighed. Significant inconsistency will often mean that the prosecution cannot establish the case beyond reasonable doubt. This is what occurred in this case.

97. That said, it remains the case that, just because an accused person is not convicted, it does not mean that the events alleged by the prosecution did not occur. The adversarial process required in trials meant that this trainee was required to give her evidence about highly personal interactions nearly a year after the events and in an unfamiliar and highly formal setting. She was required to recall some peripheral matters in detail, where one would expect that many reasonable people would forget such detail after a lengthy period of time. It was these failures to recall such matters, and her inconsistent evidence about the dates of her sexual encounters with the accused, that led to her evidence being held to be insufficient to convict.

98. There was a similar outcome in the matter of T.

T

99. There were two events that were the subject of sexual misconduct allegations against T by a civilian co-worker. In that case the DFM did not accept the complainant's evidence without other corroboration.

100. After considering all the evidence, the DFM was satisfied beyond reasonable doubt, that at a certain point in the evening of the first event, some sexual misconduct had occurred, as this was witnessed by an independent witness. The DFM did, however, find that misconduct inconsistent with what the complainant alleged had occurred, in the charges as brought by the prosecution.

101. Finally, the DFM found the complainant's conduct on the night of the second event as being very difficult to reconcile with someone who alleges sexual misconduct. The accused was acquitted of the charges relating to his alleged indecent conduct.

102. In this matter, similarly to the previous matter, the complainant was required to give evidence over 12 months after the alleged incident.

103. A further matter was prosecuted during the reporting period relating to alleged sexual misconduct, where the accused was acquitted of a number of charges because the complainant's version of events was uncorroborated.

104. Despite the difficulties associated with the prosecution of such matters, I will continue to prosecute such matters if they meet the standard required by my prosecution policy.

105. During the reporting period there were a number of other noteworthy matters.

J

106. J was charged with one count pursuant to s 61B of the *Crimes Act 1900,* of capturing visual data, in circumstances where a reasonable person would consider such a capture to be an invasion of privacy and indecent. The allegation was that J used his mobile telephone to film a female who was taking a shower. Following a trial J was found guilty and convicted.

107. Section 61B of the *Crimes Act 1900* (ACT) was inserted into the Act on 3 March 2015. The matter of J was the first time this offence had been prosecuted by the ODMP or ACTDPP.

108. The section expands on the types of prohibited voyeuristic conduct colloquially called 'upskirting'. Section 61B deals with two types of offending conduct: observing with a device or capturing visual data that (a) in all circumstances would be an invasion of privacy and indecent; or (b) captures the genital or anal region or the breasts of a female in circumstances that would be invasion of privacy. The offence was designed to capture behaviours such as using binoculars to watch someone from a distance, using a phone to see up a women's skirt, using a phone to record in a change room, streaming live data, or taking photos of people having sex, for example.

109. I am also of the view, based on not only my time as DMP but after many years of involvement in the jurisdiction, that there has been an encouraging increase in the number of matters in which complainants have reported matters involving superiors or those in a position of relative authority, in particular, instructors. I am hopeful that this represents a growing confidence that such complaints will be taken seriously and followed through. The following matters would tend to support this view.

Q

110. This matter was tried before a DFM and involved charges arising from interactions between a male NCO and a young female, both within the same chain of command. At the time of the offending, the female had only recently finished her basic and initial employment training as part of the 'gap year' program.

111. The matter involved charges of prejudicial conduct: three arising from sexualised social media messages and one charge against the accused for giving the complainant a sex toy as 'a gift'.

112. Except for one prejudicial conduct charge, the accused admitted to all of the alleged acts. Regarding the other charges, it was argued that he had a reasonable excuse for sending sexualised messages and gifting a sex toy, as the acts were between consenting adults. Therefore, it was argued, that such conduct was not prejudicial to the discipline of the Defence Force.

113. After nearly 16 hearing days, four of which were substantially focussed on extensive cross-examination of the complainant by the defending officer, Q was convicted of three of the counts of prejudicial conduct and he was sentenced to be dismissed from the Defence Force.

D

114. D was a senior instructor on an Initial Employment Course who indecently touched two young females over a period of

weeks. It was initially dealt with as an unacceptable behaviour complaint but the females persisted in their complaint and it was subsequently investigated.

115. D subsequently apologised for his behaviour and pleaded guilty to offences relating to the conduct alleged by the two young females. He was ultimately convicted.

L

116. L was an instructor at a training unit. The four female complainants were students at the time.

117. On Anzac Day 2016, L was out drinking at a number of establishments, and ended his evening at the venue where the complainants were socialising. He engaged in misconduct relating to all complainants, which involved pinching buttocks, kissing and one act of indecency involving the touching of a complainant in her genital region.

118. L pleaded guilty to the conduct alleged. The evidence indicated that he was suffering from significant mental health issues at the time of the offending.

P

119. P was the RSM of a unit who, on the date of the offending, was attending the unit Anzac Day function. The complainant, a female private soldier, was present at the function with a number of her friends. During the afternoon, P began to speak in a group with the complainant, who did not know him, but was aware of his rank and position.

120. Not long after this, P began to act inappropriately towards the complainant, bringing up the topic of marriage and touching her about the arms and shoulders.

121. P then put his arm around the complainant's waist and cupped her on the buttocks. The complainant was shocked and felt unable to respond. Shortly afterwards, a young soldier from the unit, came up and started talking to her. P told the young man to '*fuck off*' and to '*leave [his] future wife alone*'.

122. P then touched the complainant on the buttocks without her consent a further two times during the afternoon. During the remainder of the Anzac Day function, P continued to consume alcohol and followed the complainant around the unit compound, trying to maintain her attention.

123. P pleaded not guilty to three charges of an act of indecency and one charge of prejudicial conduct (in relation to his conduct towards the young soldier who was speaking with the complainant). P was convicted on one count of an act of indecency and the count of prejudicial conduct. He was acquitted of the remaining two counts of acts of indecency.

Reporting of convictions

124. Matters resulting in a conviction are reported in Service newspapers. However, due to what I regard as a wholly unnecessary and overly cautious approach, the reports are obscured so as to de-identify the convicted member to such a degree that they seldom convey anything resembling the circumstances behind the conviction. This is patently at odds with the open nature of Superior Service tribunals (see DFDA s 140) and the fact that civilian newspapers, in the absence of a specific non-publication order by the tribunal, openly print names and the details of the circumstances when they cover military trials.

125. In my view this is a missed opportunity to reinforce the message that Defence reforms, such as *Pathway to Change*, are gaining traction and not only denounce such conduct but encourage others who, in similar circumstances, may be reluctant to make a complaint. The following is the manner in which the P

(above) was eventually reported, under the title of 'NCO', in the Service newspapers:

1 x Act of Indecency Without Consent – DFDA s 61(3) and Crimes Act (ACT) s 60(1)
1 x Prejudicial Conduct – DFDA s 60(1)
Member was accused of committing an act of indecency on a subordinate member.
Member was also accused of prejudicing discipline by making an offensive statement to another subordinate member in the presence of the subordinate member.
Member pleaded not guilty to the charges but was found guilty of the charges.
Member was reduced in rank by one rank and severely reprimanded.

RIGHT OF APPEAL

126. The prosecution has no right of appeal, as is afforded to the accused. There have been a number of trials as referred to above that, had the prosecution had the right to appeal as occurs in the civilian criminal jurisdiction, the ODMP would have appealed the decision.

ELECTIONS

127. Numerous matters are referred to my office by way of election by the accused person, either before or during a trial, to be tried by court martial or DFM. An 'upfront election' can be made by an accused when the commanding officer offers that election to him or her because of the rank of the accused or the serious nature of the charges. An 'in-trial election' is given when the commanding officer is of the view that the evidence adduced by the prosecution is sufficient to support the charge and that,

should there be a conviction, it would warrant an elective punishment. An elective punishment is a more serious punishment than is otherwise available to a commanding officer.

128. For example, for an accused person who is a Private soldier, a Leading Aircraftsman or an Able Seaman, a commanding officer can impose the punishment of 7 days' detention prior to election, and 28 days after election, if the accused elects to be tried by the commanding officer.

129. The election system at the summary level is needlessly complex and confusing. I am firmly of the view that many of the matters that come to my office by way of election, should be returned to the unit for trial, however in circumstances where an accused elects trial by court martial or DFM, I have no other option but to refer the matter for trial by court martial or DFM or direct that the charge not be proceeded with.

130. The trial of PTE G is indicative of the problems associated with elections.

PTE G

131. The circumstances of the alleged offending were that, in April 2015, his company carried out section-based scenarios at a WTTS facility. At the completion of the third scenario, the platoon sergeant commented on the unprofessional nature of the section's conduct. PTE G spoke up and said that he didn't agree with his sergeant and after some exchanges between them, the sergeant told him to, '*Shut up and listen to the feedback*', as it wasn't PTE G's place to question the sergeant in that forum. PTE G was alleged to have shrugged his shoulders, rolled his eyes and said '*Yeah, ok*'.

132. The matter was referred to my office as the commanding officer, during the trial, offered PTE G an 'in-trial election' to be tried by court martial or DFM. The commanding officer had the power to impose a period of 7 days' detention without offering

PTE G an election. As there were some inconsistencies in the paperwork which could deem the referral wrong at law, and because I was of the opinion that any punishment in excess of 7 days' detention would be likely to be determined manifestly excessive on review, I referred the matter to PTE G's chain of command for consideration that the matter be dealt with summarily.

133. I received the following Minute stating:

> *with respect to the election, CO (name) advises that it was offered because he assessed that an elective punishment was needed in the event of a conviction. Both CO (name) and I consider alleged insubordinate conduct on the part of a Private soldier towards a Sergeant to be a matter of considerable gravity in the context of an Army unit environment.*

134. In the circumstances, my only options were to direct that the charge not be proceeded with or to refer the matter to a DFM or court martial for trial. In view of the seriousness with which the chain of command viewed the alleged misconduct, I signed a charge sheet and referred the matter for trial, and after a two day hearing PTE G was acquitted.

135. The investigation of the matter had been conducted at unit level by personnel with no investigative experience. While that type of investigation is not a problem when the matter is heard at a summary level, where strict rules of evidence do not apply, it can create difficulties before a Superior Service tribunal, where the *Evidence Act 1995* applies.

136. I am certain that, had the matter been dealt with summarily, the cost would have only been a fraction of what it ultimately was and may have had a different outcome.

FRAUD MATTERS

137. I have reported, as my predecessors have also done, that there is considerable difficulty in prosecuting fraud matters within the current ADF military discipline system**.** These difficulties primarily relate to the inadequacies in the wording of the foundational Determination that relates to the allowances that members of the ADF are entitled to receive.

138. In relation to some of the fundamental provisions, in line with suggestions made by my office, there have been some amendments to the Determination that provide greater clarity to defence members, concerning their obligations when in receipt of allowances, which in turn reduce the obstacles in the prosecution of such matters.

139. Additionally, as I have indicated previously in my report, there have been a number of decisions that are inconsistent with the rule of law and would have been the subject of an appeal if the prosecution had a right of appeal.

B

140. B was charged with one count of obtaining a financial advantage. The allegation was that he and his partner purchased a property together in his posted location and failed to notify Defence Housing Australia (DHA). As a result, B received a subsidy to the rent he paid for the service residence he occupied, to the value of $28,883.89.

141. B pleaded not guilty to the charge and gave evidence to the effect that he misunderstood the requirements surrounding the owning of investment properties in posted locations. In particular, B gave evidence that he thought the 30 km radius (relevant for rent assistance purposes) was measured from the city CBD, rather than his posted unit.

142. While the DFM was critical of B's explanation, he found that his evidence could not be rejected altogether and found that it was not proved beyond reasonable doubt that B knew or believed that he was not entitled to the financial advantage the subject of the charge. Again, there was a question of lack of clarity of the Determination.

143. B was acquitted of the charge.

144. The further inadequacies of the Determination have been highlighted in the decisions that I have made not to prosecute in the following two matters.

H

145. In September 2007, H was posted to a capital city as a recognised Member with Dependants (MWD), sharing custody of his two teenage daughters. He had separated, but not divorced, from his wife in 2005.

146. H moved into a service residence, and his daughters stayed with him in the residence for at least 90 nights per annum, thereby qualifying as dependants, in accordance with the Determination.

147. In 2013, H's CO gave approval for H's estranged wife to move into the residence as a child carer. Approval was granted in accordance with the relevant Determination. H remained in the residence until some time in December 2014, when he moved out. His estranged wife and one of his daughters remained in the residence.

148. In January 2015, H signed a lease for an apartment. He did not apply for rental allowance, thereby not applying for additional subsidies. He resided in that apartment until June 2015.

149. In December 2015, H spoke to a DHA officer and explained that he wished to hand back the residence, and that he had moved out in July 2014, because of significant domestic issues.

150. In order for a prosecution to succeed, it must be proved beyond reasonable doubt that H knew or believed that he was not entitled to receive the benefit alleged – here being market rental value of the property where his estranged wife and daughter lived.

151. In this case, although it was clear to me that H received an entitlement that was not contemplated in the drafting of the Determination, being a subsidised residence for his estranged wife and daughter, there were significant impediments to the prosecution.

152. It is indicative of the fact that the drafting of the Determination provides loopholes for potential accused to avoid prosecution.

153. This was also the case in the matter of DH.

DH

154. DH and his wife were the beneficiaries of a family trust. In November 2010, DH completed paperwork through DHA for a subsidised service accommodation. At the time, however, he failed to declare that the family trust had recently purchased land which was within a 30km radius of his posting location. This information was omitted from his documents. The property built on the purchased land became suitable for occupancy in June 2011. DH did not inform DHA of his suitable own home as required by the relevant Defence Determination**.**

155. DH purchased a second property through his family trust in March 2014 which was also within a 30km radius of his posting location. DH also did not inform DHA of the purchase of this property.

156. DHA was notified by DH in August 2015 that his family trust company owned two properties within the 30km radius of his posting location.

157. DH was provided subsidised residences in his posting location for 5 years, and the calculated benefit received by DH as a result of this omission, is $28,174.12.

158. DH discussed his property development interests with other personnel, including command, and was quite open about the matter of his family trust. There was evidence to this effect.

159. In his record of interview with ADFIS, DH argued that he understood that the trust 'delineated ownership' and his understanding of the entitlement for housing, based on a 2006 reading of the Determination, accorded with this.

160. In circumstances where the prosecution is required to prove that an accused person knew or believed that they weren't entitled to a benefit, and the decisions of the DFDAT concerning this requirement, and the fact that DH hid his investments in 'plain sight', meant that there were no reasonable prospects of conviction in the matter.

161. DH did repay the full amount of his overpayment and had separated from the permanent forces at the time the brief of evidence came to my office.

162. Again, this inability to prosecute indicated that the wording of the Determination means that there are considerable loopholes available to members of the Defence Force in a system of substantial allowances, that in turn, relies on the honesty of those receiving allowances.

ICT PROSECUTIONS

163. There has been an increase in the number of matters referred to the office which involve either the misuse of information technology (IT) systems (e.g. accessing/altering protected information) or where IT systems are the principle means by which other offences are committed (e.g. false data entry as part of fraud). Prosecution of such matters is challenging due to the lack of technical IT investigative capability and the fact that many of the orders and instructions covering the use of these systems have not been drafted to administer the system and not necessarily to create enforceable general orders. In other instances the orders covering use of these systems have limited applicability in a deployed environment.

R

164. R was charged with numerous offences arising from his deployment as the senior information systems technician. During this period, it was alleged that he accessed, without authority, the email accounts of 10 other members of the unit, in one case the personal drives, and on a number of occasions both the Deployed DSN and DRN. It was alleged that he did this by misusing his privileged user status as a system administrator.

165. After a trial before a RCM and a judge advocate, R was convicted of nine acts of unauthorised access to restricted data and two alternative offences of prejudicial conduct. He was acquitted in relation to 14 charges. The court martial panel awarded either reprimands or severe reprimands for each of these convictions.

166. During the trial, defence counsel successfully objected to several key documents: the Information Systems Security Policy and Procedure (ISSPP) for the Defence Restricted Network (DRN), Defence Secret Network (DSN) and deployed networks that

specifically forbade network roaming, which was the crux of the allegations against R.

167. The judge advocate ruled that both the DRN and DSN ISSPP were inapplicable to the alleged activity and they applied only to the strategic networks, not the deployed networks in the Middle East Area of Operations (MEAO). The deployed network ISSPP was ruled inadmissible because of both its lack of promulgation and lack of a nexus to the MEAO networks.

168. Additional shortcomings with these documents were identified during the course of the hearings. Discussions between my office and the relevant stakeholders have cause significant work to be carried out in this area, which may mean that the difficulties in future prosecutions are reduced.

169. Additionally, there were a large number of challenges encountered during the trial that will be a relevant consideration for future ICT prosecutions.

170. The resource burden associated with gathering sufficient evidence to prove ICT related offences to the criminal standard is often disproportionate to the likely outcome of any criminal proceedings. Administrative processes, in some cases, may be a more efficient means of resolving alleged misconduct. As a result of this matter, any decision I make to prosecute ICT related matters will be carefully scrutinised.

171. My office held three other briefs of evidence relating to similar alleged misconduct by members of the Defence Force on deployment during the same timeframe. I made the decision to prosecute the R matter first, before determining whether it was a proper use of Commonwealth resources to prosecute the other matters. Considering all the above factors, and with consultation with the relevant Services, I referred those three matters back to command to consider whether administrative action was appropriate.

CHARACTER EVIDENCE

172. It has frequently been the case in sentencing proceedings, and continued to be the case during the reporting period, that senior officers are asked to provide personal character references for defence members, usually following a conviction and in support of a plea in mitigation.

173. Personal character references will only be given weight and credibility if the witness provides the evidence in court and is able to demonstrate full knowledge of the nature and circumstances of what the offender has done. For example, in an offence of dishonesty such as fraud, a fundamental issue that arises is whether the individual can be trusted, has integrity and is reliable. A conviction for an offence involving dishonesty fundamentally calls this into account. To be useful, the personal character evidence should show that the referee is aware of the offence and the factual circumstances.

174. Too often, senior officers and SNCOs provide character references, without acknowledging the circumstances, or possibly in ignorance of the circumstances of the offending.

175. This was highlighted in the matter of M.

M

176. At the relevant time M was a Commanding Officer. Ms A was a civilian subordinate working for M.

177. DHA rejected a form M had submitted in relation to an application for rental allowance and informed M that it was necessary to have the form signed by the landlord of the accommodation in which he resided. On the same day M entered the office of Ms A. He said to Ms A, '*I need some female handwriting on this form*', and gave her the form. M asked Ms A to sign a particular on the form. Ms A felt she had no choice but

to comply and she signed the name on the bottom of form. On the same day CMDR M submitted the signed form to DHA.

178. Ms A made a Public Interest Disclosure submission to the then Inspector General – Defence (IG-D,) regarding the incident with M.

179. M was convicted of one count of prejudicial conduct and was subsequently sentenced. There was no suggestion that M had any unentitled gain.

180. During sentencing, a two-star officer said in evidence that he did not have any issue with the integrity of the member, notwithstanding his conviction for such an offence. It is also very concerning that in the trial setting which is open to the public, the senior officer appeared to have no appreciation of the gravity of M's actions. Furthermore, a one-star officer gave evidence in M's sentencing proceeding, that was tantamount to challenging the finding of guilt made by the Defence Force magistrate.

181. This case is not isolated, in that many officers are prepared to give evidence that a convicted person is '*a good soldier'* or *'a good sailor or airman*'. While there is nothing wrong with this in principle, when the referee lacks objectivity and/or they clearly fail to grasp the nature of the conduct of the accused, the effect, given their seniority, is an undermining of the proceedings.

A CATALYST FOR REFORM

182. As is discussed below, there has been a wave of movement for reform that reached its peak when I notified command about the outcome of the TPR W case.

TPR W

183. The factual circumstances of the case were that a 29-year-old soldier with five years' service, including an operational

deployment, was suspected of dishonesty offences and invited for interview by ADFIS. ADFIS followed procedure and telephoned the member to convey the invitation. Two days before the interview, the member spoke to his Squadron Sergeant Major (SSM), who told him '*it's in your interests to speak to ADFIS*', '*if you've got nothing to hide, go and speak to ADFIS and tell the truth*' and '*if you tell the truth, you have nothing to worry about*'. At the commencement of the interview, the member was cautioned in accordance with the proper protocols and also confirmed at the conclusion of the interview that he had participated voluntarily. He made extensive admissions to having engaged in the alleged misconduct during the interview.

184. At trial, the DFM accepted the member's evidence that he would not have participated in the interview if not for the SSM's earlier advice. The ADFIS record of interview was excluded on the grounds that the member '*had not participated voluntarily*'.

185. The prosecutor sought an adjournment so that I could consider whether I should appeal to the Federal Court of Australia, for a declaration pursuant to s 39B(1A)(a) of the *Judiciary Act 1903,* that the confession was made voluntarily, and the decision of the DFM involved an error of law. I sought senior counsel's advice and ultimately determined not to pursue an appeal as such a declaration is discretionary relief and the circumstances must be '*most exceptional*' to warrant granting the relief. Furthermore, the DFM referred to and applied the correct legal principles in coming to his decision.

186. The case raised important policy issues as to what the necessary steps are to be taken by investigators and command to reduce the risk of a confession being excluded? While there may be no traditional threat, inducement or coercion, the risk is that the command relationship may generate a degree of moral coercion that influences the ADF member to participate in an interview, such that participation is not voluntary.

187. As a result of this decision I wrote to command advising of the outcome. Further, I have liaised with the ADFIS with a view to tightening up the process for contacting members to invite them for interview, and include additional questions at the commencement of the interview.

188. It was the letter to command that highlighted dissatisfaction with a disciplinary system applying high level criminal standards and was to some extent responsible for reform considerations.

REFORM

189. During the reporting period it has been evident to me, from discussions with command and anecdotal evidence, that there is a level of dissatisfaction with the current state of the military discipline system by command across the ADF. The concern was that the system had become overly complex and difficult to use, unresponsive and characterised by delay, and was costly to operate.

190. As a consequence, there have been a number of initiatives to reform the discipline system in order to ensure it would become responsive, and enable command to take timely and effective action in response to allegations of misconduct.

191. As part of the military discipline reform process the Registrar of Military Justice, the DMP, and Defence Counsel Services agreed to reduce perceived delay in higher tribunal disciplinary proceedings by completing 70 per cent of matters within 12 months. Previously, the benchmark for completing higher tribunal disciplinary proceedings—from Defence becoming aware of an incident until the finalisation of the trial review process—was 70 per cent of matters within 24 months. A trial of the new procedures was commenced on 1 October 2016 and improvements are already being achieved, although in such a small jurisdiction, even one complex matter can have an effect on statistics.

192. It is my view that this reform process presents an opportunity to consider the 'purpose' of the military justice system afresh. The discipline system provides an accountability framework for ADF members. Its purpose is arguably to maintain an effective, capable, disciplined ADF that adheres to professional standards and behaviours and meets government and community expectations

193. Our current system embodies certain human rights norms and indeed has been modified to reflect those norms in recent years – the removal of convening authorities and creation of the DMP being one such example. Our system is also intended to fulfil Australia's international obligations to implement the Rome Statute and other international legal obligations. These are matters that are relevant to the consideration of any reform.

194. While we need the system to reflect our international obligations and fundamental human rights norms, there is also significant flexibility about how to structure the system to meet these goals. Currently, we have an investigative model based on a criminal justice model with statutory guarantees such as of a right to silence and even a right to opt out of a disciplinary investigation (DFDA s 101B(2)). The idea of adopting alternative investigative approaches including an inquisitorial approach is something that I think, must be contemplated.

195. What is important is that individuals, command, government and the community can have certainty and confidence in the system and its various interactions, and the achievement of fair outcomes and finality.

APPEALS TO THE DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

196. There were seven appeals to the DFDAT lodged or heard in 2016. Only three appeals were heard with a decision in two of them.

AB Angre v Chief of Navy

197. In June 2014, AB Angre and others were charged with a number of offences including forcible confinement, acts of indecency without consent, sexual intercourse without consent, assault, assault occasioning actual bodily harm and prejudicial conduct. These charges arose from AB Angre's involvement in an alleged last night at sea 'tradition'. The hearing commenced in August 2014 before a General Court Martial (GCM).

198. AB Angre pleaded guilty to three of the charges in full satisfaction of the charge sheet at the beginning of the trial. One of AB Angre's co-accused, AB Thompson, also pleaded guilty to two charges. Two of the other co-accused defended the charges and were acquitted.

199. Before AB Angre and AB Thompson were sentenced, AB Thompson successfully appealed his convictions to the DFDAT.

200. AB Angre did not join AB Thompson's appeal to the Tribunal but rather, in March 2015, applied to a separately constituted court martial to withdraw his pleas of guilty. This application was dismissed in November 2015 and in December 2015, AB Angre filed a notice of appeal in the Tribunal seeking to set aside his convictions.

201. Two interlocutory hearings occurred in June and July 2016, and the Tribunal handed down two decisions on 29 August 2016.

202. These decisions are published at:
http://www.austlii.edu.au/au/cases/cth/ADFDAT/2016/1.html
http://www.austlii.edu.au/au/cases/cth/ADFDAT/2016/2.html

203. The second of these decisions related to the proper construction of section 23 of the *Defence Force Discipline Appeals Act 1955*, in relation to the Tribunal's power to receive new or fresh evidence on appeal. This decision was appealed to the Federal Court which was heard in November 2016. The appeal to

the Federal Court was dismissed for several reasons including that, principally, by allowing the appeal to continue would be to 'fragment' the proceedings before the Tribunal and that this was undesirable.

204. The decision is published at:
http://www.austlii.edu.au/au/cases/cth/FCAFC/2016/171.html

205. The appeal proper before the Tribunal was heard between 12 and 16 December 2016. The Tribunal reserved its decision.

Baker v Chief of Army

206. Following a 7 day hearing, MAJ Baker was convicted of two counts of assaulting a subordinate on a bus in the presence of approximately 30 soldiers.

207. MAJ Baker subsequently petitioned twice through his chain of command and, when both of these petitions were dismissed and the convictions upheld, MAJ Baker appealed to the DFDAT. His grounds included:

(i) insufficiency of evidence;
(ii) that his conduct was justified or excused by law; and
(iii) fresh or new evidence.

208. I appeared in this matter on 27 October 2016 and the DFDAT reserved its decision.

CPO McKenna v Chief of Navy

209. Following a trial by DFM, CPO McKenna was convicted of three offences including misuse of a carriage service and failing to comply with a general order. His grounds of appeal include that the DFM erred in law in a number of respects including that he effectively reversed the onus of proof and that this amounted to a miscarriage of justice.

210. The appeal of *CPO McKenna v Chief of Navy* was listed for 10 February 2017.

Douglas v Chief of Army

211. CPL Douglas was found guilty following a trial by DFM of an act of indecency without consent and prejudicial conduct. He was acquitted on three other charges.

212. CPL Douglas has appealed on the grounds that the DFM erred in law by requiring the evidence of the appellant to be corroborated before accepting it in particular and the convictions were unsafe or unsatisfactory.

213. The appeal is listed for hearing on 28 April 2017.

Komljenovic v Chief of Navy

214. Following an 8 day hearing before a DFM, LS Komljenovic was convicted of one count of prejudicial conduct and was sentenced to be severely reprimanded.

215. The particulars of the charge were that LS Komljenovic behaved in a manner likely to prejudice the discipline of the Defence Force, by engaging in intimate relations, namely kissing and touching, with a superior officer while in the presence of members of HMAS Anzac's ships company.

216. LS Komljenovic has appealed on the following grounds:

(i) the DFM ought to have excused himself on the basis of his previous professional relationship with me which LS Komljenovic contends amounts to an apprehension of bias;
(ii) The DFM relied on an extraneous opinion to determine the ultimate issue that had to be tried.
(iii) That the DFM erred in law failing to find that the evidentiary onus had been discharged by the defence with respect to involuntary intoxication ;

(iv) That the DFM erred in law in finding that the conduct of the appellant constituted an offence contrary to s. 60 DFDA; and
(v) Insufficiency of evidence.

217. The most significant of these grounds is the first ground relating to the contention that my previous position as a DFM and judge advocate gives rise to an apprehension of bias.

218. Noting that this ground might appear to be, in effect, a challenge to the appointment made by the Minister of Defence (Minister Andrews) of me as the DMP. Independent Counsel has been appointed to appear on behalf of Chief of Navy and the matter is listed for 27 April 2017.

Williams v Chief of Army

219. Following a trial on three acts of indecency without consent by DFM in April 2015, SGT Williams was convicted of one count and acquitted of two counts.

220. SGT Williams petitioned his conviction and when this petition was dismissed, he appealed to the DFDAT. Of his several grounds of appeal, the most significant related to whether or not there was jurisdiction to deal with the conduct by way of DFDA charges.

221. Traditionally the law has regarded there to be two competing tests for determining the jurisdiction under the DFDA. The first test is the 'service connection' test which, in summary, requires the act constituting the offending behaviour to be connected to a person's military service. The second test is the 'service status' test which applies jurisdiction of the DFDA to any matter, regardless of the relationship of the alleged offending act to ADF service, provided that at the time of the offending, the accused was a defence member.

222. Although this question has not been conclusively decided by the High Court of Australia, for approximately the past 15 years, Service tribunals have applied the more demanding 'service connection' test.

223. During the appeal, counsel for Chief of Army submitted that should the DFDAT not be satisfied that the 'service connection' test was satisfied, the 'service status' test would in the all the circumstances suffice.

224. On 16 December 2016 the DFDAT dismissed the appeal and published their reasons. Most significantly, the DFDAT held that the 'service status' is the correct test on to apply in determining jurisdiction and, in any event, on the facts of the case, the 'service connection' test was also satisfied.

OTHER MATTERS

Investigative provisions of the DFDA

225. For many years, it has been apparent to the personnel administering disciplinary arrangements in the ADF that the investigative provisions of the DFDA are in urgent need of review in order to equip ADF investigators appropriately to respond to the challenges of twenty first century offending. Regrettably, however, there have been no significant changes made to these provisions since the enactment of the DFDA in 1982. The investigative provisions of the DFDA were lifted from the *Criminal Investigation Bill 1977*, and based on the Australian Law Reform Commission Report 2 - *Criminal Investigation* – published in November 1975. Consequently, the investigative provisions of the DFDA are over 40 years old.

226. Together with the difficulties of obtaining information because of the amendments to the *Privacy Act 1988* and other legislation such as the *Telecommunications (Interception and Access) Act 1979*, ADFIS investigators are precluded from obtaining much material relevant to their briefs of evidence.

227. Furthermore, as ADFIS is not able to issue search warrants, or rely on civilian police to exercise search warrant powers on their behalf for the production of material from civilian entities such as banks, airlines, real estate agents, and even from Defence Housing Australia and Toll Transitions in respect of information relevant to relocations arrangements for ADF members provided under contract with Defence. The investigatory powers of ADFIS are therefore significantly limited, which greatly inhibits investigations into fraud and related matters. As much of the evidence required for prosecution of fraud and related offences now comes from external sources outside the Department of Defence, it is increasingly apparent that without DFDA reform, all fraud offences committed by ADF members will need to be investigated and prosecuted outside the ADF.

FINANCE

228. ODMP was adequately financed during the reporting period. Funding was allocated towards prosecutorial training and travel to maintain professional engagements with domestic and international prosecutorial associations. ODMP has complied with the *Public Governance, Performance and Accountability Act 2013 (Cth)*, and all relevant financial management policies of the ADF.

CONCLUSION

229. It is important that the discipline system does not become isolated from command. I will continue working with commanders of all levels across the three Services to improve understanding of the DFDA and pursue the maintenance of discipline by increasing communication and seeking new ways to enhance engagement with matters coming before superior service tribunals.

COMPLIANCE INDEX OF REQUIRED INFORMATION FOR STATUTORY AUTHORITIES

(Senate Hansard, 11 November 1982, pp. 2261- 2262)

Enabling Legislation	*Defence Force Discipline Act 1982*
Responsible Minister	Minister for Defence
Overview	Paragraphs: 1-15
Powers, Functions & Objectives	Paragraphs: 16-18
Membership and Staff	Paragraphs: 19-21, 23-25, 28, 29
Information Officer	Miss Kerryn Dawson Executive Assistant to DMP Office of the DMP Department of Defence Level 3, 13 London Circuit CANBERRA ACT 2600 Telephone: 02 6127 4403 Facsimile: 02 6127 4444
Financial Statement	Paragraph: 228
Activities and Reports	Paragraphs: 36-227
Operational Problems	30-35
Subsidiaries	Not applicable

Online version of the report is available at http://www.defence.gov.au/publications/2016-DMP-Annual-Report.pdf

ANNEX A to
DMP REPORT 01 JAN 15 TO 31 DEC 16

OFFICE OF THE DIRECTOR OF MILITARY PROSECUTIONS

Department of Defence
13 London Circuit
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DIRECTOR OF MILITARY PROSECUTIONS PROSECUTION POLICY

Contents

INTRODUCTION

This policy replaces the Director of Military Prosecution's (DMP) previous policy of 5 September 2013.

The policy applies to all prosecutors posted to the Office of the Director of Military Prosecutions (ODMP), any legal officer to whom DMP has delegated function(s) under *Defence Force Discipline Act 1982* (DFDA) s 188GR and any ADF legal officer who has been briefed to advise DMP or to represent DMP in a prosecution before a Defence Force magistrate (DFM), a restricted court martial (RCM) or a general court martial (GCM), or to represent DMP in the Defence Force Discipline Appeal Tribunal (DFDAT) or another court.

In order to promote consistency between Commonwealth prosecution authorities, some aspects of this policy are modelled on relevant Commonwealth policies.

This publication of policy and guidelines will be periodically updated to ensure that it continues to incorporate changes to the law and Defence policy. The aims of this policy are to:

a. provide guidance for prosecutors to assist in ensuring the quality and consistency of their recommendations and decisions; and

b. to inform other ADF members and the public of the principles which guide decisions made by the DMP.

Members of the ADF are subject to the DFDA in addition to the ordinary criminal law of the Commonwealth, States and Territories. Decisions in respect of the prosecution of offences can arise at various stages and encompass the initial decision whether or not to prosecute, the decision as to what charges should be laid and whether a prosecution should be continued.

The initial decision of whether or not to prosecute is the most significant step in the prosecution process. It is therefore important that the decision to prosecute (or not) be made fairly and for appropriate reasons. It is also important that care is taken in the selection of the charges that are to be laid. In short, decisions made in respect of the prosecution of service offences under the DFDA must be capable of withstanding scrutiny. Finally, it is in the interests of all that decisions in respect of DFDA prosecutions are made expeditiously.

The purpose of a prosecution under the DFDA is not to obtain a conviction; it is to lay before a service tribunal what the prosecution considers to be credible evidence relevant to what is alleged to be a service offence. A prosecutor represents the service community: as Deane J has observed, he or she must *"act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one"*.

Although the role of the prosecutor excludes any notion of winning or losing, the prosecutor is entitled to present the prosecution's case firmly, fearlessly and vigorously, with, it has been said *"an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings".*

This policy is not intended to cover every conceivable situation which may be encountered during the prosecution process. Prosecutors must seek to resolve a wide range of issues with judgment, sensitivity and common sense. It is neither practicable nor desirable too closely to fetter the prosecutor's discretion as to the manner in which the dictates of justice and fairness may best be served in every case.

1. THE DECISION TO PROSECUTE

1.1 Factors governing the decision to prosecute

The prosecution process normally commences with a suspicion, an allegation or a confession. However, not every suspicion, allegation or confession will automatically result in a prosecution. The fundamental question is whether or not the public interest requires that a particular matter be prosecuted. In respect of prosecutions under the DFDA, the public interest is defined primarily in terms of the requirement to maintain a high standard of discipline in the ADF.

The criteria for exercising the discretion to prosecute cannot be reduced to a mathematical formula. Indeed, the breadth of factors to be considered in exercising the discretion reinforces the importance of judgement and the need to tailor general principles to individual cases.

The decision to prosecute can be understood as a two-stage process. First, does the evidence offer reasonable prospects of conviction? If so, is it in the service interest to proceed with a prosecution taking into account the effect of any decision to prosecute on the maintenance of discipline in the ADF.

1.2 Admissible evidence and reasonable prospect of conviction

The initial consideration will be the adequacy of the evidence and whether or not the admissible evidence available is capable of establishing each element of the offence. A prosecution should not be instituted or continued unless there is reliable evidence, duly admissible before a service tribunal, that a service offence has been committed by the person accused. This consideration is not confined to a technical appraisal of whether the evidence is sufficient to constitute a prima facie case. The evidence must provide reasonable prospects of a conviction.

The decision as to whether there is a reasonable prospect of a conviction requires an evaluation of how strong the case is likely to be when presented in Court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact. The prosecutor should also have regard to any lines of defence which are plainly open to or have been indicated by the accused, and any other factors which are properly to be taken into account and could affect the likelihood of a conviction.

The factors which need to be considered will depend upon the circumstances of each individual case. Without purporting to be exhaustive they may include the following:

a. Are the witnesses available and competent to give evidence?

b. Do the witnesses appear to be honest and reliable?

c. Do any of the witnesses appear to be exaggerating, defective in memory, unfavourable or friendly towards the accused, or otherwise unreliable?

d. Do any of the witnesses have a motive for being less than candid or to lie?

e. Are there any matters which may properly form the basis for an attack upon the credibility of a witness?

f. What impressions are the witnesses likely to make in court, and how is each likely to cope with cross-examination?

g. If there is any conflict between witnesses, does it go beyond what might be expected; does it give rise to any suspicion that one or both versions may have been concocted; or conversely are the versions so identical that collusion should be suspected?

h. Are there any grounds for believing that relevant evidence is likely to be excluded as legally inadmissible or as a result of some recognised judicial discretion?

i. Where the case is largely dependent upon admissions made by the accused, are there grounds for suspecting that they may be unreliable given the surrounding circumstances?

i. If identity is likely to be an issue, is the evidence that it was the accused who committed the offence sufficiently cogent and reliable?

j. Where more than one accused are to be tried together, is there sufficient evidence to prove the case against each of them?

If the assessment leads to the conclusion that there are reasonable prospects of a conviction, consideration must then be given as to whether it is in the service interest that the prosecution should proceed.

1.3 Maintenance of discipline/Service Interest

It is critical that the ADF establish and maintain the high standard of discipline that is necessary for it to conduct successful operations. As the ADF may be required to operate at short notice in a conflict situation, a common and high standard of discipline must be maintained at all times. Discipline is achieved and maintained by many means, including leadership, training and the use of administrative sanctions. Prosecution of charges under the DFDA is a particularly important means of maintaining discipline in the ADF. Indeed, the primary purpose of the disciplinary provisions of the DFDA is to assist in the establishment and maintenance of a high level of service discipline.

The High Court of Australia, through a number of decisions, has explained the limits of the ADF discipline jurisdiction. Specifically, the High Court has decided that service offences should only be prosecuted where such proceedings can be reasonably regarded as substantially serving the purpose of maintaining or enforcing service discipline.

In many cases the requirement to maintain service discipline will be reason enough to justify a decision to lay charges under the DFDA. However, occasionally wider public interest considerations, beyond those relating to the maintenance of discipline in the ADF, will warrant civil criminal charges being laid.

Although it is a matter for the DMP to determine when the prosecution of a matter will substantially serve the purpose of maintaining service discipline, the DFDA provides at s 5A for the appointment of superior authorities to represent the interests of the service in relation to matters referred to the DMP. Where charges are being considered by the DMP, the DMP will usually canvass the views of the relevant superior authority in writing. Such a request will outline the alleged offending and detail the proposed charges. For the purpose of DFDA section 5A, relevant ADF interests may include:

a. unit operational or exercise commitments which may affect the timing of any trial of the charges;

b. issues concerning the availability of the accused person and/or witnesses due to operational, exercise or other commitments;

c. any severe time constraints or resource implications;

d. wider morale implications within a command and the wider ADF;

e. potential operational security disclosure issues;

f. the anticipation of media interest;

g. the prior conduct of the accused person, including findings of any administrative inquiries concerning the accused person's conduct; and

h. whether or not there is a need to send a message of deterrence, both to the accused person (specific deterrence) and to other members of the ADF (general deterrence).

It would not be appropriate for a Superior Authority to express views on whether particular charges should be laid or the legal merits of the case. Issues of maintaining discipline and Service interests will vary in each particular case but may include the following.

a. **Operational requirements.** Only in the most exceptional cases will operational requirements justify a decision not to lay or proceed with a charge under the DFDA. In particular, the existence of a situation of active service will not, by itself, justify a decision not to charge or proceed with a charge under the DFDA. In most cases, operational considerations will only result in delay in dealing with charges. Operational requirements may, however, be relevant in deciding to which level of service tribunal charges should be referred.

b. **Prior conduct.** The existence of prior convictions, or the general prior conduct of an offender, may be a relevant consideration. For example, several recent infringement notices for related conduct may justify a decision to charge a member with a Service offence under the DFDA notwithstanding that the latest offence, when viewed in isolation, would not normally warrant such action.

c. **Effect upon morale.** The positive and negative effects upon ADF morale, both generally and in respect of a part of the ADF, may be a relevant consideration.

1.4 Alternatives to charging

Laying charges under the DFDA is only one tool that is available to establish and maintain discipline. In some circumstances, maintenance of discipline will best be achieved by taking administrative action against members in accordance with Defence Instructions, as an alternative to or in conjunction with disciplinary proceedings. Similarly, in respect of minor breaches of discipline, proceedings before a Discipline Officer may be appropriate. The DMP may be asked to advise on matters that can be appropriately dealt with through administrative or Discipline Officer action.

While the DMP may make such recommendations, ultimate decisions in respect of how these breaches are dealt with still rests with commanders, who in turn apply judgement to the unique facts and circumstances of the case before them. Nevertheless, administrative or Discipline Officer action alone is inappropriate to deal with situations in which a serious breach of discipline has occurred or where the conduct involved is otherwise deemed to be serious enough to warrant the laying of charges under the DFDA. Further, in some cases the interests of justice may require that a matter be resolved publicly by proceedings under the DFDA before a Defence Force magistrate, restricted court martial or general court martial.

Alternatives to charging should never be used as a means of avoiding charges in situations in which formal disciplinary action is appropriate.

1.5 Discretionary factors

Having determined there is sufficient reliable and admissible evidence for a reasonable prospect of conviction there are

numerous discretionary factors which are relevant in deciding whether to commence (or continue with) a prosecution under the DFDA. In particular, the following is a non-exhaustive list of factors that DMP may consider in deciding, in a given case, whether charges under the DFDA should be preferred or proceeded with:

a. **Consistency and fairness.** The decision to prosecute should be exercised consistently and fairly with similar cases being dealt with in a similar way. However, it must always be recognised that no two cases are identical and there is always a requirement to consider the unique circumstances and facts of each case before deciding whether to prosecute.

b. **Deterrence.** In appropriate cases, such as where a specific offence has become prevalent or where there is a requirement to reinforce standards, regard may be paid to the need to send a message of deterrence, both to the alleged offender and the ADF generally.

c. **Seriousness of the offence.** It will always be relevant to consider the seriousness of the alleged offence. A decision not to charge under the DFDA may be justified in circumstances in which a technical and/or trivial breach of the DFDA has been committed (provided of course that no significant impact upon discipline will result from a decision not to proceed). In these circumstances, administrative action or Discipline Officer proceedings may be a more appropriate mechanism for dealing with the matter. In contrast and as a general rule, the more serious and wilful the alleged conduct giving rise to a service offence, the more appropriate it will be to prefer charges under the DFDA.

d. **Interests of the complainant.** In respect of offences against the person of another, the effect upon that other person of proceeding or not proceeding with a charge will always be a relevant consideration. Similarly, in appropriate cases regard may need to be paid to the wishes of the other person in deciding whether charges should be laid, although such considerations are not determinative.

e. **Nature of the offender.** The age, intelligence, physical or mental health, cooperativeness and level of service experience of the alleged offender may be relevant considerations. For example, in situations where an accused is about to be discharged from the ADF for mental health reasons, the issues of deterrence and maintenance of discipline would carry less weight in the decision to prosecute

f. **Degree of culpability.** Occasionally an incident, such as some accidents, will be caused by the combined actions of many people and cannot be directly attributed to the conduct of one or more persons. In these circumstances, careful regard must be paid to the degree of culpability of the individuals involved when deciding whether charges should be laid and against whom.

g. **Delay in dealing with matters.** Occasionally, conduct giving rise to possible service offences will not be detected for some time. Where service offences are not statute barred under the DFDA, it may nevertheless be relevant to consider whether the length of time since the alleged offence was committed militates against charges being laid. In considering this aspect, the sufficiency of the evidence, the discipline purposes to be served in proceeding with charges and any potential

deterioration in the ability to accord an accused person a fair trial are likely to be particularly relevant.

h. **The member's discharge from the ADF.** Once a member has discharged from the ADF, charges must be preferred within 6 months, and only if the offence carries a maximum penalty of more than 2 years civil imprisonment. In relation to serious matters, consideration will be given to referring the matter to civil authorities for prosecution.

Defending Officers may make written representations to the DMP about discretionary factors to be considered and also the extent to which proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline although if circumstances have not changed markedly since the original prosecution decision was made, or they refer only to matters that have already been considered, it is unlikely to result in a change of decision.

1.6 Discontinuing a prosecution

Generally the considerations relevant to the decision to prosecute set out above will also be relevant to the decision to discontinue a prosecution. The final decision as to whether a prosecution proceeds rests with the DMP. However, wherever practicable, the views of the service police (or other referring agency) and the views of the complainant will be sought and taken into account in making that decision.

Of course, the extent of that consultation will depend on the circumstances of the case in question, and in particular on the reasons why the DMP is contemplating discontinuing the prosecution. It will be for the DMP to decide on the sufficiency of evidence. On the other hand, if discontinuance on service interest grounds is contemplated, the views of the service police or other referring agency, and the views of the complainant will have greater relevance.

2. FACTORS THAT ARE NOT TO INFLENCE THE DECISION TO PROSECUTE

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

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

b. Personal feelings concerning the offender or any other person involved.

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

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

e. Any purported direction from higher authority in respect of a specific case, whether implicit, explicit or by way of inducement or threat.

f. Possible embarrassment or adverse publicity to a command, a unit or formation, the wider ADF or Government.

g. In relation to members of the Permanent Navy, Australian Regular Army or Permanent Air Force, or members of the Reserve rendering continuous full time service, the availability (or otherwise) of victims of crime compensation in the State or Territory where the alleged offending occurred.

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

3. CHOICE OF CHARGES

In many cases the evidence will disclose conduct which constitutes an offence against several different laws. Care must be taken to choose charges which adequately reflect the nature and extent of the offending conduct disclosed by the evidence and which will enable the court to impose a sentence commensurate with the gravity of the conduct. It will not normally be appropriate to charge a person with a number of offences in respect of the one act but in some circumstances it may be necessary to lay charges in the alternative.
The charges laid will usually be the most serious available on the evidence. However, it is necessary to make an overall appraisal of such factors as the strength of the evidence, the probable lines of defence to a particular charge and whether or not trial on indictment is the only means of disposal. Such an appraisal may sometimes lead to the conclusion that it would be appropriate to proceed with some other charge or charges.

The provisions of the DFDA must be relied upon in preference to the use of territory offences from the provisions of the *Crimes Act 1914, Crimes Act 1900* or the *Criminal Codes* unless such a course would not adequately reflect the gravity of the conduct disclosed by the evidence. Territory offences are limited in their application to ADF members by ordinary rules of statutory interpretation. In particular, where any allegedly offending conduct of an ADF member is covered by both a territory offence and an offence under the DFDA, the general provision in a statute yields to the specific provision. This was confirmed by the Full Court of the Federal Court of Australia in *Hoffman v Chief of Army* (2004) 137 FCR 520. The case provides that the question of whether a general territory offence will be excluded by a specific non-territory offence, or vice versa, is to be determined on a case-by-case basis, having regard to the purposes of the provisions under consideration, and the differences between the elements and seriousness of the offences.

Under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiation.

4. MODE OF TRIAL

The DMP may deem it appropriate to have regard to the following additional factors when deciding which service tribunal should deal with specific charges:

a. **Sentencing options.** The adequacy of the sentencing powers that are available at the various levels of service tribunal will always be an important consideration in deciding by which service tribunal charges should be tried.

b. **Cost.** For service offences or breaches of discipline, cost may be a relevant consideration in deciding what level of service tribunal should be used.

c. **Discretion to decide that an offence be tried by Defence Force magistrate, restricted court martial or general court martial.** Sections 103(1)(c) & (d) of the DFDA provide the DMP with the discretion to decide that an offence be tried by a Defence Force magistrate (DFM), a restricted court martial (RCM) or a general court martial (GCM). In making such a determination, and in addition to a careful consideration of the individual circumstances of the alleged offence(s) in the Brief of Evidence, the DMP may consider:

(1) the objective seriousness of the alleged offence(s);

(2) whether like charges would ordinarily be tried in the absence of a jury in the civilian courts in Australia;

(3) whether the nature of the alleged conduct has a particular service context that relates to the performance of duty and may be best

considered by a number of officers with general service experience;

(4) whether the scale of punishment available would enable the accused person, if convicted, to be appropriately punished;

(5) the prior convictions of the alleged offender

d. **Victims compensation schemes.** In relation to members of the Reserve forces and civilians who are alleged victims of violent offences, the availability of civilian victims of crime compensation may be a relevant consideration in determining whether the matter is prosecuted under the DFDA or referred to a civilian prosecution authority for disposal.

5. DELAY

Avoiding unnecessary delay in bringing matters to trial is a fundamental obligation of prosecutors. Accordingly all prosecutors should:

a. prepare a brief for the DMP with a proposed course of action for the disposal of the matter promptly;

b. when recommending prosecution, draft charges for approval of the DMP and arrange for delivery of the charge documentation to the accused as soon as possible;

c. balance requests for further investigation of the matter with the need to bring the matter to trial in a timely fashion; and

d. remain in contact with witnesses and ascertain their availability for attendance at trial as soon as practical.

6. SEXUAL MISCONDUCT PREVENTION AND RESPONSE OFFICE

The Sexual Misconduct Prevention and Response Office (SeMPRO) was established on 23 July 2013. SeMPRO is focused on providing support, advice and guidance to ADF members who have been affected by sexual misconduct. SeMPRO also provides advice and guidance to commanders and managers of persons affected by sexual misconduct to assist them in appropriately managing the reported incident.

Although there is no formal operational relationship between the office of the DMP, and SeMPRO there is a clear benefit in ensuring that the office of the DMP supports SeMPRO objectives.

To that end, the staff of the office of the DMP may assist SEMPRO in dealing with matters of alleged sexual misconduct, regardless of the decision to lay charges or not. This includes:

a. **informing** victims of the role and availability of SeMPRO in order to invite any victim to report the instance of alleged sexual misconduct to SeMPRO to assist SeMPRO with its reporting, prevalence and trend analysis functions,

b. **liaising** (if the victim consents to that liaison) with SeMPRO staff to assist them in ensuring that victims of sexual misconduct are kept informed throughout the prosecution process and fully supported by SeMPRO staff during the prosecution process; and

c. **reporting** (in accordance with the privacy laws) instances of alleged sexual misconduct (even when not ultimately prosecuted) and the results of trials involving alleged sexual misconduct to assist SeMPRO to identify causative or contributory factors and in its education and reporting functions.

7. DISCLOSURE

It is an important part of the ADF disciplinary system that prosecutions be conducted fairly, transparently, and according to the highest ethical standards. It is a long standing tenet of the Australian criminal justice system that an accused person is entitled to know the case that is to be made against him or her, so that the accused person is able to properly defend the charges. An accused person is entitled to know the evidence that is to be brought in support of the charges as part of the prosecution case, and also whether there is any other material which may be relevant to the defence of the charges. This right imposes an obligation of 'disclosure' on the prosecution.

7.1 What is 'disclosure'?

'Disclosure' requires the prosecution to inform the accused of:

a. the prosecution's case against him/her;
b. any information in realtion to the credibility or reliability of the prosecution witnesses; and
c. any unused material

The obligation is a continuing one (even during the appeal process) requiring the prosecution to make full disclosure to the accused in a timely manner of all material known to the prosecution which can be seen on a sensible appraisal by the prosecution:

a. to be relevant or possibly relevant to an issue in the case;
b. to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; or
c. to hold out a real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two matters.

The prosecution will disclose to the accused all material it possesses which is relevant to the charge(s) against the accused which has been gathered in the course of the investigation (or during the proofing of witnesses) and which:

a. the prosecution does not intend to rely on as part of its case, and
b. either is exculpatory or runs counter to the prosecution case (i.e. points away from the accused having committed the offence) or might reasonably be expected to assist the accused in advancing a defence, including material which is in the possession of a third party.

The prosecution duty of disclosure does not extend to disclosing material:

a. relevant only to the credibility of defence (as distinct from prosecution) witnesses;
b. relevant only to the credibility of the accused;
c. relevant only because it might deter an accused from giving false evidence or raising an issue of fact which might be shown to be false; or
d. for the purpose of preventing an accused from creating a forensic disadvantage for himself or herself, if at the time the prosecution became aware of the material, it was not seen as relevant to an issue in the case or otherwise disclosable.

The duty on the prosecution to disclose material to the accused imposes a concomitant obligation on the service police / investigators to notify the prosecution of the existence of all other documentation, material and other information, including that which concerns any proposed witnesses, which might be of relevance to either the prosecution or the defence. If required, in addition to providing the brief of evidence, the service police / investigators shall certify that the prosecution has been notified

of the existence of all such material. Such material includes statements made by witnesses that have not been signed

Subject to public interest immunity considerations, such material, if assessed as relevant according the criteria identified above, should be disclosed.

Where a prosecutor receives material / information that may possibly be subject to a claim of public interest immunity, the prosecutor should not disclose the material without first consulting with the service police/investigators, and where appropriate, Defence Legal. The purpose of the consultation is to give the service police/investigators the opportunity to make a claim of immunity if they consider it appropriate.

The prosecution must not disclose counselling files relating to complainants in sexual offence proceedings , unless the court otherwise orders. In this regard it is relevant to note the provisions of Division 4.5 of the *Evidence (Miscellaneous Provisions) Act 1991* relating to protected confidence material.

7.2 Unused material

"Unused material" is all information relevant to the charge/s against the accused which has been gathered in the course of the investigation and which the prosecution does not intend to rely on as part of its case, and either runs counter to the prosecution case (ie. points away from the accused having committed the alleged offence(s)) or might reasonably be expected to assist the accused in advancing a defence, including material which is in the possession of a third party (ie. a person or body other than the investigation agency or the prosecution).

The prosecution should disclose to the defence all unused material in its possession unless:

a. it is considered that the material is immune from disclosure on public interest grounds;

b. disclosure of the material is precluded by statute, or

c. it is considered that legal professional privilege should be claimed in respect of the material.

Where disclosure is withheld on public interest grounds the defence is to be informed of this and the basis of the claim in general terms (for example that it would disclose the identity of an informant or the location of a premises used for surveillance) unless to do so would in effect reveal that which it would not be in the public interest to reveal.

In some instances it may be appropriate to delay rather than withhold disclosure, for example if disclosure would prejudice ongoing investigations. Disclosure could be delayed until after the investigations are complete.

Legal professional privilege will ordinarily be claimed against the production of any document in the nature of an internal DPP advice or opinion. Legal professional privilege will not be claimed in respect of any record of a statement by a witness that is inconsistent with that witness's previous statement or adds to it significantly, including any statement made in conference, provided the disclosure of such records serves a legitimate forensic purpose.

The requirement to disclose unused material continues throughout a prosecution. If the prosecution becomes aware of the existence of unused material during the course of a prosecution which has not been disclosed, that material should be disclosed as soon as reasonably possible.

Where feasible the accused should be provided with copies of the unused material. If this is not feasible (for example because of the bulk of the material) the accused should be provided with a schedule listing the unused material, with a description making clear the nature of that material, at the time the brief of

evidence is served. The defence should then be informed that arrangements may be made to inspect the material.

If the prosecution has a statement from a person who can give material evidence but who will not be called because they are not credible, the defence should be provided with the name and address of the person and, ordinarily, a copy of the statement.

Where the prosecution is aware that material which runs counter to the prosecution case or might reasonably be expected to assist the accused is in the possession of a third party, the defence should be informed of:

a. the name of the third party;

b. the nature of the material; and

c. the address of the third party (unless there is good reason for not doing so and if so, it may be necessary for the prosecutor to facilitate communication between the defence and the third party.)

There may be cases where, having regard to:

a. the absence of information available to the prosecutor as to the lines of defence to be pursued, and/or

b. the nature, extent or complexity of the material gathered in the course of the investigation,

there will be difficulty in accurately assessing whether particular material satisfies the description of unused material. In these cases, after consultation with the relevant investigating agency, the prosecutor may permit the defence to inspect such material.

7.3 Disclosure affecting credibility and/or reliability of a prosecution witness

The prosecution is also under a duty to disclose to the accused information in its possession which is relevant to the credibility or reliability of a prosecution witness, for example:

a. a relevant previous conviction or finding of guilt;
b. a statement made by a witness, whether signed or unsigned, which is inconsistent with any prior statement of the witness;
c. a relevant adverse finding in other criminal proceedings or in non-criminal proceedings;
d. any physical or mental condition which may affect reliability;
e. any concession which has been granted to the witness in order to secure the witness's testimony for the prosecution.

Previous convictions

It is not possible for the service police to conduct criminal checks for all prosecution witnesses. Prosecutors should only request a criminal history check for a prosecution witness where there is reason to believe that the credibility of the prosecution witness may be in issue.

While the duty to disclose to the accused the previous convictions of a prosecution witness extends only to relevant prior convictions, a prior conviction recorded against a prosecution witness should be disclosed unless the prosecutor is satisfied that the conviction could not reasonably be seen to affect credibility having regard to the nature of, and anticipated issues in, the case. In that regard, previous convictions for offences involving dishonesty should always be disclosed.

The accused may request that the prosecution provide details of any criminal convictions recorded against a prosecution witness. Such a request should be complied with where the prosecutor is

satisfied that the defence has a legitimate forensic purpose for obtaining this information, such as where there is a reason to know or suspect that a witness has prior convictions.

8. CHARGE NEGOTIATION

Charge-negotiation involves communications between an accused person via his/her defending officer and the DMP in relation to charges to be proceeded with. Such negotiations may result in the accused person pleading guilty to fewer than all of the charges he/she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account without proceeding to conviction.

The DMP is the sole authority to accept or negotiate offers made by an accused person who is to be tried by a DFM, RCM or GCM. A legal officer who prosecutes on DMP's behalf must seek DMP's instructions prior to accepting an offer made in these charge-negotiations.

Charge-negotiations are to be distinguished from consultations with a service tribunal as to the punishment the service tribunal would be likely to impose in the event of the accused pleading guilty to a service offence. No legal officer prosecuting on behalf of the DMP is to participate in such a consultation.

Nevertheless, arrangements as to charge or charges and plea can be consistent with the requirements of justice subject to the following constraints:

a. any charge-negotiation proposal must not be initiated by the prosecution; and

b. such a proposal should not be entertained by the prosecution unless:

   (1) the charges to be proceeded with bear a reasonable relationship to the nature of the misconduct of the accused;

(2) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and

(3) there is evidence to support the charges.

Any decision by DMP whether or not to agree to a proposal advanced by the accused person, or to put a counter-proposal to the accused person, will take into account all the circumstances of the case and other relevant considerations, including:

a. whether the accused person is willing to cooperate in the investigation or prosecution of others, or the extent to which the accused person has done so;

b. whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the accused is already serving a term of imprisonment) would be appropriate for the misconduct involved;

c. the desirability of prompt and certain dispatch of the case;

d. the accused person's antecedent conduct;

e. the strength of the prosecution case;

f. the likelihood of adverse consequences to witnesses;

g. in cases where there has been a financial loss to the Commonwealth or any person, whether the accused person has made restitution or reparation or arrangements for either;

h. the need to avoid delay in the dispatch of other pending cases;

i. the time and expense involved in a trial and any appeal proceedings; and

j. the views of the victim(s) and/or complainant(s), where this is reasonably practicable to obtain.

The proposed charge(s) should be discussed with any complainant(s) and where appropriate an explanation of the rationale for an acceptance of the plea ought to be explained. The views of the complainant will be relevant and need to be weighed by the decision maker but are not binding on the DMP.

In no circumstances will the DMP entertain charge-negotiation proposals initiated by the defending officer if the accused person maintains his or her innocence with respect to a charge or charges to which the accused person has offered to plead guilty.

A proposal by the Defending Officer that a plea of guilty be accepted to a lesser number of charges or a lesser charge or charges may include a request that the proposed charges be dealt with summarily, for example before a Commanding Officer.

A proposal by the Defending Officer that a plea of guilty be accepted to a lesser number of charges or to a lesser charge or charges may include a request that the prosecution not oppose a submission to the court during sentencing that the particular penalty falls within a nominated range. Alternatively, the Defending Officer may indicate that the accused will plead guilty to a statutory or pleaded alternative to the existing charge. DMP may agree to such a request provided the penalty or range of sentence nominated is considered to be within the acceptable limits of an exercise of proper sentencing discretion.

9. IMMUNITIES (UNDERTAKINGS OF DMP)

Section 188GD vests DMP with the power to give an undertaking to a person that they will not be prosecuted for a service offence in relation to assistance provided to investigators. Essentially, this provision is aimed at securing the assistance of a co-accused or accomplice in circumstances where the disciplinary efficacy of bolstering the prosecution case against the primary accused outweighs the forfeiture of the opportunity to prosecute the person to whom the undertaking is given. The preference is always that a co-accused person willing to assist in the prosecution of another plead guilty and thereafter receive a reduction to their sentence based upon the degree of their cooperation. Such an approach may not always be practicable, however.

In determining whether to grant an undertaking, DMP will consider the following factors.

a. The extent to which the person was involved in the activity giving rise to the charges, compared with the culpability of their accomplice.

b. The strength of the prosecution case against a person in the absence of the evidence arising from the undertaking.

c. The extent to which the testimony of the person receiving the undertaking will bolster the prosecution case, including the weight the trier of fact is likely to attach to such evidence.

d. The likelihood of the prosecution case being supported by means other than evidence from the person given the undertaking.

e. Whether the public interest is to be served by not proceeding with available charges against the person receiving the undertaking.

Details of any undertaking, or of any concession in relation to the selection of charges in light of cooperation with the prosecution, must be disclosed to the service tribunal and to the accused through their Defending Officer.

10. OFFENCES OCCURRING AND/OR PROSECUTED OVERSEAS

In respect of service offences committed or intended to be prosecuted overseas, additional considerations apply. Although jurisdiction under Australian domestic criminal law will rarely exist in such cases, the nation within whose territory an alleged offence has been committed may have a claim to jurisdiction. In such cases a potential conflict of jurisdiction between the DFDA and the foreign nation's criminal law may arise. In most cases jurisdictional disputes between foreign nations and the ADF will be resolved by reference to foreign visiting forces legislation or Status of Forces Agreements or other similar arrangements.

J.A. WOODWARD CSC
Brigadier
Director of Military Prosecutions

26 October 2015

ANNEX B to
DMP REPORT 01 JAN 15 TO 31 DEC 16

CLASS OF OFFENCE BY SERVICE - 2016

Class of Offence	NAVY	ARMY	RAAF	TOTAL
01 – HOMICIDE AND RELATED OFFENCES				
02 – ACTS INTENDED TO CAUSE INJURY	8	5	1	14
03 – SEXUAL ASSAULT AND RELATED OFFENCES	3	8	4	15
04 – DANGEROUS OR NEGLIGENT ACTS ENDANGERING PERSONS		3		3
05 – ABDUCTION, HARASSMENT AND OTHER OFFENCES AGAINST THE PERSON				
06 – ROBBERY, EXTORTION AND RELATED OFFENCES	1			1
07 – UNLAWFUL ENTRY WITH INTENT/BURGLARY, BREAK AND ENTER				
08 – THEFT AND RELATED OFFENCES	2	1	1	4
09 – FRAUD, DECEPTION AND RELATED OFFENCES	2	5	21	28
10 – ILLICIT DRUG OFFENCES	1			1
11 – PROHIBITED AND REGULATED WEAPONS AND EXPLOSIVES OFFENCES				
12 – PROPERTY DAMAGE AND ENVIRONMENTAL POLLUTION				
13 – PUBLIC ORDER OFFENCES	2			2
14 – TRAFFIC AND VEHICLE REGULATORY OFFENCES	1			
15 - OFFENCES AGAINST JUSTICE PROCEDURES, GOVERNMENT SECURITY AND GOVERNMENT OPERATIONS	1			1
16 – MISCELLANEOUS CIVILIAN OFFENCES			1	1
17 – SPECIFIC MILITARY DISCIPLINE OFFENCES	11	9	2	22
Grand Total	**32**	**33**	**30**	**95**