



DIRECTOR OF MILITARY PROSECUTIONS

*Report for the period
01 January to 31 December 2019*

Director of Military Prosecutions

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Senator the Hon. Linda Reynolds, CSC
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 01 January to 31 December 2019.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "JA Woodward".

JA Woodward
Brigadier
Director of Military Prosecutions
Australian Defence Force

3 April 2020

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DIRECTOR OF MILITARY PROSECUTIONS

REPORT FOR THE PERIOD 01 JANUARY TO 31 DECEMBER 2019

OVERVIEW

1. I am pleased to present the Director of Military Prosecutions (DMP) Annual Report for the period 01 January to 31 December 2019, my fifth since being appointed as the DMP by the Minister for Defence on 01 July 2015. My current appointment as the DMP is until 30 June 2020.¹

2. As provided for in the *Defence Force Discipline Act 1982* (DFDA), the DMP is responsible for:

- a. carrying on prosecutions for Service offences in proceedings before a court martial or Defence Force magistrate (DFM);
- b. representing the Service Chiefs in proceedings before the Defence Force Discipline Appeal Tribunal (DFDAT);
- c. seeking the consent of the Commonwealth Director of Public Prosecutions as required by s 63 of the DFDA;
- d. making statements or giving information to particular persons or to the public relating to the exercise of powers under the DFDA;
- e. doing anything incidental or conducive to the performance of any of these functions; and
- f. performing such other functions as are prescribed by the regulations.²

¹ On 23 March 2020, the Minister for Defence reappointed me for a further 12 months, commencing 01 July 2020.

² DFDA, s 188GA.

The DMP must also fulfil his or her legal mandate in a fair, impartial and independent manner.

3. Members of the Australian Defence Force (ADF) are expected to comply with Australian law, military law and international law. The chain of command is responsible for the maintenance of discipline and a disciplined force 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. Prosecutors who are members of the ADF 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. As I have said in previous reports, 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, usually without any prior advocacy experience. This is exacerbated 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 have tried 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 have the ability to provide concise and articulate legal advice to commanders. At the end of 2019, and moving into 2020, my Office only had one experienced prosecutor apart from me and that prosecutor had three years' experience. I am grateful to the Navy, in this instance, in that his posting was extended to four years so that the Office could benefit from his experience.

7. Extended experience is required for an advocate to become 'trial competent', and permanent legal officers will continue to be placed at a significant disadvantage when they appear in trials by court martial or before a DFM, until they have the ability to obtain such experience.

8. 2019 was a relatively quiet year with only fifteen contested trials in the higher disciplinary service tribunals and one appeal before the DFDAT. The most significant features of the year were:

- a. the referral of all matters amounting to prescribed offences³ being referred to my office from the ADF Investigative Service (ADFIS) before a decision was made to discontinue investigation or not to prosecute the matter;
- b. the progress made in achieving the timelines mandated for the completion of trials before the higher disciplinary tribunals; and
- c. a continuing representation of 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.

9. As prosecutors, we must 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 to the maintenance of service discipline.

10. Although the role of the prosecutor excludes any concept of winning or losing, a prosecutor, including a military 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*'.

11. I continue to be grateful to the officers who have been posted to the ODMP and the civilian staff who have shown great dedication, professionalism and enthusiasm for the important task they are pursuing.

³ As defined by s 104 of the DFDA and s 51 of the *Defence Force Discipline Regulations 2018*.

INTRODUCTION

12. Section 196B of the DFDA obliges the DMP of the ADF, 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.

13. This report is for the period 01 January to 31 December 2019.

14. The position of DMP was established by s 188G of the DFDA, and commenced on 12 June 2006. The officeholder 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.⁴

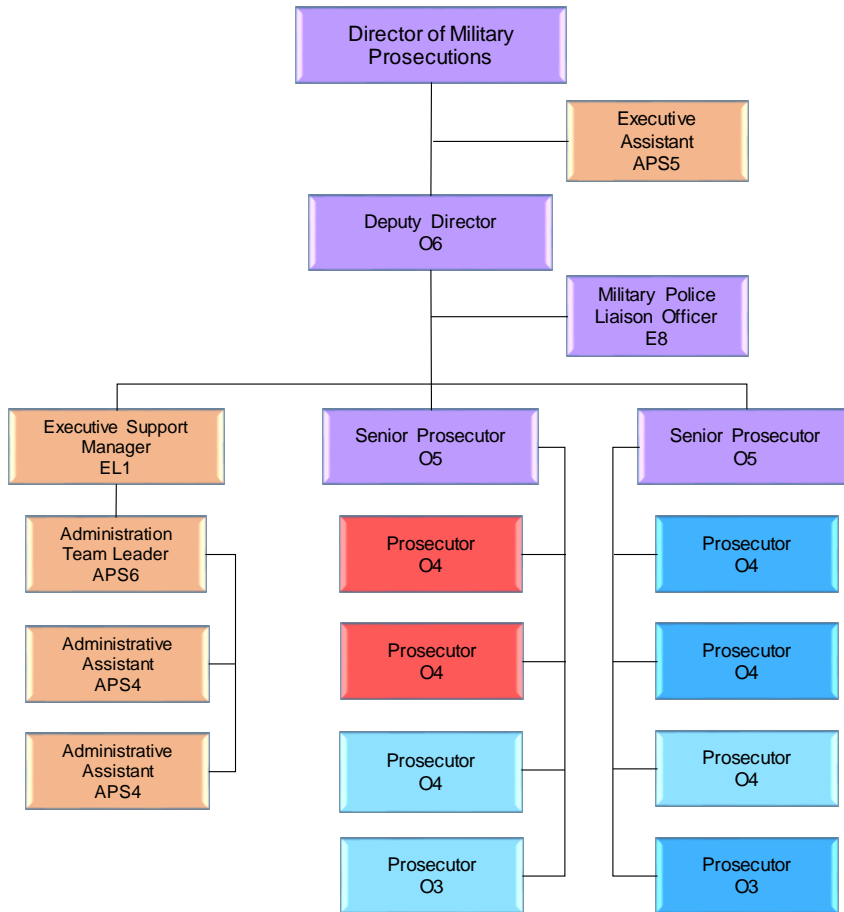
15. Previous appointments to the position of DMP have been:

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

⁴ DFDA, s 188GG.

ORGANISATIONAL STRUCTURE

16. The Office structure during the reporting period was as follows:



17. During the reporting period, I had a Deputy Director at the O6 level who was appointed by the Minister for 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.

18. There are two senior prosecutor positions that have the responsibility for the administrative management of those

prosecutors who work directly to them. One senior prosecutor position was vacant for much of the reporting period, with Navy being unable to fill the position until October 2019; however, an O4 Army officer ably filled the position on higher duties allowance during the vacancy.

19. I continued to conduct weekly meetings with all staff to receive an update on all ongoing matters and to provide direction for their future management. This meant that the strict timelines that are imposed on prosecutors were monitored. The weekly meetings provided a forum to discuss matters of current concern, including legal and procedural issues, and administrative matters, and provided an opportunity to undertake legal education sessions and share lessons learned from recent trial proceedings.

20. One Air Force billet at the rank of Squadron Leader remained vacant during the reporting period. Staffing levels were otherwise relatively static for most of the period; a few prosecutors were engaged on exercises or on courses at the request of their parent Service, or on approved absences.

21. Although the loss of personnel for service reasons can have a disproportionate impact on manpower in a comparatively small organisation, the work in the Office in 2019 was such that the workload was manageable. However, in 2020, as previously stated, the Office will have only one experienced prosecutor and will be carrying vacancies in all three services at the O4 rank level (ie Lieutenant Commander, Major and Squadron Leader). This will likely have a detrimental impact on the ability of my Office to meet the key case management timelines in bringing matters to trial, which are overseen by the Office of the Judge Advocate General.

Reserve Force

22. Members of the Reserve were utilised on very few occasions during 2019, and were only used to provide advice to me or conduct advocacy training to ODMP prosecutors, rather than undertake any prosecutions on my behalf.

23. The Reserve has previously provided an invaluable source of mentoring for more junior prosecutors and in providing a level of legal technical capability to supplement the skills of the permanent prosecutors. I envisage engaging a number of reservists to enhance the relatively inexperienced complement of legal officers that will be posted to this Office in 2020. I make further comment on the use of the Reserve below in the context of the Review of Defence Legal Services and the potential implications for the organisational structure of ODMP.

Civilian staff

24. At the commencement of the reporting period, there were six civilian APS positions in my Office; one member of staff was temporarily acting in a higher duties position (APS5 in an APS6 position) and three positions were substantively vacant. One vacant APS5 position was disestablished and recruitment was conducted to fill one vacant APS4 and to permanently fill the other APS4 and the APS6 position, which were both being filled temporarily.

25. Four of the five APS positions were permanently filled by the beginning of September 2019; one APS5 position (Executive Assistant to the DMP) remains vacant, but is being filled temporarily by an APS4 on additional responsibility pay following the promotion of the APS5 to the vacant APS6 position. Current staff are managing the workload at the moment, however, recruiting will be considered later in 2020 to fill the vacant APS5 position permanently.

Review of Defence Legal Services

26. In 2018, the then Minister for Defence, Senator the Hon. Marise Payne, requested a review of the provision and administration of legal services advice in Defence. Lieutenant General (Retired) Mark Evans, AO, DSC and Mr John Weber were subsequently appointed to lead the Defence Legal Services Review. I was consulted on two occasions with respect to the operations of this Office and possible organisational structures that could be adopted to maintain

the performance of my statutory functions while yielding greater efficiencies and best practice outcomes.

27. Although I am not in a position to disclose the recommendations arising from the Review, it is appropriate that I record my broad concerns with the tenor of the approach that was very evident during the engagement process.

28. The Review team placed a great deal of emphasis on the advocacy skills of the Legal Reserve and explored a number of options, which ranged from a maintenance of the status quo in the ODMP organisational structure through to briefing the Reserve to conduct all prosecutions and, thereby, reducing the number of permanent staff significantly. The arguments presented to increase the use of the Legal Reserve were premised on a view that the caseload of approximately 50 trials per year did not justify the maintenance of some 10 permanent prosecutors.

29. It is too simplistic to suggest that Reserve members who practice as advocates would make better prosecutors in this unique jurisdiction, and my experience as both the DMP and as a judge advocate would suggest otherwise (aside from a few exceptions, most notably with respect to those Reservists who have previously served as a permanent prosecutor). Moreover, reliance on the trial caseload as the measure of workload belies the much greater number of briefs of evidence and other matters referred to ODMP for consideration. Any significant reliance on the use of the Reserve would have a commensurate increase in administrative oversight, and would undoubtedly suffer from issues of timeliness/responsiveness due to their competing civilian practices.

30. In previous Reports, I have repeatedly expressed the view that a career path should be created 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 in some cases, ultimately be trained as judge advocates and DFMs. Such a career path would necessitate longer and repeat postings to this Office. Few

officers have been afforded the opportunity to date to become specialist military advocates and, of those that have, I regard them as being largely on par with or superior to their civilian counterparts who practice in this jurisdiction.

31. Irrespective of this, for those that have been posted to this Office, they have benefited from training and skill development in the practice of advocacy, which is a skillset that can be readily used throughout their service careers in analysing complex facts, applying the law, making recommendations to command on courses of action and assisting command make well-informed decisions. Any ADF legal officer who has attended on senior ADF commanders can attest to the requirement to 'think on your feet'; advocacy cannot be regarded as the soul domain of the barrister in performing ADF legal service.

32. I remain engaged with Head Defence Legal with respect to the implementation of the Review's recommendations, mindful that my Office is part of a broader legal service delivery capability, which has limited resources being applied to almost unlimited demands and needs.

Office relocation

33. As I noted in my 2017 report, I had been pursuing the relocation of the Office from 13 London Circuit, Canberra City to my preferred location within the Brindabella Business Park precinct. In the intervening period, the building at 13 London Circuit has been sold and development approval was being sought to redevelop the site and build a new hotel in the current location. Regardless, Defence has exercised the option to extend the existing lease of the premises until late 2022. While my preference remains for this Office to be relocated to more suitable accommodation, unfortunately I do not envisage that this will occur during my tenure as the DMP due to other competing Defence accommodation priorities and constraints.

PROSECUTION POLICY

34. In prosecuting matters, I act on behalf of the Service Chiefs. Prosecutors in 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.

35. 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. A copy of the policy is at Annex A to this report and an online version is also available at:

<https://www.defence.gov.au/publications/docs/ProsecutionPolicy26Oct15.pdf>.

UNDERTAKINGS, DIRECTIONS AND GUIDELINES

36. 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.

37. Although no formal direction under the DFDA was given to the Joint Military Police Unit (JMPU), as I have previously reported, an agreement was reached at the end of 2017 to ensure that all potential 'prescribed offences'⁵ under investigation, in circumstances where a decision was being considered to take no further investigative action by JMPU, would be referred to ODMP for consideration as to the appropriate course of action to be taken. During the reporting period, this agreement was extended to include investigations

⁵ Including an offence carrying a maximum punishment of more than 2 years imprisonment.

into the conduct of any officer, save for those disciplinary matters at training establishments. One hundred and sixty-five such matters were referred to the ODMF in 2019.

38. As in the previous reporting period, the overwhelming majority of these cases were prescribed sexual offences. In the majority of cases, the complainant made the informed decision to take no further action once the complaint was made, or there was insufficient credible evidence to proceed with the matter.

39. In two of the cases, after the complainants were spoken to by me, they decided to proceed with their respective complaint, both of which involved prescribed sexual offences, with a view to prosecution of the matter following an investigation.

40. In two of the cases, one involving acts of indecency and the other allegations of fraud, I determined that there was a prima facie case that warranted more fulsome investigation. This ultimately resulted in those matters going to trial.

41. In three cases, which involved the same officer engaging in inappropriate behaviour with subordinates, I determined that the pattern of behaviour warranted investigation with a view to prosecution of the matters. In all the other cases a decision was made that concurred with the recommendation of JMFU.

42. Complainants in sexual offence allegations are advised of all their options, the legislative protections provided for them, including giving evidence remotely, restriction on cross examination and suppression of complainant's identity and the fact that they can reverse their decision not to proceed with an allegation at a later date and the implications that may bring. The intention is to ensure that a complainant's decision not to proceed any further with a complaint is not based on erroneous assumptions or misunderstanding about the prosecution process.

TRAINING

43. Training for military prosecutors must support both their current posting at the ODMP, as well as their professional development as legal officers.

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

45. 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 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, whether the matter is contested or not.

46. Courses completed by prosecutors during the reporting period included mandatory ADF Legal Training Modules, as well as general Service courses, including the prerequisite promotion courses.

47. 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.

OUTREACH

ACT Law Society

48. 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 or alternative government in-house counsel sessions run by the Australian Government Legal Network, amongst others, in order to complete their 10 required Compulsory Professional Development points.

Australian Association of Crown Prosecutors

49. 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.

50. The AACP Annual Conference was held in Perth in July 2019 and two members of my staff attended the conference. The theme of the conference was *Prosecuting into the Future*. The conference provides a good opportunity to hear of the challenges facing prosecutors in the civilian jurisdictions and to learn how problems have been dealt with.

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. In September 2019, I attended the 24th Annual Conference and General Meeting of the IAP in Buenos Aires, Argentina with one of my staff. It was also the fourth meeting of the International Association of Military Prosecutors. The theme of the conference was *International Co-operation Across Different Legal Systems*, which explored how different legal systems operate in relation to international cooperation and overcome the legal and practical challenges of delivering prosecutorial services across those different systems and presenters from across the global community (in excess of

400 participants represented over 100 countries) examined key themes in respect of a common understanding of, and further progress in the topic. This included lectures in ethics, accountability, codes of conduct, professional standards and practice management matters, combined with case studies of issues dealt with by prosecutors across the globe.

53. The meeting of the Association of Military Prosecutors allowed for a series of discussions covering the challenges and concerns unique to prosecuting matters within a military jurisdiction, including focus on recent developments in military justice in each of the nations, and covered both procedural matters and case law. The group included representatives from Denmark, Canada, the United States of America, the Netherlands, Romania, the Ukraine and Australia.

Commonwealth Director of Public Prosecutions (CDPP)

54. Section 63 of the DFDA requires me to obtain the consent of the Director of Public Prosecutions (DPP) prior to me proceeding in a prosecution for certain serious offences, such as murder and aggravated sexual assault offences.⁶ This is supported by a *Memorandum of Understanding between the Australian Directors of Public Prosecutions and Director of Military Prosecutions* dated 22 May 2007 (MOU). The MOU contemplates that representatives from the CDPP and ODMP conduct regular liaison meetings, not less frequently than once a year. In December 2019, I met with senior CDPP representatives to discuss the management of referrals to the offices of the respective Commonwealth, State and Territory DPPs, which served to clarify our collective understanding of the practical application of the MOU and the DMP Prosecution Policy.

⁶ As defined in the Australian and New Zealand Standard Offence Classification (ANZSOC). See sections 51–55 of the *Crimes Act 1900* (ACT).

Internal (Department of Defence) Liaison

55. 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 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.

Joint Military Police Unit (JMPU)⁷

56. During the reporting period, ODMP informally liaised on a frequent basis with Colonel Nicholas Surtees, the Provost Marshal–ADF (PM-ADF) and Commander JMPU, and his staff, concerning the relationship between the two offices, means to reduce the timelines in relation to briefs of evidence, the requests for further information in relation to briefs of evidence and the decisions in relation to all matters involving prescribed offences that were referred to the ODMP. In December 2019, my Deputy also represented me at a meeting of the Head Defence Investigative Authorities Committee, which is chaired by the PM-ADF. The relationship between the two offices continues to be effective and productive.

57. The staff of the ODMP supported the continuation of training provided by JMPU to its investigator courses. These sessions are an important professional development tool for ADF military police investigators. This support is seen as an invaluable tool to maintain the professional relationship that currently exists and builds a strong professional relationship

⁷ JMPU was established on 01 March 2018, which unified the ADF's general duty and investigative policing capabilities, placing their command and control under the Provost Marshal–ADF. Effective 20 January 2020, the individual Service domestic policing entities, including the ADF Investigative Service (ADFIS), united to become a single domestic based policing organisation.

with new investigators. I regard the symbiotic relationship between JMPU, military police and ODMP as crucial in ensuring the efficient and effective disposal of service discipline matters.

58. 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. I have formed the view during my tenure as the DMP that the JMPU Chief Legal Adviser should be a Defence legal officer who has served in this Office as a prosecutor, and preferably immediately before taking up the role. I am pleased that one of my most experienced prosecutors will take up that role in 2020 and thereby provide contemporary, well-informed advice to JMPU members in investigating and preparing briefs of evidence for my Office to consider.

Command

59. As I have said in previous reports, 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 and enforcing service discipline. The ODMP has continued its engagement with command during the reporting period to endeavour to address any lack of confidence that such officers may have in the military justice system.

60. To that end, I commenced meeting quarterly with the Deputy Chief of Navy in connection with the quarterly reports provided to the Minister and others to discuss any problems or issues that related to Navy matters being dealt with by this Office. These discussions proved to be a useful informal means of addressing some of the practical challenges in supporting command in the efficient maintenance of service discipline. While I have not put such an arrangement in place with the Deputy's counterparts in Army and Air Force, I routinely engage with representatives from their respective Headquarters on an as required basis.

61. The legal officers and RSM (E) in each Service Headquarters, the legal officers at the subordinate Force level command (FORCOMD, Fleet and Air Command) together with the relevant RSM (E) receive a fortnightly update on all matters relevant to their particular service that are currently within the Office. This continued throughout the reporting period.

62. During the reporting period, I and/or my Deputy also attended meetings of the Military Justice Legal Forum (MJLF), comprised of a number of representatives from Defence Legal, other Defence statutory office holders and senior command legal advisers. The MJLF makes recommendations for military justice policy development or legislative reform to the Military Justice Steering Group (MJSG),⁸ which has primary responsibility for delivering command-led military discipline reform in the ADF. The MJLF has served as a useful medium to robustly discuss the technical legal aspects of the military justice system before changes to the conduct of superior service tribunal proceedings, amongst other things, are considered by command, as represented at the MJSG. This also reinforces command's place (through the MJSG) at the apex of the application of service discipline in the ADF.

SIGNIFICANT ISSUES

Mental Health Issues

63. As I have previously reported, and will reiterate again here, ADF members are 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. This trend continued unabated in this reporting period.

64. I accept that being investigated and/or prosecuted for an offence against the law of the Commonwealth can be a

⁸ Previously known as the Military Justice Coordination Committee.

stressful experience, which may cause the accused significant anxiety and lead to the development of an adjustment disorder. Nevertheless, the maintenance and enforcement of service discipline is an inherent part of military life, including for personnel who have mental health problems, whether arising from their service or not. Apart from the limited circumstance where s 145 of the DFDA applies, the mental health problem will almost always not be a legal excuse for contravening the law.

65. As I have said in my previous reports, this is an area that desperately needs legislative reform, particularly to establish treatment plans and diversionary conferencing, not only because of the growing prevalence of mental health issues, but because of the gross inadequacy and archaic nature of the existing legislative provisions in the DFDA. To that end, I understand that detailed reforms, intended to take account of mental health considerations, which either affect an accused's fitness to stand trial or the accused's culpability at the time of the alleged offending, is on the Government's legislative agenda for the 2020 Parliamentary sittings.

Publication of Information – Court Martial and DFM Proceedings

66. From 31 March 2019, the RMJ commenced publication of the list of upcoming superior service tribunal proceedings and proceedings outcomes on both intranet and internet websites of the Judge Advocate General (JAG). I commend this initiative by the JAG, which is intended to help reinforce an open and transparent military justice system, and promotes public confidence in the discipline system and its legal processes, and supports general deterrence.

67. While the publicity that attends any criminal proceeding is potentially embarrassing to a range of people, including the accused, complainants, witnesses, families and communities, this is even more pronounced and more acutely felt in the relative microcosm of the ADF. While superior service tribunals are required to conduct hearings in public,

save for some limited circumstances,⁹ few members of the public and few ADF members not involved in proceedings attend the trials. Moreover, in recent years, the outcomes of their proceedings have only been published in Service newspapers with their detail heavily redacted.

68. Consequently, the enhanced transparency of proceedings did initially draw concerns about the level of corresponding media attention that it unsurprisingly attracted, including the use of imagery of accused members obtained from social media (and elsewhere), and the organisational reputation implications of ADF members engaging in conduct that is at times inimical to the positive cultural reform agenda that the ADF has been resolutely pursuing for several years. As unpalatable as such media focus may be, provided that the media coverage is accurate and informed, then the benefits to all interested stakeholders clearly outweighs any deleterious effects.

Social Media

69. There has been a notable increase in the use of social media in the context of offending being dealt with by my Office during the reporting period, involving, amongst other things, the non-consensual capture and/or distribution of intimate images.¹⁰ These offences were enacted by legislative reform in 2015¹¹ and 2017¹² and have naturally resulted in a number of alleged offences being referred to this Office for my consideration.

⁹ See DFDA, s 140.

¹⁰ See s 61B and Part 3A of the *Crimes Act 1900* (ACT).

¹¹ *Crimes Legislation Amendment Act 2015* (ACT) – criminalised indecent observations or recordings of other people in situations where that person should be afforded privacy.

¹² *Crimes (Intimate Image Abuse) Amendment Act 2017* (ACT). The practice of sharing intimate images of a person, using online communication, without that person's consent is colloquially referred to as 'revenge porn', but encompasses conduct that goes beyond any motivation for revenge.

70. The ubiquitous nature of smartphone devices with built-in cameras, has enabled people, for example, to intentionally set a phone to record in a change room or shower cubicle, or to take video/photos of people engaging in sexual activities, and then effortlessly disseminate this data via social media platforms. There are a number of these platforms, including Facebook, Instagram, Twitter and Snapchat. Social media accounts are, accordingly, a valuable source of evidence for investigators and prosecutors relevant to a variety of offences, not just those referred to above.

71. Accepting that social media is now very much part of the millennial zeitgeist, this reality necessitates that ADF investigators be able to effectively exploit these potential sources of evidence. However, the social media platform Snapchat, which is more frequently being seen to be the medium of choice by accused members, is particularly problematic. Snapchat is, by its very nature, an ephemeral message and video/picture-sharing service.¹³ Unless screenshots are taken by the recipient of any inappropriate data, then the temporary nature of the material means that it will become inaccessible to users and, likewise, investigators.

72. Notwithstanding that Defence has a Media and Communication Policy, which outlines individuals' responsibilities when using social media, policies alone cannot prevent the misuse of these ephemeral platforms and, at most, are only somewhat useful in holding personnel to account. Similarly, proposed legislative reforms that will expand and modernise the DFDA investigative powers are unlikely to overcome the inherent constraints in exploiting the associated social media account to obtain relevant evidence of offending. Training and education of ADF personnel in the responsible use of social media and providing them with the tools to enable them to protect themselves, which would

¹³ There are numerous other ephemeral or self-destructing messaging applications that delete a message after a set period of time, including Telegram, Hash, Cover Me, Confide, Signal, Wickr and Bleep.

include capturing unlawful data distributed to them by other people, may counteract some of these challenges.

MILITARY JUSTICE PROCEEDINGS

73. During the reporting period, military prosecutors appeared in several different types of judicial proceedings related to the military justice system. These were predominantly trials by DFM, but also included pre-trial directions hearings before an RCM¹⁴ and a GCM.¹⁵ There was only one appeal to the DFDAT, which I appeared on behalf of the Chief of Army, together with Reserve counsel who appeared in the GCM, prosecuting the appellant.¹⁶

74. Military trials, in contrast to civilian justice processes, are mobile. This allows trials to take place in or close to the military community that was most affected by the alleged offences. As previously mentioned, superior service tribunal proceedings are predominantly open to the public, resulting in increased transparency. Those most affected by an alleged offence can see for themselves that justice is being done.

75. During the reporting period, in addition to the 27 open matters carried over from 2018, there were 151 new matters referred to the ODMP, a substantial increase of more than 40 per cent over the previous reporting period. In 12 of those matters, members elected to have their cases heard by court martial or DFM. Forty-two DFM hearings, one RCM and one GCM pre-trial directions hearing were conducted. Fifty-four 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

¹⁴ The charge was withdrawn before proceeding to trial.

¹⁵ The substantive trial of this matter has been adjourned to a date to be fixed in 2020.

¹⁶ *Boyson v Chief of Army* [2019] ADFDAT 2. See below for further discussion.

or enforcing service discipline. Thirty-seven matters were referred back to units for summary disposal.

76. As at 31 December 2019, ODMP had 43 open matters. Annex B shows the number of offences by class and Service that were dealt with during the reporting period.¹⁷

77. 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 GCM. A DFM and an 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.

78. The case discussed below is an example of one of the more significant matters dealt with during the reporting period.

PTE R

79. PTE R was charged with a Territory offence (s 61 of the DFDA) of assault occasioning actual bodily harm (under s 24 of the *Crimes Act 1900* (ACT)), to be heard before a DFM. The charge relates to an allegation that PTE R assaulted his former partner in a hotel room in Brisbane in late August 2015. The complainant was a serving member of the RAAF at the time of the alleged offence.

80. On 26 August 2019, at a pre-trial directions hearing on the charge, the DFM dealt with an objection from the accused that the service tribunal did not have jurisdiction to deal with the charge. In ruling against the objection, the DFM

¹⁷ The classes of offences is largely based on the structure and principles of the Australian and New Zealand Standard Offence Classification (ANZSOC) produced by the Australian Bureau of Statistics, and has been modified to suit the military discipline environment of the ADF.

considered himself bound by the decision of the DFDAT in *Williams v Chief of Army*,¹⁸ which I referred to in my 2016 report. In that case, the DFDAT held that the correct test to apply in determining jurisdiction is 'service status'. In other words, regardless of the relationship of the alleged offending behaviour to a person's military service ('service connection' test), provided that at the time of the offending the accused was a defence member, then jurisdiction under the DFDA can be exercised. In making his ruling, the DFM referred to a recent decision of the Supreme Court of Canada,¹⁹ which also effectively reinforced the 'service status' test in their jurisdiction. However, in Australia, the correct test for the jurisdiction of service tribunals trying Territory offences under the DFDA has not yet been authoritatively settled.

81. On 12 September 2019, the DFM adjourned the trial to a date to be fixed on the basis that PTE R had or was about to file an application in the High Court of Australia challenging the constitutional validity of the DFM's jurisdiction to hear the matter. On 13 September 2019, proceedings were filed in the original jurisdiction of the High Court of Australia seeking a writ of prohibition against the DFM from hearing the charge. The relevant issue is whether there is sufficient 'service connection' for the matter to be prosecuted in a service tribunal on the basis that the alleged offending took place between two serving Defence members, or whether the 'service status' of the accused is sufficient.

APPEALS TO THE DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL (DFDAT)

82. There was one appeal to the DFDAT in 2019. A further significant decision was handed down on 21 February

¹⁸ [2016] DFDAT 3.

¹⁹ *R v Stillman* 2019 SCC 40 (handed down 26 July 2019).

2019 relating to an appeal heard in 2018, which I included in my 2018 report.²⁰

Boyson v Chief of Army²¹

83. As previously reported, on 3 December 2018, CAPT Boyson was convicted of one count of sexual intercourse without consent by a GCM and sentenced to reduction in rank to Lieutenant, dismissal from the ADF and 3 months imprisonment. CAPT Boyson appealed to the DFDAT on the basis that the conviction was unreasonable and/or could not be supported having regard to the evidence; and in all the circumstances, the conviction was unsafe and unsatisfactory.

84. On 2 May 2019, the DFDAT allowed CAPT Boyson's appeal by majority (Logan J dissenting). Justice Brereton (Perry J agreeing) held that it was not open on the whole of the evidence for the GCM to be satisfied, beyond reasonable doubt, that CAPT Boyson had inserted a bottle into the complainant's anus.²² Central to his Honour's reasoning was his finding that the insertion of a beer bottle into the complainant's anus was 'improbable in the extreme'.²³ His Honour did not regard the GCM's advantage in seeing and hearing the evidence as 'explaining, in the slightest, how it could have been satisfied that it was physically possible for the act charged to be performed in the circumstances revealed by the evidence'.²⁴

85. Justice Brereton also held that there was no occasion to order a new trial because 'the same considerations would

²⁰ *McLeave v Chief of Navy* [2019] ADFDAT 1. On 21 March 2019, Lieutenant McCleave filed a notice of appeal before the Federal Court of Australia, which was listed for hearing in November 2019; however, on 28 August 2019, he discontinued his appeal.

²¹ [2019] ADFDAT 2.

²² [2019] ADFDAT 2, [53].

²³ [2019] ADFDAT 2, [87]; see also at [101].

²⁴ [2019] ADFDAT 2, [103].

apply' to considering the alternative indecency charge as applied when determining that on all the evidence there ought to be doubt as to Mr Boyson's guilt on the act of intercourse charge.²⁵

86. Justice Logan (dissenting) emphasised the need for the DFDAT not to 'substitute trial by the [DFDAT] for trial by court martial', by reference to the High Court's decision in *The Queen v Baden-Clay*²⁶ and subsequent cases. His Honour considered the case to be a paradigm example of 'one where everything turned on the assessment by the court martial panel of the credibility of witnesses which they saw and heard'.²⁷ His Honour found that the GCM's verdict was reasonably open on the evidence.

87. On 27 June 2019, Defence lodged an appeal to the Federal Court of Australia on the grounds that the DFDAT majority erred by failing to have proper regard to the GCM's advantage in seeing and hearing the evidence; and that the DFDAT failed to consider the alternative charge of act of indecency and order a retrial. On 25 July 2019, Defence discontinued the appeal.

FINANCE

88. ODMP was adequately financed during the reporting period. Funding was provided by the Associate Secretary group of the Department of Defence and was principally 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* and all relevant financial management policies of the ADF.

²⁵ [2019] ADFDAT 2, [104].

²⁶ (2016) 258 CLR 308.

²⁷ [2019] ADFDAT 2, [28].

CONCLUSION

89. 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.

TABLE OF ABBREVIATIONS

Abbreviation	Description
AACP	Australian Association of Crown Prosecutors
ACT	Australian Capital Territory
ADF	Australian Defence Force
ADFIS	Australian Defence Force Investigative Service
ANZSOC	Australian and New Zealand Standard Offence Classification
APS	Australian Public Service
CAPT	Captain
CDPP	Commonwealth Director of Public Prosecutions
DFDA	<i>Defence Force Discipline Act 1982</i>
DFDAT	Defence Force Discipline Appeal Tribunal
DFM	Defence Force magistrate
DMP	Director of Military Prosecutions
DPP	Director of Public Prosecutions
FORCOMD	Forces Command
GCM	General Court Martial
IAP	International Association of Prosecutors
JAG	Judge Advocate General
JMPU	Joint Military Police Unit
MJLF	Military Justice Legal Forum
MJSG	Military Justice Steering Group
MOU	Memorandum of Understanding
ODMP	Office of the Director of Military Prosecutions
PM-ADF	Provost Marshal–ADF
PTE	Private
RCM	Restricted Court Martial
RMJ	Registrar of Military Justice
RSM	Regimental Sergeant Major

**ANNEX A TO
DMP REPORT
01 JAN TO 31 DEC 19**



**OFFICE OF THE
DIRECTOR OF
MILITARY
PROSECUTIONS**

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**DIRECTOR OF MILITARY PROSECUTIONS
PROSECUTION POLICY**

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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 INFLUENCE 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 relation 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.

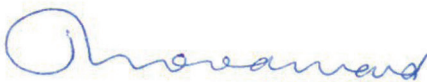
- a. The extent to which the person was involved in the activity giving rise to the charges, compared with the culpability of their accomplice.
- b. The strength of the prosecution case against a person in the absence of the evidence arising from the undertaking.
- c. The extent to which the testimony 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

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October 2015

**ANNEX B TO
DMP REPORT
01 JAN TO 31 DEC 19**

CLASS OF OFFENCE BY SERVICE – 2019

Class of Offence	NAVY	ARMY	RAAF	TOTAL
01 – HOMICIDE AND RELATED OFFENCES	0	0	0	0
02 – ACTS INTENDED TO CAUSE INJURY	7	11	1	19
03 – SEXUAL ASSAULT AND RELATED OFFENCES	16	23	7	46
04 – DANGEROUS OR NEGLIGENT ACTS ENDANGERING PERSONS	0	6	0	6
05 – ABDUCTION, HARASSMENT AND OTHER OFFENCES AGAINST THE PERSON	2	15	0	17
06 – ROBBERY, EXTORTION AND RELATED OFFENCES	0	0	0	0
07 – UNLAWFUL ENTRY WITH INTENT/BURGLARY, BREAK AND ENTER	1	0	0	1
08 – THEFT AND RELATED OFFENCES	0	4	1	5
09 – FRAUD, DECEPTION AND RELATED OFFENCES	8	12	6	26
10 – ILLICIT DRUG OFFENCES	1	1	0	2
11 – PROHIBITED AND REGULATED WEAPONS AND EXPLOSIVES OFFENCES	0	1	0	1
12 – PROPERTY DAMAGE AND ENVIRONMENTAL POLLUTION	0	1	0	1
13 – PUBLIC ORDER OFFENCES	1	1	0	2
14 – TRAFFIC AND VEHICLE REGULATORY OFFENCES	0	0	5	5
15 – OFFENCES AGAINST JUSTICE PROCEDURES, GOVERNMENT SECURITY AND GOVERNMENT OPERATIONS	1	0	0	1
16 – MISCELLANEOUS CIVILIAN OFFENCES	2	3	4	9
17 – SPECIFIC MILITARY DISCIPLINE OFFENCES	5	19	4	28
Grand Total	44	97	28	169