DIRECTOR OF MILITARY PROSECUTIONS

Report for the period
01 January to 31 December 2020

Director of Military Prosecutions

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Requests and inquiries should be addressed to the Office of the Director of Military Prosecutions at defence.dmp@defence.gov.au or on 02 5131 1292.

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Hon. Peter Dutton MP
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 2020.

Yours sincerely,

JA Woodward
Brigadier
Director of Military Prosecutions
Australian Defence Force

31 March 2021

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DIRECTOR OF MILITARY PROSECUTIONS

REPORT FOR THE PERIOD
01 JANUARY TO 31 DECEMBER 2020

OVERVIEW

1. I am pleased to present the Director of Military Prosecutions (DMP) Annual Report for the period 01 January to 31 December 2020, my sixth and final report since being appointed as the DMP by the Minister for Defence on 01 July 2015. On 23 March 2020, the Minister reappointed me for a further 12 months, commencing 01 July 2020. My appointment as the DMP will expire on 30 June 2021.

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 Commonwealth 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 year 2020 was unique in the world but also in the military justice arena. It began with the devastating bushfires and the destruction of homes and bushland, and the tragic loss of 34 lives. Then, shortly afterwards, COVID-19 reached our shores with a pandemic being declared on 20 March 2020. On 31 March 2020 the Chief of the Defence Force (CDF) issued Directive 04/2020 which identified military justice as an essential defence activity.

4. As a consequence a meeting was convened between representatives of the Office of the Judge Advocate General

(OJAG), the DMP, Director of Defence Counsel Services (DDCS) and Command to discuss issues associated with the continuing conduct of superior service tribunal proceedings. The understanding of the OJAG, ODMP and DDCS was that (in the terms of CDF Directive 04/20) the superior tribunal system should be regarded as essential defence business and the intent was to continue with listing of hearings, which included contested matters, as well as sentences.

5. Notwithstanding that most civilian criminal and civil jurisdictions significantly reduced, and in some cases ceased, the conduct of certain proceedings at that time, the general consensus was that there is sufficient flexibility to safely conduct superior service tribunal proceedings throughout Australia. This flexibility includes the fact that the DFDA permits a Defence Force magistrate (DFM) (or president of a court martial) to 'direct' or 'allow' a person to appear by video or audio link (VTC). As long as certain conditions are met with the standard and set up of the communication link, and noting the overarching requirement to ensure a fair trial, there is no legal reason why greater use of VTC cannot be made to ensure proceedings continue in a timely manner.

6. The meeting concluded that superior service tribunal proceedings were to be conducted so far as reasonably practicable, while taking necessary measures consistent with current policies and directives concerning, for example, social distancing and general transmission reduction.

7. Consequently, throughout the reporting period, superior service tribunal proceedings were able to continue essentially unabated, albeit not without some logistical challenges concerning travel, the assignment of prosecuting and defending officers, and the use of VTC. Notably, there have been almost a dozen guilty pleas conducted virtually. As border restrictions are eased, I anticipate that the conduct of virtual trials will diminish; however, there will undoubtedly be some practices that may be suited to ongoing implementation in order to maintain efficiency gains without causing any injustice to an accused.

8. During the reporting period, forty-three Defence Force magistrate hearings, one restricted court martial (RCM) and one general court martial (GCM) were conducted. There was one appeal to the Defence Force Discipline Appeal Tribunal (DFDAT). As discussed later in this report the GCM was conducted virtually with the majority of the witnesses giving evidence from Port Moresby.

9. The year 2020 also saw the release of the Inspector-General of the Australian Defence Force's Afghanistan Inquiry Report[1]. It addresses allegations of grave misconduct by some members of the Special Forces component of Operation SLIPPER during operations in Afghanistan over the period 2005 to 2016. The Report recommended that:

> *any criminal investigation and prosecution of a war crime should be undertaken by the Australian Federal Police and the Commonwealth Director of Public Prosecutions, with a view to prosecution in the civilian criminal courts, in trial by jury, rather than as a Service offence in a Service Tribunal (sic).*[2]

10. While there is jurisdiction under s 61 of the DFDA to try such offences; however, recognising that a number of the alleged perpetrators are no longer serving, it would be imprudent to adopt a bifurcated approach in these circumstances, whereby those that are still serving are dealt with under the DFDA, while former members are dealt with through a civilian criminal process.

11. During 2020, as in all other years that I have been Director, 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.

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1 The report was released in a redacted form on 19 November 2020.

2 Chapter 1.01, Para 74.

12. As the Prosecution Policy notes, a prosecutor represents the service community: 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*'.

13. In my time as Director, the ODMP has embodied these principles. I am very grateful to the legal 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 serving.

INTRODUCTION

14. 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.

15. This report is for the period 01 January to 31 December 2020.

16. 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.[3]

17. 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

c. Group Captain John Harris, SC – Acting DMP – (January 2015 – June 2015).

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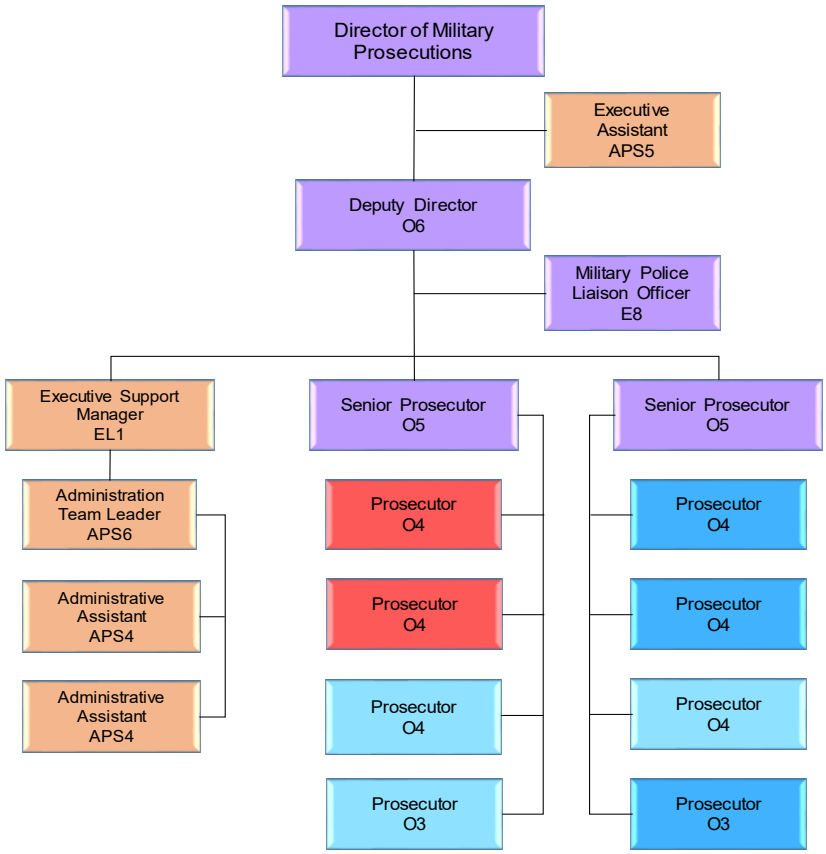
3 DFDA, s 188GG.

ORGANISATIONAL STRUCTURE

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



19. 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.

20. There are two senior prosecutor positions that have the responsibility for the administrative management of those prosecutors who work directly to them. Both positions were filled by Navy and Army for the duration of the reporting period.

21. 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.

22. One Navy billet at the rank of Lieutenant Commander (O4), two Army billets at the rank of Major (O4) and one Air Force billet at the rank of Flight Lieutenant (O3) remained vacant during the reporting period. One Lieutenant Commander (O4) was posted out of the office in October and was replaced by a Reserve Commander (O5) on a continuous full-time service arrangement. Additionally, one Squadron Leader (O4) was seconded to the Office of Defence Counsel Services in October on an interim basis to establish the management framework for the provision of legal assistance for all Air Force personnel.[4] This secondment will endure into 2021 until permanent staffing arrangements are formalised.

23. In my previous report for 2019, I foreshadowed that the office would be carrying many of the above vacancies and that this would 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 OJAG. However, a confluence of factors, including the impacts of the COVID-19 pandemic, greater use of the Reserve and me personally undertaking some of the more serious prosecutions, has not resulted in any significant diminution to achieving the established timeframes. Overall, I consider that the performance of the office during the reporting period was such that the workload remained largely manageable.

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4 This is pursuant to one of the recommendations arising from the Defence Legal Services Review (discussed further below), which resulted in CDF directing that Director of Defence Counsel Services manage the provision of legal assistance to all ADF members in October 2020.

Reserve Force

24. As mentioned above, members of the Reserve were increasingly engaged on a number of occasions during the reporting period to undertake prosecutions on my behalf and to appear before the Defence Force Discipline Appeal Tribunal. In large part this was as a result of the relatively inexperienced complement of legal officers posted to this office, combined with the travel restrictions arising from the COVID-19 pandemic and associated logistical constraints that have been in place across Australia, which prevented prosecutors from the office travelling without quarantining. Their contribution to the work of the office has again proven to be invaluable. I make further comment on the use of the Reserve below in the context of the Implementation of the Defence Legal Services Review.

Civilian Staff

25. At the commencement of the reporting period, there were five civilian Australian Public Service (APS) positions in my office, four of which were substantively filled; one member of staff was temporarily acting in a higher duties position (APS4 in the APS5 Executive Assistant to the DMP position) and one APS4 position remained effectively vacant for the duration of the reporting period.

26. Recruitment action was undertaken to permanently fill the vacant APS5 Executive Assistant to the DMP position, which resulted in one of the substantive APS4 staff (who had been acting in the position for approximately five months) being successful and subsequently promoted into the role in August.

27. At the end of the reporting period, a vacancy arose in one of the APS4 positions, which has resulted in the initiation of recruiting action to fill both vacant APS4 positions by early 2021. Further recruitment action will follow in relation to the APS5 Executive Assistant to the DMP position due to the incumbent securing a further promotion to APS6 outside the office.

Implementation of the Defence Legal Services Review

28. As previously reported, in 2018–19 a review was undertaken by Lieutenant General (Retired) Mark Evans, AO, DSC and Mr John Weber into the provision and administration of legal services advice in Defence (the Defence Legal Services Review). The Defence Committee agreed in-principle to all the recommendations of the Defence Legal Services Review. One of the recommendations was that this office be primarily staffed by Reserve Legal Officers with specialist advocacy skills, while retaining a more limited role for Permanent Legal Officers.

29. Defence Legal Division (DLD), in particular the Director General Military Legal Service (DGMLS), recognised that further analysis is required to implement the intent of this recommendation, whilst balancing the availability of human and financial resources. Moreover, that analysis has to take into account the need for the DMP to maintain sufficient depth of practical discipline law experience within the permanent military legal service workforce.

30. Some of the capability effects on the ODMP, do not, on the face of the review, appear to have been considered. Since the centralisation of the prosecution function for superior tribunals at ODMP, command lawyers are no longer involved in the preparation or conduct of trials as they once were (pre 2004). Accordingly the only means by which any full time ADF legal officer is exposed to discipline litigation or advocacy is in my office.

31. The effect of the centralisation of this role has been twofold, firstly an efficiency in the disposal of superior service tribunal matters with professional oversight, but as a consequence there is a noticeable lack of understanding by full time ADF legal officers, who have not posted into ODMP, of the superior disciplinary and criminal jurisdiction.

32. The implementation of the staffing recommendation will now see these skills all but removed from the full time component of the ADF. The role of the Deputy Director, currently within the

ordinary posting cycle, will effectively be unsustainable as a career option for full time officers.

33. Command will become almost entirely dependent on the part time component of the Military Legal Service for this expertise. This will have a marked impact on the ability to deploy any capability to conduct trials outside Australia in an operational environment. Furthermore, in relation to the decision to prosecute 'the service interest' is a fundamental consideration. The ability to properly consider 'in the service interest' will be lost if there is a reliance on a part time workforce who have for the most part not served in a fulltime, regimental, seagoing, or deployed environment.

34. It will also be a marked departure from our counter-parts in the United Kingdom, Canada, New Zealand and the United States of America who maintain and indeed foster a fulltime advocacy and prosecution capability. The current determinations for remuneration under the specialist legal officer scheme are predicated on this, until now, fundamental capability. Delay in the conduct of superior service tribunals is the inevitable consequence in any framework with a reliance on a part time workforce.

35. While the final disposition of the ODMP is yet to be settled, it is clear on any view that the downstream effects of following the recommendation have not been fully considered.

36. I am however conscious that the proposed analysis will be subsumed within a broader Defence Legal Strategic Workforce Review (SWR) to be completed by May 2021, which will assess the entire legal workforce, including officers in the Military Legal Service, but excluding the officers appointed to independent, statutory military justice roles (which includes the position of the DMP) and the APS employees attached to those offices.

37. I welcome the role that the SWR will play in holistically shaping the permanent workforce that will support me (and my successor) in fulfilling the statutory functions of this office, while yielding greater efficiencies and best practice outcomes.

Nevertheless, the SWR cannot be divorced from other implementation action being undertaken by DLD.

38. A critical aspect of the approach being taken by DLD to the implementation of the Defence Legal Services Review is the disestablishment (by mid-2021) of the existing single-Service Reserve Legal Panels. The existing panel arrangement is to be replaced by five Functional Legal Panels, including four panels that are to be managed by, and operate in support of, the military justice entities (Inspector-General of the ADF, the Office of the Judge Advocate General/Registrar of Military Justice, DMP and Defence Counsel Services). Unfortunately, the decision to create a separate Functional Legal Panel managed by, and operating in support of, the DMP—with the DMP being responsible for actively managing, administering, developing and supervising Reservists posted to the panel for duty—was made in the absence of any fulsome consultation with me or my office.

39. I have previously remarked on the use of Reserve Legal Officers and will not reiterate those observations again, suffice to say that, while the Reserve provide a vital source of mentoring for more junior prosecutors, and in providing a level of legal technical capability, they do so as a supplement to, and not a replacement for, the skills of the permanent prosecutors. Given the inherently *ad hoc* nature and historical use of the Reserve by the DMP, the creation of a DMP Functional Legal Panel is of questionable utility. I did not foresee, nor is it my preference for, the creation of a discrete, segregated functional panel for which I (or my successor) would have managerial and administrative responsibility. Based on informal discussions/consultation with DLD representatives, I had envisioned that appropriately skilled and experienced Reservists—who would predominantly be on a Defence Counsel Services (advocacy) functional panel—might be engaged by this office by invitation only, if and when required. To date, and especially this year, such an administrative arrangement has effectively been in place with the Director of Defence Counsel Services, with appropriate consultation and approvals (cognisant of potential conflicts of duty) occurring between our respective offices.

40. While I will continue to engage with DLD with respect to the implementation of the Review's recommendations, I anticipate that any substantive change to the supporting organisational structure of this office will occur after the expiration of my appointment.

PROSECUTION POLICY

41. 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.

42. 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. On 10 July 2020, I issued a new Prosecution Policy, replacing the previous policy of 26 October 2015. A copy of the new policy is at Annex A to this report and an online version is also available at:

https://defence.gov.au/mjs/docs/DMP-Prosecution-Policy.pdf.

UNDERTAKINGS, DIRECTIONS AND GUIDELINES

43. 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.

44. Although no formal direction under the DFDA was given to the Joint Military Police Unit (JMPU), as I have previously reported, all potential 'prescribed offences'[5] under investigation,

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

as well as investigations into the conduct of any officer (save for those disciplinary matters at training establishments)—in circumstances where a decision was being considered to take no further investigative action by JMPU—are referred to ODMP for consideration as to the appropriate course of action to be taken. During the reporting period, 106 such matters were referred to the ODMP.

45. 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.

46. 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.

47. In one of the cases involving a senior officer, after two complainants were spoken to by me, they decided to proceed with their respective complaint, one of which involved a prescribed sexual offence, with a view to prosecution of the matter following an investigation. The matter is currently under review by this office.

48. In another case involving an allegation against an officer of general dishonesty, which carries a maximum penalty of 10 years' imprisonment, I determined that the serious nature of the allegation necessitated more fulsome consideration by this office with a view to prosecution, rather than the matter being referred back to the officer's unit to deal with. This ultimately resulted in the matter going to trial, with the officer involved pleading guilty to, and being convicted of, substituted charges of making a false

entry in a service document, making a false service document and prejudicial conduct.

49. In another matter involving allegations of assault on a superior and creating a disturbance, I determined that there was a prima facie case of assault occasioning actual bodily harm. The investigation was referred to this office for prosecution; the member was subsequently tried by a DFM and convicted. In the bulk of other cases a decision was made that concurred with the recommendation of JMPU.

TRAINING

50. Training for military prosecutors must support both their current posting at the ODMP, as well as their continuing professional development as legal practitioners and officers of their parent Service.

51. 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. Unfortunately the comparatively short time for postings to the office mean that the 'training liability' invariably outweighs the collective court room experience.

52. 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.

53. Courses completed by prosecutors during the reporting period included mandatory ADF Legal Training Modules, as well as general Service courses, including prerequisite promotion courses, many of which were delivered virtually.

54. In conjunction with continuing legal education subjects provided by the Law Society of the Australian Capital Territory (ACT), 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.

55. In late February, the Australian Advocacy Institute conducted an in-house advocacy skills workshop utilising the Court Martial Facility, Fyshwick. This provided current and aspiring military prosecutors the opportunity to practise trial techniques and strategies, and improve their advocacy with the assistance of a faculty of experienced instructors. In the latter part of the year, a newly posted prosecutor undertook the same advocacy training, albeit online, as the Institute suspended the conduct of workshops due to the ongoing COVID-19 pandemic.

OUTREACH

ACT Law Society

56. 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 either attended or participated in virtual 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 (AACP)

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

58. The 2020 AACP Annual Conference was to be hosted by the Northern Territory Director of Public Prosecutions in Darwin. Due to the COVID-19 pandemic interstate travel restrictions, the Conference has been postponed until July 2021.

International Association of Prosecutors (IAP)

59. The office is an organisational member of the IAP. The IAP is a non-governmental and non-political organisation, which was established on 6 June 1995. 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.

60. In September 2020, the IAP was scheduled to celebrate its 25th anniversary at its Annual Conference and General Meeting in Athens, Greece. However, due to the ongoing COVID-19 pandemic, the Conference was cancelled in April. The IAP intends holding its next Annual Conference and General Meeting in Tbilisi, Georgia in September 2021.

Commonwealth Director of Public Prosecutions (CDPP)

61. 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. Due to the COVID-19 pandemic, we have not undertaken a liaison meeting this year, but will do so early in 2021 to ensure that the practical application of the MOU

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

and the DMP Prosecution Policy continues to be both suitable and effective.

Internal (Department of Defence) Liaison

62. 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)

63. During the reporting period, ODMP continued to informally liaise 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. The relationship between the two offices continues to be effective and productive. I note that Colonel Surtees finished up in the role of PM-ADF toward the end of the reporting period and I extend to him my appreciation for the cordial and professional dealings that our two offices have had during his tenure.

64. 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 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.

65. The ODMP maintains a monthly duty prosecutor roster and the prosecutor allocated to the roster at any particular time regularly provides advice to military police investigators about the legal aspects of their investigations.

Command

66. 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.

67. I endeavour to meet quarterly with the Deputy Chief of Navy, Deputy Chief of Air Force and the Chief of Staff Army Headquarters in connection with the quarterly reports provided to the Minister referred to above. These meetings provide an opportunity to discuss any problems or issues relating to matters being dealt with by this office pertaining to members of their respective Service. These discussions have proven to be a useful informal means of addressing some of the practical challenges in supporting command in the efficient maintenance of service discipline.

68. The legal officers and RSM(E) in each Service Headquarters, the legal officers at the subordinate Force level command (Fleet, Forces and Air Commands) 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.

69. 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), 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

Conduct of Superior Service Tribunal Proceedings and the COVID-19 Pandemic

Legislative Reforms

70. I have previously commented on proposed reforms that are intended to modernise the DFDA mental health provisions, including 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. While these reforms were understood to be on the Government's legislative agenda for the 2020 Parliamentary sittings, other competing legislative drafting priorities have delayed the finalisation of the draft final Bill.

71. Another legislative reform of note is contained in the Regulatory Powers (Standardisation Reform) Bill 2020, which, amongst other things, amends the DFDA to trigger Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014* (RPA). The Bill was introduced to Parliament on 03 December 2020 and was referred to the Senate Legal and Constitutional Affairs Committee on 10 December 2020; the Committee's report is due on 19 February 2021. The need for modernisation of the investigative powers available to military police under the DFDA was most

recently commented on by the Judge Advocate General in his 2018 Annual Report.[7]

72. As noted in the Explanatory Memorandum to the Bill, the existing investigative powers, found in Part VI of the DFDA, are limited in their scope, in terms of investigative tools and their application to 'service land', which is narrowly defined in the DFDA. The nature of military life and offending is changing, so the additional investigative powers provided for in the RPA are needed to permit the gathering of new forms of evidence and from 'off-base' locations. For example, possible evidence of alleged fraud may be revealed by bank statements or real estate records, or stored on personal electronic devices. The additional investigative powers are necessary to access or obtain that material, wherever it is located, either with the consent of the occupier of the premises or the owner of the thing, or by executing a warrant.

73. Accordingly, Part 3 of the RPA[8] will provide a restricted set of powers that are parallel, and supplementary, to those which the DFDA currently confers in relation to service land, to use on civilian premises to investigate alleged service offences. The RPA is triggered to allow appointed members of the ADF or APS employees in the Department to enter premises under an investigation warrant or with consent of the occupier and to exercise investigation powers under that Act for the purposes of gathering material relating to the contravention of service offences.

74. It is intended that investigation powers under the RPA will co-exist with the investigation powers contained under Part VI of the DFDA. Investigators will either: access and use RPA powers to investigate service offences in any location when in receipt of an Investigation Warrant; or they will use their existing powers under

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7 2018 JAG Report at paragraphs 58–65 https://www.defence.gov.au/JAG/JAG-Report-2018.pdf).

8 Part 3 of the RPA relates to Investigation and provides for entry, search and seizure of evidential material in any place, pursuant to an Investigation Warrant issued by a civilian magistrate or judge.

Part VI of the DFDA to investigate service offences upon service land.

75. These are important reforms that have been a long time in the making. While civilian policing powers have been expanded over the last 30 years, the powers afforded to military police under the DFDA have largely remained unchanged since it was enacted in 1982. It is hoped that these modern law enforcement powers that will soon be available to the military police will be appropriately used to enhance the expediency of investigations and the exercise of military justice in a timely fashion across all levels of service tribunal.

MILITARY JUSTICE PROCEEDINGS

76. 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 trials before an RCM and a GCM. There was only one appeal to the DFDAT, which I briefed Reserve counsel to appear on behalf of the Chief of Army, as I had prosecuted the appellant in the original DFM trial proceedings.

77. 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. 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.

78. During the reporting period, in addition to the 43 open matters carried over from 2019, there were 123 new matters referred to the ODMP, a decrease of almost 19 per cent over the previous reporting period. In only one of those matters, the member elected to have their case heard by court martial or DFM. During the reporting period, forty-three DFM hearings, one RCM trial and one GCM trial were conducted. Forty 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. Nineteen matters were referred back to units for summary disposal.

79. As at 31 December 2020, ODMP had 55 open matters. Annex B shows the number of offences by class and Service that were dealt with during the reporting period.[9]

80. 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.

81. The cases discussed below are examples of some of the more significant matters dealt with during the reporting period.

CAPT Howieson

82. On 15 September 2020, CAPT Howieson was found guilty of one count of prejudicial conduct (contrary to s 60 of the DFDA). After pleading not guilty to the charge—as well as three other charges of acts of indecency without consent (contrary to s 61(3) of the DFDA, and s 60(1) of the *Crimes Act 1900* (ACT))—he was convicted by a GCM. The punishments imposed were reduction in rank to Lieutenant and a severe reprimand.

83. The offending occurred around the time of the 2018 Asia-Pacific Economic Cooperation meetings in PNG, while CAPT

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9 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.

Howieson was the Australian Liaison Officer at Taurama Barracks, Port Moresby, and shortly before he was due to return to Australia on posting. He attended the Taurama Barracks Regimental Aid Post and told a female nursing officer of the PNG Defence Force that she had to assist him with obtaining a semen sample on the pretext of a referral from the doctor attached to the Australian High Commission in Port Moresby.

84. The trial of CAPT Howieson had a complex procedural history dating back to April 2019, when the matter was referred to the RMJ requesting the convening of a GCM. The RMJ's original convening order anticipated that the GCM would be held on 08 July 2019. The proceedings were beset with a number of pre-trial hearings, logistical difficulties in securing witnesses based in PNG, the COVID-19 pandemic, vacating trial dates, and multiple substitutions to the constitution of the court martial panel, defence counsel and prosecuting officers.

85. The prosecution witnesses in the trial all gave evidence virtually from Murray Barracks in Port Moresby.

OCDT Igoe

86. On 20 April 2020, OCDT Igoe pleaded guilty to, and was convicted of, two charges before a DFM: one charge of capturing visual data (contrary to s 61(3) of the DFDA, and s 61B of the *Crimes Act 1900* (ACT)) and one charge of non-consensual distribution of an intimate image (contrary to s 61(3) of the DFDA and s 72C of the *Crimes Act 1900* (ACT)). In respect of both convictions, he was sentenced to dismissal from the ADF and imprisonment for 35 days (to be served concurrently), which were upheld on automatic review.

87. The offending occurred on 17 August 2019 at the Living-In-Accommodation (LIA) at ADFA, when OCDT Igoe filmed and then distributed, via 'Snapchat,' a video of himself engaging in consensual sexual activities with two other ADFA members, without their knowledge or consent.

88. On 03 June 2020, OCDT Igoe filed an application in the Federal Court of Australia seeking an interlocutory injunction restraining the implementation of orders of the Reviewing Authority requiring him to undergo the period of imprisonment for 35 days.

89. On 31 July 2020, His Honour Justice Logan handed down his judgment, ordering that the sentence imposed on OCDT Igoe by the DFM and the decision of the reviewing authority be quashed.[10] Justice Logan was not convinced that, had the case proceeded to a hearing on the substantive merits, he would have concluded that any of the alleged jurisdictional errors had been made out; however, his Honour was satisfied that the Court had jurisdiction to make the orders jointly sought and that it was appropriate in the exercise of that jurisdiction to make those orders.

90. The matter was remitted back for sentencing before a different DFM. On 02 October 2020, OCDT Igoe was sentenced to dismissal from the ADF in respect of both convictions.

PTE R

91. As previously reported, 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 related 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.

92. 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. On 30 June 2020, the matter was heard before the High Court of Australia.

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10 *Igoe v Major General Michael Ryan AM in his capacity as a Reviewing Authority (No 2)* [2020] FCA 1091.

93. On 09 September 2020, the High Court handed down its decision in which the seven Justices of the Court unanimously dismissed PTE R's application.[11] In reaching this decision, five Justices (Keifel CJ, Bell, Keane, Gageler and Edelman JJ) held that s 61(3) of the DFDA, in obliging defence members to obey the law of the land, is, in all its applications, a valid exercise of the defence power. Two Justices (Nettle and Gordon JJ) held that s 61(3) is valid only in its application to offences which, because of their nature or circumstances of commission, have a proven connection with defence force discipline, and that such a threshold was satisfied in the present case.

94. Importantly, three Justices (Keifel CJ, Bell and Keane JJ) expressly indicated in their joint judgment that the 'service connection' vs 'service status' test dichotomy is not necessarily the right way to approach the question of the validity of s 61(3) of the DFDA. The proper question is whether the law in question is supported by s 51(vi) of the Constitution (the defence power). Ultimately, that requires a determination as to whether 'the measure can reasonably be seen to conduce to the efficiency of the defence forces of the Commonwealth' or, similarly, 'whether the measure does tend or might reasonably be considered to conduce to or promote or to advance the defence of the Commonwealth'.[12] The joint judgment accepted that s 61(3) was such a measure. Their Honours said:

> *A rule that requires defence force personnel always and everywhere to abide by the law of the land is sufficiently connected with s 51 (vi) because observance of the law of the land is readily seen to be a basic requirement of a disciplined and hierarchical force organised for the defence of the nation.*[13]

95. In any event, a clear majority of five Justices said that s 61(3) of the DFDA is valid in its entirety. Therefore, any conduct by

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11 *Private R v Cowen* [2020] HCA 31.

12 *Private R v Cowen* [2020] HCA 31, [42].

13 *Private R v Cowen* [2020] HCA 31, [80].

a member of the armed services that would be an offence under the law of the ACT amounts also to a disciplinary offence that is subject to military jurisdiction. While not technically the correct way of phrasing it, in practical terms the judgment gives the functional effect of upholding the 'service status' test.

96. As the DFM trial was adjourned pending the High Court's judgment in this matter, the trial of PTE R was relisted for hearing in December 2020. On 08 December 2020, having pleaded not guilty to the charge of assault occasioning actual bodily harm, PTE R was convicted of the offence. The proceedings have been adjourned until February 2021 for sentencing.

APPEALS TO THE DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL (DFDAT)

97. There was one appeal to the DFDAT in 2020.

Mikus v Chief of Army[14]

98. On 05 August 2020, LTCOL Mikus was convicted by a DFM of one charge of assaulting a subordinate contrary to s 34(1) of the DFDA. The DFM imposed a fine of $6,500.00 and a severe reprimand.

99. The offending occurred on 07 November 2019 at an Other Ranks function celebrating the end of the annual Royal Australian Corps of Signals corps week at Borneo Barracks, known as the 'Caduceus Cup'. LTCOL Mikus, the then Commanding Officer (CO) of 1CSR, was on the dancefloor when he slapped the buttocks of the victim, a young female PTE signaller of 1CSR.

100. During the course of the trial, a number of witnesses were extensively cross-examined as to what they observed in relation to the behaviour of their then CO. This included three eye-witnesses, two of which held the rank of PTE and the third was a CAPT. The DFM observed that, despite the submissions made by defence

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14 [2020] ADFDAT 1.

counsel for LTCOL Mikus, the three eye witnesses and the complainant were credible and reliable. In his view, they 'were witnesses of truth', whereas in relation to LTCOL Mikus, the DFM found his evidence to be 'unconvincing'.

101. On 03 September 2020, LTCOL Mikus appealed to the DFDAT on the basis that the conviction was unreasonable and/or could not be supported having regard to the evidence; as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction was wrong in law and that a substantial miscarriage of justice occurred; and in all the circumstances, the conviction was unsafe and unsatisfactory.

102. On 04 December 2020, the DFDAT heard the appeal. In the course of the hearing, the Tribunal also recognised that there was an additional ground of appeal based on a material irregularity in the course of the DFM proceedings and that a substantial miscarriage of justice had occurred. The main basis for challenging the conviction was an alleged inadequacy of the reasons given by the DFM for his convicting LTCOL Mikus.

103. On 22 December 2020, the Tribunal unanimously dismissed the appeal. In analysing the adequacy of the reasons for decision, the Tribunal considered the question of whether there is an obligation to do so, and the nature and extent of any such obligation. While their Honours determined that there is no explicit statutory obligation for a DFM to give reasons,[15] they went on to hold that 'it would be subversive of the statutory right of appeal…to conclude that a DFM has no obligation to give reasons':[16]

> *Whether they are delivered orally, as in the present case, or in writing, there is no requirement for them to be lengthy or elaborate. However, where more than one conclusion is open on the evidence, it will generally be*

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15 [2020] ADFDAT 1, [40]–[50].

16 [2020] ADFDAT 1, [60].

> *necessary for those reasons at least to explain why one conclusion was preferred to another.*[17]

104. The Tribunal found that the DFM's decision in this case was the result of 'his satisfaction that there was consistent, credible and corroborated direct evidence, from four witnesses, to the contrary of that given by LTCOL Mikus', with the issue of witness demeanour playing a role in that determination.[18] Moreover, they accepted the submission that:

> *…although another sentence or two in the judgment might have made it clearer, the reader of the judgment would not be under any misapprehension as to why LTCOL Mikus' evidence had not been accepted.*[19]

FINANCE

105. 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, library subscriptions and membership of professional bodies, including practising certificates with the ACT Law Society; allocations for overseas and domestic travel were significantly underutilised during the reporting period due to the COVID-19 pandemic. ODMP has complied with the *Public Governance, Performance and Accountability Act 2013* and all relevant financial management policies of the ADF.

CONCLUSION

106. These annual reports may be perceived by some readers as laconic in style and sparse on detail. They reflect the fact that the exercise of service discipline at this jurisdictional level is but a microcosm of a much broader military justice system that operates in support of command and the ADF. The matters dealt with by the

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17 [2020] ADFDAT 1, [62].
18 [2020] ADFDAT 1, [73].
19 [2020] ADFDAT 1, [73].

superior tribunal system neither represent nor are indicative of broader discipline issues or trends that some may perceive as representative of a problematic ‘culture' in the ADF. In my position as DMP (and as a former judge advocate), I have been privy to the more serious allegations of disciplinary offences. Such prolonged exposure might have elicited a somewhat jaundiced perception of the prevailing ADF culture at any given point in time. However, it also means that I have witnessed the exercise of the very Defence values that senior leaders seek to reinforce throughout the organisation, most often evinced by the display of courage and integrity of complainants and witnesses to testify against their subordinates, peers and superiors.

107. I cannot overemphasise the resilience, fortitude and honesty that many of our junior officers, sailors, soldiers and airmen and airwomen exhibit in entering the public arena of a court martial or DFM trial. For most, who have never appeared as a witness in either a civilian court or service tribunal proceeding before, nor may ever do so again, the experience of being questioned may be invasive and potentially devastating, and one that will certainly never be forgotten. I acknowledge the personal impact that this experience has likely had on each of them and thank them for their essential contribution to the dispensation of military justice in the ADF.

108. Finally, as this is my last report, and as I referred to in the Introduction, I take the opportunity to recognise and thank all the officers (both permanent and Reserve), non-commissioned officers and APS staff that I have had the privilege to serve with during my tenure as the DMP. Their collective professionalism, moral courage, service, determination, enthusiasm and support to military justice has been commendable.

TABLE OF ABBREVIATIONS

Abbreviation	Description
AACP	Australian Association of Crown Prosecutors
ACT	Australian Capital Territory
ADF	Australian Defence Force
ANZSOC	Australian and New Zealand Standard Offence Classification
APS	Australian Public Service
CAPT	Captain
CDPP	Commonwealth Director of Public Prosecutions
COVID-19	Coronavirus disease 2019
DDCS	Director of Defence Counsel Services
DFDA	*Defence Force Discipline Act 1982*
DFDAT	Defence Force Discipline Appeal Tribunal
DFM	Defence Force magistrate
DGMLS	Director General Military Legal Service
DLD	Defence Legal Divisions
DLSWR	Defence Legal Strategic Workforce Review
DMP	Director of Military Prosecutions
DPP	Director of Public Prosecutions
GCM	General Court Martial
IAP	International Association of Prosecutors
JMPU	Joint Military Police Unit
LIA	Living-In-Accommodation
MJLF	Military Justice Legal Forum
MJSG	Military Justice Steering Group
MOU	Memorandum of Understanding
ODMP	Office of the Director of Military Prosecutions
OJAG	Office of the Judge Advocate General
PM-ADF	Provost Marshal–ADF
PTE	Private
RCM	Restricted Court Martial
RMJ	Registrar of Military Justice
RSM(E)	Regimental Sergeant Major (Equivalents)

ANNEX A TO
DMP REPORT
01 JAN TO 31 DEC 20

OFFICE OF THE DIRECTOR OF MILITARY PROSECUTIONS

Department of Defence
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Canberra BC ACT 2610

DIRECTOR OF MILITARY PROSECUTIONS PROSECUTION POLICY

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INTRODUCTION

This policy replaces the Director of Military Prosecution's (DMP) previous policy of 26 October 2015.

The position of the DMP was created by section 188G of the *Defence Force Discipline Act 1982* (DFDA) and commenced on 12 June 2006.

The DFDA ensures the effective removal of the prosecution process from the chain of command by affording the DMP an independent status in that process. The creation of an independent DMP has resulted in a significant modernisation in the process of charging and prosecuting service offences in the Australian Defence Force (ADF).

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.

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.

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 section 188GR of the DFDA and any ADF legal officer who has been briefed to advise DMP or to represent DMP in a prosecution before a superior service tribunal (i.e. 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, State and Territory prosecution authorities, some aspects of this policy are modelled on those respective 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.'[1]

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.*'[2]

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1 *Whitehorn v R* (1983) 152 CLR 657, 663–4.

2 *Boucher v R* (1954) 110 CCC 263, 270 (Rand J).

1. THE DECISION TO PROSECUTE

1.1 Factors governing the decision to prosecute

It is not the case that every allegation of disciplinary misconduct must culminate in a prosecution. The decision to prosecute should not be made lightly or automatically but only after due consideration. An inappropriate decision to prosecute may mean that an innocent defence member suffers unnecessary distress and embarrassment. On the other hand, an inappropriate decision not to prosecute may mean that the guilty go free and the Defence community is denied the protection to which it is entitled.

The fundamental question is whether or not the ADF interest requires that a particular matter be prosecuted. In respect of prosecutions under the DFDA, the ADF 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 judgment and the need to tailor general principles to individual cases. The demands of fairness and consistency are important considerations, but the interests of the complainant, the accused and the members of the ADF must all be taken into account. The term ‘accused’ refers to the alleged offender in any given case.

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 ADF 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 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 reliability 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 complainant or 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?

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

k. Where more than one accused are to be tried together, is there sufficient admissible 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 ADF interest that the prosecution should proceed.

1.3 Maintenance of discipline/ADF 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 sought to explain the limits of the ADF discipline jurisdiction. Specifically, reliance has been routinely placed on High Court judgments that have determined that service offences should only

be prosecuted where such proceedings can 'reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline'.[3]

There is no judgment of the High Court that has held that the 'service connection' test must be satisfied for jurisdiction under the DFDA to be established, or to preclude the acceptance of the broader 'service status' test.[4] This was recognised by the Defence Force Discipline Appeal Tribunal in *Williams v Chief of Army*.[5] This issue is currently listed before the High Court for determination in the matter of *Private R v Brigadier Michael Cowen & the Commonwealth*.[6] While this case will have been argued in the High Court prior to the publication of this policy, the decision has been reserved. The 'service status' test accords with the prevailing authorities in Canada[7] and the United States of America.[8]

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 section 5A for the appointment of superior authorities to represent the interests of the ADF in relation to matters referred to the DMP. Where charges are being considered by the DMP, the DMP will usually seek the

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3 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 570 (Brennan and Toohey JJ).

4 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at [35] (McHugh J, with whom Gleeson, Gummow and Hayne JJ agreed), [77] and [88] (Kirby J), [157] (Callinan and Heydon JJ).

5 [2016] ADFDAT 3 at [30].

6 No S272 of 2019.

7 *R v Stillman* (2019) 436 DLR (4th) 193.

8 *Solorio v United States* 483 US 435 (1987).

views of the relevant superior authority in writing.[9] 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 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. any serious health issues of the accused that may influence the decision to prosecute;

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

i. whether or not there is a need to send a message of deterrence, both to the accused (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 ADF 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

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9 This does not occur in cases where the matter has been referred to the DMP under s 105A(2), paragraph 109(b) or 110(1)(d), s 129D(2) or 130(5), s 131A or s 141(8), 145(1) or (3) or 194(7).

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, as an alternative to or in conjunction with disciplinary proceedings.

While the DMP may make recommendations concerning administrative action, ultimate decisions in respect of whether such action is taken still rests with commanders, who in turn apply judgment to the unique facts and circumstances of the case before them.

Nevertheless, administrative 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 ADF interests may require that a matter be resolved publicly by proceedings under the DFDA before a superior service tribunal.

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 summary 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's service in the ADF is about to be terminated for mental health reasons and the alleged offending may have been to some extent attributable to that mental health condition, the issues of deterrence and maintenance of discipline would carry less weight in the decision to prosecute. This, of course, will depend on the alleged culpability of the accused.

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[10], 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 a fair trial are likely to be particularly relevant.

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10 Pursuant to s 96 of the DFDA, the time limitation to prosecute service offences, other than offences under s 61, is 5 years.

h. **The accused ceases to be a member of the ADF.** Once a person ceases to be a member of 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 military 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 ADF interest grounds is contemplated, the views of the military 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 before a superior service tribunal 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(s).

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* (Cth)*, Crimes Act 1900* (ACT) or the Commonwealth/ACT *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.

At this stage the DFDA does not provide an offence for assault on private premises or assault occasioning actual bodily harm, on private premises. Consequently reliance must be had on the

relevant provisions of the *Crimes Act 1900* (ACT) to prosecute those offences.[11]

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

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11 In *The Director of Military Prosecutions v Ian Scott Henderson* (2017) FCA 1608 the Federal Court ruled that a DFM had jurisdiction to hear a common assault charge under DFDA s 61 and *Crimes Act 1900* s 26.

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 a superior service tribunal.** Sections 103(1)(c) and (d) of the DFDA provide the DMP with the discretion to decide that an offence be tried by a superior service tribunal. 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, if convicted, to be appropriately punished;

   (5) the accused's prior convictions.

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 civilian police for further investigation for potential disposal by civilian prosecution authorities.

5. RETRIAL

Where a trial has miscarried or been overturned by a reviewing authority or the DFDAT and referred back to the DMP, prompt consideration should be given to whether or not a retrial is required. Factors to be considered include:

a. the reason the trial miscarried or was overturned on review/appeal;

b. the seriousness of the alleged offence;

c. the cost to the Commonwealth;

d. the inconvenience to the units of the accused, witnesses and victim; and

e. the views of the complainant/victim.

6. 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.

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 is entitled to know the case that is to be made against him or her, so that the accused is able to properly defend the charges. An accused 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. subject to a claim of legal professional privilege, including internal ODMP advice;

b. generated or obtained by ODMP relating to representations by superior authorities about the interests of the ADF in the proceedings;

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 military 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 military 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 military police/investigators, and where appropriate, Defence Legal. The purpose of the consultation is to give the military 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 4.4.3 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 ODMP 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; or

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 military 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 via his/her defending officer and the DMP in relation to charge(s) to be proceeded with. Such negotiations may result in the accused pleading guilty to fewer than all of the charges he/she is facing, or to a lesser charge(s), 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 who is to be tried by a superior service tribunal. 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(s) 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 charge(s) to be proceeded with bears a reasonable relationship to the nature of the misconduct of the accused;

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

    (3) there is evidence to support the charge(s).

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

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

b. whether the sentence that is likely to be imposed if the charge(s) is 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'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 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 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 maintains his or her innocence with respect to the charge(s) to which the accused 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(s) may include a request that the proposed charge(s) 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(s) 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. SENTENCING

The prosecution has an active role to play in the sentencing process.

The duty of the prosecution at sentence is outlined by the High Court. It is '*to draw to the attention of the judge what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases.*'[12]

A prosecutor is not required, and should not be permitted, to make a submission as to the bounds of the available sentencing range or to proffer some statement of the specific result.

Such a statement is one of opinion and is neither a proposition of law or fact which a sentencing judge may properly take into account.

If it appears there is a real possibility that the superior service tribunal may make a sentencing order that would be inappropriate and not within a proper exercise of the sentencing discretion, the prosecutor may make submissions on that issue.

Where facts are asserted on behalf of an offender which are contrary to the prosecutor's instructions or understanding, the prosecutor should press for a trial of the disputed issues, if the resolution of such disputed facts is in the interests of justice or is material to sentence.

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12 *Barbaro v The Queen* (2014) 253 CLR 58 at [39].

10. WITNESS PREPARATION

Prosecutors may assist a witness prepare for giving evidence by:

a. advising the witness to read their statement prior to giving evidence;

b. explaining the court's procedure (including the roles of all parties), oath/affirmation taking and the order of examination in chief, cross-examination and re-examination;

c. informing the witness that they must answer all questions truthfully, however difficult they may be;

d. informing the witness that it is not a sign of weakness if they do not know or do not recall the answer to a particular question and, if this is genuinely the case, they should not be afraid to say so;

e. explaining the role of defence counsel – that it is their job to put the accused's case and challenge the prosecution's version of events, including by suggesting the witness is mistaken or lying. The witness should be told to listen carefully to any such suggestion and clearly say whether they agree or disagree with it;

f. informing the witness that they should not be afraid to ask for a break if they genuinely need one such as when they feel tired, are losing concentration or if they want to compose themselves emotionally; and

g. explaining to the witness the importance of listening to all questions carefully and making sure they understand each one before answering it. Witnesses should be encouraged not to be afraid to ask the person asking the question to repeat or rephrase any question which they do not understand.

Prosecutors **must not**:

a. advise or suggest to a witness that false or misleading evidence should be given; or

b. coach a witness by advising what answers the witness should give to questions that might be asked.

Prosecutors may proof a witness by eliciting the account of the witness contained in the statement, without the witness referring to it. The prosecutor may question and test the version of evidence to be given by the witness.

If new and relevant information comes forward, then the prosecutor should request that the investigator obtain that information in statement form. The prosecutor may ask the witness questions about a crucial piece of evidence in the statement so that the prosecutor can determine how to adduce this at trial.

11. THE ROLE OF THE PROSECUTOR AT TRIAL

Trial prosecutors **must**:

a. present the prosecution case fairly and vigorously;

b. place before the superior service tribunal all relevant and reliable evidence and address the tribunal as to how to use that evidence according to law;

c. call all witnesses:

(1) whose testimony is admissible and necessary for the presentation of all of the relevant circumstances; or

(2) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue, unless the prosecutor believes on reasonable grounds that the testimony of a particular witness is untruthful or is unreliable;

d. **not** adopt tactics involving an appeal to prejudice or amounting to an intemperate or emotional attack upon the accused. That does not mean that in properly carrying out the role the prosecutor's addresses and cross-examination must be bland, colourless and lacking in the advocate's flourish;

e. **not** comment on answers given by witnesses in evidence during the course of their evidence;

f. **not** put forward theories that are not supported by evidence; and

g. **not** reverse the onus of proof in addresses or cross-examination of the accused.

12. 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 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. However, such an approach may not always be practicable.

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; and

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.

13. 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.

Jennifer.woodward

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J.A. WOODWARD CSC
Brigadier
Director of Military Prosecutions

10 July 2020

ANNEX B TO
DMP REPORT
01 JAN TO 31 DEC 20

CLASS OF OFFENCE BY SERVICE – 2020

Class of Offence	NAVY	ARMY	RAAF	TOTAL
01 – HOMICIDE AND RELATED OFFENCES	0	0	0	**0**
02 – ACTS INTENDED TO CAUSE INJURY	2	10	1	13
03 – SEXUAL ASSAULT AND RELATED OFFENCES	9	18	2	29
04 – DANGEROUS OR NEGLIGENT ACTS ENDANGERING PERSONS	0	1	0	1
05 – ABDUCTION, HARASSMENT AND OTHER OFFENCES AGAINST THE PERSON	0	2	0	2
06 – ROBBERY, EXTORTION AND RELATED OFFENCES	0	0	0	0
07 – UNLAWFUL ENTRY WITH INTENT/BURGLARY, BREAK AND ENTER	0	0	0	0
08 – THEFT AND RELATED OFFENCES	0	1	0	1
09 – FRAUD, DECEPTION AND RELATED OFFENCES	5	35	4	44
10 – ILLICIT DRUG OFFENCES	0	0	2	2
11 – PROHIBITED AND REGULATED WEAPONS AND EXPLOSIVES OFFENCES	0	0	0	0
12 – PROPERTY DAMAGE AND ENVIRONMENTAL POLLUTION	1	0	1	2
13 – PUBLIC ORDER OFFENCES	0	0	0	0
14 – TRAFFIC AND VEHICLE REGULATORY OFFENCES	0	0	0	0
15 – OFFENCES AGAINST JUSTICE PROCEDURES, GOVERNMENT SECURITY AND GOVERNMENT OPERATIONS	0	0	0	0
16 – MISCELLANEOUS CIVILIAN OFFENCES	3	6	0	9
17 – SPECIFIC MILITARY DISCIPLINE OFFENCES	8	8	4	20
Grand Total	**28**	**81**	**14**	**123**