

Department of Defence

Director of Military Prosecutions

*Report for the period
1 January to 31 December 2013*

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

Senator the Hon David Johnston
Minister for Defence
Parliament House
CANBERRA ACT 2600

Dear Minister,

As Director of Military Prosecutions I submit the report herewith as required by section 196B of the *Defence Force Discipline Act 1982*, covering the period from 1 January to 31 December 2013.

Yours sincerely,

M.A. Griffin, AM

Brigadier M.A. Griffin, AM
Director of Military Prosecutions
Australian Defence Force

7 March 2014

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ANNEX A PROSECUTION POLICY

ANNEX B CLASS OF OFFENCE BY SERVICE

TABLE OF ABBREVIATIONS USED IN REPORT

ABBREVIATIONS	DESCRIPTION
AACP	Australian Association of Crown Prosecutors
ADF	Australian Defence Force
ADFIS	Australian Defence Force Investigative Service
DDCS	Director of Defence Counsel Services
DFDA	Defence Force Discipline Act 1982
DFDAT	Defence Force Discipline Appeal Tribunal
DFM	Defence Force magistrate
DMP	Director of Military Prosecutions
DPP	Director of Public Prosecutions
GCM	General Court Martial
MJCC	Military Justice Coordination Committee
NCO	Non Commissioned Officer
ODMP	Office of the Director of Military Prosecutions
RCM	Restricted Court Martial
RMJ	Registrar of Military Justice
SPILO	Service Police Investigations Liaison Officer

DIRECTOR OF MILITARY PROSECUTIONS

AUSTRALIAN DEFENCE FORCE

REPORT FOR THE PERIOD 1 JANUARY TO 31 DECEMBER 2013

PREAMBLE

1. The position of Director of Military Prosecutions (DMP) was established by section 188G of the *Defence Force Discipline Act 1982* (Cth) (DFDA), and commenced on 12 June 2006. The office holder must be a legal practitioner of not less than five years experience, and be a member of the Permanent Navy, Regular Army or Permanent Air Force, or a member of the Reserves rendering full-time service, holding a rank not lower than Commodore, Brigadier or Air Commodore.

2. On 11 July 2013 the tenure of the inaugural DMP, Brigadier McDade, expired and I was appointed as DMP on 05 August 2013 for a period of five years. Group Captain Christopher Ward, acted as the DMP in the intervening period. I would like to take the opportunity to thank Brigadier McDade, for her hard work and determined efforts in establishing the office as the independent and effective prosecution service that it is.

3. Section 196B of the DFDA requires the DMP, as soon as practicable after 31 December each year, to provide to the Minister a report relating to the operations of the DMP. Herein is that report for the period 01 January to 31 December 2013.

PROSECUTION POLICY

4. The primary function of the DMP is to carry on prosecutions for service offences in proceedings before courts martial or Defence Force magistrates.¹ The factors to be considered in deciding whether to charge a person with a service offence, and if so, what offence is to be charged, are articulated in the prosecution policy at Annex A. The policy has been revised and updated having had the benefit of considering the policies of the Directors of Public Prosecutions of the states, territories and the Commonwealth in addition to the prosecution policies of other armed forces.

5. To promote transparency and to raise awareness of these factors and the related topics included in the policy, the policy is published via the Defence Restricted Network and the internet.

6. During the reporting period, no undertakings have been given to any person pursuant to section 188GD of the DFDA (relating to my 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 section 188GE of the DFDA.

PERSONNEL

7. At the commencement of the reporting period, the office had established positions for 13 prosecutors (ranging in rank from Army Captain (E) to Brigadier (E)), a senior non-commissioned officer performing the duties of a Service Police Investigations Liaison Officer (SPILO), and seven civilian support staff.

¹ Section 188GA (1) (a) of the DFDA.

8. Actual staffing levels at the end of 2013 are shown below.

Position	Rank	Status
DMP	Brigadier	Filled
DDMP	Colonel (E)	Filled
Senior Prosecutor	Wing Commander	Filled
Senior Prosecutor	Lieutenant Colonel	Filled
Business Manager	Executive Level 1	Filled
Prosecutor	Lieutenant Commander	Filled
Prosecutor	Lieutenant Commander	Filled
Prosecutor	Major	Filled
Prosecutor	Major	Filled
Prosecutor	Major	Filled
Prosecutor	Squadron Leader	Filled
Prosecutor	Squadron Leader	Vacant
Prosecutor	Flight Lieutenant	Filled
Prosecutor U/T	Lieutenant	Filled
Service Police	Warrant Officer Class 2	Filled
Investigation Liaison	(E)	
Executive Assistant	APS 5	Filled
Paralegal	APS 5	Filled
Paralegal	APS 5	Vacant
Paralegal	APS 4	Filled
Paralegal	APS 4	Vacant
Paralegal	APS 4	Vacant

9. **Deployments.** During the reporting period, the Deputy Director (Group Captain Ward) deployed to the United Nations Mission in the South Sudan for a period of at least 12 months. Air Force approved continuous full time service for Group Captain John Harris, SC, an RAAF specialist reservist to cover the vacancy until January 2015.

10. Another prosecutor, a Major, was deployed on OP SLIPPER in August. Army approved the continuous full time service of a reserve Major to cover this vacancy until the member's replacement posted into the unit in January 2013.

11. Although the loss of two personnel for deployment represents a considerable loss of manpower in a comparatively small organisation I am mindful that such opportunities broaden the operational experience of full time legal officers and assist in supporting the high demand for legal officers for military operations. I am grateful to both Air Force and Army for their efforts in promptly filling these vacancies.

EXTERNAL ASSOCIATIONS

12. During the period it was not mandatory for ADF legal officers to hold a practising certificate although a recent change in Defence Legal policy has now mandated practising certificates for full time legal officers. Any legal officer who is posted to assist me in accordance with section 188GQ of the DFDA is required to obtain a practising certificate as soon as possible. During the reporting period, all legal officers at ODMP either already held, or obtained soon after their posting, a practising certificate. Prosecutors of this office completed the legal ethics training provided to all Defence legal officers and will continue to do so.

13. Since 2007, ODMP prosecutors have been admitted as members of the Australian Association of Crown Prosecutors (AACP). The AACP is comprised of Crown or State prosecutors from every Australian jurisdiction and some jurisdictions in the Pacific region. One of the prosecutors at ODMP is also an office holder in the organisation.

14. The Office is an organisational member of the International Association of Prosecutors.

INTERNAL (DEPARTMENT OF DEFENCE) LIAISON

15. During the reporting period, I reported regularly to the Chief of the Defence Force and the Service Chiefs. The reports contained information for the reporting period on new briefs of evidence referred to ODMP, the outcomes of briefs closed, the number of trials before Defence Force magistrates (DFMs), Restricted Courts Martial (RCM) and General Courts Martial (GCM), referrals to the Registrar of Military Justice (RMJ) and included statistics giving a general overview of matters referred to me.

16. When appointed, I was directed by the Minister to provide him with quarterly reports on the operation and workload of the Office and matters which may have implications for the command or operational imperatives of the ADF. I have provided those reports to the Minister.

17. The Military Justice Coordination Committee (MJCC) met periodically during the year. This committee was created in response to the Street/Fisher recommendation that a committee be formed to:

oversee and coordinate DFDA action items and facilitate future efficiencies across the principal responsible DFDA agencies.

The Committee has provided an effective forum to initiate amendments to the DFDA. Work on issues concerning the difficulties with drug offences under the DFDA and the need to modernise the investigative provisions under Part VI of the DFDA which were raised in the committee in the previous reporting period have been progressed. Officers from ODMP are engaged with Defence Legal and the ADF Investigative Service (ADFIS) in the ongoing work to seek legislative amendments in these two areas.

18. During the reporting period, significant effort was made to continue support for the Defence Police Training Centre

in its training of service police in investigations and the management of investigations. I recently attended the Training Centre as the reviewing officer for the recent march-out parade of the Service Police Basic Course and have also instructed on the Investigator's Course.

19. I regard the relationship between ADFIS, service police and ODMP as crucial in ensuring the efficient and effective disposal of service discipline matters. It is my intention to take every opportunity to foster that relationship at all levels.

20. Since my appointment I have also endeavoured to consult with commanders across the three services. This has included meeting with the CDF and three service chiefs as well as meeting and discussing concerns and issues with commanders on the ground across the country, including the Army pre-command course.

21. I am cognisant that while my office and the execution of my duties under the DFDA are statutorily independent they are done on behalf of command and for the purpose of maintaining service discipline. These visits have been valuable and instructive. They have allowed me to identify the issues that concern command and have provided me with direction to review and reform the business processes of ODMP to achieve better outcomes and identify where greater efficiencies might be made.

CONTACT WITH MILITARY PROSECUTING AUTHORITIES OF OTHER ARMED FORCES AND OTHER ORGANISATIONS

22. Between 24 and 30 November 2013, a prosecutor from my office attended a seminar conducted by the NATO School Oberammergau (NSO) in co-operation with International Institute of Higher Studies in Criminal Sciences (ISISC) held in Siracusa, Italy.

23. The aim of the seminar was to provide military and civilian legal advisors an understanding of Shari'a law and

possible implications on military operations in Islamic States. In particular, the seminar focused on Islamic international law and international humanitarian law; the Islamic criminal justice system, the rule of law in post-conflict Muslim societies as well as transitional justice in contemporary post-conflict Muslim societies.

TRAINING OF PROSECUTORS

24. During the reporting period, all new prosecutors were provided with one-on-one instruction and in-house training. Courses completed by prosecutors during the reporting period included ADF Legal Training Modules as well as general service courses including pre-requisite promotion courses.

25. A range of training is provided in-house by prosecutors and other subject matter experts. This training assists in prosecutors meeting their mandatory continuing legal education requirements.

CASELOAD

26. During the reporting period, 29 DFM hearings were held, 10 RCM and four GCM. Thirty matters were not proceeded with due to the determination that there was no reasonable prospect of success, or that to prosecute would not have enhanced or enforced service discipline. Thirty three matters were referred back for summary disposal. Six matters were referred to civilian Directors of Public Prosecution for prosecution pursuant to the extant DMP-DPP memorandum of understanding.

27. As at 31 December 2013, ODMP had 61 open matters. Annex B shows matters by Service, which were dealt with during the reporting period.

PROCESS

28. I have commenced a review of the management of files in the office to explore the possibility of a more efficient rate of disposal of matters. This review will examine not only how files are managed within the office but also where ODMP may assist the service police, the RMJ and the Director of Defence Counsel services (DDCS) in reducing the average time taken for matters to be brought to trial or otherwise dealt with.

SIGNIFICANT CASES DURING THE REPORTING PERIOD

***Li v Chief of Army* [2013] HCA 49 (27 November 2013)**

29. ***Li v Chief of Army* [2012] ADFDAT 1-** On 8 April 2011, Major Li was convicted by RCM of creating a disturbance on service land contrary to subsection 33(b) of the DFDA. He was sentenced to a fine of \$5000, \$3000 of which was suspended, and a severe reprimand.² His appeal to the Defence Force Discipline Appeal Tribunal (DFDAT) was heard on 16 December 2011 and the decision of the DFDAT dismissing the appeal was delivered on 16 March 2012.

30. The decision of the DFDAT was appealed to the full court of the Federal Court which upheld the decision of the DFDAT. Special leave to appeal to the High Court was granted and the matter was heard on 13 October 2013.

31. Two questions of law were raised on appeal both of which concerned the operation of DFDA s 33(b) creating a disturbance on service land. The first concerned the requirement for there to be a threat of violence in order for there to be a 'disturbance,' the second question concerned the precise physical and fault elements relating to the 'creating' of a disturbance.

² On Review, this fine was reduced to \$3000 (\$2500 suspended).

32. The High Court held that a disturbance consisted of a 'non-trivial interruption of order' and that 'quarrelling may, in a particular context, be enough.' On the matter of the elements of the offence the court held that an accused had to have intentionally done an act and that act has resulted in a disturbance, furthermore they held that he either 'believed that the act would result in a disturbance' or was reckless to that fact.

33. The court held the Judge Advocate's directions during the court martial were erroneous so far as the elements of the offence were concerned. The conviction was quashed. There is no intention to retry Major Li.

Yewsang v Chief of Army [2013] DFDAT 1

34. On 23 August 2012 Sergeant Yewsang was convicted by a DFM on one count of obtaining a financial advantage by deception and one count of making a false statement in relation to an application for a benefit. He was reduced in rank to Corporal and awarded a severe reprimand on both counts. The charges concerned the overpayment of travel allowances to Sergeant Yewsang when he claimed for travel by car but instead used the money to purchase less expensive airline tickets.

35. On 21 March 2013 the DFDAT allowed the appeal in part and found that in relation to the obtaining a financial advantage charge the DFM erred in law by finding that then-Sergeant Yewsang had been dishonest. The finding of guilt on the other charge was not disturbed.

Ferdinands v Chief of Army [2013] DFDAT 2

36. Mr Trevor Ferdinands was originally charged with two counts of assault in 1999. He was acquitted on one charge and convicted on the other and reduced in rank from Corporal to Private. At the trial and ever since Mr Ferdinands has strenuously denied the charges and has sought to appeal the decision on multiple occasions.

37. The DFDAT considered an application for an extension of time in order to seek leave to appeal and a number of other oral applications made before the tribunal on 28 February 2013. The tribunal dismissed all applications.

Ferdinands v Chief of Army [2013] FCAFC 103

38. Mr Ferdinands took the decision of the DFDAT in *Ferdinands v Chief of Army* [2013] ADFDAT 2 to the Full Court of the Federal Court.

39. The Federal Court dismissed Mr Ferdinand's proceedings brought under the *Defence Force Discipline Appeals Act* 1955 and further ordered the Registrar of the Court to require Mr Ferdinands, in the event of any further application to the Court, to show cause why 'the proceeding should not be dismissed as vexatious and an abuse of process.'

King v Chief of Navy [2013] DFDAT 3

40. Captain King was convicted by a GCM panel on 12 December 2012 of four counts of obtaining a financial advantage and three counts of obtaining a financial advantage by deception arising from conduct during the period February to August 2011. He was acquitted of a number of similar offences during this period and the earlier period of April 2010 – February 2011. The offences involved Captain King's receipt of separation and other allowances while he was posted as CO HMAS Albatross in Nowra and the fact that during that period he separated from his wife and failed to inform the chain of command.

41. Captain King lodged a Notice of Appeal with the DFDAT against his convictions. During the appeal hearing, the members of the DFDAT raised an issue which had not been the subject of the appeal, namely whether the Judge Advocate had correctly directed the GCM panel on the

construction of the term 'normally lives with', as it pertains to categorisation of members and their dependants.

42. The DFDAT heard oral arguments for the appeal on 3 to 4 April 2013. On 28 May 2013 the DFDAT allowed the appeal and quashed each of the seven convictions recorded against Captain King on three grounds:

- a. That the Judge Advocate had erred in her directions to the panel with regard to the term 'normally lives with',
- b. That the convictions were inconsistent with acquittals for conduct during the earlier period, and
- c. That the Judge Advocate erred in allowing emails sent between CAPT King and other parties to be admitted into evidence.

Leith v Chief of Army [2013] ADFDAT 4

43. Corporal Leith was charged with two offences being one count of theft (DFDA s.47C) and one count of disobeying a lawful command (DFDA s.27 (1)). The charges arose from Corporal Leith's failure to correctly carry out a range clearance and the retention of three electric detonators following a live fire training activity. The trial was conducted at Townsville during the period 28 February to 2 March 2012 before a DFM. Corporal Leith pleaded not guilty to each of the charges. The DFM convicted him of both counts and sentenced Corporal Leith to be reduced to the rank of Private on the first charge and a severe reprimand on the second charge.

44. There were four grounds of appeal advanced by Corporal Leith. The first two of these concerned the admissibility of exchanges between him and another senior NCO under DFDA s 101J, the third ground related to the content of the command given to Corporal Leith to conduct

a range clearance and the final ground was a claim of 'double jeopardy' on the basis that Corporal Leith had also been charged and convicted by Queensland Police under s 34 of the *Explosives Act 1999* (Qld).

45. The DFDAT dismissed the appeal.

McLaren v Chief of Navy [2013] ADFDAT 5

46. Lieutenant McLaren was charged with two offences, being one act of indecency, and (in the alternative) one count of prejudicial conduct. The incident giving rise to the charges occurred on 2 January 2012 onboard HMAS Parramatta, it was alleged that Lieutenant McLaren had used a mirror to look into the shower cubicle being used by a female member of the ship's company.

47. The RCM was conducted at Defence Plaza, Sydney between 30 April and 4 May 2012. McLaren pleaded not guilty to each of the charges. The panel convicted him of the act of indecency and he was sentenced to be reduced to the rank of Sub Lieutenant and fined \$5762.25 (conditionally suspended for a period of 12 months).

48. On 14 December 2012, Sub Lieutenant McLaren lodged an appeal with the DFDAT claiming that the Judge Advocate had misdirected the panel in relation to a number of matters. On 29 November 13, the DFDAT allowed the appeal only on the grounds that the Judge Advocate had misdirected the panel on the law in relation to the use of the statements made by the complainant immediately after the incident and that this misdirection amounted to a substantial miscarriage of justice.

Afghanistan – Detainee Management – Allegations of Procedural Misconduct

49. In January 2011, ADFIS commenced an investigation into allegations that previous members of the Detainee Management Team within the ADF Initial Screening Area in Afghanistan did not comply with procedures relating to the management and administrative processing of detainees and in particular the requirement to maintain accurate records of that management and processing.

50. Following the ADFIS investigation and subsequent referral of a brief of evidence to this Office, four members of a previous Detainee Management Team were charged with service offences alleging falsification of service documents about detainees.

51. The first of the DFM trials for the disciplinary offences occurred on 27 July 2012 in Darwin. The accused ADF member was initially charged with 'falsification of a service document' but this charge was substituted at trial with a charge of 'prejudicial conduct'. The accused pleaded guilty to the charge and received a severe reprimand.

52. The second trial was held in Darwin on 23 August 2012. The ADF member was charged with two counts of 'falsifying a service document' to which he pleaded not guilty. The member was convicted of both charges and received a reprimand for each offence.

53. The third trial was held in Townsville on 21 November 2012. The ADF member was charged with one count of prejudicial conduct, four counts of 'falsifying a service document'). The accused ADF member pleaded guilty to all charges and received a fine of \$2000 for two of the counts of falsifying a service document and loss of seniority to January 2012 for each of the other three offences.

54. The fourth and final trial, a GCM was held in Canberra between 19 March and 3 April 2013. An Army Major was

charged with six offences involving variously the suppression, making away with and falsification of service documents. He was convicted on two counts of falsifying a service document and reduced in rank to Captain.

Further Appeals to the DFDAT

55. Contrary to the upward trend in the number of appeals, during 2012, no appeals were lodged in the DFDAT during 2013.

OTHER MATTERS

Investigative Provisions of the DFDA

56. Shortcomings with the investigative provisions of the DFDA have been highlighted on a number of occasions by my predecessor and I am pleased to note that work to reform these provisions has been commenced by Defence Legal in cooperation with ADFIS and ODMP. I have two of my prosecutors involved in the working group to develop a legislative reform proposal to address identified deficiencies in the existing legislation. As previously noted this is also a matter that is being sponsored by the Military Justice Coordination Committee.

Assistance to victims of service offences

57. The positive management of victims of service offences has continued during the year, including close consultation with more vulnerable victims. Where appropriate during the reporting period, arrangements have been made for close family members of victims or other support officers to attend and provide support directly to victims during pre-trial preparations and during the trial. All of my prosecutors have been instructed to liaise closely with all witnesses, in particular victims.

58. Since my appointment I have engaged with the Head of the Sexual Misconduct Prevention and Reporting Office (SeMPRO) in order to :

- a. Continue supporting victims of sexual offences,
- b. Ensure the roles, responsibilities and services offered by SEMPRO are understood by all prosecutors,
- c. Promote an understanding of the evidentiary and procedural framework of service tribunals, and
- d. Assist SeMPRO with the gathering of data, case studies and advice in order to assist their role in the education of ADF command and members.

FINANCE

59. ODMP was adequately financed during the reporting period and has complied with the *Financial Management and Accountability Act* (Cth) 1997 as well as the financial management policies of the Commonwealth.

CONCLUSION

60. In the short time since my appointment I have endeavoured to liaise closely with command across the three services both at the senior leadership level and across major ADF establishments and formations. A consistent theme is the concern held by commanders about delay in the disposal of disciplinary matters coming before superior service tribunals.

61. The role that the DMP plays in independently exercising prosecutorial discretion is vital in maintaining confidence in the impartiality and fairness of the military discipline system. However, it is apparent to me that the effectiveness of the discipline system lies substantially in the perception and confidence in the system of commanders and the broader

ADF. Protracted delay in this process is inimical to confidence in the discipline system.

62. Reforms to the ADF disciplinary framework in the last decade, in particular the establishment of an independent investigative agency (ADFIS), independent Judge Advocates, Registrar of Military Justice and my own position, have resulted in manifest improvement in the military discipline system. I believe the next challenge is making these independent organisations operate with a higher degree of efficiency to deliver more timely outcomes for everyone involved in the disciplinary process. It is my intention to identify where these efficiencies lie both within ODMP and in the way we operate with other military justice agencies and to minimise delay and strengthen confidence in the system.

COMPLIANCE INDEX OF REQUIRED INFORMATION FOR STATUTORY AUTHORITIES

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

Enabling Legislation	<i>Defence Force Discipline Act 1982</i>
Responsible Minister	Minister for Defence
Powers, Functions & Objectives	Paragraphs: 1, 3-5
Membership and Staff	Paragraphs: 6-12, 19-20
Information Officer	Mrs Janet Long Executive Assistant to DMP Office of the Director of Military Prosecutions Department of Defence Level 3, 13 London Circuit CANBERRA ACT 2600 Telephone: 02 6127 4403 Facsimile: 02 6127 4444
Financial Statement	Paragraph: 53
Activities and Reports	Paragraphs: 10-51
Operational Problems	Paragraphs: 52
Subsidiaries	Not applicable

Online version of the report is available at
http://www.defence.gov.au/publications/DMP_Annual_Report_2013.pdf



**OFFICE OF THE
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**DIRECTOR OF MILITARY PROSECUTIONS
PROSECUTION POLICY**

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DMP Prosecution Policy

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INTRODUCTION

This policy replaces the Director of Military Prosecution's (DMP) previous directive 02/2009 of 01 Oct 09. The policy applies to all prosecutors posted to the Office of the Director of Military Prosecutions (ODMP), any legal officer to whom DMP has delegated function(s) under *Defence Force Discipline Act 1982* (DFDA) s 188GR and any ADF legal officer who has been briefed to advise DMP or to represent DMP in a prosecution before a Defence Force magistrate (DFM), a restricted court martial (RCM) or a general court martial (GCM), or to represent DMP in the Defence Force Discipline Appeal Tribunal (DFDAT) or another court. In order to promote consistency between Commonwealth prosecution authorities, some aspects of this policy are modelled on relevant Commonwealth policies.

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

- a. provide guidance for prosecutors to assist in ensuring the quality and consistency of their recommendations and decisions; and
- b. to inform other ADF members and the public of the principles which guide decisions made by the DMP.

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

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

This directive deals solely with the exercise of the discretion to prosecute under the DFDA, and associated disclosure issues. It does not provide policy guidance or procedures for resolving jurisdictional conflicts between the civil, criminal and military discipline systems.¹ Advice and procedural guidance for the exercise of ADF jurisdiction is contained in the *Discipline Law Manual*.²

¹ That guidance is provided in DMP's memorandum of understanding with the Commonwealth, State and Territory Directors of Public Prosecutions of 22 May 2007.

² ADFP 06.1.1 Vol3 *Discipline Law Manual* contains guidance for jurisdictional resolution pursuant to DFDA s 63. DFDA s 63 requires the consent of the CDPP in situations where serious territory offences occur within Australia.

1. The decision to prosecute

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

1.1. Factors governing the decision to prosecute

The criteria for exercising the discretion to prosecute cannot be reduced to a mathematical formula. Indeed, the breadth of factors to be considered in exercising the discretion reinforces the importance of judgement and the need to tailor general principles to individual cases. Nevertheless, in deciding whether to prosecute or proceed with a charge under the DFDA, the following principles will be considered.

- a. Whether or not the admissible evidence available is capable of establishing each element of an offence.
- b. Whether or not there is a reasonable prospect of conviction by a Service tribunal properly instructed as to the law.
- c. The effect of any decision to prosecute or proceed with a charge on the maintenance of discipline and the Service interests of the ADF.
- d. Whether or not discretionary factors nevertheless dictate that charges should not be laid or proceeded with in the public interest (these are discussed in detail later).

1.2. Admissible evidence & reasonable prospect of conviction

A decision to prosecute or proceed with a charge under the DFDA should not be made unless there is sufficient admissible and reliable evidence available to allow a Service tribunal to conclude that the offence is proven in the absence of adequate evidence to the contrary. There must also be a reasonable expectation that a conviction will be achieved if the charge is laid (or proceeded with) and a prosecution should not be commenced where there is no reasonable prospect of conviction. In evaluating the quality and sufficiency of the available evidence and in deciding whether there are reasonable prospects of conviction, regard must be paid to whether the witnesses can be required to give evidence, the credibility of the witnesses and to the admissibility of available evidence.

1.3. Maintenance of discipline

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.

1.4. Alternatives to charging

Laying charges under the DFDA is only one tool that is available to establish and maintain discipline. In some circumstances, maintenance of discipline will best be achieved by taking administrative action against members in accordance with Defence Instructions, as an alternative to or in conjunction with disciplinary proceedings. Similarly, in respect of minor breaches of discipline, proceedings before a Discipline Officer may be appropriate. The DMP may be asked to advise on matters that can be appropriately dealt with through administrative or Discipline Officer action. While the DMP may make such recommendations, ultimate decisions in respect of how these breaches are dealt with still rests with commanders, who in turn apply judgement to the unique facts and circumstances of the case before them. Nevertheless, administrative or Discipline Officer action alone is inappropriate to deal with situations in which a serious breach of discipline has occurred or where the conduct involved is otherwise deemed to be serious enough to warrant the laying of charges under the DFDA. Further, in some cases the interests of justice may require that a matter be resolved publicly by proceedings under the DFDA before a DFM, RCM or GCM. Alternatives to charging should never be used as a means of avoiding charges in situations in which formal disciplinary action is appropriate.

1.5. Service Interests

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

Although it is a matter for the DMP to determine when the prosecution of a matter will substantially serve the purpose of maintaining service discipline, the DFDA provides at s 5A for the appointment of superior authorities to

represent the interests of the service in relation to matters referred to the DMP. Where charges are being considered by the DMP, the DMP will usually canvass the views of the relevant superior authority in writing. Such a request will outline the alleged offending and detail the proposed charges. For the purpose of DFDA section 5A, relevant ADF interests may include:

- a. unit operational or exercise commitments which may affect the timing of any trial of the charges;
- b. issues concerning the availability of the accused person and/or witnesses due to operational, exercise or other commitments;
- c. any severe time constraints or resource implications;
- d. wider morale implications within a command and the wider ADF;
- e. potential operational security disclosure issues;
- f. the anticipation of media interest;
- g. the prior conduct of the accused person, including findings of any administrative inquiries concerning the accused person's conduct; and
- h. whether or not there is a need to send a message of deterrence, both to the accused person and to other members of the ADF.

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

- a. **Operational requirements.** Only in the most exceptional cases will operational requirements justify a decision not to lay or proceed with a charge under the DFDA. In particular, the existence of a situation of active service will not, by itself, justify a decision not to charge or proceed with a charge under the DFDA. In most cases, operational considerations will only result in delay in dealing with charges. Operational requirements may, however, be relevant in deciding to which level of service tribunal charges should be referred.
- b. **Prior conduct.** The existence of prior convictions, or the general prior conduct of an offender, may be a relevant consideration. For example, several recent infringement notices for related conduct may justify a decision to charge a member with a Service offence under the DFDA notwithstanding that the latest offence, when viewed in isolation, would not normally warrant such action.

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

1.6. Discretionary factors

Having determined there is sufficient reliable and admissible evidence for a reasonable prospect of conviction there are numerous discretionary factors which are relevant in deciding whether to commence (or continue with) a prosecution under the DFDA. In particular, the following is a non-exhaustive list of factors that DMP may consider in deciding, in a given case, whether charges under the DFDA should be preferred or proceeded with:

- a. **Consistency and fairness.** The decision to prosecute should be exercised consistently and fairly with similar cases being dealt with in a similar way. However, it must always be recognised that no two cases are identical and there is always a requirement to consider the unique circumstances and facts of each case before deciding whether to prosecute.
- b. **Deterrence.** In appropriate cases, such as where a specific offence has become prevalent or where there is a requirement to reinforce standards, regard may be paid to the need to send a message of deterrence, both to the alleged offender and the ADF generally.
- c. **Seriousness of the offence.** It will always be relevant to consider the seriousness of the alleged offence. A decision not to charge under the DFDA may be justified in circumstances in which a technical and/or trivial breach of the DFDA has been committed (provided of course that no significant impact upon discipline will result from a decision not to proceed). In these circumstances, administrative action or Discipline Officer proceedings may be a more appropriate mechanism for dealing with the matter. In contrast and as a general rule, the more serious and wilful the alleged conduct giving rise to a service offence, the more appropriate it will be to prefer charges under the DFDA.
- d. **Interests of the victim.** 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.

- f. **Degree of culpability.** Occasionally an incident, such as some accidents, will be caused by the combined actions of many people and cannot be directly attributed to the conduct of one or more persons. In these circumstances, careful regard must be paid to the degree of culpability of the individuals involved when deciding whether charges should be laid and against whom.
- g. **Delay in dealing with matters.** Occasionally, conduct giving rise to possible service offences will not be detected for some time. Where service offences are not statute barred under the DFDA, it may nevertheless be relevant to consider whether the length of time since the alleged offence was committed militates against charges being laid. In considering this aspect, the sufficiency of the evidence, the discipline purposes to be served in proceeding with charges and any potential deterioration in the ability to accord an accused person a fair trial are likely to be particularly relevant.

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

2. Factors that are not to influence the decision to prosecute

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

- a. The race, religion, sex, sexual preference, marital status, national origin, political associations, activities or beliefs, or Service of the alleged offender or any other person involved.
- b. Personal feelings concerning the offender or any other person involved.
- c. Possible personal advantage or disadvantage that may result from the prosecution of a person.
- d. The possible effect of any decision upon the Service career of the person exercising the discretion to prosecute.
- e. Any purported direction from higher authority in respect of a specific case, whether implicit, explicit or by way of inducement or threat.
- f. Possible embarrassment or adverse publicity to a command, a unit or formation, the wider ADF or Government.

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

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

3. Selection of service tribunal

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 DFM, RCM or GCM.** Sections 103(1)(c) & (d) of the DFDA provide the DMP with the discretion to decide that an offence be tried by a Defence Force magistrate (DFM), a restricted court martial (RCM) or a general court martial (GCM). In making such a determination, and in addition to a careful consideration of the individual circumstances of the alleged offence(s) in the Brief of Evidence, the DMP may consider:
 - (1) the objective seriousness of the alleged offence(s);
 - (2) whether like charges would ordinarily be tried in the absence of a jury in the civilian courts in Australia;
 - (3) whether the nature of the alleged conduct has a particular service context that relates to the performance of duty and may be best considered by a number of officers with general service experience;
 - (4) whether the scale of punishment available would enable the accused person, if convicted, to be appropriately punished.

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

4. Sexual Misconduct Prevention and Response Office

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

Although there is no formal operational relationship between ODMP and SeMPRO there is a clear benefit in ensuring that ODMP supports SeMPRO objectives.

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

- a. **informing** victims of the role and availability of SeMPRO in order to invite any victim to report the instance of alleged sexual misconduct to SeMPRO to assist SeMPRO with its reporting, prevalence and trend analysis functions,
- b. **liaising** (if the victim consents to that liaison) with SeMPRO staff to assist them in ensuring that victims of sexual misconduct are kept informed throughout the prosecution process and fully supported by SeMPRO staff during the prosecution process; and
- c. **reporting** (in accordance with the privacy laws) instances of alleged sexual misconduct (even when not ultimately prosecuted) and the results of trials involving alleged sexual misconduct to assist SeMPRO to identify causative or contributory factors and in its education and reporting functions.

5. Expedition

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

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

- b. when recommending prosecution, draft charges for approval of the DMP and arrange for delivery of the charge documentation to the accused as soon as possible;
- c. balance requests for further investigation of the matter with the need to bring the matter to trial in a timely fashion; and
- d. remain in contact with witnesses and ascertain their availability for attendance at trial as soon as practical.

6. Charge selection

Particular care needs to be exercised when deciding which charges are preferred under the DFDA. Often the evidence will disclose a number of possible offences. In such cases care must be taken to choose a charge or charges which adequately reflect the nature of the misconduct disclosed by the evidence and which will provide the service tribunal with an appropriate basis for sentencing. It will often be unnecessary, as no disciplinary purpose will be served, to charge every possible offence. Under no circumstances should charges be laid with the intention of providing scope for subsequent charge-negotiation.

7. Disclosure

Disclosure is the continuing obligation of the prosecutor to keep the accused person informed about the case against him or her. Prosecutors must make full and timely disclosure to the accused of all material known to the prosecutor 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 the existence of which is not apparent from the evidence the prosecution proposes to lead; and/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 situations.

The prosecution will disclose to the defence all material which is relevant to the charge(s) against the defendant 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 runs counter to the prosecution case (i.e. points away from the defendant having committed the offence) or might reasonably be expected to assist the defendant in advancing a defence, including material which is in the possession of a third party.

The prosecution obligation to disclose does not extend to disclosing material:

- a. relevant only to the credibility of defence (as distinct from prosecution) witnesses;
- b. relevant only to the credibility of the accused person;
- c. relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false; or
- d. of which it is aware concerning the accused's own conduct to prevent an accused from creating a trap for himself or herself, if at the time the prosecution became aware of that material it was not seen as relevant to an issue in the case or otherwise disclosable pursuant to the criteria above.

8. Acceptance of pleas (charge-negotiation)

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

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

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

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

- a. any charge-negotiation proposal should not be initiated by the prosecution; and
- b. such a proposal should not be entertained by the prosecution unless:
 - (1) the charges to be proceeded with bear a reasonable relationship to the nature of the misconduct of the accused;
 - (2) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and

- (3) there is evidence to support the charges.

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

- a. whether the accused person is willing to cooperate in the investigation or prosecution of others, or the extent to which the accused person has done so;
- b. whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the accused is already serving a term of imprisonment) would be appropriate for the misconduct involved;
- c. the desirability of prompt and certain dispatch of the case;
- d. the accused person's antecedent conduct;
- e. the strength of the prosecution case;
- f. the likelihood of adverse consequences to witnesses;
- g. in cases where there has been a financial loss to the Commonwealth or any person, whether the accused person has made restitution or reparation or arrangements for either;
- h. the need to avoid delay in the dispatch of other pending cases;
- i. the time and expense involved in a trial and any appeal proceedings; and
- j. the views of the victim(s) and/or complainant(s), where this is reasonably practicable to obtain.

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

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

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

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

9. Immunities (undertakings of DMP)

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


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

- a. The extent to which the person was involved in the activity giving rise to the charges, compared with the culpability of their accomplice.
- b. The strength of the prosecution case against a person in the absence of the evidence arising from the undertaking.
- c. The extent to which the testimony of the person receiving the undertaking will bolster the prosecution case, including the weight the trier of fact is likely to attach to such evidence.
- d. The likelihood of the prosecution case being supported by means other than evidence from the person given the undertaking.
- e. Whether the public interest is to be served by not proceeding with available charges against the person receiving the undertaking.

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

10. Offences occurring and/or prosecuted overseas

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



M.A. GRIFFIN, AM
Brigadier
Director of Military Prosecutions

6 September 2013

CLASS OF OFFENCE BY SERVICE - 2013

Class of Offence ¹	NAVY	ARMY	RAAF	TOTAL
02 - ACTS INTENDED TO CAUSE INJURY	10	14	2	26
03 - SEXUAL ASSAULT AND RELATED OFFENCES	5	6	1	12
04 - DANGEROUS OR NEGLIGENT ACTS ENDANGERING PERSONS	1	1		2
05 - ABDUCTION, HARASSMENT AND OTHER OFFENCES AGAINST THE PERSON	1	1		2
08 - THEFT AND RELATED OFFENCES		7	1	8
09 - FRAUD, DECEPTION AND RELATED OFFENCES	10	17	15	42
10 - ILLICIT DRUG OFFENCES	1	1		2
13 - PUBLIC ORDER OFFENCES		1		1
15 - OFFENCES AGAINST JUSTICE PROCEDURES, GOVERNMENT SECURITY AND GOVERNMENT OPERATIONS		1		1
17 - SPECIFIC MILITARY DISCIPLINE OFFENCES	15	18	2	35
Grand Total	43	67	21	131

¹ The Class of Offence has been taken from the third edition of the Australian and New Zealand Standard Offence Classification (ANZSOC), 2011 which was developed for use within Australia and New Zealand for the production and analysis of crime and justice statistics by the Australian Bureau of Statistics. In addition to the 16 divisions within the ANZSOC a 17th category has been added to capture Specific Military Discipline Offences.