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**INSPECTOR-GENERAL  
OF THE AUSTRALIAN DEFENCE FORCE**

**INQUIRY REPORT**

**OWN-INITIATIVE INQUIRY (01/20)  
INTO THE FIRST TWELVE MONTHS OF  
PUBLISHING LISTS AND OUTCOMES OF COURTS  
MARTIAL AND DEFENCE FORCE MAGISTRATE  
TRIALS**

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**INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE  
REPORT OF AN OWN-INITIATIVE INQUIRY INTO THE FIRST TWELVE MONTHS OF  
PUBLISHING LISTS AND OUTCOMES OF COURTS MARTIAL AND DEFENCE FORCE  
MAGISTRATE TRIALS**

**SUMMARY OF FINDINGS AND RECOMMENDATIONS**

**DIRECTION 1**

**You are to assess what the practice of publication was intended to achieve.**

**FINDING 1:** The publication of courts martial and Defence Force magistrate trial lists and outcomes was intended to enhance the maintenance of service discipline through greater transparency, promoting public confidence in the superior service tribunal system and to facilitate its power of general deterrence.

**FINDING 2:** The publication of court martial and Defence Force magistrate trial lists and outcomes was anticipated to have a number of specific advantages, including to:

- increase public acceptance and confidence in the administration of military discipline through the ADF's superior tribunals
- increase general deterrence
- provide transparency to the Australian public equivalent to a civilian criminal justice system
- sharpen the difference between the summary and the superior proceedings making the decision for an ADF member to elect more momentous
- encourage better standards of advocacy
- increase scrutiny, and improve timeliness, efficiency and cost of superior court proceedings, and
- eliminate an inconsistency with publication of ADF trial outcomes; Defence Force Discipline Appeals Tribunal (DFDAT) decisions are fully published whereas courts martial and Defence Force magistrate trial outcomes are not.

**DIRECTION 2**

**You are to assess whether publication has achieved its intended aims and whether there have been any associated difficulties, problems or opportunities for improvement. As part of your inquiries, you should:**

- a. review a sample of the publication, including any media reporting, of court martial and Defence Force magistrate proceedings

- b. seek relevant views of the CDF, VCDF, Judge Advocate General, Deputy Service Chiefs, Director of Military Prosecutions, Chief of Staff ADF Headquarters, Registrar of Military Justice and Director of Defence Counsel Services, and
- c. survey a sample of those members who have been accused persons, defending officers and prosecuting officers who have appeared before a court martial or Defence Force magistrate trial in the last year.

**FINDING 3:** The publication of court martial and Defence Force magistrate trial lists and outcomes has enhanced the maintenance of service discipline by contributing to greater transparency, promoting public and ADF confidence in the superior service tribunal system and achieving consistency with the publication of Defence Force Discipline Appeal Tribunal outcomes.

**FINDING 4:** It is too early to tell if the publication of trial lists and outcomes for superior tribunals will have an impact on accused persons' decisions to elect trial by court martial or Defence Force magistrate.

**FINDING 5:** The standards of advocacy, the level of scrutiny and the efficiency and timeliness of superior tribunals may be enhanced by the publication of the outcomes of superior tribunals.

**FINDING 6:** The publication of court martial and Defence Force magistrate trial lists and outcomes has contributed to a decline in media inquiries and Freedom of Information requests.

**FINDING 7:** The publication of court martial and Defence Force magistrate trial lists and outcomes has provided command an opportunity to better support members through the trial process.

**FINDING 8:** Command has not sought a non-publication order based on concerns of the impact of a superior tribunal on the wellbeing of an accused member.

**FINDING 9:** The publication of lists of upcoming court martial and Defence Force magistrate proceedings is satisfactory and does not require improvement.

**FINDING 10:** The publication of outcomes and case summaries for guilty findings is satisfactory and does not require improvement.

**FINDING 11:** The practise of command engagement on the draft case summary is satisfactory and does not require improvement.

**FINDING 12:** The implementation of Practice Note 1 has not resulted in an increase in media reporting of superior tribunal proceedings.

**FINDING 13:** While the welfare of Defence members may be affected by media reporting, this is not as a direct consequence of the implementation of Practice Note 1.

**FINDING 14:** The publication of lists and outcomes on the Judge Advocate General internet and Defence Protected Network sites is appropriate.

**RECOMMENDATION 1:** The Office of the Judge Advocate General publish case summaries for findings of not guilty and acquittal.

**RECOMMENDATION 2:** The Judge Advocate General amend Practice Note 1 to reflect the practise for an accused member, who is found not guilty, to request that his/her name and rank be included in the outcomes of superior tribunal proceedings.

**RECOMMENDATION 3:** The Judge Advocate General amend Practice Note 1 to provide additional guidance on non-publication orders.

**RECOMMENDATION 4:** Defence Legal modify AF007 Charge Sheet and Decision Form (Form C2) to provide further information to the accused about the consequences of electing trial by a superior tribunal.

**RECOMMENDATION 5:** The Services apply for a non-publication order in appropriate circumstances including when there is concern for the welfare of the accused member.

**RECOMMENDATION 6:** The Service newspapers report on the outcomes of superior tribunal proceedings.

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**INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE REPORT**  
**REPORT OF AN OWN-INITIATIVE INQUIRY INTO THE FIRST TWELVE MONTHS OF PUBLISHING**  
**LISTS AND OUTCOMES OF COURTS MARTIAL AND DEFENCE FORCE MAGISTRATE TRIALS**

**Introduction/Background**

1. On 31 March 2019, the Office of the Judge Advocate General (OJAG) commenced publishing trial lists and outcomes of courts martial (CM) and Defence Force magistrate (DFM) proceedings. Lists and outcomes are published on both the internet and the Defence Protected Network (DPN). The policy for the publication of trial lists and outcomes is detailed in a Judge Advocate General (JAG) Practice Note.<sup>1</sup>
2. On 07 April 2020, the Inspector-General of the Australian Defence Force (IGADF) directed Air Vice Marshal Leigh Gordon and Captain Penny Campbell RAN to assist him to conduct an own-initiative inquiry into the first twelve months of publication of the lists and outcomes.<sup>2</sup> During the review period contemplated by the inquiry (31 March 2019 to 31 March 2020), no courts martial were conducted.
3. Administrative, process and procedural matters relevant to the conduct of the inquiry are addressed at annex A.

**DIRECTION 1**

**You are to assess what the practice of publication was intended to achieve.**

**Judge Advocate General intention to publish**

4. On 8 December 2017 the JAG wrote to CDF, VCDF and the Service Chiefs on the publication of superior disciplinary tribunal proceedings.<sup>3</sup> The JAG stated that his proposal to publish lists and outcomes was to 'promote public confidence in ADF tribunals, to increase their powers of general deterrence and to give effect to the *Defence Force Discipline Act* section 140'. Section 140 of the *Defence Force Discipline Act* (DFDA) requires that 'hearings of proceedings before a court martial or a Defence Force magistrate shall be in public'.<sup>4</sup>
5. The JAG also stated that 'the limited publication of superior tribunal proceedings has attracted adverse Parliamentary comment'. The JAG noted two paragraphs from the 11 May 2017 Inquiry Report by the Senate Standing Committee on Foreign Affairs and Trade into Defence's management of credit and other transaction cards. The report noted that evidence of convictions for fraud in military jurisdictions was not readily available. The report recommended that Defence be more transparent in reporting disciplinary action against individuals, including publishing the outcomes of disciplinary or criminal action on the Defence website and in service newspapers.

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<sup>1</sup> Practice Note 1 – Publication of Court Martial and Defence Force Magistrate Lists and Outcomes (AF33198257)

<sup>2</sup> IGADF Directions BN1504683

<sup>3</sup> JAG Minute 095/2017 of 8 December 2017 (AF31335806)

<sup>4</sup> *Defence Force Discipline Act 1982* (Cth), section 140

6. In his minute, the JAG also identified seven advantages from the publication of trial lists and outcomes in that it will:

- a. increase public acceptance and confidence in the administration of military discipline through the ADF's superior tribunals
- b. increase general deterrence
- c. provide transparency to the Australian public equivalent to a civilian criminal justice system
- d. sharpen the difference between the summary and the superior proceedings making the decision for an ADF member to elect more momentous
- e. encourage better standards of advocacy
- f. increase scrutiny, and improve timeliness, efficiency and cost of superior court proceedings, and
- g. eliminate an inconsistency with publication of ADF trial outcomes; Defence Force Discipline Appeals Tribunal (DFDAT) decisions are fully published whereas ordinary (courts martial and Defence Force magistrate) trial outcomes are not.

7. The JAG included a draft Practice Note in his minute which, at that time, contemplated publishing the name of the accused in the upcoming trial list.

8. The JAG commented on this proposal in his 2017 annual report to Parliament, identifying that his principal intent 'is to enhance the fundamental purpose of the *Defence Force Discipline Act* (DFDA), namely the maintenance of service discipline'. The JAG indicated that this would be achieved through 'greater transparency, to promote public confidence in the superior service tribunal system and to facilitate its power of general deterrence'.<sup>5</sup>

9. Defence's response to the JAG's proposal to expand the publication of the listing and the outcomes of superior service tribunal trials was coordinated by the Military Justice Co-ordination Committee and considered by the Chiefs of Services Committee. Air Chief Marshal Binskin, as CDF, considered the proposal on 11 Jun 18, commenting that advice to the Minister for Defence was required before action was taken to implement the proposal.<sup>6</sup>

10. Following further consultation with the Services, the JAG agreed that the accused person's name would only be published if the accused was convicted of one or more offences. Only the accused person's rank would be published in the upcoming trial list. The CDF brief of 7 January 2019 noted that the decision to not publish an accused's name in the upcoming trial lists did not adversely affect the aim of publication. That is, transparency, general deterrence and so

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<sup>5</sup> JAG Annual Report 2017 pages 21 to 24 [https://www.defence.gov.au/JAG/JAG\\_Report\\_2017.pdf](https://www.defence.gov.au/JAG/JAG_Report_2017.pdf)

<sup>6</sup> Decision Brief for CDF of 11 June 2018 (B1159709)



forth, could still be achieved in the absence of identifying the accused in the lists. General Campbell, as CDF, agreed to the refined proposal.<sup>7</sup>

11. The JAG signed Practice Note 1 – *Publication of Court Martial and Defence Force Magistrate Lists and Outcomes* on 15 March 2019 with a commencement date of 31 March 2019. The Practice Note sets out the JAG policy on the publication of trial lists and outcomes.<sup>8</sup> In accordance with the Practice Note, a list of upcoming superior tribunal proceedings and a separate list of trial outcomes are published on the OJAG web page on the internet<sup>9</sup> and on an equivalent page on the DPN. Where the trial resulted in a conviction, the outcomes list contains an embedded link to the case summary.

12. There were 40 Defence Force magistrate trials held in the review period between 31 March 2019 and 31 March 2020. The list of outcomes contains links to 27 case summaries. There were no courts martial held in the review period.

13. Prior to the publication of the Practice Note, the Service newspapers published abridged outcomes of superior tribunals. As an example, the trial results published in Navy News on 7 March 2019 are included at annex B.

#### **Analysis of what the practice of publication was intended to achieve**

14. The JAG's broad intent behind publication is the maintenance of service discipline which can be achieved through 'greater transparency, to promote public confidence in the superior service tribunal system and to facilitate its power of general deterrence'.<sup>10</sup> More specifically, the JAG identified seven anticipated advantages to publication which collectively serves to enhance the fundamental purpose of the DFDA – the maintenance of service discipline.

15. While there was discussion during the consultation process about the details of what would be published, particularly about whether to publish an accused's name in the list, the inquiry did not find the Services disagreed with or disputed the JAG's expected benefits to publication.

**FINDING 1: The publication of court martial and Defence Force magistrate trial lists and outcomes was intended to enhance the maintenance of service discipline through greater transparency, promoting public confidence in the superior service tribunal system and to facilitate its power of general deterrence.**

<sup>7</sup> Decision Brief for CDF of 7 January 2019 (EC18-002488)

<sup>8</sup> Practice Note 1 (AF33198257)

<sup>9</sup> JAG Webpage <https://www.defence.gov.au/JAG/Court-Martial-Magistrate-Proceedings.asp>

<sup>10</sup> JAG Annual Report 2017 pages 21 to 24 [https://www.defence.gov.au/JAG/JAG\\_Report\\_2017.pdf](https://www.defence.gov.au/JAG/JAG_Report_2017.pdf)

**FINDING 2:** The publication of court martial and Defence Force magistrate trial lists and outcomes was anticipated to have a number of specific advantages, including to:

- increase public acceptance and confidence in the administration of military discipline through the ADF's superior tribunals
- increase general deterrence
- provide transparency to the Australian public equivalent to a civilian criminal justice system
- sharpen the difference between the summary and the superior proceedings making the decision for an ADF member to elect more momentous
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- increase scrutiny, and improve timeliness, efficiency and cost of superior court proceedings, and
- eliminate an inconsistency with publication of ADF trial outcomes; Defence Force Discipline Appeals Tribunal (DFDAT) decisions are fully published whereas ordinary courts martial and Defence Force magistrate trial outcomes are not.

#### **DIRECTION 2 – part 1**

You are to assess whether publication has achieved its intended aims and whether there have been any associated difficulties, problems or opportunities for improvement. As part of your inquiries, you should:

- d. review a sample of the publication, including any media reporting, of court martial and Defence Force magistrate proceedings;
- e. seek relevant views of the CDF, VCDF, Judge Advocate General, Deputy Service Chiefs, Director of Military Prosecutions, Chief of Staff ADF Headquarters, Registrar of Military Justice and Director of Defence Counsel Services; and
- f. survey a sample of those members who have been accused persons, defending officers and prosecuting officers who have appeared before a court martial or Defence Force magistrate trial in the last year.

#### **Achievement of the anticipated outcomes of publication**

16. In line with Direction 1, the inquiry determined that the seven advantages identified by the JAG are a succinct summary of what the practice of publication was intended to achieve. This part of the Report addresses the first part of Direction 2, to assess whether these benefits have been achieved.

#### **Anticipated advantage 1 – Increased public and ADF confidence in the superior tribunal system**

17. The senior stakeholders interviewed (referred through the report as witnesses) were asked for their opinions on the level of ADF and public confidence in the superior tribunal system prior to the implementation of Practice Note 1. A number of witnesses did not have strong

opinions prior to publication, or their opinions were formed through the process of consultation and implementation of the Practice Note. However, the following specific points were offered:

- a. CDF noted that the Service Chiefs were losing confidence in elements of the military justice system but these concerns would not be resolved through publication.
- b. The Deputy Chief of Army (DCA) felt that Army's chain of command had some concerns that the military justice system had become convoluted and complex and not serving the interests of discipline as well as it could.
- c. The Chief of Staff ADF Headquarters (COS ADFHQ) felt that her perceptions of confidence in the discipline system were influenced by the absence of information on the outcomes of tribunals. That is, a member could be disadvantaged in career management considerations through rumour and the lack of information about the outcomes of any disciplinary proceedings.
- d. The Director Select Strategic Issues Management (DSSIM) considered that if public confidence was reflected by the views of Parliament, then the view would be fractious. Since publication, Parliament has not made any adverse comment about the superior tribunal system.
- e. The Chief Judge Advocate (CJA) said he had a sense of disquiet that Defence had not been publishing the details of public hearings, potentially contrary to the legislative intent.
- f. Deputy Chief of Navy (DCN) assessed that the Navy senior leadership felt that more could be done to demonstrate that Defence was holding people to account.
- g. The Director Defence Counsel Services (DDCS) offered the example of the convictions of two Air Force officers for being absent without leave where one officer was fined, and the other was imprisoned; however, the differences in punishment were not obvious in reporting. Publication of the outcomes would have provided an explanation (based on the factual circumstances of each matter) which would lead to confidence in the system.
- h. The JAG reported that his perceptions were driven by a sense that the ADF was not complying with section 140 of the DFDA. The JAG referred to 'an irritated groundswell' who felt the ADF was not being open about 'its bad guys'. He felt that within the ADF, the system was being hijacked by the privacy people.

18. Prosecuting and defending officers who had appeared before a DFM trial during the review period were surveyed for their views on a range of issues, including the level of confidence held by the ADF and the public in the superior tribunal system prior to and after publication. Many respondents commented that it was too soon to tell whether publication had affected public confidence. Four respondents, out of 16, felt that there was a general level of confidence held by ADF members, with 12 not responding to the question. Conversely, 15 of the respondents felt that there was a general level of confidence held by the public in the ADF's military justice system. One respondent commented:

I believe many more ADF members have become engaged in the process - we normally see full public galleries at DFM hearings.

**Anticipated advantage 2 – Increased general deterrent power**

19. In her 2016 report, Director Military Prosecutions (DMP) stated that the Service newspaper reports were unsatisfactory as they were 'obscured so as to de-identify the convicted member to such a degree that they seldom convey anything resembling the circumstances behind the conviction'. DMP felt that the lack of appropriate publication of outcomes weakened the principle of general deterrence, and was also at odds with the 'open nature of Superior Service Tribunals'.

20. The inquiry asked witnesses if they felt that the publication of trial lists and outcomes had delivered the benefit of increased deterrence. A number of witnesses felt that there was an intuitive link between publication and deterrence. Many witnesses including VCDF, DCN, DCA and RMJ, noted, however, that there is little empirical evidence to support this intuition, particularly considering that the Practice Note had only been in place since March 2019, and that there was only a small sample of proceedings during the period under review.

- a. The JAG referred to the challenge of measuring deterrence as the 'great imponderable'.
- b. DMP reiterated her concerns over the lack of trial details that were published in the Service newspapers. She felt that the fact of publication now supports prosecutors to make stronger arguments for conviction in support of the power of deterrence.
- c. DCAF stated that publication has helped to generate conversations about trial outcomes and this leads to an increase in deterrence.

21. A number of witnesses questioned the link between publishing trial outcomes and deterrence.

- a. CDF doubted that an ADF member would be motivated not to commit an offence based on an appreciation that the publication of trial outcomes could see the member named in public.
- b. DCA commented that finding information about lists and outcomes on the DPN was 'convoluted' and deterrence could not be achieved if people could not find the information.

22. The prosecuting and defending officers surveyed were generally unable to comment on any change in the general level of deterrence following publication. One respondent stated that deterrence had not been affected at all, commenting:

But, it doesn't work in the civilian world either. As a criminal law specialist of 20 years' experience I have rarely, that is never, spoken to a defendant who thought their actions through to that extent.

23. IGADF publishes statistical data on the number of summary and higher tribunal trials held in the ADF in each fiscal year. Higher tribunal trials increased by 47 per cent from 30 trials in

2018-19 to 44 trials in 2019-20. While this time frame does not directly overlap with this inquiry's review period, the substantial increase in the number of trials could indicate that publication is not achieving deterrence. However, the increase in trials could also be attributable to the Services and military justice officials placing an increased emphasis on reducing delays in the investigation, prosecution and trial of serious offences during this period.

**Anticipated advantage 3 – Provide transparency equivalent to the civilian criminal justice system**

24. The general view of witnesses was that, by publishing trial lists and outcomes, Defence had increased the transparency of the superior tribunal system. A number of witnesses also noted that, following publication, Defence could more easily demonstrate compliance with the requirements of section 140 of the DFDA.

25. As a measure of transparency in superior tribunal proceedings, the JAG, CJA and RMJ referred to a decrease in the number of Freedom of Information (FOI) requests for information about trials. The JAG commented that FOI requests are not required for civilian criminal trials as information is already publicly available. The Defence FOI disclosure log lists ten FOI decisions relating to information about superior tribunals between June 2011 and August 2020. There have been no FOI requests since publication commenced.

26. Independently of the inquiry, 2810 ADF personnel were asked about their perceptions of the publication of lists and outcomes during focus groups conducted as part of the IGADF's military justice audit program at 35 ADF units held between March 2019 and March 2020. Focus group participants indicated a general view that publication supports accountability and transparency. However, a number of members had concerns over the impact of publishing on affected individuals, and the potential negative impact to the reputation of Defence. An overview of focus group participants' comments is at Annex C.

27. The Decision Brief for CDF dated 4 Jun 2018 included a comparison between the elements to be included in the trial list and outcomes under the then-proposed draft practice note, with the details provided in the list and outcomes for the ACT Magistrates Court and Supreme Court.<sup>11</sup> A comparison between the ACT courts and Practice Note 1 confirms that the ADF provides an equivalent level of transparency, and in some areas, a greater amount of detail, including:

- a. the name of the Judge Advocate/Defence Force Magistrate at both listing and outcome
- b. the accused's rank and Service at listing
- c. the number of charges, and, for DFM trials, the relevant legislative provisions and statements of offence at listing, and
- d. the outcomes of reviews and appeals.

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<sup>11</sup> Enclosure 1, Attachments C and D



#### **Anticipated advantage 4 – Superior tribunal election**

28. Under Section 131AA of the DFDA an accused person may elect to have a charge tried by a superior tribunal (court martial or Defence Force magistrate) rather than a summary authority.

29. As the trial publication Practice Note only applies to superior tribunals, the JAG's expectation was that ADF members would more carefully consider their decision to elect to go before a superior tribunal. In his interview, the JAG noted that in electing to be tried by court martial or Defence Force magistrate, members would know they would be going from a private to a very public system.

30. Most of the witnesses interviewed either did not comment on whether this anticipated advantage had been realised or said it was too early to tell. DDCS commented that he thought accused members did not fully appreciate the consequences of election.

31. The number of elections for trial by court martial or Defence Force magistrate significantly decreased in the first year of trial publication, lending apparent support for the JAG's expectation that publication would make accused persons consider such elections more carefully. There were only four elections in the first year of publication, half the average number for the previous four calendar years.

#### **Anticipated advantage 5 – encourage better standards of advocacy**

32. The inquiry identified little evidence to support an assessment that the standards of advocacy in superior tribunal proceedings have improved. A number of witnesses stated they were not in a position to offer an opinion:

- a. The CJA felt that the public gallery does promote greater efficiency.
- b. The JAG expressed the view that, prompted by the trial publication Practice Note, the judge and trial counsel are on show and have to perform better. The Judge Advocate (JA) could put a criticism of a counsel on the public record. The JAG expects to see advocates that are better prepared, as well as a reduction in advocates raising 'stupid points'.
- c. DDCS noted that because trial transcripts are not on the public record, the actions of counsel would not be clear or able to be scrutinised.

33. Both Defence Legal and IGADF receive complaints about legal officers, which may be one indicator of poor standards of advocacy. In the previous five years, Defence Legal has received only three complaints against defending officers, and no complaints since publication commenced. In the same timeframe, IGADF received three complaints about the conduct of lawyers during superior trials, two of which were since publication commenced. One of these arose through this inquiry process.

**Anticipated advantage 6 – improve timeliness, efficiency and cost of proceedings.**

34. The inquiry identified little evidence to assess whether timeliness and efficiency had improved, or whether publication had affected the cost of proceedings. A number of witnesses stated they were not in a position to offer an opinion.

35. In 2016,<sup>12</sup> VCDF published 'delay reduction measures' aimed at improving the timeliness of the summary and superior tribunal system. IGADF and the Summary Discipline Implementation Team track the Services performance against VCDF's mandated timelines. While timeliness has improved in the last year, RMJ affirmed it is not possible to link this to publication of trial lists and outcomes.

**Anticipated advantage 7 – Consistency in ADF's trial outcomes publication**

36. With the introduction of the trial publication Practice Note, both DFDAT and superior tribunal outcomes are published. However, the content is different in that DFDAT publishes decisions and the outcomes of superior tribunals are published in a relatively short case summary.

**Analysis of the achievement of the anticipated outcomes of publication**

37. Intuitively, publication of trial lists and outcomes has achieved the JAG's anticipated outcomes. However, the inquiry did not find empirical evidence to conclude that all the anticipated advantages have been realised. In part this is due to the relatively small number of trials and published case summaries to examine, and the difficulty in identifying objective, qualitative measures to assess the effectiveness of the anticipated benefits.

38. **Anticipated advantage 1.** The favourable responses from the ADF Military Justice Audits focus group participants, the reduction in FOI requests, and the lack of questions about Defence superior tribunals in Parliament, support a finding that ADF and public confidence in the military justice system has increased.

39. **Anticipated advantage 2.** The inquiry is unable to determine whether increased general deterrence has been achieved.

40. **Anticipated advantage 3.** There is no single approach for what must be published in the lists and outcomes of trials in the various tiers of Federal, State and Territory civilian courts. The detail published by OJAG in the lists of trials and outcomes is broadly consistent with the practice adopted by the ACT Magistrates Court and Supreme Court. Publication is made both to the public at large, and to the ADF audience, through the internet and DPN respectively. This has achieved the anticipated level of transparency consistent with the civilian criminal justice system.

41. **Anticipated advantage 4.** The inquiry is unable to determine whether an accused member's decision to elect from summary to superior tribunal decisions has been affected by the practice of publication. The number of elections resulting in superior trials has not changed significantly in the last five years but the sample size is too small to determine whether publication has affected a member's decision to elect. However, the fact that lists and outcomes of superior

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<sup>12</sup> VCDF Minute VCDF/OUT/2016/446 of 16 December 2016

tribunal matters are now published does emphasise the difference in character between the two levels.

42. **Anticipated advantage 5.** The inquiry is unable to determine whether better standards of advocacy and performance of trial advocates have been achieved.

43. **Anticipated advantage 6.** Publication of trial lists and outcomes assists the public to better scrutinise superior tribunals, however, the inquiry is unable to determine whether this has led to an improvement in the timeliness, efficiency and cost of those proceedings. While timeliness has improved, it is not possible to determine this is as a result of publication.

44. **Anticipated advantage 7.** Publication of lists and outcomes of superior tribunals achieves a level of consistency with the practice of publishing the outcomes of DFDAT matters.

45. In the words of the CJA, the advantages identified by the JAG are ‘all long term laudable aims’. While a direct assessment of transparency can be made against a civilian jurisdiction, it would appear to be too early to tell in terms of superior tribunal elections being ‘more momentous’, and advocacy, scrutiny and timeliness being improved. However, there is nothing to suggest that the introduction of the Practice Note will have an adverse impact on the standards of advocacy and scrutiny, and the timeliness and efficiency of superior tribunals.

**FINDING 3: The publication of court martial and Defence Force magistrate trial lists and outcomes has enhanced the maintenance of service discipline by contributing to greater transparency, promoting public and ADF confidence in the superior service tribunal system and achieving consistency with the publication of Defence Force Discipline Appeal Tribunal outcomes.**

**FINDING 4. It is too early to tell if the publication of trial lists and outcomes for superior tribunals will have an impact on accused persons’ decisions to elect trial by court martial or Defence Force magistrate.**

**FINDING 5. The standards of advocacy, the level of scrutiny and the efficiency and timeliness of superior tribunals may be enhanced by the publication of the outcomes of superior tribunals.**

### **Additional benefits**

46. In addition to the seven anticipated advantages identified by the JAG, the inquiry found the practice of publication had two additional benefits.

47. First, an unanticipated benefit of publication of the trial list and outcomes is the reduction of media queries and Freedom of Information requests about trials discussed in paragraph 25.

48. Second, the trial publication Practice Note has focused command attention on upcoming trials, and as a result, places command in a better position to support accused persons. This is discussed further below.



**FINDING 6. The publication of court martial and Defence Force magistrate trial lists and outcomes has contributed to a decline in media inquiries and Freedom of Information requests.**

**FINDING 7. The publication of court martial and Defence Force magistrate trial lists and outcomes has provided command an opportunity to better support members through the trial process.**

## **DIRECTION 2 – part 2**

**You are to assess whether publication has achieved its intended aims and whether there have been any associated difficulties, problems or opportunities for improvement.**

49. This part of the Report addresses the second part of Direction 2, whether there have been any associated difficulties, problems or opportunities for improvement with aspects of the policy as expressed in the trial publication Practice Note.

### **Publication of lists**

50. One of the key areas of discussion during consultation on the Practice Note was the publication of the accused's name in the pre-trial list. A number of key stakeholders were concerned about the impact that publishing the name would have on the accused member. As a result of consultation, the JAG made a concession that the list of upcoming trials would not include the accused person's name.

51. All witnesses interviewed were comfortable with the existing practice of only publishing the name of the defendant once found guilty. However, the JAG believes that the inclusion of the accused member's name in the pre-trial list 'needs to be revisited'. The JAG believes that the accused member's name could be published provided sufficient notice was provided to the member. The JAG felt that the inclusion of the name would enhance the publication of the facts of acquittals, and would support increasing confidence in the superior tribunal system.

52. One reason behind the decision to publish the list of trials was to allow the public to attend. None of those interviewed was aware of any problems with public access. The Office of the JAG has developed attendance prioritisation arrangements to comply with COVID-19 rules should trial attendance at a particular location exceed what is safe and allowed. However, these prioritisation arrangements have not yet been needed.

53. While not explicitly required by Practice Note 1, RMJ's practice is to liaise with command prior to publishing the list. This provides an opportunity for command to raise any concerns and to provide support to the accused member prior to publication.

### **Non-publication orders**

54. The Practice Note specifies that publication of lists and outcomes will be consistent with any non-publication order made by a Service tribunal. A non-publication order may be sought on the grounds of the interests of the security or defence of Australia; the proper administration of

justice; public morals; or other matters considered relevant. The Practice Note refers to the unique nature of DFDA proceedings in that, in addition to the prosecution and the defence, command also has the opportunity to seek leave to be heard on a non-publication application. Thus any party to the proceedings, including the chain of command, could make an application for an order that certain details concerning the trial proceedings, such as the name of the accused member, are not published.

55. A communications package was prepared by DPG Communications and cleared by VCDF ahead of the release of the trial direction Practice Note. It included the following:

In particular for accused members, those suffering mental health issues should be encouraged to discuss the issue with their health care provider and legal officer, who can advise how the mental condition might affect the trial process and publication. Command is empowered to advise the legal officer representing the accused of their reasons should a non-publication order be deemed necessary.

56. The Case Summaries disclose that, in the first twelve months of trial publication, there was only one occasion on which an accused person sought a non-publication order. The Service Tribunal granted the order on limited grounds.<sup>13</sup> In three cases the Defence Force magistrate prohibited publication of the complainant's identity pursuant to section 40 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).

57. The inquiry asked witnesses whether they were aware of any instances where command had considered applying for, or had sought, a non-publication order. While the deputy Service chiefs were unaware of any non-publication being sought by their Service, a number of witnesses noted the case of Private R which at the time was being considered by the High Court of Australia. DDCS stated one defending officer had indicated an intent to seek a non-publication order in a future matter, but was unaware of non-publication orders being sought by command. Two of the 16 prosecuting and defending officers who responded to the survey indicated that non-publication orders had been made during a trial in which they were involved.

58. Witnesses generally felt that there was sufficient opportunity for a non-publication order to be sought, and witnesses were also unaware of any concerns that a non-publication order application had caused undue delay to the conduct of a trial.

59. DDCS did not see the need for specific guidance on non-publication orders. He noted there is a growing awareness of the issue, stating the Service headquarters had legal staff and he knows 'this is on their radar'.

60. The RMJ noted that the interplay between ACT legislation on certain criminal offences prohibits the publication of some details, and that the military practice is to not publish the details of a complainant in any matter. The RMJ also noted that some offences are not automatically captured by the non-publication provisions of the *Evidence (Miscellaneous) Provisions Act 1991* (ACT) – for example, the non-consensual distribution of intimate images – and that DFMs have exercised their own authority to make a non-publication order in these circumstances.

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<sup>13</sup> Case Summary in the matter of SCDT Ruby Elizabeth Nairn (BN13119266).

61. DCA advised that, in 2019, Army had proposed a draft procedure to ADFHQ providing guidance to Command on seeking non-publication orders. DCN also felt that some additional guidance may be warranted, particularly in circumstances where the wellbeing of the accused may be a concern.

62. CoS ADFQ stated that the Service Chiefs of Staff felt that the proposed procedure was not required as the guidance in the Practice Note, combined with the legal support available in the Service Headquarters, should be sufficient. A number of witnesses also noted that non-publication orders need to be based on evidence and considered on a case-by-case basis, and this did not lend itself to a standard operating procedure style guidance.

63. The JAG thought that command were not seeking non-publication orders as often as they might because they were 'unaware they have the power to ask'. He noted the DFDA was different from civilian courts in allowing for an order if publication would be inappropriate in the interests of 'the security or defence of Australia'. What this phrase means is largely unexplored. The JAG stated that practice notes published by courts are the 'SOP for the court'. He suggested not creating another document to deal with non-publication orders but to include it as an annex in Practice Note 1. This is the most appropriate, and transparent, vehicle to communicate publicly what is the practice of non-publication.

64. CJA reported that he has produced guidance, including assembling the relevant case law, for the DFMs and JAs in the form of a 'Bench Book'. Unrestricted access to the Bench Book is via the OJAG web page on the DPN and is available for review by both command and Service headquarter legal staff. The Bench Book includes a chapter on non-publication orders.

65. Chapter 6 of the *Superior Tribunal Manual* provides guidance on non-publication submissions.

### **Publication of outcomes for findings of guilty**

66. Practice Note 1 (as amended on 29 Aug 19) requires that a case summary be published when an accused defence member is convicted of an offence. A case summary sets out a number of matters including the rank and surname of the defendant, and the relevant factual and legal considerations which support conviction and the imposition of any punishment.

67. All witnesses interviewed agreed that there was benefit to the ADF and the Australian public in publishing a case summary when an ADF member is convicted of an offence. There was also general satisfaction with the arrangements for engagement with command on publishing the trial outcomes, as well as the accuracy of the case summaries.

68. The JAG stated he 'has not pushed the idea for full publication' knowing such a practice needs to be properly resourced. The JAG noted that he is comfortable with the current system, however, because command could seek Defence Force magistrate trial transcripts which would provide unredacted reasons for trial decisions. The reasons for a decision may be useful in understanding the context and the factors the Defence Force magistrate considered before command contemplates any associated administrative action. Such an approach would be

consistent with Defence policy governing administrative consequences following a recordable civil conviction against a member.<sup>14</sup>

69. The JAG has previously raised in his annual report<sup>15</sup> a concern that judges advocate are not involved in the court martial panels' sentencing decisions, and courts martial do not provide reasons when imposing punishments. This would lead to a difference between a case summary for a Defence Force magistrate conviction and a case summary for a court martial conviction in that the former would provide reasons for the imposition of a particular punishment and the latter would not.

70. The witnesses interviewed were mixed in their views on the significance of the potential differences between a court martial and a Defence Force magistrate case summary, with some believing that they should be consistent, and others suggesting that the current arrangements are not a problem. The JAG felt that it was not acceptable for a member to be sentenced to imprisonment, for example, by a court martial with no reason being given.

71. The JAG advised that he is developing a submission through Head People Capability to the Chiefs of Services Committee. The submission will recommend legislative reform so that the judge advocate will sit with the court martial panel while it considers punishment. The judge advocate could then publish the reasons for sentencing.

72. Most civilian courts do not publish case summaries but publish decisions. Witnesses interviewed did not have a strong view on whether the ADF should publish decisions, instead of a case summary. Both CoS ADFHQ and DDCS expressed the view that a case summary is a usable narrative compared to a decision. The RMJ also felt that case summaries offer more utility, and that decisions could see excess detail published. DCN noted the importance of understanding the context for a decision. The JAG's view was that publishing a decision would be time consuming and require more resources than publishing a case summary.

### **Publication of outcomes for not guilty findings and acquittals**

73. Currently, case summaries are not produced in the event of an acquittal or not guilty finding. The Inquiry asked witnesses their views about whether this practise should be changed. All witnesses, except the CJA and CDF (who did not express a view), supported the publication of case summaries for acquittals to enhance transparency and build confidence in superior tribunals. DCAF noted publication would also assist in educating the workforce.

74. However, some witnesses qualified their opinions:

- a. The JAG was supportive of the idea of publishing a case summary for an acquittal but expressed concern about the resource implication for a DFM to write it.
- b. While the RMJ thinks a case summary for an acquittal should be published he understands the argument that the benefit could be outweighed by the negative. He noted that case summaries would be qualified in its language and could either make the

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<sup>14</sup> MILPERSMAN Part 9, Chapter 7, paragraphs 7.31 – 7.34.

<sup>15</sup> 2017 JAG Report at paragraph 84 and 2018 JAG Report at paragraphs 47 – 57.

complainant look bad, or make the acquittal look like it was achieved on a technicality. The RMJ also felt that the case summaries would expose Defence to additional FOI requests.

- c. COS ADFHQ was also cognisant of the perceived difference between an acquittal on a technicality and an acquittal due to a lack of evidence, however, she thought this could assist a member returning to a unit.

75. The CJA was of the view that a case summary for findings of not-guilty and acquittal should not be published. The CJA was not aware of an equivalent civil jurisdiction where a case summary for a finding of not guilty or an acquittal was published. The CJA also felt that the reasons for an acquittal could be 'counterproductive' and difficult to detail in the form of a case summary.

76. There were some differing views as to whether the publication of a not guilty finding should include the name of the acquitted member.

- a. RMJ stated that the current practise is that a member has the option of having their name and rank published in the trial outcomes for not guilty findings and acquittal. However, this approach is not clear in the Practice Note.
- b. DDCS felt the name should be published, saying it could harm transparency if the defendant had the choice to be named or not.
- c. DCN felt there were benefits to publishing a case summary for acquittal but expressed concern over publishing the accused person's name. He said publication of a name could depend on the member's rank and position, noting that a member of the Senior Leadership Team or a person in a command position was different to a 24-year-old. He suggested a tiered model of publishing an accused person's name depending on their seniority and accountability.

77. The original Practice Note (dated 15 Mar 19) appeared to contemplate that a case summary might be prepared when all charges were withdrawn or the accused was acquitted (albeit without publishing the name of the accused). This was amended in the current Practice Note (dated 29 Aug 19) to make it clear that a case summary would not be produced for acquittals.

78. The desirability of publishing case summaries for acquittals was also explored in the surveys of accused members and legal officers. Eight accused (of 10) responded in the survey that they would prefer to have the reasons for their acquittal published though they would not want their name published.

79. Four legal officers (nine did not answer this question) responded in the survey that they thought the ADF should consider publishing reasons for an acquittal. The majority thought names should not be published in acquittals.



80. At least one case summary published during the review period details the reasons that an accused member, who was found guilty of one charge, was also found not guilty on a number of separate charges that were heard as part of the same trial.

**Accused comment on case summaries prior to publication**

81. The RMJ's statutory function is to assist the JAG and CJA by 'providing administrative and management services' in conjunction with trials. Under this authority the RMJ prepares and publishes the case summaries for superior tribunals. Witnesses were asked if they saw the publication by the RMJ as an administrative, rather than a judicial function, and if the accused should be given the opportunity to comment on the draft summary prior to publication.

82. While a number of witnesses felt that it may be appropriate for the accused member to be given an opportunity to comment on the case summary, most witnesses did not have a strong opinion either way.

- a. The CJA was of the view that, while publishing may be an administrative function, the judicial officer does the drafting. The CJA felt that a member who felt the case summary was inaccurate may be able to seek amendment through the redress of grievance system.
- b. The JAG stated that the case summary was an outcome of a judicial process and should not generate an administrative overlay or treatment. The JAG was of the opinion that you have to trust the judges to be fair.

83. Eleven out of 16 prosecuting and defending officers surveyed did not think that a convicted ADF member should be given an opportunity to comment on a draft case summary. However, a number thought that there was benefit in the defending officer being given an opportunity to comment.

**Media**

84. A number of witnesses interviewed assessed media reporting, and the associated potential impact on individual Defence members, as the most significant downside of the policy to publish trial lists and outcomes. A number of witnesses interviewed also noted that there was already media interest in superior tribunals prior to the decision being made to publish, and that the publication of outcomes better places Defence to respond to media enquiries.

85. Most witnesses interviewed agreed that there was a risk that the media may report on the trials of Defence members in circumstances where they would not report on a similar trial in the civilian system. Most accepted that the risk is being realised and believed that it was a side effect of being more transparent. A number of witnesses also felt that the risk was mitigated by the support that Defence could provide to individuals impacted by the trial.

86. DCN believed that the Navy members and their families who have been impacted by media reporting of superior tribunals blame Navy for allowing the media to be at the trial. He believes that the members feel unsupported. DCN also observed that the accuracy of the media was variable, and that reporting can be sensationalised through social media, which could be seen as

compounding the punishment. DCN felt that adverse media attention had resulted in two junior officers experiencing mental health issues.

87. DCN believed that the advanced notice of a trial is a contributing factor to media attention, and that the 'brand' of Defence attracts attention. DCN also stated that 'what grates with the workforce' is the different treatment between military members and someone in the civilian system.

88. The JAG felt that the media problem was misstated. Both the JAG and the CJA acknowledged that there was media reporting on superior tribunals before the publication of trial lists and outcomes. The JAG noted that the ADF attracts more attention, promotes itself to a higher standard, and is judged against that higher standard. The JAG noted two incidental benefits of publication related to the publication of trial lists and outcomes. The JAG outlined how a Navy trial held in Sydney had reinforced that members that make a complaint of inappropriate or unacceptable behaviour are supported.<sup>16</sup> The JAG also outlined that the publication of a trial list had led to an estranged family attending a trial where a Defence member was a complainant. The JAG reported that, as a result of attending the trial, the family member had been able to provide a victim impact statement in support of the complainant, and reconcile the relationship.

89. Of the 40 superior tribunals held in the review period, the inquiry found only 11 were reported in the media. There were two matters that resulted in a not guilty finding (and hence no publication by OJAG of outcomes or names) yet were extensively covered in the media, including naming the accused.<sup>17</sup> There was one guilty finding that resulted in a media story which did not name the accused even though the members' name appears in the corresponding case summary.<sup>18</sup> In the 11 matters, initial media reporting occurred before any review or appeal, and therefore before the case summary was published. The inquiry only identified one instance of further reporting after the case summary was published as the punishment was amended following automatic review.<sup>19</sup>

90. The trial location may also be a factor in media reporting. Of the 11 trials that attracted media reporting:

- a. four were held at the ADF Court Martial Facility in the ACT,
- b. three were held at Robertson Barracks or RAAF Base Darwin,
- c. three were held at Defence Plaza in Sydney or HMAS *Watson*, and
- d. one was held at RAAF Base Amberley.

91. Trials held in establishments located somewhat remotely from civilian population centres, such as HMAS *Stirling* and RAAF Base Edinburgh, did not attract media reporting.

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<sup>16</sup> Proceeding number 2019-016-DFM

<sup>17</sup> Proceeding numbers 2019-016 DFM and 2019-036-DFM

<sup>18</sup> Proceeding number 2019-035 DFM, Case Summary (BN13605872)

<sup>19</sup> Proceeding number 2019-024 DFM

92. Prior to the implementation of Practice Note 1, media would seek information about matters that are now contained in the list (ie trial date and location). Subsequent to publication, media queries appear to focus more on actions resulting from the trials themselves. Examples include:

- a. penalties associated with certain cases
- b. requests for statements regarding ADF culture (as a result of certain trials)
- c. when the annual report is released
- d. cost of DFM hearings
- e. statistics for DFM trials.

Defence Media information on media enquiries is included at annex D.

93. In addition to reporting on individual trials, there have also been articles that have reported views about Defence formed across a number of trials, including 'Defence still at sea over sexual misconduct' published in *The Courier Mail* on 28 October 2019, and 'ADF's litany of disgrace revealed' published in *The Australian* on 8 August 2020.

94. As part of the inquiry, witnesses were also asked for their views on the responsibility for correcting inaccurate media reporting. A variety of responses were provided with most witnesses agreeing that it probably involved a partnership between command, Defence Legal and Defence media. The JAG stated a strong view that the primary responsibility rests with the Judge Advocate or Defence Force magistrate as the court is not a 'creature of command' and corrections can be put on the public record during the trial.

95. Of the 16 prosecuting and defending officers who responded to the survey, two indicated that they had been approached by the media during a proceeding. Both respondents indicated that the media had been seeking clarification on procedural and administrative matters, rather than opinions on the substance of the trial. None of the 16 survey respondents indicated that they had been approached by the media after the details had been published, and none was aware of any adverse media reporting as a result of a member's details being published on the OJAG website.

### Impacts on individuals

96. Through the consultation process before the introduction of this policy, there was some discussion of the impact of publishing the list and outcomes on the mental health of ADF members and their families, and victims. Later, COS AHQ advised Army was fundamentally opposed to pre-trial publication.<sup>20</sup> Subsequent discussion between Chief of Army (CA) and the CJA appeared to resolve CA's concerns.

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<sup>20</sup> MJCC minutes of 02/2018



97. Most witnesses interviewed considered that publishing a case summary gives rise to possible adverse consequences for an accused person and members of their family. A number of witnesses made specific points on the potential impact as follows:

- a. DCAF noted that Air Force had recognised the potential for adverse impact and was looking to mitigate this through support to the accused, victim, and complainant.
- b. The CJA told the inquiry that impacts on individuals are considered when drafting case summaries.
- c. The CJA also said that if publishing details will affect an accused person's mental health, then they are entitled to apply for a non-publication order.
- d. CoS ADFHQ felt that adverse consequences were a risk for all open justice systems, and media reporting may be more of the cause of adverse impacts on the individual, rather than publishing the lists and outcomes.

98. Witnesses were asked if they were aware of any examples of adverse impacts as a result of the publication of trial list and outcomes. Apart from the two examples of mental health issues offered by DCN, no other witnesses identified instances of adverse consequences. Similarly, the 16 prosecuting and defending officer survey recipients did not raise any examples of members being impacted by details being published on the OJAG's websites.

99. Witnesses interviewed were also asked to comment on the level of support available to members going through the court process. A number of witnesses noted that the key area of support is command. CoS ADFHQ noted that the communications associated with releasing the Practice Note highlighted DCO and social workers as important mitigation of risks to families. Most witnesses agreed that the release of the Practice Note has resulted in command more carefully considering the support to members impacted by a superior tribunal. An example is the release of Navy Directive 06/2020 - *Support to members during superior tribunal proceedings*.<sup>21</sup>

100. Two Commanding Officers (one Army and one Air Force) stated that the Practice Note 1 had not affected the way in which they provide command support to accused members either before or after the trial. The current Navy supervisor of one accused member believes significant resources should be provided to the accused to support their mental health, noting he did not think the member had appropriate divisional support at the time. The final response was from an accused member's current Air Force supervisor who had not been in a command position since the publication of Practice Note 1. She noted, however, that any notifiable incident and associated media impacts on an individual would be raised by command

### **Locations of trials**

101. Witnesses were asked to consider to what extent deterrence or transparency should be considered in determining the location for a trial.

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<sup>21</sup> Navy Directive 06/20 dated 13 May 2020 (DCN/OUT/2020/081)

- a. DCA felt the best deterrence came from holding the trial where the offence occurred, but he was not aware of much objective evidence to support that.
- b. DMP's long held view is that trials should be held where the accused is based so that people can come and see that justice is being done, and that support is available for the accused from the accused person's unit.
- c. CoS ADFHQ was inclined to hold trials on a base because of military justice, maintenance of discipline and ceremony. She also noted that using video may be the future.
- d. DCAF's view was that, as the outcomes are being published, then the location is less of a factor. DCAF also noted that he would not want to disconnect the participants from their support mechanisms.
- e. The RMJ noted that deterrence was one of the criteria that he considers in proposing the location for a trial, with the location of the accused being another consideration. The RMJ said deterrence is a more important consideration if the location of the accused person is different to where the offence occurred.
- f. The CJA's view on deterrence was that not many people get the time to attend; however, they will know that the trial is on and the basis of the allegations. The CJA's view is that general deterrence is achieved by the publication of outcomes. The CJA also felt that transparency was an important consideration as long as there is no manipulation of a trial location to reduce public access
- g. DDCS's view was that deterrence within the locality of offending is an important consideration.
- h. DCN believed that transparency and deterrence were both important. DCN noted that openness and transparency with the public relies on an unpredictable media organisation and therefore there is risk. DCN's view was that, if Defence made the key driver transparency and deterrence to our workforce, then we might get a better outcome. DCN also sees benefit in holding trials at training establishments and that they are still reasonably accessible to media.
- i. The JAG stated that both transparency and deterrence are important considerations in determining trial locations. The JAG stated that 'the more trials take place locally in front of the troops as soon as they can the better'.

#### **Publishing Lists and Outcomes on OJAG website**

102. The publication of the lists and outcomes on the OJAG web page was explored with the witnesses interviewed. CA felt that the web page was difficult to find. CoS ADFHQ also felt it was obscure, but was easily found by journalists. VCDF felt that publishing on the OJAG web page seemed reasonable, and to keep a sense of independence he would not like to see it on a command site.

103. DCN voiced support to publishing the outcomes in Navy News, perhaps with some analysis, to support openness and transparency with the Navy workforce.

104. The JAG felt that the web page was similar to other jurisdictions, and there was benefit in having all the practice notes, and reports and outcomes in the one area. The JAG also noted the example of the estranged family member being aware of, and attending the trial at RAAF Amberley as a result of the trial details being published on the OJAG web page.

105. The CJA noted that superior tribunal outcomes were not currently being published in service newspapers, and that he has taken action to address this deficiency.

#### **Experiences and attitudes of persons**

106. Ten members responded to a voluntary survey of accused persons on their experiences and attitudes on the publication of trial lists and outcomes. Of the 10, six responded they were aware that some details of their trial would be published in a list on the OJAG's website, and five were unaware that their name, any convictions and a case summary about their trial would be published if they were convicted.

107. Those members who were aware that details would be published following a conviction advised of a number of concerns, including:

- a. the publishing of details allows anyone access the details of the trial
- b. no other employer publishes similar information
- c. the information published severely biases against the member, and
- d. all original charges with a 'not guilty' conviction were displayed on the website.

One respondent was glad that publication gave clarity to the accusations against them and that the court case could be read by anyone.

108. Eight members surveyed would have liked the opportunity to comment on the case summary prior to publication. Eight members would also have liked the reasons for an acquittal to be published; however, only two members would have preferred to have been named.

109. One survey respondent stated that they were approached by the media for an interview before the trial. The same survey respondent was also critical of media reporting during the trial, but prior to a determination of guilt as they believed that it established a level of bias. None of the survey respondents was contacted by the media after the details of their trial were published on the OJAG's websites. One survey respondent would have liked the media to report on their not guilty finding, stating they:

*wished they had attended the court hearing and recorded the finding. I think that they would have found the Not Guilty result and the reasons behind the judgment very interesting.*

110. Another potential impact on ADF members as a result of publication is on their future employment prospects. One accused person noted in a survey response:

*due to my name being published ... my name appears in Google searches and is easily found by prospective employers when they conduct background checks. This has severely limited my future job prospects*

111. One survey respondent reported that they had submitted a 'suppression order' to reduce the impact of the trial on members of their family. The respondent was grateful for how the Defence Force magistrate proceedings handled this procedure and allowed for the suppression order to be granted.

112. One survey respondent was critical of Defence allowing media to be present at the trial. The respondent stated:

*a known reporter - who is recognised by all involved as of low integrity and eager to disparage Defence and its members, was allowed into the court room where they took what they thought was salient details and published them online. This reporting was done with brash incorrect headlines and was repeated in the Daily News Summary for all Defence members to access. This reporter took images off my partner's social media to use in the articles, as well as publicly naming and shaming those who provided character references in support of me.*

113. In addition to concerns about individual welfare, three respondents raised concern over privacy. One respondent stated 'No other employer would breach privacy to this extent.'

114. Survey respondents were asked to identify areas where the Practice Note could be improved. Four respondents suggested that the policy would be improved if the names of members who were found guilty were not published.

115. Seven survey respondents answered No to the question 'In future, do you think the ADF should continue to publish the details of superior discipline trials?' Their reasons included:

- a. it is unfair that the accused person's details can be published, but not the person making the complaint especially if the outcome is a not guilty finding
- b. the process and punishment is adequate and publication is not necessary
- c. the trial process is traumatic enough without adding the stress of publication
- d. ADF trials should remain within the ADF
- e. a particular case summary had portrayed the accused person as a monster, when in fact the accused person believed they were innocent, and wrongly convicted without any hard evidence, and
- f. publication would impact the prospects of rehabilitation.

116. Three respondents agreed that the ADF should continue to publish the details of superior disciplinary trials, with supporting reasons being:

- a. it could assist legal officers in future cases of similar nature for both the defence and prosecution respectively, and

- b. it allows the citizens of Australia to understand the state of their Defence Force and the types of personnel serving in it.

One respondent believed that publication should only address those charges where a member has been found guilty.

117. Four respondents noted that they, or their family, had been negatively affected by having their name, conviction and a case summary published on the OJAG website. The respondents described the impact as:

- a. affecting their mental wellbeing
- b. affecting their future job prospects, and
- c. having an impact in family members' workplaces.

118. Two respondents indicated that they had raised the impact of the trial with their chain of command but received little support. The members who did not seek support from their chain of command appeared to be motivated by a lack of confidence in either their chain of command, or in the superior tribunal system.

119. One survey respondent raised a number of concerns about the fairness of the military justice system that fell outside the inquiry's Directions. With the member's consent, the issues raised were referred to IGADF's Director of Inquiry and Investigations for assessment.

### **Areas for improvement**

120. Witnesses interviewed were asked to identify any areas of difficulty or problems with the policy, or areas where they would like to see the policy improved. DCA questioned whether 'the juice is worth the squeeze' because of his nagging concerns that publication negatively affects individuals. DCN also questioned whether the policy was achieving the original intent, and would like to see a better link to the attitudes of ADF members to understand if the policy is improving the behaviour of ADF people, and improving transparency with and the trust of the public. A number of prosecuting and defending officers also questioned whether the benefits of publication were worth the potential adverse impacts.

121. While DMP recognised that the Chiefs of Services Committee was against it, she felt that there is benefit in publishing names and reasons following an acquittal. DCAF felt that there was benefit in considering guidance on seeking non-publication orders. This view was shared by DCA.

122. The RMJ said the trial publication Practice Note needs to be amended to include a policy to deal with spent convictions.

123. DDCS raised concerns over the welfare management of a person found not guilty but who was subsequently subject to command consideration of adverse administrative action. His view was that acquittal case summaries could be important considerations for command when considering further administrative action.

124. The CJA advised that he has initiated action to have trial outcomes published in Service newspapers. One of the prosecuting and defending officer survey respondents noted that there is no indication on the OJAG website that some results of ADF trials are not equivalent to civilian conviction.

125. Witnesses were also asked to identify positive aspects of the policy. DCA noted a lack of complaints from Army members. DMP noted that the policy supports a better case for general deterrence, and the communication of the reasons for a decision.

126. DCAF believed that publication of lists and outcomes was achieving the benefits of transparency, general deterrence, and openness. DCAF felt that consistency is also important.

127. CoS ADFHQ noted engagement of command in superior discipline proceedings is a positive benefit, and the policy gives the ADF something to point to in response to media inquiries. The RMJ noted giving complete visibility of an upcoming proceeding to the higher HQ with appropriate detail was a positive.

128. The CJA noted that he has not experienced members raising concerns about publication through defending officers, the RMJ does not get 'push back' in applying the policy, and there have been limited command applications for non-publication orders except in the most sensitive matters. The CJA also felt that there has been no need identified to publish member's details prior to conviction, and summaries produced support the aims of general deterrence and maintenance of service discipline.

129. DDCS said one benefit of the policy was getting the story out that the superior tribunal system is a fair and reasonable system that creates timely results and supports the proper maintenance of service discipline.

130. The JAG felt that the system had been shown to be fair to both command and members, with the reasons given in public. The JAG assessed that the policy engenders the confidence of command handing over justice to an independent tribunal.

#### **Analysis of difficulties problems and opportunities for improvement**

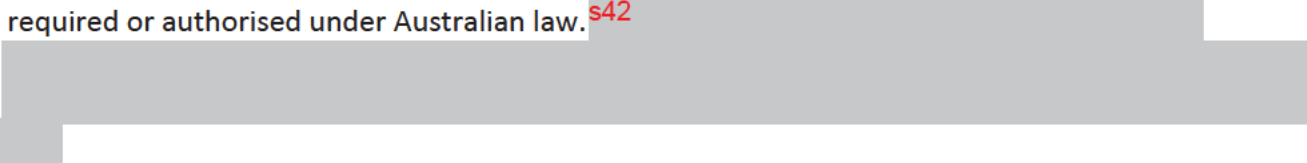
131. The inquiry did not identify any problems with the current arrangements for the publication of pre-trial lists or outcomes. However, there is an opportunity to strengthen the system by publishing case summaries for not guilty findings and acquittals, particularly as not guilty outcomes have been reported by the media. Such an approach would further enhance transparency and the maintenance of service discipline.

132. Although there was recognition an accused person's wellbeing could be negatively affected by their participation in a superior tribunal, the review could not identify any evidence of a non-publication order being sought by command in an instance where command had such concerns. The most significant impact on an accused person's wellbeing was media reporting. Formalising the trial publication process through the Practice Note has facilitated a more focused effort by command on supporting the member. A number of accused persons did not appreciate that their personal details could be published as a result of their trial by court martial or Defence Force magistrate.



133. Perhaps not surprisingly a small number of accused persons chose to respond to the survey on their experiences and attitudes on the publication of trial lists and guilty findings. A number of the respondents were critical of the impact on them. While the practice appears to be that an accused person who is found not guilty can choose whether or not their name appears in subsequent OJAG website publication, this is not clearly articulated in the Practice Note.

134. Some accused persons raised concerns that the publication of names in trial outcomes and case summaries breaches privacy obligations. Australian Privacy Principle 6 prohibits the use or disclosure of personal information except where the use or disclosure of the information is required or authorised under Australian law.<sup>s42</sup>



135. The JAG had indicated an intention to write to Defence's Privacy Officer to request that Defence's Privacy Policy be updated to inform ADF members that Defence may disclose personal information about persons the subject of court martial or DFM proceedings.<sup>22</sup> It appears this has not occurred. Defence's Privacy Policy<sup>23</sup> advises that Defence collects information for, among other things, the discipline of ADF members and states it may disclose information to 'federal, state and territory courts and tribunals'. It does not explicitly outline that information about a members' involvement in court martial or DFM proceedings may be disclosed to the public.

136. However, the summons RMJ sends to an accused member when a matter has been set down for trial, contains a comprehensive privacy notice which accords with Australian Privacy Principle 5. It explicitly advises the accused that OJAG may publish their personal information in accordance with Practice Note 1.

137. The Superior Tribunal Manual also details the occasions on which information will be collected or disclosed including publication of lists and outcomes.<sup>24</sup>

138. This inquiry reviewed the first 12 months of the practice of publishing lists and outcomes with respect to only 40 Defence Force magistrate trials. This is a small sample to assess the efficacy of Practice Note 1. There were no courts martial in the review period. Therefore, the inquiry was unable to examine the difference between case summaries of court martial or Defence Force magistrate outcomes.

139. In order to confirm the findings of this inquiry, a review of the impact of Practice Note 1 after a further four year period is appropriate.

**FINDING 8: Command has not sought a non-publication order based on concerns of the impact of a superior tribunal on the wellbeing of an accused member.**

<sup>22</sup> JAG Minute 095/2017 of 8 December 2017, paragraph 16 (AF31335806)

<sup>23</sup> [https://www.defence.gov.au/ComplaintResolution/\\_Master/docs/Defence-Privacy-Policy-Sep2016.pdf](https://www.defence.gov.au/ComplaintResolution/_Master/docs/Defence-Privacy-Policy-Sep2016.pdf)

<sup>24</sup> Paragraph 6.5, *Superior Tribunal Manual*, edition 1.

|   |
|---|
| <b>FINDING 9.</b> The publication of lists of upcoming court martial and Defence Force magistrate trials is satisfactory and does not require improvement.                |
| <b>FINDING 10.</b> The publication of outcomes and case summaries for guilty findings is satisfactory and does not require improvement.                                   |
| <b>FINDING 11.</b> The practice of command engagement on the draft case summary is satisfactory and does not require improvement.   |
| <b>FINDING 12.</b> The implementation of Practice Note 1 has not resulted in increased media reporting of superior tribunal proceedings.                                  |
| <b>FINDING 13.</b> While the welfare of Defence members may be affected by media reporting, this is not as a direct consequence of the implementation of Practice Note 1. |
| <b>FINDING 14.</b> The publication of lists and outcomes on the JAG website and Defence Protected Network sites is appropriate.   |

|   |
|---|
| <b>RECOMMENDATION 1.</b> The Office of the Judge Advocate General publish case summaries for not guilty findings.   |
| <b>RECOMMENDATION 2:</b> The Judge Advocate General amend Practice Note 1 to make it clear an ADF member, who is found not guilty, may request their name and rank be included in publication of trial outcomes.                        |
| <b>RECOMMENDATION 3:</b> The Judge Advocate General amend Practice Note 1 to provide additional guidance on non-publication orders.   |
| <b>RECOMMENDATION 4:</b> Defence Legal modify AF007 Charge Sheet and Decision Form (Form C2) to inform accused persons about the consequences, in terms of publication, of electing trial by court martial or Defence Force magistrate. |
| <b>RECOMMENDATION 5.</b> The Services apply for a non-publication order in appropriate circumstances including when there is concern for an accused person's welfare.   |
| <b>RECOMMENDATION 6.</b> Service newspapers report on court martial and Defence Force magistrate trial outcomes.  |

## CONCLUSION

140. The publication of trial lists and outcomes has enhanced transparency and the maintenance of service discipline. Formalisation of the process through Practice Note 1 has also enabled command to more deliberately consider support to members affected by courts martial and Defence Force magistrate trials. Command should consider greater use of non-publication



orders when appropriate to ensure the welfare of members is not adversely affected by media reporting.

141. Although the policy has not generated any significant problems in the first year of operation, there are a number of opportunities for improvement. One opportunity for improvement would be to ensure accused persons are better informed about publication before they elect trial by court martial or Defence Force magistrate. Another opportunity for improvement would be publication of not guilty findings summaries.



**JM Gaynor CSC**  
Inspector-General of the Australian Defence Force

27 October 2020

**Annexes:**

- A. Inquiry administration, process and procedures
- B. December 2018 to January 2019 trial results published in Navy News on 7 March 2019
- C. Overview of focus group participant responses in military justice performance audits
- D. Media Enquiry Statistics
- E. Witness list
- F. Survey Questions for legal practitioners
- G. Survey Questions for ADF members

## INQUIRY ADMINISTRATION, PROCESS AND PROCEDURES

### Inquiry authority

1. The Inquiry was conducted under the *Inspector-General of the Australian Defence Force Regulation 2016*.

### Inquiry directions and Authority

2. On 7 April 2020, IGADF directed Air Vice Marshal Leigh Gordon and Captain Penny Campbell RAN, Assistants IGADF, to assist him to conduct an inquiry into the first 12 months of the publication of listing and outcomes of Courts Martial and Defence Force magistrate trials. IGADF directed Colonel Jens Streit to help.
3. Air Vice Marshal Gordon's and Captain Campbell's authority as an Assistant IGADF is provided under Regulation 10 of the Inspector-General of the Australian Defence Force Regulation 2016 and an instrument of appointment dated 27 March 2020 and 4 February 2019 respectively.

### Scoping

4. Prior to commencing the inquiry, scoping and planning was conducted to determine how best to address the terms of reference set out in the inquiry Directions. The Assistants IGADF determined that the inquiry could be conducted by reviewing relevant documentation, interviewing witnesses and conducting a survey of participants in Defence Force magistrate trials. The practice of publishing lists and outcomes commenced on 31 March 2019. There were 40 Defence Force magistrate trials held between 31 March 2019 and 31 March 2020 (the review period), not including five matters which did not proceed to trial. There were no courts martials held during this time.

### Methodology

5. The inquiry was directed by IGADF to seek relevant views of the CDF, VCDF, Judge Advocate General, Deputy Service Chiefs, Director of Military Prosecutions, Chief of Staff ADF Headquarters, Registrar of Military Justice and Director of Defence Counsel Services. The Assistants IGADF determined to also seek views from the Chief Judge Advocate. These persons are referred to as key stakeholders in the report.
6. The Assistants IGADF drafted a set of questions and conducted telephone interviews with these witnesses in April and May.
7. IGADF also directed a survey of a sample of those members who have been accused persons, defending officers and prosecuting officers who have appeared before a court martial or Defence Force magistrate trial in the last year. The Assistants IGADF drafted separate survey questions for accused persons, and for both defending and prosecuting officers. The surveys are at Anneures F and G.

### Evidence

8. Evidence was obtained by reviewing relevant documents, Defence policies, conducting interviews, emails and issuing the survey.

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## **Witnesses**

9. The telephone interviews with key stakeholders were recorded. The Assistants IGADF did not get the interviews transcribed because of the non-contentious nature of the inquiry.
10. All key stakeholders were emailed a copy of the *Rights and Obligations of Witnesses Involved in Inspector General Australian Defence Force Inquiries*, the Statements of Impartiality, the privacy notices and a copy of the Inquiry Directions, prior to being interviewed. Each witness confirmed they had received and understood these documents at the commencement of the telephone interview. No witness indicated they did not wish the interview to be recorded.
11. A list of witnesses is at Annex E.

## **Confidentiality and immunity**

12. No person was given any guarantee of confidentiality or guarantee of immunity from prosecution concerning his or her evidence or information provided in the course of the Inquiry.

## **Survey**

13. Because the survey potentially fell within the scope of Human Research<sup>25</sup>, the Assistants IGADF sought Defence People Research - Low Risk Ethics Panel approval to conduct the survey. The submission was reviewed out of-session by the Chair of the Departments of Defence and Veterans' Affairs Human Research Ethics Committee (DDVA HREC) and the Assistant Director Research Ethics. DDVA HREC determined that the survey did not meet any of the triggers for ethical review in accordance with the 'National Statement on Ethical Conduct in Human Research', and was deemed not to be research. It was deemed that this activity is a formal administrative process conducted under statutory authority.
14. The Assistants IGADF contacted the Commanding Officer or military supervisor of each of the accused persons who had been tried by a Defence Force magistrate. Where an accused was no longer a serving member, the Assistants IGADF contacted the person who had been the accused's last Commanding Officer or supervisor prior to separation. Contact was made by email for the purpose of giving Command background information so they could be in a position to provide any necessary support to the accused person, and to seek Command advice as to whether there is any reason why the Assistants IGADF should not contact the accused. Based on Command feedback, the Assistants IGADF determined not to contact five accused persons.
15. Surveys were sent to recipients by email. For former serving member, the personal email address listed in PMKeyS was used. Participation in the survey was voluntary, and survey responses were emailed to CAPT Campbell. There were 16 returns (of 49 sent) from legal practitioners and ten returns (of 31 sent) from accused members.

## **Command views**

16. Following submission of the draft inquiry report, IGADF directed the Assistants IGADF gather the views of Commanding Officers on whether Practice Note 1 had changed the way in which they will provide support to accused persons. The Commanding Officers and supervisors identified

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<sup>25</sup> National Statement on Ethical Conduct in Human Research Chapter 4.6

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above in paragraph 14 were asked their views. Only four of them responded in the short time frame given.

### **Media**

17. The Assistants IGADF liaised with Defence Media to conduct a search of print media articles that reported on Defence Force magistrate trials.

### **Conduct of the Inquiry**

18. The Inquiry was conducted in private.

### **Statement of impartiality and independence**

19. A statement of impartiality and independence was signed by the Assistants IGADF on 20 April 2020. No concerns of actual or perceived bias were raised against them by any witness.

### **Procedural fairness**

20. The draft inquiry report did not propose potentially adverse findings against any person and thus considerations of procedural fairness did not arise

### **Documentation**

21. The inquiry records are saved into Objective.

**ANNEX B TO**  
**IGADF/BN18277965**  
**DATED 27OCTOBER 2020**

**December 2018 to January 2019 trial results published in Navy News on 7 March 2019**

|   |   |   |   |
|---|---|---|---|
| <p><b>OFFICER</b><br/><b>General Court Martial</b><br/><b>1 x Sexual Intercourse without Consent – DFDA s 61(3) and Crimes Act (ACT) s 54(1)</b><br/>Member was accused of sexual intercourse without consent. Member pleaded not guilty to the charge but was found guilty of the charge. Member was reduced in rank, imprisoned for three months and dismissed from the ADF.</p>                                      | <p><b>OFFICER</b><br/><b>Defence Force Magistrate</b><br/><b>1 x Assault Occasioning Actual Bodily Harm – DFDA s 33A</b><br/>Member was accused of assaulting another member and causing that member actual bodily harm. Member pleaded guilty to the charge and was found guilty. Member was dismissed from the ADF.</p>   | <p><b>NON-COMMISSIONED OFFICER</b><br/><b>Defence Force Magistrate</b><br/><b>2 x Prejudicial Conduct – DFDA s 60(1)</b><br/>Member was accused of doing an act that was likely to prejudice the discipline of the ADF by engaging in inappropriate behaviour. Member was also accused of making offensive remarks about a subordinate member in the presence of other subordinate members. Member pleaded guilty to the charges and was found guilty. Member was fined \$1868.37 (to be paid by instalments) and forfeited seniority in rank.</p>  | <p><b>NON-COMMISSIONED OFFICER</b><br/><b>Defence Force Magistrate</b><br/><b>1 x Failing to Comply with a General Order – DFDA s 29(1)</b><br/><b>2 x Prejudicial Conduct – DFDA s 60(1)</b><br/><b>1 x Assaulting a Subordinate – DFDA s 34</b><br/>Member was accused of failing to comply with a general order by awarding corrective training that was contrary to a Commanding Officer directive. Member was also accused of prejudicial conduct and assaulting a subordinate. Member pleaded guilty to the charges and was found guilty. Member was reduced in rank.</p> |
| <p><b>NON-COMMISSIONED OFFICER</b><br/><b>Defence Force Magistrate</b><br/><b>2 x Falsifying a Service Document – DFDA s 55(1)</b><br/><b>1 x Using a False Document – DFDA s 61(3) and Criminal Code (Cth) s 347</b><br/>Member was accused of falsifying and using a service document in relation to a fitness assessment. Member pleaded guilty to the charges and was found guilty. Member was reduced in rank.</p> | <p><b>OTHER RANK</b><br/><b>Defence Force Magistrate</b><br/><b>2 x Obtaining a Financial Advantage – DFDA s 61(3) and Criminal Code (Cth) s 135.2(1)</b><br/>Member was accused of obtaining a financial advantage in relation to rental allowance by not notifying the approving authority of a change in their circumstances. Member pleaded guilty to the charges and was found guilty. Member was severely reprimanded, fined a sum of \$2000 and forfeited seniority in rank.</p> | <p><b>OTHER RANK</b><br/><b>Defence Force Magistrate</b><br/><b>1 x Failing to Comply with a General Order – DFDA s 29</b><br/><b>1 x Disobeying Lawful Command – DFDA s 27</b><br/>Member was accused of failing to comply with a general order by tampering with live ammunition. Member was also accused of disobeying a lawful command by failing to inform the appropriate authority that they had live ammunition in their possession. Member pleaded guilty to the charges and was found guilty. Member was severely reprimanded and fined \$1250 (with \$500 wholly suspended).</p> | <p><b>OTHER RANK</b><br/><b>Defence Force Magistrate</b><br/><b>1 x Obtaining a Financial Advantage – DFDA s 61(3) and Criminal Code (Cth) s 135.2(1)</b><br/>Member was accused of obtaining a financial advantage in relation to meal payments that they were not entitled to receive. Member pleaded guilty to the charge and was found guilty. Member was ordered to pay reparation to the Commonwealth in the sum of \$813 (to be paid by instalments) and sentenced to 28 days' detention.</p>  |

# Overview of focus group participant responses in military justice performance audits

DATED 27 OCTOBER 2020

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| o of FG participants | Audit Date   |
|----------------------|--------------|
| 90                   | 08-09 Aug 19 |
| 113                  | 12-13 Aug 19 |
| 74                   | 20-21 Aug 19 |
| 60                   | 21-22 Aug 19 |
| 53                   | 27-28 Aug 19 |
| 19                   | 05-06 Sep 19 |
| 201                  | 03-04 Sep 19 |
| 55                   | 10-11 Sep 19 |
| 20                   | 09-Sep-19    |
| 96                   | 12-13 Sep 19 |
| 68                   | 19-20 Sep 19 |
| 31                   | 16-17 Sep 19 |
| 27                   | 18-Sep       |
| 74                   | 09-11 Oct 19 |
| 52                   | 07-08 Oct 19 |
| 19                   | 08-09 Oct 19 |
| 57                   | 20-21 Oct 19 |
| 88                   | 24-25 Oct 19 |
| 39                   | 29-30 Oct 19 |
| 100                  | 04-05 Nov 19 |
| 140                  | 06-08 Nov 19 |
| 46                   | 12-Nov-19    |
| 68                   | 06-08 Nov 19 |
| 150                  | 21-22 Nov 19 |
| 113                  | 17-Nov-19    |
| 137                  | 25-26 Nov 19 |
| 179                  | 27-29 Nov 19 |
| 129                  | 03-04 Dec 19 |
| 31                   | 05-06 Feb 20 |
| 26                   | 04-05 Feb 20 |
| 88                   | 19-21 Feb 20 |
| 80                   | 27-28 Feb 20 |
| 105                  | 25-26 Feb 20 |
| 81                   | 04-06 Mar 20 |
| 101                  | 11-13 Mar 20 |
| 2810                 |              |

s42

| Positive comments   | Negative comments  |
|---|--|
| No comments recorded.   | No comments recorded.  |
| Good for Transparency and serves as a deterrent   |  |
| No objection to publication 'should be named and shamed' good for transparency  |  |
| Good ADF is being transparent/aligns with public expectations/will have a deterrent effect/people should be held to account   | Is a form of extra punishment/ could have impact on future careers   |
| Good results are published / no issue in line with civilian processes.  | could impact career  |
| most in favour - should have a trustworthy relationship with the public/ about time - will be a deterrent/seems fair enough   | Civilians don't understand the context of the military system/may be a step too far  |
| good transparency/makes sense to publish for transparency/same as civilian world  | Results should not be released/ruining person's reputation/that's brutal   |
| No comments   | No comments  |
| No Comments   | No Comments  |
| Positive reaction/seen as a deterrent and warranted/publication of guilty findings is appropriate   | not warranted damages reputation of the Service  |
| Brings transparency/more in line with civilian process/good thing - give a level of accountability  | Unfair to people who are later found innocent  |
| Will create more accountability/good that results are published/good that results are published - shows consequences occur/shows transparency   | could be detrimental to the person- shouldn't be published/don't need to name and shame /could be a security issue/ could be used by the media to discredit Defence  |
| Will make people more accountable/no problem with publishing results/The public has a right to know Defence is dealing with matters/ Defence should be open about these matters   | concern about victims having to deal with a wider audience   |
| High level of accountability brings defence in line with civilians/ shows Defence is transparent/ good that details are published/reassuring to see that matters are dealt with seriously and appropriate punishment given/Holds us accountable /Transparency is a good thing/The more transparency the better accountability creates culture change/decreased rumour and unfounded gossip. | Could be damaging to defence/ADF justice system too slow people may question why people are able to get away with bad behaviour for such a long time/ don't like that names are published/ reputational risk to Defence/ some things should not be in the public sphere/ impact on the individual may not be fair/ may create a negative perception in the civilian community (effect on recruiting) |
| Good for transparency / good there is transparency and things are not being covered up  | could damage a persons reputation unnecessarily  |
| depends on the nature of the matter whether it should be published/publication creates a level of transparency/ should be transparent/closer aligned to civil system & could be a deterrent   | depends on the nature of the matter whether it should be published/don't think names of guilty members should be published 'mud sticks'/can be unfair on member because they have not been found guilty under a civil system but name is tarnished forever.  |
| Some believe it is a good thing   | Some think details should not be published   |
| Good that details are published/Good thing for Defence/Should occur   |  |
| Good for transparency/Name and shame/good move by Defence/Good idea   | Donefor transparency but should not happen damaging to members/safety issues do not have to publish names  |
| No information provided   | No information provided  |
| Some were not aware of publication but thought it was a good idea/should be common knowledge/would be a deterrent/important for transparency.   | Some were not aware of publication and said it was not a good idea/members name is tarnished for the rest of their life/why shame a Defence member/punished twice/may not be good for the victim/Defence reputation could be adversely affected/   |
| No issues with publication/if members are found innocent that should also be published/could be a deterrent.  | If it happened to us we wouldn't want it published/should remain within Defence/if members are found innocent that should also be published/could be a reputational risk to Defence/What's the long term impact on members   |
| Publication a good thing/ no reason ADF should be any different to civilians/agree with publication/good to see outcomes from other areas.  |  |
| The FGA noted about a 50/50 split in most FG groups. Positives - may trigger someone to come forward/good deterrence/those who are affected can find out the outcome/name and shame - fair enough.  | A few expressed. The FGA noted about a 50/50 split in most FG groups. Negatives - concerns for the possible adverse effect on the accused's mental health/ little uncomfortable with privacy issues/could affect next job application  |
| Some not aware of publication. Fair enough/people should do the right thing/especially good for the victim/good for transparency  | Don't like the way media portray things  |
| A few more senior rank participants were aware of the publication and considered it was good for transparency' and good that we are being seen to take action and members are held accountable'.  | Most junior rank participants were not aware of the publication of the results of courts martial and DFM results. Most thought it was a bit rough' and it should be kept in-house' damages military brand and reputation' we are not civilians'  |
| A few participants were in favour and considered it was good the ADF was being transparent.   | Most participants did not think the details of Courts Martial and DFMs should be made public. should be kept within Defence' public has a tendency to paint everyone with the same brush' Military is not well understood by civilians' seem like another punishment' Defence has different standards to civilians'.   |
| Most considered the publication to be a good idea and why it had to be done.  | Some junior rank participants did not like the idea of publication. Some did not think all details should be published   |
| Most junior officer participants were not aware of the publication and there were mixed views. Some thought it was good for transparency'. Most SNCO and junior rank participants were aware of the publication and many thought it was good for transparency and would serve as a deterrent against wrongdoing.  | Most junior officer participants were not aware of the publication and there were mixed views. Some thought it was a bit harsh. Most SNCO and junior rank participants were aware of the publication. Some said 'if it does not benefit the Defence community then details should not be published'  |
| Some junior rank participants thought the publication was good for transparency and accountability and honesty is part of Navy's signature behaviours'. Views also varied among the more senior rank participants. Some considered the publication holds us accountable' and it is good for transparency.   | Some junior rank participants thought the publication should not be allowed because it could be damaging to Defence' and the details should be kept within Defence'. Views also varied among the more senior rank participants. Some considered guilty members were being given a 'life-long punishment' with the publication.   |
| There were divergent views on the publication of results from Courts Martials and DFM results. Some participants agreed with the publication for serious guilty offences as it will act as a deterrent and Defence matters will be held to the same standard as civilian court matters.   | There were divergent views on the publication of results from Courts Martials and DFM results. Some participants were not supportive citing the privacy of the accused as well as the witnesses who can be reported on by attending journalists.   |
| Most members understood the reason behind promulgating these results (transparency) and did not have an issue with the promulgation.  | Two junior groups felt that these proceedings should stay within Defence and not published but it would depend on what the charge was in relation to   |
| Most participants were aware of the publication of courts martial and DFM results. Most considered it was good for transparency and it holds Defence to account'.   |  |
| A few participants were not aware of the publication of the details of courts martial and DFM results. There were varied opinions on whether this should occur; Some considered it was good for transparency.   | A few participants were not aware of the publication of the details of courts martial and DFM results. There were varied opinions on whether this should occur; some felt Defence matters should not be publicised and it is only for political purposes and the publication can show the Military in a bad light.   |
| Those questioned had no concerns about the publication  |  |

**Media Enquiry Statistics**

| <b>Date</b>           | <b>No. of enquiries</b> | <b>Requests for info now on website*</b> | <b>Notes</b>  |
|-----------------------|-------------------------|--|---|
| 31/3/2020 – current   | 3                       | 0  | May not include all enquiries that would just be redirected to the website – journalists may have called in about it, or a team member may have just provided the link immediately, rather than registering as a media enquiry. |
| 31/3/2019 – 31/3/2020 | 13                      | 2  | As above – may not include all simple referrals.  |
| 31/3/2018 – 31/3/2019 | 14                      | 11                                       |   |
| 31/3/2017 – 31/3/2018 | 4                       | 3  | Noting the significant difference between other years, our data may not be complete for 2017  |

*\* This is the number of enquiries that have been/would have been solved by having the content available online.*

**ANNEX E TO**  
**IGADF/BN18277965**  
**DATED 27 OCTOBER 2020**

**List of witnesses in interview order**

|   |   |
|---|---|
| Deputy Chief of Army  | MAJGEN Tony Rawlins                             |
| Director of Military Prosecutions                                       | BRIG Jennifer Woodward                          |
| Deputy Chief of Air Force   | AVM Stephen Meredith                            |
| Chief of Staff ADFHQ and Director<br>Select Strategic Issues Management | CDRE Michele Miller and<br>GPCAPT Patrick Keane |
| Vice Chief of Defence Force   | VADM David Johnston                             |
| Registrar of Military Justice   | GPCAPT Ian Henderson                            |
| Chief of Defence Force  | GEN Angus Campbell                              |
| Director of Defence Counsel Services                                    | GPCAPT Edward Eather                            |
| Chief Judge Advocate  | BRIG Michael Cowen                              |
| Deputy Chief of Navy  | RADM Mark Hammond                               |
| Judge Advocate General  | RADM Michael Slattery                           |



### Survey questions for legal practitioners

1. Prior to the commencement of Practice Note 1 on 31 March 2019:

- (a) Did you believe that there was a general level of confidence held by ADF members in the conduct of Courts Martial and DFM trials as part of the ADF's military justice system?

Yes ☐ No ☐

- (b) Did you believe that there was a general level of confidence held by the Australian public in the conduct of Courts Martial and DFM trials as part of the ADF's military justice system?

Yes ☐ No ☐

- (c) Did you believe that the ADF should move to publish Court Martial and DFM lists and outcomes of trials?

Yes ☐ No ☐

2. Since the commencement of Practice Notice 1, how has the general level of confidence held by ADF members and the public changed, if at all?

3. Since the commencement of Practice Notice 1, how has the general level of deterrence changed, if at all?

4. During the course of the DFM proceeding, did any member of the media approach you to comment on the proceeding, or seek to interview you?

Yes ☐ No ☐

- a. If yes, please describe that engagement.

F-2

5. Has any member of the media contacted you for comment after details of the trial you were involved with were published on the OJAG's websites?

Yes ☐

No ☐

- a. If yes, please describe that engagement.

6. Are you aware of any adverse media reporting of you, or another person, as a result of their details being published on the OJAG's websites?

Yes ☐

No ☐

- a. If yes, please describe the media reporting.

7. A non-publication application can seek to prevent the name of an ADF member being published on the OJAG's websites. Are you aware of any non-publication order being made during the trial with which you were involved?

Yes ☐

No ☐

8. Practice notice 1 is the policy that instructed the publication of Court Martial and Defence Force Magistrate lists and outcomes. Having been through the process now, do you have any suggestions or recommendations on changes to Practice Note 1?

Yes ☐

No ☐

- a. If so, what would they be?

9. Do you hold any concerns about having a convicted ADF member's name, conviction/s and a case summary about that trial published on the OJAG's websites?

Yes ☐

No ☐

F-3

- a. If yes, what are your concerns?

10. Do you consider that a convicted ADF member should be given an opportunity to comment on the draft case summary before it is published?

Yes ☐

No ☐

- a. If yes, why?

11. Are you aware of any adverse impact to an accused person, including members of their family, due to a trial being published on the OJAG's websites?

Yes ☐

No ☐

- a. If yes, please describe the adverse impact.

- b. If so, was action taken by the chain of command?

Yes ☐

No ☐

- c. If yes, to your knowledge was the adverse impact brought to the attention of the accused person's chain of command?

12. Do you think the ADF should continue to publish the details of superior discipline trials?

Yes ☐

No ☐

- a. Why or why not?

F-4

13. Should the ADF consider publishing on the OJAG's websites findings of not guilty, including the reasons given by DFM?

Yes ☐

No ☐

a. If yes, why?

b. Should this publication include the name of the acquitted ADF member?

Yes ☐

No ☐

14. What is your name? (optional)

a. Do you consent to your name being used in conjunction with any survey responses you've made in the own-initiative inquiry report?

Yes ☐

No ☐

15. If there are any other comments you would like to make, please do so here.

**Thank you**

We very much appreciate you taking the time to complete this survey.

**Submit**

If you have difficulty with the submit button, please return it to by email to [penny.campbell@defence.gov.au](mailto:penny.campbell@defence.gov.au) or by mail to:

DMJPR  
BP25-4-25 Brindabella  
Park PO Box 7938  
Canberra BC ACT 2610

Survey questions for ADF members

1. When you were charged with an offence, were you aware that some details (not including your name) would be published in a list on the OJAG's websites?

Yes

☐

No

☐

2. Were you aware that if you were convicted of an offence, your name, any conviction/s and a case summary about your trial would be published on the OJAG's websites?

Yes

☐

No

☐

- a. If yes, would this concern you, and how?

3. If you were convicted, would you have preferred to be given the opportunity to comment on the draft case summary before it was published?

Yes

☐

No

☐

4. If you were acquitted, would you prefer to have the reasons for your acquittal published in a case summary?

Yes

☐

No

☐

- a. If yes, would you prefer to have your name published in this case summary?

Yes

☐

No

☐

5. During the course of the DFM proceeding, did any member of the media approach you to comment on the proceeding, or seek to interview you?

Yes

☐

No

☐

- a. If yes, please describe that engagement.

G-2

6. Has any member of the media contacted you for comment after details of your trial were published on the OJAG's websites?

Yes ☐

No ☐

- a. If yes, please describe that engagement.

7. Are you aware of any adverse media reporting about you, or another accused person, or a family member, as a result of their details being published on the OJAG's websites?

Yes ☐

No ☐

- a. If yes, please describe the media reporting.

8. A non-publication application can seek to prevent the name of an ADF member being published. Did you know that you could seek an application for a non-publication order during the trial?

Yes ☐

No ☐

9. Are you aware of any non-publication order being made during your trial?

Yes

No

10. Practice notice 1 is the policy that instructed the publication of Court Martial and DFM lists and outcomes. Having been through the process now, do you have any suggestions or recommendations on changes to Practice Note 1?

Yes ☐

No ☐

- a. If so, what would they be?

11. In future, do you think the ADF should continue to publish the details of superior discipline trials?

Yes ☐

No ☐



G-3

a. Why or why not?

12. Has there been any impact on you, or a member of your family in having your name, conviction/s and a case summary about your trial published on the OJAG's websites?

Yes

☐

No

☐

a. If yes, please describe the impact.

13. If yes to the above question, did you raise the matter with your chain of command?

Yes

☐

No

☐

a. If so, what did the chain of command do?

b. If you did not raise the matter, can you explain why?

14. What is your name? (optional)

a. Do you consent to your name being used in conjunction with any survey responses you've made in the own-initiative inquiry report?

Yes

☐

No

☐

15. If there are any other comments you would like to make, please do so here.

**Thank you**

We very much appreciate you taking the time to complete this survey.

Please return it to by email to [penny.campbell@defence.gov.au](mailto:penny.campbell@defence.gov.au) or by mail to:

DMJPR

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**Submit**