



**JUDGE ADVOCATE GENERAL**

**DEFENCE FORCE  
DISCIPLINE ACT 1982**

*Report for the period  
1 January to 31 December 2011*

Department of Defence

***Defence Force Discipline Act 1982***

*Report for the period  
1 January to 31 December 2011*

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JUDGE ADVOCATE GENERAL

HEADQUARTERS AUSTRALIAN DEFENCE FORCE  
DEPARTMENT OF DEFENCE  
CANBERRA ACT 2600

**The Hon. Stephen Smith MP**  
Minister for Defence  
Parliament House  
CANBERRA ACT 2600

Dear Minister,

I submit herewith my report covering the period from 1 January to 31 December 2011. The report is furnished pursuant to the requirements of section 196A(1) of the *Defence Force Discipline Act 1982*

Yours sincerely,

A handwritten signature in black ink, appearing to read 'R R S Tracey'.

**Major General the Hon Justice R R S Tracey, RFD**  
Judge Advocate General  
Australian Defence Force

24 April 2012

Enc.

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## JUDGE ADVOCATE GENERAL

### AUSTRALIAN DEFENCE FORCE

#### REPORT FOR THE PERIOD 1 JANUARY TO 31 DECEMBER 2011

#### PREAMBLE

1. Section 196A(1) of the *Defence Force Discipline Act 1982* (DFDA) obliges the Judge Advocate General (JAG), as soon as practicable after 31 December each year, to prepare and furnish to the Minister for Defence, a report relating to the operation of the DFDA, the regulations and rules of procedure made under it and the operation of any other law of the Commonwealth or of the Australian Capital Territory (ACT), in so far as that law relates to the discipline of the Defence Force. This report is for the 12 month period to 31 December 2011. The office of JAG of the Australian Defence Force (ADF) was created by s.179 of the DFDA. The holder of the office must be, or have been, a judge of a Federal Court or State Supreme Court. The appointment is made by the Governor-General in Executive Council. The Minister may appoint a person to act as JAG or Deputy Judge Advocate General (DJAG) for a period not greater than twelve months<sup>1</sup>.

2. Former holders of the office of JAG-ADF have been:

- a. 1985-1987      The late Major General the Hon Justice R. Mohr, RFD, ED (of the Supreme Court of South Australia).
- b. 1987-1992      Air Vice Marshal the Hon Justice A.B. Nicholson, AO, RFD (Chief Justice of the Family Court of Australia) - appointed in February 1988 but had been acting since Major General Mohr's retirement on 30 July 1987.
- c. 1992-1996      Rear Admiral the Hon Justice A.R.O. Rowlands, AO, RFD (of the Family Court of Australia).

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<sup>1</sup> DFDA s. 188

- d. 1996-2001 Major General the Hon Justice K.P. Duggan, AM, RFD (of the Supreme Court of South Australia).
- e. 2001-2007 Major General the Hon Justice L.W. Roberts-Smith RFD (of the Supreme Court of Western Australia) – appointed in June 2002, but had been acting since Major General Duggan’s retirement in 2001.

3. I was first appointed JAG on 26 September 2007, having acted in the position since 20 June 2007. I satisfy the statutory qualification for appointment by virtue of my appointment as a judge of the Federal Court of Australia. My initial appointment as JAG was until 31 December 2008. I was subsequently appointed as Acting JAG on and from that time until 31 December 2009. I was reappointed as JAG on and from 10 February 2010 for a term of four years. The Office of JAG was vacant from 1 January 2010 until that appointment. As I indicated in my report for 2008<sup>2</sup>, I also hold the appointment as President of the Defence Force Discipline Appeals Tribunal (DFDAT). As I there indicated, in my view, there is no conflict between these appointments, but it is appropriate that the fact that I hold both appointments is made apparent to those reading this report.

4. The functions of the JAG are prescribed by the DFDA and maybe summarised as follows:

- a. Reporting annually to Parliament on:
  - (1) The operation of the DFDA, the Regulations, the Rules of Procedure; and
  - (2) The operation of any other law of the Commonwealth or of the ACT insofar as that law relates to the discipline of the Defence Force<sup>3</sup>;
- b. Making Procedural Rules for Service tribunals, being:

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<sup>2</sup> At paragraph 26.

<sup>3</sup> DFDA s.196A.



- (1) Court Martial and Defence Force Magistrate Rules (CM/DFM Rules); and
- (2) Summary Authority Rules (SAR);
- c. Nominating the judge advocate (JA) for a court martial<sup>4</sup> and Defence Force magistrates (DFM's)<sup>5</sup>;
- d. Nominating to a Service Chief officers to be members of the JA's panel<sup>6</sup>;
- e. Appointing DFMs from officers appointed as members of the JA's panel<sup>7</sup>;
- f. Nominating to a Service Chief legal officers for the purposes of DFDA s.154(1)(a); and
- g. If requested, providing a final and binding legal report in connection with the internal review of proceedings before Service tribunals.

5. The Office of the JAG (OJAG) and its functions are indicative of the legislature's desire for an appropriate civilian judicial oversight of the operation of the DFDA and related legislation.

6. Each JAG has been a two-star ranking officer of the Reserve Forces. Previous JAG Reports have noted that this status as a superior court judge and the fact that the JAG has held senior military rank, have resulted in the JAG having an important leadership role among both Permanent and Reserve legal officers. The command and administrative responsibility in this regard remains, of course, with the Head Defence Legal (HDL), the Director General Australian Defence Force Legal Services (DGADFLS) and the single Service heads of corps/category.

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<sup>4</sup> DFDA s.129B.

<sup>5</sup> DFDA s.129C.

<sup>6</sup> DFDA s.196.

<sup>7</sup> DFDA s.127

7. The JAG necessarily also plays a significant role in the promotion of the jurisprudential welfare and education of the ADF.

8. I share the opinion held by previous holders of the office, that the JAG should not act as general legal adviser to the ADF, nor the government, as that would be inconsistent with judicial office.

9. During the reporting period, Brigadier Ian Westwood AM continued to hold the position of Chief Judge Advocate (CJA) established under DFDA s.188A. Colonel Geoff Cameron CSC continued to hold the position of Registrar of Military Justice (RMJ) established by DFDA s.188F.

10. The position of staff officer to the JAG and CJA was filled during the reporting period by Lieutenant Commander Michael Paes. On behalf of CJA and myself I formally record my gratitude to him for his diligent discharge of his duties.

11. Funding for OJAG for the period of this report was provided by the Secretary/Chief of the Defence Force (CDF) group of the Department of Defence.

12. Section 179 of the DFDA provides for the appointment of DJAGs, and the practice since commencement of the DFDA has been to have three, comprising one from each of the Services. In office as DJAGs during the reporting period were:

- a. Commodore The Honourable Justice M.J. Slattery RANR,
- b. Brigadier D.J. Gunson RFD SC, and
- c. Air Commodore M.J.F. Burnett FM.

13. I formally record my gratitude to them for their help, support and counsel.

14. Mr Mark Cunliffe PSM continued as HDL and Air Commodore Paul Cronan AM assumed the responsibilities of DGADFLS from Commodore Vicki McConachie CSC RAN. Dr D. Lloyd continued in the position of Defence General Counsel, but left the position in December in order to take up an appointment within another Department. It is appropriate that I acknowledge here Dr Lloyd's significant contribution to Defence during his 15 years service with the Department.

## OPERATION OF THE SUPERIOR MILITARY TRIBUNALS

15. As I observed in my report for 2009<sup>8</sup> the *Military Justice (Interim Measures) Act (No 1) 2009* reinstated the system of trials by court martial and DFM that had existed in 2006, immediately preceding the passage of the *Defence Legislation Amendment Act 2006* which purported to create the former Australian Military Court (AMC). The Explanatory Memorandum to that Bill indicated:

This is an interim measure until the Government can legislate for a Chapter III court.

16. Legislation for a Chapter III court was not introduced during the reporting period. It is undesirable for "interim" arrangements to continue indefinitely. In particular, if the system of court martial and DFM trials is to continue for a significant period of time, then there are a number of procedural issues that should be addressed.

17. Statistics for trials conducted under the DFDA during the reporting period are set out in Annexes to this report.

## APPOINTMENTS

18. I have already detailed the terms of my own appointment and that of the DJAGs. The interim measures instituted by the *Military Justice (Interim Measures) Act (No 1) 2009* included the appointment, by force of law, of the former Chief Military Judge and military judges as CJA and full time JAs for a period of two years. In the event, the interim measures have continued beyond the two year point, and the terms of those appointments were varied to four years<sup>9</sup> following the passage of the *Military Justice (Interim Measures) Amendment Act 2011* during the reporting period.

19. The current position so far as the expiration of statutory appointments within my office are as follow:

- a. JAG, MAJGEN Tracey, expiry date 9 February 2014;
- b. DJAG-Navy, Commodore Slattery, expiry date 9 March 2014;

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<sup>8</sup> Paragraph 18 et seq.

<sup>9</sup> But subject to legislation establishing a Chapter III court being enacted in the meantime.

- c. DJAG-Army, Brigadier Gunson, expiry date 9 March 2014;
- d. DJAG-RAAF, Air Commodore Burnett, expiry date 9 March 2014;
- e. CJA, Brigadier Westwood, expiry date 21 September 2013;
- f. Full-time JA, Colonel Morrison, expiry date 21 September 2013<sup>10</sup>;
- g. Full-time JA, Lieutenant Colonel Woodward, expiry date 21 September 2013; and
- h. RMJ, Colonel Cameron, expiry date 21 September 2012.

20. The officers appointed as JA's and DFM's and Section 154 officers within the reporting period are set out at Annex P.

#### **APPEALS TO THE DFDAT**

21. During the reporting period, there were three appeals to the DFDAT in connection with convictions recorded by courts martial and DFM. These were:

- a. *Green v Chief of Army* [2011] ADFDAT 2;
- b. *Low v Chief of Navy* [2011] ADFDAT 3; and
- c. *Li v Chief of Army* [2011] ADFDAT 4.

The appeals in *Green* and *Low* were dismissed and the judgement for *Li* was not handed down in the reporting period.

#### **LEGISLATION**

22. I have referred earlier to the enactment of the *Military Justice (Interim Measures) Amendment Act 2011* to extend the appointments under the interim arrangements for the former Chief Military Judge and military judges of the AMC.

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<sup>10</sup> COL Morrison has tendered his resignation after the reporting period so as to take up an appointment to the Magistrates Court of the ACT.

23. In conjunction with the Attorney-General's Department, Defence finalised drafts of the *Military Court of Australia Bill* and the *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill*. These Bills are scheduled to be introduced during the Winter 2012 sittings of Parliament. If enacted, they will establish the Military Court of Australia and provide for the transfer of trials for serious service offences from the current interim system to the new system.

### **HIGH COURT CHALLENGE**

24. I noted in my report for 2010<sup>11</sup> that the validity of the *Military Justice (Interim Measures) Act (No 2) 2009* was to be challenged in the High Court. The legislation concerned had, following the High Court decision in *Lane v Morrison*<sup>12</sup>:

... (sought) to maintain the continuity of discipline within the ADF ... by imposing disciplinary sanctions on persons corresponding to punishments imposed by the AMC.<sup>13</sup>

25. In *Able Seaman Joseph Anthony Peter Haskins v The Commonwealth*<sup>14</sup> and *Paul Nicholas v The Commonwealth of Australia and Anor*<sup>15</sup> a majority of the Court held that the legislation provided lawful authority justifying the sanctions imposed upon the applicants, and were valid laws of the Commonwealth.

### **PROCEEDINGS BROUGHT AS A RESULT OF CIVILIAN CASUALTIES IN AFGHANISTAN**

26. During the reporting period a General Court Martial (GCM) was convened to try charges of manslaughter and dangerous conduct against two soldiers allegedly responsible for killing and injuring certain civilians in Afghanistan in 2009. Prior to the court martial being assembled and sworn, the accused men entered certain objections to the charges. These

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<sup>11</sup> Paragraph 28 et seq.

<sup>12</sup> [2009] HCA 23.

<sup>13</sup> Explanatory Memorandum to the *Military Justice (Interim Measures) Bill (No 2) 2009*, General Outline at page 2.

<sup>14</sup> [2011] HCA 28.

<sup>15</sup> [2011] HCA 29.

objections were heard by Brigadier Westwood, sitting alone as the JA to the court martial, in accordance with DFDA s.141(7). The prosecution case against each of the accused men was one of involuntary manslaughter by criminal negligence and dangerous conduct with negligence as to consequences. The prosecution did not allege that either intended to occasion the death of or grievous bodily harm to the alleged victims or to unlawfully kill or injure any other person. CJA ruled that:

In the absence of a duty of care imposed by statute, mere negligence, even if established, will not suffice to establish criminal culpability in the case of actual engagement in armed conflict.<sup>16</sup>

27. A copy of the ruling is at Annex Q.

#### **The Intended Operation of DFDA s.36, Dangerous Conduct**

28. The ruling raised, inter alia, issues with the drafting and intended application of DFDA s.36, dangerous conduct. These included:

- a. The intended scope of sub-section 36(3) (dangerous conduct by negligence) in the case of actual operations against the enemy in light of *Shaw Savill and Albion Co Ltd v The Commonwealth*<sup>17</sup>;
- b. The intended operation of sub-sections 36(1)(e), (2)(e), and (3)(e) (the exclusion applicable to enemy persons killed or injured in the course of duty) having regard to the fact that, for the provisions to apply sensibly, absolute liability should attach to them whereas the default provisions of the *Criminal Code Act 1995* presently apply a fault element of recklessness; and
- c. The way in which s.36 as a whole is intended to operate in the case of death or grievous bodily harm occasioned to civilians or enemy personnel having regard to the specific *Offences Against Humanity and Related Offences* created by the *Criminal Code Act 1995* Chapter 8.

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<sup>16</sup> Ruling by CJA of 20 May 2011 at Pre-trial Directions Hearing for GCM of SGT J and LCPL D arising from an incident in Afghanistan on 12 February 2009 at page 37.

<sup>17</sup> (1940) 66 CLR 344.

## **PRE-TRIAL APPLICATIONS OR OBJECTIONS**

29. DFDA s.141 expressly provides for the list of applications and objections that may be made by the accused prior to arraignment. There is, however no provision for pre-trial applications by the prosecution. Consistent with what prosecutors are able to do in the civilian criminal justice system, it is my view that it would be desirable if the legislation were to be amended to allow such pre-trial applications by the prosecution.

30. Such an amendment would be particularly useful in cases where a JA could approve the amendment of charges or make a ruling on the admissibility of evidence before a court martial panel was assembled and in circumstances where the result of a ruling may affect the number of witnesses that the prosecution would be required to call and the time that a court martial panel would be waiting outside the court, during proceedings, for legal issues to be resolved.

## **THE ACCUSED'S ATTENDANCE AT ALL HEARINGS**

31. DFDA s.139 provides that "... a hearing before a service tribunal shall be held in the presence of an accused person". In the absence of any provision in the DFDA to the contrary, this provision has been interpreted to mean that an accused person must be present, even at what could be classified as a mention of the matter. Civilian courts make provision for an application to be made for an accused person to be excused from attendance at court in circumstances where they are represented by a lawyer and are not on bail.

32. It is my view that in hearings such as adjournment applications, applications by the prosecution to withdraw charges and other purely procedural hearings, provision should be made to dispense with the requirement that the accused be present.

## **SUSPENDED DETENTION**

33. DFDA s.78 provides that:

Where a service tribunal imposes on a person 2 or more punishments of detention in respect of 2 or more service offences, the service tribunal shall not make an order suspending the whole or a part of any of those punishments unless it also makes an order suspending the whole or a part of the other punishment or the other punishments.

34. This provision has been interpreted to mean that if there are multiple offences where detention has been imposed as a sentence, if one of those sentences is to be suspended, then all sentences must be suspended. This does not appear to take into account that the Service tribunal may be sentencing an offender for a number of offences over a significant period of time involving more than one course of conduct. In such a situation, the Service tribunal may want to treat one course of conduct differently for sentencing purposes, from another course. The provision does not allow the Service tribunal to suspend sentences of detention for one course of conduct but determine for other reasons that the sentences should not be suspended for another course of conduct.

35. The provision also fetters the ability of the Service tribunal to impose cumulative sentences in relation to a number of different courses of conduct.

36. Relevant to this consideration is the question of global sentencing in situations of multiple offences referred to in paragraphs 36 to 41 of my report for the period ending 31 December 2009.

#### **THE POWER OF THE PRESIDENT AT A COURT MARTIAL TO MAKE PROTECTIVE ORDERS AND NON-PUBLICATION ORDERS**

37. A further matter that arose for consideration in the matter of SGT J and LCPL D involved the role of the president in the making of protective orders under DFDA s.140, public hearings, and non publication orders under DFDA s.148, record of proceedings to be kept. Section 140 makes a general provision that hearings before a court martial shall be in public. Sub-section (2) then provides, relevantly:

In proceedings before a court martial ... the president of the court martial ... may, if the president considers it necessary in the interests of the security or defence of Australia, for proper administration of justice or public morals:

- (a) order that some or all of the members of the public shall be excluded during the whole or a specified part of the proceedings; or
- (b) order that no part of or relating to, the whole or a specified part of the proceedings shall be published.

38. The exercise of this power is subject to the provisions of sub-section (3) which provides:



The president of a court martial shall not make an order under sub-section (2) unless the president has first consulted the judge advocate.

39. Section 148 provides that a record of proceedings shall be kept. This is subject to the power at sub-section (2) that, relevantly:

The president of a court martial ... may order that the whole or a specified part of a record under sub-section (1) that relates to proceedings before the court martial ... is not to be published if the court martial ... considers that such a publication would be inappropriate, taking account of the interests of the security or defence of Australia, the proper administration of justice, public morals or any other matter it considers relevant.

40. In my view, and consistent with the arrangements in the civil criminal courts involving a trial before a judge and jury, these discretions under DFDA s.140 and s.148 should be vested in the JA rather than the president.

41. Such orders are discretionary, but require proper weight to be given to the legal concept of open justice. In all other courts, these are discretions that would be exercised by the judicial officer. Reasons would be given and any exercise of the discretion, or refusal to do so, could be challenged in a higher court.

42. In the case of a court martial the matter is further complicated if the protective orders are sought in connection with material to which objection might be taken in the course of the trial. The president and members of the court martial panel are, of course, analogous to a civilian jury in that they will be required to return a verdict on the basis of the evidence properly admitted in the trial and the JAs directions. Protective orders will ordinarily have to be sought at the outset of the proceedings so as to avoid inadvertent disclosure during the trial. It may be, depending upon the course of the evidence, that material of concern is not ultimately admissible. If the president has had to consider it with a view to making a protective order, there is a risk that the panel would have to be discharged.

43. The legislation gives no guidance as to what is intended by the requirement that the president "consult" with the JA before making an order of the kind specified at DFDA s.140. As a result it is unclear whether this is intended to occur in open court or privately and there is the related issue as to whether the president is required to give reasons for any decision.

44. In my view the existing arrangements require review as a matter of urgency.

### **DIRECTOR OF MILITARY PROSECUTIONS (DMP)**

45. During the reporting period Brigadier Lyn McDade was the DMP appointed under DFDA s.188GF. She is required to report independently to the Minister, for presentation to the Parliament on the operations of her office.

### **DIRECTOR OF DEFENCE COUNSEL SERVICES (DDCS)**

46. The position of DDCS was filled, during the reporting period, by Colonel Roy Abbott CSC. Colonel Abbott retired from the Australian Regular Army at the end of 2011. It is appropriate that I acknowledge his service of many years, most recently in his very able discharge of the duties as DDCS.

### **DISCIPLINE LAW TRAINING**

#### **Discipline Law Training for ADF personnel**

47. Throughout 2011 the ADF Military Law Centre (MLC) has continued to provide discipline law training to pre-command courses. The course content includes: command responsibilities with respect to discipline and the law under the DFDA and associated legislation, the procedures for the proper conduct of summary proceedings, DFDA investigations, jurisdiction of Service tribunals, powers of punishment of summary authorities and the Discipline Officer Scheme.

48. The following formal military discipline training was provided to ADF officers who have been designated to assume command or executive officer positions across the three Services:

- a. **RAN.** Five courses instructed, with an approximate total of 75 students comprising officers appointed to Commanding Officer or Executive Officer positions (Major Fleet Units, Minor War Vessels and Shore appointments).
- b. **Army.** One course instructed, with an approximate total of 110 students comprising officers appointed to Command units or formations and Regimental Sergeant Majors designate.
- c. **Air Force.** Three courses instructed, with an approximate total of 69 students comprising officers appointed to Officer Commanding or Commanding Officer positions.

### **Training for ADF Legal Officers**

49. ADF legal officers receive specialist professional training in discipline law through attendance at different stages of their careers:

- a. **Legal Training Module 1 (LTM 1).** This is the first course of legal training undertaken by ADF legal officers. During the reporting period, discipline subjects were conducted during two LTM 1 courses with 35 students attending.
- b. **Legal Training Module 2 (LTM 2).** This is a graduate diploma level course undertaken by ADF legal officers which is normally conducted within four years post LTM 1. During the reporting period, discipline subjects were conducted during one LTM 2 course with 23 students attending.
- c. **Legal Training Module 3 (LTM 3).** This is a Masters level course undertaken by ADF legal officers which is normally conducted within four years post LTM 2. LTM 3 subjects (Discipline, Administration and Operations) are conducted in alternating years. During the reporting period, discipline subjects were covered during one LTM 3 course with 22 students attending.

### **Development of Discipline Training Support Tools**

50. In my 2010 report<sup>18</sup> I foreshadowed the release of online DFDA training through the CAMPUS system<sup>19</sup>. The online training was released in 2011. The training is scenario based and includes the use of high quality video to demonstrate the conduct of Discipline Officer and Summary Authority hearings. The training is broken down into the following sections:

- a. Investigating officer
- b. Clerk at Summary Hearings

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<sup>18</sup> Paragraph 35.

<sup>19</sup> CAMPUS is a computer based learning management system (LMS) and is accessed by ADF members through the Defence Restricted Network at their place of work.

- c. Recorder at Summary Hearings
- d. Defending Officer
- e. Prosecuting Officer
- f. Summary Authority
- g. Relevant Officer
- h. Discipline Officer.

### **Military Justice Training – Competency and Governance Framework**

51. In my 2010 report<sup>20</sup> I addressed the Military Justice Training Competency and Governance Framework. Implementation of the framework continues. The question of whether the training competencies should be made part of the National Training Framework will be further considered during 2012.

### **TRIALS UNDER THE DFDA**

52. The statistics for summary trials and the Discipline Officer Scheme conducted by the three Services during 2009 are set out in Annexes A to I. As was indicated in the report for 2005<sup>21</sup> responsibility for the Discipline Tracking and Case Flow Management System was transferred to the Inspector General Australian Defence Force (IGADF). Accordingly, IGADF has provided the statistics for the summary trials for this report drawing upon the electronic system.

53. Statistics for proceedings before court martial and DFM pursuant to the arrangements reinstated by the *Military Justice (Interim Measures) Act (No 1) 2009* appear at Annexes J to N.

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<sup>20</sup> Paragraphs 36, 37 and Annex R.

<sup>21</sup> Paragraphs 95-96.

## **VISITS AND ACTIVITIES**

54. In the course of the year I had regular discussions with legal officers from each of the three services which have covered a wide range of issues relating to the operation of the service discipline system.

55. In September 2011 I had the pleasure of hosting a visit from the Judge Advocate General of the United Kingdom (UK), His Honour Judge Jeff Blackett. His visit facilitated discussions about recent developments in UK and European military jurisprudence touching on disciplinary matters. His Honour gave a seminar on these issues to military and academic lawyers at the Law School of the University of Melbourne.

56. On the weekend of 14-16 October 2011 I conducted a conference at HMAS Creswell with the DJAG's, CJA, the full-time JA's and my staff officer. Because of the geographic separation of the participants, the conference provided a most useful opportunity for informal discussion. The substance of matters discussed are reflected elsewhere in this report.

## **THE PANELS OF JUDGE ADVOCATES/DEFENCE FORCE MAGISTRATES AND SECTION 154 REVIEWING OFFICERS**

57. Details of the officers appointed to these panels following the *Military Justice (Interim Measures) Act (No 1) 2009* appear at Annex P.

## **CONCLUSION**

58. The interim arrangements reinstating the system of trial by court martial and DFM continue to operate satisfactorily, but it is undesirable for "interim" arrangements to continue indefinitely. I am pleased to note that the *Military Court of Australia Bill* and the *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill* are scheduled for introduction into the Parliament during the Winter 2012 sittings.

### TABLE OF ABBREVIATIONS USED IN REPORT

<b>Abbreviation</b>	<b>Description</b>
ACT	Australian Capital Territory
ADF	Australian Defence Force
AMC	Australian Military Court
CDF	Chief of the Defence Force
CJA	Chief Judge Advocate
CM/DFM Rules	Court Martial and Defence Force Magistrate Rules
DDCS	Director of Defence Counsel Services
DFDA	<i>Defence Force Discipline Act 1982</i>
DFDAT	Defence Force Discipline Appeal Tribunal
DFM	Defence Force Magistrate
DGADFLS	Director General Australian Defence Force Legal Services
DJAG	Deputy Judge Advocate General
DMP	Director of Military Prosecutions
GCM	General Court Martial
HDL	Head, Defence Legal
IGADF	Inspector General Australian Defence Force
JA	Judge Advocate
JAG	Judge Advocate General
LTM1	Legal Training Module 1
LTM2	Legal Training Module 2
LTM3	Legal Training Module 3
MLC	Military Law Centre
OJAG	Office of Judge Advocate General
RAN	Royal Australian Navy
RANR	Royal Australian Navy Reserve
RFD	Reserve Forces Decoration
RMJ	Registrar of Military Justice
SAR	Summary Authority Rules
UK	United Kingdom

**COMPLIANCE INDEX OF REQUIRED INFORMATION FOR STATUTORY AUTHORITIES**

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

Enabling Legislation	<i>Defence Force Discipline Act 1982</i>
Responsible Minister	Minister for Defence Science and Personnel
Powers, functions & objectives	Paragraphs: 4-8
Membership and Staff	Paragraph: 3, 9-10
Information Officer	Jennifer Mackenzie Paralegal to Chief Judge Advocate Department of Defence F-TS-OJAG (PO Box 7906) CANBERRA BC ACT 2610 Telephone: 02 6127 4344 Facsimile: 02 6127 4399
Financial Statement	Paragraphs: 11
Activities and Reports	Paragraphs: 54-56
Operational Problems	Paragraphs: 15-17, 29-44
Subsidiaries	Not Applicable

## **NATURE AND JURISDICTION OF SUMMARY AUTHORITIES**

1. There are three levels of summary authorities created under the DFDA:
  - a. superior summary authorities;
  - b. commanding officers; and
  - c. subordinate summary authorities.

### **Superior Summary Authorities**

2. Superior summary authorities (SUPSAs) are appointed by instrument by certain senior officers pursuant to the DFDA. SUPSAs are usually themselves senior officers within a command.

### **Commanding Officers**

3. The power of a commanding officer to hear a matter under the Act is derived from his/her position in command and there is no separate discipline appointment required, although an officer may be appointed by instrument as a commanding officer for disciplinary purposes.

### **Subordinate Summary Authorities**

4. Subordinate summary authorities (SUBSAs) are appointed by instrument by commanding officers pursuant to the DFDA to assist them in the enforcement of discipline within their command. Their jurisdiction and powers of punishment are substantially less than those of a commanding officer.



NAVY  
JANUARY-DECEMBER 2011

STATISTICS OF TRIALS AND OUTCOMES FOR MEMBERS OF THE NAVY BEFORE SUMMARY AUTHORITIES

	SUPERIOR SUMMARY AUTHORITY			COMMANDING OFFICER			SUBORDINATE SUMMARY AUTHORITY		
	NUMBER OF TRIALS HELD	CHARGES TRIED		NUMBER OF TRIALS HELD	CHARGES TRIED		NUMBER OF TRIALS HELD	CHARGES TRIED	
		GUILTY	N.G.		GUILTY	N.G.		GUILTY	N.G.
January	1		1	3	4	2	7	6	1
February				18	27	5	22	23	2
March	1	1		13	19	9	15	16	2
April	1	12		10	11		19	23	1
May				15	20		16	20	1
June	1	1		15	24	3	24	31	1
July	1	1		11	13		17	17	3
August				10	17		8	8	1
September				12	21		23	28	
October				12	15	1	12	24	1
November	1		1	20	27	5	27	28	1
December				14	30	2	13	15	1
<b>TOTAL</b>	<b>6</b>	<b>15</b>	<b>2</b>	<b>153</b>	<b>228</b>	<b>27</b>	<b>203</b>	<b>239</b>	<b>13</b>
			<b>0</b>			<b>2</b>			<b>12</b>

**CONVICTIONS FOR OFFENCES COMMITTED BY RANK FOR MEMBERS OF THE NAVY  
BEFORE SUMMARY AUTHORITIES**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
<b>Sect 23</b>		1					4		21	2
<b>24</b>	4	1				1	8		94	
<b>25</b>									1	
<b>26</b>							9		18	
<b>27</b>						1	2		14	4
<b>28</b>										
<b>29</b>	11	2		1		3	13		98	4
<b>30</b>										
<b>31</b>										
<b>32</b>									3	
<b>33(a)</b>	1	5		1			3		11	
<b>33(b)</b>										
<b>33(c)</b>										
<b>33(d)</b>										
<b>34</b>							1			
<b>35</b>							1		3	
<b>36</b>										
<b>36B</b>									2	
<b>37</b>						1			20	
<b>38</b>										
<b>39</b>										
<b>40</b>									2	
<b>40A</b>										
<b>40B</b>										
<b>40C</b>										
<b>40D</b>										
<b>41</b>										
<b>42</b>										
<b>43</b>									10	
<b>44</b>										
<b>45</b>									6	
<b>46</b>									1	
<b>47C</b>							1		1	
<b>47P</b>										
<b>48</b>										
<b>49</b>										
<b>50</b>										
<b>51</b>										
<b>53</b>										
<b>54</b>										
<b>54A</b>										
<b>55</b>									6	
<b>56</b>										
<b>57</b>										
<b>58</b>										
<b>59</b>									3	
<b>60</b>	3	5		1		1	4		37	
<b>61</b>	12						11		9	
<b>TOTAL</b>	<b>31</b>	<b>14</b>	<b>0</b>	<b>3</b>	<b>0</b>	<b>7</b>	<b>57</b>	<b>0</b>	<b>360</b>	<b>10</b>

## PUNISHMENTS IMPOSED BY RANK ON MEMBERS OF THE NAVY BEFORE SUMMARY AUTHORITIES

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
Reprimand	5	1		1		1	14		45	
Conditional conviction without punishment									1	
Unconditional conviction without punishment							2		9	
Severe reprimand	20	5		1		2	6		16	1
Extra duties									6	
Extra Drill									1	
Stoppage of leave		5							20	
Restriction of privileges		1							172	10
Suspended fine	2						3		25	1
Fine Less than 14 Days Pay	8	3		1		4	33		172	6
Fine More than 14 Days Pay									4	
Forfeiture of service for purposes of promotion										
Forfeiture of seniority				1		1	3			
Reduction in rank							1			
Suspended detention										
Committed detention									12	
<b>TOTAL</b>	<b>35</b>	<b>15</b>	<b>0</b>	<b>4</b>	<b>0</b>	<b>8</b>	<b>62</b>	<b>0</b>	<b>483</b>	<b>18</b>

ARMY  
JANUARY-DECEMBER 2011

STATISTICS OF TRIALS AND OUTCOMES FOR MEMBERS OF THE ARMY BEFORE SUMMARY AUTHORITIES

	SUPERIOR SUMMARY AUTHORITY			COMMANDING OFFICER			SUBORDINATE SUMMARY AUTHORITY			
	NUMBER OF TRIALS HELD	CHARGES TRIED		NUMBER OF TRIALS HELD	CHARGES TRIED		NUMBER OF TRIALS HELD	CHARGES TRIED		
		GUILTY	N.G.		QUASHED	GUILTY		N.G.	QUASHED	GUILTY
January				2	2		6	6		2
February	1	1		11	10	4	25	25		2
March				27	38	2	73	84	2	1
April	1	1		15	18		61	75	2	3
May	1	4		31	59	1	69	78	4	6
June	2	2		21	25	2	81	94		5
July	1	1		14	22		58	66	2	5
August	1	1		34	46	2	60	67	1	2
September				41	68		61	79	5	5
October	1	1		23	36	3	69	86	1	3
November	2	1	1	57	75	4	72	88	5	4
December	2	2		31	44	2	49	53	2	2
TOTAL	12	14	1	307	443	19	684	801	24	40

**CONVICTIONS FOR OFFENCES COMMITTED BY RANK FOR MEMBERS OF THE ARMY  
BEFORE SUMMARY AUTHORITIES**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
<b>Sect 23</b>	1	5						2		19
<b>24</b>	5	11	1			2	16	7		139
<b>25</b>								1		6
<b>26</b>	4	4					8	5		57
<b>27</b>	2	11		1		3	13	10		74
<b>28</b>										
<b>29</b>	9	2	1	5		17	46	15		262
<b>30</b>										
<b>31</b>										1
<b>32</b>		1		1						4
<b>33(a)</b>		2								21
<b>33(b)</b>										
<b>33(c)</b>										
<b>33(d)</b>										
<b>34</b>	2					1	3	2		2
<b>35</b>	1	1		1		1	6			6
<b>36A</b>			1					3		11
<b>36B</b>	3	19				6	6	9		119
<b>37</b>								1		18
<b>38</b>										1
<b>39</b>										
<b>40</b>		1				1	3	2		16
<b>40A</b>										
<b>40B</b>										
<b>40C</b>										
<b>40D</b>										
<b>41</b>										
<b>42</b>										
<b>43</b>							2			17
<b>44</b>	4			1		1				5
<b>45</b>							1			2
<b>46</b>										
<b>47C</b>						1				5
<b>47P</b>										
<b>48</b>										
<b>49</b>										
<b>50</b>										
<b>51</b>										
<b>53</b>										
<b>54</b>										
<b>54A</b>										
<b>55</b>						1	3			7
<b>56</b>										3
<b>57</b>										3
<b>58</b>										
<b>59</b>										
<b>60</b>	4	7		4		8	17	8		110
<b>61</b>						1				3
<b>TOTAL</b>	<b>35</b>	<b>64</b>	<b>3</b>	<b>13</b>	<b>0</b>	<b>43</b>	<b>124</b>	<b>65</b>	<b>0</b>	<b>911</b>

**PUNISHMENTS IMPOSED BY RANK ON MEMBERS OF THE ARMY BEFORE SUMMARY AUTHORITIES**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
Reprimand	10	1		4		8	22	16		70
Conditional conviction without punishment										2
Unconditional conviction without punishment	1	5	1	2		8	5	2		28
Severe reprimand	6	3		4		8	36	11		37
Extra duties		4					1	1		25
Extra drill										9
Stoppage of leave		5								44
Restriction of privileges		41						1		444
Suspended fine		2		1		2	2			27
Fine Less than 14 Days Pay	23	23	2	4		24	69	40		445
Fine More than 14 Days Pay							3			16
Forfeiture of service for purposes of promotion										
Forfeiture of seniority						4	5	2		
Reduction in rank						2	14	6		17
Suspended detention										
Committed detention										47
<b>TOTAL</b>	<b>40</b>	<b>84</b>	<b>3</b>	<b>15</b>	<b>0</b>	<b>56</b>	<b>157</b>	<b>79</b>	<b>0</b>	<b>1211</b>

AIR FORCE  
JANUARY-DECEMBER 2011

STATISTICS OF TRIALS AND OUTCOMES FOR MEMBERS OF THE AIR FORCE BEFORE SUMMARY AUTHORITIES

	SUPERIOR SUMMARY AUTHORITY			COMMANDING OFFICER			SUBORDINATE SUMMARY AUTHORITY						
	NUMBER OF TRIALS HELD	CHARGES TRIED		NUMBER OF TRIALS HELD	CHARGES TRIED		NUMBER OF TRIALS HELD	CHARGES TRIED					
		GUILTY	N.G.		GUILTY	N.G.		GUILTY	N.G.				
January													
February	1	5	8	4	4			2	3				1
March				2	3			6					
April	1	3		1	1			4	4				1
May				2	9			5	8				
June				5	17			3	4				
July				7	12	1		3	3				2
August	1	2		2	2			12	13				
September				2	2			3	4				2
October				2	3	1		11	13				1
November				2	2			4	5				
December								1	1				
<b>TOTAL</b>	<b>3</b>	<b>10</b>	<b>8</b>	<b>29</b>	<b>55</b>	<b>4</b>	<b>2</b>	<b>55</b>	<b>65</b>	<b>6</b>	<b>1</b>		

**CONVICTIONS FOR OFFENCES COMMITTED BY RANK FOR MEMBERS OF THE AIR FORCE  
BEFORE SUMMARY AUTHORITIES**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
<b>Sect 23</b>									4	
<b>24</b>		2							7	
<b>25</b>										
<b>26</b>							1		5	
<b>27</b>		1					1		1	
<b>28</b>										
<b>29</b>	2	3	1			10	3		28	4
<b>30</b>										
<b>31</b>										
<b>32</b>										
<b>33(a)</b>							2		4	2
<b>33(b)</b>										
<b>33(c)</b>										
<b>33(d)</b>										
<b>34</b>										
<b>35</b>										
<b>36</b>										
<b>36B</b>							1		2	
<b>37</b>							2		4	
<b>38</b>										
<b>39</b>										
<b>40</b>									1	
<b>40A</b>										
<b>40B</b>										
<b>40C</b>										
<b>40D</b>										
<b>41</b>										
<b>42</b>										
<b>43</b>									2	
<b>44</b>							2			
<b>45</b>									1	
<b>46</b>									2	
<b>47C</b>						1				
<b>47P</b>										
<b>48</b>										
<b>49</b>										
<b>50</b>										
<b>51</b>										
<b>53</b>										
<b>54</b>										
<b>54A</b>										
<b>55</b>						8	1			
<b>56</b>							1			
<b>57</b>										
<b>58</b>										
<b>59</b>										
<b>60</b>	3		1			1	8		6	
<b>61</b>							2			
<b>TOTAL</b>	<b>5</b>	<b>6</b>	<b>2</b>	<b>0</b>	<b>0</b>	<b>20</b>	<b>24</b>	<b>0</b>	<b>67</b>	<b>6</b>



## PUNISHMENTS IMPOSED BY RANK ON MEMBERS OF THE AIR FORCE BEFORE SUMMARY AUTHORITIES

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
Reprimand	3	1				1	8		14	1
Conditional conviction without punishment									2	
Unconditional conviction without punishment		1				1			1	
Severe reprimand						7	6		5	2
Extra duties									3	
Extra drill										
Stoppage of leave	1	3							1	
Restriction of privileges		2							32	3
Suspended fine			1			5	4		5	
Fine Less than 14 Days Pay	4	3	2			6	10		29	5
Fine More than 14 Days Pay									1	
Forfeiture of service for purposes of promotion										
Forfeiture of seniority						1				
Reduction in rank										
Suspended detention										
Committed detention									4	
<b>TOTAL</b>	<b>8</b>	<b>10</b>	<b>3</b>	<b>0</b>	<b>0</b>	<b>21</b>	<b>28</b>	<b>0</b>	<b>97</b>	<b>11</b>

ANNEX E TO  
JAG REPORT 2011

COMBINED STATISTICS OF TRIALS AND OUTCOMES FOR MEMBERS BEFORE SUMMARY AUTHORITIES

	SUPERIOR SUMMARY AUTHORITY				COMMANDING OFFICER				SUBORDINATE SUMMARY AUTHORITY			
	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED
		GUILTY	N.G.			GUILTY	N.G.			GUILTY	N.G.	
January	1	0	1	0	5	6	2	0	14	13	1	3
February	2	6	8	0	33	41	9	1	49	51	2	5
March	1	1	0	0	42	60	11	0	94	106	4	2
April	3	16	0	0	26	30	0	1	84	102	3	5
May	1	4	0	0	48	88	0	1	90	106	4	7
June	3	3	0	0	41	66	5	1	108	129	1	6
July	2	2	0	0	32	47	2	2	78	86	7	7
August	2	3	0	0	46	65	2	1	80	88	2	2
September	0	0	0	0	55	91	0	3	87	111	7	6
October	1	1	0	0	37	54	6	2	92	123	3	3
November	3	1	2	0	79	104	9	3	103	121	6	5
December	2	2	0	0	45	74	4	1	63	69	3	2
<b>TOTAL</b>	<b>21</b>	<b>39</b>	<b>11</b>	<b>0</b>	<b>489</b>	<b>726</b>	<b>50</b>	<b>16</b>	<b>942</b>	<b>1105</b>	<b>43</b>	<b>53</b>

### **NATURE AND JURISDICTION OF DISCIPLINE OFFICERS**

1. Discipline officers are able to deal with minor disciplinary infringements by defence members below the rank of lieutenant in the Navy, captain in the Army and flight lieutenant in the Air Force.
2. A commanding officer may appoint an officer or warrant officer to be a discipline officer by instrument under the DFDA. There is no trial before a discipline officer and the member must elect to be dealt with by a discipline officer. The procedure is used where the commission of the infringement is not in dispute and the role of the discipline officer is only to award a punishment.
3. Discipline officers have jurisdiction to deal with a limited number of offences and to award limited punishments under the DFDA.

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DISCIPLINE OFFICER STATISTICS

Infringement	Number
Section 23	336
24	257
27	145
29	1095
32(1)	15
35	30
60	99
<b>TOTAL (1)</b>	<b>1977</b>

Action Taken	Number
<b>Punishment Imposed - Fine</b>	223
ROP	673
SOL	461
Extra Duties	74
Extra Drill	13
Reprimand	455
No Punishment Imposed	67
Referred to an Authorised Member	11
<b>TOTAL (1)</b>	<b>1977</b>

**ARMY**  
**JANUARY-DECEMBER 2011**  
**DISCIPLINE OFFICER STATISTICS**

<b>Infringement</b>	<b>Number</b>
<b>Section 23</b>	227
<b>24</b>	415
<b>27</b>	699
<b>29</b>	1123
<b>32(1)</b>	56
<b>35</b>	130
<b>60</b>	311
<b>TOTAL (1)</b>	<b>2961</b>

<b>Action Taken</b>	<b>Number</b>
<b>Punishment Imposed - Fine</b>	347
<b>ROP</b>	1147
<b>SOL</b>	321
<b>Extra Duties</b>	422
<b>Extra Drill</b>	75
<b>Reprimand</b>	543
<b>No Punishment Imposed</b>	94
<b>Referred to an Authorised Member</b>	12
<b>TOTAL (1)</b>	<b>2961</b>

**AIR FORCE  
JANUARY-DECEMBER 2011  
DISCIPLINE OFFICER STATISTICS**

<b>Infringement</b>	<b>Number</b>
<b>Section 23</b>	47
<b>24</b>	43
<b>27</b>	111
<b>29</b>	120
<b>32(1)</b>	3
<b>35</b>	18
<b>60</b>	26
<b>TOTAL (1)</b>	<b>368</b>

<b>Action Taken</b>	<b>Number</b>
<b>Punishment Imposed - Fine</b>	76
<b>ROP</b>	50
<b>SOL</b>	39
<b>Extra Duties</b>	89
<b>Extra Drill</b>	17
<b>Reprimand</b>	73
<b>No Punishment Imposed</b>	19
<b>Referred to an Authorised Member</b>	5
<b>TOTAL (1)</b>	<b>368</b>

## **NATURE AND JURISDICTION OF COURTS MARTIAL AND DEFENCE FORCE MAGISTRATES**

### **Courts Martial**

1. A court martial is a service tribunal which is created for the purpose of trying a defence member or a defence civilian on a specific charge or charges, usually of a serious nature. In certain circumstances a court martial may also be convened solely for the purpose of determining punishment in respect of a person who has been convicted by another service tribunal.

### **Types of Court Martial**

2. A court martial may be either a general court martial or a restricted court martial. A general court martial comprises a president, who is not below the rank of colonel or equivalent and not less than four other members. A restricted court martial comprises a president, who is not below the rank of lieutenant colonel or equivalent, and not less than two other members. A judge advocate, who is a legal officer who has been appointed to the judge advocate's panel and has been enrolled as a legal practitioner for not less than five years, is appointed to assist the court martial with legal matters.

3. A general court martial has wider powers of punishment than a restricted court martial. A general court martial may impose the punishment of life imprisonment in certain cases where that punishment is provided for in the legislation creating the offence or in any other case may impose imprisonment for a fixed period or for any period not exceeding the maximum period provided by the legislation creating the offence. A restricted court martial may impose imprisonment for a period not exceeding six months.

### **Defence Force Magistrate**

4. Defence Force magistrates are appointed by the JAG from members of the judge advocate's panel. A Defence Force magistrate sits alone when trying a matter and has the same jurisdiction and powers as a restricted court martial.

### **Choice of Tribunal**

5. Courts martial and Defence Force magistrates have jurisdiction to hear any charge against any member of the defence force or a defence civilian. Prior to the commencement of the DFDA in 1985, there was no Defence Force magistrate and all higher level matters were tried by a court martial.

6. The Defence Force magistrate jurisdiction was introduced so that matters which had been referred to the higher level of jurisdiction could be tried with less formality than in the case of a court martial. It was also seen to have certain administrative and other advantages. A Defence Force magistrate sits alone whereas courts martial require at least four persons (three members and the judge advocate). A Defence Force magistrate gives reasons for decision both on the determination of guilt or innocence and on sentence; courts martial do not give reasons on either.

ANNEX K TO  
JAG REPORT 2011

NAVY

JANUARY-DECEMBER 2011

STATISTICS FOR TRIALS AND OUTCOMES FOR COURTS MARTIAL AND DEFENCE FORCE MAGISTRATES

	GENERAL COURT MARTIAL				RESTRICTED COURT MARTIAL				DEFENCE FORCE MAGISTRATE						
	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	WD	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	WD	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	WD
		GUILTY	N.G.				GUILTY	N.G.				GUILTY	N.G.		
January															
February					2	2					1	2			
March					1	3					1	1			
April											3	14	1		
May	1		4		3	3	2	1	1		1	1			
June															
July															
August															
September											2	1	4		3
October											1	1			
November	1		1								2	2			1
December	2	10	2								1	3			3
<b>TOTAL</b>	<b>4</b>	<b>10</b>	<b>7</b>	<b>0</b>	<b>4</b>	<b>6</b>	<b>8</b>	<b>2</b>	<b>1</b>	<b>1</b>	<b>12</b>	<b>25</b>	<b>6</b>	<b>0</b>	<b>7</b>



**CONVICTIONS FOR OFFENCES COMMITTED BY RANK FOR MEMBERS OF THE NAVY  
FOR COURTS MARTIAL AND DEFENCE FORCE MAGISTRATES**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
<b>Sect 23</b>										
<b>24</b>										
<b>25</b>										
<b>26</b>		1								
<b>27</b>		1								
<b>28</b>										
<b>29</b>									1	
<b>30</b>										
<b>31</b>										
<b>32</b>										
<b>33(a)</b>									2	
<b>33(b)</b>										
<b>33(c)</b>										
<b>33(d)</b>										
<b>34</b>				1		2				
<b>35</b>										
<b>36</b>										
<b>36A</b>										
<b>37</b>										
<b>38</b>										
<b>39</b>										
<b>40</b>										
<b>40A</b>										
<b>40B</b>										
<b>40C</b>										
<b>40D</b>										
<b>41</b>										
<b>42</b>										
<b>43</b>	1									
<b>44</b>										
<b>45</b>										
<b>46</b>										
<b>47C</b>							1		1	
<b>47P</b>										
<b>48</b>										
<b>49</b>										
<b>50</b>										
<b>51</b>										
<b>53</b>										
<b>54</b>										
<b>54A</b>										
<b>55</b>										
<b>56</b>										
<b>57</b>										
<b>58</b>										
<b>59</b>							3			
<b>60</b>	1					2				1
<b>61</b>	7					1	13		3	1
<b>TOTAL</b>	<b>9</b>	<b>2</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>5</b>	<b>17</b>	<b>0</b>	<b>7</b>	<b>2</b>

**Details of Quashed Convictions**

<b>DFDA Sect</b>	<b>Rank</b>	<b>Short Summary of Offence</b>	<b>Reason for quashing</b>
61	PO	Obtaining a financial advantage	Matter of law

**PUNISHMENTS IMPOSED BY RANK ON MEMBERS OF THE NAVY  
FOR COURTS MARTIAL AND DEFENCE FORCE MAGISTRATES**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
Reprimand							1		2	
Conditional conviction without punishment										
Unconditional conviction without punishment										
Severe reprimand		2		1		1				
Suspended fine						2			2	1
Fine Less than 14 Days Pay	1	2		1		2	2		2	2
Fine More than 14 Days Pay										
Forfeiture of service for purposes of promotion										
Forfeiture of seniority						1	1		2	
Reduction in rank	4					1	1			
Suspended detention									2	
Committed detention									2	
Dismissal	4								5	
Imprisonment	3								1	
<b>TOTAL</b>	<b>12</b>	<b>4</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>7</b>	<b>5</b>	<b>0</b>	<b>18</b>	<b>3</b>

ARMY

JANUARY-DECEMBER 2011

STATISTICS FOR TRIALS AND OUTCOMES FOR COURTS MARTIAL AND DEFENCE FORCE MAGISTRATES

	GENERAL COURT MARTIAL			RESTRICTED COURT MARTIAL			DEFENCE FORCE MAGISTRATE						
	NUMBER OF TRIALS HELD	CHARGES TRIED		NUMBER OF TRIALS HELD	CHARGES TRIED		NUMBER OF TRIALS HELD	CHARGES TRIED					
		GUILTY	N.G.		GUILTY	N.G.		GUILTY	N.G.				
January													
February				1	1		3	4	7				10
March				2	9	8							
April				2	1		3	5					
May	2		4				1	1					1
June				1	3		3	3	2				
July				1	3	2							
August							4	8	2				1
September							2		2				
October							1	3					
November				2	3		2	2					1
December							1	1	1				1
<b>TOTAL</b>	<b>2</b>	<b>0</b>	<b>4</b>	<b>9</b>	<b>20</b>	<b>10</b>	<b>20</b>	<b>27</b>	<b>14</b>	<b>20</b>	<b>20</b>	<b>14</b>	<b>14</b>

One matter was withdrawn prior to trial and an RCM held in April was referred back to RMJ during the trial and was retried in July

**CONVICTIONS FOR OFFENCES COMMITTED BY RANK FOR MEMBERS OF THE ARMY  
FOR COURTS MARTIAL AND DEFENCE FORCE MAGISTRATES**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
<b>Sect 23</b>										
<b>24</b>										
<b>25</b>				1						
<b>26</b>				1			2			1
<b>27</b>							3			
<b>28</b>										
<b>29</b>							1			
<b>30</b>										
<b>31</b>										
<b>32</b>										
<b>33(a)</b>				1			1			3
<b>33(b)</b>	1									
<b>33(c)</b>										
<b>33(d)</b>										
<b>34</b>				1			1			
<b>35</b>										
<b>36</b>							1			
<b>36A</b>										1
<b>37</b>										
<b>38</b>										
<b>39</b>										
<b>40</b>							1			1
<b>40A</b>										
<b>40B</b>										
<b>40C</b>										
<b>40D</b>							1			
<b>41</b>										
<b>42</b>										
<b>43</b>										
<b>44</b>										
<b>45</b>										
<b>46</b>										
<b>47C</b>										
<b>47P</b>										
<b>48</b>										
<b>49</b>										
<b>50</b>										
<b>51</b>										
<b>53</b>										
<b>54</b>										
<b>54A</b>										
<b>55</b>										3
<b>56</b>	1									
<b>57</b>										
<b>58</b>										
<b>59</b>										
<b>60</b>	1			1			4			
<b>61</b>							1			14
<b>TOTAL</b>	<b>3</b>	<b>0</b>	<b>0</b>	<b>5</b>	<b>0</b>	<b>0</b>	<b>16</b>	<b>0</b>	<b>0</b>	<b>23</b>

**Details of Quashed Convictions**

<b>DFDA Sect</b>	<b>Rank</b>	<b>Short Summary of Offence</b>	<b>Reason for quashing</b>
61	PTE	Misuse of a Commonwealth credit card x 20	Matter of law

**PUNISHMENTS IMPOSED BY RANK ON MEMBERS OF THE ARMY  
FOR COURTS MARTIAL AND DEFENCE FORCE MAGISTRATES**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
Reprimand							1			1
Conditional conviction without punishment										
Unconditional conviction without punishment										9
Severe reprimand	2			1			4			4
Suspended fine	1						4			4
Fine Less than 14 Days Pay	1			3			6			8
Fine More than 14 Days Pay	1						1			2
Forfeiture of service for purposes of promotion										
Forfeiture of seniority				3			1			
Reduction in rank	1						4			
Suspended detention										2
Committed detention							1			1
Dismissal										3
Imprisonment										
<b>TOTAL</b>	<b>6</b>	<b>0</b>	<b>0</b>	<b>7</b>	<b>0</b>	<b>0</b>	<b>22</b>	<b>0</b>	<b>0</b>	<b>34</b>

ANNEX M TO  
JAG REPORT 2011

AIR FORCE

JANUARY-DECEMBER 2011

STATISTICS FOR TRIALS AND OUTCOMES FOR COURTS MARTIAL AND DEFENCE FORCE MAGISTRATES

	GENERAL COURT MARTIAL				RESTRICTED COURT MARTIAL				DEFENCE FORCE MAGISTRATE						
	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	WD	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	WD	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	WD
		GUILTY	N.G.				GUILTY	N.G.				GUILTY	N.G.		
January															
February											1	5	3		
March											1				
April															
May															
June	1	6	1												
July											1	2			1
August															
September											2	4			2
October															
November															
December											2	2			
<b>TOTAL</b>	<b>1</b>	<b>6</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>7</b>	<b>13</b>	<b>3</b>	<b>0</b>	<b>3</b>

One matter was not completed and referred back to RMJ



**ONVICTIONS FOR OFFENCES COMMITTED BY RANK FOR MEMBERS OF THE AIR FORCE  
FOR COURTS MARTIAL AND DEFENCE FORCE MAGISTRATES**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
<b>Sect 23</b>										
<b>24</b>										
<b>25</b>										
<b>26</b>										
<b>27</b>										
<b>28</b>										
<b>29</b>										
<b>30</b>										
<b>31</b>										
<b>32</b>										
<b>33(a)</b>										
<b>33(b)</b>										
<b>33(c)</b>										
<b>33(d)</b>										
<b>34</b>										
<b>35</b>										
<b>36</b>										
<b>36A</b>										
<b>37</b>										
<b>38</b>										
<b>39</b>										
<b>40</b>										
<b>40A</b>										
<b>40B</b>										
<b>40C</b>										
<b>40D</b>										
<b>41</b>										
<b>42</b>										
<b>43</b>										
<b>44</b>										
<b>45</b>										
<b>46</b>										
<b>47C</b>										
<b>47P</b>										
<b>48</b>										
<b>49</b>										
<b>50</b>										
<b>51</b>										
<b>53</b>										
<b>54</b>										
<b>54A</b>										
<b>55</b>			1						2	
<b>56</b>			3				3			
<b>57</b>										
<b>58</b>										
<b>59</b>										
<b>60</b>							5			
<b>61</b>			3			1			1	
<b>TOTAL</b>	<b>0</b>	<b>0</b>	<b>7</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>8</b>	<b>0</b>	<b>3</b>	<b>0</b>

**Details of Quashed Convictions**

<b>DFDA Sect</b>	<b>Rank</b>	<b>Short Summary of Offence</b>	<b>Reason for quashing</b>

**PUNISHMENTS IMPOSED BY RANK ON MEMBERS OF THE AIR FORCE  
FOR COURTS MARTIAL AND DEFENCE FORCE MAGISTRATES**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
Reprimand										
Conditional conviction without punishment										
Unconditional conviction without punishment										
Severe reprimand			6				5		1	
Suspended fine			5							
Fine Less than 14 Days Pay			1						1	
Fine More than 14 Days Pay									1	
Forfeiture of service for purposes of promotion										
Forfeiture of seniority									2	
Reduction in rank			1			1	3			
Suspended detention										
Committed detention						1				
Dismissal from ADF										
Imprisonment										
<b>TOTAL</b>	<b>0</b>	<b>0</b>	<b>13</b>	<b>0</b>	<b>0</b>	<b>2</b>	<b>8</b>	<b>0</b>	<b>5</b>	<b>0</b>

ANNEX N TO  
JAG REPORT 2011

COMBINED JANUARY - DECEMBER 2011

STATISTICS FOR TRIALS AND OUTCOMES FOR COURTS MARTIAL AND DEFENCE FORCE MAGISTRATES

	GENERAL COURT MARTIAL				RESTRICTED COURT MARTIAL				DEFENCE FORCE MAGISTRATE						
	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	WD	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	WD	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	WD
		GUILTY	N.G.				GUILTY	N.G.				GUILTY	N.G.		
January	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
February	0	0	0	0	3	3	0	0	0	0	5	11	10	20	10
March	0	0	0	0	3	12	8	0	0	0	2	1	0	0	0
April	0	0	0	0	2	1	0	0	0	0	6	19	1	0	0
May	3	0	4	0	3	3	2	1	1	1	2	2	1	0	1
June	1	6	1	0	1	3	0	0	0	0	3	3	2	0	0
July	0	0	0	0	1	3	2	0	0	0	1	2	0	0	1
August	0	0	0	0	0	0	0	0	0	0	6	9	6	0	4
September	0	0	0	0	0	0	0	0	0	0	4	4	2	0	2
October	0	0	0	0	0	0	0	0	0	0	2	4	0	0	0
November	1	0	1	0	2	3	0	0	0	0	4	4	0	0	2
December	2	10	2	0	0	0	0	0	0	0	4	6	1	0	4
<b>TOTAL</b>	<b>7</b>	<b>16</b>	<b>8</b>	<b>0</b>	<b>8</b>	<b>15</b>	<b>28</b>	<b>12</b>	<b>1</b>	<b>1</b>	<b>39</b>	<b>65</b>	<b>23</b>	<b>20</b>	<b>24</b>

**DEFENCE FORCE DISCIPLINE ACT**

**LIST OF SECTIONS USED IN STATISTICS**

<b>Section Number</b>	<b>Class of Offence</b>	<b>Description</b>
23	3	Absence from duty
24	3	Absence without leave
25	3	Assaulting a superior officer
26	3	Insubordinate conduct
27	3	Disobeying a lawful command
28	3	Failing to comply with a direction in relation to a ship, aircraft or vehicle
29	3	Failing to comply with a general order
30	3	Assaulting a guard
31	3	Obstructing or refusing to assist a police member
32	3	Offences while on guard or watch
33(a)	3	Assault on another person
33(b)	3	Creating a disturbance
33(c)	3	Obscene conduct
33(d)	3	Insulting or provocative words to another person
34	3	Assaulting a subordinate
35	3	Negligent performance of duty
36(1)	2	Dangerous conduct
36(2&3)	3	Dangerous conduct
36A	3	Unauthorised discharge of weapon
36B	3	Negligent discharge of weapon
37	3	Intoxicated while on duty etc
38	3	Malingering
39	3	Causing loss, stranding or hazarding of a service ship
40	3	Driving while intoxicated
40A	3	Dangerous driving
40C	3	Driving a service vehicle for unauthorised purpose
40D	3	Driving without due care or attention etc
41	3	Flying a service aircraft below the minimum height
42	3	Giving inaccurate certification
43	3	Destroying or damaging service property
44	3	Losing service property
45	3	Unlawful possession of service property
46	3	Possession of property suspected of having been unlawfully obtained

<b>Section Number</b>		<b>Description</b>
47C	3	Theft
47P	3	Receiving
48	3	Looting
49	3	Refusing to submit to arrest
49A	3	Assault against arresting person
50	3	Delaying or denying justice
51	3	Escape from custody
52	3	Giving false evidence
53	3	Contempt of service tribunal
54	3	Unlawful release etc of person in custody
55	3	Falsifying service documents
56	3	False statement in relation to application for a benefit
57	3	False statement in relation to appointment or enlistment
58	3	Unauthorised disclosure of information
59(1)	1	Dealing in or possession of narcotic goods
59(5, 6 or 7)	2	Dealing in or possession of narcotic goods
60	3	Prejudicial conduct
61	1, 2 or 3	Offences based on territory offences

**LIST OF JUDGE ADVOCATES AND DEFENCE FORCE MAGISTRATES<sup>1</sup>**

Brigadier Ian Westwood AM, Chief Judge Advocate  
Colonel Roger Brown RFD  
Colonel Peter Morrison RFD  
Group Captain Peter Burke  
Commander the Hon Justice Dennis Cowdroy OAM RANR  
Commander Fabian Dixon SC RANR  
Commander Nanette Williams RANR  
Lieutenant Colonel Jennifer Woodward  
Wing Commander Gordon Lerve

**LIST OF ACTIVE S.154 OFFICERS**

Brigadier Ian Westwood AM, Chief Judge Advocate  
Colonel Roger Brown RFD  
Colonel Peter Morrison RFD  
Group Captain Peter Burke  
Commander the Hon Justice Dennis Cowdroy OAM RANR  
Commander Fabian Dixon SC RANR  
Commander Nanette Williams RANR  
Lieutenant Colonel Stuart Durward SC  
Lieutenant Colonel Jennifer Woodward  
Wing Commander John Devereux  
Wing Commander Gordon Lerve  
Lieutenant Commander Sylvia Emmett FM RANR

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<sup>1</sup> Certain of these appointments expired in September and, having regard to the volume of work, not all of the appointments were renewed.

**MERRILL CORPORATION**

ABN 85 120 213 318

Level 4, 190 Queen Street, Melbourne 3000. Telephone: 03 8628 5560 Fax: 03 9670 8582  
Operations in: Melbourne, Brisbane, Darwin, Canberra, Sydney, Adelaide, Townsville and Newcastle

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**TRANSCRIPT OF PROCEEDINGS**  
**TRANSCRIPT-IN-CONFIDENCE**

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**AUSTRALIAN DEFENCE FORCE**

**DEFENCE PLAZA, SYDNEY, NEW SOUTH WALES**

**PRE-TRIAL DIRECTIONS HEARING**

**BRIG I D WESTWOOD, Chief Judge Advocate**

**LTCOL T BERKLEY, with LTCOL H DEMPSEY and SQNLDR J LIDDY,**  
**Prosecutor**

**MAJ D McLURE, with CAPT K WOLAHAN, appearing for the**  
**First Defendant**

**MAJ J HYDE appearing for the Second Defendant**

**MR T BEGBIE appearing for the Commonwealth**

**0930 FRIDAY 20 MAY 2011**

**DAY 8**

**TRANSCRIPT VERIFICATION**

I hereby certify that the following transcript was made from the sound recording of the above stated case and is true and accurate

Signed.  .. Date *24/5/11*.....(Chief Judge Advocate)

Signed.  .. Date ....20/05/11.....(Recorder)

Signed.  .. Date ....20/05/11.....(Transcriber)

Signed.  .. Date ....20/05/11.....(Transcriber)

Signed.  .. Date ....20/05/11.....(Transcriber)

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12 Feb 2009 CIVCAS 20/05/11



# **EXHIBIT LIST**

Date: 20/05/11

<b>Number</b>	<b>Description</b>	<b>Page No.</b>
	EXHIBIT MFI 33 - COMMONWEALTH'S DOCUMENTS RE PROTECTIVE ORDERS SOUGHT .....	1

5 CHIEF JUDGE ADVOCATE: Please be seated and you may remove  
headdress. I have one preliminary matter before I rule on those  
applications, and that is that yesterday I received through the registry a  
copy of the Commonwealth's documents in connection with the protective  
orders sought. If there's no objection, I'll simply propose to mark those  
for identification 33.

10

PROSECUTOR: If the court pleases.

15 **#EXHIBIT MFI 33 - COMMONWEALTH'S DOCUMENTS RE  
PROTECTIVE ORDERS SOUGHT**

20 CHIEF JUDGE ADVOCATE: Pursuant to the Defence Force Discipline  
Act section 141(1)(b) the accused men have entered certain objections to  
the charges brought by the prosecution. Before detailing those  
applications, I shall refer to the charges and the prosecution applications to  
amend them.

25 Each accused man was originally separately charged with a principal  
count of manslaughter contrary to DFDA section 61(3) and the Crimes  
Act 1900 ACT section 15 and, in the alternative, with dangerous conduct  
with negligence as to the consequences, contrary to DFDA section 36(3).  
There was a further principal count against each man. As with the  
alternative counts, these further principal counts were charged as being  
30 contrary to DFDA section 36(3). There are issues with the drafting of the  
charges and, by minute dated 11 April 2011, the prosecution has  
foreshadowed an application to amend. Because of the objections taken to  
the charges, I shall deal with the application to amend in conjunction with  
the current objections by the accused men.

35

40 As against each accused man, the manslaughter charges were originally  
pleaded as follows: being a Defence member at Sorkh Morghab, Uruzgan  
Province, Islamic Republic of Afghanistan on 12 February 2009, did kill  
five persons, namely, two male children aged between 6 and 13 years, one  
female child aged between six and 13 years, one male infant aged  
approximately two years, and one female infant aged approximately two  
years. The amendments foreshadowed by the prosecution include  
severing those charges so as to bring separate counts of manslaughter in  
connection with each of the five persons allegedly killed. The charges  
45 will otherwise be particularised in the same way as the original charges.

The pleading of these charges is in accordance with section 275 of the Crimes Act which provides relevantly:

5                    *In an indictment for... manslaughter it shall not be necessary to set out the way in which or the means by which the death alleged was caused but it shall be sufficient... in an indictment for manslaughter to charge that the accused did kill the deceased.*

10                    In the case of SGT J, the charge against section 36(3), being the second charge on the charge sheet as originally framed and brought in the alternative to the principal count of manslaughter, is pleaded as follows: being a Defence member at Sorkh Morghab, Uruzgan Province, Islamic Republic of Afghanistan on 12 February 2009, did engage in dangerous  
15                    conduct by attacking with weapons an adult male located within a room of a residential compound and was negligent as to whether this act was likely to cause the death of civilians within that room. Particulars of attacking:  
20                    (a) directing members of Force Element Charlie to post an F1 fragmentation grenade into the room; (b) directing members of Force Element Charlie to fire a machine gun into the room; (c) directing members of Force Element Charlie to post a second F1 fragmentation grenade into the room; (d) firing his M4 assault rifle into the room.

25                    If the original first charge is severed in the manner foreshadowed by the prosecution, this will become the sixth charge and it is intended it will be pleaded in the alternative to the first, second, third, fourth and fifth counts. It is also intended that this charge will relate only to those civilians whose alleged deaths have been made the subject of the earlier manslaughter counts. Accordingly, it is proposed to amend the charge so as to provide  
30                    the following particulars of civilians within the room: (a) two male children aged between 6 and 13 years; (b) one female child aged between six and 13 years; (c) one male infant aged approximately two years; (d) one female infant aged approximately two years.

35                    What was originally the third charge against SGT J but which would become the seventh charge following the amendments foreshadowed by the prosecutor is brought as a further principal count. It is in the same terms as the original second charge, save that here it is alleged that his act was likely to cause grievous bodily harm to civilians within that room. It  
40                    is the prosecution's intention that that charge will apply to persons allegedly in the room but not the subject of the manslaughter counts. Accordingly, the prosecution have foreshadowed an amendment so as to provide the following particulars of civilians within the room to whom this charge is intended to relate: (a) two adult females; (b) one female child aged  
45                    approximately four years; (c) one female child aged

approximately 10 years.

5 In the case LCPL D, the alternative charge, the second charge on the original charge sheet, is pleaded as follows: being a Defence member at Sorkh Morghab, Uruzgan Province, Islamic Republic of Afghanistan on 12 February 2009, did engage in dangerous conduct by attacking with explosives an adult male located within a room at a residential compound and was negligent as to whether this act was likely to cause the death of civilians within that room. Particulars of attacking: (a) posting an F1  
10 fragmentation grenade into the room; and (b) posting a second F1 fragmentation grenade into the room.

15 As with the charges against SGT J, the prosecution application to sever the manslaughter count would mean that this would become the sixth charge. It would be pleaded in the alternative to the severed original first count. As with the sixth charge against SGT J, it is intended that this alternative count will relate only to those civilians alleged to have been the subject of the earlier manslaughter counts. As with the charges against SGT J, the original third charge is in the same terms as the second charge,  
20 save that it is alleged that the act was likely to cause grievous bodily harm to civilians within that room.

25 Again, the prosecution now propose that this count will become the seventh charge against LCPL D. It will be brought as a further principal count and it is intended to relate only to civilians alleged to have been within the room but who were not the subject of the earlier manslaughter counts. The civilians concerned will be particularised in the same way as they are in the proposed seventh charge against SGT J.

30 In the course of oral submissions, the prosecutor conceded that there might be some issue with the current pleading of the charges against DFDA section 36(3), by reason of these alleging conduct by attacking, but has made no further formal application to amend, pending my ruling on the matters currently before the court.  
35

On the basis of the application to amend the charges, foreshadowed by the prosecutor, the accused men make the following applications:

40 (a) *Pursuant to DFDA section 141(1)(b)(iv), the accused object to the charges on the grounds that they do not disclose a service offence or are otherwise wrong on law.*

In summary, the accused contend that:

- 5
1. *The homicide offences in the Crimes Act 1900 ACT, picked up by DFDA section 61, and the offences provided by DFDA section 36 do not apply to the conduct of soldiers in combat causing the death of civilians not taking a direct part in hostilities, because conduct of that kind is more specifically proscribed in Division 268 of the Criminal Code 1995 Cth.*
- 10
2. *Alternatively, soldiers acting in the course of their duties are immune from prosecution for causing death or injury to others, in the course of combat, unless their conduct contravened customary international law, that is, the laws of armed conflict and international humanitarian law.*
- 15
3. *Alternatively a charge, having a fault element of negligence against soldiers for their conduct in combat is wrong in law, because soldiers do not owe a legally enforceable duty of care to anyone for their acts in combat.*
- 20
- (b) *alternatively, pursuant to DFDA section 141(1)(b), objection is taken to the charges on the grounds that they are duplicitous.*
- 25
- (c) *alternatively, pursuant to DFDA section 141(1)(b), objection is taken to charges 6 and 7 against both accused, on the grounds that acquittal or conviction on charge 6 would entitle the accused to a defence of autrefois acquit or autrefois convict, on charge 7.*
- 30
- (d) *alternatively, pursuant to DFDA section 141(1)(b), the accused object to the charges on the grounds that the prosecution had declined to provide essential particulars.*
- 35
- (e) *on these grounds, the accused seek an order that the charges be dismissed, or permanently stayed.*

40

The objection that the prosecution has declined to provide essential particulars related originally to the application made on 30 March this year. In that application, each accused man asserts that the prosecutor is required to provide particulars of alternate courses of action that the prosecution say he could have adopted to avoid what is said to be an outcome attracting criminal sanction. The prosecution resists this application. The application was subsequently extended to the amended particulars supplied by the prosecutor.

45

I would make some general observations concerning the accused men's

submissions. They submit as core propositions, inter alia, that:

5                   *Subject to the laws of armed conflict, soldiers engaged in combat during armed conflict may lawfully kill or wound enemy combatants and attack military objectives, even when it is known that the attack will cause civilian deaths or injuries, if those expected deaths or injuries are proportionate to the anticipated military advantage.*

10                  In support of that proposition, they refer to article 43(2) of Additional Protocol 1 of 1977 to the Geneva Conventions, which provides:

15                   *Members of the armed forces of a party to a conflict, other than medical personnel and chaplains, covered by Article 33 of the third convention, are combatants. That is to say, they have the right to participate directly in hostilities.*

20                  They also refer to the decision in *United States v Lindh* (2002) Federal Supplement, 2nd Series 541 at 553, where the court referred to combatant immunity in the following terms:

25                   *Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.*

30                  The first observation that I would make is that the conduct of a member of the Australian Defence Force is not regulated solely by the restrictions and limitations of the law of armed conflict. It is open to the parliament, through legislation, or to proper military authority, through lawful orders, to further restrict and regulate the conduct of Defence members.

35                  Legislation, even if in contravention of generally acknowledged principles of international law, is binding upon, and must be enforced by, the courts of this country. I rely, for that proposition, on the observations of Latham CJ in *Polites v The Commonwealth* (1945) 70 CLR 60 at 69.

40                  The second observation is that in terms of the decision in *US v Lindh*, the prosecution case is that the actions allegedly perpetrated by the accused men were not lawful, belligerent acts against legitimate military targets.

45                  Before proceeding further, it is convenient to look at the legislative provisions creating the offences. The primary counts of manslaughter brought against each man are incorporated as service offences by the operation of DFDA section 61(3). That subsection provides:

*A person who is a Defence member or a Defence civilian is guilty of an offence if:*

- 5                   (a) *the person engaged in conduct outside the Jervis Bay territory, whether or not in a public place, and*
- (b) *engaging in that conduct would be a territory offence if it took place in the Jervis Bay territory, whether or not in a*  
10                   *public place.*

The territory offences incorporated into the DFDA, by operation of section 61(3), include those created by the Commonwealth Criminal Code. The offence of manslaughter arises under the Crimes Act 1990  
15                   ACT, section 15, which provides, relevantly:

1. *Except if a law expressly provides otherwise, an unlawful homicide that is not, under section 12, murder, shall be taken to be manslaughter.*
- 20                   2. *A person who commits manslaughter is guilty of an offence punishable, on conviction, by imprisonment for 20 years.*

DFDA, section 36, creates the offence of dangerous conduct. It regulates in a descending hierarchy of seriousness certain dangerous conduct. Section 36(1) provides:

25                   

*A person who is a Defence member or a Defence civilian is guilty of an offence if:*

30                   

- (a) *the person engages in conduct; and*
- (b) *the conduct is in or in connection with -*
- 35                   (i) *the operation, handling, service or storage, or*
- (ii) *the giving of directions with respect to the operation, handling, servicing or storage*
- 40                   *of a ship, aircraft or vehicle or of a weapon, missile, explosive or other dangerous thing or equipment; and*
- (c) *the conduct causes or is likely to cause the death of or grievous bodily harm to another person, and*
- 45

*(d) the first mentioned person knows of the matter mentioned in paragraph (c); and*

5 *(e) where the person mentioned in paragraph (c) is an enemy person the conduct is not in the execution of the first-mentioned person's duty.*

10 Subsections (2) and (3) of section 36 are in identical terms to subsection (1), save that the fault element attaching to the accused person's awareness of the causation or likely causation of death or grievous bodily harm to another person is in subsection (2) recklessness and subsection (3) negligence. The maximum punishment on conviction for an offence against subsection (1) is 10 years imprisonment. For an offence against subsection (2) is five years imprisonment and for an offence against subsection (3) is two years imprisonment.

15 DFDA section 3(1) defines "enemy person" to mean:

20 *(1) a representative or agent of the enemy or (2) a member of an armed force of a body politic that constitutes the enemy or an armed force or other force that constitutes the enemy.*

"The enemy" is defined to mean:

25 *A body politic or an armed force engaged in operations of war against Australia or an allied force and includes any force, including mutineers and pirates, engaged in armed hostilities against the Defence Force or an allied force.*

30 In order to fully understand the basis on which the accused men's applications are made it is necessary to refer briefly to some aspects of the case foreshadowed by the prosecutor. The prosecution case is that the conduct giving rise to the charges took place during a night-time operation within a residential compound in Afghanistan. Prior to the conduct on the part of the accused men alleged to give rise to the charges, a member of  
35 the force commanded by SGT J is said to have fired upon an adult male located within a room within the compound. The adult male returned fire. That fire continued, at least sporadically, until the posting of the second grenade.

40 The adult male was killed as a result of the actions alleged on the part of the accused men. No charge is brought concerning his death. The prosecution alleges that the room in which the adult male was located also contained civilian non-combatants, including children. It is alleged that  
45 the accused men's acts resulted in the deaths of certain of the children and



was otherwise such as to fall within the conduct proscribed by section 36(3).

5 The prosecution case against each of the accused men is one of involuntary manslaughter by criminal negligence and dangerous conduct with negligence as to consequences. The prosecution does not allege that either intended to occasion the death of or grievous bodily harm to the alleged victims or to unlawfully kill or injure any other person.

10 As Simpson J noted in R v Sood Ruling No. 3 (2006) NSWSC 762 at paragraph 43:

15 *The elements of manslaughter by criminal negligence may be stated as follows: (1) The accused did an act or omitted to do an act. (2) As a result of which a death of a person was caused. (3) The accused was under a duty of care to that person. (4) The act or omission constituted a breach of the accused's duty of care to that person of such magnitude as to warrant being punished by a criminal justice system.*

20 The prosecution does not have to establish that the accused's actions were otherwise unlawful. The negligence required to establish the manslaughter charges is governed by the common law. In particular, it is the test enunciated by the Full Court of the Supreme Court of Victoria in Nydam v R (1977) VR 430. For the purposes of DFDA section 36(3), negligence is governed by the provisions of the Commonwealth Criminal Code section 5.5.

30 That codification in the Criminal Code was based on the common law position in Nydam and for current purposes it will suffice if I refer simply to the codified provision. The code at section 5.5 provides:

35 *A person is negligent with respect to a physical element of an offence if his or her conduct involves;*  
*(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and*  
*(b) such a high risk that the physical element exists or will exist that the conduct merits criminal punishment for the offence.*

40 While the accused men have raised the issue of whether or not a duty of care was owed to the civilians as an alternative argument to certain other propositions, it is convenient to start with that issue. If, as a matter of law, there is no duty of care, then the proposed manslaughter charges disclose no offence and there would be no requirement to consider combatant immunity from prosecution or a potential conflict with other criminal

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provisions.

5 Under cover of a minute of 11 April 2011 - and this is marked for identification 15 - the learned prosecutor formally withdrew the particulars that had been provided at documents marked for identification 8 and 10. And these have become exhibits 2 and 5 on the application for particulars dated 30 March. Those earlier particulars had asserted that a duty of care towards the Afghan civilians allegedly impacted by the accused men's actions was imposed through their orders.

10 The particulars provided under cover of the minute of 11 April simply assert in connection with the charges of manslaughter by negligence at paragraph 14:

15 *Each of the accused owed the five dead civilian children a duty of care not to kill or injure them.*

So far as the offences brought against DFDA section 36 are concerned, the prosecution says at paragraph 23:

20 *Each of the accused owed the five dead civilian children a duty of care not to kill or injure them.*

And at paragraph 32:

25 *Each of the accused owed the civilian survivors a duty of care not to kill or injure them.*

30 The particulars include a general reference to the accused men's orders and instructions at paragraph 18 in connection with the manslaughter counts and at paragraphs 28 and 36 in connection with the offences against DFDA section 36(3). These particulars are in the same terms and provide - and I quote from those given at paragraph 18:

35 *The matters to which the court martial panel may have regard in deciding whether the accused men were negligent are not limited by subsection 11(2) of the DFDA (vide subsection 11(3)(B) of the DFDA). These include but are not limited to orders and instructions and training relating to the use of force and*  
40 *limitations on the use of force such as Rules of Engagement, the six-step targeting process and verbal instruction.*

45 The particulars do not further describe how it is said by the prosecution that the accused men's orders and instructions were relevant. In the course of oral submissions it was common ground that a duty of care was

5 required for the manslaughter counts but the learned prosecutor resiled from the position in the particulars that a duty of care was required for the purposes of section 36(3). However, if I were to rule that a duty of care had as a matter to be established, he would submit that it arose on the same basis as that which the prosecution says arises to found the manslaughter counts.

10 I shall deal firstly with the manslaughter counts. In the case of the manslaughter counts the prosecution initially asserts that the duty of care arises as a matter of common law. In *Callaghan v R* (1952) 87 CLR 115 Dixon CJ and Webb, Fullagar and Kitto JJ refer with approval to the summing up to a jury by Sir James Fitzjames Stephen explaining the neglect which may make a man guilty of manslaughter as follows:

15 *Manslaughter by negligence occurs when a person is doing anything dangerous in itself or has charge of anything dangerous in itself and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence and ought to be punished.*

20 The prosecution says that the accused men were doing something dangerous in and of itself and that a duty of care therefore arose to those who might be impacted by their conduct.

25 In the course of oral submissions the prosecutor advanced for the first time the proposition that a duty of care arose as a result of the application of international law. As I understand the basis on which this submission was ultimately refined, reliance was placed on the accused men's orders which were said to reflect a duty of care arising under international law.  
30 In light of these submissions, the defence sought answers from the prosecutor to the following questions. This is from the document marked for identification 32.

35 (1) *Does the prosecution say that the duty of care referred to in paragraph 2 of the minute, i.e. a common law duty of care not to harm the civilian occupants of room 6 when engaging the fighting aged male, was a duty owed in relation to the manslaughter charges as well as the dangerous conduct charges?*

40 (2) *Does the prosecution still maintain that a duty of care arises from the fact that the accused were engaged in a dangerous activity?*

45 (3) *Does the prosecution contend that on 12 February 2009 the*

*accused attacked the civilian occupants of room 6 within the meaning of article 13 of Additional Protocol 2 to the Geneva Conventions of 1949 and articles 48 to 51 of Additional Protocol 1 to the Geneva Convention of 1949?*

5

*(4) Does the prosecution contend that the accused were ever shown the Rules of Engagement?*

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*(5) In relation to ADDP 06.1, Rules of Engagement, and ADDP 06.4 Law of Armed Conflict -*

and these were certain policy manuals of the department -

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*does the prosecution contend that (a) these publications constitute orders binding the accused; (b) the accused read these documents at any time before 12 February 2009?*

The learned prosecutor responded - and this is from the transcript for 18 May, pages 33 to 35:

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*In relation to point 1, consistently with our submissions, the duties owed in relation to the manslaughter charges, but consistently with our proposition that there is no duty in respect to the section 36 charges.*

25

I then sought some clarification from the prosecutor and in effect I asked him to confirm whether it was the case that if I were against him in connection with that, that he would assert that the duty arose in the same way as he asserted it arose for the manslaughter to which the response was given *yes on both bases, which answers question 2. The answer to that is yes. The answer to 3 is as follows:*

30

*In relation to a deliberate attack as described in Article 49 of Protocol 1 and Article 13 of Protocol 2, no. In relation to question 4, does the prosecution contend that the accused were shown the Rules of Engagement, that document? No. In relation to question 5, in relation to the documents, the answer to (a) would necessarily be in part because I put them to you as some parts are compulsory, some parts are merely policy. In relation to paragraph (b), no.*

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MAJ McLure raised the prospect of there being some ambiguity in connection with answer 3 and the learned prosecutor responded:

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*To save any ambiguity, as I said, in terms of a deliberate attack,*

5 no. And a deliberate attack is described I think in article 49 of Additional Protocol 1 and it's not further described in Protocol 2. Remember we're using the Nydam test here. We are saying that engaging the fighting aged male such a great situation of danger was occasioned to other occupants of the room that their actions were such a great falling short. Now, I don't think I can put it any more explicitly than that.

10 He subsequently in answer to a question from me said:

15 *We say that there is evidence that they did know that there were civilians there or that they did appreciate the likelihood. But whatever that may bring in the course of the case, we say the evidence would reveal that a reasonable person would have known of their likely presence or their actual presence. It's always been our case that in engaging the fighting aged male they created the danger to the civilians and that, as we've said, gave rise to the duty to them at common law.*

20 There was a further question asked in connection with a question going to the protocols. The learned prosecutor responded:

25 *I don't think that you can answer it yes or no. We are not suggesting that it is relevant at all to the case whether there was an intentional attack on the civilians. It is simply irrelevant. We are saying that this is a negligent situation. If the question asked is this on the behalf of the accused: are we saying that we breached that specific article of the protocol? No. The articles of the protocol are mentioned as being part of a fabric of duties which we say gives rise to a duty of care, not each and every one of them, but they are, such as the articles that we have pointed out, give rise to proportionality are part of this fabric, and that's how I put it. I want it to be clear they are part of the fabric. As to those particular ones, no, of course not; I think that should be clear.*

40 The ongoing changes of approach by the prosecution are perhaps indicative of the difficulties inherent in a prosecution for allegedly negligent acts said to have been committed in the course of armed conflict. While of course it is not determinative, I think the fact that the prosecution is unable to refer me to any cases where charges of negligent manslaughter have been brought in connection with actual combat situations is also illustrative of the difficulties in this regard.

45 The accused men submit that, as a matter of law, there was no duty of

care. The learned authors of Thomson Reuters, the Laws of Australia - and this at paragraph 10.1.151 - say in connection with the duty of care to the victim that must be established for manslaughter by criminal negligence:

5

*In the case of death occasioned by an omission a legal duty to take positive action to avoid causing death or injury to the victim must be established. Where death is caused by a positive act, the duty of care to the victim may be established on the basis that a person is under a general tortious duty to act in such a way as not to cause harm to another.*

10

They say that this conclusion is implicit in the test of criminal negligence expounded by the court in *Nydam v R* and from Sir James Stephen's summing up in a matter of *R v Doherty* [1887] 16 Cox's Reports 306 at 309. As his Honour the Chief Justice at common law, McClellan CJ and Howie JA observe in *Burns v R* (2011) NSWCCA 56 at paragraph 96:

15

*Gross negligence manslaughter depends upon the offender owing the deceased a duty of care: Kelly v Rex [1923] 32 CLR 509 at 515; R v Taktak (1988) 14 NSWLR 226 at 357; R v Hall (1999) NSWSC 738 and (1999) 108 A Crim R 209 at 211-212. The duty must be recognised by common law or statute. Not every moral duty amounts to a legal duty: R v Instan [1893] 1 QB 450 at 453, a judgment of Coleridge CJ.*

20

25

For reasons to which I will come subsequently, I consider the issue of whether the duty of care can be established to be of fundamental importance. It is not asserted that there was a statutory duty of care for the purposes of the manslaughter charges.

30

In *Rex v Bateman* [1925] 19 Cr App R 8, a decision of the United Kingdom Court of Criminal Appeal comprising Lord Hewitt CJ and Salter and Fraser JJ, the court draws no distinction between the duty of care required to establish tortious liability and that required to establish criminal negligence. The court said at page 10:

35

*In expounding the law to juries on the trial of indictments for manslaughter by negligence, judges have often referred to the distinction between civil and criminal liability for death by negligence. The law of criminal liability for negligence is conveniently explained in that way. If A has caused the death of B by alleged negligence then, in order to establish civil liability, the plaintiff must prove, in addition to pecuniary loss caused by the death that A owed a duty to B to take care, that the duty was*

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45

*not discharged and that the default caused the death of B.*

5 *To convict A of manslaughter, the prosecution must prove the three things abovementioned and must satisfy the jury in addition that A's negligence amounted to a crime. In the civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence but on the amount of damage done. In a criminal court on the contrary, the amount and degree of negligence are the determining question.*

10  
15 That statement of the law was approved more recently by the House of Lords in R v Adomako (1995) 1 AC C 171. It also reported at (1994) 3 All ER 79. In that matter Lord McKay went on to say - and this is from page 86 of the All England Report:

20 *On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died.*

25 In Re Milgate (1994) 118 FLR 77 Higgins J, sitting in the Supreme Court of the ACT, followed Bateman in dealing with an application under the Criminal Injuries Compensation Act 1983 ACT. In the matter of Burns, to which I have already referred, the New South Wales Court of Criminal Appeal was concerned with whether the supplier of a prohibited drug owes a duty of care to a person to whom they supplied the drug and who, in their presence, takes the drug. The court notes at paragraph 99 that there is debate as to whether the duty of care in gross negligence manslaughter is to be equated with the duty giving rise to a liability in tort.

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35 At paragraph 100 their Honours refer to the argument of Messrs Herring and Palser in their article the Duty of Care in Gross Negligence (2007) Criminal Law Review 24 at 37 that:

*The nature of criminal proceedings necessitates a different approach to the question of duty of care that is appropriate in civil proceedings.*

40 At paragraph 102 the Court of Criminal Appeal say that it was not necessary to explore the issue in that case. They do, however, at paragraph 111 cite for approval a portion of the judgment handed down by Lord Judge in R v Evans (Gemma) (2000) EWCA Crim Div 650, which includes the following passage:

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5                    *In our judgment, consistent with R v Adomako (1995) 1 Appeal Cases 171, and the link between civil and criminal liability for negligence, for the purposes of gross negligence manslaughter, when a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening, a consequent duty on him to act, by taking reasonable steps to save the other's life will normally arise.*

10                  At the time of the alleged conduct giving rise to the charges, the accused men were on active service in Afghanistan. It is agreed, for present purposes, that the accused men were participating in an armed conflict of a non-international character. It is common ground that, subject to their orders, they were authorised to use force, including lethal force. In these  
15                  circumstances the question arises as to whether there is a duty of care to private individuals.

                    In *Shaw Savill & Albion Company Ltd v The Commonwealth (1940) 66 CLR 344*, the High Court considered an action for negligence, brought  
20                  against the Commonwealth, following a collision between HMAS ADELAIDE and the motor vessel *Coptic*.

                    Dixon J, with whom Rich ACJ and McTiernan J agreed said, at page 361:

25                    *It could hardly be maintained that during an actual engagement with the enemy, or a pursuit of any of his ships, the navigating officer of a King's ship of war was under a common law duty of care to avoid harm to such non-combatant ships as might appear in the theatre of operations.*

30                    *It cannot be enough to say that the conflict or pursuit is a circumstance affecting the reasonableness of the officer's conduct as a discharge of the duty of care, though the duty itself persists.*

35                    *To adopt such a view would mean that whether the combat be by sea, land or air, our men go into action accompanied by the law of civil negligence warning them to be mindful of the person and property of civilians.*

40                    *It would mean that the courts could be called upon to say whether the soldier, on the field of battle, or the sailor fighting on his ship, might reasonably have been more careful to avoid causing civil loss, or damage.*

45                    *No one can imagine a court undertaking the trial of such an issue*



*either during or after a war. To concede that any civil liability can rest upon a member of the armed forces for supposedly negligent acts or omissions in the course of an actual engagement with the enemy, is opposed, alike, to reason and to policy.*

5

His Honour went on to say, at 361-362:

*The principle must extend to all active operations against the enemy. It must cover attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement.*

10

Subsequently, at 362:

*But when, in an action of negligence against the Crown, or a member of the armed forces of the Crown, it is made to appear to the court that the matters complained of formed part of, or an incident in, active naval or military operations against the enemy, then, in my opinion, the action must fail on the ground that while in the course of actually operating against the enemy, the forces of the Crown are under no duty of care to avoid causing loss or damage to private individuals.*

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In *Groves v The Commonwealth* (1982) 150 CLR 113, Gibbs CJ said, at page 117:

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*I have no difficulty in accepting the correctness of what was said by Dixon J in *Shaw Savill & Albion Co Limited v The Commonwealth*.*

That approach of the High court, in *Shaw Savill*, was more recently applied by the England & Wales Court of Appeal (Civil Division) in *Mulcahy v The Ministry of Defence* (1996) EWCA Civ 1323. That case involved an action by a soldier who was injured when a Howitzer gun was discharged after the soldier had been directed by a sergeant to proceed to the front of the gun concerned.

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Neill LJ, with whom the other members of the court agreed, specifically rejected a suggestion by counsel, and this is from page 770 of the report in the All England Reports, the citation for the All England Reports is (1996) 2 All ER 758.

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*It's been submitted, by the plaintiff in that matter, that the right approach, it was suggested, was to allow the claim to proceed and then to have an investigation, at the trial, into the particular circumstances surrounding the firing of the gun to see whether there had been any breach of a duty of*

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care. *The exigencies of battle might well provide an excuse for what, in other circumstances would constitute a breach of duty.*

The court specifically rejected that argument.

5 This approach, which was rejected in both *Shaw Savill* and in *Mulcahy*, in  
the case of civil actions for negligence, is, of course, the approach for  
which the learned prosecutor contends. He says that there is a duty of care  
and that the court martial can consider all of the relevant circumstances,  
10 including the fact of armed conflict, and decide whether or not it is  
satisfied, beyond reasonable doubt, that criminal negligence is established.

Neill LJ went on to say, and this is from page 771 of the All England  
Reports:

15 *The question then becomes is a duty of care to be imposed in such  
conditions so as to make one serviceman liable for his negligent  
act towards another.*

20 *In my opinion, despite the careful arguments addressed to us on  
behalf of the plaintiff, there is no basis for extending the scope of  
the duty of care so far.*

25 *I would echo the words of Gibbs CJ, in Groves case (1982) 150  
CLR 113 at 117 to hold that there is no civil liability for injury  
caused by the negligence of persons in the course of an actual  
engagement with the enemy seems to me to accord with common  
sense and sound policy.*

In that same matter, Sir Iain Glidewell observed, and this is at page 772:

30 *Indeed, it could be highly detrimental to the conduct of military  
operations if each soldier had to be conscious that even in the  
heat of battle he owed such a duty to his comrade. My reasons  
are thus, in essence, those expressed by Dixon J in the passage  
35 from his judgment in Shaw Savill & Albion Co Limited v The  
Commonwealth.*

And his Honour continues:

40 *If, during the course of hostilities, no duty of care is owed by a  
member of the armed forces to civilians or their property, it must  
be even more apparent that no such duty is owed to another  
member of the armed forces.*

45 *Shaw Savill* and the other cases in which it was applied were of course

concerned with civil liability for the test of negligence. The learned prosecutor submits that the cases should be distinguished on that basis and he referred me to a number of United Kingdom authorities in which the observations of Lord McKay in Adomako, to which I have referred, were considered.

The principal case on the point was R v Wacker (2002) EWCA Crim 1944. The Court of Appeal was there considering a case of negligent manslaughter in connection with the deaths of a number of illegal immigrants being smuggled into the United Kingdom. They were conveyed by the accused in a cargo container. With a view to evading detection, the accused closed the air vent to the container and they suffocated. Those who died had been willing collaborators with the accused in the illegal activity concerned.

The court below had proceeded on the basis that the ordinary principles of the law of negligence did not recognise a duty of care owed between those involved in a criminal enterprise. This approach was taken on what was said to be a strict application of the principles from Adomako to which I have referred. The Court of Appeal started with a consideration of public policy. They say at paragraph 30:

*There are occasions when it is helpful when considering questions of law for the court to take a step back and to look at an issue of law that arises without first turning to and becoming embroiled in the technicalities of the law. This is such a case. We venture to suggest that all right-minded people would be astonished if the propositions being advanced on behalf of the appellant correctly represented the law of the land.*

At paragraph 35 they say:

*Thus looked at as a matter of pure public policy, we can see no justification for concluding that the criminal law should decline to hold a person as criminally responsible for the death of another simply because the two were engaged in some joint unlawful activity at the time, or indeed, because there may have been an element of acceptance of a degree of risk by the victim in order to further the joint unlawful enterprise. Public policy, in our judgment, manifestly points in totally the opposite direction.*

At paragraph 37 they conclude:

*Adomako was a case where an anaesthetist had negligently brought about the death of a patient. It therefore involved no*

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*element of unlawful activity on the part of either the anaesthetist or the victim. We have no doubt that issues raised in the case we are considering would never had crossed the minds of those deciding that case in the House of Lords. Insofar as Lord McKay referred to ordinary principles of the laws of negligence, we do not accept for one moment that he was intending to decide that the rules relating to ex turpi causa were part of those ordinary principles. He was doing no more than holding that in an ordinary case of negligence the question whether there was a duty of care was to be judged by the same legal criteria as governed whether there was a duty of care in the law of negligence. That was the only issue relevant to that case and to give the passage more extensive meaning accepted in the court below was, in our judgment, wrong.*

Consistent with Adomako and unlike the facts in Wacker and the other cases to which I was referred, these being R v Gemma Evans - and I think I have already given the citation for that - and R v Willoughby (2005) 1 WLR 1880, there is no element of otherwise unlawful activity alleged against the accused men. There is no contention that they were not authorised by their orders to engage the fighting aged male and their actions, aside from the result alleged to have been occasioned or which was said to have been likely to have been occasioned, are not asserted to have been otherwise unlawful.

Again, unlike the situation in Wacker, I do not consider that public policy relating to whether or not a duty of care should exist for the purpose of a criminal offence allegedly committed in the course of armed conflict is necessarily different from that applied by the High Court in determining the same question for the purposes of civil liability.

In the case of a duty of care asserted to exist in connection with armed conflict, it seems to me that the public policy considerations are identical insofar as either the prospect of civil suit or criminal charges might restrict what would otherwise be lawful conduct directed towards engaging the enemy. Indeed, it would seem an extraordinary position if members of the Defence Force engaged on actual operations against the enemy had no duty of care such as to give rise to an action for negligence sounding only in damages because, to quote from Dixon J:

*To adopt such a view would mean that whether the combat be by sea, land or air, our men go into action accompanied by the law of civil negligence warning them to be mindful of the person and property of civilians.*

Yet a duty of care existed for the purposes of the criminal law where breach could constitute negligent manslaughter and result in 20 years imprisonment.

5 In considering the approach that was taken by the High Court in Shaw  
Savill, I think it important to bear in mind that members of the Defence  
Force are in a unique position under Australian law when actually  
engaged in armed conflict on the authority of the Commonwealth.  
10 Subject to applicable laws of the Commonwealth, their orders and the  
accepted Laws of Armed Conflict, they are authorised to offensively apply  
force, including lethal force.

15 It is accepted that they will not be doing so in a benign environment.  
Rather, there is an inevitable and real risk of death or injury either as  
a result of the inherently dangerous tasks that they may be ordered to  
undertake to attack the enemy or as a result of enemy action. There will  
rarely be time for calm reflection and a careful weighing of risks and  
consequences in exchanges with life and death consequences for all. They  
are compellable on pain of penalty to conduct operations against the  
20 enemy.

I refer, for example, to the specific provisions contained in the DFDA at  
part 3, relating to offences, these being Division 1, Offences Relating to  
Operations Against the Enemy.

25 I will not quote extensively from these, but I shall refer to two of them.  
Section 15 creates the offence of abandoning or surrendering a post. It  
provides that:

30 *A Defence member or a Defence civilian is guilty of an offence if  
the person has a duty to defend or destroy a place, post, service  
ship, service aircraft or service armoured vehicle and the person  
knows of that duty and the person abandons or surrenders to the  
enemy the place or thing mentioned.*

35 There is a defence, as with most of the offences created by Division 1,  
with the onus on the accused, on the balance of probabilities, to establish  
that he or she had a reasonable excuse for the relevant conduct.

40 Section 15(f) relates to failing to carry out orders.

45 *A person who is a Defence member or a Defence civilian is guilty  
of an offence if the person is ordered by his or her superior  
officer to prepare for or to carry out operations against the  
enemy, or is otherwise under orders to prepare for or to carry out*

*operations against the enemy and the person does not use his or her utmost exertions to carry those orders into effect.*

5 These offences carry a maximum punishment of 15 years' imprisonment,  
as do a number of the other offences contained in Division 1, relating to  
operations against the enemy. In my view, they speak of parliament's  
clear intention that members of the Defence Force are to do their utmost in  
attacking and resisting the enemy, subject, of course, to accepted  
principles of the laws of armed conflict and to specific laws of the  
10 Commonwealth, such as those contained in the Commonwealth Criminal  
Code, Division 268.

15 Members of the Defence Force cannot simply decide that they will take no  
further part in hostilities, or that they will refrain from engaging in  
conduct that is inherently dangerous to themselves or others. Or that they  
will refrain from inflicting harm on enemy persons when their duty  
requires otherwise.

20 In the different situation of aid to the civil power, Lord Diplock expresses  
the contrast between the position of the soldier and the civilian, in these  
terms, and this is Reference under section 48A of the Criminal Appeal  
(Northern Ireland) Act 1968, No 1 of 1975 and it's reported at (1976)  
2 All ER 937. This, of course, related to the difficulties in Northern  
Ireland at the time of the IRA terrorist attacks. His Lordship says:

25  
*In theory, it may be the duty of every citizen when an arrestable  
offence is about to be committed in his presence, to take whatever  
reasonable measures are available to him to prevent the  
commission of the crime. But the duty is one of imperfect  
obligation and does not place him under obligation to do  
30 anything by which he would expose himself to risk of personal  
injury. Nor is he under any duty to search for criminals or seek  
out crime.*

35  
*In contrast to this, a soldier who is employed in aid of the civil  
power in Northern Ireland is under a duty, enforceable under  
military law, to search for criminals, if so ordered by his superior  
officer, and to risk his own life, should this be necessary in  
preventing terrorist acts.*

40  
*For the performance of this duty he is armed with a firearm, a  
self-loading rifle, from which a bullet, if it hits the human body, is  
almost certain to cause serious injury, if not death.*

45 The armed conflict in which a member of the Defence Force might find

him or herself will potentially range from situations where the security of the nation is under real and imminent threat to situations where, together with our allies, Australian forces enjoy technical and tactical superiority.

5 It could not be suggested that the situation faced by the accused men fell at the former end of the spectrum, but the principles of law must apply equally to all situations of armed conflict. The potential of what is at stake may be gleaned from some observations of Sir Isaac Isaacs, sitting in the High Court, in a matter of *Farey v Burvett* (1916) HCA 36.

10 This was a case about rationing at the time of the 1914-18 war. His Honour said, at page 9:

15 *A war imperilling our very existence, involving not the internal development of progress, but the array of the whole community in mortal combat with the common enemy, is a fact of such transcendent and dominating character as to take precedence of every other fact of life. It is the ultimo ratio of the nation.*

20 While the learned prosecutor sought to rely upon obligations arising under the international laws of armed conflict, in aid of his contention that a duty of care applied, I do not consider that this is the position under that law, at least for the purposes of establishing criminal liability.

25 I see that we are not at almost 10 minutes to 11. It might be convenient if I were to take the morning tea adjournment at this point and I will look to resume at a quarter past 11.

30 **ADJOURNED** [1048]

**RESUMED** [1116]

35 **CHIEF JUDGE ADVOCATE:** Before the adjournment I was about to move to my reasons for having concluded that the position under international law was such that it did not give rise to a duty of care, at least for the purposes of establishing criminal liability.

40 The international obligations assumed by Australia as a signatory to Additional Protocol 1 to the Geneva Conventions of 12 August 1949 were subsequently made the subject of the Geneva Conventions Act 1957. Article 51 provides the civilian population and individual civilians with general protection against dangers arising from military operations,  
45 relevantly, 51(2).

5                    *The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population are prohibited.*

And 51(4):

10                    *Indiscriminate attacks are prohibited. Indiscriminate attacks are: those which are not directed at a specific military objective; those which employ a method or means of combat which cannot be directed at a specific military objective; or those which employ a method or means of combat, the effects of which cannot be limited as required by this protocol, and, consequently, in each such case*  
15                    *are of a nature to strike military objectives and civilians or civilian objects without distinction.*

20                    The commentary to Article 51, the protection of the civilian population, at paragraph 1934 provides:

*Thus, in relation to criminal law, the protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result.*

25                    In the matter of the Prosecutor v Blaskic IT-95-14-T for 3 March 2000 at paragraph 180, the trial chamber of the International Criminal Tribunal for the former Yugoslavia said that the mens rea required for an offence based on breach of the protection of its civilians by the laws and customs of war, as proscribed by Article 3 of the tribunal's statute:

30                    *Such an attack must have been conducted intentionally in the knowledge or when it was impossible not to know that civilians or civilian property were being targeted not through military necessity.*

35                    At paragraph 170 of its judgment the trial chamber held that Article 3 of its statute covered the additional protocols. In the corresponding matter of Prosecutor v Gaelic IT-98-29-T of 5 December 2003 at paragraph 42, the trial chamber held that the above quote from Blaskic is applicable to  
40                    Article 51(2) of Additional Protocol 1. Similarly, in incorporating into Australian domestic law the obligations arising under Additional Protocol 1 by way of the provisions inserted into the Commonwealth Criminal Code at Chapter 8, Offences Against Humanity and Related Offences, fault elements of intention, knowledge or recklessness are required. Mere  
45                    negligence will not suffice.



5 A duty of care giving rise to criminal responsibility for negligent acts committed in the course of armed conflict would be more onerous than the duty imposed by the accepted law of armed conflict and the international agreements to which Australia is a signatory. It would also be more onerous than the specific war crimes regulating armed conflict of a non-international character through Division 268 of the Commonwealth Criminal Code.

10 I have given careful consideration to the fact that criminal negligence requires a far greater departure from the standard of the reasonable person that is required to establish civil negligence and the extent to which this might ameliorate the concern expressed by Dixon J in *Shaw Savill*, such that the existence of a duty of care for the purposes of the criminal law  
15 should be distinguished from the position held to exist for tort. I do not consider that it does. While the departure from the standard of the reasonable person necessary to found civil liability is less than that necessary to found criminal liability, so too are the consequences. Insofar  
20 as a member of the ADF might, as a consequence of a duty of care, be required to be mindful of persons and property, I do not think any rational distinction can be drawn.

25 The difficulties inherent in a member of the ADF engaged in actual combat having a duty of care, whether in tort or for the purposes of manslaughter, is pointed out by MAJ McLure's submissions as to the potential conflict between duties to one's comrades and duties to others on the battlefield. It begs the question of which duty is paramount and would run the real risk of causing members in such a situation to hesitate in  
30 circumstances where that might prove fatal and give enemy forces a corresponding advantage.

35 Similarly, in connection with the receipt of orders and the obligation to obey them, the subordinate only knows for certain what he or she can detect through his or her own senses from a potentially limited perspective of the battlefield. He might anticipate other factors, for example, the presence of non-combatants from experience or from intelligence. He will not know what possibly more current or detailed information or broader  
40 perspective of the battlefield as a whole, including threats of which he or she may be unaware is informing the superior's orders. He or she is compellable on pain of penalty to obey lawful orders and DFDA section 14 provides a defence in these terms:

45 *A person is not liable to be convicted of a service offence by reason of an act or omission that (b) was in obedience to a lawful order or an unlawful order that the person did not know and*

*could not reasonably be expected to have known was unlawful.*

5 A corresponding provision exists at the Commonwealth Criminal Code  
section 268.16(3). If a member of the Defence Force is held to owe a duty  
of care to others on the battlefield, with the exception of enemy personnel,  
it seems to me that in any situation where he or she can envisage the  
possibility of one of his comrades or a non-combatant being injured or  
killed through compliance with the order, he or she would be required to  
question the orders to ascertain the basis on which they were founded or  
10 run the risk of breaching a duty of care and be left hoping to avail him or  
herself of the defence under section 14 if a prosecution were brought.

15 This would be an invidious position, particularly when hesitation may  
yield the advantage to the enemy and lead to death or injury of the  
subordinate or his or her comrades. So far as the giving of orders is  
concerned, it may be necessary for subordinates to be ordered into harm's  
way. If a duty of care exists in armed conflict to one's comrades and  
subordinates, such orders would run the risk of exposing the officer,  
warrant officer or senior non-commissioned officer concerned to criminal  
20 charges in the event of their death or serious injury. It may be that  
negligence would not in fact be established, but the risk of facing trial and  
the uncertainty as to the outcome would again likely cause hesitation  
where perhaps advantage would be afforded to the enemy.

25 In summary, having regard to the restrictions on the soldier, sailor or  
airman's ability to choose to refrain from inherently dangerous conduct,  
his or her positive obligation to conduct operations against the enemy and  
the life and death ramifications of hesitation, I can see no basis on which  
to distinguish the approach taken by the High Court in *Shaw Savill*. For  
30 the same reasons that it is opposed alike to reason and policy to concede a  
tortious liability, it is in my view contrary to reason and policy to impose a  
criminal duty. If it were to be imposed clear words would be needed by  
the parliament.

35 In the alternative to a duty of care arising as a matter of common law, the  
prosecution asserts that such a duty may be imposed by orders and was in  
fact imposed in this case. At page 42 of the transcript for 18 May the  
learned prosecutor agreed with my summary of his position that as a  
subsidiary proposition he asserted that the orders reflected international  
40 law. For the reasons given earlier, I do not consider that a duty of care for  
negligence is imposed by the applicable principles of international law.

45 So far as the orders are concerned, in essence, the prosecution case is that  
the accused men's orders required them to act in a particular way and they  
failed to do so. Failure to act for the purposes of manslaughter by

5 criminal negligence was considered by the New South Wales Court of Criminal Appeal comprising Yeldham, Carruthers and Loveday JJ in R v Taktak (1988) 34 A Crim R 334. The court overturned a conviction for manslaughter by criminal negligence founded on failure to act. At page 357 Carruthers J referred to the necessity for the Crown to prove that the appellant owed a duty of care in law to the deceased. Yeldham at 345 said:

10 *Thus, although manslaughter is usually defined in terms of the doing of an act causing death, and indeed is usually committed by a person so acting, it can be committed by an omission to act. What must be established is that the defendant was under a legally recognised duty arising from the common law or from statute to act in a certain way but omitted to do so, that as a*  
15 *result of this omission to act death resulted and that by the defendant's omission to act the defendant exhibited culpability associated with one of the relevant heads of manslaughter.*

20 This was confirmed by the New South Wales Court of Criminal Appeal in Burns v R in the passage to which I referred earlier. In particular, the court observed that so far as gross negligence manslaughter is concerned, the duty must be recognised by common law or statute. While orders impose obligations enforceable on pain of penalty under service law, I do not consider that a duty purportedly implied by exercise of such military  
25 authority could be categorised as imposing an obligation arising from the common law or from statute.

30 Certain of the material to which I have been referred is no more than policy guidance and could not constitute an order. There are, however, directions capable of constituting orders. I think it is clear that if they were so construed the orders in question would constitute general orders within the terms of the definition of "general order" DFDA section 3(1), being an order issued by the Chief of the Defence Force.

35 Compliance with general orders is mandated by DFDA section 29. While that section applies strict liability to the fact of the order and to the failure to comply with it, this is subject to a statutory defence where the accused person proves on the balance of probabilities that he or she neither knew, nor could reasonably be expected to have known, of the order. There is no  
40 scope in the operation of manslaughter by criminal negligence for some corresponding defence.

45 Rather, it would seem that if an order could impose the duty to act in a particular way for the purpose of manslaughter, then the order would be elevated to the status of an obligation imposed by law where ignorance of

the law or legal obligation concerned would not constitute a defence. This would be a fundamental shift from the operation of DFDA section 29. The potential for injustice is readily apparent if one takes the case of a validly issued order which has not been promulgated to a Defence member who ultimately is alleged to have failed to discharge a duty of care said to be imposed by operation of the order.

In the course of submissions I did ask the learned prosecutor whether he was aware of any authority in connection with the relevance of orders issued to police officers in connection with negligence in the discharge of their duties. At the time I had forgotten about a relevant authority and I shall refer to it now. I do not think that it significantly affects these reasons. It is a matter of *Knightly v Johns* (1982) 1 All ER 851 and it is a case to which the court referred in the matter of *Mulcahy*, to which I have already referred. A police officer had ordered his subordinates to travel in the opposite direction of a tunnel in order to close it off to traffic. This order was contrary to police force standing orders for road accidents and vehicle breakdowns in the Queensway Tunnel.

Now, as I read the case, the orders themselves were not seen to be the source of a duty but, rather, indicative of the standard of care required. Failure to comply with the order was not seen as the foundation for establishing negligence.

So far as the duty of care is concerned, Stephen LJ held, at 857:

*In considering the duty to take care, the test is reasonable foreseeability, which I understand to mean foreseeability of something of the same sort being likely to happen, as against it being only a possibility which would never occur to the mind of a reasonable man or, if it did, would be neglected as too remote to require precautions or to impose responsibility.*

In any event, that decision of *Knightly v Johns* was brought to the attention of the Court of Appeal in *Mulcahy v Ministry of Defence*.

This was in the context of a submission by the plaintiff that one of the matters that would need to be investigated was whether the sergeant operating the gun had been in breach of some recognised rule or standing instruction. Notwithstanding the fact that this was not established, one way or the other, the court went on to dismiss the case, according to the principles established in *Shaw Savill*, and to which I have already referred.

I think it follows that regardless of what might have been regulated by

orders or instructions, the Court of Appeal did not consider that it could impose a duty of care, having regard to the Shaw Savill principles.

5 For these reasons I do not consider that the accused men had a duty of care to the civilians allegedly impacted by their actions so as to give rise to the charges of manslaughter by criminal negligence. This ruling affects the manslaughter charges, as originally framed, and those proposed, following amendment. Accordingly, I uphold the objections taken to the manslaughter counts, pursuant to DFDA section 141(b)(iv) on the basis  
10 that the charges do not disclose service offences.

15 Having so ruled, I propose to refer those charges back to the Director of Military Prosecutions, in accordance with section 141(8), but I shall take submissions before doing so.

20 I turn now to section 36(3). So far as the offences against section 36(3) are concerned, I think it is clear that the legislation itself purports to make Defence members and Defence civilians accountable for intentional conduct of the kind regulated by the section which causes, or is likely to be the cause of death or grievous bodily harm to others in circumstances where the perpetrator is negligent as to that result, or likely result, occurring.

25 The issue, for the purposes of the present application, is whether section 36(3) applies to the conduct alleged against the accused men and, if it does, must section 36(3) yield to the provisions of the Commonwealth Criminal Code, chapter 8, Division 268?

30 This is a somewhat different issue from whether or not there is a duty of care, but must be considered against the background that, for the reasons given in connection with the other charges, I do not consider that a common law duty of care arises to situations of actual engagement in the course of armed conflict.

35 Neither the explanatory memorandum, nor the second reading speech, nor the 1973 Working Party report provides assistance on whether section 36(3) was intended to apply to situations of armed conflict and, if it was, the scope of that application.

40 Because of the specific reference in the section to enemy persons, it seems plain that the parliament must have intended the provision to have some application to situations of armed conflict, but the scope of that application is unclear. However, having regard to my conclusion that there is no common law duty of care by a member of the ADF during  
45 armed conflict, in accordance with the principles identified in Shaw Savill,

I consider this silence surprising if it were parliament's intention to change the law.

5 Section 36(3) does not, in its terms, expressly impose a duty of care. It can be contrasted, for example, with section 265 of the Western Australian Criminal Code, which provides for the duty of persons doing dangerous acts in the following terms:

10 *It is the duty of every person who, except in a case of necessity...*

And it then continues. The purpose of my reference to it is the specific statutory provision for a duty.

15 As I have already observed, the learned prosecutor resiled from his earlier assertion that a duty of care is required for the operation of the subsection, and now contends that the concept of negligence should be resolved simply by reference to the Commonwealth Criminal Code and that resort cannot be had to the common law in interpreting it.

20 I do not think that this is a correct statement of the law, relating to the operation of the code and its interpretation. For example, in *R v LK* and *R v RK* (2010) HCA 17, French CJ concluded, at paragraph 57, that section 11.5(2) of the code operated upon the common law concept of conspiracy, although it could not be taken as defining the elements of the offence.

25 In that same matter, as noted by the learned author of *Odgers Principles of Federal Criminal Law*, 2nd edition, at paragraph 0.0.210, Gummow, Hayne, Crennan, Kiefel and Bell JJ, with whom Hayden J substantially agreed, emphasised the proposition that the common law may be taken into account when considering:

30 *Expressions that have an accepted legal meaning and that meaning may not be specifically set out in the code.*

35 The Commonwealth Criminal Code, section 5.5, which defines negligence was, as the Model Criminal Code Officers Committee stated, in relation to the proposal on which the provision is based, based closely on *Nydam*. *Nydam* was plainly concerned with the application of negligence to the alleged breach of a duty of care.

40 Be that as it may, my concern here is not with the proper interpretation of the Code, section 5.5, but, rather, with the interpretation of section 36(3). The subsection does not seek to absolutely proscribe the operation of the things regulated by the section or the giving of directions concerning that

operation. Rather, it seeks to regulate the operation of such things or the giving of direction concerning their operation only where that conduct causes or is likely to cause the death of or grievous bodily harm to another person and the principal is negligent as to that result.

5

In my view there must be a duty of care before the fault element of negligence can operate for the purposes of that subsection. This follows from the fact that negligence requires the tribunal of fact to determine what a reasonable person would have done in the circumstances. In my view, that question can logically be addressed only where there is a duty of care. Without a duty of care the concept of negligence is meaningless in terms of the section because it is impossible to objectively fix a standard of care that the reasonable person would exercise to avoid the stated outcomes without a corresponding duty. If one does attempt to fix a standard, there is a de facto imposition of a duty of care if the accused is to be held liable for having fallen short of that standard.

10

15

The latter point is illustrated by considering omissions or failure to act. In Taktak, the New South Wales Court of Criminal Appeal refers to Professor Geddes Criminal Law, the 1985 edition, at page 32, where it is said:

20

25

*That at common law a person does not in general incur criminal liability for a failure to intervene and prevent or attempt to prevent the occurrence of harm. In this context a person who sees a strange child drowning in a shallow pond and fails to rescue the child does not incur criminal liability.*

30

If the question could legitimately be asked as to what a reasonable person would have done in the case of the child, it would be open to find that a reasonable person would have attempted some rescue, notwithstanding that there was no duty to do so. If the person who failed to act could then be judged against that standard, there would be a de facto in position of a duty of care where none existed.

35

40

It seems to me that a duty of care for the purposes of section 36(3) might be construed to arise in one of two principal ways: the first is that the section is read to imply a duty of care to all those who suffer or who are likely to suffer death or grievous bodily harm by way of the conduct regulated by the section; the second is that the section be read to apply only where there is otherwise a duty of care at law to the persons concerned.

45

A variation on the first interpretation would be to read it down to exclude instances where a duty of care would have been specifically excluded at

5 common law. The section must be interpreted in light of subsection 36(3)(e). This subsection specifically applies the operation of section 36(3) to enemy persons where the impugned conduct of a Defence member or Defence civilian is not in the execution of that person's duty. I have already quoted the relevant statutory provisions.

10 As originally enacted, the exception now contained in subparagraph (3) was contained in a general provision - subsection (4) relating to section 36 as a whole - in the following terms:

15 *This section does not apply in relation to any behaviour of a person in the execution of a person's duty by reason only that the behaviour causes or is likely to cause the death of or grievous bodily harm to an enemy person.*

20 The section and the specific provision for enemy persons was amended by the Defence Legislation Amendment (Application of the Criminal Code) Act 2001. Again, the explanatory memorandum provides little assistance in interpreting the intended application of section 36 in general or section 36(3) in particular.

So far as the provision now contained in section 36(1)(e), (2)(e) and (3)(e) is concerned, it says:

25 *Paragraphs (1)(e), (2)(e) and (3)(e) replace the provisions contained in subsection 36(4) which applies to all three variations of this offence. This means that the service tribunal must consider whether the victim was an enemy and whether injury was occasioned in the course of the defendant's duty.*

30 In my view, the intended operation of subparagraph (e) is problematic. To sensibly apply the provision, a fault element of absolute liability must be applied to the requirement that the person said to be affected by the impugned conduct was an enemy person. The subsection does not do this. Consequently, subparagraph (e) would be deconstructed in accordance with the Code and section 5.6 to attribute a fault element of recklessness to the requirement that the person concerned was an enemy person. It would follow that a Defence member acting otherwise than in the course of his or her duty who kills an enemy soldier in a way sought to be regulated by the section but is not at least reckless as to that person's status would be exempted from the operation of the section, whereas if he or she was aware of the status or reckless as to it, he would fall within the section.

45 An example is provided by the case of a soldier who has taken a service



5 vehicle without authority for personal reasons and runs down a person on the side of the road. It transpires that the person was an enemy person; section 36(3)(e) would operate, but on the facts in this scenario it might not be possible to establish that the accused was at least reckless as to the other person's status as an enemy. In such a case the charge would not be made out. This is not relevant to the present matter but it is illustrative of the difficulties inherent in the drafting of the provision.

10 If section 36(3) is interpreted as imposing a broad duty of care to all those who suffer or who are likely to suffer death or grievous bodily harm by way of the conduct regulated by the section, subparagraph (e) and its predecessor (4) would prevent the absurd situation where the provision would otherwise apply to conduct in the course of duty directed to enemy persons. However, having regard to the nature of armed conflict, it seems  
15 unlikely that parliament would have sought to impose by implication rather than specific provision a wide-ranging duty of care to enemy persons, albeit subject to the operation subsection (4) as originally enacted and subsection (3)(e) in its current form.

20 It is also unlikely that such a duty of care would be imposed by implication towards individual civilians who take up arms against Australian forces or those non-combatants whose incidental or collateral death or injury would be otherwise permitted under accepted international principles of armed conflict, particularly if, as the learned prosecutor  
25 contends, section 10.5 of the Criminal Code would not operate to provide a defence other than one expressly provided by statute.

Of course a duty to enemy persons will otherwise arise in particular circumstances such as under the Geneva Conventions where an enemy  
30 person is hors de combat or has surrendered. In my view, in accordance with the principles identified in Shaw Savill, this duty would be capable of constituting a duty of care for the purposes of section 36(3), at least in situations other than an actual engagement with other enemy forces.

35 The inclusion of the limiting word "only" in section 36(4) as originally enacted would leave the way clear for that form of the exclusion to have extended the operation of the negligence provisions to such enemy persons to whom a duty of care was owed even if the section as a whole is construed in the second of the ways to which I have referred. Similarly,  
40 section 36(3)(e) as currently drafted is capable of operating to leave the application of section 36(3) to such enemy persons if this narrow construction is preferred.

45 It is an accepted principle of statutory interpretation that there is a presumption against the alteration of common law doctrines. Professors

Pearce and Geddes in their "Statutory Interpretation Australia" 6th edition at page 183, paragraph 5.24, refer to the following authorities: Burchett and Ryan JJ in *Thompson v Australian Capital Television Pty Ltd* (1994) 54 FCR 513 at 526. And this is an internal quote:

5

*Statutory reforms removing a particular plank from the edifice of the common law do not necessarily bring down whole sections of the structure just because a rule expressly changed or abolished had an historical or a logical connection with other rules of the common law. To forbid such a consequence the rule has been established and should be adhered to (Corporate Affairs Commissioner of New South Wales v Yuill (1991) 100 ALR 609 at 610 per Brennan J), that acts altering the common law should be construed as doing so only so far as is necessary to give effect to their provisions (Hocking v Western Australian Bank (1909) 9 CLR 738 at 746; American Dairy Queen (QLD) Pty Ltd v Blue Rio Pty Ltd (1981) 37 ALR 613 at 616.)*

10

15

20

The learned authors then refer to a decision of the Full High Court in *Balog v Independent Commissioner Against Corruption* (1990) 169 CLR 625 at 635-6 where the court observed:

25

*That where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred.*

30

MAJ McLure referred me to another decision of the High Court in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) HCA 49. The court was there considering whether a particular provision of the Trade Practices Act disposed of legal professional privilege. McHugh J held at paragraph 39 that:

35

*It is an elementary rule of statutory construction that courts do not read general words in a statute as taking away rights, privileges and immunities that the common law or the general law classifies as fundamental unless the context or subject matter of the statute points irresistibly to that conclusion.*

40

At paragraphs 43 to 44 his Honour went on to state:

45

*Courts do not construe legislation as abolishing, suspending or adversely affecting rights, freedoms and immunities that the courts have recognised as fundamental unless the legislation does so in unambiguous terms. In construing legislation the courts begin with the presumption that the legislature does not interfere with these fundamental rights, freedoms and immunities unless it*

5                   *makes its intention to do so unmistakably clear. The courts will*  
                      *hold that the presumption has not been overcome unless the*  
                      *relevant legislation expressly abolishes, suspends or adversely*  
                      *affects the right, freedom or immunity or does so by necessary*  
10                   *implication. They will hold that the legislature has done so by*  
                      *necessary implication whenever the legislative provision would*  
                      *be rendered inoperative or its object largely frustrated in its*  
                      *practical application if the right or freedom or immunity were to*  
                      *prevail over the legislation. A power conferred in general terms,*  
15                   *however, is unlikely to contain the necessary implication because*  
                      *general words will almost always be able to be given some*  
                      *operation even if that operation is limited in scope.*

15                   Consistent with those authorities, I consider that clear and unambiguous  
language was required if section 36(3) was intended to take away the  
relief from any duty of care that might otherwise have existed in actual  
combat granted by the High Court in *Shaw Savill*.

20                   I am reinforced in this approach by the provisions of section 15AA of the  
Acts Interpretation Act 1901 Commonwealth. That provision provides  
that:

25                   *In the interpretation of an act a construction that would promote*  
                      *the purpose or object underlying the Act, whether that purpose or*  
                      *object is expressly stated in the Act or not, shall be preferred to a*  
                      *construction that would not promote that purpose or object.*

30                   The DFDA is stated in the preamble to be an Act relating to the discipline  
of the Defence Force and for related purposes. In my view, where there  
are competing interpretations as to its provisions, then preference should  
be given to that which impedes as little as possible the freedom of  
operation of members of the Defence Force to engage in armed conflict at  
the Commonwealth's behest subject to the accepted principles of the Law  
of Armed Conflict.

35                   So far as international law is relevant to the interpretation of domestic law,  
Mason CJ and Deane J observed in *Minister for Immigration & Ethnic  
Affairs v Teoh* (1995) 183 CLR 273 at 287 that:

40                   *Where a statute or subordinate legislation is ambiguous, the*  
                      *courts should favour that construction which accords with*  
                      *Australia's obligations under a treaty or international*  
                      *conventions to which Australia is a party, at least in those cases*  
45                   *in which the legislation is enacted after entry into or ratification*  
                      *of the relevant international instrument. This is because*

5 parliament, prima facie, intends to give effect to Australia's  
obligations under international law. It is accepted that a statute  
is to be interpreted and applied so far as its language permits so  
that it is in conformity and not in conflict with the established  
10 rules of international law (*Polites v Commonwealth* at 68-69, 77,  
80-81). The form in which this principle is expressed might be  
thought to lend support to the view that the proposition  
enunciated in the previous paragraph should be stated to require  
the courts to favour a construction as far as the language of the  
15 statute permits that is in conformity and not in conflict with  
Australia's international obligations. This indeed is how we  
would regard the proposition that is stated in the preceding  
paragraph. In this context, there are strong reasons for rejecting  
a narrow conception of ambiguity.

15 So far as this principle is concerned, I note that at the time of Royal ascent  
to the Defence Force Discipline Act, Australia had implemented the  
Geneva Conventions into domestic law by the Geneva Conventions Act  
1957. Civilians caught in armed conflicts were protected by the  
20 provisions of the 4th Geneva Convention, relative to the protection of  
civilian persons in time of war, for international armed conflicts, and  
common Article 3 for armed conflicts not of an international character.

25 By 1991 additional Protocol 1 was also implemented into the Geneva  
Conventions Act 1957. These stood as the general obligations, with  
respect to war crimes under domestic law, when chapter 2 of the  
Commonwealth Criminal Code was made applicable to the DFDA in  
2001.

30 In the following year the Rome Statute for the International Criminal  
Court was implemented into Australian law, via the Commonwealth  
Criminal Code. This brought with it a raft of offences which were known  
to Australian law previously as breaches of the Geneva Conventions Act,  
but also new offences regarding crimes against humanity and genocide.

35 In both the commentary to additional Protocol 1, at paragraph 1934, and  
Article 30(1) of the Rome Statute, the requisite fault elements for crimes  
involving the death of civilians in armed conflict are intent and  
knowledge. Interpretation of section 36(3) to impose, by implication, a  
40 broad duty of care would not be in direct conflict with these international  
obligations in that such an interpretation would restrict the freedom of  
operations of members of the ADF more narrowly than required by the  
international obligations. In my view, consistent with *Polities*, it would be  
open to parliament to do so, but I would expect this to be done clearly,  
45 rather than by implication.

5 If I am wrong in concluding that a duty of care is required before the  
concept of negligence, under the Criminal Code section 5.5 can operate, it  
seems to me that in any event if section 36(3) is to operate to proscribe  
conduct that causes, or is likely to cause, death or grievous bodily harm to  
another person, it necessarily creates a duty of care to those persons.

10 For the reasons given more generally, concerning duty of care, I consider  
that in the absence of plain words, any such duty would have to be read  
down to at least exclude cases where the law had previously expressly  
excluded, as opposed, perhaps, to failing to apply a duty of care.

15 Having regard to these matters I believe that it must have been  
parliament's intention to restrict the operation of section 36(3) to those  
situations where there is otherwise a duty of care arising at law or, at least,  
that section 36(3) operate subject to existing law, expressly excluding a  
duty of care.

20 For the reasons already given in connection with the manslaughter charges  
I consider that Shaw Savill is binding authority that such a duty of care  
does not exist in connection with actual engagement in the course of  
armed conflict. For these reasons, I uphold, pursuant to DFDA section  
141(b)(iv), the objections taken to the charges on the basis that the charges  
do not disclose service offences.

25 Having so ruled, I propose to refer the charges back to the Director of  
Military Prosecutions, in accordance with section 141(8), but I will take  
submissions before doing so. If that referral back were made, there would  
be no charges before the court martial, and I think it would follow that it  
would be dissolved by operation of law.

30 In light of these rulings it has not been necessary to deal with certain other  
of the objections raised by the accused men. Without reaching a view on  
the applicability of combat immunity, I do consider, on the basis of *Ellias  
J's* consideration of the concept in *Bici v Ministry of Defence (2004)  
EWHC 783*, a decision of the Queen's Bench Division, at paragraph 84  
and following, that the concept, potentially, has broader application than  
the prosecution submission that it was limited to prisoners of war.

40 I would conclude these remarks by saying that the ruling does not detract  
from the personal tragedy inherent in the prosecution allegations, or  
diminish the importance of the lives concerned. Both the domestic law of  
Australia and international law of armed conflict hold members of the  
ADF accountable for their conduct on operations, but criminal culpability,  
45 in such circumstances, requires proof of fault elements of at least

recklessness or intention. In the absence of a duty of care imposed by statute, mere negligence, even if established, will not suffice to establish criminal culpability in the case of actual engagement in armed conflict. And I so rule.