



JUDGE ADVOCATE GENERAL

**DEFENCE FORCE
DISCIPLINE ACT 1982**

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

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Department of Defence

Defence Force Discipline Act 1982

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JUDGE ADVOCATE GENERAL

**HEADQUARTERS AUSTRALIAN DEFENCE FORCE
DEPARTMENT OF DEFENCE
CANBERRA ACT 2600**

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

Dear Minister,

I submit herewith my report covering the period from 1 January to 31 December 2013. 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, AM RFD
Judge Advocate General
Australian Defence Force

8 April 2014

Enc.

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JUDGE ADVOCATE GENERAL

AUSTRALIAN DEFENCE FORCE

REPORT FOR THE PERIOD 1 JANUARY TO 31 DECEMBER 2013

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 2013. 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 months¹.

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).

¹ 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. Outside the reporting period I was reappointed on and from 9 February 2014 as acting JAG until 29 March 2014 and then on 13 March 2014 I was appointed as JAG until 29 July 2014. As I have previously indicated², I also hold the appointment as President of the Defence Force Discipline Appeal 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 may be 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 Force³;

² My report for 2008 at paragraph 26

³ DFDA s.196A.

- b. Making Procedural Rules for Service tribunals, being:
 - (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 martial⁴ and Defence Force magistrates (DFMs)⁵;
- d. Nominating to a Service Chief officers to be members of the JAs panel⁶;
- e. Appointing DFMs from officers appointed as members of the JAs panel⁷;
- 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 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.

⁴ DFDA s.129B.

⁵ DFDA s.129C.

⁶ DFDA s.196.

⁷ 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, Major General Ian Denis Westwood AM continued to hold the position of Chief Judge Advocate (CJA) established under DFDA s.188A. Colonel Jennifer Ann Woodward continued to serve as a full time JA. Group Captain Nina Louise Harvey served as the 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 Major Peter Cumines. 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 His Honour Judge M.J.F. Burnett .

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 continued as DGADFLS. Mr Adrian D'Amico continued in the position of Defence General Counsel.

OPERATION OF THE SUPERIOR MILITARY TRIBUNALS

15. During the reporting period, trials by court martial and DFM continued in accordance with the provisions of the *Military Justice (Interim Measures)*

Act (No 1) 2009, as amended by the *Military Justice (Interim Measures) Amendment Act 2011* and the *Military Justice (Interim Measures) Amendment Act 2013*.

16. The Bill to establish a Military Court under Chapter III of the Constitution which was introduced into the 43rd Parliament lapsed upon the prorogation of Parliament during the reporting period. I shall return to this issue later in this report.

STATISTICS

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. 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 respectively 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 six years following the passage of the *Military Justice (Interim Measures) Amendment Act 2013*.

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

- a. JAG, Major General Tracey, expiry date 29 July 2014;
- b. CJA, Major General Westwood, expiry date 21 September 2015;
- c. DJAG-Navy, Commodore Slattery, expiry date 30 May 2014;
- d. DJAG-Army, Brigadier Gunson, expiry date 30 May 2014;
- e. DJAG-Air Force, Air Commodore Burnett, expiry date 30 May 2014;
- f. Full-time JA, Colonel Woodward, expiry date 21 September 2015; and

g. RMJ, Group Captain Harvey, expiry date 21 September 2014.

20. The officers appointed as JAs and DFMs 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 five appeals to the DFDAT in connection with convictions recorded by courts martial and DFM. These were:

- a. *Yewsang v Chief of Army* [2013] ADFDAT 1;
- b. *Ferdinands v Chief of Army* [2013] ADFDAT 2;
- c. *King v Chief of Navy* [2013] ADFDAT 3;
- d. *Leith v Chief of Army* [2013] ADFDAT 4 and
- e. *McLaren v Chief of Navy* [2013] ADFDAT 5.

The appeals in *King* and *McLaren* were upheld, the appeal in *Yewsang* was partly upheld (the conviction on the first charge was quashed) and the appeals in *Ferdinands* and *Leith* were dismissed.

APPEAL TO THE FULL BENCH OF THE FEDERAL COURT AND TO THE HIGH COURT

22. The decision of the DFDAT in *Li v Chief of Army* [2012] ADFDAT 1 was taken on appeal, initially, to the Federal Court of Australia. In *Li v Chief of Army* [2013] FCAFC 20, a majority of the court ordered that the appeal be dismissed. That decision was subsequently appealed to the High Court in the matter of *Li v Chief of Army* [2013] HCA 49. Major Li had been convicted by a Restricted Court Martial of having created a disturbance on Service land contrary to DFDA s.33(b). The appeal to the High Court concerned the proper construction of that section. The Court (French CJ, Crennan, Kiefel, Bell and Gageler JJ) held that:

[28] The service offence created by s.33(b) of the DFDA is therefore best construed as relevantly having two physical elements, to each of which the Criminal Code attaches a distinct fault element. The first physical element is conduct, for which the fault element is intention: it must be proved that the defence member or defence civilian charged did the act, and meant to do the act. The second physical element is the result of that conduct, for which

the fault element is recklessness: it must be proved that the act resulted in a disturbance (being a non-trivial interruption of order), and that the defence member or defence civilian charged either believed that the act would result in a disturbance or was aware of a substantial risk that the act would result in a disturbance and, having regard to the circumstances known to him or her, it was unjustifiable to take that risk.

23. The court allowed Major Li's appeal, quashed his conviction, and remitted the case to the DFDAT for the making of further orders, if any.

LEGISLATION

24. As I noted in my report for 2012⁸, the *Military Court of Australia Bill 2012* (Military Court Bill) and the *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012* (Consequential Amendments Bill) were introduced into the House of Representatives on 21 June 2012. The Bills lapsed when the 43rd Parliament was prorogued. As a result, the system of trial by court martial and DFM introduced, on an interim basis, by the *Military Justice (Interim Measures) Act (No 1) 2009* will continue. Legislation to create a Chapter III Court had also been introduced into the 42nd Parliament in 2010, but lapsed when that Parliament was prorogued⁹.

25. The *Military Justice (Interim Measures) Amendment Act 2013* was enacted during the reporting period. It operates to continue the appointment, by force of law, of the former Chief Military Judge and military judges as CJA and full time JAs respectively.

26. When the system of trial by court martial and DFM was restored, there was an additional full time JA appointed under the legislation. The officer concerned, Colonel Peter Morrison RFD, resigned in 2012¹⁰. His resignation coincided with a drop in the number of matters being referred for trial by court martial and DFM, as reflected in the statistics published as annexes to this report. While the number of trials remained below the long term average, CJA and RMJ were able to manage the list with the remaining two full time appointments, and the assistance of part time JAs. Having regard to the interim nature of the arrangements, and the reduced

⁸ Paragraph 24 et seq.

⁹ See JAG Report for 2010 paragraph 27

¹⁰ See JAG Report for 2012 paragraph 19

case load, CJA has not sought to have the vacant position filled; however, he advises that this is not tenable on a long term basis.

27. It is desirable that a final decision be taken as to whether the interim measures are to continue indefinitely or whether, for instance, a Chapter III military court is to be created. The interim measures are working satisfactorily. Should they be retained, I believe that enhancements to the role of the JA would offer significant advantages within the traditional structure. Further comment appears at paragraph 38 et seq. If the interim measures are to continue for any extended period, CJA advises that it will be necessary to fill the currently vacant position of full time JA, such that there is a panel of three full time officers. The rate of referrals at the start of 2014 is consistent with a return to the longer term average of trials which will require the third appointment. This aside, without an additional appointment, there is very little flexibility to manage leave or to cope with unplanned absences. Similarly, a valuable opportunity for longer term succession planning is missed.

28. Certain legislative instruments made under the DFDA will be affected by sunset provisions introduced in 2012 by way of amendment to section 50 of the *Legislative Instruments Act 2003*. The legislative instruments which appear to be affected, and the relevant dates, are:

- a. *Defence Force Discipline (Consequences of Punishment) Rules* – made by the CDF on 1 November 1986, registered on 1 January 1985, ‘sunset’ on 1 April 2018;
- b. *Defence Force Discipline Regulations* – made by the Governor-General on 5 December 1985, registered on 1 January 2005, ‘sunset’ on 1 April 2018;
- c. *Summary Authority Rules* – made by the JAG on 22 September 2009, registered on 29 September 2009, ‘sunset’ on 1 October 2019; and
- d. *Court Martial and Defence Force Magistrate Rules* – made by the JAG on 23 October 2009, registered on 28 October 2009, ‘sunset’ on 1 April 2020.

29. Action will be required prior to the applicable ‘sunset’ date to preserve the operation of the legislative instruments concerned.

OTHER MILITARY DISCIPLINE LAW REFORM

30. Defence Legal have continued with work related to the electronic versions of forms required for day to day use under the DFDA. The new forms are included on the Departmental "Web Forms" database. This standardises the formatting of these forms, ensures widespread availability, and means that there is a central point for version control.

31. Defence Legal is currently working on the revision of the explanatory materials contained in the Discipline Law Manual (DLM) to remove the last of the references to the former Australian Military Court (AMC) and to address various changes that have occurred since the last revision. The following chapters have been updated and published electronically:

- a. Chapter 2 – Jurisdiction,
- b. Chapter 5 – Discipline Officer Scheme – minor disciplinary infringements,
- c. Chapter 6 – Charging Service Offences for trial by Summary Authority,
- d. Chapter 10 – Summary Authority Punishments and Orders,
- e. Chapter 11 – Review of Service Tribunal Proceedings, and
- f. Chapter 12 – Important Information for the Accused – Rights, Reviews and Appeals.

32. In my report for 2012¹¹, I referred to the decision to publish trial outcomes for courts-martial and DFMs in the Service newspapers. At the time, I expressed concern that in some cases, acquittals were not being included in the reporting. I am concerned to note that this omission has not been completely addressed. Where both convictions and acquittals are recorded against the one accused, the reporting appears to reflect that fact. However, where there are acquittals in respect of all charges the result is not being consistently reported. This is a matter of concern because it obscures transparency and openness, and runs the risk of undermining confidence in the integrity of such proceedings if the impression is

¹¹ Paragraph 31.

(wrongly) conveyed that conviction (at least on some counts) is the inevitable outcome of a prosecution.

CLARIFICATION OF THE EVIDENCE PROVISIONS TO APPLY TO SUPERIOR SERVICE TRIBUNALS

33. The *Evidence Act 1995* (Cwlth) applies, inter alia, to all proceedings in a Federal Court¹². "Federal court" is defined to include:

A person or body (other than a court or magistrate of a State or Territory) that, in performing a function or exercising a power under a law of the Commonwealth, is required to apply the laws of evidence.

The Commonwealth *Evidence Act* is thereby specifically applied to the superior Service tribunals.

34. The DFDA also contains a specific provision relating to the rules of evidence. Section 146(1) provides:

Subject to regulations in force under sub-section (2), the rules of evidence in force in the Jervis Bay Territory apply to a trial by a court martial or Defence Force magistrate as if:

- (a) the court martial or Defence Force magistrate were a court exercising jurisdiction in or in relation to that Territory; and
- (b) the trial were a criminal proceeding in such a court.

There are no regulations in force under sub-section (2) relevant for current purposes.

35. Until the *Evidence Act 2011* (ACT) came into force on 1 March 2012, there was no conflict between the application of s.4(1) of the *Evidence Act 1995* (Cwlth) and DFDA s.146 because the Commonwealth *Evidence Act* was also specifically applied to ACT courts, and hence to courts sitting in the Jervis Bay Territory. However, on 1 March 2012, the *Evidence Act 2011* (ACT) came into force, and by proclamation dated 9 February 2012 made under s.4(6) of the *Evidence Act 1995* (Cwlth), the Commonwealth legislation ceased to apply to proceedings in an ACT court (and hence to courts in the Jervis Bay Territory), except insofar as the provisions apply to proceedings in all Australian courts.

¹² *Evidence Act 1995* (Commonwealth) s.4(1).

36. Ordinarily, the enactment of the *Evidence Act 1995* (Cwlth) would have displaced the earlier provision of the DFDA to the extent to which the later legislation was inconsistent with the earlier. However, the *Evidence Act 1995* (Cwlth) contains a specific provision at s.8 to regulate the operation of other Acts. Relevantly, s.8(1) provides:

This Act does not affect the operation of the provisions of any other Act other than sections 68, 79, 80 and 80A of the *Judiciary Act 1903*.

37. There is, consequently, uncertainty as to whether the rules of evidence to be applied by the superior Service tribunals should be governed by the provisions of the *Evidence Act 1995* (Cwlth) by virtue of s.4(1) of that Act, or by the provisions of the relevant ACT legislation by virtue of the operation of DFDA s.146. In practical terms, the ACT legislation essentially mirrors the Commonwealth legislation, but there are discrepancies, and plainly there is the potential for significant inconsistency to arise in the future. I understand that Defence Legal have the issue in hand, and recommend that the situation be clarified by legislation as soon as possible.

A GREATER ROLE FOR THE JUDGE ADVOCATE IF THE SYSTEM OF TRIAL BY COURT MARTIAL IS RETAINED

38. As foreshadowed at paragraph 27, I believe that enhancements to the role of the JA would offer significant advantages within the traditional structure. The comments and suggestions that follow are endorsed by CJA, the DJAGs and the permanent JA, all of whom consider that reform is necessary if the traditional arrangements are to be retained.

39. Before proceeding further, it may be useful to look very briefly at the role of the JA under the provisions pre-dating the DFDA. At that time, each of the Services was governed by separate disciplinary legislation¹³. In the case of Army and, effectively, the Air Force, this reflected the provisions of the *Army Act 1881* (Imp). Courts martial did not necessarily require the appointment of a JA and were under the control of the President (the senior officer appointed to the court martial). Where a JA was appointed, the President and members were not bound by the JA's directions¹⁴. Rather,

¹³ Detail is provided at paragraph 42 et seq to the Explanatory Memorandum to the *Defence Force Discipline Bill 1982*

¹⁴ Rule of Procedure 103

the JA merely advised on matters of law. In the event of a conviction, the President and members, not the JA, determined sentence.

40. The DFDA substantially increased the role of the JA. The DFDA requires the appointment of a JA to each court martial and s.134 provides, relevantly:

- (1) In proceedings before a court martial, the judge advocate shall give any ruling, and exercise any discretion, that, in accordance with the law in force in the Jervis Bay Territory, would be given or exercised by a judge in a trial by jury.

...

- (4) A ruling given by the judge advocate in accordance with sub-section (1) or (3)¹⁵ and a decision made by the judge advocate under sub-section 141(5) or (6)¹⁶ is binding on the court martial.

41. Notwithstanding these provisions, the DFDA nonetheless reflects much of the earlier philosophy. So,

- a. The President presides¹⁷ and exercises a number of discretions that would, in a civil criminal trial, be vested in the judge. These include the power to make protective orders and non-publication orders which I raised in detail in my report for 2011¹⁸, and the power under s.148A to allow testimony to be given by video link or audio link;
- b. The President and members determine, on the basis of a simple majority, whether the accused person before the court is guilty or not guilty¹⁹. As with a civil jury, no reasons are given for finding; and,

¹⁵ Sub-section (3) makes similar provisions to sub-section (1) in connection with sentencing hearings.

¹⁶ Which deal with pre-trial applications and objections.

¹⁷ s.133(1)(b)

¹⁸ Paragraph 37 et seq.

¹⁹ s.133(2)

- c. In the event of a conviction, the President and members determine sentence²⁰, again on the basis of a simple majority, but give no reasons.

42. In our view, it is not appropriate that the President exercise judicial discretions. Rather, consistent with the approach in DFDA s.134(1), all discretions that would ordinarily be given or exercised by a judge sitting with a jury in civil criminal proceedings should be vested in the JA. My report for 2011, in connection with the power of the President to make protective orders and non-publication orders, refers to the significant difficulties that arise from these discretions, which are ordinarily the province of the presiding judge, being exercised by the President of the lay tribunal of fact.

43. We also recommend that the JA be afforded greater independence, for example by way of permanent appointment for a term of years by the Governor General in Council in a way analogous to that adopted for the Military Judges of the former AMC. The independence of the JA would reinforce that of the court martial itself. The quasi judicial function of CJA and the JAs could be separated from my office to emphasise the independent role of the JAG in the review process and through this annual report to Parliament.

44. Consideration could be given to further adjusting the respective roles of the JA and the President. One option is the arrangement now in place in the United Kingdom, where the JA presides and the panel of officers appointed as members of the court martial have a role analogous to that of a jury in a civilian trial as the sole arbiters of matters of fact. This arrangement is consistent with the JA exercising all discretions that would ordinarily be given or exercised by a judge sitting with a jury in civil criminal proceedings. It would reinforce the separate functions of the JA and the court martial panel such that there is a clear distinction between the conduct of the trial according to law (the responsibility of the JA) and the adjudication of guilt or innocence (the responsibility of the officers appointed to the panel). As I have already observed, it is unsatisfactory that this necessary distinction between judicial function and that of the tribunal of fact is blurred because of certain judicial discretions being vested in the President. Having regard to the history of courts martial, and the requirement for courts to sit on active service, we do not consider that it is

²⁰ s.132(1)(g)

necessary to review the minimum numbers required for a court martial panel, nor the established procedure for voting and reaching a verdict.

45. If the JA were to preside, there would be scope to establish a permanent court martial (as opposed to a series of ad hoc tribunals). This would offer significant advantages in terms of dealing with interlocutory matters pre-trial, and would also provide the basis for matters which are currently the subject of command review, such as pre-trial custody, to be vested instead in the officers appointed as JAs, to be determined independently of command and according to legal principle.

46. As matters currently stand, following any conviction, a court martial is required to consider action under Part IV of the DFDA, which concerns punishments and orders. Counsel will address the court martial, and the JA will then give binding legal directions in accordance with DFDA s.134(3). Those directions traditionally address the relevant sentencing principles that must be applied by the court martial and the sentencing options available to the court martial. The JA will not express a view as to the appropriate sentence because, as the legislation is currently framed, he or she has no role in determining the sentence that should be imposed. The court martial panel considers sentence with no other person present, and is required to arrive at a decision on the basis of a simple majority. Subject to the sentence being one that is available as a matter of law, the JA will endorse the panel's findings sheet and the President will announce the sentence but no reasons will be given.

47. We recommend that the JA be more directly involved in the sentencing process. This is the position that pertains now in the UK. In all but relatively straight forward disciplinary offences, the court martial panel is not well equipped to judge the objective seriousness of offences involving significant criminality, such as acts of indecency without consent. This has been evident from recent sentences imposed by courts martial. The problem is compounded by the fact that there is no prosecution right of appeal against a sentence that is manifestly inadequate. Sentences can be reduced on review, but not increased. Manifestly inadequate sentences have the potential to undermine confidence in the disciplinary system, particularly in the case of offences where there is a complainant (in the strict sense of that word). We also consider that, notwithstanding that challenge to the sentencing decision of the court martial is restricted to the internal review and petition process, that nonetheless reasons should be given to increase the transparency of the process. If that is to be done, we consider that it is essential that the JA be part of the sentencing deliberations.

48. We suggest that the JA should preside over the sentencing process and be part of the private deliberative processes of the court martial. This would retain the involvement of the members of the court martial in the process, and their views on the disciplinary impact of the offending could be taken into account. As now, the JA would give binding legal directions concerning the matters that must be taken into account, but would also be able to reflect the objective seriousness and criminality of the offending in the sentencing deliberations, and to assist the court martial to give reasons for sentence. Because the JA's presence would ordinarily constitute an equal number deciding on sentence, we suggest that the JA also be given a second or casting vote in the event that a simple majority cannot otherwise be achieved. Because the court martial panel will comprise at least three officers, it will always be the case that the panel, if unanimous, will be able to prevail over the JA as to the sentence to be imposed. This reinforces the primacy of the court martial panel's view concerning sentence, but having the JA chair the sentencing hearing, and given a casting vote in the event that a simple majority cannot be otherwise achieved, equally reinforces the importance of proper weight being given to both legal principle and to the objective criminality of the offending. The JA would then deliver the court martial's reasons for sentence, and the President could announce the sentence itself.

RMJ'S PERFORMANCE MEASURES

49. During the reporting period, RMJ has formalised performance measures for the listing and commencement of trials before court martial and DFM and for the actioning of other requests to that office. The measures put in place are as follow:

- a. Within two weeks of receipt of a referral from the Director of Military Prosecutions (DMP), 90% are to be listed, that is, a trial date fixed;
- b. Within three months of receipt of the referral from the DMP 80% of proceedings are to have commenced. (If the referral coincides with the Christmas stand down period, then the performance measure would be increased to four months.); and
- c. So far as other requests (for example Freedom of Information, requests for specific statistics etc) RMJ will action 95% of requests within the time frame provided/negotiated or 28 days if no time frame is provided/negotiated.

50. RMJ will report to the Service Chiefs and other interested parties at the end of each calendar month on a cumulative basis. The final report for 2013 is included at Annex Q²¹.

OPERATION OF SUB-RULE 6(4) OF THE COURT MARTIAL AND DEFENCE FORCE MAGISTRATE RULES

51. In my report for 2012, I referred to the desirability of modernising the provisions for making the necessary travel arrangements for witnesses summoned to attend before a court martial or DFM²². I am pleased to report that suitable amendments have been made to sub-rule 6(4) of the *Court Martial and Defence Force Magistrate Rules*.

DIRECTOR OF MILITARY PROSECUTIONS

52. The DMP is appointed under DFDA s.188GF. Brigadier Lyn McDade's appointment finished on 11 July 2013, and her successor, Brigadier Michael Griffin AM, was sworn in by CJA on 8 August 2013. I acknowledge the significant work done by Brigadier McDade in establishing the independent statutory office of DMP. Brigadier Griffin will report independently to the Minister, for presentation to the Parliament, on the operation of his office.

DIRECTOR OF DEFENCE COUNSEL SERVICES (DDCS)

53. The position of DDCS was filled, during the reporting period, by Colonel Penny Cumming.

DISCIPLINE LAW TRAINING

Discipline Law Training for ADF personnel

54. The following paragraphs outline the discipline law training provided in the ADF in the reporting period.

²¹ The apparent difference between these figures and the statistics forming part of this report is explained at paragraph 64.

²² Paragraph 37 et seq.

Single Service

55. Primary delivery points for military justice in the Services are: on initial appointment; subsequent promotion courses; and trade-specific training (for example, for Service Police and Coxswains). The broad breakdown of delivery is:

- a. **Navy:** Military justice training occurs on recruit/initial officer courses, and on promotion courses for both non-commissioned officers (NCOs) and officers.
- b. **Army:** Military justice training occurs on recruit/initial officer courses, and on promotion courses for both NCOs and officers.
- c. **Air Force:** Military justice training occurs on recruit/initial officer courses, Professional Military and Education Training courses for both NCOs and officers, and as stand-alone training (for example, prosecuting/defending officer courses).

Pre-Command Training

56. Prior to assuming 'command', the single-Services require officers to complete their individual pre-command courses. Each pre-command course has a military justice component delivered by staff from the Military Law Centre (MLC). The Discipline Law course content covers: command responsibilities with respect to 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.

57. In 2013, the military justice training on pre-command course was as follows:

- a. **Navy.** Six courses instructed, with an approximate total of 87 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 70 students comprising officers appointed to command units or formations.

- c. **Air Force.** Three courses instructed, with an approximate total of 50 students comprising officers appointed to Officer Commanding or Commanding Officer positions.

Vice Chief of the Defence Force (VCDF) Group

58. The VCDF Group includes the Australian Defence College (ADC). Units of ADC include the Australian Defence Force Academy (ADFA) and Defence Learning Branch (DLB). CAMPUS, the online learning tool, is part of DLB.

- a. **ADFA:** Military justice familiarisation training occurs at the commencement of a cadet's attendance at ADFA, and then more detailed training occurs in Year 1 and Year 2.
- b. **CAMPUS:** Online DFDA training through the CAMPUS system continued to be utilised in 2013 since its inception in 2011. There are eight online courses covering the range of DFDA roles. The training is scenario based and includes the use of high quality video to demonstrate the conduct of Discipline Officer and Summary Authority trials.

Inspector General of the Australian Defence Force (IGADF)

59. The IGADF makes available a Military Justice Awareness Training package for local delivery.

Training for ADF Legal Officers

60. 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, and provides an introduction to discipline law aimed at the role of junior ADF legal officers. During 2013, 17 ADF legal officers attended the LTM1 course (plus seven other civilian lawyers/paralegal staff from Defence Legal also attended).
- 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 LTM1 and consists of four

graduate level subjects. During the reporting period, 24 students completed the Military Discipline Law subject.

- 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 LTM2. LTM3 consists of three core subjects (Advanced Military Discipline Law, Advanced Military Administrative Law and Advanced Military Operations Law) conducted biennially, plus permanent legal officers without an existing master of laws degree must complete a further five electives from an approved list. During the reporting period, 25 students completed the Advanced Military Discipline Law subject.

Ongoing Development of Discipline Law Training

61. The MLC is continuing to develop a repository of military justice training resources to improve the efficiency of military justice training. The MLC also plans in 2014 to undertake a review of the discipline law competencies under the *Governance of Military Justice Training Manual*.

TRIALS UNDER THE DFDA

62. The statistics for summary trials and the Discipline Officer Scheme conducted by the three Services during 2013 are set out in Annexes A to I. As was indicated in the report for 2005²³ responsibility for the Discipline Tracking and Case Flow Management System was transferred to the IGADF. Accordingly, IGADF has provided the statistics for the summary trials for this report drawing upon the electronic system.

63. 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.

64. There is an apparent discrepancy between these figures and those recorded in the RMJ performance report. This is because the RMJ figures reflect the number of trials whereas the annual statistics reflect the number of accused persons. So, for instance, if three co-accused were to be tried by the one court martial, RMJ would reflect this as one trial whereas the

²³

Paragraphs 95-96.

main statistics will continue to show three matters proceeding to trial and results by rank and offence in connection with each accused.

VISITS AND ACTIVITIES

65. 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.

66. On the weekend of 25-27 October 2013 I conducted a conference at HMAS Creswell with the DJAGs, CJA, Colonel Woodward, and RMJ. 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

67. Details of the officers performing these functions appear at Annex P.

CONCLUSION

68. The interim arrangements reinstating the system of trial by court martial and DFM continue to operate satisfactorily. It is, however, desirable that a final decision be taken as to whether the interim measures are to be made permanent or whether, for instance, a Chapter III military court is to be created. While the measures in place remain "interim" it is difficult to address necessary reform.

TABLE OF ABBREVIATIONS USED IN REPORT

Abbreviation	Description
ACT	Australian Capital Territory
ADC	Australian Defence College
ADF	Australian Defence Force
ADFA	Australian Defence Force Academy
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
DLB	Defence Learning Branch
DLM	Discipline Law Manual
DMP	Director of Military Prosecutions
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
NCOs	National Commissioned Officers
RAN	Royal Australian Navy
RANR	Royal Australian Navy Reserve
RFD	Reserve Forces Decoration

RMJ	Registrar of Military Justice
SAR	Summary Authority Rules
VCDF	Vice Chief of the Defence Force

COMPLIANCE INDEX OF REQUIRED INFORMATION FOR STATUTORY AUTHORITIES

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

Enabling Legislation	<i>Defence Force Discipline Act 1982</i>
Responsible Minister	Minister for Defence
Powers, functions & objectives	Paragraphs: 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: 65-66
Operational Problems	Paragraphs: 15-16, 30-48
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 2013

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				6	7		2	3	
February				21	31	25	18	23	6
March				8	10	1	11	14	
April				7	20		13	11	2
May				7	10	1	14	14	1
June	1	1	3	15	16	14	9	9	1
July				15	18	4	14	15	1
August				7	12		15	17	
September				8	13	2	16	16	2
October				8	9	4	12	14	
November				8	8		21	29	1
December				3	9		12	13	
TOTAL	1	1	3	113	163	51	157	178	13
			0						3

**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
Sect 23	1	2					1		25	11
24	1	2				2	8		55	13
25							1		1	
26				1					8	2
27							2		15	2
28										
29	12	2				3	7		37	20
30										
31										
32							1		4	2
33(a)									3	1
33(b)							2			
33(c)										1
33(d)									1	
34	1					1				
35										
36A										
36B	1						1			
37	1						1		2	1
38										
39										
40										
40A										
40B										
40C										
40D										
41										
42										
43							2		1	1
44							1			
45										
46										
47C									2	
47P										
48										
49										
50										
51										
53										
54										
54A										
55							1		4	1
56	1					2				1
57										
58										
59										
60	2	3				1	5		17	4
61									11	23
TOTAL	20	9	0	1	0	9	33	0	186	83

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	7						10		24	10
Conditional conviction without punishment							1		1	1
Unconditional conviction without punishment	1			1		1			8	17
Severe reprimand	2					3	6		17	6
Extra duties		1							7	5
Extra Drill									5	1
Stoppage of leave		4							16	5
Restriction of privileges		5							54	26
Suspended fine							3		3	1
Fine Less than 14 Days Pay	10	5		1		4	19		91	32
Fine More than 14 Days Pay									5	
Forfeiture of service for purposes of promotion										
Forfeiture of seniority							2		2	
Reduction in rank						1	1		3	
Suspended detention										
Committed detention									16	25
TOTAL	20	15	0	2	0	9	42	0	252	129

ARMY
JANUARY-DECEMBER 2013

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		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					6	8		1	9	10		1
February					15	21			34	33		1
March	1	1			18	20	3		57	68		2
April	3	7			15	26	2		47	54		3
May	1	1			24	31	3		46	48		4
June	1	1			21	28	2		76	90		1
July					44	54	3		68	76		4
August	2	2			37	51	1		70	77		6
September	1	1			34	56	5	1	73	79	7	3
October	4	6			40	72	4	1	93	113	3	3
November	1	1			42	64	2	1	96	120	10	2
December	1	1			25	40	3	1	63	84	9	3
TOTAL	15	21	0	0	321	471	28	5	732	852	46	31

**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
Sect 23	1	22					2			22
24	6	1		1		2	7	4		116
25							1			9
26	3	2		1		3	9	3		48
27	7	1	1			4	9	3		90
28				1						
29	25	20	4	14		24	43	31		247
30										1
31										
32										1
33(a)		1								16
33(b)										8
33(c)										
33(d)								1		6
34										
35	1	2					3	2		6
36										1
36A		3								28
36B	8	32				6	8	7		110
37	1	1				1				18
38										
39										
40							1			2
40A										2
40B										
40C						1	5	1		1
40D	2						2			5
41										
42										
43							4			23
44	2					1	1			1
45							3	1		3
46										1
47C							1	1		11
47P										
48										
49										1
50										
51										
53										
54										
54A										
55	2					2		1		8
56								1		
57										
58										
59										2
60	15	11		5		10	28	10		103
61						10		1		
TOTAL	73	96	5	22	0	64	127	67	0	890

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 LAC	AB LAC	PTE SMN AC
Reprimand	14	2	2	9		14	49	16		82
Conditional conviction without punishment			1			1				5
Unconditional conviction without punishment	6	2	1	1		8	1	3		19
Severe reprimand	14	3	1	6		10	21	12		41
Extra duties	1							1		33
Extra drill										17
Stoppage of leave	1	18						1		30
Restriction of privileges		56						2		463
Suspended fine	4	2				4	7	3		18
Fine Less than 14 Days Pay	49	25	1	9		31	68	35		425
Fine More than 14 Days Pay	1		1				1			11
Forfeiture of service for purposes of promotion										
Forfeiture of seniority						10	9			
Reduction in rank						3	9	7		13
Suspended detention										
Committed detention										42
TOTAL	90	108	7	25	0	81	165	80	0	1199

**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
Sect 23		3					1			
24	2						5		4	1
25									1	
26						1	2		1	
27						2	4		1	
28										
29	4	2		1		2	9		5	10
30										
31										
32										
33(a)						2	1		1	
33(b)						1				
33(c)										2
33(d)										
34										
35										
36										
36B				1			1			
37	1						1			
38									1	
39										
40										
40A										
40B										
40C										
40D										
41										
42										
43										
44										
45										
46										
47C										1
47P										
48										
49										
50										
51										
53										
54										
54A										
55							1			
56										
57										
58										
59										
60	1	1		2		4	9		9	4
61							2		1	
TOTAL	8	6	0	4	0	12	36	0	24	18

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 LAC	AB LAC	PTE SMN AC
Reprimand	2	1				1	11		9	1
Conditional conviction without punishment										
Unconditional conviction without punishment		2								1
Severe reprimand		1				5	14		5	2
Extra duties							1			1
Extra drill										
Stoppage of leave		1								1
Restriction of privileges		1							6	5
Suspended fine	1					4	9		3	2
Fine Less than 14 Days Pay	7	1		1		9	18		10	7
Fine More than 14 Days Pay						1				
Forfeiture of service for purposes of promotion										
Forfeiture of seniority						2	5			
Reduction in rank				3			6			
Suspended detention										
Committed detention									5	4
TOTAL	10	7	0	4	0	22	64	0	38	24

ANNEX E TO
JAG REPORT 2013

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		NUMBER OF TRIALS HELD	CHARGES TRIED		NUMBER OF TRIALS HELD	CHARGES TRIED			
		GUILTY	N.G.		QUASHED	GUILTY		N.G.	QUASHED	GUILTY	N.G.
January	0	0	0	13	16	0	1	16	18	1	0
February	0	0	0	40	61	26	2	54	61	7	3
March	1	1	0	27	32	4	1	69	83	0	2
April	3	7	0	23	46	4	0	62	71	2	3
May	1	1	0	39	62	4	1	64	66	5	2
June	2	2	3	38	47	16	0	85	99	1	1
July	0	0	0	61	74	7	1	86	100	5	8
August	2	2	0	47	72	1	0	88	97	8	4
September	1	1	0	44	71	7	1	91	97	9	4
October	4	6	0	51	85	8	1	107	129	3	3
November	1	1	0	55	79	4	2	119	151	11	2
December	1	1	0	31	54	4	1	77	101	9	3
TOTAL	16	22	3	469	699	85	11	918	1073	61	35

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.

NAVY
JANUARY-DECEMBER 2013
DISCIPLINE OFFICER STATISTICS

Infringement	Number
Section 23	283
24	227
27	155
29	953
32(1)	31
35	42
60	103
TOTAL	1794

Action Taken	Number
Punishment Imposed - Fine	254
ROP	348
SOL	164
Extra Duties	132
Extra Drill	8
Reprimand	816
No Punishment Imposed	56
Referred to an Authorised Member	16
TOTAL	1794

**ARMY
JANUARY-DECEMBER 2013**

DISCIPLINE OFFICER STATISTICS

Infringement	Number
Section 23	220
24	361
27	678
29	1210
32(1)	42
35	180
60	382
TOTAL	3073

Action Taken	Number
Punishment Imposed - Fine	351
ROP	1169
SOL	511
Extra Duties	454
Extra Drill	125
Reprimand	374
No Punishment Imposed	65
Referred to an Authorised Member	24
TOTAL (1)	3073

**AIR FORCE
JANUARY-DECEMBER 2013**

DISCIPLINE OFFICER STATISTICS

Infringement	Number
Section 23	21
24	41
27	105
29	269
32(1)	7
35	9
60	64
TOTAL	516

Action Taken	Number
Punishment Imposed - Fine	158
ROP	76
SOL	55
Extra Duties	48
Extra Drill	30
Reprimand	137
No Punishment Imposed	10
Referred to an Authorised Member	2
TOTAL	516

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.

NAVY

JANUARY-DECEMBER 2013

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		WD	
		GUILTY	N.G.		GUILTY	N.G.		GUILTY	N.G.		
January											
February											
March											
April											
May											
June											
July											
August											
September											
October											
November											
December	1	5	0								
TOTAL	1	5	0	0	0	0	0	0	16	4	0

One matter was withdrawn prior to trial

**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
Sect 23										
24									1	
25										
26										
27										
28										
29									1	
30										
31										
32										
33(a)										
33(b)										
33(c)										
33(d)				1			1			
34										
35										
36										
36A										
37				1						
38										
39										
40										
40A										
40B										
40C										
40D										
41										
42										
43										
44										
45										
46										
47C							1			
47P										
48										
49										
50										
51										
53										
54										
54A										
55										
56				1						
57										
58										
59										
60				3			1			
61									10	
TOTAL	0	0	0	6	0	0	3	0	12	0

Details of Quashed Convictions

DFDA Sect	Rank	Short Summary of Offence	Reason for quashing

**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										
Conditional conviction without punishment										
Unconditional conviction without punishment										
Severe reprimand				4			1			
Suspended fine				2						
Fine Less than 14 Days Pay										
Fine More than 14 Days Pay				1						
Forfeiture of service for purposes of promotion										
Forfeiture of seniority				4					2	
Reduction in rank							1			
Suspended detention										
Committed detention							2		2	
Dismissal									8	
Imprisonment									7	
TOTAL	0	0	0	11	0	0	4	0	19	0

ARMY

JANUARY-DECEMBER 2013

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.		QUASHED	WD		GUILTY	N.G.	QUASHED	WD			
January														
February														
March														
April	1	2	3											
May				1	1								1	
June				1	1									
July														
August														
September	1		5										5	
October				2	2	3							4	
November	1	1		2	2	2							1	
December													4	
TOTAL	3	3	8	6	6	5	1	1	1	15	23	8	0	14

**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
Sect 23										
24										1
25										
26										1
27										
28										
29										
30										
31										
32										
33(a)		2								1
33(b)										
33(c)										
33(d)										
34						1				
35										
36										
36A										
37										
38										
39										
40										
40A										
40B										
40C										
40D										
41										
42										
43										
44										1
45										
46										
47C							7			
47P										
48										
49										
50										
51										
53										
54										
54A										
55		2								2
56										
57										
58										
59										
60	1					1	2			2
61		2				1	1	1		3
TOTAL	3	4	0	0	0	3	10	1	0	11

Details of Quashed Convictions

DFDA Sect	Rank	Short Summary of Offence	Reason for quashing
37	SGT	Intoxicated while on duty	Error 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 LAC	AB LAC	PTE SMN AC
Reprimand							1			
Conditional conviction without punishment										
Unconditional conviction without punishment										
Severe reprimand	1					1	2	1		
Suspended fine							2			
Fine Less than 14 Days Pay								1		1
Fine More than 14 Days Pay		1					2			
Forfeiture of service for purposes of promotion										
Forfeiture of seniority										
Reduction in rank	3					2	6			
Suspended detention										2
Committed detention						1				5
Dismissal		3					6			3
Imprisonment							1			3
TOTAL	4	4	0	0	0	4	20	2	0	14

**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
Sect 23										
24										
25										
26							1			
27										
28										
29										
30										
31										
32										
33(a)									1	
33(b)							1			
33(c)										
33(d)										
34										
35										
36										
36A										
37										
38										
39										
40										
40A										
40B										
40C										
40D										
41										
42										
43										
44										
45										
46										
47C							1			
47P										
48										
49										
50										
51										
53										
54										
54A										
55										
56										
57										
58										
59										
60										
61							1		17	
TOTAL	0	0	0	0	0	0	4	0	18	0

Details of Quashed Convictions

DFDA Sect	Rank	Short Summary of Offence	Reason for quashing

**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							1		4	
Suspended fine									4	
Fine Less than 14 Days Pay							2		5	
Fine More than 14 Days Pay										
Forfeiture of service for purposes of promotion										
Forfeiture of seniority							2			
Reduction in rank							1			
Suspended detention										
Committed detention							1			
Dismissal from ADF									13	
Imprisonment									13	
TOTAL	0	0	0	0	0	0	7	0	26	0

COMBINED JANUARY - DECEMBER 2013

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	0	0	0	0	0	0	0	0	0	0	0
March	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
April	1	2	3	0	0	0	0	0	0	0	2	3	0	0	1
May	0	0	0	0	1	1	0	0	0	0	4	6	5	0	0
June	0	0	0	0	2	1	2	0	0	0	4	10	3	0	0
July	0	0	0	0	0	0	0	0	0	0	2	3	0	0	0
August	0	0	0	0	2	1	3	0	0	0	5	19	1	0	5
September	1	0	5	0	0	0	0	0	0	0	2	3	1	0	4
October	0	0	0	0	3	6	3	0	2	0	2	2	3	0	0
November	1	1	0	0	2	2	2	1	1	1	3	1	2	0	0
December	1	5	0	0	0	0	0	0	0	0	2	6	0	0	4
TOTAL	4	8	8	6	10	11	10	1	3	28	56	15	0	14	

DEFENCE FORCE DISCIPLINE ACT

LIST OF SECTIONS USED IN STATISTICS

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

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

LIST OF JUDGE ADVOCATES AND DEFENCE FORCE MAGISTRATES

Major General Ian Westwood AM, Chief Judge Advocate
Colonel Peter Morrison
Colonel Jennifer Woodward
Group Captain Peter Burke

LIST OF ACTIVE S.154 OFFICERS

Major General Ian Westwood AM, Chief Judge Advocate
Colonel Peter Morrison
Colonel Jennifer Woodward
Group Captain Peter Burke
Commander the Hon Justice Dennis Cowdroy OAM RANR
Commander Fabian Dixon SC RANR
Commander James Renwick SC RANR
Lieutenant Colonel Stuart Durward SC
Lieutenant Colonel Paul Smith
Wing Commander Gordon Lerve
Squadron Leader Christopher Hoy SC
Lieutenant Andrew Eckhold RANR

OFFICE OF THE REGISTRAR OF MILITARY JUSTICE

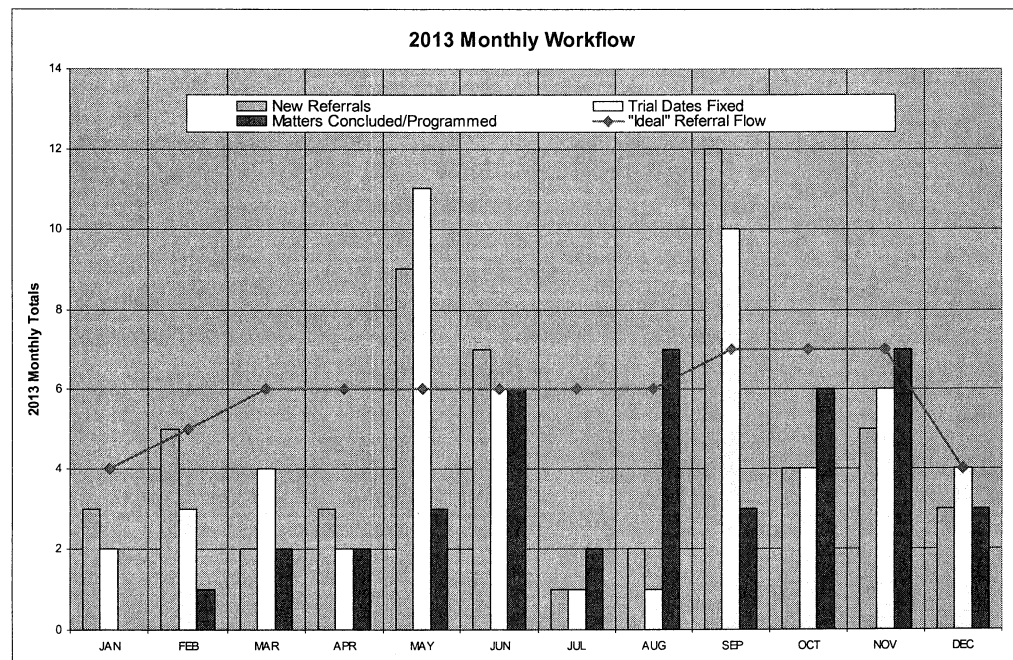
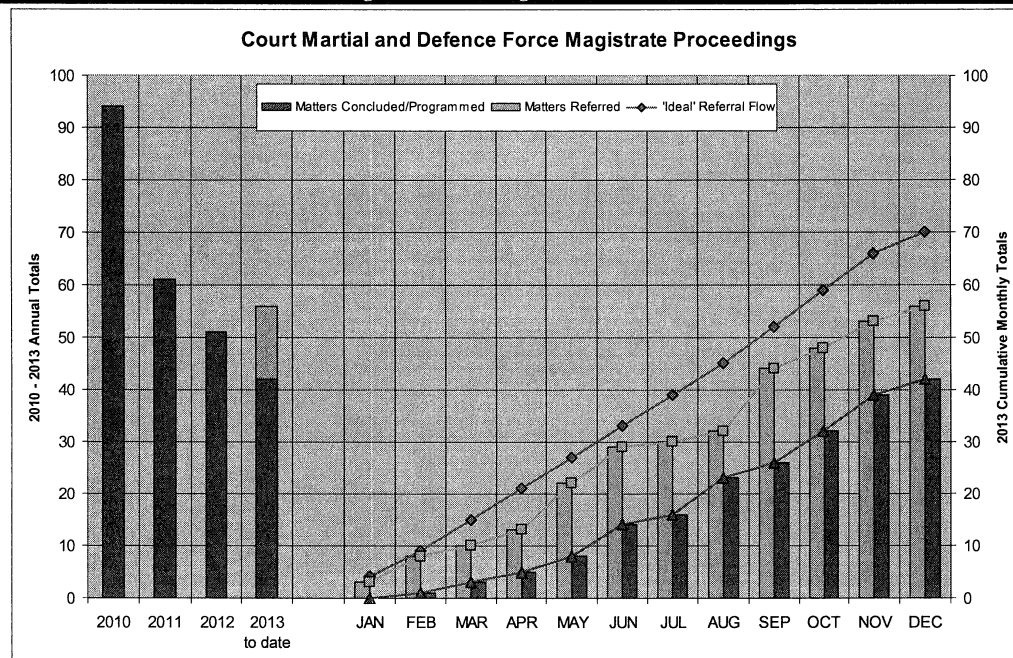
REPORT FOR THE PERIOD JANUARY-DECEMBER 2013 (INCLUSIVE)

Current wef 31 Dec 13

1. ORMJ Process

- The RMJ's powers are triggered upon receipt of a referral from the DMP.
- On receipt of the referral, RMJ aims to list the matter (fix a date) within two weeks and have the matter commence within three months (see Item 4 KPIs for details of indicators and performance against these).

2. Court Martial and Defence Force Magistrate Proceedings*



* The January figures for referrals include matters carried over from the previous year (for 2013, two referrals were carried over from 2012).
 * The figures are based on the number of matters referred and concluded and not the number of accused. Of the above matters referred/concluded, one involved three co-accused and one involved 2 co-accused.
 * The term 'concluded' includes where a court martial is convened/the matter is referred to a DFM but the charges are withdrawn prior to trial at a pre-trial hearing (there have been two such matters during the reporting period). It does not include matters where, prior to the convening of a court martial/referral to DFM the charges are withdrawn (there has been one such matter during reporting period). This best reflects number of proceedings/workload, although may not capture all referrals.

3. RMJ Analysis/Comments

- The CM/DFM system is resourced to deal with, and the Item 4 KPIs developed cognizant of:
 - Approximately 70 concluded matters per year. This varies depending on the breakdown of the type of tribunal, whether there are co-accused and the length and complexity of the matters.
 - A relatively steady/predictable flow of referrals. The ‘ideal referral flow’ (pink line) is approximately 6 referrals per month, although it has been adjusted to reflect what is traditionally a slightly slower start to the year, a slight peak in Sep, Oct and Nov (which is desirable as it allows for the listing of matters for the following Jan and Feb), before a tailing off in Dec.
- It is these predictions upon which resource requirements are determined and resources are levelled.
 - OJAG established positions to vacancy levels reflect the current workload.
 - The management of resources, and therefore working within KPIs, becomes more difficult when there are spikes or troughs in the rate of referrals. ORMJ, ODMP and DDCS are cognisant of this and are working together to address the issue. As a result, the workflow in Oct and Nov has significantly improved.
- **Number of matters concluded in 2013: 42.**
- **Number of outstanding referrals carried over into 2014: 14 (all already listed for 2014).**

4. KPIs*

Performance

Comments

**ON TRACK
SOME CONCERNS
SERIOUS CONCERNS**

<p>Within two weeks of receipt of referral by RMJ from DMP, 90% of matters are to be listed (trial date fixed).</p>	<p>SOME CONCERNS</p> <p>89%</p> <p>Number of matters NOT listed within two weeks: 6/56</p>	<p>6 ‘out of time’ listings (but only 3 of these are of concern). Numbers of weeks/days by which timeline exceeded: 7 weeks, 4 weeks, 3 weeks, 7 days, 6 days, 3 days. Reasons: appointing/responsiveness of DOs (usually due to responsiveness of accused), limited/conflicting availability of counsel (particularly DOs, and particularly where multiple DOs for co-accused), accused (usually due to deployment/health) and complainants/witnesses (usually due to operations/deployments), deconflicting multiple matters for an accused, and ascertaining witness availability.</p>
<p>Within three months of receipt of referral by RMJ from DMP, 80% of proceedings are to have commenced (if spans Xmas stand down then an additional month is allowed).</p>	<p>SOME CONCERNS</p> <p>77%</p> <p>Number of matters NOT commenced within three/four months: 13/56</p>	<p>13 ‘out of time’ listings (but only 6 of these are of concern). Numbers of weeks/days by which timeline exceeded: 2x13wks; 11wks; 9wks; 2x5wks; 2wks; 1wk; 2x5days; 2x4days; and 3days. Reasons: X-mas standdown, spikes in work flow (which impact on availability of resources, particularly JAs/DFMs and facilities), limited/conflicting availability of counsel (particularly DOs, and particularly where multiple DOs for co-accused), accused (usually due to deployment/health) and complainants/witnesses (usually due to operations/deployments), deconflicting multiple matters for an accused, classified proceedings, and unit commitments.</p>
<p>ORMJ will action 95% of all requests within the timeframe provided/negotiated or 28 days if no timeframe is provided/negotiated.</p>	<p>ON TRACK</p> <p>100%</p>	<p>Examples include: FOI requests, Single Access Mechanism (SAM) requests, requests for statistics, etc.</p>

* These KPIs recognise that there will be matters that will legitimately fall outside normally acceptable parameters. A matter will only be permitted to be progressed outside normally acceptable parameters in exceptional circumstances and, in such cases, will be closely managed and progressed as expeditiously as possible.