



JUDGE ADVOCATE GENERAL

**DEFENCE FORCE
DISCIPLINE ACT 1982**

*Report for the period
1 January to 31 December 2017*

Department of Defence

Defence Force Discipline Act 1982

*Report for the period
1 January to 31 December 2017*

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JUDGE ADVOCATE GENERAL

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

Senator the Hon Marise Payne
Minister for Defence
Parliament House
CANBERRA ACT 2600

Dear Minister,

I submit herewith my report covering the period from 1 January to 31 December 2017. 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 'M. J. Slattery'.

Rear Admiral The Hon Justice M.J. Slattery RANR
Judge Advocate General
Australian Defence Force

25 May 2018

Enc.

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**JUDGE ADVOCATE GENERAL
AUSTRALIAN DEFENCE FORCE**

REPORT FOR THE PERIOD 1 JANUARY TO 31 DECEMBER 2017

PREAMBLE

1. Section 196A(1) of the *Defence Force Discipline Act 1982* (DFDA) obliges the Judge Advocate General of the Australian Defence Force (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 2017. The office of JAG was created by DFDA s.179. 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.¹

JUDGE ADVOCATES GENERAL

2. Former holders of the office of JAG 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 AB 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 ARO Rowlands AO RFD RANR (of the Family Court of Australia).

¹ DFDA s.188.

- d. 1996–2001 Major General the Hon Justice KP Duggan AM RFD (of the Supreme Court of South Australia).
- e. 2001–2007 Major General the Hon Justice LW 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.
- f. 2007–2014 Major General the Hon Justice RRS Tracey AM RFD (of the Federal Court of Australia).

3. I was first appointed JAG on 14 May 2015, having acted in the position since 30 July 2014. I satisfy the statutory qualification for appointment by virtue of my appointment as a judge of the Supreme Court of New South Wales. My current appointment as JAG is until 29 July 2021.²

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

- a. Reporting annually to Parliament on:
 - (i) The operation of the DFDA, the regulations, the rules of procedure; and
 - (ii) 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.³
- b. Making procedural rules for Service tribunals, these being:
 - (i) Court Martial and Defence Force Magistrate Rules; and
 - (ii) Summary Authority Rules (SAR).
- c. Nominating judge advocates (JAs) for courts martial⁴ and Defence Force magistrates (DFMs).⁵

² I was reappointed as JAG on 9 March 2017.

³ DFDA s.196A.

⁴ DFDA s.129B.

- d. Nominating to the Chief of the Defence Force (CDF) or a Service Chief officers to be members of the JAs panel.⁶
- e. Appointing DFMs from officers appointed as members of the JAs panel.⁷
- f. Nominating to the CDF legal officers for the purposes of DFDA s.154(1)(a).
- 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 indicate the legislature's desire for appropriate civilian judicial oversight of the operation of the DFDA and related legislation.

6. Each JAG has been a two-star ranking reserve officer. Previous JAG reports have noted that the JAG's military rank and civilian judicial status 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 with the Head Defence Legal (HDL), the Director General Australian Defence Force Legal Services (DGADFLS) and the single Service heads of corps/category.

7. The JAG necessarily also plays a significant role in the promotion of the jurisprudential welfare and education of the Australian Defence Force (ADF).

8. I share the opinion held by previous holders of this 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. Funding for the Office of the JAG (OJAG) for the period of this Report was provided by the Associate Secretary Group of the Department of Defence.

⁵ DFDA s.129C.

⁶ DFDA s.196.

⁷ DFDA s.127.

OTHER SIGNIFICANT APPOINTMENTS

Chief Judge Advocate

10. From the commencement of the reporting period until 21 September 2017, Major General Ian Denis Westwood AO continued to hold the position of Chief Judge Advocate (CJA) established under DFDA s.188A.

11. Brigadier Michael Cowen QC was appointed as CJA from 22 September 2017 for a period of five years. As outlined in my 2016 Report, Brigadier Cowen was previously appointed as a reserve JA and DFM.

12. The appointment of Brigadier Cowen was preceded by a public call for expressions of interest for the position. A broad range of competitive applications were received from both inside and outside the ADF. Seven candidates were the subject of final interview.

13. The final interviews of shortlisted candidates took place on 10 August 2017 in Canberra. The distinguished panel which assisted me with the decision consisted of the Hon Justice Richard Tracey AM RFD, Air Vice Marshal Margaret Staib AM CSC, Ms Louise Rafferty from the Australian Government Solicitor and Commodore John Rush QC RFD RANR. Brigadier Cowen was the unanimous choice of the panel for appointment to the position of CJA. The appointment was made in consultation with Chief of Army and CDF and after notification to the Minister.

14. Brigadier Cowen brings to the role of CJA a rich legal and military background. He has extensive experience in the practice of the criminal law. He has been a civilian prosecutor for over 23 years in both the United Kingdom and Australia. He also possesses broad military experience. Before joining the Army Reserve in Australia in 2008, he served in the British Army, including deploying to Afghanistan in 2002 as part of Operation Enduring Freedom. I have great confidence in Brigadier Cowen to carry forward the challenging role of CJA and to promote the administration of justice within the ADF.

Permanent Judge Advocate

15. As noted in my 2015 and 2016 Reports,⁸ Group Captain Ian Scott Henderson AM was appointed as a full time JA and DFM for twelve months

⁸ 2015 Report at paragraph 40, 2016 Report at paragraph 10.

commencing on 8 February 2016. In September 2016, his appointment was extended to 30 September 2017. In June 2017, his appointment was further extended until 31 December 2018.

16. I have previously expressed the view that having JAs and DFMs drawn from both the permanent and reserve forces brings a desirable mix of skills and experience to the superior service tribunal system.⁹ I continue to hold this view.

Reserve Judge Advocates

17. This reporting period has seen significant turnover in reserve JAs and DFMs. At the commencement of the reporting period, there were three serving reserve officers, Captain the Hon Dennis Antill Cowdroy OAM QC RANR, then-Lieutenant Colonel Michael Cowen QC and Wing Commander Gregory Paul Lynham.

18. Brigadier Cowen transferred from providing reserve JA and DFM service to presiding full time as CJA. Captain Cowdroy's appointments as a JA and DFM expired on 15 March 2017. Wing Commander Lynham's appointments as a JA and DFM ended upon his appointment as a judge of the District Court of Queensland in April 2017. I would like to record my thanks to Captain Cowdroy and Wing Commander Lynham for their dedicated service within this jurisdiction. The ADF continues to benefit from their expertise as s.154 reporting officers.¹⁰

19. As a result of these staff movements, a selection process was initiated to recruit new reserve JAs and DFMs. Expressions of interest were sought from reserve legal officers. Eighteen applications were received. Five candidates were the subject of final interview. The interviews of shortlisted candidates took place on 17 November 2017 in Canberra. I chaired the interview panel, assisted by the three DJAGs and CJA.

20. The interview panel was unanimous in its view that I should nominate to CDF three of the short listed applicants for appointment as reserve JAs. I was pleased to nominate Group Captain Scott Michael Geeves and Lieutenant Colonel Jonathan James Hyde for appointment as JAs during

⁹ 2015 Report at paragraph 40, 2016 Report at paragraph 11.

¹⁰ This Report at paragraphs 28–29.

the reporting period and Lieutenant Commander Gregory Andrew Sirtes SC RANR shortly after the reporting period.

21. CDF appointed Group Captain Geeves and Lieutenant Colonel Hyde as JAs on 14 December 2017 and I subsequently signed their instruments of appointment as DFMs on 15 December 2017. CDF appointed Lieutenant Commander Sirtes as a JA on 19 February 2018 and I subsequently signed his instrument of appointment as a DFM on 15 March 2018. They join Major General Ian Westwood, who was appointed as a reserve JA and DFM upon the expiration of his appointment as CJA.

Deputy Judge Advocates General

22. Section 179 of the DFDA provides for the appointment of DJAGs. The practice since commencement of the DFDA has been to have three DJAGs, with one from each of the Services. The DJAGs during the reporting period were:

- a. DJAG–Navy: Commodore John Timothy Rush QC RFD RANR;
- b. DJAG–Army: Brigadier His Honour Judge Stuart Gordon Durward SC;
- c. DJAG–Air Force: Air Commodore His Honour Judge Michael Burnett AM (until 9 March 2017); and
- d. DJAG–Air Force: Air Commodore His Honour Judge Gordon Bruce Lerve (from 18 May 2017).

23. I formally record my gratitude to them for their help, support and counsel. I also thank them for their service to the ADF, much of which is voluntary and is given in addition to their other demanding professional duties as judges or counsel.

Air Commodore Michael Burnett AM

24. This reporting period has seen the completion of Air Commodore Burnett's term as DJAG-Air Force. After initial entry into the Australian Army Reserve in 1985, he transferred to the RAAF Specialist Reserve in 1991. Air Commodore Burnett was appointed as a JA and DFM in 1997 following many years as a prosecuting officer and defending officer in superior service tribunal proceedings. He was initially appointed as DJAG-Air Force on 22 March 2010 and re-appointed on 26 June 2014.

25. Air Commodore Burnett continues to contribute to the ADF as a reserve legal officer. I wish to record my thanks to him for his service and commitment, and in particular for his stimulating engagement on policy issues about the interim military justice system following the High Court's decision in *Lane v Morrison*.¹¹

26. I was delighted that in the Queen's Birthday Honours List for 2017 Air Commodore Burnett's service received public acknowledgement with his appointment as a Member of the Order of Australia *for exceptional service as a legal officer and as the Deputy Judge Advocate General – Air Force*.

Section 154 reporting officers

27. Section 154 of the DFDA requires that reviewing authorities obtain a report of a legal officer prior to commencing a review of a service conviction. For a conviction by a court martial or DFM, or a direction given under DFDA ss.145(2) or (5), the legal report must be provided by a legal officer appointed by CDF on the recommendation of the JAG.¹²

28. The experiences and perspectives gained by these officers through the provision of legal opinions pursuant to DFDA s.154 are unique and afford a great opportunity to observe how the DFDA is operating in practice. I have appreciated their input in relation to law reform and their other observations regarding improvements to the operation of the DFDA. I also thank them for their service to the ADF, much of which is voluntary and is given in addition to their other demanding professional duties as judges or counsel.

29. The section 154(1)(a) legal reporting officers during the reporting period were:

- a. Major General Ian Westwood AO;
- b. Captain Dennis Cowdroy OAM QC RANR;
- c. Captain James Renwick SC RANR;
- d. Colonel Paul Smith;

¹¹ (2009) 239 CLR 230, [2009] HCA 29.

¹² DFDA s.154(1)(a)

- e. Group Captain Michael O'Brien;
- f. Group Captain James Gibson;
- g. Commander Fabian Dixon SC RFD RANR;
- h. Then-Group Captain Gordon Lerve (prior to his promotion to Air Commodore and his appointment as DJAG–Air Force in May 2017);
- i. Wing Commander Gregory Lynham;
- j. Wing Commander Glenn Theakston;
- k. Lieutenant Commander Gregory Sirtes SC RANR; and
- l. Major Douglas Campbell QC.

30. On 14 December 2017, CDF appointed two additional section 154(1)(a) legal reporting officers, Lieutenant Commander Sylvia Emmett RANR and Lieutenant Commander Catherine Traill RANR.

Related appointments

31. Mr Mark Cunliffe PSM continued as HDL and Mr Adrian D'Amico continued as Defence General Counsel. Air Commodore Chris Hanna CSC and bar was succeeded by Commodore Peter Bowers RAN as DGADFLS in December 2017. I wish to acknowledge Air Commodore Hanna's significant contribution in this role over the past three years and earlier as the inaugural Director Defence Counsel Services (DDCS).

32. Group Captain Nina Harvey continued to serve as the Registrar of Military Justice (RMJ) established by DFDA s.188F. On 19 June 2017, the Minister for Defence extended Group Captain Harvey's appointment to 21 September 2018. Her deputy during the reporting period was Commander David Swanson RAN. On 7 November 2016, the Minister for Defence appointed him to act as RMJ during such periods as the RMJ is absent or otherwise unable to perform the functions of her role.¹³

¹³ DFDA s.188FL

33. The position of staff officer to the JAG and CJA was filled during the reporting period by Lieutenant Commander Patience Neal RAN. On behalf of CJA and myself I formally record our gratitude to her for her diligent discharge of this role.

34. I also wish to acknowledge the substantial support provided to OJAG by Ms Jennifer Mackenzie. As a long term staff member with deep corporate memory of all that transpires within this jurisdiction, her expertise was critical in ensuring the seamless transition between CJAs, from Major General Westwood to Brigadier Cowen.

Expiration of statutory appointments

35. The current position as to the expiration of statutory appointments within my office is as follows:

- a. JAG, Rear Admiral Slattery, expiry date 29 July 2021;
- b. CJA, Brigadier Cowen, expiry date 21 September 2022;
- c. DJAG–Navy, Commodore Rush, expiry date 29 July 2019;
- d. DJAG–Army, Brigadier Durward, expiry date 9 March 2019;
- e. DJAG–Air Force, Air Commodore Lerve, expiry date 17 May 2022; and
- f. RMJ, Group Captain Harvey, expiry date 21 September 2018.

MAJOR GENERAL IAN DENIS WESTWOOD AO

36. The retirement of Major General Westwood on 21 September 2017 marked the end of both his long tenure within OJAG and his most distinguished career as an officer in the permanent forces.

37. Major General Westwood joined the ADF in 1983. He was first appointed as a JA and DFM in 1992 and became CJA in 2004. In October 2007, he was appointed as the inaugural Chief Military Judge of the Australian Military Court (AMC). When the High Court of Australia determined that the AMC was unconstitutional, Major General Westwood resumed his previous role as CJA under an interim restored court martial and DFM system. In the ensuing years, Major General Westwood worked

tirelessly to ensure confidence in the superior service tribunal system in the face of legislative and policy uncertainty.

38. Major General Westwood did not take the common but excessively narrow view of military discipline, namely, that it is just a mechanism to ensure that members of the ADF obey orders. He firmly believed that the ADF will be its best when command's discipline is fair and is seen to be fair. His energy, good humour and fidelity to the law are significantly responsible for the present good health and efficiency of the military discipline system.

39. I note with pleasure that Major General Westwood was promoted to Officer of the Order of Australia in the Australia Day 2018 Honours List *for distinguished service to the Australian Defence Force as Chief Military Judge of the Australian Military Court and Chief Judge Advocate of the superior disciplinary tribunal system.*

40. While this esteemed and public recognition falls outside the reporting period, it is a most fitting postscript to Major General Westwood's service. For over a generation, Major General Westwood maintained the high standards for which the ADF's superior service tribunals are renowned. He retired from permanent service with the admiration and affection of all who serve and have served within this jurisdiction.

OPERATION OF THE SUPERIOR SERVICE TRIBUNALS

41. 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*, the *Military Justice (Interim Measures) Amendment Act 2013*, and the *Defence Legislation (Enhancement of Military Justice) Act 2015*.

42. In my reports for 2014, 2015 and 2016, I noted that the superior service tribunal system was still operating under interim measures legislation and that it was critical to maintaining confidence in the administration of military justice in the ADF that a decision be taken in the near term either to make the interim system permanent or to take some other clear legislative course to enhance the independence of judicial

officers in the ADF. This was raised to similar effect in the JAG reports of Major General the Hon Justice RRS Tracey AM RFD in 2011 and 2013.¹⁴

43. The interim measures legislation expired on 21 September 2017 with the retirement of Major General Westwood. In my opinion superior service tribunals continue to operate fairly under the court martial and DFM system. However, legislative reform will improve the operation of the system. The need to support the independence of ADF judicial officers remains. These issues are addressed later in this Report.¹⁵

STATISTICS

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

APPEALS

45. During the reporting period, there were 6 appeals determined by the Defence Force Discipline Appeal Tribunal (DFDAT) and two matters in the Federal Court of Australia. These were:

- a. *McKenna v Chief of Navy* [2017] ADFDAT 1;
- b. *Angre v Chief of Navy (No 3)* [2017] ADFDAT 2;
- c. *Baker v Chief of Army* [2017] ADFDAT 3;
- d. *Komljenovic v Chief of Navy* [2017] ADFDAT 4;
- e. *Douglas v Chief of Army* [2017] ADFDAT 5;
- f. *O'Neill v Chief of Army* [2017] ADFDAT 6;
- g. *Rowley v Chief of Army* [2017] FCA 1119; and
- h. *Director of Military Prosecutions v Henderson* [2017] FCA 1608.

¹⁴ 2011 Report at paragraph 16, 2013 Report at paragraphs 24–27, 2014 Report at paragraphs 24–25, 2015 Report at paragraphs 17, 39, 84 and 85, and paragraphs 37–41 of the 2016 Report.

¹⁵ This report at paragraphs 73–85.

46. In *McKenna*, the appeal was allowed in part. This was largely based on concessions by the Chief of Navy, including in relation to the quashing of one of the charges. A retrial was not ordered.

47. In *Angre (No 3)*, the appeal against the conviction on Charge 6 was dismissed. The appeal against the convictions on Charges 1 and 2 was allowed and these convictions were quashed. A new trial was ordered on Charges 1 and 2.

48. Appeals were dismissed in *Baker, Komljenovic and O'Neill*.

49. In *Douglas*, the appeal was allowed and a new trial was ordered. He was not re-tried due to his discharge from the ADF.

50. In *Rowley*, the applicant sought judicial review of a sentence of imprisonment for two offences of dishonesty. The application was dismissed.

51. In *DMP v Henderson*, the Federal Court ruled that the DFM had jurisdiction to hear a common assault charge under DFDA s.61 and *Crimes Act 1900 (ACT)* s.26.

LEGISLATION

Defence Act

52. There were no amendments to the *Defence Act* of relevance to military discipline law in 2017.

DFDA

53. There were no amendments to the DFDA in 2017.

Other legislative amendments

54. There were no other significant legislative amendments of relevance to military discipline law in 2017.

EFFICIENCY AND EFFECTIVENESS

Military Justice Coordination Committee

55. As foreshadowed in my 2016 Report, the reinvigorated Military Justice Coordination Committee (MJCC) has become the principal mechanism for the engagement of command in the development of military justice policy in the ADF. During 2017, under the leadership of its Chair, Head People Capability (HPC), Rear Admiral Brett Wolski AM RAN, the MJCC has effectively fulfilled the role that CDF reset for it in 2016. During the reporting period, the MJCC has ensured that command has a direct means of bringing to attention issues with the operation of, and reform proposals for, the superior and summary service tribunal system. The MJCC has provided a central forum for testing command's response to proposals from OJAG for DFDA rule changes and for other initiatives for improving the efficiency of service tribunals.

Summary Discipline System Review

56. My 2016 Report also foreshadowed the important work being undertaken by the Summary Discipline System (SDS) Review led by Commodore Nigel Perry CSC RANR, assisted by Colonel Geoff Cameron CSC and a team of permanent and reserve personnel from all three Services. Commodore Perry, Colonel Cameron and their team produced a thorough SDS Review Report during the reporting period, which the Chiefs of Service Committee (COSC) endorsed in November 2017.

57. The last overhaul of the summary discipline system occurred as a result of the Senate Foreign Affairs, Defence and Trade References Committee Report into *The Effectiveness of Australia's Military Justice System* dated 16 June 2005. These recommendations were implemented by the Military Justice Implementation Team, led by Rear Admiral Mark Bonser AO CSC RAN. A review of these changes, their implementation and the operation of the summary discipline system as a whole was overdue, particularly in light of command concerns that the system was no longer meeting disciplinary requirements.

58. The SDS Review and the acceptance of the SDS Review Report started the process of addressing these concerns. Members of the SDS Review team closely engaged with OJAG.

59. The SDS Review proposed reform in three phases (called 'Tracks') reflecting the priority to be attached to each group of reforms. The SDS

Review Report suggested in Track 1 some excellent managerial solutions to give command better oversight into the timelines for the progress of matters through the summary discipline system. Such clearer oversight has long been needed. It will enable points of inefficiency in the system to be more quickly identified and addressed. I fully support the SDS Review Report's Track 1 recommendations for internal policy and procedural changes, together with improved training and education, to facilitate command involvement and oversight of the summary discipline system. In particular, I commend the work evident in the *Commanders' Guide to Discipline* and the *Commanders' Guide to Punishment*. I also commend the SDS Review Report's identification of the need to formalise, in VCDF, command responsibility for the performance of the ADF's discipline system, including the summary discipline system.

60. The SDS Review Report also advanced the excellent proposal for a built-in five-year parliamentary review of the DFDA. I support this proposal, with further discussion later in this Report.¹⁶

61. My final note to COSC in relation to the SDS Review Report supported many of its Track 2 recommendations, including for the simplification of the rights of election from summary to superior service tribunals, and for a wider range of punishments at the summary level. While not intending to detract from the SDS Review's very significant achievements, my note also pointed out some concerns that I had with Tracks 2 and 3. These included:

- a. Reform to the unnecessarily complex right of election is long overdue. However, the right itself is an important safeguard for accused persons.
- b. Expansion of the range of punishments available within the discipline officer scheme that operates under DFDA Part IXA is warranted. However, it should be approached cautiously to prevent misuse of the scheme.

62. I raised my concerns about these and other recommendations of the SDS Review Report during the consultation process.

¹⁶ This report at paragraph 87.

63. It is expected that in 2018 a Summary Review Implementation Team will be established in order to implement the recommendations of the SDS Review Report.

Review of the Summary Authority Rules

64. Arising from discussions with the SDS Review Team, I commenced an assessment of how the SAR might be amended to promote the timeliness, efficiency, transparency, cost-effectiveness and accessibility of the summary discipline system. The JAG has the authority under DFDA s.149 to make SAR, not inconsistent with the DFDA, for the conduct of trials before summary authorities. The SAR have not been amended since 2009.

65. I proposed to the SDS Review Team that SAR rule 14 be amended to remove the requirement for the accused person to be provided with copies of witness statements in the first instance. A plea of guilty could be entered to a statement of facts setting out the elements of the alleged offence. Witness statements would only be required to be prepared and served if and when the accused person pleads not guilty at a summary trial. Witness statements may still be served before that time at the prosecution's option where that would serve the better administration of justice. This is consistent with modern civilian police and local court summary trial practice,¹⁷ in which a full brief of evidence need not be prepared and served when a guilty plea is entered. This long standing and efficient civilian practice is readily adaptable for service conditions. Legal review of guilty pleas would provide protection for accused persons in that convictions would be quashed if the allegations in the statement of facts do not establish the elements of an offence known to law.

66. I further proposed to the SDS Review Team that the SAR be amended to give a summary authority, at the commanding officer (CO) or superior summary authority level, the additional option of calling on an independent legal officer to give mid-trial advice to the summary authority about any matter of practice or procedure, as required. The DFDA election system has made some summary trials legally complex and at greater risk of legal error. Due to the lesser complexity of their proceedings, subordinate summary authorities should not need this assistance. The legal officer's presence for this purpose would be at the absolute discretion of the summary authority. Command's authority and control of summary

¹⁷ For example, the *Criminal Procedure Act 1986* (NSW) ss.173, 175 and 183.

proceedings would therefore be assisted and not undermined, while preventable legal error would be minimised. The legal advice would be given transparently in front of all parties and would be subject to the existing automatic and further review processes.

67. In November 2017, COSC asked, through HPC, that I consider revising the SAR as a matter of priority. I have formulated these two amendments for command's consideration. After the reporting period I have commenced consultation with HPC preliminary to seeking the views of command through the MJCC about these amendments. Wider JAG review of the SAR will commence in 2018 in consultation with the Summary Review Implementation Team to be appointed.

Timeliness of superior service tribunal proceedings

68. In my 2016 Report,¹⁸ I expressed concern with the results of the RMJ's desk-top review of timeliness in superior service tribunal proceedings for the period mid-2013 to mid-2016. Specifically, from the date that the ADF became aware of an allegation to the end of the automatic review:

- a. 70% of matters were completed within 23 months; and
- b. of these, only 30% of matters were completed within 12 months.

69. The RMJ has continued working closely with the Director of Military Prosecutions (DMP), DDCS and Provost Marshal Australian Defence Force (PM-ADF) to achieve finalisation of 70% of proceedings within 12 months. The RMJ reported quarterly to the MJCC on progress against this objective. I am pleased to report that timeliness is improving. From 1 October 2016 until the end of 2017:

- a. 70% of matters were completed within just over 16 months; and
- b. of these, 45% of matters (for 52% of accused persons) were completed within 12 months.

70. I note that many early referrals during this period involved historical matters, which did not benefit from the timeliness reforms. As historic

¹⁸ 2016 Report at paragraphs 49–52.

matters were finalised and reforms started taking effect, improvements to timeliness gained and continues to gain momentum.

71. The improvements made to timeliness over the last two years are primarily the result of: setting, monitoring and reporting against clear performance standards; high levels of collaboration between the DMP, DDCS and PM-ADF; internal reviews conducted and improvements undertaken by these offices; and the 'fast track' initiatives discussed in the DMP's 2017 Annual Report.¹⁹

72. The goal remains finalisation of 70% of proceedings within 12 months and RMJ is now assessing further opportunities to improve timeliness. These will include a range of legislative, policy and structural reforms. I again commend the RMJ, DMP, DDCS and PM-ADF for progress made to date.

PROCEDURAL REFORM TO SUPERIOR SERVICE TRIBUNALS

73. The ADF's superior service tribunals have continued to operate fairly under the DFDA during the reporting period. Giving legislative priority to just a few procedural reforms will greatly assist these superior service tribunals to operate both more efficiently and more flexibly. Even allowing for the differences between standing civilian courts and military tribunals, many provisions of the DFDA no longer reflect the standards of procedural efficiency and flexibility in the civilian administration of justice in Australia. Over the last year, JAs and DFMs have continued to ensure that accused persons are afforded a fair trial despite these procedural inadequacies in the DFDA. But these gaps in the DFDA limit the ADF in promoting the most fair and effective investigation, prosecution, trial and defence of alleged service offences.

74. In my view, DFDA reform in these areas, as outlined below, is now required and justly merits Parliament's early attention in order to maintain confidence in the ADF's military discipline system. ADF members should enjoy, as nearly as possible, the benefit of the modern, fair and efficient criminal processes and procedures available in Australia's civilian courts, adjusted for service conditions. Regrettably they do not yet do so.

75. Suitable models for reform already exist. Commonwealth, State and Territory legislation dealing with criminal procedure can be readily adapted

¹⁹ Director of Military Prosecutions Annual Report for 2017 at paragraph 51.

for the ADF's immediate purposes. These models have generally had a long working life in civilian courts and have received extensive judicial review.

Brief historical overview

76. The last major structural reforms to the DFDA occurred in the period 2003–2007. These reforms succeeded and have had the important effect of securing greater independence for the ADF's discipline system through the establishment of CJA, DMP and RMJ. Since the High Court of Australia declared the AMC unconstitutional in *Lane v Morrison*, however, the DFDA has not had significant legislative attention to its superior or summary service tribunal procedures.

77. In the wake of *Lane v Morrison*, the *Military Justice (Interim Measures)* suite of legislation that passed in September 2009 and which was renewed in 2011, 2013 and 2015, continued the tenure of the AMC's former judicial officers. It did not otherwise modernise the operational or procedural aspects of the DFDA. No legislative changes have been made since 2009 to have the DFDA meet current community standards for the investigation and trial of offences alleged against ADF members.

78. The procedural defects identified here are not of recent origin. They have arisen gradually over decades. In my view they can readily be addressed by adapting available civilian models for ADF purposes. When the DFDA was first enacted in 1982, it attempted to incorporate the best of then-current civilian criminal procedure. Major developments in criminal justice in civilian courts in the late 1980s and the 1990s have not been adapted into the DFDA. This section of the Report shows just how procedurally out-of-date the DFDA has become. Its present procedural obsolescence limits trial efficiency, disadvantages ADF members and tends to frustrate investigators, prosecutors, defence counsel and JAs/DFMs alike.

79. The main areas for priority reform are summarised in the following paragraphs. The examples given here should command a broad measure of consensus among those directly engaged in the prosecution and defence of charges before ADF superior service tribunals. Opinions will vary as to appropriate solutions and models in some cases. Other procedural reforms to the superior service tribunals are desirable but can be addressed at a later time.

Mentally impaired ADF members before service tribunals

80. DFDA s.145 requires a superior service tribunal that is satisfied an accused person suffers mental impairment and who may be either unable to understand the proceedings or not be responsible in law to direct that the person 'be kept in strict custody until the pleasure of the Governor-General is known'. The person may then be dealt with under executive authority under DFDA s.194.

81. Most Australian states and territories have now repealed this kind of simplistic legislation and replaced it with legislation to comprehensively and sensitively manage persons through the legal process where the court is satisfied that the person is suffering mental illness or impairment. Even though command has a power to manage such ADF members, superior service tribunals need better powers to identify and deal with the legal consequences of mental impairment.

Improving superior service tribunal procedures to civilian best practice

82. Two main defects presently exist in superior service tribunal procedures. First, once a matter has been referred to the RMJ, there is insufficient capacity to hear pre-trial applications of the tribunal's own motion or the prosecution's motion. Currently, only the defence can make pre-trial applications concerning the admissibility of evidence. Secondly, there is a lack of procedural powers like those in civilian courts for the JA or DFM to be able to direct the parties to define and focus the real issues for trial and manage the course of expert evidence.

Strengthening JA/DFM independence – appointment and term of office

83. The CJA and JA/DFM appointments in 2017 were conducted through a transparent process. Enacting that process, or one like it, in the DFDA would increase confidence in the independence of the ADF's superior service tribunal system. The independence, depth and flexibility of the ADF's judicial branch would also be enhanced if any future appointment of a permanent JA/DFM were supported in legislation, providing for statutory independence provisions similar to those that presently attach to the office of the CJA.²⁰

²⁰ 2016 Report at paragraphs 39–41 and 59.

Improving courts martial sentencing transparency and effectiveness

84. In courts martial, the JA is not directly involved in the sentencing decision-making process. Moreover, courts martial do not give reasons for sentence. This risks sentencing error, misunderstanding by the convicted person being sentenced, and loss of the power of general deterrence through the sentencing process. Having JAs sit with the members of the court martial when they consider sentence, and then help formulate and provide the reasons of the court martial for the sentence, would address these deficiencies.²¹

Giving modern powers to ADF investigators

85. The DFDA lacks many modern law enforcement powers (with attendant safeguards) found in Commonwealth, state and territory legislation. Reasonable debate can take place about the precise additional investigative powers that should be introduced into the DFDA and the safeguards that should accompany their exercise by service police. However, there is a need to update these powers to reflect the realities of modern investigative capability, especially, for example, to allow investigators reasonable access to digitally stored information, commonly a source of compelling evidence.

JAG REPORTS AND REGULAR REVIEWS OF THE DFDA

86. This Report has highlighted that the DFDA increasingly faces a risk of procedural obsolescence. The DFDA can be better protected against this risk. DFDA s.196A already embeds an annual review requirement through JAG reports. One of the purposes of these reports is to identify civilian criminal developments which may enhance the operation of the DFDA. Since *Lane v Morrison* in 2009, JAG Reports have recommended a series of (mostly procedural) reforms to the DFDA. A number of these recommendations have not as yet made their way into legislation. These are summarised at Annex P.

87. In my view, the JAG system of embedded review by annual reports would work far more effectively if there were a mandated periodic parliamentary response to the JAG's reports. This would enable the JAG to better fulfil this important function. For example, this could be by way of a commitment to procedurally review the DFDA by legislation at least once

²¹ See also this Report at paragraphs 131–132.

every five years. The UK mandates a five yearly cycle of legislative reform to its equivalent military justice legislation.²² Such regular reviews could be built into the DFDA, so it is regularly refreshed to reflect current standards of civilian criminal justice.

PUBLICATION OF SUPERIOR SERVICE TRIBUNAL PROCEEDINGS

88. In December 2017, in my role as JAG, I proposed by minute to CDF and the Service Chiefs certain changes to expand the publication of both the listing and the outcomes of superior service tribunal trials conducted under the DFDA. The principal intent behind this change is to enhance the fundamental purpose of the DFDA, namely the maintenance of service discipline. This will be achieved through greater transparency, to promote public confidence in the superior service tribunal system and to facilitate its power of general deterrence. No change to the publication regime for the ADF's summary tribunal system is being proposed.

89. The need for this change has developed over a long period. The ADF's publication of upcoming courts martial and DFM trials and subsequent trial outcomes has narrowed since the introduction of the DFDA. Historically, this information was published in routine orders. Today, upcoming superior service tribunal proceedings are neither announced externally to the public, nor internally within Defence. The outcomes of superior service tribunal proceedings are now only published in Service newspapers with their detail heavily edited.

90. In contrast, over the same period, public notice of civilian trials and trial outcomes has significantly expanded. Multiple factors have driven wider publication of civilian trials. Examples include: the rise of the internet; increased demand from the public for information about legal proceedings; and civilian legislation which now gives general rights of access to court files that record what has occurred in proceedings.²³

91. As a result, the ADF's superior service tribunal publication protocols have fallen behind accepted publication standards of Commonwealth, state and territory criminal courts. While there are critical differences between service tribunals and civilian courts, the standards of the latter are the default statutory model of fairness set by the DFDA. Civilian courts have

²² *Armed Forces Act 2006* (UK), Explanatory Notes at paragraph 14.

²³ See for example the *Court Information Act 2010* (NSW).

embraced these changes to advance a core principle of all judicial systems, namely, that open justice promotes public confidence in judicial decisions and the legal processes of courts.

92. No trial listings of ADF superior service tribunal proceedings are promulgated. Consequently, few members of the public and few ADF members not involved in proceedings attend superior service tribunal trials. Insufficient public information is provided to allow anyone who did not attend to understand the reasons for trial outcomes. The current approach does not serve to promote either general deterrence or confidence in the ADF's superior service tribunal system.

93. The limited publication of superior service tribunal proceedings has attracted adverse parliamentary comment. The Senate Foreign Affairs Defence and Trade has criticised the reporting of disciplinary action taken against individuals found guilty of credit card fraud.²⁴ The committee's comments are valid for all types of offences. The committee stated, with my emphasis:

4.32. Despite evidence of convictions for fraud in military jurisdictions, the committee is of the view that this information is not readily available publicly. Any deterrence value across the Defence community arising from awareness of such convictions may therefore be limited.

4.33. Recommendation 5. The committee recommends that the Department of Defence be more transparent in reporting disciplinary action taken against individuals found to have committed credit card fraud, whether steps taken are administrative or judicial in nature. This should include publishing the outcomes of disciplinary or criminal action on the Defence website and in service newspapers.

94. DFDA s.140(1) mandates that "the hearing of proceedings before a court martial or Defence Force magistrate shall be in public". DFDA s.140(2) provides a discretion to close the service tribunal in limited circumstances or to prohibit the publication of a report of the proceedings, "in the interests of the security or defence of Australia, the proper administration of justice or public morals". DFDA s.140(4) requires that "the appropriate service chief shall cause such steps to be taken as will permit the public to have reasonable access" to secure service premises where trials are held. DFDA s.140's intent is that superior service tribunal

²⁴ *Inquiry into Department of Defence's management of credit and other transaction cards*, 11 May 2017.

proceedings should, subject to identified service exceptions, be akin to civilian trials in terms of their openness to the public.

95. The rationale for a standard of publication that is consistent with courts/tribunals being open to the public includes the following considerations:

- a. It will increase public acceptance of and confidence in the administration of military discipline through the ADF's superior service tribunals.
- b. It will increase the general deterrence effect within the ADF of the decisions and reasons for decision of superior service tribunal proceedings.
- c. It will provide transparency to the Australian public that is equivalent to the civilian criminal justice system. For its own protection, the Australian public expects to be able to access the criminal trial outcomes for most civilian criminal trials. It should be able to do the same for ADF trial outcomes.
- d. It will sharpen the differences in character between the ADF's summary and superior service tribunal proceedings, making the decision for accused persons to elect up from summary to superior more significant.
- e. It will encourage better standards of advocacy and more disciplined performance by trial advocates in superior service tribunals.
- f. It will increase public scrutiny of, and therefore tend to improve, the timeliness, efficiency and cost of superior service tribunal proceedings.
- g. It will eliminate an existing inconsistency in the publication of the ADF's trial outcomes. At present, matters going on appeal to the DFDAT are fully published on the DFDAT's website, whereas non-appealed trial outcomes are not published at all.

96. Finally, I observe that the change proposed would not be innovative. As well as reflecting Australian civilian court practice, it reflects overseas practice in other common law military jurisdictions. The armed forces of the UK, Canada and the United States all make publically available lists of

upcoming trials (except the US Army) and then summaries of trial outcomes (including the US Army).

FEMALE LEGAL OFFICERS PRACTISING IN THE SUPERIOR SERVICE TRIBUNAL SYSTEM

97. The year 2017 saw more calls for expressions of interest for appointments as ADF judicial officers than has occurred in many years. These calls were advertised within the ADF and in the case of the CJA selection, in the civilian press. A disappointing feature of the responses to these calls was the very few female legal officers who applied for the positions. There was only one legally qualified female applicant for the position of CJA and one female applicant for the reserve JA/DFM positions.

98. This comment is not directed at the relative career opportunities for male and female legal officers overall in the ADF. Rather, it is directed to the conduct of legal practice under the DFDA. It is only the ADF discipline system over which the JAG has oversight.

99. Relatively low numbers of female legal officers are appearing in advocacy roles in the discipline system, although present numbers represent some improvements over the longer term. During the reporting period, DDCCS engaged 91 reserve legal officers for superior service tribunal matters. Of these, 19 were female. The Office of the DMP had four permanent female prosecutors on staff, including the DMP herself, from a complement of 11 prosecutors.

100. A number of highly experienced female legal officers have served and are serving within the ADF's discipline system. Significantly, two of the three DMPs have been female legal officers: Brigadier Lyn McDade and the present DMP, Brigadier Jennifer Woodward CSC. I note that Brigadier Woodward was also one of the judges of the AMC and then transitioned to being a permanent JA/DFM until her appointment as DMP.

101. Further, as I reported earlier,²⁵ in December 2017 CDF, upon my recommendation, appointed two female reserve legal officers to be s.154(1)(a) legal reporting officers. Both are judges of civilian courts: the Federal Circuit Court of Australia and the District Court of New South Wales. A DFDA s.154 legal officer performs a quasi-judicial role, in which civilian judges who are also reserve lawyers have long served the ADF.

²⁵ This Report at paragraph 30.

102. Many of the impediments to advancing the careers of women lawyers in advocacy and judicial roles in the ADF are similar to those faced in civilian court systems. I intend to work closely with HDL and command in the next year to address this issue.

DEVELOPMENTS OVERSEAS

103. In June 2017, Canada appointed its fifteenth Judge Advocate General of the Canadian Armed Forces, Commodore Geneviève Bernatchez, CD. Commodore Bernatchez has served in both the Canadian Naval Reserve and the Regular Force. She has served in a number of deployed environments, in military justice and administrative law roles. With our shared common law tradition and with armed forces of similar size and structure, it is especially valuable to draw upon the experience of the Canadian Armed Forces in the operation of military discipline tribunals. I have written to Commodore Bernatchez to further the cooperative relationship between our respective military lawyers.

104. Recent legal developments in the United States, United Kingdom and Canada are discussed elsewhere in this Report in the context of the visits that I conducted with Major General Westwood during March 2017.²⁶

DIRECTOR OF MILITARY PROSECUTIONS

105. The DMP is appointed under DFDA s.188GF. Brigadier Jennifer Woodward CSC continued as DMP during the reporting period. The DMP reports separately as required by DFDA s.196B.

106. Brigadier Woodward's leadership of her office has enhanced its level of communications with command in each of the Services and promoted court martial and DFM trial efficiency. Of particular note was her work undertaken in the reporting period in consultation with the RMJ, PM-ADF and DDCS to shorten the timeframes for the disposal of certain matters through the facilitation of early guilty pleas. I wish to acknowledge Brigadier Woodward's most able discharge of her duties as the DMP.

DIRECTOR DEFENCE COUNSEL SERVICES

107. The DDCS is appointed under the *Defence Act* s.110ZA. The position of DDCS was filled during the reporting period by Colonel Arun Lambert

²⁶ This Report at paragraphs 127–136 and Annex Q.

CSC. DDCS reports separately. I wish to acknowledge Colonel Lambert's most able discharge of his duties as the DDCS.

INSPECTOR GENERAL AUSTRALIAN DEFENCE FORCE

108. The IGADF is appointed under the *Defence Act* s.110B. The position of IGADF was filled during the reporting period by Mr Jim Gaynor CSC. IGADF reports separately as is required by *Defence Act* s.110R. I met quarterly with IGADF during the reporting period. My regular consultations with IGADF about the operation of the military justice system have given me both a better insight into the wider trends in offending within the ADF and sharper focus on the need for particular legislative reforms to the DFDA. I wish to thank IGADF for this continued independent support in the execution of my office as JAG.

DISCIPLINE LAW TRAINING

Discipline law training for ADF personnel

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

Single-Service

110. 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 Education and Training courses for both NCOs and officers, and as stand-alone training (for example, prosecuting/defending officer courses).

Australian Defence Force Academy

111. Military justice familiarisation training occurs at the commencement of a Trainee Officer's attendance at ADFA. More detailed training occurs during Year 1 and again during Years 2 and 3.

Pre-command training

112. Prior to assuming command, each of the Services requires officers to complete single-Service 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.

113. In 2017, the military justice training on pre-command courses was as follows:

- a. **Navy:** Five courses instructed, with approximately 71 students comprising officers appointed to CO or executive officer (XO) positions (Major Fleet Units, Minor War Vessels and shore appointments).
- b. **Army:** One course instructed, with approximately 70 students comprising officers appointed to command units or formations.
- c. **Air Force:** Three courses instructed, with approximately 68 students comprising officers appointed to command, XO, detachment commander, chief instructor and executive warrant officer positions.

Online DFDA training

114. The Defence People Group includes the Defence Learning Branch (DLB). Campus, the online learning tool, is part of DLB. Online DFDA training through Campus has been offered 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 proceedings.

115. In 2017, the following number of personnel completed online training:
- a. Clerk (course ID 00004077) – 300 personnel;
 - b. Defending Officer (course ID 00003925) – 1161 personnel;
 - c. Discipline Officer (course ID 00004036) – 946 personnel;
 - d. Investigating Officer (course ID 00003491) – 1021 personnel;
 - e. Prosecuting Officer (course ID 00003933) – 1081 personnel;
 - f. Recorder (course ID 00004022) – 1079 personnel;
 - g. Relevant Officer (course ID 00004023) – 1034 personnel; and
 - h. Summary Authority (course ID 00003923) – 648 personnel.

Training for ADF legal officers

116. ADF legal officers receive specialist professional training in discipline law through completion of the courses set out below at three key stages of their careers.

117. **Legal Training Module 1 (LTM1)**. This is the first course of legal training undertaken by ADF legal officers. It provides an introduction to discipline law and is aimed at junior ADF legal officers. During 2017, 28 ADF legal officers attended the LTM1 course, as well as one Australian Public Service (APS) lawyer from Defence Legal.

118. **Legal Training Module 2 (LTM2)**. This is a graduate certificate level course undertaken by ADF legal officers. It is normally completed within four years of LTM1. The course consists of four graduate level subjects (Military Discipline Law, Military Administrative Law, Military Operations Law, and Military Legal Practice). During the reporting period, 25 students completed the Military Discipline Law unit and 25 students completed the Military Legal Practice unit, which includes the practice of advocacy before service tribunals.

119. **Legal Training Module 3 (LTM3)**. This is a masters level course undertaken by ADF legal officers. It is normally completed within four years of LTM2. LTM3 consists of three core subjects (Advanced Military Discipline Law, Advanced Military Administrative Law and Advanced

Military Operations Law), each of which is conducted biennially. Permanent legal officers without an existing master of laws degree must complete a further four electives from an approved list. During 2017, 30 students completed Advanced Military Discipline Law.

Ongoing development of discipline law training

120. The MLC continually reviews discipline law training and assessment strategies and the *Governance of Military Justice Training Manual* to ensure discipline law training is relevant and up to date.

TRIALS UNDER THE DFDA

121. The statistics for summary trials and the discipline officer scheme conducted by the three Services during 2017 are set out in Annexes B–E and G–I. As was indicated in the Report for 2005,²⁷ 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.

122. Statistics for proceedings before courts martial and DFMs pursuant to the arrangements reinstated by the *Military Justice (Interim Measures) Act (No 1) 2009* appear at Annexes K to N.

VISITS AND ACTIVITIES

Domestic

123. In the course of the year, I had the opportunity to meet with a number of senior commanders including CDF, VCDF, CN, CA and DCAF. I also had regular discussions with legal officers, both permanent and reserve. I spoke at the Heads of Reserve Legal Panels Conference in Sydney in February 2017. I led discussions at Reserve Legal Panel Training Nights in Sydney, Adelaide and Melbourne and attended the Defence Legal Joint Legal Issues Workshop in May 2017.

124. On 7 June 2017, CJA and I were able to meet with the Minister for Defence Personnel, The Honourable Dan Tehan MP. He had portfolio responsibilities for military justice at this time. We foreshadowed many of the issues contained in this Report.

²⁷ 2005 Report at paragraphs 95–96.

125. The annual JAG workshop was held in Canberra on Saturday 18 November 2017. Attendees were CJA, the three DJAGs, the JA/DFMs, the RMJ, Deputy RMJ and my Staff Officer. The substance of the matters discussed is reflected elsewhere in this Report.

126. In December 2017, I met with Group Captain Philip Moss AM and Commander Cathy Rice RAN as part of the Review of Legal Support to ADF Members. CJA, the DJAGs and the RMJ were also consulted.²⁸

International

127. In the period 18–30 March 2017, the then-CJA, Major General Westwood, and I visited senior military legal staff in Washington DC, Ottawa, and the United Kingdom to discuss recent developments affecting military justice. The purpose of the visits was to inform this Report to Parliament and my submissions and reform proposals to the MJCC.

128. The visits were very effective for this purpose. They provided important comparative insights into the operation of the discipline systems of the defence forces of the United States, Canada and the United Kingdom that have closely informed recommendations made in this Report and have resulted in concrete proposals being put to the MJCC.

129. The discipline systems of the defence forces of these common law countries face many of the same structural challenges and issues for the maintenance of independence and efficiency that bear upon the operation of the DFDA. For that reason, the visits provided a rich resource of comparative experience for the development of ideas to improve the DFDA.

130. A detailed post visit report is contained at Annex Q to this Report. I wish to briefly draw upon a few of the conclusions of the post visit report and the options for particular reforms of the ADF discipline system distilled from those discussions. The options for reform cover both the superior and summary service tribunal systems. Some of them are discussed in more detail elsewhere in this Report.

The JA in courts martial sentencing

131. This Report elsewhere recommends reform to the DFDA so that a JA can sit with members of a court martial to consider sentence and give

²⁸ See also this Report at paragraph 136.

reasons for sentence.²⁹ This model is already operating successfully in the United Kingdom. Major General Westwood and I observed it in operation in courts martial over which the Judge Advocate General of the United Kingdom, His Honour Judge Jeffrey Blackett, was presiding. The deliberations guided by Judge Blackett in private consultation with the court martial members were substantially faster and more efficient than current arrangements under the DFDA, where elaborate instructions on the process are required to be given before the court martial panel retires.

132. After we observed the process in open court, Judge Blackett gave Major General Westwood and me an opportunity to consult directly with court martial members to discuss the general nature of the process with them. Those discussions made clear that the general service officers on the court martial were much assisted by the guidance of a judge in these circumstances and did not feel at all overborne by the judge's legal background in expressing their own views based on their service experience about the appropriate sentence in a particular case. The system works well and is strongly recommended for adoption by the ADF.

Victims of alleged offences and affected persons

133. The US court martial system provides extensive rights for the victims of offences allegedly committed within the US military to be afforded separate legal representation at courts martial. Neither the Canadian nor the UK jurisdictions provide the same range of rights. These developments in the United States highlight the need for greater definition of and transparency in the process of representing the interests of victims of alleged offences and other affected persons during ADF trials.

134. Following the dictates of DFDA s.134, JAs in superior discipline tribunals presently protect the interests of such persons by looking to well-developed civilian models in the Australian Capital Territory. As a first step to meet the need for greater transparency in this area, it is my intention, in consultation with CJA, the RMJ and the MJCC, to publish a practice note that fully and clearly explains the process by which victims of alleged offences and other potentially interested persons may seek to protect their rights during proceedings.

²⁹ This Report at paragraph 84.

The use of reserves in court martial

135. The UK court martial system makes extensive use of reserve general service officers to sit on court martial panels. When busy ADF units cannot readily meet the RMJ's requirements for court martial members, drawing more upon reserve general service officers is worthy of closer consideration. Each of the three Services maintains a pool of recently retired general service officers, who are closely familiar with current service conditions and who may be suitable to be tasked for court martial service.

Legal aid

136. Contrary to existing arrangements in the US, Canada and the UK, there is no inbuilt mechanism presently operating in the ADF superior service tribunal system to limit the resources that an accused person may spend defending charges brought under the DFDA. I do not recommend the introduction of some of the overseas models that limit access to legal advice for defence members and which may operate too harshly against accused persons in Australian conditions. But consideration should be given to imposing some fair and workable limitations upon the resources made available to accused ADF members in future DFDA trials in the superior service tribunal system. I was pleased to have the opportunity to share these insights with the Review of Legal Support to ADF Members and to point out to the Review the availability of potentially relevant budgetary models that are used by civilian prosecuting authorities and by civilian authorities that fund defence counsel in the Commonwealth, states and territories.³⁰

CONCLUSION

137. As indicated throughout this Report, significant steps were taken in 2017 to improve the efficiency and effectiveness of the military discipline system without legislative change to the DFDA. These steps have achieved pleasing progress, particularly as I consider that the justness and fairness of the ADF's superior and summary discipline system to be closely related to its efficiency and effectiveness. But a number of recommended legislative improvements to the DFDA that previous JAGs and I have identified in this and past Reports still remain unaddressed.³¹

³⁰ This Report at paragraph 126.

³¹ Annex P.

138. It is my assessment that limited further progress is likely to be made to improve the efficiency and effectiveness of the military discipline system without legislative changes commencing with those identified in this Report. CDF, the Service Chiefs and the MJCC have all offered a very high level of engagement and support to effect the kinds of changes that are required. Similar engagement and support have been offered by relevant Ministers.

139. With this continued command leadership and with ministerial direction, this Report respectfully requests that Parliament now address these required changes through sound legislation that will maintain confidence in the ADF's superior and summary military discipline system. Such legislation would justly merit the praise of the many ADF members and other Australians who are directly or indirectly affected by the daily operations of the DFDA.

TABLE OF ABBREVIATIONS USED IN REPORT

Abbreviation	Description
ACT	Australian Capital Territory
ADF	Australian Defence Force
ADFA	Australian Defence Force Academy
AMC	Australian Military Court
APS	Australian Public Service
CA	Chief of Army
CAF	Chief of Air Force
CDF	Chief of the Defence Force
CJA	Chief Judge Advocate
CN	Chief of Navy
CO	Commanding Officer
COSC	Chiefs of Service Committee
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
DGC	Defence General Counsel
DJAG	Deputy Judge Advocate General
DL	Defence Legal
DLB	Defence Learning Branch
DMP	Director of Military Prosecutions
HDL	Head Defence Legal
HPC	Head People Capability
IGADF	Inspector General Australian Defence Force
JA	Judge Advocate
JAG	Judge Advocate General of the Australian Defence Force

LTM1	Legal Training Module 1
LTM2	Legal Training Module 2
LTM3	Legal Training Module 3
MJCC	Military Justice Coordination Committee
MLC	Military Law Centre
NCOs	Non Commissioned Officers
OJAG	Office of the Judge Advocate General
PM-ADF	Provost Marshal Australian Defence Force
RANR	Royal Australian Navy Reserve
RMJ	Registrar of Military Justice
SAR	Summary Authority Rules
SDS	Summary Discipline System
VCDF	Vice Chief of the Defence Force
XO	Executive Officer

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: 3-8
Membership and Staff	Paragraphs: 3, 10-40
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	Paragraph: 9
Activities and Reports	Paragraphs: 123-136
Operational Problems	Paragraphs: 55-102
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 2017

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		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					2	2			2	2		
February					7	9	1	2	6	10		
March					12	14	5		16	17	1	3
April					4	5			14	17	1	1
May					7	11	4		19	20		1
June					12	16	3	2	10	14	2	
July					15	15	4		10	10		
August					13	16		1	12	15		1
September					5	4	1		6	7		
October					10	9	1		8	11	2	
November	1		1		12	13	4	1	18	21	3	
December					3	5			6	7	1	
TOTAL	1	0	1	0	102	119	23	6	127	151	10	6

**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								12
24	1	2					7			39
25										2
26	1	2				1				15
27	1	2					1			16
28										
29	5			1		5	3			50
30										
31										
32										
33(a)							1			2
33(b)										1
33(c)		1								4
33(d)	1			1						2
33A										
34	1						5			
35										2
36										
36A										
36B	2									
37		1								5
38							1			
40										
40A										
40C										
40D										2
42										
43										
44						1				
45										1
46										1
47C										
47P										
47Q										1
48										
49										
50										
51										
53										
54										
55	1						3			7
56										
57										
58										
59										1
60	2	4				6	3			37
61						1				
TOTAL	16	14	0	2	0	14	24	0	0	200

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	8	4				2	6			26
Conditional conviction without punishment										
Unconditional conviction without punishment						1	2			9
Severe reprimand	2			2		5	7			19
Extra duties										13
Extra Drill										2
Stoppage of leave		8								15
Restriction of privileges		3								94
Suspended fine	2									2
Fine Less than 14 Days Pay	11	4		1		7	16			97
Fine More than 14 Days Pay				1						3
Forfeiture of service for purposes of promotion										
Forfeiture of seniority						1	5			
Reduction in rank							3			
Suspended detention										
Committed detention										2
TOTAL	23	19	0	4	0	16	39	0	0	282

ARMY
JANUARY-DECEMBER 2017

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	1	1	1		3	4						
February	2	2			15	21	2		18	18		
March	4	4			16	21	2		62	70		
April					14	22			44	44	1	3
May	1	1			21	32	2	2	58	61	1	3
June					39	55	2	1	91	98	4	6
July					10	7	3	1	41	45	2	
August	2	2			40	51		1	54	52	3	3
September	2	1	1		33	43	1		68	73	1	5
October					16	17	1	1	48	56	1	3
November	1	1			28	43		1	94	116	1	3
December	2	2			16	23		1	57	63	2	1
TOTAL	15	14	2	0	251	339	13	8	635	696	16	27

**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		5					6	1		12
24	2	4				1	5	1		75
25							2			3
26	2					1	5	3		24
27	1	1				1	2	3		46
28										
29	21	20	2	13		17	35	15		201
30										
31										
32								1		1
33(a)										13
33(b)							1			9
33(c)										
33(d)										5
33A										3
34	1		1			1	1	2		3
35	2	2		1		2	1	1		8
36	1									1
36A	1	1		1		1	3			8
36B	15	30				2	12	15		149
37		2						1		8
38										
40										1
40A										1
40C								1		1
40D										7
42										
43							1			4
44						1	1			2
45										1
46								1		
47C										5
47P										
47Q						2	6			8
48										
49										
50										
51										
53										
54										1
55	1			1			3			13
56										4
57										1
58										
59										
60	14	5		3		8	14	4		94
61										
TOTAL	61	70	3	19	0	37	98	49	0	712

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	17	4		5		7	19	11		47
Conditional conviction without punishment							1			5
Unconditional conviction without punishment	4	1		4		2	6	4		9
Severe reprimand	6	4	1	4		9	22	5		22
Extra duties								1		41
Extra drill										16
Stoppage of leave		8								23
Restriction of privileges		43					1	1		349
Suspended fine	3			2		1	1	2		17
Fine Less than 14 Days Pay	50	15	2	8		25	60	30		374
Fine More than 14 Days Pay										7
Forfeiture of service for purposes of promotion										
Forfeiture of seniority						1	3			
Reduction in rank							7	8		17
Suspended detention										
Committed detention										29
TOTAL	80	75	3	23	0	45	120	62	0	956

AIR FORCE
JANUARY-DECEMBER 2017

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		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	4			1	1		
February					2	2			2	2		
March					1	1			3	3		
April					2	3	1		4	4		
May					5	8			6	8		
June					1	1		3	5	6		
July									1	1		
August					1	1			6	11		
September									3	3	1	
October					3	4	1		3	3		
November	1	3			1	4			5	5		
December									1			1
TOTAL	1	3	0	0	17	28	2	3	40	47	1	1

**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		1					1			3
24	1	3								5
25										
26	1						1			
27		1				1				
28										
29	3	4					8			7
30										
31										
32										
33(a)										3
33(b)										
33(c)										
33(d)							1			1
33A										
34										
35										
36										
36A										
36B	2	4								3
37										2
38										
40										
40A										
40C										
40D										
42										
43										
44										
45										
46										
47C										
47P										
47Q										
48										
49										
50										
51										
53										
54										
55										
56										1
57										
58										
59										
60	1	1					3			16
61										
TOTAL	8	14	0	0	0	1	14	0	0	41

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	2	1				3	3			3
Conditional conviction without punishment										
Unconditional conviction without punishment		1					1			1
Severe reprimand						1	3			3
Extra duties										3
Extra drill										1
Stoppage of leave		4								1
Restriction of privileges		6								9
Suspended fine	1						1			8
Fine Less than 14 Days Pay	5	5					8			14
Fine More than 14 Days Pay										
Forfeiture of service for purposes of promotion										
Forfeiture of seniority										
Reduction in rank										
Suspended detention										
Committed detention										4
TOTAL	8	17	0	0	0	4	16	0	0	47

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	1	1	0	6	10	0	0	3	3	0	0
February	2	2	0	0	24	32	3	2	26	30	0	0
March	4	4	0	0	29	36	7	0	81	90	1	3
April	0	0	0	0	20	30	1	0	62	65	2	4
May	1	1	0	0	33	51	6	2	83	89	1	4
June	0	0	0	0	52	72	5	6	106	118	6	6
July	0	0	0	0	25	22	7	1	52	56	2	0
August	2	2	0	0	54	68	0	2	72	78	3	4
September	2	1	1	0	38	47	2	0	77	83	2	5
October	0	0	0	0	29	30	3	1	59	70	3	3
November	3	4	1	0	41	60	4	2	117	142	4	3
December	2	2	0	0	19	28	0	1	64	70	3	2
TOTAL	17	17	3	0	370	486	38	17	802	894	27	34

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	346
24	172
27	162
29	979
32(1)	5
35	27
60	70
TOTAL (1)	1761

Action Taken	Number
Punishment Imposed - Fine	268
ROP	173
SOL	245
Extra Duties	360
Extra Drill	23
Reprimand	602
No Punishment Imposed	85
Referred to an Authorised Member	5
TOTAL (1)	1761

ARMY
JANUARY-DECEMBER 2017
DISCIPLINE OFFICER STATISTICS

Infringement	Number
Section 23	246
24	278
27	652
29	1269
32(1)	20
35	112
60	232
TOTAL (1)	2809

Action Taken	Number
Punishment Imposed - Fine	282
ROP	1166
SOL	440
Extra Duties	337
Extra Drill	145
Reprimand	343
No Punishment Imposed	72
Referred to an Authorised Member	24
TOTAL (1)	2809

**AIR FORCE
JANUARY-DECEMBER 2017
DISCIPLINE OFFICER STATISTICS**

Infringement	Number
Section 23	52
24	26
27	69
29	226
32(1)	4
35	16
60	64
TOTAL (1)	457

Action Taken	Number
Punishment Imposed - Fine	106
ROP	44
SOL	65
Extra Duties	65
Extra Drill	17
Reprimand	135
No Punishment Imposed	21
Referred to an Authorised Member	4
TOTAL (1)	457

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 2017

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	1				2	8				
March															
April										2	1				4
May															
June															
July	1	1		2											
August										1	24				
September										1	1				9
October	1		1												
November										2	3				1
December										4	5				
TOTAL	2	1	1	2	0	1	1	0	0	0	12	42	0	0	14

**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										
25										
26										
27										
28										
29							2			
30										
31										
32										
33(a)			1				7			
33(b)										
33(c)										
33(d)										
33A									1	
34										
35										
36										
36A										
36B										
37										
38										
39										
40										
40A									1	
40C										
40D										
42										
43										
44										
45										
46										
47C										
47P										
47Q							13			
48										
49										
50										
51										
53										
54										
55							10			
56										
57										
58										
59										
60			1							6
61							1		1	
TOTAL	0	0	2	0	0	0	33	0	3	6

Details of Quashed Convictions

DFDA Sect	Rank	Short Summary of Offence	Reason for quashing
61	AB	Forcible confinement	Quashed on appeal by the DFDA
61	AB	Act of indecency without consent	Quashed on appeal by the DFDA

**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							2			3
Conditional conviction without punishment									1	
Unconditional conviction without punishment										
Severe reprimand			1				1			
Suspended fine			1							3
Fine Less than 14 Days Pay			1				1			5
Fine More than 14 Days Pay										
Forfeiture of service for purposes of promotion										
Forfeiture of seniority									1	
Reduction in rank							30			
Suspended detention							2		1	
Committed detention									1	
Dismissal							23			
Imprisonment										
TOTAL	0	0	3	0	0	0	59	0	4	11

ARMY

JANUARY-DECEMBER 2017

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	3			
March											3	19			5
April					1	6									
May											1	1			1
June											1	3			
July											1	2			1
August															
September											1	1	1		
October											2	6	2		
November															
December															
TOTAL	0	0	0	0	0	1	6	0	0	0	11	35	3	0	7

**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	10									
25						4				
26										
27										
28										
29							1			
30										
31										
32										
33(a)										2
33(b)										
33(c)										
33(d)										
33A										1
34										
35										
36										
36A										
36B										
37										
38										
40										
40A										
40C										
40D										
42										
43										
44										
45										
46										
47C										
47P										
47Q										
48										
49										
50										
51										
53										
54										
55						4				2
56										
57										
58										
59										
60							6			
61	4					2	3			
62						2				
TOTAL	14	0	0	0	0	12	10	0	0	5

Details of Quashed Convictions

DFDA Sect	Rank	Short Summary of Offence	Reason for quashing

**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										
Conditional conviction without punishment										
Unconditional conviction without punishment										
Severe reprimand						6				
Suspended fine						4				
Fine Less than 14 Days Pay						8				
Fine More than 14 Days Pay										
Forfeiture of service for purposes of promotion										
Forfeiture of seniority						1				
Reduction in rank						3	4	6		
Suspended detention								6		2
Committed detention								6	5	
Dismissal	14									
Imprisonment	4									
TOTAL	18	0	0	0	0	22	4	18	5	2

AIR FORCE
JANUARY-DECEMBER 2017

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															
March															
April															
May															
June											2	11			1
July											1	1			
August															
September											2	2			2
October															
November											1	2			2
December											1	4	6		
TOTAL	0	0	0	0	0	0	0	0	0	0	7	20	6	0	5

**CONVICTIONS 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	2									
25										
26										
27										
28										
29									10	
30										
31										
32										
33(a)										
33(b)										
33(c)										
33(d)										
33A									1	
34										
35										
36										
36A										
36B										
37										
38										
40										
40A										
40C										
40D										
42										
43										
44										
45										
46										
47C										
47P										
47Q										
48										
49										
50										
51										
53										
54										
55						4				
56										
57										
58										
59										
60	1									
61	2									
TOTAL	5	0	0	0	0	4	0	0	11	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										
Suspended fine	1					2				
Fine Less than 14 Days Pay	2					2				
Fine More than 14 Days Pay	1									
Forfeiture of service for purposes of promotion										
Forfeiture of seniority	2					4			10	
Reduction in rank										
Suspended detention									1	
Committed detention									1	
Dismissal from ADF	1									
Imprisonment	1									
TOTAL	7	0	0	0	0	8	0	0	12	0

COMBINED JANUARY - DECEMBER 2017

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	1	1	0	0	0	4	11	0	0	0
March	0	0	0	0	0	0	0	0	0	0	3	19	0	0	5
April	0	0	0	0	0	1	6	0	0	0	2	1	0	0	4
May	0	0	0	0	0	0	0	0	0	0	3	12	0	0	2
June	0	0	0	0	0	0	0	0	0	0	1	3	0	0	0
July	1	1	0	2	0	0	0	0	0	0	2	3	0	0	1
August	0	0	0	0	0	0	0	0	0	0	1	24	0	0	0
September	0	0	0	0	0	0	0	0	0	0	4	4	1	0	11
October	1	0	1	0	0	0	0	0	0	0	2	6	2	0	0
November	0	0	0	0	0	0	0	0	0	0	3	5	0	0	3
December	0	0	0	0	0	0	0	0	0	0	5	9	6	0	0
TOTAL	2	1	1	2	0	2	7	0	0	0	30	97	9	0	26

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
33A	Assault occasioning actual bodily harm
34	Assaulting a subordinate
35	Negligent performance of duty
36	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
47C	Theft

Section Number	Description
47P	Receiving
47Q	Unauthorised use of a Commonwealth credit card
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	Dealing or possession of narcotic goods
60	Prejudicial conduct
61	Offences based on Territory offences
62	Commanding or ordering a Service offence to be committed

RECOMMENDATIONS FROM JAG REPORTS FOR FURTHER ACTION

1.	2009 2010	Amend <i>Defence Force Discipline Act</i> s 66 to permit the imposition of a general sentence to be imposed for the entirety of the wrong doing on which the offender stands convicted. Section 77 might provide a basis on which to structure a general sentencing option
2.	2011	Review DFDA s 36 to clarify scope and intended operation of the offence of 'dangerous conduct'
3.	2011	Amend DFDA s 141 to also allow submission of pre-trial applications by the prosecution.
4.	2011	Amend DFDA s 139 to allow for the accused to be absent from court during purely procedural hearings
5.	2011	Amend DFDA s 78 to permit Service tribunals to suspend sentences of detention for one course of conduct but determine for other reasons that the sentence should not be suspended for another course of conduct
6.	2011 2013 2014	Review appropriateness of a court martial President exercising judicial discretions. Ideally, 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 a civil criminal proceedings should be vested in the Chief Judge Advocate and Judge Advocates
7.	2011 2013 2014 2015 2016	Legislation for a permanent military discipline system
8.	2012 2013 2015	Report convictions and acquittals recorded by courts martial and Defence Force magistrates in Service newspapers

9.	2012	Amend DFDA s 162 to permit a reviewing authority, in reviewing whether the punishment should be approved, to consider evidence not presented at the trial, only where the evidence was not reasonably available during the proceedings
10.	2012	Amend DFDA s 188FM to clarify that the rank specified (Lieutenant Commander, Major or Squadron Leader) is only a minimum qualification for the delegation of the Registrar of Military Justice's powers and functions
11.	2013 2014	Appointment of third full-time and permanent Judge Advocate
12.	2013	Clarify by way of legislation the legal uncertainty as to whether the rules of evidence to be applied by superior Service tribunals should be governed by the <i>Evidence Act 1995</i> (Cth) or by the provisions of the relevant ACT legislation by virtue of the operation of DFDA s 146
13.	2013 2016	Afford Judge Advocates greater independence, eg. by way of permanent appointment for a term of years by the Governor General in Council in a way that is analogous to that adopted for the Military Judges of the former Australian Military Court
14.	2013	Adjust the respective roles of the Judge Advocate and the President of a court martial. An option for consideration is that the Judge Advocate 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. The court martial panel would be the sole arbiters of matters of fact with a clear distinction between the conduct of the trial according to law and the adjudication of guilt or innocence. If the Judge Advocate were to preside, this would offer significant advantages in terms of dealing with pre-trial matters.
15.	2013 2014	Afford Judge Advocates more direct involvement in the sentencing process under Part IV of the DFDA for courts martial. Judge Advocates should preside over the sentencing process and be part of the private deliberative processes of the court martial. Judge Advocates should have a second or casting vote if a simple majority cannot otherwise be achieved. Courts martial should also be required to give reasons for sentence to increase the transparency of the process.
16.	2011 2014	Review the powers of the court martial president to make protective and non-publication orders, consistent with civil criminal courts

17.	2013 2014	Create a permanent court martial that can deal with pre-trial issues
18.	2014	Amend DFDA s 153 to preclude a reviewing authority from considering a petition against the severity of punishment, where that reviewing authority has already conducted an earlier review
19.	2015	Review the arrangements for the early release of a Defence member sentenced to imprisonment on condition of good behaviour in view of the removal of recognisance release orders
20.	2015	Amend the election scheme in summary authority proceedings to allow an accused a right to elect trial by a superior Service tribunal at only one point in the dealing and trial processes
21.	2016	Introduce provisions into the DFDA to reduce delay and inefficiency in the conduct of criminal trials as have long been used in civilian criminal courts eg. <i>Criminal Procedure Act 1986</i> (NSW) Ch 3 Pt 3 Div 3
22.	2016	Three levels of internal review of guilty findings (automatic review by command, petition for review by a reviewing authority and request for further review by CDF / Service Chief) and an external appeal process (Defence Force Discipline Appeals Tribunal) does not represent best practice and requires further consideration

POST VISIT REPORT

VISIT BY RADM M.J. SLATTERY AND MAGEN I.D. WESTWOOD

TO USA, CANADA AND UK – 18-30 MAR 17

Purpose of the Visit

1. To meet with senior Defence legal staff in Washington DC, Ottawa and the UK to discuss recent developments affecting military justice with a view to informing the Judge Advocate General's (JAG) annual report to Parliament and submissions to the Military Justice Coordination Committee (MJCC).

Meetings

2. 20-21 Mar 17 - VADM Crawford (JAG of the Navy) and RADM Hannink (Deputy JAG of the Navy) and their staff.

3. 22 Mar 17 – RADM Anderson (JAG and Chief Counsel US Coast Guard) and Mr Lederer (Deputy JAG US Coast Guard) and their staff.

4. 23-24 Mar 17:

- a. LCOL d'Auteuil (Acting Chief Military Judge for Canadian Defence Force),
- b. COL Fullerton (Director Defence Counsel Services Canada),
- c. COL MacGregor (Director of Military Prosecutions Canada), and
- d. COL Holman (Head Military Justice Division Canada).

5. 27 Mar 17:

- a. Judge Blackett (JAG UK),
- b. Mr Crowley (Court Martial Administrator UK), and
- c. Mr Reed (Deputy Director Service Prosecutions UK).

6. 28 Mar 17 – MAJGEN Ridge (DALs UK) and her staff.

Approach

7. Rather than attempting to summarise the detailed discussions of the visit, we think it more useful to discuss a number of options for reform of the ADF discipline system which have been distilled from the discussions as a whole.

Summary Proceedings

8. CDRE Perry is heading a Summary Discipline Review which will report to the MJCC. The Review is being conducted as a result of concern at the perceived complexity and

legalism inherent in the current arrangements. This complexity includes the current election scheme discussed in the JAG's Annual Report for 2015¹.

9. The starting point for any reform of the summary system is a recognition that the process must balance rights and safeguards for the accused against Command's desire for a straight forward disciplinary disposal. Broadly speaking, the greater the potential adverse consequence for the accused, the greater the procedural safeguards that will be required. At present, the elective range of punishments extend to reduction in rank and detention. The severity of these consequences is such that the system necessarily incorporates the safeguards of a trial like process, including proof beyond reasonable doubt, formal rules of evidence (albeit simplified) and limited rights of election. What follow are options for adjusting the structure, although upon the assumption we make that summary powers of punishment could be significantly reduced. We do not favour option 2.

Option 1

10. If the powers of punishment were to be significantly reduced and the accused offered the election to be tried by court martial/DFM in all cases, we think it would be possible to significantly simplify the hearing procedure such that it became, effectively, an inquiry by the summary authority as opposed to a trial. Such a procedure would be analogous to the inquisitorial hearing at summary level that had been used by Army prior to the introduction of the DFDA, and to the non-judicial punishment available to US commanders.

11. In such a case, we would envisage that if the accused were to elect trial at the higher level, then on conviction, the court martial/DFM would be at large in connection with sentence. This might act as a significant disincentive for an election to be exercised frivolously.

12. Option 1 is suitable if a command consensus exists that powers of punishment at the summary level should be significantly reduced, for example by excluding the possibility of detention being imposed at the summary level. Powers of punishment as severe as detention are likely to be authorised by the Parliament only after a summary trial, rather than an inquisitorial process.

Option 2

13. If the current range of disciplinary sanctions is to be retained, but the process nonetheless simplified to replicate Option 1, this might be achievable if, in accordance with the UK model, the accused was offered both a universal right of election, but also a right to have the matter re-heard in a formal trial before a court martial/DFM with the safeguard that the punishment would be capped at the earlier summary award. The UK experience has been something less than three percent of convictions are taken to a rehearing in accordance with these arrangements. While this might reflect a significant level of acceptance of the summary disposal, it must also be seen against the fact that in the UK the accused would ordinarily be required to make a substantial contribution to the cost of his or her legal representation if the matter were to proceed before court martial. This is a matter to which we shall return subsequently. For present purposes, we think that if the current Australian arrangements whereby the accused is fully legally aided were to be retained, that one could anticipate a somewhat higher rate of applications for rehearing.

14. The other disadvantage of this option is that, as a matter of logic, the higher level tribunal might not be satisfied beyond reasonable doubt that an offence was made out following a strict application of the rules of evidence, notwithstanding that the summary

¹ Para 47 et seq

authority had quite logically found the corresponding infraction had occurred when applying a simplified process. In the event that the rehearing led to an acquittal, there would be the potential to undermine the summary authority's command authority.

15. For these reasons, we do not favour this option.

16. We would also observe that it was adopted in the UK because of the requirement to provide a "fair and impartial trial" in accordance with the European Treaty arrangements. It was acknowledged that the summary disposal would never satisfy that legal test, such that the compromise comprised by Option 2 was developed. Australia does not have the same limitations on the arrangements for summary trial. That said, at least with the disincentive to apply for a rehearing that results from an accused's requirement to contribute to the legal costs, the system is completely functional in the UK and provides for both substantial disciplinary penalties and a simplified hearing process.

Investigations

17. The investigation of an alleged offence will range from the taking of one or two statements by a NCO with no police training, to a full ADFIS investigation. There is no issue with timeliness in connection with the simple investigation, but the full ADFIS inquiry can be hugely costly in terms of resources and take significant time.

18. As the law has developed in the UK, the accused has considerably reduced rights to silence without adverse comment at the trial than is the case in the Australia. The Service authorities in the UK seek to identify at a very early stage in the investigation whether the matter is to proceed by way of a guilty plea. If it is, then the matter is not fully investigated. Rather, the hearing of the charge, on a guilty plea, is expedited. The approach has some parallels with State police action in Australia for low level offences.

19. We suggest that a similar approach be investigated for the ADF, even if it were to be limited to particular classes of offence. It is, for instance, unlikely to have any utility in the case of a serious fraud allegation.

20. We think that the arrangement would have a greater prospect of success if it were combined with a guaranteed discount on sentence for the accused. One of the problems in promulgating such an arrangement is that the superior tribunals in the ADF are not standing courts. Rather, they are a series of ad hoc tribunals. As such, there is really no scope for the Chief Judge Advocate to issue a practice note. The matter is also complicated by the fact that if the matter were to proceed before a court martial, then the lay members of the panel would sentence and there are practical difficulties in ensuring that a particular discount has been taken into account.

21. One way in which such an end might be achieved would be for consideration to be given to the review process guaranteeing the application of the discount. This is an approach which has never been used in the ADF, but it would draw upon the US arrangements whereby an accused person agrees with the chain of command that in return for he or she pleading guilty, that the commander will guarantee that, following review, the sentence is no greater than the agreed amount. It seems to us that if such an approach were adopted by the ADF, then CDF, as the ultimate reviewing authority under DFDA s.155, could promulgate a command decision that in particular cases Service tribunals were to allow a discount of a fixed percentage, and that the application of the discount would be a matter to be considered through the review process.

22. If it were determined that this could be done, then it would be possible to indicate a greater discount in the case of a plea foreshadowed from the outset, as opposed to a plea indicated at the completion of the investigation.

23. The potential for a sentencing cap to be guaranteed by a Reviewing Authority is a matter to which we shall return further in connection with pleas generally.

Pleas Generally

24. If it is accepted that there is no legal impediment to a reviewing authority agreeing, prior to trial, to guarantee an upper cap on sentence (the US model) we think there would be the potential for more matters to proceed by way of plea. In accordance with the US model, the court martial or DFM would impose a sentence in accordance with the existing arrangements, but the accused would have the benefit of a guarantee by command that if the sentence exceeded an agreed amount, then it would be further mitigated on review. It is not the purpose of this report to advise as to whether this is legally permissible, but it does not seem to us to be inconsistent with the High Court's approach in *Lane v Morrison*². So, for instance, Hayne, Haydon, Crennan, Kiefel and Bell JJ observe:

[85] Although written in a different time and context, the central point to be made about these arrangements was accurately captured by Platt J of the Supreme Court of New York when he said that: "The proceedings of the court martial were not definitive, but merely in the nature of an inquest, to inform the conscience of the commanding officer. He, alone, could not condemn or punish, without the judgement of a court martial; and it is equally clear that the court could not punish without his order of confirmation."

Their Honours went on to observe that:

[86] These features of the provisions for courts-martial set them apart from the exercise of the judicial power of the Commonwealth. The decisions of courts martial were not "definitive" of guilt; the punishments awarded by courts martial were subject to confirmation or review. Dispositive decisions about guilt and punishment were made on confirmation or review within the chain of command.

25. Such an approach is consistent with the power of a reviewing authority to mitigate punishment when it appears to the reviewing authority that the sentence is excessive³. The reviewing authority is required to take legal advice, but is not bound by the advice on this aspect. Rather, the decision is based on the reviewing authority's judgement as a senior member of the chain of command.

Legal Aid

26. Unlike the arrangements in the US, Canada and the UK, there is no inbuilt mechanism to limit the resources that an accused person wishes to expend on his or her defence. In the US and Canada, the defence is provided by permanent officers (possibly augmented with a limited budget to engage external counsel). Such officers are a finite resource in terms of the time that they have available for an individual accused. In the UK, legal aid is means tested in a way that parallels the civilian arrangements and the result is that the accused will inevitably have to make a significant contribution to the cost. The ADF arrangement is far more generous. Reserve legal officers are engaged, usually at sessional fee and there is, effectively, unlimited resourcing for the trial. In the ADF, the accused

² [2009] HCA 29

³ DFDA s.162(1)

person is the client and giving the instructions as to the points that will be taken and the issues to be challenged, but that individual has no interest at all in minimising the time of the trial and its cost. There is realistically no external ability to limit the accused's instructions because DDCCS is not the instructor.

27. We suggest that consideration be given to imposing some limitations on the resources that will be funded at public expense. It is not a matter for us to set the limits that should apply, but by way of general observation, we thought the UK arrangements were far too restrictive. They resulted in a significant number of unrepresented accused persons before the court martial and we think that this is undesirable both in terms of the risk of unfairness to the accused, but also because of the lack of assistance to the court in embarking upon the sentencing process, and the difficult position in which it places the prosecutor. We raise for consideration a scheme whereby full legal aid was available for advice pre-trial and for, say, two hearing days. Thereafter the accused would be required to contribute to the cost of the defence subject to an arrangement whereby, if he or she were acquitted on all counts, then the contribution would be refunded.

28. It seems to us that an arrangement of this kind would at least ensure that the accused was taking a conscious decision as to whether or not it was necessary to put the prosecution to proof on particular matters and might force a more pragmatic assessment of the prospects of success in determining whether or not to enter a plea.

Victims

29. The United States has introduced into the court martial system the right for the complainant in a sexual matter to be separately represented in court. This representation extends to a right to object to questions, for example, as to the complainant's sexual reputation, and to represent the complainant in connection with discovery and access to documents and, generally, in connection with privacy issues. We raise the matter because this is a developing area of the law. The ADF has, for instance, recently had the DART Review and it is the case that there is increasing awareness of the complainant's rights in the judicial process.

30. We do not necessarily advocate moving to the full US model, but we do raise for consideration whether a more formalised process should be introduced to provide legal advice to the complainant, independent of the prosecuting authorities, in all matters. This is in the context of access to records such as those kept on mobile telephones and other privacy related matters.

Case Management and Use of Reserves

31. The court martial in the UK has moved, as with the civilian criminal courts in the UK, to a system known as "better case management". The aim is to have the matter listed before a Judge Advocate at the first opportunity, and for the court to then give directions in connection with the trial itself. A major impediment to such an approach in the ADF is that the Tribunals are ad hoc, and the judge advocates are not part of a standing court. The other practical issue which occurs to us is that the system inevitably results in the matter coming before the court on at least two occasions. For the moment, we would be inclined to permit further time for the existing arrangements and RMJs performance measures to be tested before endeavouring to implement something of the nature of "better case management".

32. The court-martial system in the UK makes greater use of reserve officers than do courts martial in the ADF. This usage is more readily achievable in the context of the standing court that exists in the UK, rather the court-martial system in the ADF which sits on

an *ad hoc* basis, but we suggest that consideration be given to increasing the use of Reserve officers if court martial duties prove too burdensome to command.

Involvement of the Judge Advocate in the Sentencing Process at Court Martial

33. This was a matter raised in the JAG's annual report for 2013⁴. The matter was expressed in the following terms:

[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

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Paragraph 46 et seq

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.

34. Having observed the UK model in practice, we again raise that recommendation from the 2013 Report for further consideration. It offers a number of advantages, including the fact that if reasons were given in connection with a plea to which a discount was to apply in the circumstances discussed above, the JA's involvement in the sentencing process would permit the reasons to disclose the court's application of the discount in a particular matter. The matters which we observed were comparatively minor disciplinary infractions, but the deliberation guided by the Judge Advocate in private consultation with the members was very substantially quicker and more efficient than the current Australian arrangements where very elaborate directions on the process are required to be given and then time taken by the panel to consider an appropriate sentence.



MJ Slattery
RADM
JAG

12 May 17



ID Westwood
MAJGEN
CJA

16 May 17