DIRECTOR OF MILITARY PROSECUTIONS

Report for the period
1 January to 31 December 2011

Department of Defence

Director of Military Prosecutions

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1 January to 31 December 2011

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

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

Dear Minister,

As Director of Military Prosecutions I submit the report herewith as required by section 196B of the *Defence Force Discipline Act 1982,* covering the period from 1 January to 31 December 2011.

Yours sincerely,

Brigadier L.A. McDade
Director Military Prosecutions
Australian Defence Force

12 April 2012

Enc.

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TABLE OF ABBREVIATIONS USED IN REPORT

ABBREVIATIONS	DESCRIPTION
ADF	Australian Defence Force
ACT	Australian Capital Territory
AMC	Australian Military Court
CJA	Chief Judge Advocate
DFDA	Defence Force Discipline Act 1982
DFDAT	Defence Force Discipline Appeal Tribunal
DFM	Defence Force magistrate
DMP	Director of Military Prosecutions
DPP	Director of Public Prosecutions
GCM	General Court Martial
ICT	Information Communication Technology
ISAF SOP	International Security Assistance Force Standard Operating Procedure
MJCC	Military Justice Coordination Committee
ODMP	Office of the Director of Military Prosecutions
RCM	Restricted Court Martial
RMJ	Registrar of Military Justice
SPILO	Service Police Investigation Liaison Officer

DIRECTOR OF MILITARY PROSECUTIONS

AUSTRALIAN DEFENCE FORCE

REPORT FOR THE PERIOD 1 JANUARY TO 31 DECEMBER 2011

PREAMBLE

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

2. I was appointed the first DMP on 10 July 2006. My initial appointment was for a period of five years and on 13 June 2011, pursuant to section 188GH, you reappointed me for two years commencing 10 July 2011.

3. Section 196B of the DFDA requires the DMP, as soon as practicable after 31 December each year, to provide to the Minister a report relating to the operations of DMP. This is my fifth report.

PROSECUTION AND DISCLOSURE POLICY

4. The primary function of the DMP is to carry on prosecutions for service offences in proceedings before courts martial or Defence Force magistrates.[1] An ODMP prosecution and disclosure policy exists to provide guidance

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[1] Section 188GA(1)(a) of the DFDA.

regarding decisions to prosecute and the conduct of prosecutions; a copy of the policy is at Annex A.

5. During the reporting period, I have not given undertakings to any person pursuant to section 188GD of the DFDA (relating to my power to grant immunity from prosecution); nor have I issued any directions pursuant to section 188GE (relating to my power to issue formal directives to service police investigators and prosecutors).

PERSONNEL

6. At the commencement of the reporting period, the office had establishment positions for 14 prosecutors (ranging in rank from Army Captain (E) to Brigadier (E)), a senior non-commissioned officer performing the duties of a Service Police Investigations Liaison Officer (SPILO), and eight civilian support staff.

7. The actual manning of this office throughout the reporting period was as follows:

Position	**Rank**	**Status**
DMP	Brigadier	Filled
DDMP	Colonel	Filled
Senior Prosecutor	Wing Commander	Vacant
Senior Prosecutor	Lieutenant Colonel	Filled
Business Manager	Executive Level 1	Filled
Prosecutor	Lieutenant Commander	Filled
Prosecutor	Lieutenant Commander	Vacant
Prosecutor	Major	Filled
Prosecutor	Major	Filled
Prosecutor	Major	Filled
Prosecutor	Major	Filled
Prosecutor	Squadron Leader	Filled
Prosecutor	Squadron Leader	Filled
Prosecutor	Captain (Army)	Filled
Prosecutor	Flight Lieutenant	Filled
Prosecutor U/T	Lieutenant	Filled
Service Police Liaison	Chief Petty Officer	Filled

Legal Administration	APS 6	Vacant
Executive Assistant	APS 5	Filled
Paralegal	APS 4	Filled
Paralegal	APS 4	Filled
Paralegal	APS 4	Filled
Paralegal	APS 4	Filled
Travel Coordinator	APS 3	Vacant

8. During the reporting period, two officers deployed on operations, one for a six month rotation in the Middle East and the other on short term relief manning in the same theatre. The stated policy of releasing only one officer at a time for deployment, implemented in 2011, has worked well in broadening the experiences of junior legal officers and assisted in managing their expectations.

EXTERNAL ASSOCIATIONS

9. Generally, ADF legal officers are not required to hold a practising certificate in order to provide legal advice. If a legal officer who is posted to assist me in accordance with section 188GQ of the DFDA does not hold a practising certificate on arrival, that legal officer is required to obtain a practising certificate as soon as possible. During the reporting period, all legal officers at ODMP either already held, or obtained soon after their posting, a practising certificate.

10. Since 2007, ODMP prosecutors have been admitted as members of the Australian Association of Crown Prosecutors. The association is comprised of Crown or State prosecutors from every Australian jurisdiction and some jurisdictions in the Pacific region. This year the Association held its annual conference in Canberra, enabling, without significant cost, most ODMP prosecutors to attend. Enabling junior military prosecutors to mix with senior Crown prosecutors from all Australian jurisdictions was certainly beneficial.

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

INTERNAL (DEPARTMENT OF DEFENCE) LIAISON

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

13. As a condition of my reappointment, I have been required to report to the Minister on a quarterly basis regarding the operation and workload of the office and matters which may have implications for the command and operational activities of the ADF. The first report was rendered on 5 October 2011.

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

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

The Committee has provided an effective forum to initiate amendments to the DFDA. During the year, through Defence Legal, I placed before the Committee difficulties concerning the framing and extent of drug offences under the DFDA compared to equivalent legislation in other jurisdictions. The work of the Committee has advanced matters previously raised including the implementation of global punishments. More broadly, I have provided input to the Committee's consideration of proposed changes to the

investigative provisions of the DFDA to update and improve those provisions.

15. During the reporting period, significant effort was made to support the Defence Police Training Centre in its training of service police in investigations and the management of investigations. I have regularly attended at the Centre to address service police on matters of mutual interest. Further attention has been given to methods by which improvements can be made to the presentation of evidence for prosecutorial purposes, such as proper presentation of statements by expert witnesses. Major Glenn Kolomeitz, of this office, has been instrumental in this support.

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

16. On 22 July 2011, I spoke on the topic of military justice to the Castan Centre for Human Rights Law at Monash University at its annual Human Rights Conference.

17. From 8-10 September 2011, I attended the 10th International Military Criminal Law Conference in Budapest, Hungary, where I presented to the forum an Australian perspective of some aspects of the right against self incrimination and freedom of speech in the military context.

18. I also visited London and met with Mr Bruce Houlder QC, the UK Armed Forces Director of Service Prosecutions. Mr Houlder hosted my visit to a court martial at Bulford.

19. On 3 November 2011 in Melbourne, I met with the Canadian Director of Military Prosecutions, Captain John Maguire, Royal Canadian Navy. With the Canadian Defence Force being approximately the same size as the ADF and bearing similar pressures to act jointly, I was impressed to find how much the experience of the Canadian DMP mirrored my own. This was so particularly in the context of his interaction with command with respect to

difficult prosecutions. Of particular interest was the Canadian DMP's ability to appeal decisions on matters of law and in relation to sentence.

20. From 3-5 November 2011, I attended an international symposium on 'Military Justice in the Modern Age' at the Melbourne Law School, University of Melbourne. The theme of the conference was the interaction between civil and military standards of justice and the extent to which human rights law is beginning to influence jurisprudence and the practice of military justice.

TRAINING OF PROSECUTORS

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

22. Throughout the year, prosecutors were allocated legal topics and required to prepare and present a legal paper to office legal staff. A number of papers were presented including: the law surrounding witness reports when fresh in the memory, tendency and coincidence evidence and the new *Work Health and Safety Act 2011* (Cth) and its consequences for ADF prosecutions.

CASELOAD

23. During the reporting period, 38 DFM hearings were held, 14 RCM and five GCM. Thirty six matters were not proceeded with due to the determination that there was no reasonable prospect of success, or that to prosecute would not have enhanced or enforced service discipline. Forty two matters were referred back for summary disposal. Seven matters were referred to civilian Directors of Public Prosecution for prosecution pursuant to the extant DMP-DPP memorandum of understanding.

24. As at 31 December 2011, ODMP had 47 open matters. Attached at Annex B is a chart showing matters by service dealt with during the reporting period.

PROCESS

25. Improvements have been made to processes in the ODMP including the promulgation of an ODMP handbook for prosecutors describing internal procedure and some of the continuing legal education papers presented by individual prosecutors. A more direct method for accessing online legal resources has also been adopted.

SIGNIFICANT CASES DURING THE REPORTING PERIOD

Davis v Chief of Army [2011] ADFDAT 1

26. On 29 November 2010, the Defence Force Discipline Appeal Tribunal (DFDAT) heard an appeal in relation to the conviction of Lance Corporal Davis by RCM for assault occasioning actual bodily harm under s 24(1) of the *Crimes Act 1900* (ACT).

27. The principal ground for appeal was that where there is evidence capable of amounting to consent in a case of assault occasioning actual bodily harm, the prosecution was required to prove beyond reasonable doubt that either there was no consent given or that the degree of violence exceeded that to which consent had been given and that this represented the common law of Australia. Reference in this regard was made to *Lergesner v Carroll* [1991] 1 QD R 206, *Sorgenfrie v R* (1981) 51 FLR 147 and to *R v Tate* [2010] ACTSC 144.

28. Following an extensive review of the relevant authorities in England, Canada, New Zealand and Australia, the tribunal found that the weight of judicial opinion was that consent is irrelevant in cases of assault occasioning actual

bodily harm and does not need to be disproved by the prosecution. The tribunal found that the law does not recognise consent as a defence where there is either an intention to cause bodily harm or where bodily harm is in fact caused. The DFDAT dismissed the appeal on 22 February 2011.

***Green v Chief of Army* [2011] ADFDAT 2**

29. On 22 June 2011, the DFDAT determined an appeal in relation to the conviction of Major Green following his conviction before a GCM of one count of knowingly making a false statement in relation to an application for a benefit under s 56 of the DFDA and three counts of obtaining a financial advantage by receiving payments to which he was not entitled contrary to s 61(3) of the DFDA and s 135.2 of the *Criminal Code*. The convictions relate to the application for and receipt of financial payments arising from a purported entitlement to rental allowance.

30. The principal ground of appeal was that the learned Judge Advocate had erred in ruling that the defence of an "honest claim of right" was not available in respect of the charges under either the DFDA or *Criminal Code*.

31. The DFDAT found that the "honest claim of right" defence, provided for in s 9.5(2) of the *Criminal Code* was either not available or was superfluous in the circumstances. The defence to a charge of knowingly making a false statement, provided for in s 9.5(2) of the *Criminal Code*, would only have been available to Major Green had it been open, on the evidence, to find that on the day on which he signed the application form, he was under a mistaken belief that he had a proprietary or possessory right to the rental and associated allowances as a member categorised "Member with Dependants (Unaccompanied)". The tribunal found that while Major Green may have considered that he was entitled to another allowance which could have been payable had approval been given for him and his wife to live together in the Brisbane area, it can not

be accepted that the offence of knowingly making a false statement *necessarily* arose out of the existence of such a right, even if it may properly be characterised as a proprietary right.

32. The DFDAT found that as the prosecution had established beyond reasonable doubt, that during the period in which he received the allowances, Major Green believed that he was not entitled to them, he could not make out a defence of right with respect to the charges under s 135.2(1) of the *Criminal Code*.

***Low v Chief of Navy* [2011] ADFDAT 3**

33. Before a RCM on 24 September 2010, Petty Officer Low was convicted of: an act of indecency contrary to s 61(3) of the DFDA and s 60(1) of the *Crimes Act 1900* (ACT); assaulting a subordinate contrary to s 34(1) of the DFDA; and using insulting words in a public place contrary to s 33(d) of the DFDA. The convictions arose from events which occurred while Petty Officer Low was on short leave from *HMAS Leeuwin* in Rabaul, Papua New Guinea.

34. Petty Officer Low appealed his conviction for an act of indecency on five grounds: failure by the Judge Advocate to sever the charges; that the Judge Advocate erred by allowing the prosecution to call a particular witness; failure by the Judge Advocate to warn the same witness in relation to his privilege against self-incrimination; failure by the Judge Advocate to give a direction in relation to the complainant's credibility; and that the conviction was unreasonable or could not be supported by the evidence.

35. The DFDAT held that the Judge Advocate properly considered all relevant issues in relation to the severing of the charges. It was also considered that the Judge Advocate had properly exercised her discretion in relation to the prosecution witness and there was no unfairness to the accused. The risk of the witness incriminating himself was not raised at trial and was ruled not to have had an effect on

the outcome. It was also held that the Judge Advocate's direction satisfied the requirements of the *Evidence Act* (Cth) *1995* and that there was sufficient evidence to allow a court martial panel to convict the accused. Consequently, all five grounds of appeal were dismissed and Petty Officer Low's conviction was upheld.

***Haskins v the Commonwealth* [2011] HCA 28**
***Nicholas v the Commonwealth* [2011] HCA 29**

36. On 26 August 2009, in the case of *Lane v Morrison* [2009] HCA 29, the High Court declared that the provisions of Division 3, Part VII of the DFDA, were invalid. These provisions included sections establishing the Australian Military Court (AMC). In response to this judgement, Parliament enacted the *Military Justice (Interim Measures) Act (No 1) 2009* (Cth) ("*No 1 Act*") and *Military Justice (Interim Measures) Act (No 2) 2009* (Cth) ("*No 2 Act*"). This legislation was designed to provide for the continuity of the discipline system and the *No 2 Act* gave effect to punishments and orders made by the AMC by imposing disciplinary sanctions upon members that had been previously sentenced by the AMC.

37. *Haskins v the Commonwealth* and *Nicholas v the Commonwealth* were heard together in order for the court to answer the question as to whether the legislation was a valid law of the Commonwealth.

38. The plaintiffs claimed that the legislation usurped judicial power as it possessed the features of a bill of pains and penalties and that it offended Chapter III of the *Constitution*.

39. The Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J dissenting) held that the legislation did not usurp judicial power and due to this the legislation was not a bill of pains and penalties. Not only did the legislation not have the features of a bill of pains and penalties, it did not make a legislative determination of guilt,

nor did it make crimes of any acts after they had been done. Importantly, the punishments had been subject to review and therefore the legislation did not actually fix the final punishment. It was therefore held that the legislation was a valid law of the Commonwealth.

Li v Chief of Army [2012] ADFDAT 1

40. On 8 April 2011, Major Li was convicted by RCM of creating a disturbance on service land contrary to s 33(b) of the DFDA. He was sentenced to a fine of $5000, $3000 of which was suspended, and a severe reprimand. He appealed to the DFDAT. That was heard on 16 December 2011 and a judgement is expected in 2012.[2]

General Court Martial Trial of Able Seaman Steward Adrian Mill

41. At trial by GCM on 5 December 2011, Able Seaman Mill pleaded guilty and was convicted of two counts of 'culpable driving causing grievous bodily harm', contrary to s 61(3) of the DFDA and s 29 of the *Crimes Act 1900* (ACT). The charges arose out of an incident that occurred on 16 December 2009 on the *HMAS Stirling* causeway. Able Seaman Mill was the driver of the vehicle. He was driving the vehicle in excess of 50 kilometres per hour above the signed speed limit of 80 kilometres, when he lost control and seriously injured two passengers in the vehicle. He was sentenced to be dismissed from the Defence Force and sentenced to imprisonment for 18 months, 15 months of which were suspended.

General Court Martial Trial of Lieutenant Commander Alan John Jones

42. At trial by GCM in December 2011, Lieutenant Commander Jones was found guilty and convicted of seven counts of 'indecent conduct upon an Able Seaman without

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[2] Decision handed down 15 Mar 2012 – appeal dismissed.

her consent', contrary to s 61(3) of the DFDA and s 60(1) of the *Crimes Act 1900* (ACT), and one count of 'attempting to destroy service property', contrary to s 43 of the DFDA and s 11.1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*). Lieutenant Commander Jones was reduced in rank to Lieutenant, dismissed from the Defence Force and sentenced to imprisonment for 18 months, 6 months of which was suspended (amongst other punishments). Lieutenant Jones has appealed the convictions on the 'indecency offences' to the DFDAT.[3]

General Court Martial Trial of Sailor W

43. Before a GCM on 31 Oct 2011, Sailor W was acquitted of one charge of sexual intercourse without consent contrary to s 61(3) of the DFDA and s 54(1) of the *Criminal Code* arising from an incident that occurred in Montreal, Canada on 20 Aug 2010. The sailor raised as his defence to the charge a diagnosis of "sexsomnia" to negative the element of voluntariness.

CIVILIAN CASUALTY INCIDENT IN AFGHANISTAN

44. As the DMP, it is my responsibility to determine charges to be presented before service tribunals and to prosecute without fear or favour and independent of any interference.

45. The charges arose from the conduct of Australian soldiers during a night time clearance of an Afghan compound which resulted in the death of a number of civilians.

46. As the facts of the incident have never been tested before a court, I will not outline them in this report.

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[3] The Appeal was heard in Sydney on 15-16 March 2012 and the Tribunal has reserved its decision.

47. Taking the incident in its entirety, I formed the view that a prima facie case of manslaughter by criminal negligence and dangerous conduct existed in respect to two soldiers.

48. At a pre-trial hearing on 20 May 2011, the Chief Judge Advocate (CJA), as I understand his decision, ruled in what I consider to be the creation of new law, that Australian soldiers have no duty of care at law to protected persons or friendly forces during armed conflict. In making this decision, the CJA did not consider the evidence the prosecutors would have adduced at trial.

49. Legal issues of this kind are always debatable. Whilst there was authority from World War II that the CJA relied upon, his application of it to this case involved what I consider to be a wholly unexpected extension of the legal principle. The evidence on which I relied was not led because the charges were dismissed before that point was reached.

50. While I am not convinced that the CJA's decision is correct in law, I have no inherent right of appeal within the military justice system at any stage of the trial process. Should I decide to challenge any decision of a judge advocate (or Defence Force magistrate) I would be required to go to a civil court, most likely the Federal Court of Australia seeking the entirely discretionary relief that that court may offer. It immediately becomes questionable whether I have *locus standi* against another Commonwealth Officer to undertake such action. There is also uncertainty whether the Federal Court has jurisdiction to provide any relief. It is also questionable whether one Commonwealth officer can seek relief against another Commonwealth officer in these circumstances. All of these issues arise before the merit of the matter is even to be considered.

51. Furthermore, I do not have funds available to undertake such action. This would not have been a decision I could have taken expeditiously as I am restrained by the

decision of the then Acting Secretary Michael Pezzullo of 6 June 2007 (Annex C) requiring the approval of the Secretary of the Department of Defence before undertaking any such litigation.

52. In relation to the officer, the case turned upon whether he had breached International Security Assistance Force (ISAF) Standard Operating Procedure (SOP) 309, which regulated the circumstances in which coalition forces could enter compounds. The evidence available satisfied me that the officer was in breach of ISAF SOP 309.

53. Subsequently, further evidence was provided by the defence counsel in support of a *nolle prosequi* application.

54. I then exercised my discretion to discontinue the prosecution.

55. Every prosecution in my office is constantly reviewed in accordance with my prosecution policy. If new evidence is obtained, and that evidence suggests that there is no longer a reasonable prospect of conviction, then the prosecution is terminated at the earliest available opportunity. These decisions are made by me alone without fear or favour and consistent with the independent role of a prosecutorial authority (ie. the DMP or DPP) as outlined by Kirby P (as he then was) in *Price v Ferris* (1994) 74 A Crim R 127 at p130:

> ...[d]ecisions to commence, not to commence or to terminate a prosecution are made independently of the Courts. Yet they can have the greatest consequences for the application of the criminal law. It was to ensure that in certain cases manifest integrity and neutrality were brought to bear upon the prosecutorial decisions that the Act was passed by Parliament affording large and important powers to the DPP who, by the Act, was given a very high measure of independence.

EXTRINSIC LEGAL MATERIALS

56. Before a RCM convened on 28 April 2011, a Corporal pleaded not guilty to two counts of disobeying a lawful command, one count of using insubordinate language, one count of assaulting a superior officer and one count of engaging in threatening conduct. The RCM was initially held at Defence Plaza, Sydney. At the commencement of proceedings the Judge Advocate directed the Court Martial panel not to make any legal inquiry of their own, nor to refer to any extrinsic materials, including the Discipline Law Manual. During the trial, the Judge Advocate gave the panel a legal direction regarding statutory alternative offences. A number of questions on the law were asked by the President and a further note from the panel was passed to the Judge Advocate. It became apparent that the panel was in possession of an extract from the Discipline Law Manual, which had been provided to the President in a pre-trial administrative package. Defence counsel argued that the panel was inappropriately relying on extrinsic legal materials and that there was a risk that the panel would disregard the Judge Advocate's directions on the law. Defence counsel successfully applied to have the panel dissolved pursuant to s125 of the DFDA.

57. A second RCM was subsequently convened at Victoria Barracks, Sydney, on 28 June 2011, with a fresh Court Martial panel. The result of this particular RCM is beyond the scope of this report. However, the matter of future administrative instructions to Court Martial panels has been resolved by consultation between the office of CJA, RMJ, Director of Defence Counsel Services and myself.

OTHER MATTERS

Investigative Provisions of the DFDA

58. It is common ground among offices administering military justice in the ADF that the investigative provisions of the DFDA are in need of review and improvement. For

example, s 101Q provides for medical examinations to be conducted and medical specimens to be taken from Defence members for the purpose of investigating service offences. However, the provision has not been significantly amended since 1982 and not in a manner which takes into account developments in comparable civil legislation since that time. While the DFDA permits 'consent' in writing as a source of legal authority to conduct a medical examination, it is silent on the practical aspects of gaining that consent.

59. Also absent is any requirement that the consent obtained be 'informed consent', as is required in the *Crimes Act 1914* (Cth), which can only be obtained from a constable and only after a written statement of the procedure and relevant rights is provided to the suspect. An 'investigating officer' under the DFDA may obtain consent but the definition of 'investigating officer' under the statute extends beyond service police members to include any warrant officer or non-commissioned officer engaged in the investigation of the offence. No doubt this was intended to facilitate the investigation of service offences at summary level but is not appropriate in contemporary circumstances. Medical examinations under s 101Q may only be taken for suspected service offences relating to narcotic substances. There is no provision to conduct a medical examination for the purpose of obtaining DNA evidence.

Management of victims of service offences

60. My focus on the positive management of victims has continued during the year, including close consultation with more vulnerable victims of offences against the person. Where appropriate during the reporting period, I have arranged for close family members of victims to attend and provide support directly to victims during pre-trial preparations and during trial itself. All of my prosecutors have been instructed to liaise closely with all witnesses, in particular victims.

Forum

61. I note the comments of the CJA in his 2010 Annual Report regarding the exercise of my discretion in the choice of forum for trials. I re-iterate my earlier comments in previous reports. That is, matters which are "manifestly injurious to service discipline" are appropriately referred for court martial.

Information Communication Technology (ICT) Function

62. This office has experienced a significant deficiency in ICT function during the reporting period despite effort to rectify it through the normal Defence Restricted Network helpdesk. While this effort will continue, I report that there is a possibility of diminution in the capability of this office to fulfil its function in a timely manner.

FINANCE

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

CONCLUSION

64. The period of consolidation following the re-introduction of the Defence Force magistrate and court martial system has continued during the reporting period. The priority remains to conduct efficient and effective prosecution of matters with a focus on timeliness.

65. I look forward to continuing this period of consolidation as the office matures under the current legislative framework.

COMPLIANCE INDEX OF REQUIRED INFORMATION FOR STATUTORY AUTHORITIES

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

Enabling Legislation	*Defence Force Discipline Act 1982*
Responsible Minister	Minister for Defence
Powers, Functions & Objectives	Paragraphs: 1, 4-5
Membership and Staff	Paragraphs: 6-8, 21-22
Information Officer	Miss Kerryn Dawson Executive Assistant to DMP Office of the Director of Military Prosecutions Department of Defence Level 3, 13 London Circuit CANBERRA ACT 2600 Telephone: 02 6127 4403 Facsimile: 02 6127 4444
Financial Statement	Paragraph: 63
Activities and Reports	Paragraphs: 12-20, 25
Operational Problems	Paragraphs: 56-59
Subsidiaries	Not applicable

DIRECTOR OF MILITARY PROSECUTIONS DIRECTIVE 02/2009—PROSECUTION AND DISCLOSURE POLICY

INTRODUCTION

1. This directive states the prosecution and disclosure policy of the Director of Military Prosecutions (DMP) and replaces DMP's previous directive 01/2009 of 4 May 2008. This directive applies to all prosecutors posted to the Office of the Director of Military Prosecutions (ODMP), any legal officer to whom DMP has delegated function(s) under *Defence Force Discipline Act 1982* (DFDA) s 188GR and any ADF legal officer who has been briefed to advise DMP or to represent DMP in a prosecution before a Defence Force magistrate (DFM), a restricted court martial (RCM) or a general court martial (GCM), or to represent DMP in the Defence Force Discipline Appeal Tribunal (DFDAT) or another court. In order to promote consistency between Commonwealth prosecution authorities, some aspects of this policy are modelled on relevant Commonwealth policies.

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

3. On 12 June 2006, legislative amendments to the DFDA came into effect which significantly changed the process by which decisions are made with respect to the prosecution of ADF members for offences under the DFDA, and the administrative arrangements relating to the conduct thereof. Prior to 12 June 2006, decisions in respect of all Service offences under the DFDA rested with ADF commanders. For less serious Service offences, prosecution decisions continue to be made by unit or command authorities who are best placed to determine the discipline needs of their unit, ship or establishment and therefore make decisions based on the need to maintain discipline within the ADF. However, for more serious offences, or where charges have been referred by a summary authority to DMP, decisions in respect of the prosecution of charges will be made by DMP.

4. On 1 October 2007, amendments to the DFDA commenced; those amendments repealed the previous regime of trials by court martial and Defence Force magistrate, and established the AMC. On the same day, amendments to the *Defence Force Discipline Appeals Act 1955* (the Appeals Act) provided DMP with the power to appeal to the DFDAT in respect of punishments imposed, or court orders made, in the AMC. Further amendments to the Appeals Act, which commenced on 20 March 2008, gave DMP the power to refer to the DFDAT questions of law arising out of trials in the AMC. On 26 August 2009, the High Court of Australia struck down the AMC as being unconstitutional. Legislation was passed to re-establish the pre-2007 regime of DFM, RCM and GCM. The policy below is based on the re-established regime.

5. The initial decision as to whether to prosecute is the most important step in the prosecution process. A wrong decision to prosecute, or conversely a wrong decision

not to prosecute, tends to undermine confidence in the military discipline system. It is therefore important that the decision to prosecute (or not to prosecute) be made fairly and for appropriate reasons. It is also important that any subsequent decision not to proceed with a charge is made fairly and for appropriate reasons and that care is taken in the selection of the charges that are to be laid. In short, decisions made in respect of the prosecution of Service offences under the DFDA must be capable of withstanding scrutiny. Finally, it is in the interests of all that decisions in respect of DFDA prosecutions are made expeditiously.

6. This directive deals solely with the exercise of the discretion to prosecute under the DFDA, and associated disclosure issues. It does not provide policy guidance or procedures for resolving jurisdictional conflicts between the civil, criminal and military discipline systems.[1] In addition, this directive does not deal with situations in which the exercise of ADF jurisdiction is otherwise limited, such as by DFDA s 63. Advice and procedural guidance for dealing with such matters is provided in DI(G) PERS 45–1—*Jurisdiction under Defence Force Discipline Act -Guidance for Military Commanders* of 17 February 1999.

AIMS

7. The aims of this directive are:

a. to provide guidance for prosecutors who are responsible for making recommendations to DMP in respect of decisions regarding the prosecution of offences under the DFDA to improve the quality and consistency of their recommendations and decisions; and

b. to inform other ADF members of the principles which guide decisions made by DMP.

MAINTENANCE OF DISCIPLINE

8. It is critical that the ADF establish and maintain the high standard of discipline that is necessary for it to conduct successful operations. As the ADF may be required to operate at short notice in a conflict situation, a common and high standard of discipline must be maintained at all times. Discipline is achieved and maintained by many means, including leadership, training and the use of administrative sanctions. Prosecution of charges under the DFDA is a particularly important means of maintaining discipline in the ADF. Indeed, the primary purpose of the disciplinary provisions of the DFDA is to assist in the establishment and maintenance of a high level of Service discipline.

ALTERNATIVES TO CHARGING

9. Laying charges under the DFDA is only one tool that is available to establish and maintain discipline. In some circumstances, maintenance of discipline will best be achieved by taking administrative action against members in accordance with Defence

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

Instructions. Similarly, in respect of minor breaches of discipline, proceedings before a Discipline Officer may be appropriate. ODMP may be asked to advise on matters that can be appropriately dealt with through administrative or Discipline Officer action. Whilst ODMP may make such recommendations, ultimate decisions in respect of how these minor breaches are dealt with still rests with commanders, who in turn must apply judgement to the unique facts and circumstances of the case before them. Nevertheless, administrative or Discipline Officer action alone is inappropriate to deal with situations in which a serious breach of discipline has occurred or where the conduct involved is otherwise deemed to be serious enough to warrant the laying of charges under the DFDA. Further, in some cases the interests of justice may require that a matter be resolved publicly by proceedings under the DFDA before a DFM, RCM or GCM. Alternatives to charging should never be used as a means of avoiding charges in situations in which formal disciplinary action is appropriate.

THE DECISION TO PROSECUTE

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

Factors governing the decision to prosecute

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

a. Whether or not the admissible evidence available is capable of establishing each element of an offence.

b. Whether or not there is a reasonable prospect of conviction by a Service tribunal properly instructed as to the law.

c. The effect of any decision to prosecute or proceed with a charge on the maintenance of discipline and the Service interests of the ADF.

d. Whether or not discretionary factors nevertheless dictate that charges should not be laid or proceeded with in the public interest (these are discussed in detail later).

12. **Admissible evidence and reasonable prospects of a conviction.** A decision to prosecute or proceed with a charge under the DFDA should not be made unless there is sufficient admissible and reliable evidence available to allow a Service tribunal to conclude that the offence is likely to be proven in the absence of adequate evidence to the contrary. There must also be a reasonable expectation that a conviction will be achieved if the charge is laid (or proceeded with) and a prosecution should not be

commenced where there is no reasonable prospect of conviction. In evaluating the quality and sufficiency of the available evidence and in deciding whether there are reasonable prospects of conviction, regard must be paid to whether the witnesses can be required to give evidence, the credibility of the witnesses and to the admissibility of available evidence.

13. **Service interests and maintenance of discipline.** In respect of the prosecution (or continued prosecution) of offences under the DFDA, the requirement to maintain a high standard of discipline in the ADF is a particularly important consideration. In many cases this requirement will be reason enough to justify a decision to lay or proceed with a charge under the DFDA. However, occasionally wider public interest considerations, beyond those relating to the maintenance of discipline in the ADF, will warrant charges being laid. In respect of such cases, it is important to realise that prosecution under the civil criminal law may be required, rather than prosecution under the DFDA. In this context, regard must be paid to recent decisions of the High Court which have defined the ADF discipline jurisdiction. Specifically, the High Court has decided that Service offences should only be prosecuted where such proceedings can be reasonably regarded as substantially serving the purpose of maintaining or enforcing service discipline.

14. Consequently, it is a matter for DMP to decide whether the maintenance of discipline requires that DFDA charges be laid in a particular case. In making the prosecution decision, DMP may consider the views of a superior authority canvassing the Service interest. Issues of maintaining discipline and Service interests will vary in each particular case but may include the following.

a. **Operational requirements.** Only in the most exceptional cases will operational requirements justify a decision not to lay or proceed with a charge under the DFDA. In particular, the existence of a situation of active service will not, by itself, justify a decision not to charge or proceed with a charge under the DFDA. In most cases, operational considerations will only result in delay in dealing with charges. Operational requirements may, however, be relevant in deciding to which level of Service tribunal charges should be referred.

b. **Prior conduct.** The existence of prior convictions, or the general prior conduct of an offender, may be a relevant consideration. For example, several recent infringement notices for related conduct may justify a decision to charge a member with a Service offence under the DFDA notwithstanding that the latest offence, when viewed in isolation, would not normally warrant such action.

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

15. **Discretionary factors.** As indicated previously, numerous discretionary factors are relevant in deciding whether to commence (or continue with) a prosecution under the DFDA. In particular, the following is a non-exhaustive list of factors that DMP

may consider in deciding, in a given case, whether charges under the DFDA should be preferred or proceeded with:

a. **Consistency and fairness.** The decision to prosecute should be exercised consistently and fairly with similar cases being dealt with in a similar way. However, it must always be recognised that no two cases are identical and there is always a requirement to consider the unique circumstances and facts of each case before deciding whether to prosecute.

b. **Deterrence.** In appropriate cases, such as where a specific offence has become prevalent or where there is a requirement to reinforce standards, regard may be paid to the need to send a message of deterrence, both to the alleged offender and the ADF generally.

c. **Seriousness of the offence.** It will always be relevant to consider the seriousness of the alleged offence. A decision not to charge under the DFDA may be justified in circumstances in which a technical and/or trivial breach of the DFDA has been committed (provided of course that no significant impact upon discipline will result from a decision not to proceed). In these circumstances, administrative action or Discipline Officer proceedings may be a more appropriate mechanism for dealing with the matter. In contrast and as a general rule, the more serious and wilful the alleged conduct giving rise to a Service offence, the more appropriate it will be to prefer charges under the DFDA.

d. **Interests of the victim.** In respect of offences against the person of another, the effect upon that other person of proceeding or not proceeding with a charge will always be a relevant consideration. Similarly, in appropriate cases regard may need to be paid to the wishes of the other person in deciding whether charges should be laid, although such considerations are not determinative.

e. **Nature of the offender.** The age, intelligence, physical or mental health, cooperativeness and level of Service experience of the alleged offender may be relevant considerations.

f. **Degree of culpability.** Occasionally an incident, such as an aircraft accident, will be caused by the combined actions of many people and cannot be directly attributed to the conduct of one or more persons. In these circumstances, careful regard must be paid to the degree of culpability of the individuals involved when deciding whether charges should be laid and against whom.

g. **Delay in dealing with matters.** Occasionally, conduct giving rise to possible Service offences will not be detected for some time. Where Service offences are not statute barred under the DFDA, it may nevertheless be relevant to consider whether the length of time since the alleged offence was committed militates against charges being laid. In considering this aspect, the sufficiency of the evidence, the discipline

purposes to be served in proceeding with charges and any potential deterioration in the ability to accord an accused person a fair trial are likely to be particularly relevant.

16. In addition to the foregoing considerations, the DMP may deem it appropriate to have regard to the following additional factors when deciding which Service tribunal should deal with specific charges:

a. **Sentencing options.** The adequacy of the sentencing powers that are available at the various levels of Service tribunal will always be an important consideration in deciding by which Service tribunal charges should be tried.

b. **Cost.** For Service offences or breaches of discipline, cost may be a relevant consideration in deciding what level of Service tribunal should be used.

c. **Discretion to decide that an offence be tried by DFM, RCM or GCM.** Subsection 103(1)(c) of the DFDA provides the DMP with the discretion to decide that an offence be tried by DFM, RCM or GCM. In making such a determination, and in addition to a careful consideration of the individual circumstances of the alleged offence(s) in the Brief of Evidence, DMP may consider:

(1) the objective seriousness of the alleged offence(s);

(2) whether like charges would ordinarily be tried in the absence of a jury in the civilian courts in Australia; and

(3) whether the reduced scale of punishment available would enable the accused person, if convicted, to be appropriately punished.

The factors mentioned in clauses (1) and (2) above are clearly related and remain the most important factors. The factor in clause (3) is one which DMP will consider only if satisfied (after considering the two previous factors) that the exercise of the discretion is appropriate.

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

Factors that are not to influence the decision to prosecute

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

a. The race, religion, sex, sexual preference, marital status, natural origin, political associations, activities or beliefs, or Service of the alleged offender or any other person involved.

b. Personal feelings concerning the offender or any other person involved.

c. Possible personal advantage or disadvantage that may result from the prosecution of a person.

d. The possible effect of any decision upon the Service career of the person exercising the discretion to prosecute.

e. Any purported direction from higher authority in respect of a specific case.

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

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

SELECTION OF CHARGES

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

DISCLOSURE OF THE PROSECUTION CASE

20. Disclosure is the prosecution informing the accused person of the case against him or her. The information comprises all material required to be disclosed and includes: the prosecution case; information relevant to the credibility or reliability of prosecution witnesses; and information relevant to the credibility and reliability of the accused person.

21. In some circumstances it will also be appropriate that the prosecution informs the accused person of material, not covered in the previous paragraph, which has come into DMP's, a Defence Investigative Agency's (DIA), or a third party's possession, and which either runs counter to the prosecution case or might reasonably be expected to assist the accused person in his or her defence.

CHARGE-BARGAINING

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

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

24. Charge-bargaining is to be distinguished from consultations with a Service tribunal as to the punishment the Service tribunal would be likely to impose in the event of the accused pleading guilty to a criminal charge. No legal officer prosecuting on the behalf of DMP is to participate in such a consultation.

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

a. any charge-bargaining proposal should not be initiated by the prosecution; and

b. such a proposal should not be entertained by the prosecution unless:

(1) the charges to be proceeded with bear a reasonable relationship to the nature of the disciplinary/criminal conduct of the accused;

(2) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and

(3) there is evidence to support the charges.

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

a. whether the accused person is willing to cooperate in the investigation or prosecution of others, or the extent to which the accused person has done so;

b. whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the accused is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;

c. the desirability of prompt and certain dispatch of the case;

d. the accused person's antecedent conduct;

e. the strength of the prosecution case;

f. the likelihood of adverse consequences to witnesses;

g. in cases where there has been a financial loss to the Commonwealth or any person, whether the accused person has made restitution or arrangements for restitution;

h. the need to avoid delay in the dispatch of other pending cases;

i. the time and expense involved in a trial and any appeal proceedings; and

j. the views of the complainant(s).

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

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

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

OFFENCES OCCURRING AND/OR PROSECUTED OVERSEAS

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

UNDERTAKINGS UNDER SECTION 188GD

31. Section 188GD vests DMP with the power to give an undertaking to a person that they will not be prosecuted for a service offence in relation to assistance provided

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

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

a. The extent to which the person was involved in the activity giving rise to the charges, compared with the culpability of their accomplice.

b. The strength of the prosecution case against a person in the absence of the evidence arising from the undertaking.

c. The extent to which the testimony of the person receiving the undertaking will bolster the prosecution case, including the weight the tribunal of fact is likely to attach to such evidence.

d. The likelihood of the prosecution case being supported by means other than evidence from the person given the undertaking.

e. Whether the public interest is to be served by not proceeding with available charges against the person receiving the undertaking.

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

L.A. McDADE
Brigadier
Director of Military Prosecutions

October 2009

CLASS OF OFFENCE BY SERVICE

CLASS OF OFFENCE	NAVY	ARMY	RAAF	TOTAL
ACTS INTENDED TO CAUSE INJURY	4	12	2	**18**
SEXUAL ASSAULT AND RELATED OFFENCES	8	4	1	**13**
DANGEROUS OR NEGLIGENT ACTS ENDANGERING PERSONS		4		**4**
THEFT AND RELATED OFFENCES	1	4	2	**7**
FRAUD, DECEPTION AND RELATED OFFENCES	9	18	9	**36**
ILLICIT DRUG OFFENCES	8	3		**11**
PROPERTY DAMAGE AND ENVIRONMENTAL POLLUTION			1	**1**
TRAFFIC AND VEHICLE REGULATORY OFFENCES		1		**1**
OFFENCES AGAINST JUSTICE PROCEDURES, GOVERNMENT SECURITY AND GOVERNMENT OPERATIONS	1			**1**
SPECIFIC MILITARY DISCIPLINE OFFENCES	11	24	3	**38**
Grand Total	**42**	**70**	**18**	**130**

Australian Government
Department of Defence

Minute
Office of the Secretary

SEC/OUT/2007/176
2005/1067593/1

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FEDERAL COURT PROCEEDINGS DMP v RMJ & ANOTHER

1. On Sunday 3 June 2007, the Director of Military Prosecutions (DMP) notified me that she had instituted proceedings in the Federal Court. These proceedings seek urgent judicial review of the Registrar of Military Justice's (RMJ) decision on 31 May 2007, to "terminate" the reference of a case to a Defence Force Magistrate. The effect of this was that it was referred back to the DMP to determine the next action, including another possible request to the RMJ to refer the charges to a Defence Force Magistrate for trial.

2. The purpose of the notice on Sunday to me on 3 June 2007 was to seek my authority, as delegate of the Attorney-General, to commence Federal Court proceedings in the name of the Commonwealth of Australia under section 61 of the *Judiciary Act 1903*, if required. I sought additional information from both of you which was provided to me later that day. I appreciated receiving your advice. I subsequently advised the DMP that given the short notice of proceedings which were set down for 10.15 am on Monday 4 June 2007, I did not expect to be in a position to provide this authority prior to the scheduled commencement of the proceedings.

3. In the event, at 8:15am on Monday 4 June 2007 both of you were copied into my e-mail to Head Defence Legal which, among other things, indicated that I was not yet persuaded as to the urgency or merits of the issue and that I would be open to receiving further advice.

4. At 9:09am on Monday 4 June 2007 the Deputy Director of Military Prosecutions advised me that the DMP no longer required my authority to litigate in the name of the Commonwealth. I am not aware of any action taken by either of you to provide me with any further advice on the urgency or merits of the issue.

5. I have been advised that the proceedings have been adjourned to be heard at 10:15am on Thursday 7 June 2007.

6. I have now had the opportunity to seek advice on this matter, including advice from the Office of Legal Services Coordination (OLSC) in the Attorney-General's Department and from Henry Burmester QC, the Chief General Counsel in the Australian Government Solicitor.

7. I am concerned that the current proceedings do not appear on their face to be an efficient, effective and ethical use of Commonwealth resources.

8. As you both would be aware, the Secretary, as the Chief Executive of Defence, under section 44 of the *Financial Management and Accountability Act 1997* (FMA Act) "must manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible".

9. As members of the Defence Force, you are both allocated to the Department of Defence under regulation 4 of the Financial Management and Accountability Regulations 1997. The effect of this is that you are both members of Defence for the purposes of the FMA Act and exercise any financial powers you have as delegates of the Secretary under section 53 of the FMA Act.

10. As a result, in relation to the commencement and maintenance of this litigation, I need to ensure that Defence is using Commonwealth resources in an efficient, effective and ethical way and this in turn applies to the decisions and actions that you take as delegates of the Secretary. In this context, I note that section 129A of the *Defence Force Discipline Act 1982*, the provision that is at the centre of this dispute, will be repealed on 1 October 2007, under the *Defence Legislation Amendment Act 2006*.

11. You would be aware that under paragraph 10.6 of the Legal Services Directions:

> "Any disagreement as to the correct interpretation of legislation is to be resolved as far as possible by negotiation between the requesting agency and the administering agency. Issues should be referred to OLSC if further advice is sought from the Solicitor-General to resolve the matter."

12. Further, you would clearly be aware of your obligations as a model litigant of:

> "...endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate."

13. The obligation to attempt to resolve issues of interpretation of Commonwealth legislation between agencies should equally apply, as an underlying principle, to a dispute regarding the interpretation of legislation between two statutory offices within the same agency. This would appear to me to be self-evident.

14. Accordingly, under my powers of direction in section 53 of the FMA Act, I direct your responses as a matter of urgency as to why the continuation of the current Federal Court proceedings is an efficient, effective and ethical use of Commonwealth resources and in particular why the matter should not be referred instead to an eminent Commonwealth lawyer such as the Solicitor-General or the Chief General Counsel of the Australian Government Solicitor to provide an interpretation of the legislation which is in dispute.

15. Given that this matter is set down to be heard by the Federal Court at 10.15 am on 7 June 2007 I direct that you provide your responses as soon as possible, but no later than 5.00 pm today to enable time for me to consider them. As I am attending a meeting of the Secretaries National Security Committee between 4:00pm and 6:00pm, I would ask that you copy your response to HDL.

16. Pending your responses, and my consideration of them, in order to ensure efficient effective and ethical use of resources as required by section 44 of the FMA Act, no further expenditure on legal expenses is to be incurred before commencing or maintaining litigation involving other Commonwealth officeholders without my prior approval.

17. I have discussed this course of action with LTGEN Gillespie, Acting Chief of the Defence Force and he concurs with my decision as Acting Chief Executive of Defence.

Michael Pezzullo
Acting Secretary

6 June 07