

Department of Defence

Director of Military Prosecutions

*Report for the period
1 January to 31 December 2012*

© Commonwealth of Australia 2012
ISSN 0817 9956

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Department of Defence.

All Defence information, whether classified or not, is protected from unauthorised disclosure under the *Crimes Act 1914*. Defence information may only be released in accordance with the *Defence Protective Security Manual* (SECMAN 4) and/or Defence Instruction (General) OPS 13-4 – *Release of Classified Information to Other Countries*, as appropriate.

Requests and inquiries should be addressed to Director Defence Publishing Service, CP3-1-102, Department of Defence, CANBERRA ACT 2600.



**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 2012.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'L.A. McDade', with a long horizontal flourish extending to the right.

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

2 April 2013

CONTENTS

| | |
|---|-------|
| PREAMBLE | 1 |
| PROSECUTION AND DISCLOSURE POLICY | 1-2 |
| PERSONNEL | 2-3 |
| EXTERNAL ASSOCIATIONS | 3-4 |
| INTERNAL (DEPARTMENT OF DEFENCE) LIAISON | 4-5 |
| CONTACT WITH MILITARY PROSECUTING AUTHORITIES OF OTHER ARMED FORCES AND OTHER ORGANISATIONS | 6 |
| TRAINING OF PROSECUTORS | 6-7 |
| CASELOAD | 7 |
| PROCESS | 7 |
| SIGNIFICANT CASES DURING THE REPORTING PERIOD | 7-14 |
| OTHER MATTERS | 14-16 |
| FINANCE | 16 |
| CONCLUSION | 16-17 |
| COMPLIANCE INDEX OF REQUIRED INFORMATION FOR STATUTORY AUTHORITIES | 18 |

ANNEX A PROSECUTION AND DISCLOSURE POLICY

ANNEX B CLASS OF OFFENCE BY SERVICE

TABLE OF ABBREVIATIONS USED IN REPORT

| ABBREVIATIONS | DESCRIPTION |
|----------------------|---|
| AACP | Australian Association of Crown Prosecutors |
| ADF | Australian Defence Force |
| ADFIS | Australian Defence Force Investigative Service |
| 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 |
| 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 Investigations Liaison Officer |

DIRECTOR OF MILITARY PROSECUTIONS

AUSTRALIAN DEFENCE FORCE

REPORT FOR THE PERIOD 1 JANUARY TO 31 DECEMBER 2012

PREAMBLE

1. The position of Director of Military Prosecutions (DMP) was established 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. My appointment as DMP will expire on 11 July 2013. As this is my last report, I take the opportunity to thank the officers, non-commissioned officers and Australian Public Service staff that have been posted to or worked at the Office during my appointment. It is through their collective efforts, hard work, dedication and support that the Office has developed into an effective prosecutorial unit.

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 the DMP.

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 The factors considered in deciding whether to charge a person with a service offence, and if so, what offences are to be charged, are articulated in the prosecution and disclosure policy at Annex A. To promote transparency and to raise awareness of these factors and the related topics included in the policy, the policy is available via the Defence Restricted Network and the internet.

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 given any directions or provided any guidelines in relation to the prosecution of service offences to investigating officers or prosecutors pursuant to section 188GE of the DFDA.

PERSONNEL

6. At the commencement of the reporting period, the office had established positions for 15 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. During the period, two vacant regular Army positions, one at major rank and one at captain rank, were relocated to the CDF Commissions of Inquiry Directorate and Special Operations Command, respectively.

7. Actual staffing levels at the end of 2012 are shown below.

| Position | Rank | Status |
|-------------------|--------------------|---------------|
| DMP | Brigadier | Filled |
| DDMP | Colonel (E) | Filled |
| Senior Prosecutor | Wing Commander | Filled |
| Senior Prosecutor | Lieutenant Colonel | Filled |
| Business Manager | Executive Level 1 | Filled |

¹ Section 188GA (1) (a) of the DFDA.

| | | |
|---|--------------------------------|---------------------|
| Prosecutor | Lieutenant Commander | Filled |
| Prosecutor | Lieutenant Commander | Filled |
| Prosecutor | Major | Filled |
| Prosecutor | Major | Filled |
| Prosecutor | Major | Vacant ² |
| Prosecutor | Squadron Leader | Filled |
| Prosecutor | Squadron Leader | Filled |
| Prosecutor | Flight Lieutenant | Filled |
| Prosecutor U/T | Lieutenant | Filled |
| Service Police Investigation Liaison | Warrant Officer Class 2 (E) | Filled |
| Legal Administration | APS 6 | Filled |
| Executive Assistant | APS 5 | Filled |
| Paralegal | APS 4 | Filled |
| Paralegal | APS 4 | Filled |
| Paralegal | APS 4 | Vacant |
| Paralegal | APS 4 | Vacant |
| Travel Coordinator | APS 3 | Vacant |

8. **Deployments.** During the reporting period, one officer deployed to Timor Leste on OPERATION ASTUTE for the second half of the year. Another officer deployed to the Middle East Area of Operations on OPERATION SLIPPER for six months in September 2012. Accordingly, for the last three months of 2012, two officers were deployed simultaneously. This was a departure from my general rule of releasing only one officer at a time for deployment. This general rule has been effective in broadening the operational experience of junior legal officers and assisted in managing their expectations, while supporting the conduct of military operations. Another officer served on exchange in the United Kingdom on Exercise Long Look for four months.

EXTERNAL ASSOCIATIONS

9. Presently, ADF legal officers are not generally required to hold a practising certificate. If a legal officer who is

² Currently filled by an Army Reserve Officer on Continuous Full Time Service.

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. Prosecutors of this Office completed the legal ethics training provided to all Defence legal officers and will continue to do so.

10. Since 2007, ODMP prosecutors have been admitted as members of the Australian Association of Crown Prosecutors (AACP). The AACP is comprised of Crown or State prosecutors from every Australian jurisdiction and some jurisdictions in the Pacific region. This year the AACP held its annual conference, titled 'Crocs, Crooks and Chromosomes', in Darwin on 4-6 July 2012, which I attended, together with the Deputy Director and two junior prosecutors. The conference provided a practical look at DNA evidence and a unique opportunity to explore the most effective methods of interpreting and presenting DNA evidence in criminal trials, from a purely prosecutorial perspective.

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

INTERNAL (DEPARTMENT OF DEFENCE) LIAISON

12. During the reporting period, I reported regularly 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), Restricted Courts Martial (RCM) and General Courts Martial (GCM), referrals to the Registrar of Military Justice (RMJ) and included statistics giving a general overview of matters referred to me.

13. When reappointed, I was directed by the Minister to provide him with quarterly reports on the operation and

workload of the Office and matters which may have implications for the command or operational imperatives of the ADF. I have provided those reports to the Minister.

14. The Military Justice Coordination Committee (MJCC) met periodically 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 civilian jurisdictions. The work of the Committee has advanced matters previously raised and I have been able to provide input to the Committee's consideration of the proposals aimed at the much-needed modernisation of the investigative provisions of the DFDA.

15. During the reporting period, significant effort was made to continue support for 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, was instrumental in this support. My Office maintains a 'Duty Prosecutor' who is available to field queries from service police and to provide them with advice and that service is used frequently.

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

16. From 1-5 May 2012, I attended the XIXth Congress of the International Society for Military Law and the Law of War in Quebec City, Quebec, Canada, with over 200 delegates from many of the world's military forces and associated civilian and academic personnel. The theme of the conference was legal interoperability and ensuring observance of the law in multinational deployments, which included a discussion of the problems, challenges and solutions for national authorities enforcing national military and criminal law in multinational operations.

17. While in Canada, I also visited Ottawa, Ontario from 7-9 May and met with Colonel Mario Leveillee, who had just taken over from Captain John Maguire (Royal Canadian Navy) as the Canadian Director of Military Prosecutions. I was provided with extensive briefings on the history and passage of Canada's recent military justice legislation and received a detailed explanation of the difficulties that had been encountered and the methods employed to overcome them. Our two offices are highly comparable, with similar case loads, staffing levels and statutory powers and constraints.

TRAINING OF PROSECUTORS

18. 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.

19. A range of training is provided in-house by prosecutors. Throughout the year, prosecutors were allocated legal topics and required to prepare and present a legal paper to Office legal staff. I have liaised with the ACT Law Society to

ensure that where appropriate, that training assists in prosecutors meeting their mandatory continuing legal education requirements.

CASELOAD

20. During the reporting period, 38 DFM hearings were held, 11 RCM and one GCM. Thirty two 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. Thirty five matters were referred back for summary disposal. Two matters were referred to civilian Directors of Public Prosecution for prosecution pursuant to the extant DMP-DPP memorandum of understanding.

21. As at 31 December 2012, ODMP had 51 open matters. Annex B shows matters by Service, which were dealt with during the reporting period.

PROCESS

22. Further improvements have been made to processes in the ODMP with the development and application of the ODMP file and case management system, which greatly assists in the clear division of responsibilities, and in the tracking and administration of all matters handled by the ODMP from receipt to disposal.

SIGNIFICANT CASES DURING THE REPORTING PERIOD

Li v Chief of Army [2012] ADFDAT 1

23. On 8 April 2011, Major Li was convicted by RCM of creating a disturbance on service land contrary to subsection 33(b) of the DFDA. He was sentenced to a fine of \$5000, \$3000 of which was suspended, and a severe

reprimand.³ His appeal to the Defence Force Discipline Appeal Tribunal (DFDAT) was heard on 16 December 2011 and the decision of the DFDAT dismissing the appeal was delivered on 16 March 2012.

Li v Chief of Army [2012] FCAFC

24. On 13 April 2012, Major Li lodged an appeal against the DFDAT decision with the Federal Court of Australia and on 26 July 2012 he made an interlocutory application to have the hearing of his Federal Court appeal expedited. This interlocutory application was dismissed on 1 August 2012.⁴ The appeal was heard before a Full Court of the Federal Court in Sydney on 13 November 2012.⁵

Jones v Chief of Navy [2012] ADFDAT 2

25. 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 her consent', contrary to subsection 61(3) of the DFDA and subsection 60(1) of the *Crimes Act 1900* (ACT), and one count of 'attempting to destroy service property', contrary to subsection 43 of the DFDA and section 11.1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*). The punishments awarded included that 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.

26. Lieutenant Jones appealed the convictions on the 'indecent offences' to the DFDAT. The appeal was heard on 15-16 March 2012 and the decision of the DFDAT was delivered on 22 May 2012, dismissing the appeal (except

³ On Review, this fine was reduced to \$3000 (\$2500 suspended).

⁴ Major Ting Li v Chief of Army [2012] FCA 808 (1 August 2012).

⁵ The appeal was dismissed by a majority of the Full Court of the Federal Court of Australia on 26 February 2013, see *Li v Chief of Army [2013] FCAFC 20*

for quashing one conviction, but convicting him of the alternative charge of prejudicial conduct).

Jones v Chief of Navy [2012] FCAFC 125

27. On 19 June 2012, Mr Jones lodged an appeal with the Federal Court of Australia against the above DFDAT decision. The appeal was heard in Sydney on 19 July 2012. The decision of the Full Court of the Federal Court of Australia was delivered on 7 September 2012. The Full Court dismissed the appeal and ordered Mr Jones to pay the Chief of Navy's costs. The Federal Court notably determined that:

'in addition to the usual rule [that costs follow the event], there is a further reason for making an order for costs against the applicant [Mr Jones]: much of the applicant's argument was put in disregard of the statutory limitations on the scope of an appeal to this Court; and further, the applicant's arguments which did raise questions of law were plainly untenable. In these circumstances, it would not be fair to impose the expense incurred by the respondent [Chief of Navy] in meeting the appeal on the public purse by declining to make an order for costs in favour of the respondent.'

Bateson v Chief of Army [2012] ADFDAT 3

28. On 3 August 2010, Sergeant Bateson was convicted by a DFM of two charges of insubordinate conduct contrary to subsection 26(1) of the DFDA. SGT Bateson was acquitted of one charge of disobeying a lawful command. The convictions arose out of two short verbal exchanges between SGT Bateson and the unit Duty Officer at 1 Field Regiment at Gallipoli Barracks, Enoggera, about her use of the duty vehicle. Sergeant Bateson received a punishment in respect of both charges of reduction in rank to Corporal, with seniority in that rank set at 24 November 2000.

29. Corporal Bateson appealed her convictions for insubordinate conduct on four grounds: that the convictions

were unreasonable and could not be supported by the evidence; that wrong decisions on questions of law were made; that a material irregularity occurred in the course of the proceedings; and that the convictions are unsafe and unsatisfactory. It was contended that there were a number of legal errors that supported a finding that one or more of the grounds of appeal had been made out, including that the DFM had failed to consider whether Sergeant Bateson had been labouring under a mistake of fact believing that she had not been yelling when addressing the unit Duty Officer.

30. The DFDAT heard the appeal on 27 April 2012 and in its decision of 25 May 2012, allowed the appeal and quashed the convictions. The DFDAT held that the DFM failed to direct himself as to the possible defence of mistake of fact, pursuant to section 9.2 of the *Criminal Code Act 1995*, which deprived the Appellant of a chance of acquittal and that this was a substantial miscarriage of justice. The DFDAT did not order a retrial.

***King v Chief of Army* [2012] ADFDAT 4**

31. On 28 September 2012, the DFDAT heard an appeal in relation to the conviction of Warrant Officer Class One King by DFM on one count of disobeying a lawful command contrary to subsection 27(1) of the DFDA, two counts of prejudicial conduct contrary to subsection 60(1) of the DFDA, and a single count of giving false evidence to an Inspector General-ADF inquiry officer contrary to subsection 61(3) of the DFDA and regulation 56 of the *Defence (Inquiry) Regulations 1985*. WO1 King was acquitted of one prejudicial conduct charge. WO1 King was sentenced to be reduced in rank to Sergeant with seniority dating from 25 May 2012 in respect to each conviction. A severe reprimand was also imposed in respect to each conviction. The convictions arose out of an Inspector General-ADF inquiry in April 2011 into certain complaints made against Warrant Officer King and his Commanding Officer at Camp Phoenix, Dili, Timor Leste.

32. The appeal to the DFDAT was heard in Sydney on 27 September 2012. In the DFDAT's decision of 28 September 2012, the DFDAT allowed the appeal and quashed the convictions. The DFDAT found that one of the charges of disobeying a lawful command alleged two separate offences, occurring on two different days and at different locations. While the DFDAT determined that it did not offend rule 9(1) of the *Defence Force Discipline Rules 1985*, in that a charge shall state one offence only, it was void for latent ambiguity, with the result that there was a substantial miscarriage of justice and the conviction was quashed.

33. The DFDAT found that reasons given by the DFM for convicting Warrant Officer King of the two charges of prejudicial conduct were inadequate, in circumstances where the credibility of one witness against another was in issue. Moreover, as the charges of disobeying a lawful command and giving false evidence to an Inspector General-ADF inquiry officer were found to depend on proof of the matters in the prejudicial conduct charges, each of the convictions in relation to these charges was quashed.

34. A further successful ground of appeal was that the DFM erred by not giving adequate reasons for not directing himself in accordance with section 165 of the *Evidence Act 1995* in relation to the evidence of one of the prosecution witnesses.

General Court Martial of Captain Stefan King, RAN

35. On 12 December 2012, Captain Stefan King, RAN was convicted by a GCM of three counts of obtaining a financial advantage by deception contrary to subsection 61(3) of the DFDA and section 134.2(1) of the *Criminal Code Act 1995 (Cth)* and four counts of obtaining a financial advantage contrary to subsection 61(3) of the DFDA and section 135.2(1) of the *Criminal Code Act 1995 (Cth)*. Captain King was acquitted of three counts of obtaining a financial advantage by deception, five counts of obtaining a financial advantage and one count of dishonestly causing a risk of

loss contrary to subsection 61(3) of the DFDA and section 135.1(5) of the *Criminal Code Act 1995 (Cth)*.

36. The charges related to allowances and benefits received by Captain King while he was posted as the Commanding Officer of *HMAS Albatross* in Nowra, NSW. The prosecution case was that Captain King was categorised as a 'Member With Dependants (Unaccompanied)' when he took up his posting because he was married, but needed to live in a different location due to his posting. The prosecution submitted that Captain King ceased to be eligible for this categorisation and the benefits that flow from it when he informed his wife that he wished to end their marriage.

37. Captain King was fined in respect of each of the seven offences that he was convicted of and was sentenced to loss of seniority in the rank of Captain so as to make his seniority in that rank 12 December 2012 in respect to each offence of obtaining a financial advantage by deception. Reparation orders were also made which reflected the financial advantages which were obtained.

38. Captain King has filed a notice of appeal against his convictions in the DFDAT.

Afghanistan – Detainee Management – Allegations of Procedural Misconduct

39. In January 2011, ADFIS commenced an investigation into allegations that previous members of the Detainee Management Team within the ADF Initial Screening Area in Afghanistan did not comply with procedures relating to the management and administrative processing of detainees and in particular the requirement to maintain accurate records of that management and processing.

40. Following the ADFIS investigation and subsequent referral of a brief of evidence to this Office, four members of a previous Detainee Management Team were charged with

service offences alleging falsification of service documents about detainees.

41. The first of the DFM trials for the disciplinary offences occurred on 27 July 2012 in Darwin. The accused ADF member was initially charged with 'falsification of a service document' but this charge was substituted at trial with 'prejudicial conduct'. The accused pleaded guilty to the charge and received a severe reprimand.

42. The second trial was held in Darwin on 23 August 2012. The ADF member was charged with two counts of 'falsifying a service document' to which he pleaded not guilty. The member was convicted of both charges and received a reprimand for each offence.

43. The third trial was held in Townsville on 21 November 2012. The ADF member was charged with one substantive count of prejudicial conduct, two substantive counts of 'falsifying a service document' and two counts of ordering a service offence to be committed (with two alternative counts of 'falsifying a service document' on each). The accused ADF member pleaded guilty to the three substantive charges and the two alternative counts, and received a fine of \$2000 for two offences and loss of seniority to January 2012 for each of the other three offences.

44. The fourth trial concerning these matters and involving an accused officer is listed for trial in April 2013.

Further Appeals to the DFDAT

45. On 23 August 2012, SGT Ashley Yewsang was acquitted by a DFM of four charges and convicted of one count of obtaining a financial advantage by deception contrary to DFDA subsection 61 (3) and subsection 134.2 (1) of the *Criminal Code Act 1995* and convicted of one count of making a false statement in relation to an application for a benefit contrary to DFDA subsection 56 (1).

On 17 October 2012 Corporal Yewsang lodged an appeal against the two convictions.⁶

46. On 23 November 2012, Mr Trevor Kingsley Ferdinands filed a Notice of Appeal in the DFDAT against a conviction by a DFM in 1999.⁷

47. Continuing the upward trend in the number of appeals, during December 2012, two appeals were lodged in the DFDAT in addition to that of Captain King. Both of these appeals, *Leith v Chief of Army* and *McLaren v Chief of Navy*, arose from convictions imposed by a DFM and RCM respectively, during the first half of 2012. *Leith v Chief of Army* is expected to be heard on 5-6 June 2013 and *McLaren v Chief of Navy* later in 2013.

OTHER MATTERS

Military Court of Australia Bills

48. The Military Court of Australia Bill 2012, and the associated Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012, were introduced into the House of Representatives on 21 June 2012 and then referred to the Senate Legal and Constitutional Affairs Legislation Committee on 28 June 2012. I made a succinct submission to the Committee, expressing the hope that the Bills are constitutionally sound because it is inevitable that they will be challenged. I was not invited to, and nor did I, appear as a witness at the

⁶ On 21 March 2013, the DFDAT allowed the appeal by CPL Yewsang in part. The DFDAT quashed the first-mentioned conviction and dismissed the appeal against the second-mentioned conviction. *Ashley Yewsang v Chief of Army* [2013] ADFDAT 1

⁷ On 21 March 2013, the application for an extension of time in which to appeal was refused. The DFDAT explained that the application fell within the legal description of "frivolous and vexatious". *Ferdinands v Chief of Army* [2013] ADFDAT 2

public hearings into the Bills, which were held on 14 September 2012. The Committee's report on the Bills was tabled in the Senate on 9 October 2012, recommending that the legislation be passed unamended, subject to certain amendments being made to the explanatory memoranda. I am not aware of when the debate in the House of Representatives on the Bills will resume. If the Bills are not going to be passed by the Parliament this year, I urge consideration be given to proceeding separately with those parts of the second Bill which are not contingent on the establishment of the Military Court of Australia, so that improvements such as statutory recognition of the role of the Director of Defence Counsel Services are not held up.

Investigative Provisions of the DFDA

49. As I have previously reported, and while I note that there is a significant body of work being undertaken in the context of reviewing Defence's systems of inquiry, investigation and review, it remains common ground among offices administering military justice in the ADF that the investigative provisions of the DFDA are in need of legislative reform. I gave examples of these limitations in my last Annual Report.

Assistance to victims of service offences

50. 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 the trial itself. All of my prosecutors have been instructed to liaise closely with all witnesses, in particular victims. I look forward to working with the Head of the Sexual Misconduct Prevention and Response Office in supporting victims of sexual offences but also in assisting in providing case studies for the purpose of educating

commanders and ADF personnel on the prevention of sexual offences.

Information Communication Technology (ICT) Function

51. As raised in my previous Annual Report, there are a number of persistent information technology problems for the Office. While the problems were somewhat ameliorated by an increase in bandwidth, there continue to be days when a few personnel, if not more, have connectivity issues that have had a disruptive effect on the Office. These will be monitored closely in the first quarter of 2013 and I will raise this with the Minister in my quarterly report if these problems significantly impact on the functioning of this Office.

FINANCE

52. 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

53. 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.

54. The legislative establishment of the position of Director of Military Prosecutions represented a radical shift to statutory independence in the prosecution of service offences. In my opinion, during my tenure, awareness and understanding - on the part of commanders, other ADF members and the public - of the role and functions of the DMP has increased.

55. While work on this will remain on-going , I am confident that the role that the DMP plays in independently exercising prosecutorial discretion to promote the maintenance and enforcement of service discipline, and in doing so serve the interests of commanders, other ADF members and the public, is now much better understood and valued.

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: 1, 3-5 |
| Membership and Staff | Paragraphs: 6-8, 10-11, 18-19 |
| Information Officer | Miss Kerry 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: 52 |
| Activities and Reports | Paragraphs: 12-47 |
| Operational Problems | Paragraphs: 51 |
| 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 - 2012

| Class of Offence | NAVY | ARMY | RAAF | TOTAL |
|---|-------------|-------------|-------------|--------------|
| 02 - ACTS INTENDED TO CAUSE INJURY | 1 | 16 | 4 | 21 |
| 03 - SEXUAL ASSAULT AND RELATED OFFENCES | 2 | 7 | 4 | 13 |
| 04 - DANGEROUS OR NEGLIGENT ACTS ENDANGERING PERSONS | | 1 | | 1 |
| 08 - THEFT AND RELATED OFFENCES | 4 | 3 | 1 | 8 |
| 09 - FRAUD, DECEPTION AND RELATED OFFENCES | 7 | 14 | 8 | 29 |
| 10 - ILLICIT DRUG OFFENCES | | 3 | | 3 |
| 11 - PROHIBITED AND REGULATED WEAPONS AND EXPLOSIVES OFFENCES | 1 | 1 | | 2 |
| 12 - PROPERTY DAMAGE AND ENVIRONMENTAL POLLUTION | 1 | 1 | | 2 |
| 14 - TRAFFIC AND VEHICLE REGULATORY OFFENCES | | 6 | | 6 |
| 15 - OFFENCES AGAINST JUSTICE PROCEDURES, GOVERNMENT SECURITY AND GOVERNMENT OPERATIONS | 1 | | | 1 |
| 17 - SPECIFIC MILITARY DISCIPLINE OFFENCES | 14 | 22 | 3 | 39 |
| Grand Total | 31 | 74 | 20 | 125 |

