



# **DIRECTOR OF MILITARY PROSECUTIONS**

*Report for the period  
1 January to 31 December 2014*



Department of Defence

***Director of Military Prosecutions***

*Report for the period  
1 January to 31 December 2014*

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Prosecutions**  
Department of Defence  
13 London Circuit, PO Box 7937  
Canberra BC ACT 2610

**Hon Kevin Andrews 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 2014.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Harris'.

**Group Captain John Harris**  
Acting Director of Military Prosecutions  
Australian Defence Force

12 Jun 2015



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ANNEX A PROSECUTION POLICY

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## TABLE OF ABBREVIATIONS USED IN REPORT

| <b>ABBREVIATIONS</b> | <b>DESCRIPTION</b>                              |
|----------------------|---|
| AACP                 | Australian Association of Crown Prosecutors     |
| ADF                  | Australian Defence Force                        |
| ADFIS                | Australian Defence Force Investigative Service  |
| DDCS                 | Director of Defence Counsel Services            |
| 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                           |
| MJCC                 | Military Justice Coordination Committee         |
| NCO                  | Non Commissioned Officer                        |
| 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 2014**

#### **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.<sup>1</sup>

2. Section 196B of the DFDA requires the DMP, as soon as practicable after 31 December each year, to prepare and give to the Minister, for presentation to the Parliament, a report relating to the operations of the DMP for that year. Herein is the report for the period 01 January to 31 December 2014.

3. Brigadier Michael Griffin was appointed as the DMP on 05 August 2013 for a period of five years. He resigned with effect from 18 January 2015 to take up an appointment as Integrity Commissioner, Australian Commission for Law Enforcement Integrity.

4. On 03 October 2013 I was appointed as the Deputy DMP for a period of 12 months. Subsequently that period was extended to expire on 31 December 2015. For this reporting period, I was the Deputy DMP. On 28 January 2015 you appointed me to act as DMP until 30 June 2015

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<sup>1</sup> Section 188GG DFDA

or until the appointment of a Director of Military Prosecutions pursuant to section 188GF of the Act, or until the termination of the appointment pursuant to section 33A of the *Acts Interpretation Act 1901*, whichever occurs first. At the date of this report, I continue to act as DMP pursuant to your appointment and in that capacity I am the author of this report.

## **PROSECUTION POLICY**

5. The primary function of the DMP is to conduct prosecutions for service offences in proceedings before Courts Martial or Defence Force magistrates.<sup>2</sup> The factors to be considered in deciding whether to charge a person with a service offence, and if so what offence is to be charged, are articulated in the prosecution policy at Annex A. The policy has been revised and updated having had the benefit of consideration of the policies of the Commonwealth, State and Territory Directors of Public Prosecutions, in addition to the prosecution policies of other armed forces.

6. To promote transparency and to raise awareness of these factors and the related topics included in the policy, the policy is published via the Defence Restricted Network and the internet.

7. During the reporting period, no undertakings have been given to any person pursuant to section 188GD of the DFDA (relating to the power to grant immunity from prosecution); nor have any directions or guidelines been given in relation to the prosecution of service offences to investigating officers or prosecutors pursuant to section 188GE of the DFDA.

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<sup>2</sup> Section 188G (1)(a) DFDA

## PERSONNEL

8. At the commencement of the reporting period, the office had established positions for 12 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 seven civilian support staff.

9. Actual staffing levels at the end of 2014 are shown below.

| <b>Position</b>                      | <b>Rank</b>                 | <b>Status</b> |
|--------------------------------------|-----------------------------|---------------|
| DMP                                  | Brigadier                   | Filled        |
| DDMP                                 | Colonel (E)                 | Filled        |
| Senior Prosecutor                    | Wing Commander              | Filled        |
| Senior Prosecutor                    | Lieutenant Colonel          | Filled        |
| Business Manager                     | Executive Level 1           | Filled        |
| Prosecutor                           | Lieutenant Commander        | Filled        |
| Prosecutor                           | Lieutenant Commander        | Filled        |
| Prosecutor                           | Major                       | Filled        |
| Prosecutor                           | Major                       | Filled        |
| Prosecutor                           | Major                       | Filled        |
| Prosecutor                           | Squadron Leader             | Filled        |
| Prosecutor                           | Squadron Leader             | Vacant        |
| Prosecutor                           | Flight Lieutenant           | Filled        |
| Prosecutor U/T                       | Lieutenant                  | Filled        |
| Service Police Investigation Liaison | Warrant Officer Class 2 (E) | Filled        |
| Executive Assistant                  | APS 5                       | Filled        |
| Paralegal                            | APS 5                       | Filled        |
| Paralegal                            | APS 5                       | Vacant        |
| Paralegal                            | APS 4                       | Filled        |
| Paralegal                            | APS 4                       | Vacant        |

10. Throughout the year a number of these positions were not fully manned as the incumbents were either deployed on operations, attending professional training,

were seconded to other agencies for professional development or were on approved leave inclusive of medical leave and long service leave.

11. **Deployments.** At the commencement of the reporting period, one prosecutor had already deployed on OPERATION SLIPPER for a period of 6 months. That position was carried as a vacancy until the posting in of a replacement as part of the posting cycle in May 14.

12. **Secondments.** As part of developing a broader prosecutorial experience base Brigadier Griffin, in conjunction with the Office of the Director of Public Prosecutions (ACT), co-ordinated the secondment of a LTCOL prosecutor to that office for 5 months. There was a further secondment to the Australian Crime Commission for a period of 4 months at the O4 level. These secondments provided not only an immediate benefit in terms of the development of the professional knowledge and skills of the incumbent, but also provided an important mechanism for that knowledge and experience to be adapted and integrated into this office. As a matter of course permanent ADF legal officers have very little opportunity to work outside the ADF and these secondments provided an invaluable opportunity for permanent officers to be exposed to and experience legal criminal work in the civilian jurisdiction.

13. The RAN Lieutenant prosecutor under training position continued to be manned on a three monthly rotational basis. This is an important training position but because of its rotational nature provides a limited resource in terms of the actual prosecution of matters. This position also brings with it an attendant training liability.

14. Although the loss of personnel for deployment, secondments and professional training represents a considerable deficit of manpower in a comparatively small organisation I am mindful that such opportunities broaden both the operational and professional experience of full time

legal officers. The release of legal officers for the deployment role is essential and unavoidable based on the scale of current military operations.

15. **Administrative support.** Over the reporting period several APS positions were vacant. The shortfall in staffing had a significant impact on the essential administrative support that would normally be provided to prosecutors. Unfortunately, this administrative workload overflow was covered by the prosecutors. Steps are being taken to rectify this situation.

## **EXTERNAL ASSOCIATIONS**

16. During the reporting period and in accordance with section 188GQ of the DFDA, all legal officers at ODMP either held or obtained an ACT Practising Certificate, and completed the mandatory legal ethics training provided to all Defence legal officers.

17. 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.

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

## **INTERNAL (DEPARTMENT OF DEFENCE) LIAISON**

19. During the reporting period, ODMP reported 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 (DFM's), 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 the DMP.

20. 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 principle responsible DFDA agencies. The Committee has provided an effective forum to initiate amendments to the DFDA.

21. The ODMP engaged with the Attorney-General's Department to examine practical ways to resolve difficulties in managing and prosecuting drug offences under the DFDA. The focus was on identifying methods to bridge the jurisdictional gap that exists between the DFDA and a civilian prosecution taking into account the relatively small quantities of a prohibited substance normally involved in an ADF matter. Successful prosecution under the DFDA for possession of or use of even small amounts of a prohibited substance is essential for the maintenance of service discipline and in the light of the ADF's zero tolerance drug policy.

22. Work on a proposed legislative reform to the DFDA, which would require a service tribunal to specifically take into account victim impact statements when determining punishment, was discontinued based on the Committee's assessment that such an amendment in the light of Part IB of the Crimes Act 1914 (Cth) would be of limited utility.

23. The Committee continues with its work to develop a coordinated and integrated approach to the support for victims of sexual assault.

24. During the reporting period, ODMP supported the continuation training provided by ADFIS to its investigators. Working together with the ADFIS legal officer, training was delivered covering the construction of briefs of evidence and on the most recent developments in military and civilian law. These sessions were an important professional



development tool for the ADFIS investigators. This support is seen as an invaluable tool to maintain the professional relationship that currently exists and builds a strong professional relationship with new investigators. Brigadier Griffin and I regard the relationship between ADFIS, service police and ODMP as crucial in ensuring the efficient and effective disposal of service discipline matters.

25. During the reporting period, members of my office have continued to consult with commanders across the three services.

26. Brigadier Griffin was and I am cognisant that while my office and the execution of my duties under the DFDA are statutorily independent they are done on behalf of command and for the vital purpose of maintaining service discipline. Visits to commanding officers and their bases have been valuable and instructive. They have allowed the Director to keep in touch with the issues that concern command. This ensures that the business processes of ODMP support command and the efficient maintenance of service discipline by maintaining focus on the relevant issues affecting command.

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

27. Between 18 October and 03 November 2014, Brigadier Griffin travelled with a prosecutor from ODMP to the United States, Canada, United Kingdom and the Netherlands (Hague) to discuss issues relating to the prosecution of offences arising from operational matters and resolving problematic operational evidentiary issues.

28. Whilst in Canada, Brigadier Griffin was fortunate enough to be able to attend the Canadian Judge Advocate General's Conference. Two of the specific issues addressed at the conference were "Military Justice as an Accountability Mechanism in International Law", and "The

Relationship Between the Chain of Command and the Prosecuting Authority in the Military Justice System". These sessions provided an important insight into the concerns and issues that face other armed forces as they address the range of complex issues arising out of a prosecution for alleged offences that occur on operations.

## **TRAINING OF PROSECUTORS**

29. 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 mandatory ADF Legal Training Modules as well as general service courses including the pre-requisite promotion courses.

30. In conjunction with continuing legal education subjects provided by the ACT Law Society, a range of training was also provided in-house by prosecutors and other subject matter experts. This training assisted prosecutors to meet their mandatory continuing legal education requirements.

## **CASELOAD**

31. During the reporting period, 37 DFM hearings, 14 RCM and 4 GCM were conducted. Sixty four matters were not proceeded with due to the determination that there was no reasonable prospect of conviction, or that to prosecute would not have enhanced or enforced service discipline. Twenty three matters were referred back to units for summary disposal. No matters were referred to civilian Directors of Public Prosecution pursuant to the extant Memorandum of Understanding (MOU).

32. As at 31 December 2013, ODMP had 77 open matters. Annex B shows matters by Service which were dealt with during the reporting period.

## **PROCESS**

33. Throughout the reporting period, Brigadier Griffin continued, with the support of service police (ADFIS), the RMJ and the Director of Defence Counsel Services (DDCS), to examine and implement strategies for the best practice management of files to promote a more efficient process to reduce unnecessary delay.

34. In particular, an MOU with DDCS was pursued focusing on the provision of electronic briefs of evidence when a member is charged to the member's nominated defending officer. The provision of an electronic brief of evidence to a defending officer reduces time delays and resource usage, increases efficiency and is environmentally friendly.

35. After consultation with the Provost Marshal ADF it was determined that a Joint Directive be developed instead of an MOU. The Joint Directive will formalise the operational relationship between the two offices. The Directive will set in place an enhanced co-operation model which will specifically address the working relationship and role of the Service Police Investigative Liaison Officer (SPILO) position, establish a system of designated regional prosecutors to each ADFIS region, produce guidelines for the allocation of a prosecutor to a Major Investigation Team (MIT) and create an opportunity for the early review of briefs of evidence by a prosecutor. It is intended that this Joint Directive will promote an environment of effective and open communication between investigators and prosecutors during the initial stages of an investigation, and facilitate the co-ordination of focused lines of inquiry and evidence collection to minimise costs and delay.

## **SIGNIFICANT CASES DURING THE REPORTING PERIOD**

36. The most significant trial conducted by this office was the trial involving members of HMAS *Newcastle* accused of

the assault / indecent assault of a crewmate. The trial was complex with multiple co-accused and allegations of a serious nature. Two members were convicted of offences. One member subsequently successfully appealed his conviction to the Defence Force Discipline Appeals Tribunal (DFDAT) and consideration is currently being given to an appeal by the Chief of Navy to the Federal Court. The remaining member is seeking to have his conviction reversed and that matter is to be resolved in the near future. The amount of resources dedicated to this trial was quite significant and ultimately it has become the longest running Court Martial in Australian history.

37. The matter of an Air Force Leading Aircraftsman, which went to trial in the reporting period and is now also before the DFDAT, is significant because it examined the legal issue of charging Rental Assistance fraud matters by outlining positive acts in circumstances where a member fails to disclose their change in circumstances resulting in them obtaining more than their actual entitlement. The outcome of the prosecution and DFDAT Appeal may result in the need to amend the Pay and Conditions Manual and the relevant Defence Determination to enable Defence to properly control entitlements and allow for the prosecution of members who take positive steps to subvert their obligations. The principle established in the High Court decision of *Commonwealth DPP v Poniatowska* (2011) 282 ALR 200 is of importance to this matter. Whilst the issue is somewhat technical, it will determine the way in which this office prosecutes such fraud matters in the future. Prosecutions of this kind remain the single largest category of the work of the office.

### **Appeals to the Defence Force Discipline Appeals Tribunal (DFDAT)**

38. The DFDAT was not called upon to hear any appeals during the reporting period, although three appeals from

2014 matters were lodged and either have been heard or will be heard in 2015.

## **OTHER MATTERS**

39. The positive management of victims of service offences has continued during the year, including close consultation with more vulnerable victims. Where appropriate, arrangements were made for close family members or support officers to attend and provide support directly to victims during pre-trial preparations and hearings. All of the prosecutors were instructed and encouraged to liaise closely with all witnesses, especially victims.

## **FINANCE**

40. ODMP was adequately financed during the reporting period and has complied with the *Public Governance, Performance and Accountability Act (2013) (Cth)*, and all relevant financial management policies of the ADF.

## **CONCLUSION**

41. The office continues to work with commanders of all levels across the three services to improve understanding of the DFDA and pursue the maintenance of service discipline by increasing communication and engagement with matters coming before superior service tribunals.

42. Given the continued operational tempo and the seemingly constant media scrutiny of the behaviour of Defence members, the work done by this office of independently exercising prosecutorial discretion, remains critical to confidence in the military justice system which in turn is essential for the support of the ADF and maintenance of morale and discipline within Australia's fighting forces.

43. 2015 will see the appointment of a new Director of Military Prosecutions.

## 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, 3-7   |
| Membership and Staff           | Paragraphs: 8-10   |
| Information Officer            | Miss Kerry Dawson<br>Executive Assistant to DMP<br>Office of the Director of Military Prosecutions<br>Department of Defence<br>Level 3, 13 London Circuit<br>CANBERRA ACT 2600<br>Telephone: 02 6127 4403<br>Facsimile: 02 6127 4444 |
| Financial Statement            | Paragraph: 40  |
| Activities and Reports         | Paragraphs: 11-39  |
| Operational Problems           | Not applicable   |
| Subsidiaries                   | Not applicable   |

Online version of the report is available at  
[http://www.defence.gov.au/publications/DMP\\_Annual\\_Report\\_2014.pdf](http://www.defence.gov.au/publications/DMP_Annual_Report_2014.pdf)



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**DIRECTOR OF MILITARY PROSECUTIONS  
PROSECUTION POLICY**

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## INTRODUCTION

This policy replaces the Director of Military Prosecution's (DMP) previous directive 02/2009 of 01 Oct 09. The policy 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.

This publication of policy and guidelines will be periodically updated to ensure that it continues to incorporate changes to the law and Defence policy. The aims of this policy are to:

- a. provide guidance for prosecutors to assist in ensuring the quality and consistency of their recommendations and decisions; and
- b. to inform other ADF members and the public of the principles which guide decisions made by the DMP.

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.

The initial decision of whether or not to prosecute is the most significant step in the prosecution process. It is therefore important that the decision to prosecute (or not) be made fairly and for appropriate reasons. It is also important 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.

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.<sup>1</sup> Advice and procedural guidance for the exercise of ADF jurisdiction is contained in the *Discipline Law Manual*.<sup>2</sup>

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

<sup>2</sup> ADFP 06.1.1 Vol3 *Discipline Law Manual* contains guidance for jurisdictional resolution pursuant to DFDA s 63. DFDA s 63 requires the consent of the CDPP in situations where serious territory offences occur within Australia.

## **1. The decision to prosecute**

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.

### **1.1. Factors governing the decision to prosecute**

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).

### **1.2. Admissible evidence & reasonable prospect of 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 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.

### **1.3. Maintenance of discipline**

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.

### **1.4. Alternatives to charging**

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 Instructions, as an alternative to or in conjunction with disciplinary proceedings. Similarly, in respect of minor breaches of discipline, proceedings before a Discipline Officer may be appropriate. The DMP may be asked to advise on matters that can be appropriately dealt with through administrative or Discipline Officer action. While the DMP may make such recommendations, ultimate decisions in respect of how these breaches are dealt with still rests with commanders, who in turn 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.

### **1.5. Service Interests**

In many cases the requirement to maintain service discipline will be reason enough to justify a decision to lay charges under the DFDA. However, occasionally wider public interest considerations, beyond those relating to the maintenance of discipline in the ADF, will warrant civil criminal charges being laid. The High Court of Australia, through a number of decisions, has explained the limits of 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.

Although it is a matter for the DMP to determine when the prosecution of a matter will substantially serve the purpose of maintaining service discipline, the DFDA provides at s 5A for the appointment of superior authorities to

represent the interests of the service in relation to matters referred to the DMP. Where charges are being considered by the DMP, the DMP will usually canvass the views of the relevant superior authority in writing. Such a request will outline the alleged offending and detail the proposed charges. For the purpose of DFDA section 5A, relevant ADF interests may include:

- a. unit operational or exercise commitments which may affect the timing of any trial of the charges;
- b. issues concerning the availability of the accused person and/or witnesses due to operational, exercise or other commitments;
- c. any severe time constraints or resource implications;
- d. wider morale implications within a command and the wider ADF;
- e. potential operational security disclosure issues;
- f. the anticipation of media interest;
- g. the prior conduct of the accused person, including findings of any administrative inquiries concerning the accused person's conduct; and
- h. whether or not there is a need to send a message of deterrence, both to the accused person and to other members of the ADF.

It would not be appropriate for a Superior Authority to express views on whether particular charges should be laid or the legal merits of the case. 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.

### 1.6. Discretionary factors

Having determined there is sufficient reliable and admissible evidence for a reasonable prospect of conviction there are numerous discretionary factors which 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 some accidents, 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.

Defending Officers may make written representations to the DMP about discretionary factors to be considered and also the extent to which proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline although if circumstances have not changed markedly since the original prosecution decision was made, or they refer only to matters that have already been considered, it is unlikely to result in a change of decision

## **2. Factors that are not to influence the decision to prosecute**

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, national 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, whether implicit, explicit or by way of inducement or threat.
- f. Possible embarrassment or adverse publicity to a command, a unit or formation, the wider ADF or Government.

- g. 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.

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.

### 3. Selection of service tribunal

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.** Sections 103(1)(c) & (d) of the DFDA provide the DMP with the discretion to decide that an offence be tried by a Defence Force magistrate (DFM), a restricted court martial (RCM) or a general court martial (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, the 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;
  - (3) whether the nature of the alleged conduct has a particular service context that relates to the performance of duty and may be best considered by a number of officers with general service experience;
  - (4) whether the scale of punishment available would enable the accused person, if convicted, to be appropriately punished.

- 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.

#### **4. Sexual Misconduct Prevention and Response Office**

The Sexual Misconduct Prevention and Response Office (SeMPRO) was established on 23 July 2013. SeMPRO is focused on providing support, advice and guidance to ADF members who have been affected by sexual misconduct. SeMPRO also provides advice and guidance to commanders and managers of persons affected by sexual misconduct to assist them in appropriately managing the reported incident.

Although there is no formal operational relationship between ODMP and SeMPRO there is a clear benefit in ensuring that ODMP supports SeMPRO objectives.

To that end, the staff of ODMP may assist SEMPRO in dealing with matters of alleged sexual misconduct, regardless of the decision to lay charges or not. This includes:

- a. **informing** victims of the role and availability of SeMPRO in order to invite any victim to report the instance of alleged sexual misconduct to SeMPRO to assist SeMPRO with its reporting, prevalence and trend analysis functions,
- b. **liaising** (if the victim consents to that liaison) with SeMPRO staff to assist them in ensuring that victims of sexual misconduct are kept informed throughout the prosecution process and fully supported by SeMPRO staff during the prosecution process; and
- c. **reporting** (in accordance with the privacy laws) instances of alleged sexual misconduct (even when not ultimately prosecuted) and the results of trials involving alleged sexual misconduct to assist SeMPRO to identify causative or contributory factors and in its education and reporting functions.

#### **5. Expedition**

Avoiding unnecessary delay in bringing matters to trial is a fundamental obligation of prosecutors. Accordingly all prosecutors should:

- a. prepare a brief for the DMP with a proposed course of action for the disposal of the matter promptly;



- b. when recommending prosecution, draft charges for approval of the DMP and arrange for delivery of the charge documentation to the accused as soon as possible;
- c. balance requests for further investigation of the matter with the need to bring the matter to trial in a timely fashion; and
- d. remain in contact with witnesses and ascertain their availability for attendance at trial as soon as practical.

## **6. Charge selection**

Particular care needs to be exercised when deciding which 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-negotiation.

## **7. Disclosure**

Disclosure is the continuing obligation of the prosecutor to keep the accused person informed about the case against him or her. Prosecutors must make full and timely disclosure to the accused of all material known to the prosecutor which can be seen on a sensible appraisal by the prosecution:

- a. to be relevant or possibly relevant to an issue in the case;
- b. to raise or possibly raise a new issue the existence of which is not apparent from the evidence the prosecution proposes to lead; and/or
- c. to hold out a real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two situations.

The prosecution will disclose to the defence all material which is relevant to the charge(s) against the defendant which has been gathered in the course of the investigation (or during the proofing of witnesses) and which:

- a. the prosecution does not intend to rely on as part of its case, and
- b. either runs counter to the prosecution case (i.e. points away from the defendant having committed the offence) or might reasonably be expected to assist the defendant in advancing a defence, including material which is in the possession of a third party.

The prosecution obligation to disclose does not extend to disclosing material:

- a. relevant only to the credibility of defence (as distinct from prosecution) witnesses;
- b. relevant only to the credibility of the accused person;
- c. relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false; or
- d. of which it is aware concerning the accused's own conduct to prevent an accused from creating a trap for himself or herself, if at the time the prosecution became aware of that material it was not seen as relevant to an issue in the case or otherwise disclosable pursuant to the criteria above.

### **8. Acceptance of pleas (charge-negotiation)**

Charge-negotiation involves communications between an accused person via his/her defending officer and the 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.

The DMP is the sole authority to accept or negotiate 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 an offer made in these charge-negotiations.

Charge-negotiations are 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 service offence. No legal officer prosecuting on behalf of the DMP is to participate in such a consultation.

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-negotiation 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 misconduct 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.

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 misconduct 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 reparation or arrangements for either;
- 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 victim(s) and/or complainant(s), where this is reasonably practicable to obtain.

The proposed charge(s) should be discussed with any victim(s) and where appropriate an explanation of the rationale for an acceptance of the plea ought to be explained. The views of the victim will be relevant and need to be weighed by the decision maker but are not binding on the DMP.

In no circumstances will the DMP entertain charge-negotiation 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.

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.

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 the acceptable limits of an exercise of proper sentencing discretion.

### **9. Immunities (undertakings of DMP)**

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.

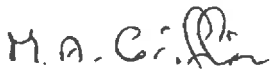
In determining whether to grant an undertaking, DMP will consider the following factors.

- 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 trier 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.

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 service tribunal and to the accused through their Defending Officer.

**10. Offences occurring and/or prosecuted overseas**

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 or other similar arrangements.



**M.A. GRIFFIN, AM**  
Brigadier  
Director of Military Prosecutions

6 September 2013

ANNEX B to  
DMP REPORT 01 JAN 14 TO 31 DEC 14

**CLASS OF OFFENCE BY SERVICE - 2014**

| <b>Class of Offence</b>   | <b>NAVY</b> | <b>ARMY</b> | <b>RAAF</b> | <b>TOTAL</b> |
|---|-------------|-------------|-------------|--------------|
| 01 – HOMICIDE AND RELATED OFFENCES  |             |             |             |              |
| 02 – ACTS INTENDED TO CAUSE INJURY  | 11          | 17          | 2           | <b>30</b>    |
| 03 – SEXUAL ASSAULT AND RELATED OFFENCES  | 10          | 11          | 2           | <b>23</b>    |
| 04 – DANGEROUS OR NEGLIGENT ACTS ENDANGERING PERSONS                                    | 1           |             |             | <b>1</b>     |
| 05 – ABDUCTION, HARASSMENT AND OTHER OFFENCES AGAINST THE PERSON                        |             |             |             |              |
| 06 – ROBBERY, EXTORTION AND RELATED OFFENCES  |             | 2           |             | <b>2</b>     |
| 07 – UNLAWFUL ENTRY WITH INTENT/BURGLARY, BREAK AND ENTER                               |             |             |             |              |
| 08 – THEFT AND RELATED OFFENCES   |             | 1           | 3           | <b>4</b>     |
| 09 – FRAUD, DECEPTION AND RELATED OFFENCES  | 11          | 8           | 5           | <b>24</b>    |
| 10 – ILLICIT DRUG OFFENCES  |             |             |             |              |
| 11 – PROHIBITED AND REGULATED WEAPONS AND EXPLOSIVES OFFENCES                           |             |             |             |              |
| 12 – PROPERTY DAMAGE AND ENVIRONMENTAL POLLUTION  |             |             |             |              |
| 13 – PUBLIC ORDER OFFENCES  |             |             |             |              |
| 14 – TRAFFIC AND VEHICLE REGULATORY OFFENCES  | 1           | 1           |             | <b>2</b>     |
| 15 - OFFENCES AGAINST JUSTICE PROCEDURES, GOVERNMENT SECURITY AND GOVERNMENT OPERATIONS | 2           |             |             | <b>2</b>     |
| 16 – MISCELLANEOUS CIVILIAN OFFENCES  | 1           |             |             | <b>1</b>     |
| 17 – SPECIFIC MILITARY DISCIPLINE OFFENCES  | 17          | 34          | 3           | <b>54</b>    |
| <b>Grand Total</b>  | <b>54</b>   | <b>74</b>   | <b>15</b>   | <b>143</b>   |

