



DIRECTOR OF MILITARY PROSECUTIONS

*Report for the period
01 January to 31 December 2021*

Director of Military Prosecutions

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01 January to 31 December 2021*

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Military Prosecutions**
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The Hon Richard Marles MP
Minister for Defence
Parliament House
CANBERRA ACT 2600

Dear Minister

As required by section 196B of the *Defence Force Discipline Act 1982*, I submit the annual report relating to the operations of the Director of Military Prosecutions for the period 01 January to 31 December 2021.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'IS Henderson'.

IS Henderson
Air Commodore
Director of Military Prosecutions
Australian Defence Force

02 June 2022

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DIRECTOR OF MILITARY PROSECUTIONS

REPORT FOR THE PERIOD 01 JANUARY TO 31 DECEMBER 2021

INTRODUCTION

1. Section 196B of the *Defence Force Discipline Act 1982* (DFDA) obliges the Director of Military Prosecutions (DMP), as soon as practicable after 31 December each year, to prepare and give to the Minister for Defence, for presentation to the Parliament, a report relating to the operations of the DMP for that year. The report must:

- a. set out such statistical information as the DMP considers appropriate; and
- b. include a copy of each direction given or guideline provided under subsection 188GE(1) during the year to which the report relates, and a copy of each such direction or guideline as in force at the end of the year.

2. This report is for the period 01 January to 31 December 2021.

OFFICE OF THE DMP

DMP

3. The position of DMP was established by DFDA, s. 188G and commenced on 12 June 2006. The DMP has the following functions:

- a. to carry on prosecutions for service offences in proceedings before a court martial or a Defence Force magistrate, whether or not instituted by the Director of Military Prosecutions;
- b. to seek the consent of the Director of Public Prosecutions as required by DFDA, s. 63;

- c. to make statements or give information to particular persons or to the public relating to the exercise of powers or the performance of duties or functions under the DFDA;
- d. to represent the service chiefs in proceedings before the Defence Force Discipline Appeal Tribunal (DFDAT);
- e. to do anything incidental or conducive to the performance of any of the preceding functions; and
- f. such other functions conferred on the DMP by or under the DFDA, any other law of the Commonwealth, or as are prescribed by the Defence Force Discipline Regulations.¹

4. The officeholder must be a legal practitioner of not less than five years' experience, and be a member of the Permanent Navy, Regular Army or Air Force, or a member of the Reserves rendering full-time service, holding a rank not lower than commodore, brigadier or air commodore.²

5. Previous appointments to the position of DMP have been:

- a. Brigadier Lynette McDade (July 2006 – July 2013);
- b. Brigadier Michael Griffin, AM (August 2013 – January 2015);
- c. Group Captain John Harris, SC – Acting DMP – (January 2015 – June 2015); and
- d. Brigadier Jennifer Woodward, CSC (July 2015 – June 2021).

6. I was appointed as the DMP by the Minister for Defence on 01 July 2021 for a period of five years. As indicated above, I succeeded Brigadier Woodward as the DMP. I note that

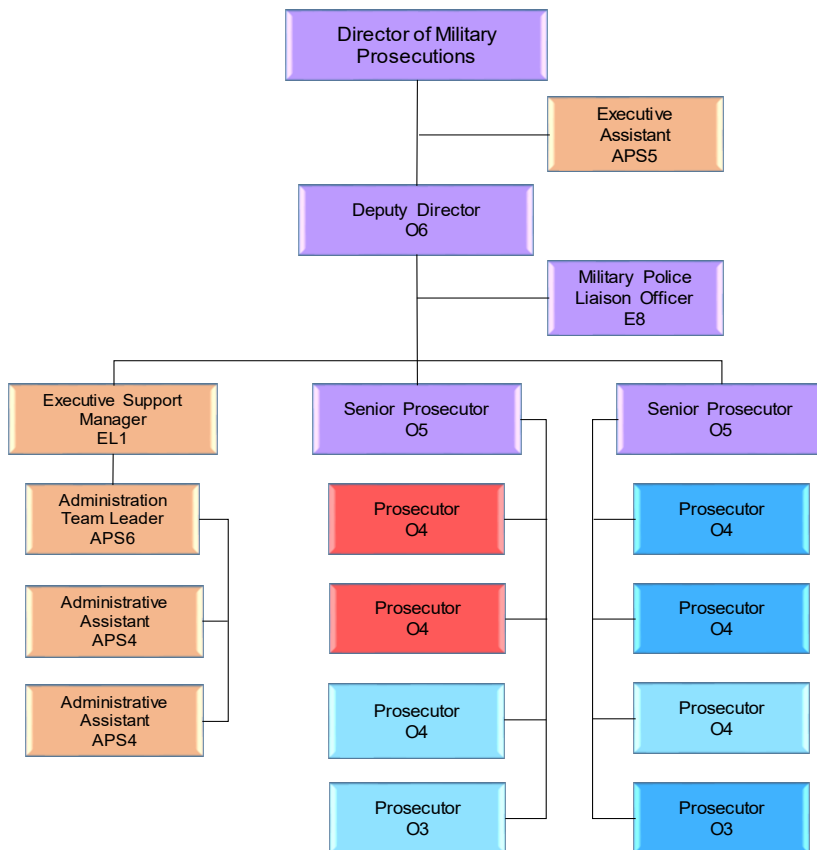
¹ DFDA, s. 188GA.

² DFDA, s. 188GG.

Brigadier Woodward served as DMP for six years, making her the second longest serving DMP to date. I would like to thank her for her time as DMP and her dedicated discharge of her duties. On a personal note, I am grateful for the assistance she provided to me to ensure a smooth hand-over and her availability to discuss matters that arose before my appointment.

Office Structure

7. With one qualification, the structure of the Office of the DMP (ODMP) during the reporting period was:



8. I note that the EL1 Executive Support Manager position was disestablished mid-year.

9. During the reporting period, the Deputy Director was appointed by the Minister for Defence to act as the DMP:
- a. during a vacancy in the Office of the DMP; or
 - b. during any period, or during all periods, when the DMP was absent from duty or from Australia, or was, for another reason, unable to perform the duties of the office.

Reserve Force

10. During the reporting period, reserve legal officers were engaged ad hoc on a number of occasions to advise or undertake prosecutions on the DMP's behalf, and to appear before the DFDAT (including in their private capacity). Two reserve legal officers also worked full-time at ODMP on posting. This is similar to how ODMP has used the reserve legal officer capability since the Office's creation in 2006.

11. In late 2021, a key step in implementation of the Defence Legal Services Review occurred with the then existing panel arrangements for reserve legal officers being replaced by a number of functional panels, including four panels that are to be managed by, and operate in support of, the military justice entities (ie, Inspector-General of the ADF, Office of the Judge Advocate General, DMP and Defence Counsel Services). The nett effect is that going forward my office will be responsible for administering, developing and supervising about 13 reserve legal officers posted to the ODMP panel for duty. I note as part of this new model, I may make reserve legal officers posted for duty to ODMP available to other areas of Defence for discrete tasks or temporary duty and vice versa.

12. I look forward to working with my new reserve panel members, Defence Legal and the other military justice entities in 2022 as we develop policies and practices to ensure ODMP (and Defence more broadly) makes the most efficient and effective use of the reserve legal officers alongside ODMP's permanent/regular ADF and APS workforce.

PROSECUTION POLICY

13. Consistent with the practice of the various Directors of Public Prosecutions, the first DMP signed a publically-available DMP Prosecution Policy on 13 April 2007.³ The most recent DMP Prosecution Policy prior to my appointment was signed on 10 July 2020. In light of the High Court's significant decision concerning military discipline jurisdiction in *Private R v Cowen* [2020] HCA 31, I signed an updated policy on 23 December 2021.

14. The main changes between the 10 July 2020 and 23 December 2021 versions of the DMP Prosecution Policy are:

- a. a revision of terminology to more closely reflect the language used by the High Court in *Private R v Cowen*;
- b. inclusion of an 'Introduction' to describe what is the 'maintenance of good order and discipline' and its relationship with operations while also highlighting the alternatives to charging — such as leadership, training and administrative action; and
- c. the role of the prosecutor has been more clearly defined and explained, along with explicit sections concerning 'Conflicts of interest' and 'Concerns and complaints'.

15. A copy of the updated policy is at Annex A and is available online at:

<https://defence.gov.au/mjs/docs/DMP-Prosecution-Policy.pdf>.

³ See DMP Annual Report 2006–2007, [11].

UNDERTAKINGS, DIRECTIONS AND GUIDELINES

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

TRAINING

17. The nature of the work at ODMP means that my staff will regularly engage with people who have experienced trauma. One of the senior prosecutors at ODMP has commenced discussions with a training provider to provide all ODMP staff with training on dealing with witnesses (including but not limited to complainants) who have experience trauma (ie, 'trauma-informed' training). I anticipate the initial training will occur in 2022, with a need to provide ongoing availability to training as new staff join ODMP.

18. Future training will look at assisting ODMP staff to deal with their own reactions to dealing with people who have been the subject of trauma (ie, 'vicarious trauma' training).

EXTERNAL ENGAGEMENT

Commonwealth Director of Public Prosecutions

19. Section 63 of the DFDA requires the DMP to obtain the consent of the (Commonwealth) Director of Public Prosecutions (CDPP) prior to proceeding with a prosecution for certain serious offences. This is supported by a Memorandum of Understanding between the Australian Directors of Public Prosecutions and Director of Military Prosecutions of 22 May 2007 (MOU).

20. There were no requests made under DFDA, s. 63 in the reporting period. As a matter of completeness, based on the information available to me, there were eleven requests made under DFDA, s. 63 between 12 June 2006 and 31 December 2020. Four of those eleven requests involved co-accused in a matter.

Consent for prosecution under the DFDA was given on seven of those occasions, including the matter with four co-accused.

21. The MOU contemplates that representatives from the CDDP and ODMP conduct regular liaison meetings, not less frequently than once a year. On 21 July 2021, I met with Mr James Carter, Deputy Director International Assistance and Specialist Agencies, and have maintained contact since.

Australian Capital Territory Director of Public Prosecutions

22. Due to DFDA, ss. 61 and 146, along with Court Martial and Defence Force Magistrate Rules 2020, r. 5, there is a clear benefit to ODMP in having a working relationship with the Australian Capital Territory Director of Public Prosecutions.

23. I met with Mr Shane Drumgold SC on 23 July 2021 and have maintained contact since.

SIGNIFICANT ISSUES

Legislative Reforms

24. As the Judge Advocate General (JAG) reports on the operation of the DFDA and associated legislation in the JAG's annual report,⁴ I will limit myself to noting matters that directly relate to the prosecution function.

25. The *Defence Legislation Amendment (Discipline Reform) Act 2021* received Royal Assent on 13 December 2021 and is due to commence on 14 December 2022 (unless an earlier date is proclaimed). Among other things, four new service offences have been created, namely: s. 35A 'Failure to perform duty or carry out activity'; s. 48A 'Cyber-bullying'; s. 48B 'Failure to comply with removal order' (in relation to a cyber-bullying offence); and s. 56A 'Failure to comply with requirement to notify change in circumstances' (in relation to receipt of a benefit arising out of, or

⁴ DFDA, s. 196A.

based on, the recipient's membership of, or service in or in connection with, the Defence Force).

Appeals and other superior court proceedings

26. As the JAG reports on appeals and other superior court proceedings in the JAG's annual report that affect the operation of the DFDA and associated legislation, I will limit myself to noting matters that directly relate to the prosecution function. There were no such appellate or superior court decisions in 2021.

MILITARY JUSTICE PROCEEDINGS

27. In addition to 56 matters carried over from 2020, in 2021 ODMP received:

- a. 76 briefs of evidence referred by the Joint Military Police Unit;
- b. 13 referrals by a summary authority;
- c. 1 election by accused from the summary level; and
- d. 6 miscellaneous referrals.

28. The 152 matters with ODMP in 2021 were dealt with as follows:

- a. 47 were subject of a direction that there be no prosecution under the DFDA;
- b. 29 were referred for trial by a summary authority;
- c. 50 were referred for trial by Defence Force magistrate;
- d. 2 were referred for trial by restricted court martial;
- e. 0 were referred for trial by general court martial; and

f. 31 were carried over into 2022.⁵

29. Annex B shows the number of offences by class and Service that were dealt with during the reporting period.⁶

30. There were two appeals to the DFDAT in 2021.

FINANCE

31. ODMP was adequately financed during the reporting period. Funding was provided by the Associate Secretary group of the Department of Defence and was principally allocated towards prosecutorial training, library subscriptions and membership of professional bodies (including practising certificates with the ACT Law Society). Allocations for overseas and domestic travel were significantly underutilised during the reporting period due to the COVID-19 pandemic.

32. ODMP has complied with the *Public Governance, Performance and Accountability Act 2013* and all relevant financial management policies of the ADF.

⁵ The number of matters dealt with in 2021 does not equal 152 due to the way matters 'in' are counted compared with matters 'out'. For example, one brief of evidence 'in' might generate two or more matters 'out'.

⁶ The classes of offences is largely based on the structure and principles of the Australian and New Zealand Standard Offence Classification produced by the Australian Bureau of Statistics, slightly modified to suit the military discipline environment of the ADF.

TABLE OF ABBREVIATIONS

Abbreviation	Description
ADF	Australian Defence Force
APS	Australian Public Service
CDPP	Commonwealth Director of Public Prosecutions
DFDA	<i>Defence Force Discipline Act 1982</i>
DFDAT	Defence Force Discipline Appeal Tribunal
DMP	Director of Military Prosecutions
JAG	Judge Advocate General
MOU	Memorandum of Understanding
ODMP	Office of the Director of Military Prosecutions



**OFFICE OF THE
DIRECTOR OF
MILITARY
PROSECUTIONS**

ANNEX A TO
DMP REPORT
01 JAN TO 31 DEC 21

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DIRECTOR OF MILITARY PROSECUTIONS PROSECUTION POLICY

This policy replaces the policy of 10 July 2020. Please send any comments, suggestions or questions by email to defence.dmp@defence.gov.au.

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INTRODUCTION

Background

1. The position of Director of Military Prosecutions (DMP) was created by *Defence Force Discipline Act 1982* (DFDA), s. 188G and commenced on 12 June 2006. The principle rationale for the creation of the DMP was for decisions on the prosecution of service offences before superior service tribunals¹ to be made independent from the chain of command. The functions of the DMP are set out in DFDA, s. 188GA.
2. This policy:
 - a. provides direction and guidance for prosecutors to assist in ensuring the quality and consistency of their recommendations and decisions;
 - b. informs other Australian Defence Force (ADF) members and the public of the principles that apply to decisions made by the DMP; and
 - c. applies to:
 - (1) all prosecutors posted to the Office of the DMP (ODMP);
 - (2) any legal officer to whom the DMP has delegated functions under DFDA, s. 188GR,; and
 - (3) any legal officer or legal practitioner who has been briefed to advise DMP or to represent DMP before a superior service tribunal, Defence Force Discipline Appeal Tribunal (DFDAT), Federal Court or High Court.
3. This policy does not cover every conceivable situation that may be encountered during the prosecution process as it is neither practicable nor desirable to overly fetter a prosecutor's discretion as to the manner in which the dictates of justice and fairness may best be served in every case.
4. As members of the ADF are subject to the DFDA in addition to the criminal law of, among other jurisdictions, the Commonwealth, States and Territories,² and so as to promote consistency with civilian prosecution authorities, some aspects of this policy are modelled on those respective policies.

Maintenance of good order and discipline

5. Good order and discipline, at both the individual and unit level, is necessary to successfully conduct operations. And as the ADF may be required to conduct operations at short notice, good order and discipline must be maintained at all times.
6. While the primary purpose of the DFDA is to assist in the establishment and maintenance of good order and discipline, it is not the case that every allegation of disciplinary misconduct must culminate in a prosecution. An inappropriate decision to

¹ Comprising trials by Defence Force magistrate (DFM), restricted court martial (RCM) and general court martial (GCM).

² As explained by Kiefel CJ, Bell and Keane JJ in *Private R v Cowen* [2020] HCA 31 at [54], the jurisdiction of service tribunals, which exists for the purposes of the nation's defence, is complementary to the jurisdiction of the civilian (criminal) courts, which exist for the general purpose of punishing those guilty of criminal conduct.

prosecute may mean that an innocent defence member suffers unnecessary distress and embarrassment. On the other hand, an inappropriate decision not to prosecute may mean that the guilty go unpunished and good order and discipline, at the individual and unit level, suffers accordingly.

Alternatives to charging

7. Laying charges under the DFDA is but one tool available to maintain good order and discipline. Other means include leadership, training and the use of administrative action.³ And in some circumstances, maintenance of good order and discipline will best be achieved by the matter being dealt with by civilian authorities — where appropriate, accompanied or followed by administrative action — and potentially in conjunction with disciplinary proceedings.

8. Accordingly, a prima facie question should always be asked: is potential prosecution under the DFDA appropriate for the alleged conduct compared with the alternatives of, in particular, civilian criminal jurisdiction and/or administrative action. To avoid potential delay, minimise uncertainty, and (where applicable) allow the relevant Service to manage the accused,⁴ wherever feasible this decision is best made as early in the process as practicable.

THE DECISION TO PROSECUTE

9. The purpose of a prosecution under the DFDA is not to obtain a conviction; it is to lay before a service tribunal what the prosecution considers to be credible evidence relevant to what is alleged to be a service offence. A Deane J has observed, a prosecutor must:

... act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.⁵

10. 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.

11. 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) and the selection of the charges that are to be laid should not be made lightly or automatically, but only after due consideration, fairly and for appropriate reasons. Finally, it is in everyone's interests that decisions in respect of DFDA prosecutions are made expeditiously.

12. The decision to prosecute can be understood as a two-stage process. First, does the evidence offer reasonable prospects of conviction? If so, is it in the service interest to proceed with a prosecution? In respect of prosecutions under the DFDA, the service interest is defined primarily in terms of the requirement to maintain good order and discipline.

³ While the DMP may make recommendations concerning administrative action, decisions in respect of whether such action is taken rests with commanders.

⁴ For simplicity, the term 'accused' is used throughout this policy to refer to a person against whom charges are being considered, have been preferred or upon conviction.

⁵ *Whitehorn v R* (1983) 152 CLR 657, 663–4.

Admissible evidence and reasonable prospect of conviction

13. The initial consideration will be the adequacy of the evidence and whether or not the admissible evidence is capable of establishing each element of the offence. A prosecution should not be instituted or continued unless there is reliable evidence, admissible before a service tribunal, on which a finding could be made beyond reasonable doubt that a service offence has been committed by the accused. This consideration is not confined to a technical appraisal of whether the evidence is sufficient to constitute a prima facie case. The evidence must provide reasonable prospects of a conviction.

14. The decision as to whether there is a reasonable prospect of a conviction requires an evaluation of how strong the case is likely to be when presented before a service tribunal. It must take into account such matters as the availability, credibility and reliability of witnesses and their likely impression on the arbiter of fact. The prosecutor should have regard to any lines of defence which are plainly open to or have been indicated by the accused, and any other factors which are properly to be taken into account and could affect the likelihood of a conviction.

15. The factors which need to be considered will depend upon the circumstances of each individual case. Without purporting to be exhaustive, they may include the following:

- a. Are the witnesses available and competent to give evidence?
- b. Do the witnesses appear to be credible and reliable?
- c. Do any of the witnesses appear to be exaggerating, defective in memory, unfavourable or friendly towards the complainant or the accused, or otherwise unreliable?
- d. Do any of the witnesses have a motive for being less than candid or to lie?
- e. Are there any matters which may properly form the basis for an attack upon the credibility of a witness?
- f. What impressions are the witnesses likely to make before a service tribunal, and how is each likely to cope with cross-examination?
- g. If there is any conflict between the accounts of the witnesses, does it go beyond what might be expected; does it give rise to any suspicion that one or both versions may have been concocted; or conversely are the versions so identical that collusion should be suspected?
- h. Are there any grounds for believing that relevant evidence is likely to be excluded as legally inadmissible or as a result of some recognised judicial discretion?
- i. Where the case is largely dependent upon admissions made by the accused, are there grounds for suspecting that the admissions may be unreliable or inadmissible given the surrounding circumstances?
- j. If identity is likely to be an issue, is the evidence that it was the accused who committed the offence sufficiently cogent and reliable?
- k. Where more than one accused are to be tried together, is there sufficient admissible evidence to prove the case against each of them?

16. If the assessment leads to the conclusion that there are reasonable prospects of a conviction, consideration must then be given as to whether it is in the service interest that the prosecution should proceed.

Service interest in proceeding with a prosecution

17. 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. The demands of fairness and consistency are important considerations, but the interests of the complainant, the accused and members of the ADF generally must all be taken into account.

18. The following is a non-exhaustive list of factors that the DMP may consider in deciding, in a given case, whether charges under the DFDA should be preferred or proceeded with:

- a. **Seriousness of the offence.** It will always be relevant to consider the seriousness of the alleged offence in a discipline context.
 - (1) 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 that no significant impact upon good order and discipline will result from a decision not to proceed). In these circumstances, administrative action may be a more appropriate mechanism for dealing with the matter.
 - (2) In contrast, and as a general rule, the more serious the alleged conduct giving rise to an alleged offence, the more appropriate it will be to prefer charges under the DFDA (or refer to the relevant civilian authorities for criminal prosecution).⁶
- b. **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.
- c. **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 accused and the ADF generally.
- d. **Effect upon morale.** The positive and negative effects of the alleged conduct upon ADF morale, both generally and in respect of a part of the ADF, may be a relevant consideration to, in particular, the maintenance of good order.
- e. **Delay in dealing with matters.** Conduct giving rise to possible service offences may not be detected for some time. Where service offences are not statute barred under the DFDA,⁷ 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

⁶ In this respect, consideration must be given the relative seriousness of the alleged conduct from the discipline perspective and as an alleged breach of criminal law.

⁷ Pursuant to DFDA, s. 96, the time limitation to prosecute service offences, other than offences under s. 61, is 5 years.

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

- f. **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 circumstances and facts of each case before deciding whether to prosecute.
- g. **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 type of service tribunal charges should be referred.
- h. **Interests of the complainant.** In respect of offences against the person, the wishes of and effect upon that other person of proceeding or not proceeding with a charge is a relevant, but not determinative, consideration. Greater weight will usually be given to not doing something contrary to the wishes of a complainant than doing something in conformity with those wishes.
- i. **Nature of the accused.** The age, intelligence, physical or mental health, cooperativeness and level of service experience of the accused may be relevant considerations.
- j. **Prior conduct.** The existence of prior convictions, or the general prior conduct of an accused, 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.
- k. **The accused is, or is about to be, no longer a member of the ADF.** An accused's relationship to the ADF is a relevant consideration in a discipline system.
 - a. Once a person ceases to be a member of the ADF (or a Defence civilian), charges must be preferred within 6 months, and only if the offence carries a maximum penalty of more than 2 years' civil imprisonment.⁸
 - b. Where a person will soon cease to be a member of the ADF, the reasons for the pending separation are a factor, noting whether the separation is voluntary or involuntary as a key discriminator. For example, in situations where an accused's service in the ADF is about to be terminated for mental health reasons and the alleged offending may have been to some extent attributable to that mental health condition, the issues of deterrence and maintenance of good order and discipline would carry less weight in the decision to prosecute.
 - c. In relation to serious matters, consideration will be given to referring the matter to civil authorities for prosecution. A complainant may also choose to report any matter to civil authorities.

⁸ DFDA, s. 96(6).

Superior authorities

19. Although it is a matter for the DMP to determine when the prosecution of a matter will substantially serve the purpose of maintaining good order and discipline, the DFDA provides at section 5A for the appointment of superior authorities to represent the interests of the ADF in relation to matters referred to the DMP. Where charges are being considered by the DMP, the DMP will usually seek the views of the relevant superior authority in writing. Such a request will outline the alleged offending, the nature of proposed charges and likely forum for trial.

20. What are the 'interests of the Defence Force' for the purpose of section 5A is not defined in the DFDA, so it is a matter for superior authorities as to what interests they may wish to communicate as relevant ADF interests. The DMP will then exercise judgement when considering those interests against this policy.

Defending officers

21. Defending officers may make written representations to the DMP, usually via the assigned prosecutor, about factors or matters to be considered when making decisions against this policy.

Offences occurring and/or prosecuted overseas

22. In respect of service offences committed or intended to be prosecuted overseas, additional considerations apply. Along with possible jurisdiction under Australian criminal law, the nation within whose territory (including flagged/registered ships and aircraft) an alleged offence has been committed may have a claim to jurisdiction. In such cases, a potential overlap of jurisdiction between the DFDA and the foreign nation's criminal law may arise.

23. In some cases, jurisdictional issues between foreign nations and the ADF may be resolved by reference to foreign visiting forces legislation or Status of Forces Agreements or other similar arrangements.

Factors that are not to influence the decision to prosecute

24. 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 of the accused or any other person involved (noting the rare exceptions where one or more of these factors may have special significance to the commission of the alleged offence or to do so would be in the interests of the accused).
- b. Personal feelings concerning the accused 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.

25. Finally, no person has a ‘right’ to be tried under the DFDA. Accordingly, a request by a member to be tried in order to clear that person’s name is not a relevant consideration in deciding whether charges under the DFDA should be laid or proceeded with.

Discontinuing a prosecution

26. The considerations relevant to the decision to prosecute set out above will also be relevant to the decision to discontinue a prosecution. The final decision as to whether a prosecution proceeds rests with the DMP. However, where practicable and potentially relevant, the views of one or more of the relevant superior authority, the military police or other referring agency, and (where applicable) the complainant may be sought and taken into account in making that decision.

27. Of course, the extent of that consultation will depend on the circumstances of the case in question, and in particular on the reasons why the DMP is contemplating discontinuing the prosecution. It will be for the DMP to decide on the sufficiency of evidence. On the other hand, if discontinuance on service interest grounds is contemplated, the views of the relevant superior authority, the military police or other referring agency, and (where applicable) the complainant may have greater relevance.

CHOICE OF CHARGES

28. In many cases the evidence will disclose conduct constituting an offence against several different laws. Care must be taken to choose charges which adequately reflect the nature and extent of the alleged conduct disclosed by the evidence and which would enable the service tribunal to impose a sentence commensurate with the gravity of the conduct. As appropriate, this may include charging a person with more than one offence in respect of the one act and/or laying charges in the alternative.

29. Sections 15–60 and 62 of the DFDA will be relied upon in preference to the use of DFDA, s. 61 Territory offences, unless such a course would not adequately reflect the gravity of the conduct disclosed by the evidence.

30. Territory offences are limited in their application by ordinary rules of statutory interpretation. In particular, where any alleged offending conduct is covered by both a Territory offence and an offence under the DFDA, the general provision in a statute yields to the specific provision.⁹ However, noting that sections 33(a) and 33A of the DFDA do not create offences for assaults on private premises, case law supports using the relevant provisions of the *Crimes Act 1900* (ACT) to prosecute those offences.¹⁰

31. Under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiation.

⁹ See *Hoffman v Chief of Army* (2004) 137 FCR 520.

¹⁰ See *Director of Military Prosecutions v Henderson* (2017) FCA 1608; see, for example, the charge in *Private R v Cowen* [2020] HCA 31.

MODE OF TRIAL

32. When deciding which type of service tribunal should deal with specific charges, factors to be considered include:

- a. the accused's prior convictions;
- b. the adequacy of the sentencing powers that are available at the various levels of service tribunal;
- c. differences in the cost and administrative arrangements of conducting proceedings before different types of service tribunals;
- d. the likely length of the proceedings and the effect on the normal activities and operations of the ADF;
- e. whether the nature of the alleged conduct has a particular service context, for example the performance of duty or otherwise relates to customs, practices or procedures of the Defence Force generally or one Service in particular; and
- f. whether the trial may involve complex issues of fact or law.

RETRIAL

33. Where a conviction has been quashed on review, petition or appeal and the charge referred back to the DMP, prompt consideration should be given to whether or not a retrial is required. Factors to be considered include:

- a. the reason the conviction was quashed on review or appeal;
- b. the seriousness of the alleged offence;
- c. cost of a re-trial;
- d. the inconvenience to the units of the accused, witnesses and complainant; and
- e. the views of the complainant.

DELAY

34. 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.

DISCLOSURE

35. It is an important part of the ADF disciplinary system that prosecutions be conducted fairly, transparently, and according to the highest ethical standards. It is a long standing tenet of the Australian criminal justice system that an accused is entitled to know the case that the prosecution intend to make so as to be able to properly defend the charges. An accused is entitled to know the evidence that is to be brought in support of the charges as part of the prosecution case and also whether there is any other material which may be relevant to the defence of the charges.

36. While the prosecution will comply with Court Martial and Defence Force Magistrate Rules 2020, r. 15, that is not the end of the matter.

What is ‘disclosure’?

37. ‘Disclosure’ requires the prosecution to inform the accused of:

- a. the prosecution’s case,
- b. any information in relation to the credibility or reliability of the prosecution witnesses, and
- c. any unused material.

38. The obligation is a continuing one (including during the appeal process)¹¹ requiring the prosecution to make full disclosure to the accused in a timely manner of all material known to the prosecution 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 whose existence is not apparent from the evidence the prosecution proposes to use, and
- c. to hold out a real as opposed to fanciful prospect of providing a lead to evidence that goes to either of the previous two matters.

39. The prosecution duty of disclosure does not extend to disclosing material:

- a. subject to a claim of legal professional privilege, including internal ODMP advice;
- b. generated or obtained by ODMP relating to representations by superior authorities about the interests of the ADF in the proceedings;
- c. relevant only because it might deter an accused from giving false evidence or raising an issue of fact which might be shown to be false; or
- d. for the purpose of preventing an accused from creating a forensic disadvantage for himself or herself, if at the time the prosecution became aware of the material, it was not seen as relevant to an issue in the case or otherwise disclosable.

40. The duty on the prosecution to disclose material to the accused imposes a concomitant obligation on the military police/investigators to notify the prosecution of the existence of all

¹¹ As well as the review and petition process, if known to ODMP.

other documentation, material and other information, including that which concerns any proposed witnesses, which might be of relevance to either the prosecution or the defence. If required, in addition to providing the brief of evidence, the military police/investigators shall certify that the prosecution has been notified of the existence of all such material. Such material includes statements made by witnesses that have not been signed.

41. Subject to public interest immunity considerations, such material, if assessed as relevant according the criteria identified above, should be disclosed.

42. Where a prosecutor receives material/information that may possibly be subject to a claim of public interest immunity, the prosecutor should not disclose the material without first consulting with the military police/investigators, and where appropriate, Defence Legal. The purpose of the consultation is to give the military police/investigators the opportunity to make a claim of immunity if they consider it appropriate.

43. The prosecution must not disclose counselling files relating to complainants in sexual offence proceedings, unless the service tribunal otherwise orders. In this regard it is relevant to note the provisions of Division 4.4.3 of the *Evidence (Miscellaneous Provisions) Act 1991* relating to protected confidence material.

Unused material

44. 'Unused material' is all information relevant to the charge(s) against the accused which has been gathered in the course of the investigation and which the prosecution does not intend to rely on as part of its case, and either runs counter to the prosecution case (ie, points away from the accused having committed the alleged offence(s)) or might reasonably be expected to assist the accused in advancing a defence, including material which is in the possession of a third party (ie, a person or body other than the investigation agency or the prosecution).

The prosecution should disclose to the defence all unused material in its possession unless:

- a. it is considered that the material is immune from disclosure on public interest grounds,
- b. disclosure of the material is precluded by statute, or
- c. it is considered that legal professional privilege should be claimed in respect of the material.

45. Where disclosure is withheld on public interest grounds, the defence is to be informed of this and the basis of the claim in general terms (for example, that it would disclose the identity of an informant or the location of a premises used for surveillance) unless to do so would in effect reveal that which it would not be in the public interest to reveal.

46. In some instances it may be appropriate to delay rather than withhold disclosure. For example, if disclosure would prejudice ongoing investigations, disclosure could be delayed until after the investigations are complete.

47. Legal professional privilege will ordinarily be claimed against the production of any document in the nature of an internal ODMP advice or opinion. Legal professional privilege will not be claimed in respect of any record of a statement by a witness that is inconsistent with that witness's previous statement or adds to it significantly, including any statement made in conference.

48. The requirement to disclose unused material continues throughout a prosecution. If the prosecution becomes aware of the existence of unused material during the course of a prosecution which has not been disclosed, that material should be disclosed as soon as reasonably possible.

49. Where feasible, the accused should be provided with copies of the unused material. If this is not feasible (for example because of the bulk of the material), the accused should be provided with a schedule listing the unused material, with a description making clear the nature of that material, at the time the brief of evidence is served. The defence should then be informed that arrangements may be made to inspect the material.

50. If the prosecution has a statement from a person who can give material evidence but who will not be called because they are not considered, on reasonable grounds, to be credible, the defence should be provided with the name and address of the person and, ordinarily, a copy of the statement.

51. Where the prosecution is aware that material which runs counter to the prosecution case or might reasonably be expected to assist the accused is in the possession of a third party, the defence should be informed of:

- a. the name of the third party;
- b. the nature of the material; and
- c. the address of the third party (unless there is good reason for not doing so; and if so, it may be necessary for the prosecutor to facilitate communication between the defence and the third party).

52. There may be cases where, having regard to:

- a. the absence of information available to the prosecutor as to the lines of defence to be pursued, or
- b. the nature, extent or complexity of the material gathered in the course of the investigation,

there will be difficulty in accurately assessing whether particular material satisfies the description of unused material. In these cases, after consultation with the relevant investigating agency, the prosecutor may permit the defence to inspect such material.

Disclosure affecting credibility and/or reliability of a prosecution witness

53. The prosecution is also under a duty to disclose to the accused information in its possession which is relevant to the credibility or reliability of a prosecution witness. For example:

- a. a relevant previous conviction or finding of guilt;
- b. a statement made by a witness, whether signed or unsigned, which is inconsistent with any other statement of the witness;
- c. a relevant adverse finding in other criminal proceedings or in non-criminal proceedings;
- d. any physical or mental condition which may affect reliability; or

- e. any concession which has been granted to the witness in order to secure the witness's testimony for the prosecution.

Previous convictions

54. It is not practicable, nor legally required, to conduct discipline/criminal history checks for all prosecution witnesses. However, while an accused may request that the prosecution provide details of any discipline/criminal convictions recorded against a prosecution witness, the prosecution duty to disclose is not limited to where a request has been made. Therefore, prosecutors should always request a discipline/criminal history check for a prosecution witness where there is reason to believe that the credibility of the prosecution witness may be in issue.

55. While the duty to disclose to the accused the previous convictions of a prosecution witness extends only to relevant prior convictions, a prior conviction recorded against a prosecution witness should be disclosed unless the prosecutor is satisfied that the conviction could not reasonably be seen to affect credibility having regard to the nature of, and anticipated issues in, the case. In that regard, previous convictions for offences involving dishonesty should always be disclosed.

CHARGE NEGOTIATION

56. Charge negotiation involves communications between an accused (via the defending officer) and the DMP in relation to charge(s) to be proceeded with. Such negotiations may result in the accused pleading guilty to fewer than all of the charges, or to a lesser charge(s), with the remaining charges either not being proceeded with or taken into account without proceeding to conviction.

57. The DMP is the sole authority to accept offers made by an accused who is to be tried by a superior service tribunal. A legal officer who prosecutes on the DMP's behalf must seek the DMP's instructions prior to accepting an offer made in charge negotiations.

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

- a. the charges to be proceeded with bear a reasonable relationship to the nature of the misconduct of the accused and would provide an adequate basis for an appropriate sentence in all the circumstances of the case;
- b. the desirability of prompt and certain dispatch of the case;
- c. the accused's antecedent conduct;
- d. the strength of the prosecution case;
- e. the likelihood of adverse consequences to witnesses;
- f. in cases where there has been a financial loss to the Commonwealth or any person, whether the accused has made restitution or reparation or arrangements for either;
- g. the need to avoid delay in the dispatch of other pending cases;
- h. the time and expense involved in a trial and any review/appeal proceedings; and

- i. the views of the victim(s) and/or complainant(s), where this is reasonably practicable to obtain.

59. The proposed charges may be discussed with any complainant and where appropriate an explanation of the rationale for an acceptance of the plea ought to be explained. The views of the complainant will be relevant but are not binding on the DMP.

60. The DMP will not entertain charge negotiation proposals if the accused maintains that the accused is innocent with respect to the charges to which the accused has offered to plead guilty.

61. A proposal by a defending officer that a plea of guilty be accepted to a lesser number of charges or a lesser charge(s) may include a request that the proposed charge(s) be dealt with by a summary tribunal (due to DFDA, s. 103(1)(b), practically this would be limited to a superior summary authority or a commanding officer and could not be a subordinate summary authority).

62. A proposal by a defending officer that a plea of guilty be accepted to a lesser number of charges or to a lesser charge(s) may include a request that the prosecution not oppose a submission to the service tribunal during sentencing that the particular penalty falls within a nominated range. Alternatively, a defending officer may indicate that the accused will plead guilty to a statutory or pleaded alternative to the existing charge. The 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.

63. 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.

THE ROLE OF THE PROSECUTOR

Conflicts of interest

64. Prosecutors are to be alert to any real or perceived conflicts of interest and bring any such matters to the attention of their supervisor, the Deputy DMP and/or DMP as appropriate. This requirement applies to both assigned matters and other matters being dealt with in the office.

Witness preparation

65. Prosecutors may assist a witness prepare for giving evidence by:
- a. advising the witness to read their statement prior to giving evidence;
 - b. explaining service tribunal procedure (including the roles of all parties), oath/affirmation taking, and the order of examination in chief, cross-examination and re-examination;
 - c. informing the witness that they must answer all questions truthfully, however difficult they may be;

- d. informing the witness that it is not a sign of weakness if they do not know or do not recall the answer to a particular question and, if this is genuinely the case, they should not be afraid to say so;
- e. explaining the role of the defending officer – that it is their job to put the accused’s case and challenge the prosecution’s version of events, including by suggesting the witness is mistaken or lying – and that the witness should listen carefully to any such suggestion and clearly say whether they agree or disagree with it;
- f. informing the witness that they should not be afraid to ask for a break if they genuinely need one such as when they feel tired, are losing concentration or if they want to compose themselves emotionally; and
- g. explaining to the witness the importance of listening to all questions carefully and making sure they understand each one before answering it – witnesses should be encouraged not to be afraid to ask the person asking the question to repeat or rephrase any question which they do not understand.

Prosecutors must not:

- a. advise or suggest to a witness that false or misleading evidence should be given, or
- b. coach a witness by advising what answers the witness should give to questions that might be asked.

66. Prosecutors may prove a witness by eliciting the account of the witness contained in the statement. The prosecutor may question and test the version of evidence to be given by the witness.

67. If new and relevant information comes forward, then the prosecutor should consider requesting that the investigator obtain that information in statement form. The prosecutor may ask the witness questions about a piece of evidence in the statement so that the prosecutor can determine how to adduce this at trial.¹²

At trial

Trial prosecutors must:

- a. present the prosecution case fairly and vigorously;
- b. place before the superior service tribunal all relevant and reliable evidence and address the tribunal as to how to use that evidence according to law;
- c. call all witnesses:
 - (1) whose testimony is admissible and necessary for the presentation of all of the relevant circumstances; and
 - (2) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue, unless the

¹² See also Disclosure above, especially [47].

prosecutor believes on reasonable grounds that the testimony of a particular witness is untruthful or is unreliable.

68. Trial prosecutors must not:
- a. adopt tactics involving an appeal to prejudice or amounting to an intemperate or emotional attack upon the accused – that does not mean that in properly carrying out the role the prosecutor’s addresses and cross-examination must be bland, colourless and lacking in the advocate’s flourish;
 - b. comment on answers given by witnesses in evidence during the course of their evidence;
 - c. put forward theories that are not supported by evidence; or
 - d. reverse the onus of proof in addresses or cross-examination of the accused.

Sentencing

69. The prosecution has an active role to play in the sentencing process.

70. The duty of the prosecution at sentence, as outlined by the High Court, is ‘to draw to the attention of the judge what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases.’¹³ A prosecutor should not make a submission as to the bounds of the available sentencing range or to proffer some statement of the specific result, but may indicate in general terms whether what type of sentencing disposition, whether imprisonment, dismissal or otherwise, it contends is necessary or appropriate.

71. If it appears there is a real possibility that the superior service tribunal may make a sentencing order that would not be in accordance with the DFDA or other law, the prosecutor may make submissions on that issue.

72. Where facts are asserted on behalf of an accused which are contrary to the prosecutor’s instructions or understanding, the prosecutor should press for a trial of the disputed issues if the resolution of such disputed facts is in the interests of justice or is material to sentence.

Concerns and complaints

73. As a prosecutor represents the DMP, any concerns or complaints in relation to the handling of a matter or conduct at trial by:

- a. others about the conduct of a prosecutor, or
- b. a prosecutor about the conduct of others,

should preferably be raised with the DMP for a decision on any further action or referral of the complaint.

¹³ *Barbaro v The Queen* (2014) 253 CLR 58 at [39].

IMMUNITIES (UNDERTAKINGS OF DMP)

74. Section 188GD of the DFDA vests the 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 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. However, such an approach may not always be practicable.

75. 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; and
- e. whether the service interest is to be served by not proceeding with available charges against the person receiving the undertaking.

76. Details of any undertaking to assist the prosecution in other matters, 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.



IS Henderson
Air Commodore
Director of Military Prosecutions

23 December 2021

**ANNEX B TO
DMP REPORT
01 JAN TO 31 DEC 21**

CLASS OF OFFENCE BY SERVICE – 2021

Class of Offence	NAVY	ARMY	RAAF	TOTAL
01 – HOMICIDE AND RELATED OFFENCES	0	0	0	0
02 – ACTS INTENDED TO CAUSE INJURY	2	11	2	15
03 – SEXUAL ASSAULT AND RELATED OFFENCES	12	8	10	30
04 – DANGEROUS OR NEGLIGENT ACTS ENDANGERING PERSONS	0	2	0	2
05 – ABDUCTION, HARASSMENT AND OTHER OFFENCES AGAINST THE PERSON	1	1	2	4
06 – ROBBERY, EXTORTION AND RELATED OFFENCES	0	0	0	0
07 – UNLAWFUL ENTRY WITH INTENT/BURGLARY, BREAK AND ENTER	0	0	0	0
08 – THEFT AND RELATED OFFENCES	0	1	0	1
09 – FRAUD, DECEPTION AND RELATED OFFENCES	7	10	3	20
10 – ILLICIT DRUG OFFENCES	0	0	0	0
11 – PROHIBITED AND REGULATED WEAPONS AND EXPLOSIVES OFFENCES	0	0	0	0
12 – PROPERTY DAMAGE AND ENVIRONMENTAL POLLUTION	1	1	0	2
13 – PUBLIC ORDER OFFENCES	0	1	0	1
14 – TRAFFIC AND VEHICLE REGULATORY OFFENCES	0	0	0	0
15 – OFFENCES AGAINST JUSTICE PROCEDURES, GOVERNMENT SECURITY AND GOVERNMENT OPERATIONS	0	0	0	0
16 – MISCELLANEOUS CIVILIAN OFFENCES	2	3	1	6
17 – SPECIFIC MILITARY DISCIPLINE OFFENCES	9	6	1	16
Grand Total	34	44	19	97