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CHIEF JUDGE ADVOCATE

Australian Defence Force

BN7521834

PRACTICE NOTE 6 — PART IV SENTENCING (VERSION 4)

1. **Purpose.** This Practice Note sets out the practice to be followed by counsel to assist superior service tribunals when undertaking DFDA, Part IV sentencing action.
2. **Commencement.** This Practice Note commences forthwith.

Roles

3. Both counsel are to assist the tribunal to apply the sentencing principles in section 70 of the DFDA. In general:
 - a. Prosecution counsel are best placed to assist with general information about:
 - (1) an ADF member's service background
 - (2) the likely career management implications of potential punishments.
 - b. Defence counsel are best placed to:
 - (1) provide information specific to the convicted person
 - (2) make submissions on the personal consequences of potential punishments.
4. Without limiting the material that either counsel may put forward, it is expected that counsel will assist the tribunal as follows:

Prosecution counsel

- a. In all cases,¹ Prosecution counsel should:
 - (1) tender or call evidence from the convicted person's career management agency on:
 - (a) how the conviction alone and how the punishments of reprimand, severe reprimand, forfeiture of service/seniority, reduction in rank and detention will affect:
 - (i) capability
 - (ii) employability in the convicted person's category/corps/specialisation/trade

¹ The limited exception being where the convicted person is not a member of the ADF.

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2

- (iii) future promotion prospects
- (b) whether the convicted person would move to a different pay grade if reduced in rank
- (2) for discipline history:
 - (a) advise the tribunal of the absence of a record of previous convictions; or
 - (b) tender or call evidence of the existence and details of previous convictions — if tendering material, this should not contain irrelevant and potentially prejudicial material (eg, a report/record showing investigations or charges that did not result in a conviction).²
- b. In all relevant cases, Prosecution counsel should:
 - (1) advise whether or not a restitution or reparation order is being sought
 - (2) provide any information relevant to suspension under section 99 of the DFDA (see Practice Note 4- *Suspension from duty after conviction orders (extant version)*).
- c. Note that *Crimes Act 1914*, s. 16A(2)(ea) applies to Victim Impact Statements (VIS).
 - (1) All the provisions of Crimes Act, ss. 16AAAA and 16AB should be complied with.
 - (2) If it is intended to rely upon a VIS, note paragraphs 5 and 6 below.

Defence counsel

- d. In all cases, Defence counsel should tender a *Pre-Sentence Report* (copy at annex A).³
- e. If making submissions concerning the effect of various punishments on likely future DVA or superannuation entitlements, Defence counsel should support those submissions with:
 - (1) documents from DVA or the Commonwealth Superannuation Corporation (as the case may be)
 - (2) a professional advisor (eg, a licensed financial advisor); or
 - (3) sworn evidence.
- f. If making submissions that mental illness is relevant to mitigation of penalty or on the likely effect of imprisonment or detention on the convicted person's physical

² The original PD103 *Conduct Record* should not be tendered, but rather the relevant extracts from it (see Practice Note 2 — *Filing of Material, and tendering and handing up documents (extant version)*).

³ The Pre-Sentence Report template is maintained by Defence Counsel Services.

and/or mental health, Defence counsel should support those submissions with a report or evidence from a suitably qualified expert, noting paragraphs 5 and 6 below.

- (1) A party seeking to rely upon a report should first obtain the other party's consent to the tendering of the report. If consent is not obtained, the party seeking to rely upon the evidence would have to make arrangements for the witness to give oral testimony.
 - (2) Any expert report or evidence must be relevant to the proceedings. To be admissible, or carry any weight, the report or evidence should, as appropriate:
 - (a) clearly distinguish between, and address the likely effect of, imprisonment and detention
 - (b) for mental illness, address the current sentencing principles in civilian courts.⁴
- g. If making submissions that the convicted person co-operated in the investigation of the offence or other offences, provide some level of particularity (eg, identify relevant admissions made during a record of interview).
- h. **Guilty pleas.** Where a convicted person entered a plea of guilty, Defence counsel should specify at what point the intended guilty plea was indicated to the prosecution and/or the Registrar of Military Justice (RMJ). Without limiting the possible stages, relevant stages include:⁵
- (1) after the convicted person was charged by the Director of Military Prosecutions (DMP)
 - (2) at the initial PTDH
 - (3) a date subsequent to the initial PTDH but prior to the first day of trial
 - (4) on the day of the trial.

Timing

5. Counsel should be prepared for the Part IV sentencing action to proceed immediately following the recording of a conviction. This applies regardless of whether sentencing is following on from a contested trial or an arraignment on a guilty plea.

⁴ Currently the 'Verdins principles' (*Verdins; Buckley; Vo* (2007) 16 VR 269 at [32]). To that end, the instructed expert may be assisted by being asked the questions in annex B.

⁵ The stages have been listed in the usual order from furthest away from the time of arraignment to the closest. If relevant, counsel should indicate why a particular stage did not occur in the usual order.

OFFICIAL

4

6. Counsel should come prepared to address all reasonable sentencing options and should not expect an adjournment to obtain material or instructions to address the above issues.

M Cowen, QC
Brigadier
Chief Judge Advocate

15 March 2022

Annexes:

- A. *Pre-Sentence Report*
- B. Questions for expert concerning mental illness relevant to sentencing (*Verdins* principles)

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Pre-Sentence Report

Section 70 of the [Defence Force Discipline Act 1982](#)

Note: A copy of the members current Salary Variation Advice or PSS Payslip must be attached to this form when submitted. Other additional information may be attached as required.

Personal particulars

Printed name	Rank	PMKeyS ID	Date of birth
Mustering, category or ECN	Date of enlistment or appointment	Discharge date	Seniority in present rank

Education and trade qualifications

Qualification	Educational Institution	Date Commenced	Date Completed

Marital status (circle/underline/highlight as necessary)

Single	Divorced	Married	Separated	Dependant Partner
<i>Is your spouse or partner employed?</i>				
Yes	No			

Dependents (circle/underline/highlight as necessary)

Do you have any dependant children:				
Yes	No			
Number of Children in:				
Daycare/Preschool	School	Tertiary Level	Employed	Unemployed
Do you have a dependant parent/s:				
<i>Mother</i> (Wholly dependant / Partially Dependiant) <i>Father</i> (Wholly dependant / Partially Dependiant) <i>Both</i> (Wholly dependant / Partially Dependiant)				

Sensitive: Personal (After first entry)

Accused person's income and financial means (Spouse includes interdependent partner)

<p>Fortnightly remuneration</p> <p>* This is calculated by adding a member's fortnightly salary (as per their attached Salary Variation Advice) and all allowances (pre tax) = Figure A _____ A</p>																					
<p>Daily salary (Fineable daily rate of pay)</p> <p>Annual Salary = \$ _____ (Regular member; do not include allowances)</p> <p>One day fine = \$ _____ (Regular member – Annual salary/365 = Figure B. Reserve member – daily pay rate = Figure B) _____ B</p>																					
<p>Fortnightly expenses (if needed, attach additional information):</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr><td style="width: 30%;">Tax</td><td></td></tr> <tr><td>DFRDB/MSBS</td><td></td></tr> <tr><td>Rent/Mortgage</td><td></td></tr> <tr><td>Hire Purchase</td><td></td></tr> <tr><td>Other Loans</td><td></td></tr> <tr><td>Food</td><td></td></tr> <tr><td>Electricity and/or Gas</td><td></td></tr> <tr><td>Mobile/Internet</td><td></td></tr> <tr><td>Other</td><td></td></tr> <tr><td>TOTAL = Figure C</td><td></td></tr> </table> <p align="right">_____ C</p>		Tax		DFRDB/MSBS		Rent/Mortgage		Hire Purchase		Other Loans		Food		Electricity and/or Gas		Mobile/Internet		Other		TOTAL = Figure C	
Tax																					
DFRDB/MSBS																					
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Hire Purchase																					
Other Loans																					
Food																					
Electricity and/or Gas																					
Mobile/Internet																					
Other																					
TOTAL = Figure C																					
<p>Net fortnightly income (A – C) _____ D</p>																					
<p>Other income per fortnight _____ E</p>																					
<p>Spouse/partner's net income per fortnight _____ F</p>																					
<p>Total family income per fortnight (D + E + F) _____ Total</p>																					
<p>Assets: Unit/Flat House Land Vehicle Other</p> <p>Total approximate value: _____</p>																					

Sensitive: Personal (*After first entry*)

Accused person's savings: Total approximate value: _____

Defending Officer

Are medical or social worker reports relevant to medical or physical condition and/or needs of the accused person attached at Annex A?	YES	NO
Are reports from supervisors or commanders as to behaviour attached at Annex B?	YES	NO
Are character references attached at Annex C?	YES	NO
Is a report regarding potential consequential effects of conviction and/or punishment attached at Annex D?	YES	NO
Is the Service history (where applicable) attached at Annex E?	YES	NO
Signature of Defending Officer	Date	
Name of Defending Officer		

Accused

I request that the above information be placed before the Service Tribunal in the event of my conviction.	
Signature of Accused Member	Date

Summary Authority

I have received this Pre-Sentence report: YES NO		
Signature	Printed name	Date

QUESTIONS FOR EXPERT CONCERNING
MENTAL ILLNESS RELEVANT TO SENTENCING
(*VERDINS* PRINCIPLES)

1. Does the information available to you demonstrate that it is more likely than not that the symptoms suffered by the convicted person at the time of the offending as a result of any mental condition are realistically connected with the offending conduct by way of:
 - a. having caused or contributed to the offending
 - b. having impaired the convicted person's ability at the time to exercise appropriate judgment
 - c. having impaired the convicted person's ability at the time to make calm or rational choices or to think clearly
 - d. having made the convicted person disinhibited
 - e. having impaired the convicted person's ability to appreciate the wrongfulness of the conduct
 - f. having obscured the intent to commit the offence, or
 - g. in any other way?
2. If there is such a realistic connection, please refer in your report to the information upon which you rely to demonstrate the connection, and your opinion as to the nature and severity of the symptoms, the manner in which the symptoms are connected to the conduct and the extent of the connection.
3. If there is no such realistic connection, please include in your report in any event an opinion as to the nature and severity of the convicted person's symptoms and the effect of any condition on the convicted person's mental capacity at the time of offending and at the time of your report.
4. Whether or not there is any realistic connection between symptoms at the time and the offending conduct, please also include in your report your opinion as to whether the nature of the convicted person's condition is such that:
 - a. a sentence of imprisonment or detention would weigh more heavily on the convicted person than a person in normal health (and if so, in what way); and
 - b. there is a serious risk that a sentence of imprisonment or detention would have a significant adverse effect on the convicted person's mental health.

⁶ An expert's opinion is likely to carry more weight if it is clear that the expert understands the difference between imprisonment and detention and distinguishes between the two.