



# **DIRECTOR OF MILITARY PROSECUTIONS**

*Report for the period  
01 January to 31 December 2022*

# **Director of Military Prosecutions**

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01 January to 31 December 2022*

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Military Prosecutions**  
Department of Defence  
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Canberra BC ACT 2610

**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 2022.

Yours sincerely

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

**IS Henderson**  
Air Commodore  
Director of Military Prosecutions  
Australian Defence Force

17 May 2023

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## **DIRECTOR OF MILITARY PROSECUTIONS**

### **REPORT FOR THE PERIOD 01 JANUARY TO 31 DECEMBER 2022**

#### **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 2022.

#### **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.<sup>1</sup>
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.<sup>2</sup>
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.

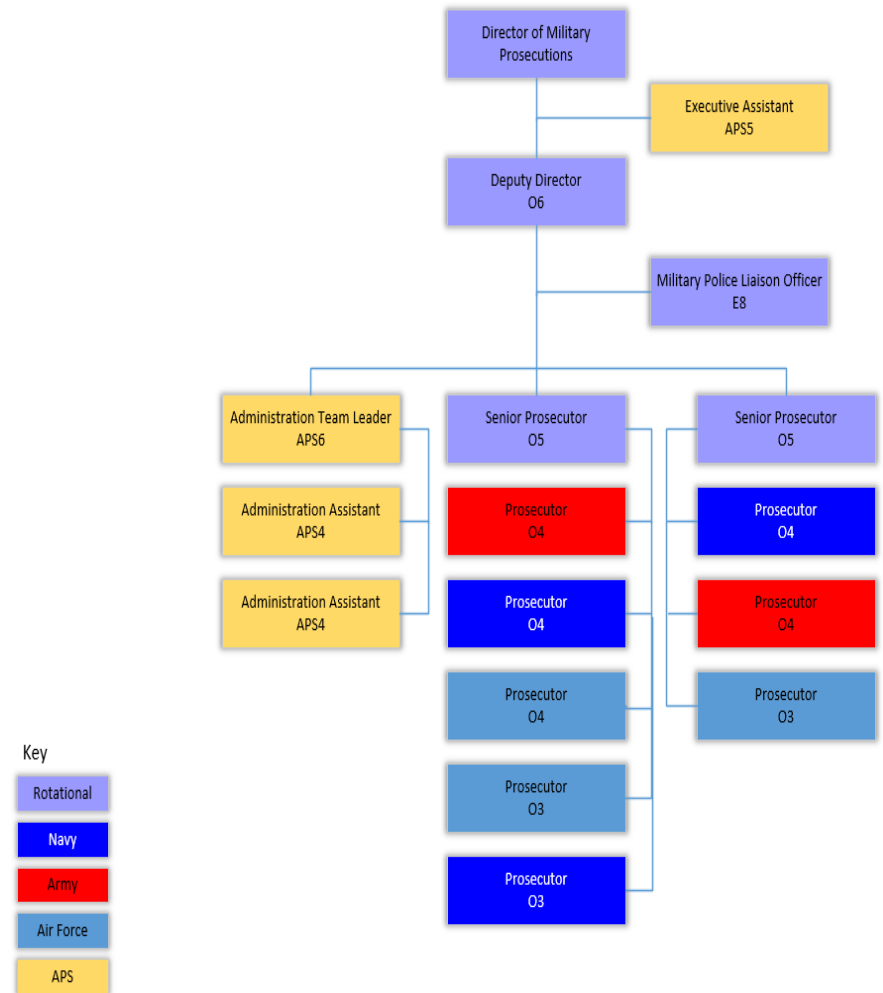
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<sup>1</sup> DFDA, s. 188GA.

<sup>2</sup> DFDA, s. 188GG.

**Office Structure**

7. The structure of the permanent staff in the Office of the DMP (ODMP) during the reporting period was:



8. 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.

9. The permanent staff of the office relocated from 13 London Circuit, Civic ACT to the Brindabella Business Park precinct, ACT in November 2022. The new office premises are fit for purpose and I anticipate the office being located at the new premises for the foreseeable future.

### **Reserve Force**

10. As noted in the 2021 Annual Report,<sup>3</sup> during the reporting period 13 reserve legal officers were on the 'ODMP Reserve Legal Officer panel'. As well as providing direct support to ODMP, on various occasions these reserve legal officers were made available for discrete tasks or temporary duty at the request of other parts of Defence.

11. While possible under the new reserve legal officer model, in the reporting period I had no occasion to call on support from reserve legal officers outside of the ODMP reserve legal officer panel.

### **PROSECUTION POLICY**

12. The DMP Prosecution Policy I signed on 23 December 2021 remained in force during the reporting period. A copy of the policy is available online at:

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

### **UNDERTAKINGS, DIRECTIONS AND GUIDELINES**

13. 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

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<sup>3</sup> DMP Annual Report 2021, [11].

guidelines given in relation to the prosecution of Service offences to investigating officers or prosecutors pursuant to DFDA, s. 188GE.

## **TRAINING**

14. The nature of the work at ODMP means that my staff will regularly engage with people who have experienced trauma. As foreshadowed in the 2021 Annual Report,<sup>4</sup> ODMP staff, along with two staff who were due to join ODMP later in 2022 and early in 2023, and a number of other invited Defence personnel attended a day's training provided by the Blue Knot Foundation on trauma-informed practice.

15. 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**

16. 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).

17. There was one jurisdictional request made under DFDA, s. 63 in the reporting period and in that matter consent for prosecution under the DFDA was given. Prosecution of that matter has carried over into 2023.

18. The MOU contemplates that representatives from the CDPP and ODMP conduct regular liaison meetings, not less frequently than once a year. On 01 November 2022, I met, via MS

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<sup>4</sup> DMP Annual Report 2021, [17].

Teams, with Mrs Roberta Devereaux, Acting Deputy Director Fraud and Specialist Agencies.

### **Australian Capital Territory Director of Public Prosecutions**

19. 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.

20. In the reporting period, I maintained contact with Mr Shane Drumgold SC, along with senior staff from his office (as did my own prosecutors) at various training opportunities.

### **SIGNIFICANT ISSUES**

#### **Legislative Reforms**

21. As the Judge Advocate General (JAG) reports on the operation of the DFDA and associated legislation in the JAG's annual report,<sup>5</sup> I limit myself to noting matters that directly relate to the prosecution function.

22. As foreshadowed in the 2021 Annual Report,<sup>6</sup> the *Defence Legislation Amendment (Discipline Reform) Act 2021* commenced on 13 December 2022. 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 based on, the recipient's membership of, or service in or in connection with, the Defence Force).

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<sup>5</sup> DFDA, s. 196A.

<sup>6</sup> DMP Annual Report 2021, [25]. Note error in forecast commencement date.

## **Appeals and other superior court proceedings**

23. 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 limit myself to noting matters that directly relate to the prosecution function. There were no such appellate or superior court decisions in 2022.

## **MILITARY JUSTICE PROCEEDINGS**

24. In addition to 31 matters carried over from 2021, in 2022 ODMP received:

- a. 93 briefs of evidence referred by the Joint Military Police Unit;
- b. 23 referrals by a summary authority; and
- c. 2 election by accused from the summary level.

25. The 149 matters with ODMP in 2022 were dealt with as follows:

- a. 54 were subject of a direction that there be no prosecution under the DFDA;
- b. 9 were referred for trial by a summary authority;
- c. 45 were referred for trial by Defence Force magistrate;
- d. 6 were referred for trial by restricted court martial;
- e. 1 was referred for trial by general court martial; and
- f. 42 were carried over into 2023.<sup>7</sup>

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<sup>7</sup> The number of matters dealt with in 2022 does not equal 149 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'.

26. Annex A shows the number of offences by class and Service that were received by ODMP during the reporting period.<sup>8</sup>

27. There were two appeals to the DFDAT in 2022.

## **FINANCE**

28. 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).

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

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<sup>8</sup> 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**

<b>Abbreviation</b>	<b>Description</b>
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

**ANNEX A TO  
DMP REPORT  
01 JAN TO 31 DEC 22**

**CLASS OF OFFENCE BY SERVICE RECEIVED BY ODMP – 2022**

<b>Class of Offence</b>	<b>NAVY</b>	<b>ARMY</b>	<b>RAAF</b>	<b>CIVILIAN</b>	<b>TOTAL</b>
01 – HOMICIDE AND RELATED OFFENCES					
02 – ACTS INTENDED TO CAUSE INJURY	5	10			15
03 – SEXUAL ASSAULT AND RELATED OFFENCES	21	18	8		47
04 – DANGEROUS OR NEGLIGENT ACTS ENDANGERING PERSONS					
05 – ABDUCTION, HARASSMENT AND OTHER OFFENCES AGAINST THE PERSON	2	4	2	1	9
06 – ROBBERY, EXTORTION AND RELATED OFFENCES					
07 – UNLAWFUL ENTRY WITH INTENT/BURGLARY, BREAK AND ENTER					
08 – THEFT AND RELATED OFFENCES		5			5
09 – FRAUD, DECEPTION AND RELATED OFFENCES	11	21	2		34
10 – ILLICIT DRUG OFFENCES					
11 – PROHIBITED AND REGULATED WEAPONS AND EXPLOSIVES OFFENCES					
12 – PROPERTY DAMAGE AND ENVIRONMENTAL POLLUTION			2		2
13 – PUBLIC ORDER OFFENCES					
14 – TRAFFIC AND VEHICLE REGULATORY OFFENCES					
15 – OFFENCES AGAINST JUSTICE PROCEDURES, GOVERNMENT SECURITY AND GOVERNMENT OPERATIONS					
16 – MISCELLANEOUS CIVILIAN OFFENCES	3	1			4
17 – SPECIFIC MILITARY DISCIPLINE OFFENCES	3	8	1		12
<b>Grand Total</b>	<b>45</b>	<b>67</b>	<b>15</b>	<b>1</b>	<b>128</b>