

Chapter 1

Annual reports

Director of Military Prosecutions

1.1 The Director of Military Prosecutions Report for the period 1 January to 31 December 2013 was tabled in the Senate on 14 May 2014. This is the seventh report presented to Parliament by the Director of Military Prosecutions (DMP).

1.2 The inaugural DMP, Brigadier McDade, ended her tenure on 11 July 2013. The new DMP, Brigadier M. A. Griffin AM, was appointed on 5 August 2013 for a period of five years. In the intervening period Group Captain Christopher Ward was acting DMP. In the annual report, Brigadier Griffin took the opportunity to thank Brigadier McDade for her 'hard work and determined efforts in establishing the office as the independent and effective prosecution service that it is.'¹

1.3 The Office of the DMP is a statutory body created under the *Defence Force Discipline Act 1982* (DFDA). The position of the DMP was created by section 188G of the DFDA and commenced on 12 June 2006.² The office holder must be a legal practitioner with not less than five years experience, and be a member of the Permanent Navy, Regular Army or Permanent Air Force, or be a member of the Reserves rendering full-time service, holding a rank not lower than the rank of Commodore, Brigadier or Air Commodore.³

1.4 Under section 188GA of the DFDA, 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 Directors of Public Prosecutions as required by section 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 this Act;
- (d) to represent the service chiefs in proceedings before the Defence Force Discipline Appeal Tribunal; and
- (e) to do anything incidental or conducive to the performance of any of the preceding functions.⁴

1 Director of Military Prosecutions, Annual Report 2013, p. 1.

2 Director of Military Prosecutions, Annual Report 2013, p. 1.

3 Director of Military Prosecutions, Annual Report 2013, p. 1.

4 *Defence Force Discipline Act 1982*, section 188GA(1).

1.5 The primary function of the DMP is to carry on prosecutions for service offences in proceedings before courts martial or Defence Force magistrates.⁵

1.6 Section 196B of the DFDA requires the DMP, as soon as practicable after 31 December each year, to provide the Minister with a report relating to the operations of the DMP.⁶

Personnel

1.7 Brigadier Griffin reported that at the commencement of the reporting period the DMP had established 13 positions for prosecutors, a senior non-commissioned officer performing the duties of a Service Police Investigations Liaison Officer, and seven civilian support staff.⁷

External Associations

1.8 Brigadier Griffin noted that, since 2007, prosecutors from the Office of the DMP have been admitted as members of the Australian Association of Crown Prosecutors (AACP). The Office of the DMP is an organisational member of the International Association of Prosecutors.⁸

Internal (Department of Defence) Liaison

1.9 During the reporting period, Brigadier Griffin provided regular reports to the Chief of the Defence Force and the Service Chiefs. Quarterly reports on the operations and workload of the Office of the DMP were provided to the Minister.⁹

1.10 Brigadier Griffin noted that the Military Justice Coordination Committee (MJCC) has provided an effective forum to initiate amendments to the DFDA. This committee was created in response to the Street/Fisher recommendation that a committee be formed to:

Oversee and coordinate DFDA action items and facilitate future efficiencies across the principal responsible DFDA agencies.¹⁰

1.11 Brigadier Griffin noted that the MJCC continued its work on issues concerning the difficulties with drug offences under DFDA and the need to modernise the investigative provisions of the DFDA.¹¹

5 Defence Force Discipline Act 1982, section 188GA(1).

6 Director of Military Prosecutions, Annual Report 2013, p. 1.

7 Director of Military Prosecutions, Annual Report 2013, p. 2.

8 Director of Military Prosecutions, Annual Report 2013, p. 4.

9 Director of Military Prosecutions, Annual Report 2013, p. 5.

10 Director of Military Prosecutions, Annual Report 2013, p. 5.

11 Director of Military Prosecutions, Annual Report 2013, p. 5.

1.12 During the reporting period, the Office of the DMP continued to support the Defence Police Training Centre in its training of service police in investigations and the management of investigations. Brigadier Griffin recognised the importance of the relationship between Australian Defence Force Investigative Service (ADFIS), service police and the Office of the DMP.¹²

1.13 Brigadier Griffin reported that since his appointment he has consulted widely with commanders across the three services. He considered that these consultations have helped him identify issues that concern command and provided direction for review and reform of the business processes of the Office of the DMP.¹³

Contact with military prosecuting authorities of other armed forces and other organisations

1.14 A prosecutor from the Office of the DMP attended a seminar conducted by the NATO School Oberammergau in co-operation with International Institute of the Higher Studies in Criminal Sciences held in Siracusa, Italy between 24 and 30 November 2013. The aim of the seminar was to provide and understanding of Shari'a law and possible implications in Islamic States.¹⁴

Caseload

1.15 Brigadier Griffin noted that from 1 January 2013 to 31 December 2013, 39 Defence Force Magistrate (DFM), 10 Restricted Courts Martial (RCM) and four General Court Martial (GCM) hearings were held. She also provided the following caseload data for the reporting period:

- 30 matters were not proceeded;
- 33 matters were referred back for summary disposal;
- six matters were referred to civilian Directors of Public Prosecution; and
- as at 31 December 2013, Office of the DMP had 61 open matters.¹⁵

Process

1.16 Brigadier Griffin reported that he has commenced a review of management of files in the office of the DMP to examine the possibility of a more efficient rate of disposal of matters.¹⁶

12 Director of Military Prosecutions, Annual Report 2013, pp. 5–6.

13 Director of Military Prosecutions, Annual Report 2013, p. 6.

14 Director of Military Prosecutions, Annual Report 2013, pp. 6–7.

15 Director of Military Prosecutions, Annual Report 2013, p. 7.

16 Director of Military Prosecutions, Annual Report 2013, p. 8.

Significant cases

1.17 The annual report cited seven significant cases heard during the reporting period, including two cases which have been mentioned in previous reports:

- *Li v Chief of Army* [2013] HCA 49 (27 November 2013): on 8 April 2011, Major Li was convicted by RCM of creating a disturbance on service land. An appeal to the DFDAT was heard on 16 December 2011 which was dismissed on 15 March 2012. Major Li lodged an appeal against the DFDAT decision with the Federal Court of Australia. The Federal Court upheld the decision of the DFDAT. The High Court heard an appeal on 13 October 2013. The conviction was quashed and there is no intention to retry Major Li.¹⁷
- *King v Chief of Army* [2013] DFDAT 3: on 12 December 2012, Captain King, RAN was convicted by a GCM of three counts of obtaining a financial advantage by deception, and four counts of obtaining financial advantage during the period February to August 2011. Captain King filed a notice of appeal against his convictions in the DFDAT. On 28 May 2013 the DFDAT quashed each of the seven convictions recorded against Captain King.¹⁸

Afghanistan—Detainee Management—Allegations of Procedural Misconduct

1.18 Brigadier Griffin noted that the Australian Defence Force Investigative Service (ADFIS) commenced an investigation in January 2011 into allegations that previous members of the Detainee Management Team within the ADF Initial Screening Area in Afghanistan 'did not comply with procedures relating to the management and administrative processing of detainees and in particular the requirement to maintain accurate records of that management and processing'. Following the ADFIS investigation, four members of the previous Detainee Management Team were charged with services offences alleging falsification of service documents about detainees. Three of the trials concerning these matters had been held during the previous reporting period; the fourth and final trial was held between 19 March and 3 April 2013.¹⁹

Investigative provisions of the DFDA

1.19 Brigadier Griffin noted that the previous DMP, Brigadier McDade had highlighted on a number of occasions the need to reform the investigative provisions of the DFDA. Brigadier Griffin was pleased to note that work to reform these provisions has commenced.²⁰

17 Director of Military Prosecutions, Annual Report 2013, pp. 8–9.

18 Director of Military Prosecutions, Annual Report 2013, pp. 10–11.

19 Director of Military Prosecutions, Annual Report 2013, pp. 13–14.

20 Director of Military Prosecutions, Annual Report 2013, p. 14.

Assistance to victims of service offences

1.20 Brigadier Griffin noted that the positive management of victims of service offence continued during the 2013. Since his appointment, Brigadier Griffin also engaged with the Head of the Sexual Misconduct Prevention and Reporting Office.²¹

Table of Offences

1.21 The report included the following table of offences:²²

Class of Offence	NAVY	ARMY	RAAF	TOTAL
02–Acts intended to cause injury	10	14	2	26
03–Sexual assault and related offences	5	6	1	12
04–Dangerous or negligent acts endangering persons	1	1	0	2
05–Abduction, harassment and other offences against the person	1	1	0	2
08–Theft and related offences	0	7	1	8
09–Fraud, deception and related offences	10	17	15	42
10–Illicit drug offences	1	1	0	2
13–Public order offences	0	1	0	1
15–Offences against justice procedures, government security and government operations	0	1	0	1
17–Specific military discipline offences	15	18	2	35
TOTAL	43	67	21	131

21 Director of Military Prosecutions, Annual Report 2012, pp. 14–15.

22 Director of Military Prosecutions, Annual Report 2013, Annex B.

Conclusion

1.22 In conclusion, Brigadier Griffin stated that:

In the short time since my appointment I have endeavoured to liaise with command across the three services both at the senior leadership level and across major ADF establishments and formations. A consistent theme is the concern held by commanders about the delay in the disposal of disciplinary matters coming before superior service tribunals.

...

Reforms to the ADF disciplinary framework in the last decade, in particular the establishment of an independent investigative agency (ADFIS), independent Judge Advocates, Registrar of Military Justice and my own position, have resulted in manifest improvement in the military discipline system. I believe the next challenge is making these independent organisations operate with a higher degree of efficiency to deliver more timely outcomes for everyone involved in the disciplinary process. It is my intention to identify where these efficiencies lie both within ODMP and in the way we operate with other military justice agencies and to minimise delay and strengthen confidence in the system.²³

23 Director of Military Prosecutions, Annual Report 2013, pp. 15–16.

Judge Advocate General

1.23 The Judge Advocate General's (JAG) annual report for the period 1 January 2013 to 31 December 2013 was tabled in the House of Representatives on 27 May 2014 and in the Senate on 17 June 2014. Section 196B of the DFDA requires the JAG, as soon as practicable after 31 December each year, to provide the Minister with a report relating to the operation of the DFDA.²⁴

1.24 The office of the Judge Advocate General (JAG) of the ADF was created by s 179 of the *Defence Force Discipline Act 1982* (DFDA). The current JAG, Major General the Hon Justice RRS Tracey, RFD, was reappointed as JAG on 10 February 2010 for a term of four years. The current JAG also holds the appointment of President of the Defence Force Discipline Appeals Tribunal (DFDAT).²⁵

1.25 The functions of the JAG are prescribed by the DFDA. The JAG is responsible for the following functions:

- (a) reporting annually to Parliament on the operation of the DFDA, the Regulations, the Rules of Procedure, and the operation of any other law of the Commonwealth or the ACT insofar as that law relates to the discipline of the Defence Force;
- (b) making Procedural Rules for Service tribunals, being Court Martial and Defence Force Magistrate Rules, and Summary Authority Rules;
- (c) nominating the judge advocate for a court martial and Defence Force magistrates;
- (d) nominating to a Service Chief officers to be members of the judge advocate's panel;
- (e) appointing Defence Force magistrates from officers appointed as members of the judge advocate panel;
- (f) nominating to a Service Chief legal officers for the purposes of DFDA s 154(1)(a); and
- (g) if requested, providing a final and binding legal report in connection with the internal review of proceedings before Service tribunals.²⁶

24 Judge Advocate General Annual Report, 2013, p. 1.

25 Judge Advocate General Annual Report, 2013, pp. 1–2.

26 Judge Advocate General Annual Report, 2013, pp. 2–3.

Operation of the Superior Military Tribunals

1.26 The JAG noted that during the reporting period, trials by court martial and DFM continued in accordance with the *Military Justice (Interim Measures) Act (No 1) 2009*, as amended by the *Military Justice (Interim Measures) Amendment Act 2011*.²⁷

Appeals to the Defence Force Discipline Appeal Tribunal

1.27 During the reporting period, there were five appeals to the Defence Force Discipline Appeal Tribunal (DFDAT) in connection with convictions recorded by courts martial and DFM. These were:

- (a) *Yewsang v Chief of Army* [2013] ADFDAT 1;
- (b) *Ferdinand v Chief of Army* [2013] ADFDAT 2;
- (c) *King v Chief of Navy* [2013] ADFDAT 3;
- (d) *Leith v Chief of Army* [2013] ADFDAT 4; and
- (e) *McLaren v Chief of Navy* [2013] ADFDAT 5.

1.28 The appeals in *King* and *McLaren* were upheld, the appeal in *Yewsang* was partly upheld and the appeals in *Ferdinand* and *Leith* were dismissed.²⁸

Legislation

1.29 In the previous annual report, the JAG noted that the *Military Court of Australia Bill 2012* and the associated *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012* were introduced into the House of Representatives on 21 June 2012.

1.30 The JAG noted that the bills lapsed when the 43rd Parliament was prorogued, resulting in the continuation of the system of trial by court martial and DFM, which was introduced as an interim measure in 2009. While the interim measures are working satisfactorily, the JAG believed that a final decision should be taken as to whether the interim measures will continue indefinitely, or whether a Chapter III court is to be created.²⁹

Other Military Discipline Reform

1.31 The JAG noted that during the reporting period Defence Legal was working on revising and updating the Discipline Law Manual which provides guidance to those involved in summary authority proceedings.

27 Judge Advocate General Annual Report, 2013, pp. 5–6.

28 Judge Advocate General Annual Report, 2013, p. 6.

29 Judge Advocate General Annual Report, 2013, pp. 7–8.

1.32 The JAG noted that the decision to publish trial outcomes for courts martial and DFMs in Service newspapers had commenced. The JAG noted that concerns he raised in the previous report, that in some cases acquittals were not being included in the reporting, had not been completely addressed.³⁰

A greater role for the Judge Advocate if the system of trial by court martial is retained

1.33 The JAG argued for an enhanced role of the Judge Advocate if the system of trial by court martial is to be retained. The JAG, Chief Judge Advocate and the Deputy Judge Advocates General agree that reform is necessary if the traditional arrangements are to continue.³¹

Operation of sub-rule 6(4) of the Court Martial and Defence Force Magistrate Rules

1.34 In the previous annual report, the JAG expressed the view that provisions for making the necessary travel arrangement for witnesses summoned to attend before a court martial or DFM should be modernised. He was pleased to report that amendments have been made to the *Court Martial and Defence Force Magistrate Rules*.³²

Conclusion

1.35 In conclusion, the JAG stated that:

The interim arrangements reinstating the system of trial by court martial and DFM continue to operate satisfactorily. It is, however, desirable that a final decision be taken as to whether the interim measures are to be made permanent or whether, for instance, a Chapter III military court is to be created.³³

1.36 The JAG noted that it is difficult to address necessary reforms as long as the measures in place remain 'interim'.³⁴

**Senator Chris Back
Chair**

30 Judge Advocate General Annual Report, 2013, pp. 9–10.

31 Judge Advocate General Annual Report, 2013, pp. 11–15.

32 Judge Advocate General Annual Report, 2013, p. 16.

33 Judge Advocate General Annual Report, 2013, p. 20.

34 Judge Advocate General Annual Report, 2013, p. 20.

