

The Senate

Foreign Affairs, Defence and Trade
Legislation Committee

Annual reports (No. 2 of 2014)

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Preface

Terms of reference

1. The committee is responsible for examining annual reports of departments and agencies within two portfolios: Defence (including the Department of Veterans' Affairs), and Foreign Affairs and Trade.

2. Under Standing Order 25(20), the committee is required to report on annual reports tabled by 31 October each year by the tenth sitting day of the following year, and on reports tabled by 30 April each year by the tenth sitting day after 30 June of that year. This report also examines annual reports that were tabled after 30 April 2014.

3. The standing order states:

Annual reports of departments and agencies shall stand referred to the committees in accordance with an allocation of departments and agencies in a resolution of the Senate. Each committee shall:

- a) Examine each annual report referred to it and report to the Senate whether the report is apparently satisfactory;
- b) Consider in more detail, and report to the Senate on, each annual report which is not apparently satisfactory, and on the other annual reports which it selects for more detailed consideration;
- c) Investigate and report to the Senate on any lateness in the presentation of annual reports;
- d) In considering an annual report, take into account any relevant remarks about the report made in debate in the Senate;
- e) If the committee so determines, consider annual reports of departments and budget-related agencies in conjunction with examination of estimates;
- f) Report on annual reports tabled by 31 October each year by the tenth sitting day of the following year, and on annual reports tabled by 30 April each year by the tenth sitting day after 30 June of that year;
- g) Draw to the attention of the Senate any significant matters relating to the operations and performance of the bodies furnishing the annual reports; and
- h) Report to the Senate each year whether there are any bodies which do not present annual reports to the Senate and which should present such reports.

Role of annual reports

4. Annual reports place a great deal of information about government departments and agencies on the public record. Accordingly, the tabling of annual reports continues to be an important element of accountability to Parliament and more broadly to the Australian people. The information provided in annual reports assists Parliament in the effective examination of the performance of departments and agencies and the administration of government programs. Indeed, as noted in the *Requirements for annual reports*:

Annual reports serve to inform the Parliament (through the responsible Minister), other stakeholders, educational and research institutions, the media and the general public about the performance of departments in relation to services provided. Annual reports are a key reference document and a document for internal management. They form part of the historical record.

...

Annual reports and Portfolio Budget Statements (PB Statements) are the principal formal accountability mechanisms between government and departments and from departments through (or on behalf of) government to the Parliament.¹

Assessment of annual reports

5. The committee examines annual reports to determine whether they are timely and 'apparently satisfactory' and whether they comply with the relevant requirements for the preparation of annual reports of departments and authorities.² The requirements are set down in the following instruments:

- for portfolio departments and bodies prescribed under the FMA Act: *Public Service Act 1999*, subsections 63(2) and 70(2), and the *Requirements for annual reports for departments, executive agencies and FMA Act bodies*, Department of Prime Minister and Cabinet, 24 June 2013;
- for Commonwealth authorities and companies: the *Commonwealth Authorities and Companies Act 1997* (CAC Act); Commonwealth authorities and companies reporting under the CAC Act are required to comply with the *Commonwealth Authorities (Annual Reporting) Orders 2011* and the *Commonwealth Companies (Annual Reporting) Orders 2011*, respectively;
- and for non-statutory bodies: the guidelines are contained in the government response to the report of the Senate Standing Committee on Finance and

¹ *Requirements for annual reports for departments, executive agencies and FMA Act bodies*, Department of the Prime Minister and Cabinet, 24 June 2013, p. 3.
www.dpmc.gov.au/guidelines/index.cfm

² Refer to Appendix 1 for a table of the reports referred to the committee for scrutiny.

Government Operations on Non-statutory Bodies, *Senate Hansard*, 8 December 1987, vol s124, pp. 2643–45 (requirements were modified in 1987).

6. For FMA Act bodies, significant amendments in the Requirements for Annual Reports for the 2012–13 period relate to:

- **Spatial reporting**—a new requirement has been added for selected portfolio agencies to report on expenditure in relation to the Spatial Reporting Framework.³

7. For Commonwealth authorities and companies, the annual reports for the 2011–12 financial year were the first annual reports to be prepared under the new orders with the exception of clauses dealing with related entity transactions, which apply to annual reports for each financial year ending on or after 30 June 2013.

Annual reports considered

8. The annual reports of the following organisations have been examined by the committee:

Defence portfolio

Director of Military Prosecutions

Judge Advocate General

General comments on the annual reports

Timeliness in tabling reports

9. Under Senate Standing Order 25(20)(c), the committee must report to the Senate any lateness in the presentation of annual reports.

10. In accordance with the *Requirements for Annual Reports* published in June 2012, agencies are required to present:

A copy of the annual report...to each House of Parliament on or before 31 October in the year in which the report is given. If Senate Supplementary Budget Estimates hearings are scheduled to occur prior to 31 October, it is best practice for annual reports to be tabled prior to those hearings.⁴

11. The committee found that the reports were presented within a reasonable timeframe. A table detailing the dates relating to the timeliness of presentation is at Appendix 1.

3 The committee notes that this requirement was not applicable to any of the FMA Act bodies under its portfolio coverage.

4 *Requirements for annual reports for departments, executive agencies and FMA Act bodies*, Department of Prime Minister and Cabinet, 24 June 2013, Part 1, section 4.

Matters of significance

12. In accordance with Senate Standing Order 25, the committee is to note any significant matters relating to the operations and performance of the bodies presenting their annual reports. The committee found no matters of significance relating to the operations and performance of the bodies presenting their reports.

Comments made in the Senate

13. The committee is obliged, under Senate Standing Order 25(20)(d), to consider any remarks made about these reports in the Senate. There were no comments in the Senate on any of these reports.

Bodies not presenting annual reports to the Senate

14. The committee is required to report to the Senate each year on whether there are any bodies that do not present annual reports to the Senate and which should present such reports. The committee is satisfied that there are no bodies within these portfolios that did not meet their reporting requirements to the Senate.

Standard of reports

15. The committee found all reports to be generally of a high standard. They effectively described the function, activities and financial positions of the various departments and agencies. The committee therefore found all of the annual reports to be 'apparently satisfactory'.

Conclusion

16. The committee found that the reports submitted by the Director of Military Prosecutions and the Judge Advocate General were of a high standard. The following chapter provides a brief overview of some of the matters that arose during the reporting period between 1 January 2013 and 31 December 2013.

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.

Appendix 1

**Compliance tabled for the annual reports tabled during
the period 1 November 2013 to 30 April 2014 and referred
to the committee**

Department/agency	Enabling legislation and timeliness	Date on letter of transmittal	@ Date report submitted to minister (if known) % Date report received by minister (if known)	* Date report presented to President # Date tabled in the Senate ^ Date tabled in H/Representatives
Director of Military Prosecutions	<i>Defence Force Discipline Act 1982</i> , section 196B. As soon as practicable after 31 December each year.	7 Mar 2014	@ 11 Mar 2014 % 11 Mar 2014	# 14 May 2014 ^ 14 May 2014
Judge Advocate General	<i>Defence Force Discipline Act 1982</i> , section 196A(1). As soon as practicable after 31 December each year. JAG reports for the period 1 January to 31 December each year.	8 Apr 2014	@ 22 Apr 2014 % 22 Apr 2014	# 17 June 2014 ^ 27 May 2014