

The Senate

Foreign Affairs, Defence and Trade
Legislation Committee

Annual reports (No. 2 of 2012)

September 2012

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ISBN 978-1-74229-684-5

Printed by the Senate Printing Unit, Parliament House, Canberra.

Membership of the Committee

Core Members

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Senator Alan Eggleston, LP, WA (Deputy Chair)

Senator Mark Bishop, ALP, WA

Senator David Fawcett, LP, SA

Senator Scott Ludlam, AG, WA

Senator Anne McEwen, ALP, SA

Secretariat

Dr Kathleen Dermody, Secretary

Miss Jedidiah Reardon, Senior Research Officer

Ms Penny Bear, Research Officer

Ms Jo-Anne Holmes, Administrative Officer

Senate Foreign Affairs, Defence and Trade Committee

Department of the Senate

PO Box 6100

Parliament House

Canberra ACT 2600

Australia

Phone: + 61 2 6277 3535

Fax: + 61 2 6277 5818

Email: fadt.sen@aph.gov.au

Internet: http://aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/index.htm

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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.

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. 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 annual reports are examined by the committee to determine whether they are timely and 'apparently satisfactory'.² The committee considers whether the reports comply with the relevant requirements for the preparation of annual reports of departments and authorities.

6. The requirements are set down in the following instruments:

- for portfolio departments: *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, 23 June 2010;
- for Commonwealth authorities and companies: the *Commonwealth Authorities and Companies Act 1997*; in particular, the *Commonwealth Authorities and Companies (Report of Operations) Orders 2002*; and

1 *Requirements for annual reports for departments, executive agencies and FMA Act bodies*, Department of Prime Minister and Cabinet, 8 July 2011, p. 3.
http://www.dpmc.gov.au/guidelines/docs/annual_report_requirements_2010-11.pdf (accessed 4 September 2012). It should be noted that the Annual Report Requirements were updated on 28 June 2012. The new guidelines will be used in the committee's next report as they apply to annual reports for the year ending 30 June 2012.

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

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- for non-statutory bodies: the guidelines are contained in the government response to the report of the Senate Standing Committee on Finance and Government Operations on Non-statutory Bodies, *Senate Hansard*, 8 December 1987, pp. 2643–45 (requirements were modified in 1987).

Annual reports considered

7. 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

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

9. In accordance with the *Requirements for Annual Reports* published in June 2010, 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 Estimates is scheduled to occur prior to 31 October, it is best practice for annual reports to be tabled prior to those hearings.³

10. 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.

Comments made in the Senate

11. 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.

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

3 *Requirements for annual reports for departments, executive agencies and FMA Act bodies*, Department of Prime Minister and Cabinet, 23 June 2010, Part 1, section 4. p. 2.

their annual reports. The committee found no matters of significance relating to the operations and performance of the bodies presenting their reports.

Bodies not presenting annual reports to the Senate

13. 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, which do not meet their reporting requirements to the Senate.

Standard of reports

14. 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

15. 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 2011 and 31 December 2011.

Chapter 1

Annual reports

Director of Military Prosecutions

1.1 The Director of Military Prosecutions Report for 2011 was tabled in the Senate on 21 June 2012. This is the fifth report presented to Parliament by Brigadier L.A. McDade.

1.2 The Office of the Director of Military Prosecutions (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 2006.¹ 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.²

1.3 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;
- (e) to do anything incidental or conducive to the performance of any of the preceding functions.³

1.4 The primary function of the DMP is to carry on prosecutions for service offences in proceedings before courts martial or Defence Force magistrates.⁴

1 Director of Military Prosecutions, Annual Report 2011, p. 1.

2 Director of Military Prosecutions, Annual Report 2011, p. 1.

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

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

Personnel

1.5 Brigadier McDade reported that at the commencement of the reporting period the DMP established 14 positions for prosecutors.⁵

External Associations

1.6 Brigadier McDade noted that, since 2007, prosecutors from the Office of the Director of Military Prosecutions (ODMP) have been admitted as members of the Australian Association of Crown Prosecutors (AACP). As the AACP held its annual conference in Canberra in 2011, most ODMP prosecutors were able to attend, without significant cost. Brigadier McDade noted that attendance at the conference provided junior military prosecutors with the opportunity to mix with senior Crown prosecutors from all Australian jurisdictions.⁶

Internal Liaison: amendments to the DFDA

1.7 Brigadier McDade noted that the Military Justice Coordination Committee (MJCC) has provided an effective forum to initiate amendments to the DFDA.⁷ 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.⁸

1.8 The matters raised by Brigadier McDade included:

- (a) difficulties concerning the framing and extent of drug offences under the DFDA compared to equivalent legislation in other jurisdictions;
- (b) providing input on proposed changes to the investigative provisions of the DFDA to update and improve those provisions; and
- (c) advancing matters previously raised including the implementation of global punishments.

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

On 3 November 2011, Brigadier McDade met with the Canadian Director of Military Prosecutions, Captain John Maguire, Royal Canadian Navy. Brigadier McDade noted similar experiences of the Canadian DMP, especially in relation to the interactions with command with respect to difficult prosecutions. Of particular interest, Brigadier

5 Director of Military Prosecutions, Annual Report 2011, p. 2.

6 Director of Military Prosecutions, Annual Report 2011, p. 3.

7 Director of Military Prosecutions, Annual Report 2011, p. 4.

8 Director of Military Prosecutions, Annual Report 2011, p. 4.

McDade mentioned the Canadian DMP's ability to appeal decisions on matters of law and in relation to sentence.⁹

Caseload

1.9 Brigadier McDade noted that from 1 January 2011–31 December 2011, 38 Defence Force Magistrate (DFM), 14 Restricted Courts Martial (RCM) and five General Court Martial (GCM) hearings were held. She also provided the following caseload data for the reporting period:

- (a) 36 matters were not proceeded;
- (b) 42 matters were referred back for summary disposal;
- (c) 7 matters were referred to civilian Directors of Public Prosecution; and
- (d) as at 31 December 2011, ODMP had 47 open matters.¹⁰

Significant cases

1.10 The Annual Report cited eight significant cases heard during the reporting period:¹¹

- (a) *Davis v Chief of Army* [2011] ADFDAT 1: an appeal to the Defence Force Discipline Appeals Tribunal (DFDAT) was heard on 29 November 2010 which was dismissed by the tribunal on 22 February 2011.
- (b) *Green v Chief of Army* [2011] ADFDAT 2: an appeal to the DFDAT was dismissed on 22 June 2011.
- (c) *Low v Chief of Navy* [2011] ADFDAT 3: an appeal in relation to a conviction by a RCM for an act of indecency. The appeal was dismissed and the conviction upheld.
- (d) *Haskins v the Commonwealth* [2011] HCA 28 and *Nicholas v the Commonwealth* [2011] HCA 29: on 26 August 2009, the High Court declared that the provisions of Division 3, Part VII of the DFDA, were invalid. The provisions included sections establishing the Australian Military Court (AMC). In response to the judgement, and in order to provide continuity of the discipline system, the Parliament enacted the *Military Justice (Interim Measures) Act (No 1) 2009* and *Military Justice (Interim Measures) Act (No 2) 2009*. *Haskins v the Commonwealth* and *Nicholas v the Commonwealth* were heard together and the court held that the legislation was a valid law of the Commonwealth.

9 Director of Military Prosecutions, Annual Report 2011, pp. 5–6.

10 Director of Military Prosecutions, Annual Report 2011, pp. 6–7.

11 Director of Military Prosecutions, Annual Report 2011, pp. 7–13.

- (e) *Li v Chief of Army* [2012] ADFDAT 1: 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.
- (f) General Court Martial Trial of Able Seaman Steward Adrian Mill: at trial by GCM on 5 December 2011, Able Seaman Mill pleaded guilty and was convicted of two counts of 'culpable driving causing grievous bodily harm'. Able Seaman Mill was sentenced to be dismissed from the Defence Force and sentenced to 18 months imprisonment, 15 months of which were suspended.
- (g) General Court Martial Trial of Lieutenant Commander Alan John Jones: at trial by GCM in December 2011, Lieutenant Commander Jones was found guilty and convicted of seven counts of 'indecent conduct upon an Able Seaman without her consent' and one count of 'attempting to destroy service property'. Lieutenant Commander Jones was reduced in rank to Lieutenant, dismissed from the Defence Force and sentenced to 18 months imprisonment, 6 months of which were suspended (amongst other punishments). An appeal to DFDAT in relation to the 'indecent offences' was heard in March 2012 and the Tribunal has reserved its decision.
- (h) General Court Martial Trial of Sailor W: before a GCM on 31 October 2011, Sailor W was acquitted of one charge of sexual intercourse without consent. In defence to the charge, the sailor raised 'a diagnosis of "sexsomnia" to negative the element of involuntariness'.¹²

Civilian casualty incident in Afghanistan

1.11 In the previous annual report, Brigadier McDade noted that three members of the ADF were charged with service offences following a civilian casualty incident in 2009. The matters were referred to the Registrar of Military Justice for trial by GCM. In the current report, Brigadier McDade noted that as the DMP:

...it is my responsibility to determine charges to be presented before service tribunals and to prosecute without fear or favour and independent of any interference.¹³

12 Director of Military Prosecutions, Annual Report 2011, p. 13.

13 Director of Military Prosecutions, Annual Report 2011, p. 13.

1.12 Brigadier McDade explained:

The charges arose from the conduct of Australian soldiers during a night time clearance of an Afghan compound which resulted in the death of a number of civilians.

...

Taking the incident in its entirety, I formed the view that a prima facie case of manslaughter by criminal negligence and dangerous conduct existed in respect to two soldiers.¹⁴

1.13 However, at a pre-trial hearing on 20 May 2011, the Chief Judge Advocate (CJA), ruled in what Brigadier McDade considers to be the creation of new law, that 'Australian soldiers have no duty of care at law to protected persons or friendly forces during armed conflict'. The charges were dismissed. While Brigadier McDade was not entirely convinced that the CJA's decision was correct in law, she noted that the DMP has no inherent right of appeal within the military justice system at any stage of the trial process.

1.14 Subsequently, further evidence was provided by defence counsel and Brigadier McDade exercised her discretion to discontinue the prosecution.¹⁵

Investigative provisions of the DFDA

1.15 Brigadier McDade observed that the investigative provisions of the DFDA are in need of review and improvement. As an example, she cited s 101Q, which provides for medical examinations to be conducted and medical specimens to be taken from Defence members for the purpose of investigating service offences. She recorded that the provision has not been significantly updated since 1982 and as such does not take account of developments in comparable civil legislation since that time. The result is that the provision does not contain any requirement for consent to be 'informed consent'.¹⁶

Information communication technology (ICT) function

1.16 Brigadier McDade reports that the ODMP has experienced a significant deficiency in ICT function during the reporting period, which may lead to the diminution of the capability of the ODMP to fulfil its function in a timely manner.¹⁷

14 Director of Military Prosecutions, Annual Report 2011, p. 13.

15 Director of Military Prosecutions, Annual Report 2011, pp. 13–14.

16 Director of Military Prosecutions, Annual Report 2011, pp. 15–16.

17 Director of Military Prosecutions, Annual Report 2011, p. 16.

Table of Offences

1.17 The report included the following table of offences:

Class of Offence	RAN	ARMY	RAAF	TOTAL
Acts intended to cause injury	4	12	2	18
Sexual assault and related offences	8	4	1	13
Dangerous or negligent acts endangering persons	0	4	0	4
Theft and related offences	1	4	2	7
Fraud, deception and related offences	9	18	9	36
Illicit drug offences	8	3	0	11
Property damage and environmental pollution	0	0	1	1
Traffic and vehicle regulatory offences	0	1	0	1
Offences against justice procedures, government security and government operations	1	0	0	1
Specific military discipline offences	11	24	3	38
TOTAL	42	70	18	130

Conclusion

1.18 In conclusion, Brigadier McDade stated that:

The period of consolidation following the re-introduction of the Defence Force magistrate and court martial system has continued during the reporting period. The priority remains to conduct efficient and effective prosecution of matters with a focus on timeliness.

Brigadier McDade stated that she looked forward to 'continuing this period of consolidation as the office matures under the current legislative framework'.¹⁸

18 Director of Military Prosecutions, Annual Report 2011, p. 17.

Judge Advocate General

1.19 The Judge Advocate General annual report for the period 1 January 2011 to 31 December 2011 was tabled in the Senate on 21 June 2012.

1.20 The office of the Judge Advocate General (JAG) of the Australian Defence Force was created by s 179 of the *Defence Force Discipline Act 1982* (DFDA). The current JAG, Major General the Hon Justice R R S Tracey, RFD, was reappointed as JAG on and from 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).

1.21 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;¹⁹
- (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 martial²⁰ and Defence Force magistrates;²¹
- (d) nominating to a Service Chief officers to be members of the judge advocate's panel;²²
- (e) appointing Defence Force magistrates from officers appointed as members of the judge advocate panel;²³
- (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.

Operation of the Superior Military Tribunals

1.22 The JAG noted that the *Military Justice (Interim Measures) Act (No 1) 2009* reinstated the system of trials by court martial and Defence Force Magistrate (DFM) that had existed in 2006, prior to the passage of the *Defence Legislation Amendment Act 2006* which purported to create the former Australian Military Court (AMC). The

19 DFDA s 196A.

20 DFDA s 129B.

21 DFDA s 129C.

22 DFDA s 196.

23 DFDA s 127.

JAG raised concerns that the explanatory memorandum to the bill indicated that this is 'an interim measure until the Government can legislate for a Chapter III court'.²⁴

1.23 The JAG believed that it is undesirable for 'interim' arrangements to go indefinitely. In particular, there are a number of procedural issues that should be addressed if the system of court martial and DFM trials continues for a significant period of time.²⁵

Appeals to the Defence Force Discipline Appeal Tribunal

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

- (a) *Green v Chief of Army* [2011] ADFDAT 2;
- (b) *Low v Chief of Navy* [2011] ADFDAT 3; and
- (c) *Li v Chief of Army* [2011] ADFDAT 4.

1.25 The appeals in *Green* and *Low* were dismissed, and judgement for *Li* was not handed down during the reporting period.²⁶

Legislation

1.26 The JAG noted that the Military Court of Australia Bill and the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill were scheduled to be introduced during the Winter 2012 sittings of Parliament.²⁷ If enacted, the bills will establish the Military Court of Australia.²⁸

High Court Challenge

1.27 During the reporting period, the *Military Justice (Interim Measures) Act (No 2) 2009* was challenged in the High Court. *Haskins v the Commonwealth* and *Nicholas v the Commonwealth* were heard together and the court held that the legislation was a valid law of the Commonwealth.²⁹

Proceedings brought as a result of civilian casualties in Afghanistan

1.28 The JAG recorded that during the reporting period a GCM was convened to try charges of manslaughter and dangerous conduct against two soldiers allegedly

24 Judge Advocate General Annual Report, 2011, p. 5.

25 Judge Advocate General Annual Report, 2011, p. 5.

26 Judge Advocate General Annual Report, 2011, p. 6.

27 The bills were introduced on 21 June 2012, and on 28 June 2012 the bills were referred to the Legal and Constitutional Affairs Legislation Committee for inquiry and report on 9 October 2012.

28 Judge Advocate General Annual Report, 2011, p. 7.

29 Judge Advocate General Annual Report, 2011, p. 7.

responsible for civilian casualties in Afghanistan in 2009. The accused men entered certain objections to the charges prior to the court martial being assembled and sworn in. The Chief Judge Advocate ruled that

In the absence of a duty of care imposed by statute, mere negligence, even if established, will not suffice to establish criminal culpability in the case of actual engagement in armed conflict.³⁰

The intended operation of Defence Force Discipline Act 1982 s 36, dangerous conduct

1.29 In the JAG's view, the ruling raised a number of issues with the drafting and intended application of DFDA s 36, dangerous conduct. These included:

- the intended scope of sub-section 36(3), dangerous conduct by negligence;
- the intended operation of sub-sections 36(1)(e), (2)(e), and (3)(e), the exclusion applicable to enemy persons killed or injured in the course of duty; and
- the way in which s 36 as whole is intended to operate in the case of death or grievous bodily harm occasioned to civilians or enemy personnel in regards to the specific *Offences Against Humanity and Related Offences* created by the *Criminal Code Act 1995* Chapter 8.³¹

The power of the president at a court martial to make protective orders and non-publication orders

1.30 The JAG noted that the consideration of the case resulting from the civilian casualties in Afghanistan also raised concerns about the role of the president in the making of protective orders under DFDA s 140, public hearings, and non-publication orders under DFDA s 148, that record of proceedings be kept. The JAG believed that discretions under DFDA s 140 and s 148 should be vested in the Judge Advocate, rather than the president of the court martial, which is currently the case. The JAG suggested that the existing arrangements should be reviewed as a matter of urgency.³²

Pre-trial applications or objections

1.31 The JAG believed that it would be desirable if s 141 of the DFDA were amended to allow pre-trial applications by the prosecution. Currently, s 141 expressly provides for pre-trial applications by the accused, while there is no provision for pre-trial applications by the prosecution.

30 Judge Advocate General Annual Report, 2011, p. 8.

31 Judge Advocate General Annual Report, 2011, p. 8.

32 Judge Advocate General Annual Report, 2011, pp. 10–11.

The accused's attendance at all hearings

1.32 In his report, the JAG stated that DFDA s 139 provides that '...a hearing before a service tribunal shall be held in the presence of an accused person'. The JAG argued that provision should be amended to dispense with the requirement that the accused be present at purely procedural hearings, such as adjournment applications.³³

Conclusion

1.33 In conclusion, the JAG stated that:

The interim arrangements reinstating the system of trial by court martial and DFM continue to operate satisfactorily, but it is undesirable for 'interim' arrangements to continue indefinitely.

He was pleased to note that the Military Court of Australia Bill and the Military Court of Australia Transitional Provisions and Consequential Amendments) Bill were scheduled for introduction into the Parliament during the Winter 2012 sittings.³⁴

Senator the Hon. Ursula Stephens
Chair

33 Judge Advocate General Annual Report, 2011, p. 9.

34 Judge Advocate General Annual Report, 2011, p. 15.

Appendix 1

List of annual reports tabled during the period 1 November 2011 to 30 April 2012 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.	24 Apr 2012		# 21 Jun 2012
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.	12 Apr 2012		# 21 Jun 2012