

## Military Justice

### Overview

- 2.1 The 'generic term *Military Justice* Procedures usefully describes the broad concepts of discipline and inquiry which are integral to the command and administration of the Australian Defence Force'.<sup>1</sup> Whilst in some respects the two systems of military inquiry and military discipline are related, and both inquiry and disciplinary action may result from a single incident, their purposes are quite different.<sup>2</sup>
- 2.2 Military inquiries are used to investigate a wide variety of matters related to Defence and are essentially fact finding in focus and intent. They are not employed to investigate criminal or disciplinary matters and are not primarily directed at fault attribution. At all levels, inquiries are conducted to determine facts as a basis for further action, although it is possible that the facts unearthed by an investigation may point to the need to undertake separate disciplinary action.<sup>3</sup>
- 2.3 In contrast, the primary objective of the military discipline system is to assist in the maintenance of discipline in the Defence Force. The nature of military service demands teamwork, mutual support and personal reliability underpinned by both individual and collective discipline. Compliance with orders and authority, sometimes in situations in which life or death rests upon that compliance,<sup>4</sup> is essential to the effectiveness of the ADF. The DFDA provides a formal discipline system for the

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1 Department of Defence, Submission, p. 542.

2 Department of Defence, Private Briefing, Transcript, p. 3.

3 *ibid*, p. 4.

4 *ibid*, p. 5.

investigation of service offences, trial of offenders by service tribunals and the punitive action against guilty parties.<sup>5</sup>

- 2.4 Although not formally a measure under the DFDA,<sup>6</sup> administrative action provides the ADF with an alternative avenue to institute punitive measures against individuals. Such action can range from removal of a security clearance to discharge from the service. Administrative 'action is not generally an alternative to disciplinary or criminal action, except in some matters involving professional failure.'<sup>7</sup>
- 2.5 This chapter provides a broad overview of these avenues for investigative and punitive action within the ADF. A diagrammatical representation of the military justice system is at Appendices F, G and H.

## Defence Inquiries

### Overview

- 2.6 A military inquiry may be used to inquire into any matter affecting the Defence Force.<sup>8</sup> The purpose of a military inquiry is to investigate the facts associated with a particular incident and inform the decision maker of the findings and recommendations. Such inquiries are not primarily focused on the attribution of fault, rather they provide an internal management tool to allow corrective action to be taken by the decision maker.<sup>9</sup> Military inquiries are not empowered to implement findings and recommendations stemming from the inquiry; this remains a command decision.<sup>10</sup>
- 2.7 A military inquiry is conducted without regard to legal forms, is not bound by the rules of evidence and may inform itself of any matter relevant to its inquiry.<sup>11</sup> Such inquiries are not investigations under the DFDA.<sup>12</sup> Indeed, military inquiries conducted under the D(I)R are primarily concerned with determining the facts, and not empowered to

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5 *ibid.*

6 Department of Defence, Submission, p. 1035.

7 *ibid.*, p. 1038.

8 *The Australian Defence Force, Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences, Review of Practices and Procedures. Report of the Commonwealth Defence Force Ombudsman under section 35A of the Ombudsman Act 1976* Smith, P., *op cit.*, p. 7.

9 Department of Defence, Private Briefing, Transcript, p. 4.

10 *ibid.*, p. 30.

11 *ibid.*, p. 26.

12 *ibid.*, p. 27.

impose punishment.<sup>13</sup> Where allowed for in the Instrument of Appointment, the report of the inquiry may include recommendations regarding subsequent disciplinary investigation. The appointing authority may, after considering the report of the inquiry, decide that a separate investigation under the DFDA is necessary. Such investigations should only be conducted when the appointing authority has reason to suspect that an offence under the DFDA has been committed.<sup>14</sup>

2.8 Any evidence given by a witness before a military inquiry is not admissible in evidence against the witness in any civil, criminal or disciplinary proceedings. This emphasises the fact finding focus of military inquiries and provides a safeguard to the rights of persons who are compelled to give evidence under the D(I)R.<sup>15</sup>

2.9 A military inquiry can be conducted concurrent with an investigation under the DFDA, provided that one does not prejudice the other. Where there is a possibility of prejudice one should be adjourned while the other proceeds.<sup>16</sup> When the first is complete, the adjourned one may be resumed.<sup>17</sup> In practice this rarely occurs.<sup>18</sup>

## Policy

2.10 Military inquiries are provided for under D(I)R which were framed in the aftermath of the sinking of HMAS *Voyager* and came into force on 3 July 1985.<sup>19</sup>

2.11 The central policy document for the implementation of the D(I)R is a Defence Instruction (General) 34-1 *Inquiries into Matters Affecting the Defence Force*,<sup>20</sup> which was last revised on 22 July 1997.<sup>21</sup> This document provides an outline of the legislative framework for the conduct of

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13 *ibid*, p. 30.

14 *ibid*, p. 27.

15 *ibid*, p. 30.

16 There are no rules regarding order or precedence.

17 Department of Defence, Private Briefing, Transcript, p. 27.

18 Where, during the course of a D(I)R inquiry, it becomes clear that a disciplinary or criminal offence has occurred, the inquiry should be suspended and the matter referred to the Appointing Authority. The Appointing Authority has the options of initiating a DFDA investigation, referring the matter to civil police and/or proceeding with the D(I)R inquiry. A D(I)R inquiry and a DFDA investigation should not be conducted concurrently where there is a danger that the DFDA investigation will not be compromised by the inquiry. (See Department of Defence, Submission, p. 1266).

19 D(I)R 2.

20 Defence Instruction (General) 34-1 *Inquiries into Matters Affecting the Defence Force* was first introduced on 22 August 1986.

21 Amendment 34-1

inquiries, advice on the circumstances under which an inquiry should be conducted, advice on the conduct of inquiries by investigating officers, boards and combined boards of inquiry and a summary of the provisions for appointing and appearing before a General Court of Inquiry.

- 2.12 It should be noted that the ADF plan to replace Defence Instruction (General) 34-1 *Inquiries into Matters Affecting the Defence Force*, with ADFP 202 *Administrative Inquiries in the ADF*. The new manual will provide an extensive practical guide to the conduct of administrative inquiries into matters of general command and administration. ADFP 202 is currently in draft.<sup>22</sup>

## Inquiry Objectives

- 2.13 The basic objectives of all inquiries are the same; namely:
- a) to collect, assemble and, in some cases, preserve evidence;
  - b) to gather the best available evidence with the least possible delay;
  - c) to establish facts known to be true and those that may be presumed from the evidence; and,
  - d) as an option, to make recommendations concerning remedial or other action.<sup>23</sup>

## The Inquiry Process

- 2.14 Every military inquiry follows the same basic process. An incident is followed by a decision regarding the level of inquiry to be invoked and then the appointment of personnel to conduct the inquiry. The conduct of the inquiry will adhere to the basic tenets of procedural fairness although the procedure followed will depend on the level of inquiry being pursued. The product of the inquiry will be a report which, depending on the instrument of appointment, may include recommendations for future action. On the basis of the report and any accompanying recommendations, the Appointing Authority will decide on any future action. Such action may include administrative proceedings against individuals or referring the matter for a DFDA investigation.<sup>24</sup>

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22 Department of Defence, Private Briefing, Transcript, pp. 31-32.

23 Department of Defence, Submission, p. 584.

24 Department of Defence, Private Briefing, Transcript, pp. 26-27.

## Levels of Inquiry

- 2.15 There are three formal levels of inquiry that may be implemented under D(I)R:
- a) **General Court of Inquiry** – used to inquire into matters of exceptional gravity which may have major ramifications to the Defence Force;
  - b) **Board of Inquiry (BOI)** – used to inquire into matters of significance to the ADF which do not warrant a General Court of Inquiry; or
  - c) **Investigating Officer** – used for inquiries into other matters.
- 2.16 The Regulations also provide for the Minister or a delegate to appoint a combined board of inquiry for a matter that involves the armed forces of both Australia and another country.<sup>25</sup>
- 2.17 Each level of inquiry has different characteristics and selection of the appropriate type of inquiry is a critical decision in the inquiry process. Occasionally the choice may be governed by the significance of the incident, but, in most cases, commanders face a choice<sup>26</sup> regarding the level of inquiry.
- 2.18 An overview of the types of military inquiry is at Appendix I.

## General Courts of Inquiry

### Overview

- 2.19 Under the D(I)R, there is provision for a General Court of Inquiry to investigate matters that may have major ramifications for the ADF.<sup>27</sup> The convening of a General Court of Inquiry removes the Department of Defence from the investigative process, negating any conflict of interest and ensuring independence in the investigation of a serious matter.
- 2.20 In practice, a General Court of Inquiry would only be appointed to investigate a case of exceptional gravity. Indeed a General Court of Inquiry is only likely to be employed where the circumstances dictate a need for greater independence than would be the case, were the inquiry to be conducted by members of the ADF. In such circumstances it may be argued that other forms of inquiry, such as a Royal Commission or

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25 D(I)R 39.

26 Department of Defence, Submission, p. 585.

27 Department of Defence, Private Briefing, Transcript, p. 27.

Parliamentary Inquiry, may be a more appropriate mechanism for investigation.

- 2.21 The appointment of a General Court of Inquiry is a step of such moment that it would only be taken in exceptional circumstances. Indeed, the option to appoint a General Court of Inquiry has not been taken since its inception under the D(I)R in 1985.<sup>28</sup>

### **Selection and Appointment of Personnel**

- 2.22 A General Court of Inquiry would be convened by the Minister of Defence who would be responsible for the appointment of all members of the Court via an instrument published in the Gazette.<sup>29</sup>

### **Composition**

- 2.23 At least a Judge or other experienced legal practitioner of at least five years standing<sup>30</sup> must be appointed to a General Court of Inquiry. Where more than one person is appointed to the Court the President must be a Judge, or other experienced legal practitioner of at least five years standing. Where a General Court of Inquiry is constituted by one person, the Minister may, in the instrument appointing the Court, or by later instrument published in the Gazette, appoint two or more persons possessing special knowledge or experience to be assessors to assist the Court.<sup>31</sup>

### **Terms of Reference**

- 2.24 The Terms of Reference (TOR) for a General Court of Inquiry are included in the Instrument of Appointment and issued by the Minister of Defence.<sup>32</sup>

### **Hearings in Public**

- 2.25 By its nature, there would likely be substantial public interest in the proceedings of a General Court of Inquiry and all hearings would be public although there are privacy provisions for security and fairness.<sup>33</sup> A General Court of Inquiry may be closed to the public, in part or in full, where the President is satisfied that it is necessary to do so in the interests

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28 Department of Defence, Submission, p. 588.

29 D(I)R 5.

30 D(I)R 6.

31 D(I)R 8.

32 D(I)R 5.

33 D(I)R 11.

of the defence of the Commonwealth or of fairness to a person who the President considers may be affected by the inquiry.<sup>34</sup>

## Witnesses

- 2.26 A General Court of Inquiry is quasi-judicial in nature and all persons affected by the inquiry may be legally represented. The Court can compel appearance and testimony by a civilian or member of the ADF.<sup>35</sup> Evidence is taken on oath or affirmation and while a witness may be excused from answering a question on the basis of prejudice to the defence of the Commonwealth no such excuse provisions exist in regard to self incrimination;<sup>36</sup> in this respect a General Court of Inquiry is more powerful than a court of law.
- 2.27 A statement or disclosure made by a witness to a General Court of Inquiry is not admissible in any DFDA, civil or criminal proceedings against that witness. However such statement or disclosure may be used as evidence by external review agencies, such as the Ombudsman or for prosecution under D(I)R.<sup>37</sup>
- 2.28 Like all other levels of inquiry, the Court is conducted without regard to legal forms, is not bound by the rules of evidence and may inform itself of any matter relevant to its inquiry; it may consider hearsay and opinion. However, disciplinary action resulting from a BOI will require that the disciplinary, criminal, or civil case against an individual be subsequently proven, in the appropriate court, where the rules of evidence then apply.

## Report

- 2.29 On completion a General Court of Inquiry furnishes a report to the Minister of Defence,<sup>38</sup> who takes decisions based on its findings and recommendations. Where an assessor has been appointed to assist a General Court of Inquiry, the assessor is not involved in the preparation of the inquiry report. Rather the assessor conducts an independent examination of the report and may make a written statement regarding the findings, observations or recommendations of the report. Where an assessor makes such a written statement, the statement is passed to the President and accompanies the report when it is submitted to the Minister.<sup>39</sup>

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34 D(I)R 11(2).

35 D(I)R 12.

36 D(I)R 13.

37 *Defence Act 1903*, Section 124(2)(c).

38 D(I)R 20.

39 D(I)R 19.

## Boards of Inquiry

### Overview

- 2.30 A BOI, commissioned by an Appointing Authority, may be used to inquire into matters of significance to the ADF which do not warrant the quasi-judicial approach of a General Court of Inquiry.<sup>40</sup> This level of inquiry is usually employed in circumstances of serious injury, death or substantial loss of Commonwealth property and it provides a means to identify weaknesses in the operational, technical and procedural methods of the ADF.<sup>41</sup>
- 2.31 The primary role of a military BOI is to establish the facts of a particular incident expeditiously and to inform the Appointing Authority, who is then responsible for initiating rectifying action.<sup>42</sup> A BOI is only permitted to make recommendations regarding rectification or punitive action where such recommendations are allowed for in the Instrument of Appointment.<sup>43</sup> However, any action taken as an outcome of the findings of a BOI is under the authority, and at the discretion, of the appointing authority.<sup>44</sup>

### Selection and Appointment of Personnel

- 2.32 Personnel are appointed to a Board of Inquiry by an Appointing Authority. Under current arrangements BOI may be appointed by:
- a) the CDF,
  - b) the CDF and the Secretary together, or
  - c) the Service Chiefs.<sup>45</sup>
- 2.33 The authority to appoint a BOI may be delegated to an officer not below the rank of Lieutenant Colonel (Equivalent).<sup>46</sup> Present practice is to delegate this authority to the command level above that of unit command to ensure that someone superior to a commanding officer holds this authority for the units under command.<sup>47</sup>

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40 Department of Defence, Private Briefing, Transcript, p. 27.

41 Department of Defence, Submission, p. 1031.

42 *ibid*, p. 1028.

43 D(I)R 25.

44 Department of Defence, Private Briefing, Transcript, p. 30.

45 D(I)R 23.

46 D(I)R 24.

47 Department of Defence, Submission, p. 588.



## Composition

- 2.34 At least two people must be appointed to a BOI and the president of the Board must be an officer.<sup>48</sup>

## Terms of Reference

- 2.35 The TOR for a BOI are included in the Instrument of Appointment and issued by the Appointing Authority.<sup>49</sup>
- 2.36 The Instrument of Appointment must specify whether the Board is empowered to make recommendations<sup>50</sup>.

## Hearings in Private

- 2.37 D(I)R<sup>51</sup> stipulate that a BOI is held in private unless directed by the Appointing Authority to conduct all or part of the inquiry in public. The appointing officer may also direct that specified persons or classes of person may be present.<sup>52</sup>
- 2.38 Recent Boards of Inquiry have been held in public with elements of the proceedings taken *in camera* as necessary.

## Witnesses

- 2.39 A BOI is, like a General Court of Inquiry, a powerful investigative instrument. A BOI can compel appearance and testimony by a civilian<sup>53</sup> or member of the ADF.<sup>54</sup> Evidence is not taken on oath or affirmation unless directed by the Appointing Authority<sup>55</sup> and witness excuse provisions are the same as those for Courts of Inquiry; excuse provisions in relation to prejudice to the defence of the Commonwealth but none in regard to self incrimination.<sup>56</sup> However, where a witness has been charged with an offence and that offence has not yet been dealt with by a court, or otherwise disposed of, that witness may decline to answer questions on the basis of self incrimination in regard to the outstanding charge.<sup>57</sup>

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48 D(I)R 26. No rank is specified for the officer appointed president of a BOI.

49 D(I)R 23.

50 It is usual for BOI to be given the opportunity to make recommendations.

51 D(I)R 29.

52 D(I)R 29 (3).

53 Not only civilians working for the Department of Defence.

54 D(I)R 30.

55 D(I)R 31.

56 D(I)R 32.

57 D(I)R 32 (5) (c).

- 2.40 A statement or disclosure made by a witness to a BOI is not admissible in any DFDA, civil or criminal proceedings against that witness.<sup>58</sup> However such statement or disclosure may be used as evidence by external review agencies, such as the Ombudsman or for prosecution under D(I)R.
- 2.41 Like all other levels of inquiry, a BOI is conducted without regard to legal forms, is not bound by the rules of evidence<sup>59</sup> and may inform itself of any matter relevant to its inquiry; it may consider hearsay and opinion. However disciplinary action resulting from a BOI will require that the disciplinary, criminal, or civil case against an individual be subsequently proven, in the appropriate court, where the Rules of Evidence then apply.
- 2.42 Legal representation is not normal for persons affected by the inquiry however, such representation may be approved by the Appointing Authority before the inquiry has commenced or the Board President after the commencement of proceedings.<sup>60</sup>
- 2.43 Where a BOI investigates a personnel matter, the Appointing Authority is required, 'as soon as possible after any decisions flowing from the BOI's report have been made, to provide all witnesses who gave evidence to the BOI with written notification of their status and, subject to [the provisions of the Privacy Act], the outcomes of the inquiry in relation to matters relevant to them'.<sup>61</sup>

### **Evidence Affecting an Officer Senior to the President**

- 2.44 Where, in the course of proceedings, an officer of higher rank than the President of a BOI may be affected by some of the evidence presented during the course of the inquiry proceedings should be suspended.<sup>62</sup>
- 2.45 The Appointing Authority then has the option to install a new President of higher rank, continue with the inquiry or to dissolve the inquiry completely.<sup>63</sup>

### **Report**

- 2.46 On completion a BOI furnishes a report to the Appointing Authority,<sup>64</sup> who takes decisions based on its findings and recommendations.

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58 *Defence Act 1903*, Section 124 (c).

59 Department of Defence, Submission, p. 588.

60 D(I)R 33 (3).

61 Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force*, p. 14.

62 D(I)R 35 (1) and (2).

63 D(I)R 35 (3).

64 D(I)R 36.

- 2.47 The Appointing Authority is responsible to furnish to the superior headquarters, a copy of the report, details of action taken and any associated recommendations for future action.
- 2.48 The superior headquarters is responsible to furnish a report of the outcome of the BOI to the Minister of Defence.

## Combined BOI

- 2.49 D(I)R<sup>65</sup> provide for the Minister or a delegate to appoint a Combined BOI to investigate a matter which involves the armed forces of both Australia and another country.<sup>66</sup>
- 2.50 The conduct of a Combined BOI is the same as that for a BOI except that:
- a) the Board must comprise at least two members with at least one being Australian and one being a member of the armed forces of any country or countries involved;<sup>67</sup>
  - b) there may be more than one President of the Combined BOI;<sup>68</sup> and
  - c) the Instrument of Appointment must specify the participating county or countries.<sup>69</sup>

## Investigating Officers

### Overview

- 2.51 An Investigating Officer may be appointed under D(I)R, by an Appointing Officer, to investigate a minor matter or the facts of a particular incident.<sup>70</sup> An inquiry by an Investigating Officer is a quick, administratively simple and economical method of gathering information.
- 2.52 An Investigating Officer has the same primary role as a military BOI; to establish the facts of a particular incident expeditiously and to inform the Appointing Officer. An Investigating Officer is only permitted to make recommendations regarding rectification or punitive action where such

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65 D(I)R 39.

66 'No Combined BOI has been conducted since the D(I)R came into force on 20 June 1985. Prior to that date single Service legislative provisions provided for the conduct of inquiries. Under the previous legislative framework proceedings akin to a Combined BOI were conducted in respect of the collision between HMAS *Melbourne* and the USS *Frank E. Evans*' (See Department of Defence, Submission, p. 1235).

67 D(I)R 42.

68 D(I)R 43 (2).

69 D(I)R 39 (2) (b).

70 Smith, P., op cit, p. 8.

recommendations are allowed for in the Instrument of Appointment<sup>71</sup> and it is the Appointing Officer who is responsible for any action taken as a result of the investigation.<sup>72</sup>

## Appointment

- 2.53 Under D(I)R Investigating Officers may be appointed, in writing, by a commanding officer or by an officer superior in command.<sup>73</sup> The officer who appoints the Investigating Officer is known as the Appointing Officer.
- 2.54 An Investigating Officer must be an officer, warrant officer or officer of the Australian Public Service higher than Class 3.<sup>74</sup>

## Terms of Reference

- 2.55 The TOR for an Investigating Officer are included in the Instrument of Appointment and issued by the Appointing Officer.
- 2.56 The Instrument of Appointment must specify whether the Investigating Officer is empowered to make recommendations.<sup>75</sup>

## Hearings in Private

- 2.57 D(I)R stipulate that an Investigating Officer shall not conduct an inquiry in public.<sup>76</sup>

## Witnesses

- 2.58 An Investigating Officer can compel appearance and testimony by a member of the ADF<sup>77</sup> but not civilians. Civilians may however appear voluntarily before an Investigating Officer and may refuse to answer any questions.<sup>78</sup>
- 2.59 An Investigating Officer cannot take evidence on oath or affirmation<sup>79</sup> and there is no provision for the legal representation of witnesses. For
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71 Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force*, p. 2.

72 Department of Defence, Private Briefing, Transcript, p. 30.

73 D(I)R 69.

74 D(I)R 69 (2).

75 D(I)R 70.

76 D(I)R 72.

77 Excluding members of the Reserve who are not rendering service.

78 Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force*, p. 3.

79 D(I)R 73.

members of the ADF who are compelled to answer questions excuse provisions exist in relation to what is reasonable in the circumstances of the case. There is no protection against self incrimination at this level of inquiry.<sup>80</sup> A statement or disclosure made by a witness to an Investigating Officer cannot be used in any DFDA proceedings but may be admissible as evidence in civil or criminal proceedings and may be used as evidence by external review agencies, such as the Ombudsman.<sup>81</sup>

2.60 Like all other levels of inquiry, an Investigating Officer is not bound by the rules of evidence<sup>82</sup> and may consider hearsay and opinion. However disciplinary action resulting from an inquiry by an Investigating Officer will require that the disciplinary, criminal, or civil case against an individual be subsequently proven, in the appropriate court, where the rules of evidence then apply.

2.61 Where an Investigating Officer investigates a personnel matter, the Appointing Officer is required, 'as soon as possible after any decisions flowing from the Investigating Officer's report have been made, to provide all witnesses who gave evidence to the BOI with written notification of their status and, subject to [the provisions of the *Privacy Act*], the outcomes of the inquiry in relation to matters relevant to them'.<sup>83</sup>

## Report

2.62 On completion an Investigating Officer furnishes a report to the Appointing Officer, who takes decisions based on the findings and recommendations.<sup>84</sup>

2.63 The Appointing Officer is responsible to furnish to the next superior officer in the chain of command, a copy of the report, details of action taken and any associated recommendations for future action.<sup>85</sup>

## Legal Representation

2.64 Under D(I)R legal representation for person likely to be affected by military inquiries is not a right. In the case of inquiries conducted by an Investigating Officer, Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* states that 'a witness is not

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80 Department of Defence, Submission, p. 589.

81 *Defence Act 1903*, Section 124 (2) (c).

82 Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force*, p. 3.

83 *ibid*, p. 4.

84 *ibid*, p. 3.

85 *ibid*, p. 4.

entitled to legal representation'.<sup>86</sup> However Sheppard. J, 'X' v McDermott (1994) 51 FCR 1 suggests that, in such an inquiry, the matter of allowing witnesses legal representation is entirely at the discretion of the Investigating Officer.<sup>87</sup> 'On the request of a witness, an Investigating Officer may allow the witness to be advised and accompanied by a legal officer but the legal officer is not entitled to answer questions on behalf of the witness.'<sup>88</sup> However, a witness is entitled to seek advice from any Service legal officer prior to being interviewed by an Investigating Officer.<sup>89</sup>

- 2.65 For a BOI, D(I)R stipulate that legal representation may be approved by the Appointing Authority before the commencement of the inquiry and by the President of the BOI during the conduct of the inquiry.<sup>90</sup> Persons likely to be affected by a General Court of Inquiry may be represented by a legal practitioner.<sup>91</sup> The limitations on the role of a legal representative are different for each level of inquiry.
- 2.66 Regardless of the level of inquiry, where legal representation is approved for an ADF member, a Service legal officer<sup>92</sup> may be provided at no cost to the member or the member may chose to be represented by a private legal practitioner. Where an ADF member chooses to be represented by a private legal practitioner, that representation is at the expense of the member. Guidance in Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* suggests that in nominating a Service legal officer to represent a member authorised to appear before a BOI, an Appointing Authority should ensure that the legal officer is suitably qualified and experienced, and is readily available to undertake the task.<sup>93</sup>

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86 *ibid*, p. 3.

87 'It was said that the investigating officer did not propose to allow the applicant to be represented by counsel at the hearing before him. That, of course, is entirely a matter for the investigating officer. But reflection on his part, and on the part of those responsible for his appointment, may suggest that it may be wise for the investigating officer to be assisted by a person who is legally qualified and to allow legal representation of the applicant by an appropriate legal practitioner so long as the assistance provided by the practitioner is given in a constructive way.', Sheppard. J, 'X' v McDermott (1994) 51 FCR 1, p. 27.

88 Department of Defence, Submission, p. 1216.

89 *ibid*, p. 1217.

90 D(I)R 33.

91 D(I)R 15 (3).

92 Either Regular or Reserve.

93 Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force*, p. 7.

- 2.67 For a BOI, the investigating body is normally assisted by a legal officer who acts as Counsel Assisting the inquiry.<sup>94</sup> Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* makes it quite clear that in identifying a Counsel Assisting for a BOI, the Appointing Authority should ensure that such an appointment cannot reasonably lead to the perception, by an interested party, of a conflict of interest because of previous involvement with the issues or personnel associated with the investigation.<sup>95</sup>
- 2.68 During the inquiry the Counsel Assisting is responsible for advising the BOI, questioning witnesses on behalf of the President of the BOI and to provide a summation in a final address to the BOI.<sup>96</sup> The Counsel Assisting is 'not required to present a case to the Board and...should not attempt to influence their findings in any way.'<sup>97</sup>

## Cost

- 2.69 The military inquiry system is operated primarily by members of the ADF who perform disciplinary functions as a secondary duty that is incidental and additional to their normal duties.<sup>98</sup> For example, an officer may be called upon to conduct a D(I)R investigation but the time spent on this function is likely to be very small relative to his or her primary duties. Table 2.2 statistically details the current legal framework within the ADF. However few, if any, of these legal professionals work exclusively on inquiry system matters.<sup>99</sup>
- 2.70 There is no historical cost for the conduct of D(I)R inquiries within the ADF. The cost of each inquiry will 'vary considerably according to the type of inquiry being conducted and the complexity of the matter being inquired into.'<sup>100</sup> Notwithstanding, there is no cash expenditure for ADF members performing inquiry functions as a secondary duty or full-time ADF legal officers performing functions within the military inquiry system. This is not the case when cost is assessed on an accrual basis, however the ADF does not currently capture accrual costings of such functions. When part-time ADF legal officers are utilised to perform functions within the military inquiry system they are paid sessional fees in

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94 D(I)R 51.

95 Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force*, p. 7.

96 *ibid*, p. 11.

97 *ibid*, p.10.

98 Department of Defence, Submission, p. 1290.

99 *ibid*.

100 *ibid*.

accordance with current policy.<sup>101</sup> In addition, an inquiry may incur costs including: travel and accommodation for witnesses and other inquiry participants, inquiry recording costs and other administrative costs associated with the conduct of the inquiry.

## Reporting

- 2.71 There is no statutory or policy requirement for the ADF to provide an annual report on the operation of D(I)R. In practice the only reporting of D(I)R inquiries outside of the ADF occurs when the report on the outcome of a BOI is passed to the Minister of Defence. Public release of the report and/or the BOI Report is at the discretion of the Minister.<sup>102</sup>

## Defence Discipline

### Overview

- 2.72 Military discipline is implemented and managed within the ADF under the provisions of the DFDA. This Act provides a formal discipline system that gives the ADF a legal basis for investigating, hearing, and awarding punishment for offences committed by permanent ADF members, and in limited circumstances by Reservists and Defence civilians.<sup>103</sup> The Act provides a formal mechanism for the investigation of service offences, trial by service tribunals and for convicted offenders to be punished.
- 2.73 The procedures under the DFDA import common law principles of criminal liability, which correlate closely with procedures applying in civilian courts,<sup>104</sup> enabling the offender to seek legal representation. Offences of a serious or criminal nature, which are not covered by the DFDA, are tried under Australian civil or criminal law. The DFDA is sufficiently flexible to enable it to operate extraterritorially, during conflict and peace.
- 2.74 While it is a separate system, the military discipline system coexists with the civil legal system and Defence members continue to be subject to the civilian justice system in addition to the military discipline system.

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101 INDMAN, Instruction R0112, *Sessional Fees for Reserve Legal Officers*. The legal authority covering payment of fees for Reserve legal officers is Determination 0109, *Legal Officers; Professional Fee*, made under Section 58B of the *Defence Act, 1903*.

102 Department of Defence, Submission, p. 1285.

103 *ibid*, p. 556.

104 *ibid*, p. 557.



## Legislative Basis

### DFDA

2.75 The primary legislation that establishes the current military discipline system is the DFDA. The DFDA creates service offences and service tribunals, vests service tribunals with jurisdiction to hear and try service offences and provides for the punishment of persons convicted of service offences.<sup>105</sup> The Act also contains detailed provisions in respect of arrest, search and custody and the investigation of service offences and establishes a comprehensive system for the appeal and review of convictions and punishments.<sup>106</sup> Finally, it creates the office of the Judge Advocate General, details procedural matters and establishes the principles of criminal liability that are to apply to proceedings conducted by service tribunals.<sup>107</sup>

### Defence Force Discipline Regulations

2.76 The *Defence Force Discipline Regulations* made pursuant to section 197 of the DFDA, deals primarily with detainees and detention centres. In addition, these Regulations create and modify some of the rules of evidence that apply to service tribunals.<sup>108</sup>

### Defence Force Discipline Rules

2.77 The *Defence Force Discipline Rules* deal essentially with procedural matters and are made by the Judge Advocate General pursuant to section 149 of the DFDA.<sup>109</sup>

### Defence Force Discipline (Consequences of Punishment) Rules

2.78 The *Defence Force Discipline (Consequences of Punishment) Rules* have been made by the Chief of the Defence Force pursuant to the DFDA. They lay down the consequences that flow when military punishments are awarded by service tribunals, for example, reduction in rank, restriction of privileges, stoppage of leave and extra duties.

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105 Department of Defence, Private Briefing, Transcript, p. 6.

106 *ibid.*

107 *ibid.*

108 *ibid.*

109 *ibid.*

## Additional Legislation and Subordinate Legislation

- 2.79 In addition, the following legislation and subordinate legislation is also imported into or otherwise has application in respect of the military justice system:
- a) Part VIII of the *Defence Act 1903* (Commonwealth) provides enforcement mechanisms in respect of civilian misconduct before service tribunals;
  - b) the *Evidence Act 1995* (Commonwealth); the *Evidence Act 1971* (ACT), as modified by section 29 and schedule 1 of the Defence Force Discipline Regulations; and
  - c) the *Evidence Regulations* (Commonwealth).
- 2.80 These collectively operate to specify the rules of evidence that apply to proceedings before service tribunals.<sup>110</sup>

## *Defence Force Discipline Appeals Act 1955*

- 2.81 The *Defence Force Discipline Appeals Act 1955* (Commonwealth) establishes the Defence Force Discipline Appeals Tribunal to which persons convicted by Courts Martial or Defence Force Magistrates may appeal their conviction.<sup>111</sup>

## Discipline Law Manual

- 2.82 The *Discipline Law Manual* is a comprehensive guide to the military discipline system employed within the ADF. It comprises two volumes of which the first is a guide to the military discipline system, drafted in such a way as to make it comprehensible to the layman and useful to service legal officers. The second volume contains copies of the legislation that underpins the military discipline system.<sup>112</sup>

## Jurisdiction

- 2.83 The offences created by the DFDA are directed to maintaining and enforcing service discipline.<sup>113</sup> Specifically, the Act creates a wide variety of service offences that range from prejudicial behaviour to mutiny and aiding the enemy.<sup>114</sup> While several only apply in respect of operations

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110 *ibid.*

111 *ibid.*

112 Department of Defence, Submission, p. 585.

113 *ibid.*, p. 588.

114 Department of Defence, Private Briefing, Transcript, p. 7.

against the enemy or while members are engaged on active service, the majority have application during peace time.<sup>115</sup> Many of the offences created are unique to the military, such as absence without leave, disobedience of a lawful command and mutiny. However, others duplicate or overlap with offences created under Australian civil or criminal law.<sup>116</sup>

- 2.84 The policy for jurisdiction in such cases is detailed in Defence Instruction (General) PERS 45-1 titled *Jurisdiction Under the DFDA Guidance for Military Commanders*. The product of extensive discussions with civil investigation and prosecution authorities, this policy is accepted by both the ADF and the Director of Public Prosecutions. The policy seeks to apply commonsense procedures for the resolution of jurisdictional issues and does not impinge on the ability of the ADF to maintain discipline or conduct operations.<sup>117</sup> Where there is doubt regarding jurisdiction the ADF is required to consult with civil prosecution authorities.<sup>118</sup> The policy also provides general guidance to ADF commanders on the exercise of their jurisdiction under the DFDA.<sup>119</sup>
- 2.85 The exercise of military jurisdiction within Australia is also expressly limited by section 63 of the DFDA. The ADF requires the consent of the Commonwealth Director of Public Prosecutions before a service tribunal can deal with more serious offences such as murder, manslaughter and certain sexual offences.<sup>120</sup> Under current arrangements, the ADF has agreed that all allegations of sexual assault will be immediately referred to civilian authorities for investigation and prosecution.<sup>121</sup>
- 2.86 The limitations imposed by section 63 of the DFDA do not apply in respect of offences committed overseas. Nevertheless, the exercise of DFDA jurisdiction overseas may be regulated by international agreements, such as Status of Forces Agreements and approval from the host government will usually be required before a DFDA trial is conducted overseas.<sup>122</sup>
- 2.87 Section 61 of the DFDA allows offences against laws of the Commonwealth in force in the Jervis Bay territory and offences against the

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115 *ibid.*

116 *ibid.*

117 *ibid.*

118 *ibid.*

119 Defence Instruction (General) PERS 45-1 titled *Jurisdiction Under the DFDA Guidance for Military Commanders*, p. 1.

120 DFDA, Section 63.

121 *ibid.*, p. 2.

122 Department of Defence, Private Briefing, Transcript, p. 8.

Crimes Act (ACT) to be imported and charged as offences under the Act.<sup>123</sup>

- 2.88 In recent years the High Court has affirmed the jurisdiction of service tribunals to conduct trials for service offences,<sup>124</sup> where ‘proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline’.<sup>125</sup>

### Jurisdiction Over Civilians

- 2.89 The DFDA provides jurisdiction for certain offences over Defence Civilians.<sup>126</sup> Jurisdiction over civilians who are members of the Public Service exists through remedies provided in the *Public Service Act*. The only control which may be exercised in respect of civilian contractors is through the provisions of individual contracts.<sup>127</sup>
- 2.90 The ADF contend that the DFDA provides sufficient jurisdiction over civilians involved in overseas deployments and operations and that the Public Service Act provides for sufficient jurisdiction over public servants. However, the ADF have identified that in the case of civilian contractors, ‘the remedies provided in the form of financial penalties may not be appropriate or sufficiently effective in ensuring ADF objectives are met’.<sup>128</sup> This issue is currently the subject of a study being conducted by the ADF.

### Avenues of Defence Discipline

- 2.91 Under the provisions of the DFDA, there are two classes of service tribunals that are authorised to try service offences. At the lower level are summary authorities and at the higher level are Courts Martial and Defence Force Magistrates.<sup>129</sup> In addition, the DFDA provides for the imposition of limited means of dealing with a minor disciplinary breach via the Discipline Officer system.<sup>130</sup>
- 2.92 The higher tribunals possess more potent powers of punishment and wider jurisdiction than the summary authorities however the

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123 *ibid*, p. 7.

124 *Re Tyler; Ex parte Foley* (1993).

125 Department of Defence, Submission, p. 559.

126 ‘defence civilian’ means a person (other than a defence member) who: (a) with the authority of an authorised officer, accompanies a part of the Defence Force that is: (i) outside Australia; or (ii) on operations against the enemy; and (b) has consented, in writing, to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force.

127 Department of Defence, Submission, p. 1272.

128 *ibid*.

129 *ibid*, p. 557.

130 *ibid*, p. 564.

overwhelming majority of disciplinary cases are heard by summary authorities.<sup>131</sup> A summary of these statistics is detailed in Table 2.1.

Table 2.1 Trial Statistics Under the DFDA

Year	Courts Martial and Restricted Courts Martial	Trials by Defence Force Magistrate	Summary Trials	Discipline Officers
1985	15	5	3010 <sup>132</sup>	N/A
1986	14	35	6937	N/A
1987	56	35	7595	N/A
1988	37	32	8494	N/A
1989	31	46	8449	N/A
1990	28	64	7229	N/A
1991	28	49	7780	N/A
1992	18	30	6824	N/A
1993	11	18	4713 <sup>133</sup>	N/A
1994	11	18	4533	N/A
1995	12	32	4010	N/A
1996	11	29	4166	754
1997	1	47	3680	N/A <sup>134</sup>

Source Department of Defence, Submission, p. 620.

## Court Martial

2.93 Under the DFDA there are two levels of Court Martial: General Court Martial and Restricted Court Martial.<sup>135</sup> The procedures for both levels are essentially the same. However, a General Court Martial comprises a President, who is not below the rank of Colonel,<sup>136</sup> and not less than four other members<sup>137</sup> whilst a Restricted Court Martial comprises a President and not less than two other members.<sup>138</sup>

131 Department of Defence, Private Briefing, Transcript, p. 8.

132 The DFDA was introduced in July 1985. The figures presented for 1985 are those for DFDA actions initiated from the six months of 1985 following the introduction of the Act. Figure for subsequent years cover a 12 month period.

133 The significant drop in summary trials conducted in 1993 was explained by the ADF as resulting from the impact of the Commercial Support Program and its attendant downsizing in the number of personnel in the ADF (See Department of Defence, Submission, p. 1271).

134 Statistics for Discipline Officer proceedings were not available from the ADF because of the unreliability of the data. The JAG has directed that shortcomings in data collection methods across the ADF be rectified and noted in his report that new uniform statistic collection requirements are now in force. (Department of Defence, Submission, p. 1270).

135 DFDA, Section 114 (1).

136 *ibid*, Section 116 (2) (a).

137 *ibid*, Section 114 (2).

138 *ibid*, Section 114 (3).

- 2.94 Under current arrangements, members of a Court Martial, who must be serving personnel, are appointed by the officer convening the court martial (Convening Authority).<sup>139</sup> Members of a Court Martial essentially perform a jury-like function but are also required to determine punishment.<sup>140</sup> A Judge Advocate, who is a permanent or reserve legal officer, is nominated to each court to advise, rule and direct on matters of law.<sup>141</sup>
- 2.95 Courts Martial may only deal with charges that have been referred to them by Convening Authorities and are generally used to try the more serious offences under the DFDA.<sup>142</sup>

### Defence Force Magistrate

- 2.96 DFM (DFM) provide an alternative to a Court Martial for dealing with a serious offence. DFM are appointed by the Judge Advocate General and have the same powers as a Restricted Court Martial.<sup>143</sup> Holders of DFM appointments are usually senior full-time ADF legal officers or senior part-time ADF lawyers, such as Queen's Counsel and civilian magistrates.<sup>144</sup>

### Summary Authority

- 2.97 Summary authorities have limited powers of punishment and are generally used to try less serious offences but also conduct preliminary hearings for more serious offences. The majority of disciplinary cases are under the DFDA are dealt with by summary authorities.<sup>145</sup>
- 2.98 There are three levels of Summary Authority: subordinate summary authorities, commanding officers and superior summary authorities.<sup>146</sup> There are defined limits on who and what offences may be tried and what punishment may be awarded at each level of summary authority.
- 2.99 Only officers of the ADF may be appointed as summary authorities.<sup>147</sup> Under the provisions of the DFDA all commanding officers are appointed as a summary authority and are empowered to appoint an officer, or class

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139 Convening Authorities are appointed by service chiefs to decide whether charges should go to trial and, if so, at what level.

140 Department of Defence, Private Briefing, Transcript, p. 9.

141 *ibid.*

142 Department of Defence, Submission, p. 561.

143 *ibid.*, p. 562.

144 Department of Defence, Private Briefing, Transcript, p. 9.

145 *ibid.*, p. 8.

146 *ibid.*

147 DFDA, Section 105.

of officers (such as sub-unit commanders) as subordinate summary authorities. The Act also allows for the CDF or a Service Chief to appoint an officer, or class of officers (such as formation commanders) to be a superior summary authority.<sup>148</sup>

## Discipline Officer

- 2.100 Recent amendments to the DFDA<sup>149</sup> provide for the appointment of Discipline Officers to deal with acts or omissions that are otherwise capable of being charged as service offences under the DFDA.<sup>150</sup> Discipline Officers provide a means to expeditiously deal with minor infringements of discipline without resort to the more formal and administratively complex summary trial procedures.<sup>151</sup>
- 2.101 A Discipline Officer's powers of punishment are limited to:
- a) awarding a fine not exceeding the amount of a member's pay for one day; or
  - b) restriction of privileges for not greater than two days; or
  - c) stoppage of leave for not greater than three days; or
  - d) extra duties for not greater than three days; or
  - e) extra drill for a maximum of three days; or
  - f) a reprimand.<sup>152</sup>
- 2.102 Discipline Officers must be serving personnel and are appointed by commanding officers. Most commonly Discipline Officers are of Warrant Officer rank. A Discipline Officer may impose a minor punishment, in the nature of extra training however a conviction is not recorded when a Discipline Officer takes punitive action against a member. Under current arrangements,<sup>153</sup> Discipline Officers may only deal with service personnel below non-commissioned rank<sup>154</sup> who elects to be dealt with by a Discipline Officer.<sup>155</sup>

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148 *ibid.*

149 As a result of the Defence Force Discipline Legislation Board of Review 1989.

150 DFDA, Section 169 (b).

151 Department of Defence, Private Briefing, Transcript, p. 9.

152 DFDA, Section 169 (f).

153 *ibid.*, Section 169 (c).

154 Consideration is being given to extending the scheme to other ranks such as junior officers under training.

155 DFDA, Section 169 (e).

## Convening Authority

- 2.103 Convening authorities are appointed by a Service Chief and perform a vital role in the administration of the military discipline system. Convening authorities are responsible for deciding whether charges that have been referred by a summary authority should be forwarded to a higher tribunal for trial, referred back to the summary authority for trial or not proceeded with. Where charges are to be referred to a higher tribunal for trial, the convening authority will arrange for the appointment of a court martial or a DFM to try them<sup>156</sup>.

## DFDA Procedure

- 2.104 In essence all proceedings under the DFDA follow a similar pattern which commences with an incident. The next step is an investigation followed by a decision to charge, a trial, punishment and review.

## Investigation

- 2.105 When there is an incident that raises the prospect of formal disciplinary action, an investigation will usually be conducted in accordance with the investigative provisions of the DFDA, Part VI, sections 101 to 101ZC inclusive.<sup>157</sup> These provisions cover the duties of Investigating Officers, confessions, investigative action, evidence, the rights of persons charged with service offences, search and seizure.

## The Decision To Charge

- 2.106 An investigation may result in a recommendation to prefer charges under the DFDA. Under current arrangements, the decision to charge members is a command decision. In practical terms the person in the chain of command who is best placed to assess the discipline consequences of the member's conduct will take this decision.<sup>158</sup>

## Trial Procedures

- 2.107 Following the preferring of charges, an initial hearing before a summary authority must be conducted. In hearing the case, the role of the summary authority is to determine whether the evidence available establishes a

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156 Department of Defence, Private Briefing, Transcript, p. 13.

157 *ibid*, p. 11.

158 *ibid*.



prima facie case that warrants trial. This process is somewhat like a committal hearing in the civilian courts.<sup>159</sup>

- 2.108 At the conclusion of a hearing the decision must be made to either try the case at the summary level or to refer the charges to a convening authority for consideration of whether one of the higher tribunals should be appointed to try them. Charges may be referred to a convening authority if they are of a serious nature and the limited powers of punishment available to the summary authority are considered insufficient to deal with the case.<sup>160</sup>
- 2.109 Charges may also be referred to a convening authority if the accused elects to be tried or punished by court martial or DFM.<sup>161</sup> The option for this election is provided to the accused when one of the more severe punishments available to the summary authority is being considered.<sup>162</sup> If the accused elects to be punished or tried by the summary authority, then that authority is at liberty to award an elective punishment.<sup>163</sup>
- 2.110 The rules of evidence that apply in the ACT apply to proceedings before service tribunals, and the DFDA imports common law principles of criminal liability.<sup>164</sup> This means that, as in criminal proceedings, the burden of proof lies on the prosecution and the offences must be proven beyond reasonable doubt.<sup>165</sup> An accused person has the right to testify or remain silent, the right to call witnesses in his or her defence, and the right to cross-examine prosecution witnesses. An accused member also has the right to be represented before a service tribunal by another defence member, including a legal officer, provided that that person is reasonably available. Before one of the higher tribunals, the accused person will normally be legally represented.<sup>166</sup>

## Punishment

- 2.111 When the individual is convicted of a service offence, the opportunity is provided for the presentation of evidence in mitigation before sentence is determined.<sup>167</sup> Section 70 of the DFDA details the sentencing principles to

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159 *ibid*, p. 12.

160 Department of Defence, Private Briefing, Transcript, p. 12.

161 Department of Defence, Submission, p. 562.

162 Department of Defence, Private Briefing, Transcript, p. 12.

163 *ibid*.

164 *ibid*.

165 Department of Defence, Submission, pp. 560 - 561.

166 Department of Defence, Private Briefing, Transcript, p. 12.

167 *ibid*, p. 14.

be followed and evidence in mitigation must be considered in the sentencing consideration.

- 2.112 A wide range of punishments is available to service tribunals. The scale of punishment ranges from conviction without punishment to life imprisonment and includes a significant number of punishments which are unique to the military such as restriction of privileges, stoppage of leave and extra duties. While General Courts Martial have the most extensive powers of punishment, lesser service tribunals are more restricted in the punishments they can award.

## Review

- 2.113 Under the DFDA, all convictions and punishments awarded by service tribunals are subject to automatic review including legal examination of the proceedings by a Service lawyer.<sup>168</sup>
- 2.114 In addition, a member convicted of a service offence has access to two levels of review on petition. In the first instance there is access to a reviewing authority appointed by the Service Chief and then there may be a further review by the Service Chief.<sup>169</sup> A person convicted by a court martial or by a DFM may be able to pursue an appeal against the conviction, but not the punishment, to the Defence Force Discipline Appeals Tribunal.<sup>170</sup>
- 2.115 When conducting a review by petition, a reviewing officer is required to obtain a legal report which is binding on them on questions of law. In the case of petitions to the service chiefs, the legal report is provided by the Judge Advocate General or the Deputy Judge Advocate General.<sup>171</sup>

## Judge Advocate General

- 2.116 The office of the Judge Advocate General (JAG) is established by Part XI of the DFDA. The JAG must be, under the terms of the legislation, either a judge of the Federal Court or a state Supreme Court.<sup>172</sup> The JAG may be appointed for a period not exceeding seven years and may not be appointed past the age of 65 years.<sup>173</sup> Since the introduction of the Defence

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<sup>168</sup> DFDA, Sections 151 - 152.

<sup>169</sup> Department of Defence, Submission, p. 563.

<sup>170</sup> Under the *Defence Force Discipline Appeals Act* where appeals are heard by a tribunal comprising, usually, of not less than three judges (Justice or Judge of a federal court or of the Supreme Court of a State or Territory) who are appointed by the Governor General (*Defence Force Discipline Appeals Act, 1955, Section 7*).

<sup>171</sup> DFDA, Section 154.

<sup>172</sup> Department of Defence, Private Briefing, Transcript, p. 39.

<sup>173</sup> Department of Defence, Submission, p. 897.

Force Discipline Act in 1985, the practice has been ‘to appoint officers to the position of JAG for a period of four years with the one exception being the first JAG’<sup>174</sup> who was appointed for three years.

2.117 The functions of the JAG are to:

- provide an annual report to the Minister on the operation of the DFDA;
- provide legal reports to the Service Chiefs when they review petitions from convicted members;
- when requested, review legal reports provided to a reviewing officer;
- appoint DFM;
- nominate to the Service Chiefs, members to be appointed to the Judge Advocates Panel and the panel of officers who provide reports pursuant to DFDA Section 154;
- establish and maintain a list of legal officers that are available to assist and advise persons in custody under the DFDA; and
- make rules and procedures relating to conduct of Service Tribunals - *Defence Force Discipline Rules* deal essentially with procedural matters and are made by the Judge Advocate General pursuant to section 149 of the DFDA.<sup>175</sup>

2.118 With regard to advice from the JAG, the incumbent of that office is not available to give general legal advice to anybody within the defence organisation. The JAG is required, by the DFDA to restrict himself or herself to the statutory functions of providing reviews. The JAG is not available to give general legal advice to the ADF command chain.<sup>176</sup> ‘The only point at which the JAG may become involved in giving advice in relation to a court martial or hearing before a DFM (DFM) or summary authority is at the review stage.’<sup>177</sup> The JAG has no role in the ADF system of inquiries conducted under D(I)R.

## Defence Legal Office

2.119 The JAG does not provide a ‘technical’ chain of command for legal professionals in the ADF, rather this is the function of the Director General Defence Legal Office (DGDLO).<sup>178</sup> ‘The responsibilities of the DGDLO include the management of Defence Legal Office (DLO) resources

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174 *ibid.*, p. 1234.

175 Department of Defence, Private Briefing, Transcript, p. 6.

176 *ibid.*, p. 39.

177 Department of Defence, Submission, p. 1234.

178 *ibid.*

throughout Australia and the professional oversight of all legal officers within the DLO.<sup>179</sup> ‘The DLO is a specialist integrated legal organisation consisting of all Permanent and Reserve Navy, Army and Air Force legal officers, all Defence civilian legal officers and the Directorates of Freedom of Information and Classified Archives and Records Review.’<sup>180</sup> ‘The primary function of the DLO is to provide legal advice and support to the command and management of the ADF and the Department. Where capacity exists, and within defined limits, legal assistance may be provided to Defence members.’<sup>181</sup>

- 2.120 The DLO has its head office in Canberra and representatives posted, or attached to, most major commands, formations and units around Australia.<sup>182</sup> The ADF legal framework is statistically represented at Table 2.2. It is important to note that under current arrangements DFMs and JAs<sup>183</sup> are not part of the DLO organisation.

Table 2.2 ADF Legal Framework<sup>184</sup>

Service	Legal Officer (Full Time)	Legal Officer (Part Time)	DFM (Full Time)	DFM (Part Time)	JA (Full Time)	JA (Part Time)
Navy	24	122	0	13	0	14
Army	37	93	1	7	1	7
RAAF	25	99	0	2	0	5
<b>TOTAL</b>	<b>86</b>	<b>314</b>	<b>1</b>	<b>22</b>	<b>1</b>	<b>26</b>

Source Department of Defence, Submission, pp. 1230-1233.

## Legal Representation

- 2.121 Under the provisions of the DFDA, an accused person awaiting trial by Court Martial or DFM trial shall, subject to the exigencies of the service, ‘be afforded the opportunity to be represented at the trial, and to be advised before the trial, by a legal officer’<sup>185</sup> at no expense to the accused person.<sup>186</sup> In practice, an accused person is provided with a Permanent

179 [http://www.adfa.oz.au/MLC/lool/sections/director\\_general/director\\_general.htm](http://www.adfa.oz.au/MLC/lool/sections/director_general/director_general.htm).

180 *ibid.*

181 *ibid.*

182 *ibid.*

183 A Judge Advocate is a lawyer who is appointed effectively as a legal adviser to a court martial.

184 Full-time numbers reflect current establishment positions while part-time numbers represent part-time personnel available to perform legal duties.

185 DFDA, Section 137 (1).

186 DFDA, Section 137 (2).

Forces or the Reserve Forces legal officer.<sup>187</sup> The only limiting factor in the selection of legal representation for an accused person is the availability of Permanent Force legal officers<sup>188</sup> and for this reason accused persons are often provided with Reserve legal officers.<sup>189</sup>

- 2.122 For summary proceedings, an accused may conduct his or her own defence or nominate another ADF member to defend them.<sup>190</sup> There is nothing in the DFDA to provide for an accused person to be represented by a legal officer however the Act does not prohibit the summary authority from authorising legal representation.<sup>191</sup> In practice an accused person is normally represented by another ADF member, nominated by the accused. It is not general practice for an accused member to be represented by a legal officer, however in complex matters a summary authority may authorise the accused to be represented by a legal officer at no cost to the accused. Notwithstanding, the accused person is entitled to seek legal advice from a Service legal officer at no cost to the accused. In addition, any member of the ADF who represents the accused may, at no cost to themselves or the accused, seek legal advice from a Service legal officer in order to fulfil their duty as the Defending Officer.<sup>192</sup>
- 2.123 When an ADF member seeks legal advice from a Service legal officer on a matter relating to DFDA action, that advice is provided at no cost to the member. Similarly, when an accused is represented by a Service legal officer in a DFDA action, that representation is provided at no cost to the accused. Where an accused chooses, in a DFDA action, to be represented by a civilian legal practitioner, that representation will be at the member's expense. In civil or criminal cases, a Service legal officer may not act for or formally represent the accused but may, if a Reserve officer, be retained by the accused as a private legal practitioner.<sup>193</sup> Service legal assistance is also available to assist members in preparing petitions and appeals, if convicted.

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187 A person who is enrolled as a barrister, a solicitor, a barrister and solicitor or a legal practitioner of a civil court (See DFDA, Section 3).

188 A Permanent Force legal officer may be unavailable because he or she has the responsibility to provide advice to the command structure and representation of the accused would bring into question issues of conflict of interest (See Smith,P., op cit, p. 63).

189 Department of Defence, Submission, p. 1216.

190 ADFP 201, Volume 1, Chapter 7, pp. 7-10.

191 Department of Defence, Submission, p. 1216.

192 *ibid.*

193 Smith,P., op cit, p. 63.

## Cost

- 2.124 The military discipline system is operated primarily by members of the ADF who perform disciplinary functions as a secondary duty that is incidental and additional to their normal duties.<sup>194</sup> For example, Commanding Officers may be required to act as a summary authority or a reviewing authority under the DFDA but the time spent on these duties is likely to be very small relative to their primary functions of command and administration. Table 2.2 statistically details the current legal framework within the ADF. However few of these legal professionals work exclusively on discipline system matters.<sup>195</sup>
- 2.125 'There is no historical cost for the conduct of trials by Service tribunals under the DFDA. The cost of trials varies widely according to whether the accused member pleads guilty or contests the charges, whether the accused member is legally represented and how many witnesses need to be called.'<sup>196</sup> Notwithstanding, there is no cash expenditure for ADF members performing disciplinary functions as a secondary duty or full-time ADF legal officers performing functions within the military discipline system. This is not the case when cost is assessed on an accrual basis however the ADF does not currently capture accrual costings of such functions. When part-time ADF legal officers are utilised to perform functions within the military discipline system they are paid sessional fees in accordance with current policy.<sup>197</sup> In addition, a Service tribunal may incur costs including: travel and accommodation for witnesses and other participants, court recording costs and other administrative costs associated with the conduct of the tribunal.

## Detention Centres

- 2.126 Detention centres are used to detain, for short periods of time, personnel convicted of a service offence and sentenced to period of detention. The DFDA contains provisions relating to detainees and detention centres and prescribes the circumstances in which members may be placed in detention centres. Further legislative provisions in respect of military detention centres are contained in the Defence Force Regulations made pursuant to the DFDA. These Regulations provide for the classification of detention centres, detail matters relating to their operation and mandate

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194 Department of Defence, Submission, p. 1290.

195 *ibid.*

196 *ibid.*

197 INDMAN, Instruction R0112, *Sessional Fees for Reserve Legal Officers*. The legal authority covering payment of fees for Reserve legal officers is Determination 0109, *Legal Officers; Professional Fee*, made under Section 58B of the *Defence Act, 1903*.

the protection of human rights of detainees. Defence Instruction (Army) Personnel 58-1 *Orders For Detention Centres* details the procedural responsibilities and requirements for the operation of detention centres.

- 2.127 It is important to note the difference between detention and imprisonment. Imprisonment is usually awarded by a Service tribunal for more serious criminal offences and must be accompanied by dismissal from the ADF.<sup>198</sup> Under current arrangements, Service personnel serve periods of imprisonment in civil correctional establishments. In contrast during periods of detention at the Defence Force Corrective Establishment (DFCE), staff attempt to rehabilitate members under detention and to prepare them to render further effective service in the ADF. Members are encouraged, inter alia, to adopt a more positive attitude towards military service, maintain proper respect for authority and to develop a greater degree of self-respect and self-discipline.<sup>199</sup>
- 2.128 ADF detention centres are classified as unit, area or corrective.<sup>200</sup> It is this classification which determines how long a member may be detained in that facility.<sup>201</sup> Whilst the ADF has several area detention centres<sup>202</sup> and numerous unit detention centres,<sup>203</sup> there is only one corrective detention centre, the DFCE located at Holsworthy.
- 2.129 The role of the DFCE is to hold and provide correctional training of Service Persons Under Sentence (SUS) and the holding of Service Personnel Under Arrest (SUA) temporarily committed for safe keeping.<sup>204</sup> SUS can be held for up to two years although in practice it is rare for any member to be held for longer than three months. SUA are held pending the laying of charges; or awaiting a hearing and/or trial by a service tribunal; or awaiting confirmation of a sentence of detention or imprisonment awarded by a service tribunal.<sup>205</sup>
- 2.130 The commanding officer of the DFCE is the Commandant of the Army Military Police Training Centre (COMDT AMPTC) who is commanded by the Commander Training Command – Army. Staff at the DFCE are drawn from all three Services with the Officer in Charge (OIC) provided by Army. All members of staff at the DFCE undertake a four day Detention

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198 DFDA, Section 71-1.

199 DFCE Brief, p. C-1 to C-2.

200 Defence Force Discipline Regulation 5 (1).

201 Defence Force Discipline Regulation 5 (2).

202 For example RAAF *Williams*, RAAF *Wagga* and 1st Recruit Training Battalion.

203 For example HMAS *Penguin*, RAAF *Tindal* and at the 1st Battalion Royal Australian Regiment.

204 DFCE Visit Brief, p. C-1.

205 *ibid.*

Centre Supervisors Course followed by continuation training as directed by the COMDT AMPTC or the OIC.

- 2.131 A Visiting Officer program is conducted to facilitate external inspection of the DFCE. Visiting Officers are drawn from Sydney based units of all three Services and are normally of the rank Major (Equivalent). In addition to inspecting the physical condition of the establishment, the Visiting Officer is required to interview each detainee in order to identify any problems which may not otherwise be raised by detainees or identified by DFCE staff. Each Visiting Officer is required to complete a formal report which is provided to Commander Training Command – Army. In addition to the Visiting Officer program, each detainee is reviewed by a medical practitioner prior to entry into the DFCE and at least weekly while under detention. Detainees are also provided with access to legal, social welfare, psychological and chaplaincy support while held at the DFCE.
- 2.132 Table 2.3 provides statistics on detainees held at the DFCE since 1993. The average length of sentence per Detainee was 18 days.

Table 2.3 Detainee Statistics – Defence Force Corrective Establishment 1993 - 1999<sup>206</sup>

Service	Male	Female	Total
Navy	55 (8.41%)	1 (0.15%)	56 (8.56%)
Army	561 (85.78%)	23 (3.52%)	584 (89.3%)
RAAF	12 (1.83%)	2 (0.31%)	14 (2.14%)
<b>TOTAL</b>	<b>628 (96.02%)</b>	<b>26 (3.98%)</b>	<b>654</b>
Repeat Offender	59 (9.02%)	0 (0%)	59 (9.02%)

Source DFCE Visit Brief, p. F-1.

## Reporting

- 2.133 The JAG reports annually to the Minister of Defence as a statutory requirement established by Section 196A of the DFDA. The report covers the operation of the DFDA, the regulations and rules of procedure and the operation of any other law of the Commonwealth or of the Australian Capital Territory in so far as that law relates to the discipline of the ADF. The Act requires that the Report include such statistical information as the JAG considers appropriate. In practice the Report includes statistical summaries of Courts Martial, DFM and summary trials.

206 Statistics from 1 January 1993 to 30 April 1999 (See DFCE Visit Brief, p. F-1).



- 2.134 The JAG Report is laid before each House of the Parliament by the Minister of Defence. Once tabled in the Parliament the JAG Report becomes public information.

## Administrative Action

### Overview

- 2.135 Although not formally a measure under the DFDA<sup>207</sup> the ADF may use administrative action as an alternative means to institute punitive measures against individuals. Notwithstanding,
- the use of administrative action is not generally an alternative to disciplinary or criminal action, except in some matters involving professional failure.<sup>208</sup> It has merit in its own right, having application particularly where a person's behaviour, actions or the like fall short of the high standards of professionalism required in the ADF, but do not constitute criminal conduct nor warrant the initiation of disciplinary proceedings.<sup>209</sup>
- 2.136 Administrative action may also 'follow a civil conviction or formal disciplinary proceedings'.<sup>210</sup> This is not a case of double jeopardy but rather administrative follow up. In most cases a criminal or DFDA conviction will not in itself result in the termination of a member's service, rather it can only be used as part of an administrative procedure to terminate an individual's service.<sup>211</sup>
- 2.137 Administrative action against a member may have a serious impact on his or her future career prospects within the ADF. Indeed, administrative action for professional failure may include discharge from the ADF where individuals are found to be unsuitable for further service in the military. It is important to note that individuals do not have the right to elect to be dealt with under the DFDA rather than be subject to administrative action.<sup>212</sup>

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207 Department of Defence, Submission, p. 549.

208 The term 'professional failure' encompasses professional negligence and errors of judgement.

209 Department of Defence, Submission, p. 1038

210 *ibid*, p. 1036.

211 Ms J Kelly, Transcript, p. 68.

212 Department of Defence, Submission, p. 1038

## Avenues of Administrative Action

2.138 The ADF has the capacity to take adverse administrative action against its members in a number of ways, including:

- a) discharge from the Service,
- b) reversion in rank,
- c) censure,
- d) removal of a member from an appointment or locality,
- e) denying or delaying promotion,
- f) change of employment category, and
- g) removal of security category (which could limit employment opportunities).<sup>213</sup>

2.139 Currently the ADF do not maintain statistics of administrative action taken and such historical information cannot be readily compiled.<sup>214</sup> However, Table 2.4 provides an indicative annual average for the three main forms of administrative action.

Table 2.4 Indicative Annual Average – Administrative Action

Service	Censure <sup>215</sup> / Formal Warning <sup>216</sup>	Reversion in Rank	Administrative Discharge
Navy	14	15 <sup>217</sup>	135 <sup>218</sup>
Army	21	0	201 <sup>219</sup>
Air Force	273 <sup>220</sup>	0	23 <sup>221</sup>

Source Department of Defence, Submission, pp.1283-1284.

213 *ibid*, p. 1036.

214 The principle reason for this is that Navy figures do not include CO's Censure and within Army, censures, which apply for a specified period, are destroyed when the life of the censure has expired.

215 Censure is used by Navy and Army only and is only applicable to officers.

216 Formal Warning is used by Air Force only and is applicable to all members of that Service.

217 All junior sailors.

218 One senior sailor and 134 junior sailors.

219 One junior officer and 200 Other Ranks.

220 33 officers, 31 WOFF/SNCO and 209 Other Ranks – of the 273 warnings, 126 were issued for failure to pass the Physical Fitness Test.

221 One officer, 2 WOFF/SNCO and 20 Other Ranks – of the 23 discharges, 12 were for failure to pass the Physical Fitness Test.

## Administration to Discharge Unsuitable Personnel

- 2.140 For certain offences under the DFDA, a service Tribunal may sentence a member to dismissal from the Defence Force.<sup>222</sup> The ADF also have the authority to take administrative action to terminate the service of a member where:
- the officer has been absent without leave for a continuous period of at least three months;
  - retention is not in the interests of the ADF (after conviction of an offence or a service offence<sup>223</sup> or as a result of unacceptable behaviour);
  - the member is inefficient or incompetent for reasons or causes within the member's control;
  - the member is unsuitable for further service (generally on psychological or medical grounds);<sup>224</sup> or
  - behaviour, actions or performance 'fall short of the high standards of professionalism required in the ADF'.<sup>225</sup>
- 2.141 The ADF has formal administrative processes aimed at identifying personnel who are unsuitable for further military service. Initial identification of such individuals is often achieved through the annual confidential reporting system where the individual's superiors are required to remark on performance, potential and attitudes. Individuals whose professional performance is considered to be unsatisfactory are provided with a progression of formal warnings, counselling and the opportunity to improve their level of performance.<sup>226</sup> When an individual fails to demonstrate an acceptable level of improvement the decision may be taken to terminate<sup>227</sup> their service in the ADF.
- 2.142 Although the procedural arrangements vary between the three Services,<sup>228</sup> when the decision is taken to pursue termination of the member's service,

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222 DFDA, Section 68 (1) (c).

223 Having been convicted of an offence or a service offence, the Service Chief has certified in writing that, having regard to the nature and seriousness of the offence, the retention of the member is not in the interests of the Defence Force.

224 Defence Instruction (General) Personnel 03-3; Australian Book of Reference 10, Sailor's Career Management Manual, Chapter 6; Defence Instruction (Army) Personnel 47-10; Defence Instruction (Army) Personnel 116-5; Defence Instruction (Air Force) Personnel 4-19.

225 Department of Defence, Submission, p. 1038.

226 *ibid*, p. 1037.

227 Note that the correct terminology is for the appointment of an officer to be terminated while Warrant Officers, Non Commissioned Officers and Other Ranks are discharged. Throughout this report the term 'terminate' is used for all members regardless of rank.

228 Defence Instruction (General) Personnel 03-3 outlines the policy for the termination of appointment of officers of the ADF. Procedures for the termination of a sailor's service are

the process that is followed is essentially the same. The member is provided with advice that termination is to be pursued and invited to demonstrate why the proposed action should not proceed. Such advice will 'lay out the precise nature of the action the commander is considering, the detailed basis upon which action is to be taken and the material upon which the commander will rely in reaching a decision'.<sup>229</sup>

- 2.143 The member's response is considered by the initiating officer in determining whether to proceed with the proposed termination. Both the initiating officer and the member have access to legal advice during the process. Following receipt of the member's response to the termination advice the initiating officer either ceases termination action or recommends termination to the decision-maker. If, following consideration of the member's response the initiating officer elects to progress termination action, the member's response, the initial advice that termination was to be pursued and the recommendations of the initiating officer are considered by the decision-maker in determining whether to proceed with the proposed termination.
- 2.144 For officers, the initiating officer is the relevant authority identified in legislation for the termination of the appointment of an officer. The relevant authorities are: the Governor General for officers of the rank of Major General (Equivalent) or a higher rank; the Minister of Defence Science and Personnel for officers of the rank of Brigadier (Equivalent) or a higher rank; and the single Service Chief for all other officers.<sup>230</sup> In the case of Warrant Officers, Non Commissioned Officers and Other Ranks the initiating officer is normally the member's commanding officer.<sup>231</sup>
- 2.145 In most cases where termination of service is proposed for an officer, the initiating officer is also responsible for the final decision. For Warrant

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covered in the Australian Book of Reference 10, Sailor's Career Management Manual, Chapter 6. Some additional and specific procedures for the termination of an Army officer's appointment are detailed in Defence Instruction (Army) Personnel 47-10 while those for soldiers are addressed in Defence Instruction (Army) Personnel 116-5. The policy and procedures governing administrative action against all Air Force personnel is contained in Defence Instruction (Air Force) Personnel 4-19.

229 Department of Defence, Submission, p. 1037.

230 Defence Instruction (General) Personnel 03-3, p. 3. Note that the exception is in cases where an officer has been absent without leave for a continuous period of at least three months the relevant authorities are: the Minister of Defence Science and Personnel for officers of the rank of Brigadier (Equivalent) or a higher rank; and the single Service Chief for all other officers.

231 Provisions do exist in the relevant instructions for single Service headquarters or career management agencies to initiate the termination of Warrant Officers, Non Commissioned Officers and Other Ranks.

Officers, Non Commissioned Officers and Other Ranks, the decision maker is generally a designated senior appointment holder.<sup>232</sup>

## Administrative Censure

2.146 The procedures for administrative censure are different for all three Services. Procedures for administrative censure within Navy and Army are only applicable to officers while Air Force has a formal warning process that is applicable to all members of the Service.

### Navy

2.147 The policy for administrative censure for officers within Navy is detailed in Defence Instruction (Navy) Administration 35-1. Navy consider an administrative censure to be 'a written record of the fact that an officer's conduct has fallen short of that to be expected of an officer of his/her seniority and experience... It is not a punishment and does not bar the subsequent trial by a Service Tribunal of an officer for an offence which is the same as, or substantially the same as, that for which he/she is censured.'<sup>233</sup> Such a censure can take two forms: a Commanding Officer's Logging or, in more serious circumstances, a censure by an Administrative Authority or the Chief of Navy.

2.148 A Commanding Officer's Logging is an internal-to-ship action that provides a formal admonishment of an officer.<sup>234</sup> The Logging is prepared in triplicate with a copy provided to the officer and the remaining two copies retained by the Commanding Officer. The Logging remains 'in the ship except when the officer is brought to trial by a Service Tribunal for a similar offence while he/she is still serving in the same ship, in which case the original copy [of the censure] is made available for production at the trial.'<sup>235</sup> Both copies of the Logging retained by the Commanding Officer are destroyed when the officer leaves the ship. The policy<sup>236</sup> does not provide for the officer who is the subject of Logging action to be provided with advice of the proposed Logging<sup>237</sup> to be pursued and invited to

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232 Defence Instruction (General) Personnel 03-3; Australian Book of Reference 10, Sailor's Career Management Manual, Chapter 6; Defence Instruction (Army) Personnel 47-10; Defence Instruction (Army) Personnel 116-5; Defence Instruction (Air Force) Personnel 4-19.

233 Defence Instruction (Navy) Administration 35-1, p 1.

234 *ibid.*

235 *ibid.*

236 Defence Instruction (Navy) Administration 35-1.

237 Including the proposed action, the detailed basis upon which action is to be taken and the material to be relied upon by the decision maker.

demonstrate why the intended action should not proceed.<sup>238</sup> Nor is there provision for the officer's response to be considered by the Commanding Officer in determining whether to proceed with the proposed Logging.

- 2.149 The procedure for a censure by an Administrative Authority or the Chief of Navy is somewhat different and is more closely aligned with that followed for other forms of administrative action. The Commanding Officer is required to forward a detailed report of the circumstances to the Administrative Authority.<sup>239</sup> The policy<sup>240</sup> requires that in the preparation of this report the officer 'be given the opportunity to submit his/her reasons in writing as to why he/she should not be censured.'<sup>241</sup> These reasons are to accompany the report to the Administrative Authority. The Administrative Authority may then 'refuse the submission [by the Commanding Officer], impose a censure or forward the [submission] to the Chief of Navy with his/her recommendations.'<sup>242</sup> When a censure is imposed by an Administrative Authority or the Chief of Navy one copy is provided to the censured officer and a further copy is retained permanently on the officer's Navy Office personnel record. A copy of the officer's reasons as to why the censure should not be effected is attached to both copies of the censure. When a censure is initiated by an Administrative Authority or the Chief of Navy the officer who is the subject of the censure will be given a similar opportunity to present reasons as to why the censure should not be effected.
- 2.150 The effect of a censure within Navy 'on an officer's future employment and promotion will depend entirely on the circumstances.'<sup>243</sup> A Commanding Officer's Logging has a limited life<sup>244</sup> and is likely to only have an impact should the officer come before a Service Tribunal or repeat the conduct or behaviour which was the subject of the censure. A censure by an Administrative Authority or the Chief of Navy has the potential for a more significant impact on an officer's future employment and promotion. It provides a permanent record and will be considered when selecting the officer for future postings and may 'indicate unsuitability for certain postings.'<sup>245</sup> The policy is clear that 'a censure does not in itself

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238 Such advice will outline the proposed action, the detailed basis upon which action is to be taken and the material relied upon by the decision maker.

239 There are currently three Administrative Authorities in the RAN. They are the Chief of Navy, the Maritime Commander and the Naval Training Commander (See Department of Defence, Submission, p. 1286).

240 Defence Instruction (Navy) Administration 35-1.

241 *ibid.*, p. 2.

242 *ibid.*

243 *ibid.*

244 The officer's tenure in the ship.

245 Defence Instruction (Navy) Administration 35-1, p. 2.

have the effect of precluding an officer from being considered for promotion' however the censure 'will be taken into account by the Promotion Board with all the other attributes of the officer.'<sup>246</sup>

## Army

- 2.151 The policy for administrative censure for officers within Army is detailed in a draft Defence Instruction (Army) Personnel. Army consider an administrative censure to be 'a formal and adverse criticism of the behaviour or performance of an officer' however a censure 'is not a punishment, or a Warning, but an administrative procedure whereby a superior military authority informs an officer of the authority's displeasure at the officer's work performance or manner of behaviour.'<sup>247</sup> The draft policy states that administrative censure is 'a matter of custom, rather than a prescribed procedure arising from a statute.'<sup>248</sup> While the draft policy limits the appointment holders which can issue a censure, in practice administrative censures are also issued by Commanding Officers of the rank of Lieutenant Colonel.
- 2.152 When the decision is taken by an issuing authority<sup>249</sup> to pursue administrative censure of an officer, that officer is provided with written advice of the proposed censure action and invited to demonstrate why the proposed action should not proceed. This advice is known as a *Notice to Show Cause*. The *Notice to Show Cause* will specify the precise nature of the proposed censure, the detailed basis upon which action is to be taken and the material upon which decision will be based. The officer's response to the *Notice to Show Cause* is considered by the issuing authority in making the decision to proceed or not to proceed with the proposed censure action. The censure process is generally conducted as a private matter between the issuing authority and the officer in order to reduce the undermining effect on the subordinate's credibility that may result from more public action.<sup>250</sup> Notwithstanding, both the issuing authority and the officer have access to legal advice during the process.
- 2.153 A censure within Army is imposed for a specified period.<sup>251</sup> The censure is prepared in triplicate with one copy provided to the censured officer,

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246 *ibid.*

247 Draft Defence Instruction (Army) Personnel, *Administrative Censures*, p. 1.

248 *ibid.*

249 In practice including appointment holders detailed at Annex Committee to Draft Defence Instruction (Army) Personnel, *Administrative Censures* and Commanding Officers of the rank of Lieutenant Colonel

250 Department of Defence, Submission, p. 1037.

251 While the specified life of the censure is not limited by the draft policy, the term of a censure is 'normally between two and five years ... [although]... a censure may be issued for a longer

one copy placed on the officer's unit personnel file and the third copy forwarded to the Directorate of Officer Career Management – Army, for incorporation on the officer's career management personnel file. The policy does not require that a copy of the officer's response to the *Notice to Show Cause* be attached to copies of the censure placed on the officer's personnel files. When the life of the censure has expired copies of the censure are expunged from the officer's personnel files and destroyed.

- 2.154 The effect of a censure within Army on an officer's future employment and promotion can be significant. It will be considered in any decisions relating to the officer's career management and may indicate unsuitability for certain postings. With regard to promotion, the 'issue of a censure will, except in cases of compelling Service need, make the recipient officer non competitive for promotion for the period that the censure remains active.'<sup>252</sup>

## Air Force

- 2.155 The policy for formal warning of members of Air Force is detailed in Defence Instruction (Air Force) Personnel 4-19. Formal Warnings<sup>253</sup> can take two forms: a Unit Formal Warning or, in more serious circumstances, an Air Force Office Warning.
- 2.156 The Unit Formal Warning is 'intended to be an aid to effective personnel management and [is] used when other attempts at corrective action have failed or are deemed inappropriate.'<sup>254</sup> Formal Warnings are employed when 'a member fails to respond to advice and formal counselling by failing to improve their performance or behaviour...[or]...when the member has fallen short in the performance of their duties, because of misconduct or other reasons of a serious nature'.<sup>255</sup> The decision to issue a Unit Formal Warning to a member is normally preceded by a period of formal counselling. A Unit Formal Warning can be issued to any member of the Air Force.
- 2.157 When raising a Unit Formal Warning on an officer, the Commanding Officer is required to provide initial advice of this intention to the

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period, or for the entire length of the recipient officer's career.' (See Draft Defence Instruction (Army) Personnel, *Administrative Censures*, p. 2).

252 Draft Defence Instruction (Army) Personnel, *Administrative Censures*, p. 3.

253 Formal Warnings are quite distinct from Unsuitability Reports. The latter is used when a member of the Air Force, for reasons beyond their own control, is unable to perform satisfactorily the duties of the posting, rank, mustering or specialisation (Instruction (Air Force) Personnel 4-19, Annex B, p. B1).

254 Defence Instruction (Air Force) Personnel 4-19, Annex G, p. G1.

255 *ibid.*



Directorate of Personnel Officers – Air Force.<sup>256</sup> In preparing the Unit Formal Warning, the Commanding Officer is required to detail the alleged shortcomings of the individual, specify the proposed period for the warning invite the affected member to make a statement in extenuation/rebuttal.

- 2.158 The member's statement in extenuation/rebuttal is reviewed by the Commanding Officer in determining whether to proceed with the proposed Unit Formal Warning. If requested an officer is to be made available to assist an airman/airwoman with the preparation of the member's statement.<sup>257</sup> Where the Commanding Officer decides to proceed with warning action he or she is required to comment on the statement and have that comment acknowledged by the affected member. Both the Commanding Officer and the affected member have access to legal advice during the Unit Formal Warning process.
- 2.159 The Unit Formal Warning is prepared in duplicate with one copy retained by the unit and the other forwarded to Air Force Office<sup>258</sup> through Wing Headquarters or the Support Unit. The Wing Headquarters or the Support Unit is required to comment on the warning before onforwarding to Air Force Office. If at the end of the Unit Formal Warning period a member has not reached the required standard, the Commanding Officer may raise an Adverse Report or extend the period of the Unit Formal Warning by raising an extension.<sup>259</sup> Such an extension requires that the affected member is formally counselled, the specifics of how the member is failing to meet the required standard outlined and the member provided an opportunity to make a written statement regarding the extension. If the member improves to the required standard within the period of the Unit Formal Warning, the Commanding Officer is to formally release the member from the warning. The distribution requirements for both an extension and a release are the same as for submission of the original Unit Formal Warning.
- 2.160 Air Force Office Warnings are distinct from those issue by units in that they are deemed to be more serious than a Unit Formal Warning; however, there is no administrative difference between the [two forms of warning] as far as the member is concerned.<sup>260</sup> Air Force Office Warnings

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256 Defence Instruction (Air Force) Personnel 4-19, p. 3.

257 *ibid*, p. 4.

258 To the Directorate of Personnel Officers – Air Force or the Directorate of Personnel Airmen – Air Force as determined by the rank of the affected member. In this regard the policy is somewhat outdated as, since the implementation of the Defence Reform Program, both career management organisations fall under the Defence Personnel Executive Program.

259 Defence Instruction (Air Force) Personnel 4-19, p. 4.

260 *ibid*, Annex H, p. H1.

are issued when the relevant career management organisation<sup>261</sup> within Air Force Office determines that 'an existing Unit Formal Warning requires greater emphasis, or a member's record indicates that they should be formally warned but no Unit Formal Warning has been issued'.<sup>262</sup> The process for the issue of an Air Force Office Warning allows for the affected member to make a statement in extenuation/rebuttal and for that statement to be considered by the decision-maker in determining whether to proceed with the formal warning. Release from an Air Force Office Warning is initiated by Air Force Office after consultation with the member's Commanding Officer.

- 2.161 Where a member fails to respond to a formal warning the Commanding Officer may raise an Adverse Report on the member. The Adverse Report details the circumstances leading to the decision to submit the report and the Commanding Officer's recommendation for subsequent action. The member is provided with a copy of the report and given an opportunity to make a statement in extenuation/rebuttal. As for the formal warning process, the member is provided with access to legal advice throughout the action. The Adverse Report is submitted to Air Force Office through Wing Headquarters or the Support Unit. Unlike the formal warning process, the roles of the initiating officer and the decision-maker are quite separate with the Commanding Officer initiating the process but the decision on subsequent action being taken by the relevant career management organisation in Air Force Office. An Adverse Report can be used as the basis to pursue other forms of administrative action including termination, reduction in rank and re-mustering.
- 2.162 The effect of a formal warning within Air Force on a member's future employment and promotion can be significant. It will be considered when selecting the member for future postings and may indicate unsuitability for certain postings. When a member under warning is posted, details of the warning are passed to the gaining unit and responsibility to manage the warning is assumed by the new Commanding Officer. While a censure in itself will not preclude an officer from being considered for promotion it will be taken into account by the promotion authority with all the other attributes of the officer and will form part of the officer's overall efficiency profile. The effect of a formal warning is far more clear for airmen/airwomen who, in accordance with Defence Instruction (Air Force) Personnel 5-1, will not normally be promoted while under a formal warning.

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261 In consultation with the member's Commanding Officer (See *ibid*).

262 *ibid*.

## Other Administrative Action

2.163 All other forms of administrative action follow a similar process to that used to administratively terminate the service of a member. The member is provided with advice of the administrative action<sup>263</sup> to be pursued and invited to demonstrate why the proposed action should not proceed.<sup>264</sup> The member's response is considered by the initiating officer in determining whether to proceed with the proposed termination. Both the initiating officer and the member have access to legal advice during the process. Following receipt of the member's response the initiating officer either ceases the proposed administrative action or recommends to the decision-maker that the action proceed. The initiating officer does not have the authority to make the final decision, rather the decision-maker provides a formal review of the proposed action before making a determination to proceed or not.

## Appeal against Administrative Action

2.164 For all forms of administrative action a member is, throughout the process, afforded every opportunity to make representation and to be heard. In addition, a member may appeal the decision to take administrative action through the internal ADF redress of grievance<sup>265</sup> system<sup>266</sup> or through external agencies, such as the Defence Force Ombudsman,<sup>267</sup> the Human Rights and Equal Opportunity Commission, and the civil courts.<sup>268</sup>

## Legal Representation

2.165 Legal advice is available to any member of the ADF subject to administrative action. Such advice is provided by a Permanent Forces or the Reserve Forces legal officer.<sup>269</sup> The only limiting factor in the provision of legal representation is the availability of Permanent Force legal

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263 *Notice to Show Cause* is the term used by the Army. Within Navy the *Notice to Show Cause* is known as a *Notice of Cause* and within Air Force a *Formal Warning Letter*.

264 Such advice will outline the proposed action, the detailed basis upon which action is to be taken and the material relied upon by the decision maker.

265 When a members submits a Redress of Grievance in respect of proposed administrative action, the implementation of the proposed administrative action is suspended pending the outcome of the Redress of Grievance.

266 Defence Instruction (General) Personnel 34-1.

267 Defence Instruction (General) Personnel 34-3.

268 Department of Defence, Submission, p. 1037.

269 A person who is enrolled as a barrister, a solicitor, a barrister and solicitor or a legal practitioner of a civil court (See DFDA, Section 3).

officers<sup>270</sup> and for this reason Reserve legal officers are often made available to a member who is subject to administrative action.

- 2.166 When an ADF member seeks legal advice from a Service legal officer on a matter relating to administrative action, that advice is provided at no cost to the member. Where a member chooses to seek advice from a civilian legal practitioner, that advice will be at the member's expense. Service legal assistance is also available to assist members in preparing an application for a Redress of Grievance. 'The role of the legal officer is not to take on the running of the complaint, but to provide advice on rights and principles of administrative law and procedural fairness.'<sup>271</sup>

## Cost

- 2.167 The administrative action system is operated primarily by members of the ADF who perform administrative action functions as a secondary duty that is incidental and additional to their normal duties. For example, Commanding Officers may be required to take administrative action against some of their subordinates but the time spent on these duties is likely to be very small relative to their primary functions of command and administration. Table 2.2 statistically details the current legal framework within the ADF. However, few, if any, of these legal professionals work exclusively on administrative action matters.<sup>272</sup>
- 2.168 There is no historical cost for administrative action within the ADF. There is no cash expenditure for ADF members performing administrative action functions as a secondary duty or full-time ADF legal officers performing functions in the administrative action process. This is not the case when cost is assessed on an accrual basis however the ADF does not currently capture accrual costings of such functions. When part-time ADF legal officers are utilised in the administrative action process they are paid sessional fees in accordance with current policy.<sup>273</sup>

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270 A Permanent Force legal officer may be unavailable because he or she has the responsibility to provide advice to the command structure and representation of the accused would bring into question issues of conflict of interest (See Smith,P., op cit, p. 63).

271 Smith,P., op cit, p. 64.

272 *ibid.*

273 INDMAN, Instruction R0112, *Sessional Fees for Reserve Legal Officers*. The legal authority covering payment of fees for Reserve legal officers is Determination 0109, *Legal Officers; Professional Fee*, made under Section 58B of the *Defence Act, 1903*.

## Reporting

- 2.169 There is no statutory or policy requirement for the ADF to provide an annual report on the operation of the administrative action system. In practice, the ADF does not maintain statistics of administrative action taken and provides no formal report on this issue.

