

OVERVIEW OF THE AUSTRALIAN MILITARY DISCIPLINE SYSTEM

1. In addition to being subject to the normal criminal law (this can include the criminal law systems of other countries, as well as Australia's criminal law system), Australian Defence Force (ADF) members (and certain other people in limited circumstances) are subject to a system of military discipline law. This system applies overseas as well as in Australia.
2. The purpose of the normal criminal law is to deter criminal behaviour. The purpose of military discipline law, however, is to maintain and enforce service discipline. A *Memorandum of Understanding between the Australian Directors of Public Prosecutions and Director of Military Prosecutions* provides for consultation and cooperation between these prosecutorial authorities, which is necessary because of the overlap between some service offences and some general criminal laws. Jurisdiction under the *Defence Force Discipline Act 1982*¹ (DFDA) is restricted to the prosecution of service offences which can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline. In other words, the ADF has a 'service connection' test to establish military jurisdiction and not a 'service status' test as is the case in the United States.

AUSTRALIA'S CURRENT MILITARY DISCIPLINE SYSTEM

3. **Constitutional basis.** The Australian Constitution contains a number of heads of power which empower the Commonwealth government to legislate with respect to Defence matters. Section 51(vi) (known as the 'defence power') is the main power relied on to legislate with respect to Defence matters, including the DFDA.
4. **Defence Force Discipline Act 1982.** The DFDA came into effect in 1985 and established a unified discipline regime applicable to all members of the ADF. The DFDA maintains the central feature of the previous single-Service systems it replaced, that being the role of command in deciding guilt or otherwise, in imposing punishments and in reviewing the conduct of trials.
5. **Offences under the DFDA.** The DFDA regulates three kinds of offending:
 - a. **Disciplinary offences:** service offences that are purely disciplinary in nature and for which there is no civilian equivalent (e.g. mutiny, prejudicial conduct, absence without leave or disobeying a lawful command).
 - b. **Equivalent offences:** service offences with elements that are the same or similar to a civilian offence (e.g. assaulting a superior officer, theft or driving while intoxicated).
 - c. **Territory offences:** service offences applicable by virtue of the incorporation of the criminal law of the Australian Capital Territory and certain Commonwealth criminal laws into the DFDA through section 61.

Defence members, defence civilians and prisoners of war are subject to the DFDA. For the purposes of the DFDA, 'defence civilians' are persons who are properly authorised to be 'defence civilians' and who accompany a part of the Defence Force that is outside Australia

¹ <http://www.comlaw.gov.au/Series/C2004A02711>

or on operations with the enemy and has agreed in writing to subject him or herself to military jurisdiction while so accompanying that part of the Defence Force.

Summary Authorities

6. The term ‘summary’, when applied to legal proceedings, is a reference to dealing with matters expeditiously and without ordinary incidental formalities.² There are three different levels of summary authority: superior summary authorities, commanding officers and subordinate summary authorities:³

- a. **Superior summary authorities.** The Chief of the Defence Force (CDF) and the Service Chiefs appoint superior summary authorities.⁴
- b. **Commanding officers.** Commanding officers are able to exercise the powers of a commanding officer for disciplinary purposes.⁵ In addition, the CDF, a Service Chief or an officer authorised by CDF or a Service Chief can appoint commanding officers for disciplinary purposes.⁶
- c. **Subordinate summary authorities.** Commanding officers appoint subordinate summary authorities.⁷

7. Unlike judge advocates in courts martial or Defence Force magistrates, summary authorities are commanders and, generally, they will not have legal qualifications. This makes them lay-tribunals, albeit that they are exercising quasi-judicial functions.

8. Also unlike judge advocates and Defence Force magistrates, a summary authority must generally commence proceedings by ‘dealing’ with a charge. A summary authority’s power to deal with a charge is broader than his/her ability to try a charge. A summary authority, in dealing with a charge, is essentially deciding on the disposition of the charge or, in other words, deciding what course of action to take.

9. Possible courses of action include: referring the charge to the Director of Military Prosecutions (DMP), referring the charge to another summary authority, trying the charge, or directing that the charge not be proceeded with.⁸ To decide on the most appropriate course of

² *Dowson v McGrath* (1956) W.A.R. 27.

³ The term ‘summary authority’ is defined in ss 3(1) of the DFDA as meaning a ‘superior summary authority’, a ‘commanding officer’ or a ‘subordinate summary authority’. In turn, the term ‘superior summary authority’ is defined in ss 3(1) of the DFDA, the term ‘commanding officer’ is defined in ss 3(11) of the DFDA, and the term ‘subordinate summary authority’ is defined in ss 3(1) of the DFDA.

⁴ DFDA ss 3(1) and 105(1). The appointment of superior summary authorities is discussed in more detail in Chapter 7.

⁵ DFDA ss 3(11). This is discussed in more detail in Chapter 7.

⁶ See DFDA ss 5(1) (and DFDA ss 3(1) for a definition of the term ‘authorized officer’). The appointment of commanding officers for disciplinary purposes is discussed in more detail in Chapter 7.

⁷ DFDA ss 3(1) and 105(2). The appointment of subordinate summary authorities is discussed in more detail in Chapters 3 and 7.

⁸ These options are discussed in more detail in Chapters 7 and 8.

action, a summary authority may hear an outline of the case, and may also hear evidence in relation to a charge.⁹

10. There are two main reasons for having different levels of summary authorities. The first is so that the summary authority is of an appropriate rank having regard to the accused person. The second is so that more senior officers deal with and try more serious charges, leaving more junior officers to deal with and try the less serious charges.

Courts martial and Defence Force magistrate trials

11. Courts martial and Defence Force magistrate (DFM) trials are generally reserved for the trial of more serious service offences. The two exceptions to this are offences referred to a court martial or DFM by a summary authority, and those where an accused before a summary authority has a right to elect, and elects, to be tried by court martial or DFM from a summary hearing.

12. Courts martial are made up of panel members who are Defence members and who decide whether or not an accused is guilty and award the punishment. Courts martial are assisted by a judge advocate, who is a military officer and a legal practitioner with significant experience, appointed by the CDF to the judge advocates panel on the recommendation of the Judge Advocate General (JAG). The JAG is appointed by the Governor-General and must be, or have been, a Justice or Judge of a federal court or of a Supreme Court of a State or Territory. The JAG may be a civilian or a member of the ADF and his or her duties include the appointment of DFMs, appointment of officers who provide legal reports on the trials of service offences, the making of Rules for the conduct of trials of more serious service offences and providing the highest level of legal report for reviewing authorities in instances where a reviewing authority seeks further legal advice to that initially provided by an ADF legal officer. Defence Force magistrates are appointed by the JAG from the panel of judge advocates.

13. **General Courts Martial.** General Courts Martial are constituted by a panel of not less than five officers, including a President of the panel who is of or above the rank of Colonel (equivalent). They may impose punishments up to and including imprisonment for life.

14. **Restricted Courts Martial (RCM).** Restricted Courts Martial are constituted by a panel of not less than three officers, including a President of the panel who is of or above the rank of Lieutenant Colonel (equivalent). They can impose sentences of imprisonment or detention for a period not exceeding six months.

15. **Defence Force magistrates (DFM).** DFM trials are akin to a judge exercising summary jurisdiction under the general criminal law, in that they are constituted by a legal officer sitting without a jury or panel. The powers of punishment of a DFM are the same as for a RCM.

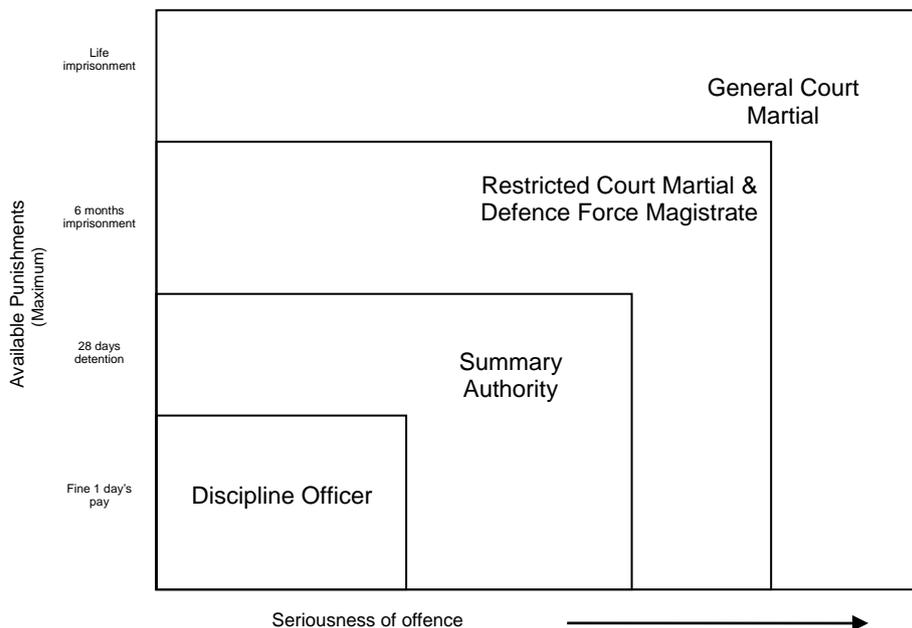
16. Both courts martial and DFM trials are conducted in accordance with the laws of evidence in force in the Jervis Bay Territory, and apply the practice and procedure of the Supreme Court of the Australian Capital Territory, where their procedure is not otherwise provided for by or under the DFDA. Importantly, as members of the ADF, the JAG, judge

⁹ DFDA ss 111A(2).

advocates, Defence Force magistrates and court martial panel members are themselves all subject to the provisions of the DFDA.

17. **Discipline Officer Scheme.** The system of service tribunals is complemented by a 'discipline officer' scheme. The discipline officer scheme was established to provide an alternative for dealing with more minor disciplinary 'infringements'. The Discipline Officer scheme operates to quickly dispose of minor disciplinary infringements committed by junior members of the ADF. Discipline Officers are restricted to imposing minor punishments (a fine of up to one day's pay), and can only be used if the accused person has admitted the offence and submitted to the Discipline Officer's jurisdiction. Discipline Officer records are only in existence for a twelve month period, so no permanent record is made or kept of the infringement. The Discipline Officer scheme does not fall for consideration in this paper.

The relative breadth of jurisdiction of the Discipline Officer Scheme and Service Tribunals



18. **Director of Military Prosecutions (DMP).** Offences tried by courts martial and DFMs are prosecuted by the DMP or by his/her staff, who are ADF legal officers, on the DMP's behalf.

19. **Legal representation of accused.** Any accused person awaiting trial by a court martial or a DFM is afforded the opportunity to be represented at the trial, and to be advised before the trial, by a legal officer, at no cost to the accused person. An ADF member is not obliged to be represented by an ADF legal officer, but is generally required to pay for their representation if it is not provided by an ADF legal officer.

20. **Parallel administrative action.** The fact that an ADF member has been the subject of disciplinary action (including the discipline officer scheme) does not mean that parallel administrative action cannot be taken against him/her.

USE OF THE DISCIPLINE SYSTEM IN PEACETIME

21. It has generally been agreed by the Chief of the Australian Defence Force and the three Service Chiefs that a proper military discipline system must be able to operate in Australia and Overseas, in peacetime and on operations. This is generally recognised as important due to the need to maintain a disciplined force, even in peacetime, that can be deployed at anytime and operate effectively:

The ADF has a military justice system to support commanders and to ensure effective command at all times. It is vital to the successful conduct of operations and to facilitate its activities during peacetime, including the maintenance of operational preparedness. Establishing and maintaining a high standard of discipline in both peace and on operations is essential for effective day-to-day functioning of the ADF and is applicable to all members of the ADF. The unique nature of ADF service demands a system that will work in both peace and armed conflict. Commanders use the military justice system on a daily basis. It is an integral part of their ability to lead the people for whom they are responsible. Without an effective military justice system, the ADF would not function...Discipline is much more an aid to ADF personnel to enable them to meet the challenges of military service than it is a management tool for commanders to correct or punish unacceptable behaviour that could undermine effective command and control in the ADF. Teamwork and mutual support of the highest order are essential to success. Obedience to lawful direction is an intrinsic requirement expected from the most junior to the most senior members of the ADF.¹⁰

22. Other commentators have noted the long history of discipline and its enforcement regarding an armed force. More especially the enforcement of discipline is seen as being necessary during both ‘war’ and in peacetime.

All armies of the world have some form of military law to govern their troops during war and peace, with the Australian Army being no exception. Military law is unfortunately necessary to maintain discipline and morale among the troops engaged in war or parading in peace. As old as the existence of armed forces is the concept of discipline and a special law code to enforce that discipline has been part of soldiering since the early Roman times.¹¹

THE ADF’S PREVIOUS MILITARY DISCIPLINE SYSTEM - A MILITARY COURT

23. As a result of the Committee’s Report in 2005, Defence established the Australian Military Court (AMC) under the DFDA. The AMC comprised a Chief Military Judge, two full-time Military Judges, and up to eight part-time Military Judges. The Governor-General of the Commonwealth of Australia appointed all Military Judges. To be eligible for appointment as a Military Judge, a person must have been:

¹⁰ General Peter Cosgrove, Chief of Defence Force, Submission to The Foreign Affairs, Defence and Trade References Committee Report ‘*The Effectiveness of Australia’s Military Justice System*’ P16, pp 5-6,
http://www.apf.gov.au/parliamentary_business/committees/senate_committees?url=fact_ctte/miljustice/index.htm.

¹¹ Anthony Buckingham, Australian MP, “*A brief history of Australian military law*”, History Website, 2007, www.home.iprimus.com.au/buckomp

- a. enrolled as a legal practitioner (and to have been so for at least 5 years);
- b. an ADF member (either permanent or reserve, however, reservists must be rendering continuous full-time service);
- c. met minimum rank requirements; and
- d. met individual service deployment requirements.

24. The Service and deployability requirements reflected the fact that the AMC was intended to be fully deployable and to sit anywhere at any time. All Military Judges had security of tenure. This helped to ensure that they were perceived as being independent and impartial in the performance of their judicial duties. The AMC could hear and determine appeals from summary authorities. The AMC could also try charges in the first instance (that is, without there having been a summary authority trial).

25. **Appeals to the AMC.** The AMC could hear appeals from summary authority proceedings by a convicted person in relation to that person's conviction, any punishment imposed and/or any order made. Upon appeal, the AMC could uphold or quash a conviction. If the AMC quashed a conviction, it could order a new trial which would be heard by the AMC, or, where there was an applicable 'alternative offence' substitute a conviction for that alternative offence. Upon appeal, the AMC could also confirm, quash/revoke or vary a punishment or order.

26. **Trials.** The consent of the Commonwealth Director of Public Prosecutions is always required before DFDA proceedings can be commenced for certain very serious offences (for example, treason, murder, manslaughter and certain serious sexual offences) allegedly committed in Australia. While the AMC could hear appeals from decisions of summary authorities in relation to 'custodial offences', it could not try a charge of a custodial offence. Other than these limitations the AMC was able to try any charge for a 'service offence' against any 'defence member' or 'defence civilian'.

27. The AMC was the only tribunal able to try charges where the accused person was above the rank of Rear Admiral/Major General/Air Vice Marshal, regardless of the offence with which they were charged, where the offence was a 'prescribed offence' (generally more serious offences proscribed by the DFDA), regardless of the rank of the accused person, and where an accused person elected to be tried by the AMC, rather than a summary authority (the right of election, if any, was determined by the rank of the accused person, the nature of the offence and, in certain circumstances, the seriousness of the alleged conduct).

28. An AMC trial could be conducted by a Military Judge sitting with a military jury (of either twelve or six members) or a Military Judge sitting alone.

29. **Appeals from the Australian Military Court.** The *Defence Force Discipline Appeals Act 1955*¹² provided for appeals to be made to the Defence Force Discipline Appeal Tribunal. A convicted person and the Director of Military Prosecutions have standing to bring an appeal.

¹² <http://www.comlaw.gov.au/Series/C1955A00016>

30. A convicted person could appeal against their conviction, punishment or order made in respect of the conviction. However a ground of appeal that is not a question of law, could only be brought by leave of the Defence Force Discipline Appeal Tribunal. The Director of Military Prosecutions could appeal against a punishment imposed or order made in respect of a conviction. An appeal or application to appeal had to be brought within 60 days of the conviction, punishment or order being made.

31. Appeals from proceedings in the AMC could also be made by an affected party to either the Federal Court of Australia or the High Court of Australia on a question of law or for the purpose of seeking a form of relief from a decision of the Australian Military Court.

The end of the AMC

32. In August of 2009 the High Court of Australia in the case of *Lane v Morrison*¹³ held that those provisions within the DFDA which created the AMC were invalid. While the summary system was unaffected (excepting those links to the AMC) there was an immediate requirement to re-instate the previous system of courts martial and Defence Force magistrates hearings as an interim system. The post-*Lane v Morrison* Australian military justice system was enacted through the Military Justice (Interim Measures) Bill (No 1) 2009 (Cth)¹⁴ and the Military Justice (Interim Measures) Bill (No 2) 2009 (Cth).¹⁵ In its response to the High Court ruling, the Government directed that a court under Chapter III of the Australian Constitution be developed as the long term solution. On 24 May 2010 the Government announced its intention to create a new federal court, the Military Court of Australia, under Chapter III.

THE MILITARY COURT OF AUSTRALIA

Background

33. On 24 May 2010, the Government announced that it would legislate to create the Military Court of Australia (MCA) constituted under Chapter III of the Constitution. The MCA will try charges of serious service offences and, in addition, all Defence members charged with less serious service offences will have the right to elect to be tried by the new MCA. *The Military Court of Australia Bill 2010* had its first and second readings in the House of Representatives on 24 Jun 2010, but lapsed when Parliament was prorogued before the 2010 General Election.

34. The Australian Government remained committed to the creation of a constitutional and permanent military court. Legislation for the creation of the MCA was reintroduced into Parliament on 21 June 2012.¹⁶ On 9 October 2012, the Australian Senate Legal and Constitutional Affairs Legislation Committee delivered a report on the bills establishing the

¹³ *Lane v. Morrison* (2009) 239 CLR 230

(<http://www.austlii.edu.au/au/cases/cth/HCA/2009/29.html>)

¹⁴ http://www.apf.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s727

¹⁵ http://www.apf.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s728

¹⁶ <http://parlinfo.apf.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2F4853%22>

MCA.¹⁷ While committee members from the current Government endorsed the bills with only a few minor changes, committee members from two opposition parties objected to the bills because of the absence of a right to trial by jury before the Military Court of Australia, and the inability of reservist military members to be appointed as military judges of the Court. The Bills have not passed through Parliament and will again lapse if not passed before Parliament is prorogued for the 2013 General Election (which must be held before 30 November 2013).

Structure of the MCA

35. **A superior court of record.** The MCA will be a court of record and have its own seal and stamp. The Chief Justice of the MCA will be required to prepare and give to the Attorney-General an annual report on the management and administrative affairs of the Court.

36. **Two Divisions.** The MCA will consist of a separate General Division and a Superior and Appellate Division. These two Divisions will comprise judicial officers at the level of Federal Magistrate and Federal Court Judge respectively. Judges of the Superior and Appellate Division will try very serious service offences, hear appeals from decision of the General Division of the MCA and appeals from a decision of a court martial or Defence Force magistrate (a residual service tribunal to be used on an ad hoc basis overseas if required).

37. **Appointment of judicial officers.** To be appointed as a Judge or Federal Magistrate of the MCA, a person must by reason of experience or training, understand the nature of service in the ADF and must not be a member of the ADF. The Minister for Defence must be consulted in relation to all judicial appointments.

Administration of the MCA

38. **Registry.** There will be a Registrar of the MCA who may also be the Registrar of the Federal Court of Australia.

39. **Arrangements with other courts.** While the MCA will be a separate and distinct federal court, it will be serviced by the Federal Court of Australia's administrative systems to the greatest extent possible in order to enhance efficiency.

40. **Administrative support from the ADF.** Subject to the discretion of the presiding judicial officer, ADF members may carry out administrative functions, such as escort or orderly duties, to assist with the conduct of trials. A senior military officer position will be created to act as a means of liaison between Defence and the MCA to address administrative arrangements between the ADF and the MCA.

41. **Special provisions for ADF staff.** ADF members carrying out administrative functions for the MCA are protected from any command influence because they are exempt from the *Defence Force Discipline Act 1982* in relation to the performance of their functions within the MCA.

Practice and Procedure, Rules and Regulations

¹⁷http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/military_court_2012/report/index.htm

42. **Open to public.** The MCA will be open to the public. However, the MCA may regulate the giving of certain evidence for the protection of witnesses and may forbid or restrict publication of particular evidence, identities and documents for reasons of national or operational security.
43. **Accused to be present at hearings.** The accused has a right to be present at all hearings. This right may only be qualified because of disorderly behaviour.
44. **Courts rules.** Rules of Court will need to be developed by the judges and magistrates of the Court.
45. **Rules of evidence.** The MCA will hear evidence on oath or affirmation orally. The Commonwealth *Evidence Act 1995*¹⁸ and parts of the Australian Capital Territory's *Evidence (Miscellaneous Provisions) Act 1991*¹⁹ will govern evidence given in the MCA.
46. **Location of the MCA.** The Registrar of the MCA may determine if it is appropriate for a trial to be conducted in a federal court room or on a military base. The conduct of trials on bases can provide defence members with visibility of the administration of military justice and also provides flexibility for the MCA to conduct trials in the locality of witnesses, particularly where this is remote from capital cities.
47. **Role of uniformed members in the proceeding.** The MCA will necessarily have links to the ADF through the appearance in the court room of uniformed defence personnel in a variety of roles (prosecution, defence counsel and administrative staff). All personnel providing administrative assistance or appearing before the MCA will be dressed in ceremonial uniform.

CONSEQUENTIAL CHANGES TO THE MILITARY DISCIPLINE SYSTEM

Discontinuance of certain offices

48. **Chief Judge Advocate.** There will be no requirement for another Chief Judge Advocate to be appointed at the expiration of the current Chief Judge Advocate's term. The responsibilities of the office outside those as the senior sitting judge advocate will be resumed by the Judge Advocate General.
49. **Registrar of Military Justice.** The office of Registrar of Military Justice will be discontinued following the introduction of the MCA. The roles and responsibilities of the office will be performed by the registry of the MCA. An ADF case management unit will facilitate the travel and administration of ADF members.

Director of Defence Counsel Services

50. **Statutory recognition.** The military staff position of Director Defence Counsel Services (DDCS) was created on 15 May 2006 with the primary responsibility being the coordination and management of defence counsel services for members of the ADF facing charges before the AMC (as it then came into existence, see para 25). The position of DDCS

¹⁸ <http://www.comlaw.gov.au/Series/C2004A04858>

¹⁹ <http://www.legislation.act.gov.au/a/1991-34/default.asp>

will, concurrently with the passing of legislation establishing the MCA, have statutory recognition in the *Defence Act 1903*²⁰ with the Chief of the Defence Force having responsibility for the selection and appointment of a senior military legal officer to the position.

51. **Roles and responsibilities.** The DDCS is responsible for:

- a. The provision of counsel and other assistance to the accused, at Commonwealth expense in disciplinary proceedings before the MCA, in particular:
 - (1) advice prior to trial and representation at trial;
 - (2) representation at appeals before the MCA (including cases stated and referral of questions of law after trial); and
 - (3) the trial and appeal/petitions from residual service tribunals when used.
- b. Legal representation and advice by legal officers, to persons entitled to such representation or advice, for the purposes of a court of inquiry, a board of inquiry or a Chief of the Defence Force commission of inquiry at Commonwealth expense.

52. **Protections.** The DDCS is not subject to military command or to the DFDA in the performance of his or her functions, or the exercise of his or her powers, as the DDCS.

Role of the Director of Military Prosecutions

53. **General.** The office of the Director of Military Prosecutions (DMP) was created by statute and is the ADF's independent prosecutorial authority. The office holder is given statutory tenure, certain statutory functions, and independence in the performance of these functions to ensure that his or her functions are performed, and are seen to be performed, with impartiality. The DMP's military legal staff are provided on a posting to the DMP's office in order to undertake prosecutions under the DMP's direction.

54. **Power to lay charges.** The DMP may institute charges against a defence member, independently of command.

55. **Civilian Directors of Public Prosecutions.** The *Memorandum of Understanding between the Australian Directors of Public Prosecutions and Director of Military Prosecutions* is the cooperative arrangement which underpins the statutory requirement for the Commonwealth Director of Public Prosecutions' consent and endorses cooperation and consultation between the Australian Directors of Public Prosecutions and the DMP, particularly where jurisdiction overlaps.

The Judge Advocate General

56. The Judge Advocate General (JAG) is appointed by the Governor-General of Australia, and must be, or have been, a Judge of a Federal or State or Territory Supreme Court. All

²⁰ <http://www.comlaw.gov.au/Series/C1903A00020>

appointees have been drawn from the Reserve Forces and have held the rank of Rear Admiral, Major General or Air Vice Marshal. The JAG is required to submit to Parliament an annual report on the operation of the DFDA. The JAG also provides legal review of the previous system of courts martial and Defence Force magistrate trials. With the introduction of the AMC there was a reduced need for the legal review of previous courts martial and Defence Force magistrate proceedings. However, this function was re-established with the resurgence of the courts martial system on the finding of the provisions founding the AMC to be invalid. With the establishment of the MCA in the near future the role of the JAG will mostly function as a commentator on the operation of the summary system and the ability to provide legal review of the residual service tribunals when used.

Authorised by: Director-General ADF Legal Service, Defence Legal, Department of Defence
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Disclaimer: This paper has been provided to the Response Systems to Adult Sexual Assault Crime Panel to provide a general overview and understanding of the issues in the paper. This paper is not, and does not purport to be, a definitive examination of all relevant issues. More detailed guidance is available from relevant legislation, Department of Defence policies and from Defence Legal, Department of Defence.