

COMPETENT REVIEWING AUTHORITY

Introduction

1. A competent reviewing authority decides automatic reviews and petitions. Before describing the concept of a competent reviewing authority it is necessary to outline the processes in the *Defence Force Discipline Act 1982* (DFDA) known as automatic reviews and petitions.

Background information

2. **Automatic reviews.** The DFDA provides for the automatic review of all service tribunal¹ proceedings that result in a conviction of a person of a service offence. A service tribunal is required to send the record of proceedings to a reviewing authority² as soon as practicable. Before conducting a review, the reviewing authority must obtain and consider a report from a legal officer. In relation to convictions and punishments by a Defence Force Magistrate or Court Martial, the legal report must be provided by a legal officer who has been appointed by the Chief of the Defence Force or a Service Chief.³ A reviewing authority:

- a. must quash a conviction where it appears to be wrong in law;
- b. must quash a punishment that is wrong in law or may quash a punishment that appears to be excessive; and
- c. is bound by any opinion on a question of law set out in the report obtained from a legal officer.

3. The command based nature of the automatic review process affords a procedural safeguard for convicted persons as well as facilitating oversight of the discipline system.

4. **Petitions.** In addition to automatic review, a service member may lodge a petition with the reviewing authority for review of the proceedings concerned. A petition must be lodged within 30 days of a service member receiving written notice of the results of automatic review. Petitioners must set out the grounds that are relied upon to submit that the reviewing authority ought to exercise his or her power to quash a conviction or punishment. The petitioner's specifying of grounds is what distinguishes a petition from an automatic review.

¹ The term 'service tribunal' includes the full spectrum of disciplinary proceedings, from the summary level to trials before Defence Force Magistrates or Courts Martial. Most proceedings at the summary level are before a Subordinate Summary Authority (eg. the Company Commander of a Battalion) or a Commanding Officer.

² The Chief of the Defence Force or a Service Chief may, by instrument in writing, appoint an officer, or each officer in a class of officers, to be a reviewing authority. An example of a reviewing authority on an Army base is the Brigade Commander.

³ These legal officers will be highly experienced to be appointed and will usually have judicial experience.

Competent reviewing authority

5. Although the Chief of the Defence Force or a Service Chief may appoint a 'reviewing authority' the DFDA provisions dealing with automatic reviews stipulate that a record of proceedings must be sent to a 'competent reviewing authority'. Similarly, the DFDA requires petitions to be lodged with a 'competent reviewing authority'. Section 150A of the DFDA provides that:

'A reviewing authority is a **competent reviewing authority** for the purposes of reviewing the proceedings of a service tribunal that relate to a particular charge only if the reviewing authority did not exercise any of the powers or perform any of the functions of a superior authority in relation to the charge.'

6. The requirement of a 'competent' reviewing authority is intended to ensure appropriate procedural fairness. Reviewing authorities often hold appointments as both a reviewing authority and a superior authority. The superior authority role involves making statements on the record to the Director of Military Prosecutions in relation to potential charges.⁴ Accordingly, the 'competent' reviewing authority requirement ensures that automatic reviews and petitions are reviewed by officers who have not previously acted as a superior authority in relation to the same matter. The automatic reviews and petitions processes therefore address potential allegations of bias or apprehended bias.

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⁴ The appointment and function of a superior authority is addressed in a separate brief.

CHIEF JUDGE ADVOCATE (CJA)

Statutory Basis

1. The position of CJA was formally created by the insertion of ss.188A-188E of the *Defence Force Discipline Act 1982* (DFDA) following passage of the *Defence Legislation Amendment Act 2003*. It had existed informally prior to that.
2. *Defence Legislation Amendment Act (No 2) 2005* effected the following amendments:
 - a. The permissible term for the appointment was changed from 3 years to 5 and the limitation added that the CJA must not hold office for a total of more than 10 years;
 - b. The minimum rank was changed from O6 to O7; and
 - c. The position was to be remunerated by the determination of the Commonwealth Remuneration Tribunal.
3. The office was abolished upon the purported creation of the Australian Military Court (AMC) pursuant to amendments to the DFDA effected by the *Defence Legislation Amendment Act 2006*. The Chief Military Judge (CMJ) of the AMC was appointed by the Governor-General in Council for a term of 10 years from 1 Oct 07.
4. On 26 Aug 09, the High Court handed down its decision in *Lane v Morrison* [2009] HCA 29 declaring Division 3 of Part VII of the DFDA invalid. (This part related to the purported creation of the AMC.) Following that decision, the *Military Justice (Interim Measures) Act (No 1) 2009* was enacted. The explanatory memorandum to the Bill concerned indicated:

‘The purpose of this Bill is to return to the Service tribunal system that existed before the creation of the AMC. This is an interim measure until the Government can legislate for a Chapter III court.’
5. That legislation abolished the office of CMJ and restored the office of CJA. By force of the legislation, the officer who had been appointed as CMJ was appointed as CJA under the Interim Measures.
6. The appointment by force of law was originally limited to a term of two years, but that has subsequently been amended to a term of six years.

Key Aspects of the Office

7. As indicated above, the current appointment of CJA is made by force of law. However, the legislative intention of DFDA s.188A (as amended) was that the CJA should be appointed by the Judge Advocate General (JAG) for a period not exceeding five years, subject to eligibility for re-appointment for a total term of not more than ten years. (The office of JAG was created by s.179 of the DFDA. The holder of the office must be, or have been, a judge of a Federal court or State Supreme court. The appointment is made by the Governor-General in Council.)

8. There are no specific statutory provisions for the termination of the appointment but, because it is a condition of the appointment that, inter alia, the office holder be an officer holding a rank not lower than O-7, termination of the military appointment would effectively terminate the appointment as CJA.

9. The *Military Justice (Interim Measures) Act (No 1) 2009* (as amended) does include specific provision for compensation in the event of early loss of office.

Statutory Functions

10. DFDA s.188B makes provision for the role of the CJA. In particular, CJA is to provide administrative assistance to the JAG, and the JAG may delegate all or any of his or her powers (other than those enumerated at DFDA s.188B(3)) to CJA.

11. In addition to the rank requirement imposed by DFDA s.188C, there is also a requirement that CJA be a member of the judge advocates (JAs) panel established pursuant to DFDA s.196. As a member of the JAs panel CJA sits as the judge advocate to courts martial. CJA will also, inevitably, be appointed as a Defence Force Magistrate (DFM) pursuant to DFDA s.127. (The position of judge advocate to a court martial is analogous to that of a judge sitting with a jury but with the notable exception that in the event of a conviction, the court martial panel would sentence having had direction from the JA as opposed to the JA sentencing.) The DFM is, essentially, a judge alone trial.

Key Roles in the DFDA

12. Having regard to the delegations in place under DFDA s.188B, CJA effectively allocates the JA or DFM to particular trials and, in conjunction with the Registrar of Military Justice (RMJ), manages the list of matters proceeding for trial at that level.

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DIRECTORATE OF DEFENCE COUNSEL SERVICES

Role

1. To facilitate the provision of legal representation of accused ADF members before Courts Martial and Defence Force Magistrate (DFM) trials.

Authority

2. *Defence Force Discipline Act 1982* section 137 requires the Chief of the Defence Force (CDF), where the exigencies of service permit, to provide an opportunity to an accused member awaiting trial by Court Martial or DFM to be advised prior to trial and represented at trial by a legal officer. CDF may delegate this power to an ADF member who is not below the rank of Colonel (or other service equivalent). CDF has delegated this responsibility to Director Defence Counsel Services (DDCS).

3. Unlike the Director of Military Prosecutions, DDCS does not have statutory independence. Current legislation before the Australian Parliament seeks to modify this situation by providing statutory recognition of the position and legislating its purpose and functions.

Key Aspects of the Position

4. The position is largely similar to many military legal officer posted positions in that it may only be filled by a suitably ranked legal officer (ADF equivalent to JAG officer). It is a tri-Service rotational billet meaning each of the three services takes turns in providing a suitably qualified and ranked individual to fill the position. Tenure in the position matches the ADF and single service posting cycles, usually two-three years duration.

5. At present, organisationally, the Directorate resides within the broader Defence Legal Division and reports to the Director General ADF Legal Service. However in practice, the Directorate is managed at 'arms length' from Defence Legal in order to improve its independence from the military chain of command.

6. The Directorate is physically located away from Defence Legal and any other military units associated with command functions. It is staffed by Department of Defence civilian personnel, with the only uniformed member in the Directorate being the Director.

Statutory Functions

7. The only statutory function for DCS is a CDF delegated responsibility under the *Defence Force Discipline Act 1982* section 101F mandating the establishment of a list of the names of ADF legal officers who are willing to provide legal advice at short notice to ADF members who are in military custody.

Key Roles in the DFDA system/process

8. Utilising an established nationwide tri-Service panel of over 200 reserve legal officers, DCS facilitates and co-ordinates Defending Officers for accused members facing trial by court martial or DFM.
9. Assist Defending Officers with pre-trial administration and preparation (legal research/discovery, arranging for attendance of witnesses etc).
10. Facilitate legal support for ADF members during the investigation phase as directed.
11. Assist Defending Officers and accused members throughout the trial process.

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DIRECTOR OF MILITARY PROSECUTIONS (DMP)

Administrative arrangements

1. **Position.** The position of DMP was established by inserting Part XIA into the *Defence Force Discipline Act 1982* (DFDA) by legislative amendment that took effect on 12 June 2006. The DMP replaced Convening Authorities, who had, since the inception of the DFDA in 1985, *inter alia* decided whether to charge ADF members with a service offence, convened the court martial/Defence force magistrate trial, appointed the judge advocate/Defence Force magistrate, appointed the court martial panel members, was responsible for all pre and post trial administration and reviewed all trials under the DFDA which had resulted in a conviction for a service offence.
2. **Appointment.** The DMP is appointed in writing by the Minister for Defence and fulfils the role on a full time and exclusive basis.
3. **Qualification.** The DMP must have been enrolled as a legal practitioner for not less than 5 years and must be a member of the Permanent Navy, the Regular Army or the Permanent Air Force or be a member of the Reserves who is rendering continuous full time service. The DMP holds the rank of O-7 or higher.
4. **Tenure.** The DMP holds the office for the period specified in the instrument of appointment. The period must not exceed 5 years. The DMP is eligible for reappointment but must not hold office for more than 10 years.
5. **Remuneration.** The remuneration of the DMP is determined by the statutorily independent Defence Force Remuneration Tribunal.
6. **Termination.** The Minister for Defence may terminate the appointment of the DMP in the event of misbehaviour or a loss of capacity and must terminate the appointment in the event of certain prescribed circumstances including: bankruptcy, unauthorised absence from duty, unauthorised outside employment, engaging in legal practice outside the duties of the office or if the DMP fails to comply with disclosure of conflict of interest obligations.
7. **Conflict of interest.** The DMP has a standing statutory obligation to disclose, in writing to the Minister for Defence, any interests that could potentially conflict with the proper performance of his or her functions.
8. **Staff.** The military legal officers necessary to assist the DMP are to be made available by the Service Chiefs. Civilian administrative staff are engaged under the *Public Service Act 1999*.
9. **Report to the Minister for Defence.** The DFDA requires the DMP to prepare and deliver to the Minister for Defence an annual report detailing the operations of the DMP, for tabling in Parliament.

10. **Establishment.**

- a. **Prosecutors:** 1x O-6 (Deputy), 2 x O-5, 7 x O-4, 2 x O-3;
- b. **Support staff:** 1x E-7 (Service Police Investigation Liaison); Business Manager (1 x public service); Paralegals (6 x public service - includes victim/witness support).

11. **Staff training.** There are no additional training or qualification requirements for legal officers posted to the office of the DMP.

Statutory functions

12. **Prosecutions.** DMP has sole responsibility for prosecuting charges of service offences in trials by court martial or Defence Force magistrate, including charges referred to the DMP from the summary jurisdiction (a commanding officer), or in certain circumstances, by the election of the accused ADF member. The DMP can refer charges to a CO and direct the relevant CO to try the charges.

13. **Charging ADF members.** The DMP can charge individuals without reference to command. The DMP will seek the views of superior authorities (senior ADF commanders of O-6 to O-9 rank in the accused's immediate chain of command) on service interests when considering laying charges. 'Service interests' includes impact on operations or morale, but does not include the legal merits of the decision to lay charges.

Sexual Offences

14. **Sexual offences.** All sexual offences are prescribed under the DFDA (that is they carry a maximum sentence of more than 2 years) and accordingly they cannot be dealt with by a CO. The practical effect is that the DMP has exclusive jurisdiction over the decision to prosecute and the conduct of a prosecution for sexual offences (including sexual assault) as a service offence. All prosecutions for sexual offences are carried out by the DMP in person or by an officer directed by the DMP to appear on his or her behalf.

15. **Sexual assault.** Importantly, the term 'sexual assault' has a specific and narrow meaning under Australian law. It involves only those sexual offences where an accused assaults another with intent to engage in sexual intercourse and knows that the person does not consent or is reckless as to whether they consent, or, actually engages in sexual intercourse with another person and knows that they do not consent or is reckless as to their consent. So 'sexual assault' involves only what was previously usually referred to as 'attempted rape' or 'rape'. The broader term 'sexual offences' thus includes both 'sexual assault' and other forms of sexual offences.

16. **Civilian primacy over sexual assaults occurring in Australia.** The DMP is required by section 63 of the DFDA to seek the consent of the Commonwealth Director of Public Prosecutions to prosecute, as a *service* offence, sexual assaults

that occur in Australia (and could therefore also fall within the civilian *criminal* jurisdiction). This process is outlined in the Memorandum of Understanding between the DMP and the Commonwealth, State and Territory Directors of Public Prosecution.

17. **Other sexual offences.** Sexual offences which do not involve 'sexual assault' are usefully termed 'other sexual offences' for the purposes of Australian law. An example is an unwanted touching of another person in a way that has a sexual connotation. The DMP is not required to obtain the consent of the Commonwealth Director of Public Prosecutions to prosecute allegations of other sexual offences as a service offence, even if that conduct occurs in Australia. The memorandum of understanding referred to above does however provide a consultative mechanism whereby the DMP may choose to consult with a civilian Director of Public Prosecutions (DPP) if both the DMP and the DPP have jurisdiction (which overlaps) to prosecute that other sexual offence. As a result of that consultation, the DMP may refer the allegation of a sexual offence to the DPP for prosecution in the civilian criminal courts.

Distinct, but complementary roles of DMP and civilian Directors of Public Prosecutions in relation to sexual offending and all other types of offending

18. The memorandum of understanding and the consultative mechanism that it provides also covers all other forms of offending (e.g. violent or property offences) where jurisdiction between service and civilian authorities overlaps.

19. All prosecutions under the DFDA for any service offence are carried out by the DMP in person or by an officer directed by the DMP to appear on his or her behalf. Only the DMP can prosecute service offences before a service tribunal and the DMP cannot prosecute allegations of civilian criminal conduct in civilian courts.

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REGISTRAR OF MILITARY JUSTICE (RMJ)

Background

1. **1985-2005.** From 1985 (when the *Defence Force Discipline Act 1982* (DFDA) came into effect) until 2005, Convening Authorities were responsible for a range of functions, including the convening, management and administration of courts martial and Defence Force magistrate (DFM) proceedings.
2. **2006–2007 and 2009–current.** The DFDA was amended by the *Defence Legislation Amendment Act (No. 2) 2005* to abolish Convening Authorities, replacing them with other officeholders. At this time, the position of Registrar of Military Justice (RMJ) was created to convene, manage and administer courts martial and DFM proceedings.
3. **2007-2009.** During the period 2007 – 2009 there was an interruption to these arrangements with the purported establishment of the Australian Military Court (AMC). The AMC had its own Registrar. Accordingly, the position of RMJ was abolished. In 2009, the High Court of Australia declared the AMC provisions invalid. Following this decision, the system which existed prior to the purported establishment of the AMC (including the RMJ) was re-established, but only on an interim basis (see the *Military Justice (Interim Measures) Act (No 1) 2009*).
4. **Future.** The intention since 2009 has been to establish a court under Chapter III of the Constitution, namely the Military Court of Australia (MCA) (see the *Military Court of Australia Bill 2012* and the *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012*). The MCA would have its own registry arrangements and, accordingly, the position of RMJ would again be abolished.

Statutory basis, office/staff and workload

5. **Statutory basis.** Sections 188F-188FM of the DFDA create the position of RMJ.
6. **Office.** The Office of the RMJ (ORMJ) comprises the RMJ, a Deputy RMJ (DRMJ) (a tri-Service O5 position) and up to four Australian Public Service trial administration staff.
7. **Workload.** The ORMJ has an average workload of 70 courts martial/DFM proceedings per year.

Key aspects of office

8. **Appointment.** The RMJ is appointed by the Minister for Defence (DFDA, section 188FB). Provision is also made for the Minister to appoint an Acting RMJ (A/RMJ) (DFDA, section 188FL).
9. **Qualifications.** The RMJ must:
 - a. have been enrolled as a legal practitioner for at least five years and continue to be so for the duration of the appointment;
 - b. be a member of the permanent forces or a member of the Reserves rendering full-time continuous service; and

- c. hold the rank of at least O-6 (DFDA, section 188FC).
10. The RMJ will cease to hold office if any of the above cease (DFDA, section 188FJ).
11. In addition to the statutory requirements, the RMJ position carries a Legal Level classification of LL5 (the most senior classification).
12. **Terms of office.** The terms of office are as follows:
- a. **Full time.** The Registrar holds office on a full-time basis (DFDA, section 188FB). The RMJ must not engage in practice as a legal practitioner outside the duties of the office or, without the approval of the Minister, engage in paid employment outside the duties of the office (DFDA, section 188FI).
 - b. **Tenure.** At any one time, the RMJ may be appointed for up to five years (DFDA, subsection 188FD(1)). The RMJ is eligible for reappointment (DFDA, subsection 188FD(2)).
 - c. **Conflict of interests.** The RMJ has a standing obligation to disclose any actual or potential conflicts of interest (DFDA, section 188FK).
 - d. **Terms and conditions.** The DFDA makes provision for remuneration (DFDA, section 188FG), leave (DFDA, section 188FH), resignation (DFDA, section 188FE) and other matters (DFDA, subsection 188FB(3)).
 - e. **Termination.** The Minister may terminate the appointment of the RMJ on the grounds of physical or mental incapacity or misbehaviour (DFDA, subsection 188FJ(1)) and must terminate the appointment of the RMJ in the case of bankruptcy, absence without leave or failure to comply with the obligations of the office (DFDA, subsection 188FJ(2)).
 - f. **Delegation.** The RMJ may delegate all or any of his/her powers and functions to:
 - (1) a defence member holding the rank of O-4; or
 - (2) a public servant at or acting in a level 5 position (s 188FM).

Statutory functions

13. The primary statutory function of the RMJ is set out in section 188FA of the DFDA. This provision states that:

‘The function of the Registrar is to assist the Judge Advocate General [JAG] and the Chief Judge Advocate [CJA] by providing administrative and management services in connection with charges and trials under this Act.’

14. This provision is supplemented by other provisions in the DFDA and, also, provisions in the *Defence Force Discipline Regulations 1985* and the Court Martial and Defence Force Magistrate Rules.

15. The RMJ's statutory functions are triggered upon receipt of a referral by the Director of Military Prosecutions (DMP). In the referral, the DMP will specify the type of tribunal (general court martial, restricted court martial or DFM) and the nature of the proceedings (trial or DFDA Part IV action (punishment)).

Key roles

16. The key roles of the RMJ are:

- a. Immediately following receipt of referral from DMP, engage with relevant stakeholders (JAG/CJA, ODMP/assigned Prosecutor, Defence Counsel Services (DCS)/assigned Defending Officer and chain of command) and promptly 'list' proceedings (fix the date, time and place);
- b. Request JAG/CJA to nominate JA/DFM;
- c. Set up pre-trial directions hearings (if required);
- d. For courts martial, select panel (President, other members and reserve members) through a process of random selection and comprehensive screening;
- e. Work closely with the chain of command to arrange venue, equipment, court recording, provision of administrative support, etc;
- f. Additional support is required in the case of classified proceedings and/or in the case of media/public interest;
- g. 'Convene' courts martial and 'refer' matters to DFMs for trial and/or Part IV action (punishment) by raising necessary instruments and other documentation;
- h. Co-ordinate the service/provision of convening/referral and related documentation;
- i. Issue and arrange for the service of summons to secure the attendance of accused persons (and, in limited and very rare cases, issue and arrange for the execution of a warrant for the arrest of an accused person);
- j. For courts martial, issue the administrative instruction to panel and make/co-ordinate their travel and other arrangements;
- k. Draft, for issue by the chain of command, the administrative instruction for all proceeding participants other than the court martial panel; and

- I. Issue summons to secure the attendance of witnesses and/or provision of documents at the request of DMP or DCS.

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SUPERIOR AUTHORITY

Introduction

1. A superior authority represents the interests of the Defence Force in relation to charges that are being considered by the Director of Military Prosecutions (DMP) for possible trial by a Defence Force Magistrate or a Court Martial. Before fully understanding the appointment and function of a superior authority, it is necessary to outline how the DMP becomes seized of matters and considers potential charges.

Background information – DMP consideration of potential charges

2. Information regarding the role and function of the DMP is contained in a separate brief. The background information in this brief relates specifically to the consideration of potential charges by the DMP.

3. The DMP becomes seized of matters by two means. Firstly, the ADF Investigative Service (ADFIS) may exercise discretion to refer a brief of evidence directly to the DMP (rather than to a service member's unit in the first instance). Secondly, a summary authority at unit level may refer a charge to the DMP either prior to, or during the course of, summary proceedings. The DMP then has certain powers, which include requesting the Registrar of Military Justice to refer the charge to a Defence Force Magistrate or Court Martial, to try the charge. The DMP may also refer a charge to unit level for summary trial (if the charge is within the jurisdiction of a summary authority).

Superior authority

4. A 'superior authority' is an officer (usually of star rank but can be a specific appointment at O-6 rank) appointed by the Chief of the Defence Force or a Service Chief for the purpose of representing the interests of the Defence Force in relation to charges that are being considered by the DMP for possible trial by a Defence Force Magistrate or a Court Martial.

5. Before exercising any power in relation to a potential charge, however, the DMP will write to the superior authority in the service member's chain of command. The DMP invites the superior authority to represent any interest of the ADF in relation to the charge being considered. However, as the DMP is statutorily independent from the chain of command, a superior authority is requested to refrain from offering opinions or recommendations specifically on whether the service member should be prosecuted or not. Instead, a superior authority is invited to raise service-related factors that are relevant to the consideration of a charge by the DMP. The factors that a superior authority may raise with the DMP include:

- a. whether or not there is a need to send a message of deterrence, both to the accused person and to other members of the ADF;

- b. the prior conduct of the accused person, including findings of any administrative inquiries concerning the accused person's conduct;
 - c. wider morale implications within a command or the wider ADF;
 - d. potential OPSEC disclosure issues;
 - e. any severe time constraints or resource implications;
 - f. issues concerning the availability of the accused person and/or witnesses due to operational, exercise or other commitments;
 - g. unit operational or exercise commitments which may affect the timing of any trial of the charges; and
 - h. the anticipation of media interest.
6. As outlined in a separate brief relating to competent reviewing authorities, a superior authority will often hold appointments as both a superior authority and a reviewing authority. Consistent with the 'competent' reviewing authority requirement, an officer who has previously represented the interests of the Defence Force to the DMP cannot subsequently exercise powers as a competent reviewing authority. This restriction arises from procedural fairness (bias or apprehended bias) considerations that are outlined in more detail in the separate brief relating to competent reviewing authorities.

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