

Director of Military Prosecutions
National Defence Headquarters
MGen George R. Pearkes Building
7th Floor, South Tower
101 Colonel By Drive
Ottawa ON K1A 0K2

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Distribution List

INTERIM DIRECTION REGARDING THE
IMPLEMENTATION OF MADAME ARBOUR INTERIM RECOMMENDATION

References: A. Interim recommendations from Independent External Comprehensive Review team, 20 October 2021:

<https://www.canada.ca/en/department-national-defence/campaigns/conduct-and-culture/iecr-interim-recommendations.html#toc0>

B. Report of the Third Independent Review Authority to the Minister of National Defence: <https://military-justice.ca/wp-content/uploads/2021/06/Third-Independent-Report-Fish.pdf>

C. Minister of National Defence's response to interim recommendations, 3 November 2021: <https://www.canada.ca/en/department-national-defence/campaigns/conduct-and-culture/iecr-interim-recommendations.html#toc1>

D. Joint Statement of the CFPM and the DMP, 5 November 2021:

<https://www.canada.ca/en/department-national-defence/news/2021/11/joint-statement-of-the-canadian-forces-provost-marshal-and-the-director-of-military-prosecutions.html>

E. DMP Policy Directives: <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives.html>

Context

1. On 29 April 2021, the Minister of National Defence appointed former Supreme Court Justice, Madame Louise Arbour to conduct an independent and comprehensive review of sexual misconduct in the CAF. The terms of reference provided the authority for Madame Arbour to issue any interim assessments and recommendations to address issues for immediate action that may become apparent during the conduct of the review. On 20 October 2021, Madame Arbour provided the following interim recommendation:

The Honourable Morris J. Fish's recommendation No. 68 should be implemented immediately. All sexual assaults and other criminal offences of a sexual nature under the *Criminal Code*, including historical sexual offences, alleged to have been perpetrated by a CAF member, past or present ("sexual offences") should be referred to civilian authorities. Consequently, starting immediately, the Canadian Forces Provost Marshal (CFPM) should transfer to civilian police forces all

allegations of sexual offences, including allegations currently under investigation by the [Canadian Forces National Investigation Service (CFNIS)], unless such investigation is near completion. In any event, in all cases charges should be laid in civilian court. [emphasis added]

2. Recommendation #68 provides that until the *Declaration of Victims Rights* comes into force within the military justice system, unless the victim consents, sexual assaults should not be investigated or prosecuted under the *National Defence Act* and should instead be referred to civilian authorities.
3. As reflected in the Joint Statement of the CFPM and the Director of Military Prosecutions (DMP) (ref D), both the CFPM and I have fully accepted the interim recommendation.
4. My interim direction, herein, confirms the oral direction that you have already received regarding the Canadian Military Prosecution Service (CMPS) implementation of the interim recommendation and of recommendation #68.
5. Madame Arbour's interim recommendation to immediately transfer all sexual assaults and other criminal offences of a sexual nature under the *Criminal Code* relates to cases that are at the pre-charge stage. The interim recommendation does not directly address cases where charges have already been laid and that have been - or are being - referred to the DMP for trial by court martial. However, Madame Arbour's interim recommendation does indicate that recommendation #68 should be implemented immediately.
6. Recommendation #68 applies to cases at all stages, and has already been implemented by the CMPS. It has been the long-standing practice of the CMPS to seek the views of the victim complainant regarding jurisdiction. DMP policies require prosecutors to consider the views of a victim complainant throughout all stages of a case referred to the DMP, including decisions about which jurisdiction, civilian or military, is better suited to deal with a particular matter. The views of a victim complainant on whether a case should proceed in one jurisdiction or another, or not proceed at all, are considered as determinative in all but the most exceptional circumstances.

Interim Direction

Cases that have been referred by the CFNIS for pre-charge

7. In light of the CFPM's acceptance of Madame Arbour's interim recommendation, pre-charge advice from the DMP is no longer required or desirable in cases involving sexual assaults and other criminal offences of a sexual nature under the *Criminal Code*. In order to maximize efficiency and minimize confusion, any required pre-charge consultation is best left to those who will ultimately be responsible for the prosecution of the alleged offences.
8. Military prosecutors have been directed to communicate with investigators who have requested pre-charge advice on cases involving sexual assaults and other *Criminal Code* offences of a sexual nature in order to coordinate the return of those files immediately.

Cases where charges have already been laid

9. The interim recommendation, response and subsequent media coverage of this issue may very well affect the views of victim complainants regarding jurisdiction. As such, further consultation with victim complainants is warranted.

10. Prosecutors have been directed to analyze every case at the post-charge stage which involves sexual assault or other *Criminal Code* charges of a sexual nature, and conduct a dispassionate and honest assessment of any risks which may be associated with a change in jurisdiction.

11. There is no mechanism to transfer a case between the military and the civilian criminal jurisdiction once charges have been laid. The only way to move a case from the military justice system to the civilian criminal justice system involves the withdrawal of charges already preferred or the non-preferred of the charges for cases at the post-charge review stage. Once a case is no longer active in the military justice system, charges can then be laid in the civilian criminal justice system in accordance with the existing practices and procedures in the appropriate civilian jurisdiction.

12. Moving a case between jurisdictions once charges have been laid is not without risk. While the degree of risk will vary in relation to the specifics of the case, the risk associated with a change of jurisdiction will generally include:

- a. A reduced ability to complete the trial within a reasonable time. A civilian court of criminal jurisdiction may consider the moment charges were originally laid in the military justice system as the starting point for any *Jordan*-based calculation; and
- b. Uncertainty regarding whether the case will proceed in the new jurisdiction. The civilian prosecution service assigned to the case will conduct a *de novo* assessment according to their own respective threshold. Should the civilian prosecution service decline to proceed, it may be impossible to revive charges in the military justice system.

13. Prosecutors have been directed to meet with every victim complainant in cases of this nature as soon as possible in order to make them aware of the interim recommendation and to seek their views on jurisdiction for the case to proceed. The prosecutor must cover the following information at the meeting with the victim complainant:

- a. the content of the interim recommendation and recommendation #68;
- b. what changing jurisdiction would entail; and
- c. the risks associated with changing jurisdiction.

14. In all dealings with victim complainants, prosecutors must refrain from any attempt to influence a particular outcome. All information and explanation provided to victim complainants must remain objective. Prosecutors must afford to victim complainants sufficient

time to consider their position on jurisdiction and consult with advisors, if they so desire. Consistent with the existing policy and practice of the CMPS, the views of the victim complainant on jurisdiction will be respected.

15. Prosecutors have been directed to bring to the attention of the Deputy Director of Military Prosecutions – Operations (DDMP Ops) each case where the victim complainant expresses a preference for the case to proceed in the civilian justice system.

16. DDMP Ops is responsible to issue additional guidance to:

- a. implement this interim direction as expeditiously as the circumstances permit; and
- b. maximize a smooth transition of any case moving from the military justice system to the civilian criminal justice system.

17. DDMP Sexual Misconduct Action Response Team is responsible to provide advice and support to prosecutors, as required.



Dylan Kerr
Colonel
Director of Military Prosecutions

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