



Director of Military Prosecutions

National Defence Headquarters  
Major-General George R. Pearkes Building  
101 Colonel By Drive  
Ottawa, ON K1A 0K2

## **DMP Policy Directive**

**Directive #: 004/00**

**Date: 1 March 2000**

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**Cross Reference: Witness Interviews, Pre-Charge Screening, Responding to Victim's Needs, Post-Charge Screening**

**Subject: Sexual Misconduct Offences**

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### APPLICATION OF POLICY

1. This policy applies before or after charges have been laid by a person with the authority to lay a charge under the *Code of Service Discipline* (“CSD”) pursuant to *Queen’s Regulations and Orders for the Canadian Forces* (“QR&O”).
2. Any reference in this policy to “Regional Military Prosecutor (RMP)”, “Prosecutor” or “Prosecutors” shall be deemed to refer to any officer or officers who have been authorized by the Director of Military Prosecutions (DMP) to assist or represent the DMP pursuant to section 165.15 of the *National Defence Act* (NDA) in preferring charges to court martial and in conducting prosecutions at courts martial.
3. Any reference in this policy to “sexual misconduct offence” shall be deemed to refer to any acts that are either sexual in nature or committed with the intent to commit an act that is sexual in nature and is an offence under the CSD. This would include offences such as sexual assault, voyeurism and sexual harassment.<sup>1</sup>
4. Sexual assault is non-consensual touching of a sexual nature that violates the sexual integrity of the victim. It is a legal term that refers to any form of sexual contact without consent. This can include forced or unwanted kissing, touching, vaginal penetration, anal penetration, and/or oral sex. In *R v Chase*,<sup>2</sup> the Supreme Court of Canada held that sexual assault does not focus solely on the part of the body touched. It also deals with the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force.<sup>3</sup>

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1 Defence Administrative Orders and Directives 5019-5, *Sexual Misconduct and Sexual Disorders*, 26 September 2008.

2 [1987] 2 SCR 293.

3 *Best Practices for Investigating and Prosecuting Sexual Assault*, Alberta Justice and Solicitor General – Criminal Justice Division, April 2013.

5. Harassment is any improper conduct by an individual that is directed at and offensive to another person or persons in the workplace, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles or causes personal humiliation or embarrassment, and any act of intimidation or threat. It includes harassment within the meaning of the *Canadian Human Rights Act*.<sup>4</sup>

## INTRODUCTION

6. Instances of sexual misconduct strike at the heart of the most important component of the Canadian Armed Forces (CAF): its members. The personal and institutional damage that results from sexual misconduct can be acute. Sexual misconduct almost invariably leaves both indelible traces and profound scars on victims and the institution alike—including by impairing organizational efficiency.<sup>5</sup> Cases involving sexual offences require that particular attention be given to questions of jurisdiction and communication with victims<sup>6</sup>. This policy addresses those issues.

### **Sexual Misconduct Action response Team**

7. Consistent with the findings of Justice Deschamps in her External Review into Sexual Misconduct and Sexual Harassment<sup>7</sup>, the direction provided to the CAF by the Chief of the Defence Staff through Operation HONOUR<sup>8</sup>, as well as the direction from the government in Canada's Defence Policy: Strong, Secure, Engaged<sup>9</sup>, the Canadian Military Prosecution Service (CMPS) is committed to ensuring that its prosecutors possess the appropriate knowledge and skills necessary to prosecute serious sexual misconduct offences in a manner which instills public confidence in the administration of military justice. Therefore, the Director of Military Prosecutions has created the Sexual Misconduct Action Response Team (SMART) which is a team of specialized Prosecutors that are responsible for the prosecution of all serious sexual misconduct offences. The SMART will be lead by the Deputy Director of Military Prosecutions Sexual Misconduct Action Response Team (DDMP SMART).

### DDMP SMART

8. DDMP SMART is responsible for the supervision of all cases involving serious sexual misconduct offences. While doing so, he/she will keep the appropriate regional DDMP informed as each case progresses.

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4 Defence Administrative Orders and Directives 5012-0, *Harassment Prevention and Resolution*, 13 October 2015.

5 *Canadian Armed Forces Progress Report on Addressing Inappropriate Sexual Behaviour*, Prepared for the Chief of the Defence Staff by the Chief of Military Personnel, February 1, 2016.

6 Person directly affected by the alleged conduct giving rise to one or more offences. Prosecutors are reminded that in court martial proceedings, it is proper not to refer to the complainant as a victim until such time as the court martial has made a finding of guilt, leading to the logical conclusion that the complainant is a victim of the act(s) alleged.

7 Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, 27 March 2015.

8 CDS OP ORDER – OP HONOUR, 14 August 2014.

9 Strong, Secure, Engaged: Canada's Defence Policy, 7 June 2017 at 27.

9. DDMP SMART is responsible to provide mentorship and support for its team members as needed in serious sexual misconduct cases. This is to be done at all stages of the case.
10. DDMP SMART is responsible to liaise with other prosecution services in Canada involved in sexual misconduct prosecutions to ensure that best practices are identified and followed at all stages of sexual misconduct prosecutions within the CAF.
11. DDMP SMART will be the CMPS representative for the Coordinating Committee of Senior Officials (CCSO) Working Group on Access to Justice for Adult Victims of Sexual Assault to explore, analyze and provide recommendations for handling of sexual misconduct cases.
12. DDMP SMART will identify and facilitate regular training opportunities for team members to acquire and maintain current knowledge and skills and will ensure continuity of expertise.

#### STATEMENT OF POLICY

13. When assigned a case, the Prosecutor shall take all necessary steps to ensure that the matter is dealt with in the most appropriate jurisdiction (military or civilian) and that the concerns of victims are solicited, considered and addressed.
14. To promote the flow of information between the Prosecutor and the victim, every effort will be made to have sexual misconduct offence cases handled by the same Prosecutor from beginning to end. Prosecutors should ensure that sexual offences are dealt with expeditiously, mindful that delay may increase the emotional stress of vulnerable victims and may weaken their resolve or ability to effectively participate in the criminal justice process.<sup>10</sup>
15. All cases of serious sexual misconduct offences shall be prosecuted by a prosecutor on the SMART ensuring that such cases are properly handled by prosecutors who possess the appropriate knowledge and skills necessary to prosecute such offences.

#### ASSIGNMENT OF FILE

16. Before a file is assigned to a Prosecutor by the Regional DDMP, he or she shall consult with DDMP SMART before assigning a file that involves an allegation of a serious sexual misconduct offence.

#### JURISDICTION

17. In order to determine whether charges should proceed in the military or civilian justice system, the Prosecutor may communicate directly with civilian authorities having concurrent jurisdiction, either before or after a charge is laid. The Prosecutor shall consult with the DDMP SMART prior to any such communication for cases involving serious sexual misconduct offences.

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10 *Sexual Offences – Practice Note*, Nova Scotia Public Prosecution Service, February 2008.

18. Determining which jurisdiction should prosecute a sexual offence case will require careful consideration of all relevant factors including:
- a. the degree of military interest in the case, as reflected by factors such as the place where the offence was alleged to have occurred, or whether the accused was on duty at the time of the alleged offence;
  - b. the degree of civilian community interest in the case;
  - c. the views of the victim;
  - d. whether the accused, the victim, or both are members of the CAF;
  - e. whether the matter was investigated by military or civilian personnel;
  - f. the views of the investigative agency;
  - g. geographic considerations such as the current location of necessary witnesses;
  - h. jurisdictional considerations where, for example, the alleged offence was committed abroad;
  - i. post-conviction consequences; and
  - j. the views of the Commanding Officer, as expressed through the unit legal advisor, with respect to unit disciplinary interests.
19. Where consensus is not achieved by consultation between the Prosecutor, civilian authorities and unit legal advisor, the Prosecutor shall engage the DDMP SMART who will continue the consultation process to resolve the matter.

### **The Views of the Victim Regarding Jurisdiction**

20. In providing legal advice on whether or not a charge should be laid and the jurisdiction in which any charge should heard, it is important for the Prosecutor to take into account the views of the victim of the alleged sexual misconduct offence. Certain concerns expressed by the victim may be better addressed by proceeding in the military justice system but others may be better addressed by asking civilian authorities to exercise jurisdiction. The DDMP SMART will provide direction, mentorship, and advice to Prosecutors regarding these sensitive issues.
21. The Prosecutor must take into account the victim's views on issues such as:
- a. urgency of resolution;
  - b. safety concerns about possible reprisals from the suspect or others;
  - c. concerns relating to conditions imposed on the suspect following release from custody;<sup>11</sup>
  - d. access to victim support services;
  - e. physical or mental trauma resulting from the alleged offence;
  - f. physical or mental trauma resulting from participation in court proceedings; and
  - g. the needs of any children or other dependants affected by the alleged offence.
22. If the Prosecutor determines that the information in the investigation report does not adequately indicate the views of the victim as described above, the Prosecutor shall follow up with the investigator and request additional information.

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11 See sections 158.2 to 159.9 of the *National Defence Act* which addresses conditions of release following pre-trial custody.

23. The Prosecutor shall consult with the DDMP SMART before a final decision is taken in cases involving serious sexual misconduct offences.
24. Once jurisdiction is decided, the Prosecutor shall invite the investigator to inform the victim of the decision and the associated reasoning.
25. Any determination with respect to jurisdiction shall be communicated by the Prosecutor to the affected Assistant Judge Advocate General (AJAG) or Deputy Judge Advocate (DJA) as soon as practical.

## COMMUNICATION WITH VICTIMS

26. Victims must be afforded a meaningful role in military justice proceedings so that they are informed, respected and heard. The Prosecutor plays a vital role in the delicate balance between the needs and interests of the victim and the proper administration of military justice.
27. The victim in a sexual misconduct offence case may well be concerned for her or his own emotional and physical safety and understandably, distrusting of others. Accordingly, sensitivity for the unique and perplexing dilemma of the victim is required throughout the investigation and court martial of these matters. Discretion requires a balanced and thoughtful approach.
28. In accordance with this policy, the Prosecutor shall:
  - a. expect investigators to conduct thorough and timely investigations with sensitivity for the victim;
  - b. ensure timely information is provided to the victim throughout the court martial process;
  - c. maximize the safety and comfort of the victim throughout the court martial process (by keeping the victim informed and by taking any other measures appropriate in all of the circumstances);
  - d. consider the views of the victim to a prosecution, and any evident impact a decision to prosecute (or not prosecute) may have on her or him; and
  - e. seek sentences which reflect the prevalence, seriousness and repugnance of these service offences, among other relevant sentencing factors.
29. In cases involving serious sexual misconduct offences, the reasons to explain a decision not to prosecute should be provided in order to maintain confidence in the administration of justice. A victim may feel aggrieved by decisions not to prosecute, or decisions to prosecute when they do not favour prosecution. Counsel should keep the victim appropriately informed of the decision.<sup>12</sup>
30. Prosecutors should continue to acquire and maintain their knowledge and skills through regular training opportunities in order to address the unique considerations which arise in sexual misconduct cases including victims' concerns.

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12 *Public Prosecution Service of Canada Deskbook*, Part 2.3.

## WITNESS PREPARATION

31. Witness preparation is a vital function of the Prosecutor with carriage of a sexual offence to be tried by court martial. The Prosecutor should attempt to provide support, encouragement and understanding; a non-judgmental attitude where the victim/witness is reluctant, but assurance that it is wise and prudent for a fearful victim to seek justice. Early in preparation for court martial, the Prosecutor should, where possible, meet with the victim in private and comfortable surroundings and:<sup>13</sup>
- a. explain the role of prosecution and defence counsel in court martial proceedings;
  - b. explain the role of a witness in court;
  - c. explain the disclosure process and lack of confidentiality;
  - d. determine if they have reviewed their statement and if there are any inconsistencies they now identify;
  - e. review inevitable lines of questioning under cross-examination;
  - f. assess the victim's reliability as a witness;
  - g. encourage the victim to testify truthfully to what occurred, telling the whole truth and being explicit;
  - h. discuss any testimonial fears (physical or emotional responses);
  - i. inform the victim of any release conditions imposed on the accused and determine if the victim has any concerns with the accused's compliance with those conditions;
  - j. confirm that the victim has been made aware of available community support services; and
  - k. attempt to answer any questions the victim might have.<sup>14</sup>
32. The Prosecutor should inform the victim that it is possible, under section 180 of the NDA, for the Prosecutor to request from the presiding military judge that the public be excluded from the courtroom while the victim is testifying. The Prosecutor should add, however, that the military judge is not obliged to grant such a request. Under *Queen's Regulations & Orders* (QR&O) article 112.33, the military judge has the power, depending on the charges against the accused, to grant certain accommodations to victims, witnesses under the age of 18 years, and those who are able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability. The Prosecutor should determine at the earliest stage if accommodations will be necessary for any witness.
33. For a charge relating to certain sexual misconduct offences as described in section 486.4 of the *Criminal Code*, the prosecutor must address with the complainant the possibility to seek a ban on the publication of information that could identify the complainant or witness in accordance with section 179 of the NDA.
34. The Prosecutor shall make every reasonable effort to conduct the prosecution expeditiously.
35. The Prosecutor shall inform victims of court dates and matters that potentially affect their security, including changes to release conditions. This information-sharing function may be performed by the military police.

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13 *Sexual Offences – Practice Note*, Nova Scotia Public Prosecution Service, February 2008, 14-16.

14 Remember, however, that a Prosecutor must not answer a victim's questions so as to reveal the nature of another witness's expected evidence, or to defeat an order of the court excluding witnesses during the court martial. See in this regard DMP Policy Directive 012-00 *Witness Interviews*.

36. The Prosecutor shall inform victims of sexual misconduct offences of proposed resolutions wherever possible, and in advance of the matter being heard in court or reported in the media.<sup>15</sup>
37. In cases of sexual misconduct offences, the Prosecutor shall ensure that submissions made at sentencing hearings include information regarding the impact of the offence on the victim, and that the court is made aware of all factors relevant to the protection and safety of the victim and the public.

#### COUNSEL FOR THE VICTIM

38. The prosecutor represents the Crown, not individuals such as the victim, and is obliged to disclose what is learned from the victim. In cases where the victim's personal interest is at stake (such as requests to produce personal records), the prosecutor shall not act as counsel for the victim, but will facilitate requests for legal assistance through available means.

#### AVAILABILITY OF THIS POLICY STATEMENT

39. This policy statement is a public document and is available to members of the CAF and to the public.

15 See in this regard DMP Policy Directive 008-99 *Plea, Trial and Sentence Resolution Discussions*.