



Report of an Inquiry
into
Military Justice
in the
Australian Defence Force

July 2001

Note: This report is released with deletions based on privacy and confidentiality considerations



Report of an Inquiry
into
Military Justice
in the
Australian Defence Force
Conducted by
Mr J.C.S. Burchett, QC,
An Investigating Officer
Appointed by
The Chief of the Defence Force
Under the *Defence (Inquiry) Regulations 1985*

(ii)



DEPARTMENT OF DEFENCE

MILITARY JUSTICE AUDIT

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MJA01/00040/SYD

12 July 2001

Admiral C.A. Barrie, AC, RAN
Chief of Defence Force
CANBERRA ACT 2000

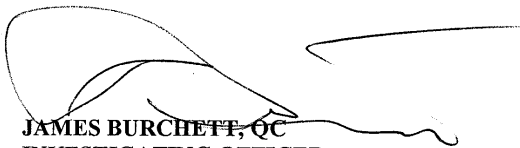
Dear Admiral Barrie,

On 15 December 2000 you appointed me to be an Investigating Officer, together with four Inquiry Assistants, to conduct an audit of military justice in the Australian Defence Force. An additional Inquiry Assistant was appointed on 1 February 2001. These appointments were made pursuant to the *Defence (Inquiry) Regulations 1985*.

You issued Terms of Reference for the conduct of the audit on 15 December 2000.

Herewith is my report of the audit, which incorporates my findings and recommendations.

Yours sincerely



JAMES BURCHETT, QC
INVESTIGATING OFFICER

MILITARY JUSTICE INQUIRY

MEMBERS OF THE MILITARY JUSTICE INQUIRY TEAM

MEMBERS APPOINTED BY CHIEF OF THE DEFENCE FORCE

Mr J.C.S. Burchett, QC, Investigating Officer

CDRE G.J. Earley, AM, RANR, Inquiry Assistant

CAPT W.R. Overton, CSC, RANR, Inquiry Assistant

COL M.D. Slater, DSC, CSC, Inquiry Assistant

GPCAPT K.R. Kelly, Inquiry Assistant

WGCDR J.G. Wahlberg, Inquiry Assistant

OTHER FULL-TIME MEMBERS

WGCDR K.W. Frick, Secretary

WGCDR F.B. Healy, Legal Adviser

CPONPC C.R. Gregory, Police Investigator

WO2 B.J. Parsons, Administrative Support

CPL D. Brand, Administrative Support

MEMBERS ASSISTING THE TEAM

CMDR D. Thorley, RANR, Legal Adviser

LTCOL P. Wilkinson, Legal Adviser

SQNLDR R.A. Keen, RAAF Police

WO2 Parker, MILPOL

SGT A.G. Cooper, RAAF POL Investigator

TABLE OF CONTENTS

i

<i>Terms of Reference</i>	1
<i>Introduction</i>	4
<i>Executive Summary and Consolidated Recommendations</i>	6
<i>The Events at 3RAR</i>	42
<i>The Inquiry Procedures</i>	51
<i>Systemic Substitution for Law of Discipline by Violence?</i>	54
<i>Management of Allegations re 3RAR</i>	61
<i>The Sources of Failure to Apply the Disciplinary Law and of Illegal Methods of Discipline</i>	67
<i>Training in relation to the Defence Force Discipline Act</i>	70
<i>Initial Training</i>	75
<i>Discipline Officer Scheme</i>	76
<i>Extras</i>	82
<i>Utility of Punishments</i>	86
<i>Time Taken for Commencement and Review of Summary and Other Trials</i>	89
<i>Training Charges</i>	91
<i>Administrative Consequences and Administrative Action in relation to Disciplinary Breaches</i>	94
<i>Equity and Diversity Issues</i>	98
<i>Unequal Treatment and Consistency of Punishments</i>	101
<i>Transparency and Victim Feedback</i>	105
<i>Access to Legal Advice</i>	107
<i>Legal Officers at Summary Proceedings</i>	109
<i>Need of CO to Seek Legal Advice during Trial</i>	111
<i>Effects of Defence Reorganisation</i>	113
<i>Investigation Issues</i>	116
<i>Peer Group Discipline</i>	119
<i>Drug Policy</i>	121

<i>Presumption of Guilt</i>	124
<i>Director of Military Prosecutions and Administration of Courts Martial and Defence Force Magistrate Hearings</i>	126
<i>Keeping Things “In-House”</i>	144
<i>Availability of Avenues of Complaint</i>	146
<i>Professional Reporting – The “Whistleblowers” Scheme</i>	149
<i>Use of ADR</i>	152
<i>Regional DFDA Units</i>	153
<i>Medical Issues</i>	155
<i>Procedural Fairness and Command Prerogative</i>	157
<i>Military Inspector General</i>	160
<i>Referrals</i>	169

LIST OF ANNEXES

- A** *List of Contacts and Submissions (annex deleted)*
- B** *List of Calls and Visits Made*
- C** *List of Defence Establishments, Ships and Units Visited*
- D** *List of Persons Interviewed following Submissions (annex deleted)*
- E** *List of Other Persons Interviewed (annex deleted)*
- F** *List of Statistics from Group Discussions Conducted*
- G** *List of Submissions Referred to Other Authorities (annex deleted)*
- H** *List of Submissions Referred to the Inquiry by the JSCFADT (annex deleted)*
- I** *Analysis of the Submissions*
- J** *List of Reference Material and Publications*
- K** *Statement of Cost of Audit*

DEFENCE (INQUIRY) REGULATIONS 1985

INVESTIGATING OFFICER

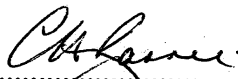
INSTRUMENT OF APPOINTMENT

Pursuant to Regulations 70(1)(d) and 70(A) of the *Defence (Inquiry) Regulations 1985*, I, Admiral Christopher Alexander Barrie, RAN, Chief of the Defence Force, hereby appoint Mr J. C. S Burchett, QC, to be an Investigating Officer for the purpose of inquiring into a matter concerning the Australian Defence Force, in accordance with the attached Terms of Reference.

And pursuant to Regulation 70B(2) of those Regulations I empower you to make recommendations arising out of your findings.

And pursuant to Regulation 75 of those Regulations I direct that your report be submitted to me by no later than 30 April 2001 and if the inquiry is not completed by that date an interim report setting out the circumstances is to be submitted to me on that date.

And pursuant to Regulation 71 of those Regulations I direct that you follow as closely as practicable the procedural guidance contained in the *Defence (Inquiry) Regulations 1985* and in ADFP 202 – *Administrative Inquiries Manual*.


.....
C.A. BARRIE
ADMIRAL, RAN
CHIEF OF THE DEFENCE FORCE
APPOINTING OFFICER

15 December 2000

DEFENCE (INQUIRY) REGULATIONS 1985

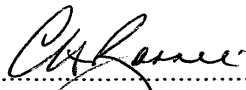
INQUIRY ASSISTANT

INSTRUMENT OF APPOINTMENT

Pursuant to Regulations 70(1)(a), and 70A of the *Defence (Inquiry) Regulations 1985*, I, Admiral Christopher Alexander Barrie, RAN, Chief of the Defence Force, hereby appoint Commodore G.J. Earley, RANR, to be an Inquiry Assistant to assist Mr J.C.S. Burchett, QC, who has been appointed an Investigating Officer pursuant to the Regulations for the purpose of inquiring into a matter concerning the Australian Defence Force, in accordance with the attached Terms of Reference.

And pursuant to Regulation 70C of those Regulations you are to assist the Investigating Officer to gather evidence for the purpose of the inquiry and you must give to the Investigating Officer all evidence you have collected for the purposes of the inquiry.

And Pursuant to Regulation 71 of those Regulations I direct that you follow as closely as practicable the procedural guidance contained in the *Defence (Inquiry) Regulations 1985* and in ADFP 202 – *Administrative Inquiries Manual*.


.....
C.A. BARRIE
ADMIRAL, RAN
CHIEF OF THE DEFENCE FORCE
APPOINTING OFFICER

11 December 2000

DEFENCE (INQUIRY) REGULATIONS 1985

INQUIRY ASSISTANT

INSTRUMENT OF APPOINTMENT

Pursuant to Regulations 70(1)(a), and 70A of the *Defence (Inquiry) Regulations 1985*, I, Admiral Christopher Alexander Barrie, RAN, Chief of the Defence Force, hereby appoint Captain W.R. Overton, RANR, to be an Inquiry Assistant to assist Mr J.C.S. Burchett, QC, who has been appointed an Investigating Officer pursuant to the Regulations for the purpose of inquiring into a matter concerning the Australian Defence Force, in accordance with the attached Terms of Reference.

And pursuant to Regulation 70C of those Regulations you are to assist the Investigating Officer to gather evidence for the purpose of the inquiry and you must give to the Investigating Officer all evidence you have collected for the purposes of the inquiry.

And Pursuant to Regulation 71 of those Regulations I direct that you follow as closely as practicable the procedural guidance contained in the *Defence (Inquiry) Regulations 1985* and in ADFP 202 – *Administrative Inquiries Manual*.



.....
C.A. BARRIE
ADMIRAL, RAN
CHIEF OF THE DEFENCE FORCE
APPOINTING OFFICER

15 December 2000

DEFENCE (INQUIRY) REGULATIONS 1985

INQUIRY ASSISTANT

INSTRUMENT OF APPOINTMENT

Pursuant to Regulations 70(1)(a), and 70A of the *Defence (Inquiry) Regulations 1985*, I, Admiral Christopher Alexander Barrie, RAN, Chief of the Defence Force, hereby appoint Colonel M.D. Slater, to be an Inquiry Assistant to assist Mr J.C.S. Burchett, QC, who has been appointed an Investigating Officer pursuant to the Regulations for the purpose of inquiring into a matter concerning the Australian Defence Force, in accordance with the attached Terms of Reference.

And pursuant to Regulation 70C of those Regulations you are to assist the Investigating Officer to gather evidence for the purpose of the inquiry and you must give to the Investigating Officer all evidence you have collected for the purposes of the inquiry.

And Pursuant to Regulation 71 of those Regulations I direct that you follow as closely as practicable the procedural guidance contained in the *Defence (Inquiry) Regulations 1985* and in ADFP 202 – *Administrative Inquiries Manual*.



.....
C.A. BARRIE
ADMIRAL, RAN
CHIEF OF THE DEFENCE FORCE
APPOINTING OFFICER

15 December 2000

(x)

DEFENCE (INQUIRY) REGULATIONS 1985


INQUIRY ASSISTANT

INSTRUMENT OF APPOINTMENT

Pursuant to Regulations 70(1)(a), and 70A of the *Defence (Inquiry) Regulations 1985*, I, Admiral Christopher Alexander Barrie, RAN, Chief of the Defence Force, hereby appoint Group Captain K.R. Kelly, to be an Inquiry Assistant to assist Mr J.C.S. Burchett, QC, who has been appointed an Investigating Officer pursuant to the Regulations for the purpose of inquiring into a matter concerning the Australian Defence Force, in accordance with the attached Terms of Reference.

And pursuant to Regulation 70C of those Regulations you are to assist the Investigating Officer to gather evidence for the purpose of the inquiry and you must give to the Investigating Officer all evidence you have collected for the purposes of the inquiry.

And Pursuant to Regulation 71 of those Regulations I direct that you follow as closely as practicable the procedural guidance contained in the *Defence (Inquiry) Regulations 1985* and in ADFP 202 – *Administrative Inquiries Manual*.


.....
C.A. BARRIE
ADMIRAL, RAN
CHIEF OF THE DEFENCE FORCE
APPOINTING OFFICER

December 2000

DEFENCE (INQUIRY) REGULATIONS 1985

INQUIRY ASSISTANT

INSTRUMENT OF APPOINTMENT

Pursuant to Regulations 70(1)(a), and 70(A) of the *Defence (Inquiry) Regulations 1985*, I, Admiral Christopher Alexander Barrie, RAN, Chief of the Defence Force, hereby appoint Wing Commander J.G. Wahlberg, to be an Inquiry Assistant to assist the Hon Mr J.C.S. Burchett who has been appointed as an Investigating Officer in accordance with the Regulations for the purpose of inquiring into a matter concerning the Australian Defence Force, in accordance with the attached Terms of Reference.

Pursuant to Regulation 71 of those Regulations I direct that you follow as closely as practicable the procedural guidelines contained in ADFP 202 – *Administrative Inquiries Manual*.



C.A. BARRIE
ADMIRAL, RAN
CHIEF OF THE DEFENCE FORCE
APPOINTING OFFICER

1 February 2001

REPORT TO THE CHIEF OF THE DEFENCE FORCE

Terms of Reference

1. The Investigating Officer is to inquire into and report upon the following matters:
 - a. Whether or not there exists in the ADF [Australian Defence Force] any evidence of a culture of systemic avoidance of due disciplinary processes.
 - b. Whether or not there are any irregularities in the administration of military justice within the ADF which may require corrective action, including but not limited to the following:
 - (1) Whether or not illegal punishments have been or are being used in the ADF for disciplinary purposes.
 - (2) Whether or not there exists any evidence that persons holding positions of authority have failed to properly act upon reports or complaints of violence, avoidance of due process or abuse of authority.
 - (3) Whether or not acts of violence have been used to maintain discipline in lieu of due process under the *Defence Force Discipline Act (DFDA)*.
 - (4) Whether or not there is any evidence that persons who have made reports of possible offences, of harassment or complaints of unacceptable behaviour have been treated unfairly because of the report or complaint made.

- (5) Whether or not there is any evidence that any ADF member who has been charged with an offence has been directed or ordered to plead guilty of the offence by a superior or a person acting for a superior.
 - (6) Whether or not any ADF member has been ordered or directed by a superior or person acting for a superior not to make a formal complaint.
 - (7) Whether or not an ADF member who has been charged with an offence has been ordered or directed not to seek legal advice or otherwise been denied access to legal advice.
 - (8) Whether or not ADF members have served sentences that are different to or in excess of punishment awarded by service tribunals.
 - (9) Whether or not administrative action has been conducted with respect to allegations of breaches of discipline where action under the DFDA would have been more appropriate.
2. Where it appears to the Investigating Officer that there is sufficient reason to do so, the Investigating Officer is to review the management of allegations arising in connection with 3RAR.
 3. The Investigating Officer is to consider whether or not matters concerning the administration of military justice which come to the attention of the inquiry should be:

- a. referred for action by appropriate ADF command or management authorities; or
 - b. referred for investigation under the *Defence Force Discipline Act* or by appropriate Commonwealth or State authorities.
4. Unless it appears to the Investigating Officer that there is a compelling reason to do otherwise, the Investigating Officer is to limit the scope of his inquiries to matters which have occurred since the introduction of the *Defence Force Discipline Act* into the ADF in 1985.
 5. The Investigating Officer is to identify the role and functions of an Inspector General of the Australian Defence Force.

Introduction

1. This report is the first of its kind. Previously, the *Defence (Inquiry) Regulations 1985* required such a report to be the work of an officer or officers, and there was no provision for the appointment of an Assistant Investigator. But in this case, it was considered essential that the “Investigating Officer” should be quite independent of the military, and the regulations were amended to permit me, as a former Federal Court judge, to be appointed Investigating Officer. To the extent that the problems concern the application and functioning of law in the military environment, and the ascertainment of disputed facts, the task, though not easy, is a lawyer’s task. To the extent that the problems impinge on matters of military organisation, I could not have attempted to examine them without expert assistance. That assistance was provided, and has been of the highest order. By a further amendment of the regulations, the appointment was authorised of Assistant Investigators, and Commodore G J Earley, Captain W R Overton, Colonel M D Slater, Group Captain K R Kelly and Wing Commander J G Wahlberg were appointed. I should say at once that none of them showed any tendency to shy away from any unpalatable truth which the investigation uncovered, or to prejudice my independence of ultimate decision.

2. I have referred to these matters at the outset because the setting up of the Inquiry in this way demonstrates the depth of the determination to expose the full extent of any failure in the ADF to follow the course of law, and to remedy it, which I believe inspired the appointments of myself and my assistants. Further demonstration was provided by the unique effort of the Chief of the Defence Force (CDF) and service chiefs to communicate their attitude to all members of the ADF, and to promote the making of submissions to this Inquiry, to which I shall refer. My assistants and I were enabled, too, to make a very extensive survey (to which I shall also refer) of the views of officers, senior and junior NCOs, trainees and others, including

chaplains, throughout Australia and in East Timor. We were supported by adequate resources and skilled staff, including Wing Commander Frick, as Secretary of the Inquiry, Wing Commander Healy, Chief Petty Officer Naval Police Coxswain Gregory and a number of other persons who were seconded to us from time to time.

3. The Terms of Reference refer to “the administration of military justice” and to “administrative action ... with respect to allegations of breaches of discipline”. In this context, I have understood military justice as embracing more than prosecutions under the *Defence Force Discipline Act 1982*; and as including also those administrative measures which may be the lawful and appropriate response of a CO to unlawful or inappropriate conduct. But I have not regarded an inquiry under the *Defence (Inquiry) Regulations* as per se a military justice proceeding – although it may possibly lead to the institution of such a proceeding. Another expression in the Terms of Reference to be noticed is “illegal punishments”, which is wider than “acts of violence ... used to maintain discipline” (more colloquially called “rough justice”, an expression not in the Terms of Reference), for an illegal punishment need not be violent. A term not in the Terms of Reference is “bastardisation”, which may be used to refer to a somewhat ritualistic infliction of pain or humiliation upon any kind of novice, including a cadet, trainee or recruit, or may be used more loosely to include the imposition – particularly in circumstances of some humiliation – of illegal punishments for real or fanciful infringements of discipline.

Executive Summary and Consolidated Recommendations

4. Although the Terms of Reference have required the Inquiry to range widely over “the administration of military justice within the ADF”, to ascertain whether there are “irregularities” in it “which may require corrective action”, the first focus of attention is on “[w]hether or not there exists in the ADF any evidence of a culture of systemic avoidance of due disciplinary processes”.

5. I have commenced my consideration of that first matter by looking at certain events in A Company 3RAR, in the years 1997 and 1998, which sparked widespread concern on their being revealed by a Military Police investigation in 1998-1999. Not all of these events, upon examination, proved to be of a kind falling within the terms of my Inquiry. But I have found that some three privates and one corporal (with whom I infer several others agreed) did individually commit assaults in the guise of disciplinary measures. That they were able to do so, unchecked for a time, is a matter for concern. However, there is no evidence to show a state of affairs involving the prevalence of assaults of this kind so as to amount to a culture, or a general practice. Nor, despite the most ample opportunity for privates in 3RAR to make anonymous complaints and submissions, has there been any acceptable evidence that the assaults were in fact more widespread, or that they have continued at all during the period since 1998. Apart from certain dubious testimony of [*Corporal A*], [*Private B*] and [*Private C*] which was rejected at the Court Martial of [*Warrant Officer D*], the evidence does not suggest that any officer or non-commissioned officer above the rank of corporal condoned any of the assaults.

6. The assaults were thoroughly investigated by the Military Police, and prosecutions were launched in respect of them. I have considered the management of the investigation and prosecutions, and have found no serious fault in it and certainly nothing in the nature of a cover-up. With hindsight, the matters could have been dealt with somewhat more swiftly; in particular, had there been no hiatus during 3RAR's involvement in Timor. Probably, too, greater expedition could have been achieved if the police had been furnished with more resources, and if the Australian Defence Force had had a Director of Military Prosecutions to streamline all prosecutions and improve the efficiency of the process by a concentration of expertise.

7. The Terms of Reference, of course, are not limited to 3RAR. The Inquiry was very widely advertised, including by a stand-down period in the ADF. Submissions (including anonymous submissions) were sought from serving persons and from the wider community, and the Inquiry team visited bases throughout Australia and in Timor. Individually, or in groups, over 2,350 members of the Australian Defence Force were involved in discussions with me and/or my assistant *investigators* about matters related to the Terms of Reference, and over 480 submissions to the Inquiry were received.

8. It is clear that, in the past, bastardisation practices have existed at some military institutions, and discipline by the fist has been practised by some (perhaps always only a few) in a number of units. The Inquiry found a very general view across the ADF that these practices are inconsistent with the ethos of the Defence Force today, with the training received at recruit schools and elsewhere, with the equity and diversity programme, and with the general practice in Units of the ADF represented by the 2,350 members the Inquiry contacted. Whatever may have been the case with such practices in the past, they have not been followed in the great body of the Defence

Force for a number of years. There may be a few exceptions. [*section deleted*]

9. The Inquiry considered the sources of failure to apply the disciplinary law and of illegal methods of discipline. It saw them, in part, in real or perceived difficulties or disadvantages with the lawful methods of discipline, and therefore proceeded to examine a wide range of issues bearing on the application of discipline in the ADF. (Of course, the pressure of views about physical discipline absorbed by members in the general community, or from the media or films, cannot be discounted as a discrete adverse influence.)

10. Under the heading “*Training in relation to the Defence Force Discipline Act*”, it is pointed out that lack of familiarity with the Act, and of sufficient training to use it efficiently and effectively, is a significant disincentive to the taking of formal disciplinary action. Illegal action may be substituted. Attention is drawn to the increasing complexity of the legal requirements applicable to the ADF. It is suggested that it is not true, if it ever was, that legal issues are not part of the business of the military. Room has to be found in the training of the modern Defence Force for the disciplinary law, not as an add-on, but as something that *is* a military matter. In future international operations, similar to that in Timor, the importance of operating within the law is likely to be underlined.

11. It is suggested that at present training of officers in the *Defence Force Discipline Act* falls short, particularly as regards new COs in the Army. Attention is drawn to other reports which have supported the provision of additional training in disciplinary law for officers. It is suggested there is presently an over-reliance on WOs and senior NCOs and that officers, whilst there is no intention to attempt to turn them into lawyers, should have an understanding of basic legal principles applicable to summary hearings.

There should be competency standards applied to persons involved in the disciplinary process. Recommendations 1 to 6 arise out of this discussion.

12. Under the heading “*Initial Training*”, reference is made to the critical importance of a recruit’s first experiences of the military and of discipline. This was a topic frequently mentioned in the Inquiry’s discussion groups around Australia. The plain conclusion is that the respect for discipline of a member of the ADF grows in some measure from the Recruit Training School. Both the length of the training and the quality of the instructors are therefore vital.

13. Under the heading “*Discipline Officer Scheme*”, the report discusses the operation of this scheme, which was introduced in 1995, in the light of the views expressed at the discussion groups around Australia. The scheme is an essential part of the structure of lawful discipline. It was recommended, from early after the *Defence Force Discipline Act* came into force, in successive reports. As early as the *May 1989 Report of the Defence Force Discipline Legislation Board of Review*, it was pointed out that the complexity and other problems of summary proceedings led to some charges not being brought when they should have been, and to some persons being punished unofficially. The Board recommended the scheme which became the Discipline Officer Scheme.

14. My inquiry found, through the discussion groups, that there was in a significant number of units, now more than five years after the introduction of the scheme, almost complete ignorance of it, particularly in the Air Force. In many places, even though the scheme is known, it is not used. Not uncommonly, no discipline officer is appointed. At the same time, there was universal agreement among those who had had experience of the scheme that it offered considerable benefits, and those who did not know it,

invariably approved when it was explained to them. The principal benefits are seen as being:

- a. it is relatively quick and informal;
- b. no permanent conduct record is generated;
- c. since it operates by consent in the sense that it only applies where there is an acknowledgment of guilt, it tends to bring with it a harmony and acceptance in the area of discipline; and
- d. it avoids indiscipline through failure to prosecute in minor cases where more formal proceedings would be seen as troublesome to administer and too harsh in ultimate consequence, or through attempts to impose discipline by illegal means.

15. One fault raised several times is a side effect of a major advantage – the lack of a permanent record. The problem is that a member with a number of minor offences dealt with under the scheme (and therefore unrecorded) may, on transfer to a new unit, start again with an entirely clean sheet and, upon offending once more, be seen as a first offender. [*section deleted*] The remedy, I suggest, would be to preserve the member's record from the previous unit until promotion and then start the new rank (instead of the new year or the new unit, as at present) with a clean sheet.

16. A difficulty raised far more frequently is the limitation of the scheme to the level of Private equivalent. I agree with the Abadee Report that the scheme should be extended to higher ranks, but, in the light of many discussions around Australia, I suggest the limit be the rank of Captain equivalent. That would also involve reconsideration of the penalties available under the scheme, and of the list of offences to which it applies.

17. The speed and simplicity of the scheme are important advantages of it. I have therefore concluded that the election period specified to enable a member to elect to be dealt with formally by charge should be shortened

from seven days to one day, recognising that in practice there would be a discretion to allow longer in a proper case.

18. Again because of the importance of the scheme, its universally applauded success where it has actually been adopted, and the unfairness of depriving some persons of its benefits, I have concluded that it should no longer be optional in a Unit. Policy guidelines should provide for a CO to appoint a discipline officer.

19. I note that, while some of the reforms suggested could be implemented as matters of policy, any substantial reform of the Discipline Officer Scheme would require legislative amendment, since the scheme itself is statutory. I make recommendations pursuant to this section of the report, at numbers 7 to 11.

20. Another topic of direct importance to the lawful enforcement of discipline is the topic of "*Extras*". Many definitions were given in the discussion groups, but again there was virtual unanimity that the imposition of extras is a valuable tool of discipline. However, there was considerable confusion as to its legality, and the precise circumstances in which it is appropriate to order the doing of extras.

21. Like the Discipline Officer Scheme, the use of extras has the advantage that there is no permanent record to interfere with the member's career as a result of something thought too minor to deserve that additional penalty. It is suggested that, where extras are not used, there is a risk that minor infringements will be allowed to occur without anything being done about them because prosecution is thought too severe. This may be seen as suggesting a lack of concern, or favouritism, particularly in the case of an officer. On the other hand, where a junior officer is observed to be doing

extras, the enforcement of discipline in an equal manner is seen to be occurring.

22. The justification for an order to do extras is that its nature is corrective rather than punitive. The fact that a punitive effect may be felt does not deny the corrective purpose, and therefore the legality, any more than the severely punitive effect of an administrative discharge, following a drug conviction, would deny the administrative nature of the discharge. It follows, of course, that extras are not appropriate as an alternative to a charge under the *Defence Force Discipline Act*, where a criminal offence has been committed.

23. The discussion groups generally agreed that a valuable reform would be to require all orders for extras to be recorded in a book kept by the Unit for the purpose, which should be regularly monitored by the CO or an appropriate person, such as the RSM or equivalent. The object is to maintain control over the awarding of extras, to ensure that reasonable limits are not exceeded.

24. A problem with extras is that of changing service and unit environments in many parts of the ADF. Activities once suitable as subjects for orders to do extras may now have disappeared. It is important that guidelines should clarify the subject of extras and encourage and assist those who should be making orders of this kind, whilst ensuring appropriate monitoring and controls to prevent abuses. Recommendations arising out of this section of the report are 12 to 16.

24. It is pointed out, under the heading "*Utility of Punishments*", that due disciplinary processes will suffer whenever the penalties likely to be imposed are seen as inappropriate. The scale of punishments was formulated between 15 and 25 years ago, to reflect what was then seen as the

modern approach to punishment. Changes in circumstances, particularly in service conditions in the Navy which is presently treated unequally in respect of punishments, and in the position of Reservists, would justify review of the nature and scale of punishments. Further, I agree with Brigadier Abadee, in his report a few years ago, that a provision equivalent to section 556A of the *Crimes Act 1900 (NSW)* should be included in the *Defence Force Discipline Act*. Recommendations arising out of this section are numbers 17 to 19.

25. Under the heading “*Time taken for Commencement and Review of Summary and Other Trials*”, reference is made to the commitments of Reserve Legal Officers as a possible cause of delay and to delays in the commencement of proceedings because of the lack of police manpower resources. I mention a practice which has been adopted in the United Kingdom of requiring a military prosecutor to provide a statement to the Judge Advocate at each trial specifying the time taken to bring the matter to trial, with reasons for any delay. I suggest that a salutary effect could be achieved by the imposition of such a requirement for all proceedings, including summary proceedings, brought under the *Defence Force Discipline Act*. The certainty of exposure of the matter to examination, and possible criticism, would promote efficiency. Perhaps guidelines could fix a period (such as 14 days) from the date of the incident to the date of the trial which, if exceeded, would require explanation in any summary matter. It is, I suggest, a major cause of disrespect for any system of law that it may involve significant delays. In the military, delay also reduces the disciplinary value of a charge under the Act. Recommendations arising out of this section of the report are numbers 20 and 21.

26. Under the heading “*Training Charges*”, I refer to confusion which was evident in the discussion groups, and also in submissions to the Inquiry, as to whether there exists in the ADF a “training charge” regime, according

to which convictions entered by summary authorities at training institutions are excluded from a member's conduct record. I examine the statutory and regulatory regime, suggesting that an amendment of the *Defence Force Discipline Regulations* could be made to establish a "training charge" regime. The regulations presently made do not have this effect. It is recommended that recruits should be allowed to make mistakes without long term adverse consequences, and should receive training in the operation of the *Defence Force Discipline Act* which may include the bringing of charges that would not otherwise be brought. Therefore a training charge regime is desirable, but it should not apply where the facts would constitute a criminal offence under the civil law, nor at institutions other than *initial* training institutions. Recommendation 22 arises out of this section.

27. Under the heading "*Administrative Consequences and Administrative Action in relation to Disciplinary Breaches*", I refer to the strong perception, at all rank levels, in the discussion groups that any conviction under the *Defence Force Discipline Act*, except perhaps for a person of quite junior rank, would be apt to have a serious impact on the offender's career progression prospects. This effect is often thought to be out of proportion to the original offence. Promotion, selection for courses, and selection for desirable positions could all be affected. As a result, administrative means of dealing with an offender may be adopted to avoid what is seen as an unwarranted additional penalty.

28. There is also a perception, particularly at the junior level, that in matters not involving criminal conduct officers and senior NCOs are rarely charged under the *Defence Force Discipline Act*. Career impact was given as the reason, although the impression that a person has "got away" with misconduct is then a problem.

29. Where administrative action has been taken against an officer or senior NCO, there may be a perception that the administrative sanction was too lenient by comparison with the conviction that would have befallen someone more junior. Often this is either produced or reinforced by a lack of transparency of the outcome and the lack of feedback to complainants or persons affected by the offending conduct. I conclude that strong guidelines should be laid down to ensure that persons with a real interest, such as victims and complainants, are not left in the dark as to what was done about an alleged breach of discipline.

30. Another source of uncertainty is the difference between the three services with regard to administrative action. Each has some form of rebuke or censure, but its nature and impact on career progression may vary, depending upon the service involved. In an era of more and more joint operations and establishments, such an inconsistency is hard to justify.

31. Discussion with service career managers indicated that the supposedly “soft” administrative sanction might in fact, in some cases, have a more prolonged and severe impact on a career than a conviction under the *Defence Force Discipline Act* would have had. Thus, cynical views are contributed to by misunderstanding of the effects, respectively, of a conviction and of administrative action. Recommendations 23 and 24 arise out of this section.

32. Under the heading “*Equity and Diversity Issues*”, two quite different matters are mentioned. The first is the question of “serial harassers”, who are said to flourish where each of a succession of complaints is incapable of proof or not serious enough to warrant more than administrative measures. I suggest that too much emphasis may have been placed at times on resolving the instant complaint (perhaps by a method of alternative dispute resolution which focuses on just that), and not enough on educational or administrative measures to ensure that there is no repetition. Where harassment has

actually been shown to have occurred, some watch is required by those responsible for personnel and postings to protect the victim and guard against a repetition of the conduct.

33. There is a claimed clash between discipline and Equity and Diversity policy. No doubt this is partly caused by the entrenched attitude of some dinosaurs who simply do not see a place for equity and diversity in the military. However, it was repeatedly said in group discussions, without dissent, that a claim of harassment leaves a persisting stain even after investigation has found it to be baseless. In consequence, many asserted - particularly inexperienced junior NCOs, but also some senior NCOs - a reluctance exists to enforce compliance with orders where a counter-attack on the ground of harassment might be brought, or is actually threatened. The emphasis at training establishments on equity and diversity rights was said to have created a situation where such a counter-attack was always possible. If it was made, the NCO, so it was suggested, would be virtually required to give proof of innocence.

34. It seems to me this problem will lessen with time, although it will not disappear. Some false or exaggerated complaints are the price to be paid for making necessary provision for real complaints. The remedy is vigilance (in which the proposed Military Inspector General may play a part), together with training and education that keep the issues of discipline and equity and diversity in balance. In the discussion groups, it was pointed out that there is a requirement of annual equity and diversity training, which, it was suggested, should be balanced by a corresponding requirement of training in the obligations imposed by military discipline. Recommendation 25 arises out of this section.

35. Under the heading "*Unequal Treatment and Consistency of Punishments*", it is pointed out that any inequality of treatment under military law has a serious impact on discipline. Reference is made to the

suggestion that a senior officer may not be charged with a speeding offence on a base, perhaps because a Lieutenant Colonel would have to be court martialled, which would be out of proportion to the minor nature of the offence. A solution would be the introduction of legislation enabling a ticket, like that used by the police in various civil jurisdictions, to be issued for minor traffic offences. Civilians on a base ought also to be included in such a system. In the case of military personnel, the ticket would not affect their records.

36. Unauthorised and negligent discharges were a topic frequently raised in discussion groups as involving unequal punishments. It is suggested a policy guideline could be issued giving guidance as to the general level of punishments, provided the unimpaired discretion of the summary authority with regard to its application were made unambiguously clear.

37. It is also suggested that lack of transparency may feed a perception of inequality of treatment of officers, and that the publicity of disciplinary outcomes is a matter that should be given consideration, in order to devise a policy that will reassure all ranks of the even handed application of military discipline. Recommendations arising out of this section are 26 to 30.

38. Under the heading "*Transparency and Victim Feedback*", it is pointed out that some long running complaints against the ADF are likely to have been contributed to by an administrative failure to explain sufficiently, or at all, the nature of action taken. Reference is made to a pilot study by the Crown Prosecution Service in the United Kingdom in relation to the provision of feedback to victims and complainants in particular sensitive situations arising in prosecutions, and it is suggested that guidelines should be issued to all COs as to action they might take, in order to explain decisions on complaints so as to give closure to incidents having the potential of causing ongoing psychological harm.

39. Under “*Access to Legal Advice*”, I have highlighted a reaction at the discussion groups which surprised me, as a lawyer. There was a very general opinion that there are not enough lawyers to meet the need. Not infrequently, only one lawyer is available at a base, and this creates problems of conflict of interest when his or her advice is sought. Further reference is made, in this section, to the problem already mentioned of the increasing complexity of legal requirements affecting the ADF in its operations. Recommendations under this heading are numbers 31 to 33.

40. Reference is made to the problem, more common in Air Force, of members requesting assistance in summary proceedings from a specified Defence member who is a lawyer. It is pointed out that the report of the Defence Force Discipline Legislation Board of Review of May 1989 indicated legal officers should not be able to appear before summary authorities, except by permission “in special circumstances”. It is suggested this general approach is appropriate, and special circumstances need not be seen as common. The issue should be discussed in the training of COs, and furthermore, it is suggested the legislation should be amended to make express provision according with the view of the report of the Defence Force Discipline Legislation Board of Review. Recommendations under this heading are recommendations numbers 34 and 35.

41. Then reference is made to the widespread practice in the past of a legally unqualified CO adjourning summary proceedings, upon a difficulty arising, for the purpose of seeking legal advice. The problem is the clash between this practice and the principle of natural justice. The Summary Authority should not receive representations about the decision to be made in the absence of a party who might want to put a different view. The solution, I suggest, is to have the necessary legal advice given in the presence of the parties at the summary hearing, rather than behind closed

doors. A fair opportunity is then provided for differing viewpoints to be put forward, and at the same time the Commander receives the assistance that is needed. The recommendation number is 36.

42. Reference is made to the significance, for the lawful enforcement of discipline, of the great changes in recent years in Defence organisation. It is suggested changes in disciplinary law have not kept pace with the rate of structural change, particularly the drawing together of the three services and the bringing in of civilians. There is now a mix, quite often, of three services, of public servants and, increasingly, of contractors. Confusions have developed in joint organisations as to the command chain of responsibility. The problem is expected to be addressed as a result of the very recent report of the Sherman/Cox Committee. Recommendations made in my report are numbers 37 to 39.

43. Under the heading "*Investigation Issues*", it is noted that many of the problems the subject of submissions to the Inquiry had a strong link to a flawed investigation. Where the investigation was by military police, there were complaints about the time taken, which, of course, is related to the resources available. Police themselves complained that Commanders sometimes sought to exercise unreasonable influence over their investigations or failed to act on their reports.

44. As regards investigations under the *Defence (Inquiry) Regulations* there are issues of procedural fairness and competence. I suggest that one of the roles to be committed to the proposed Military Inspector General be the role of oversight of administrative inquiries to ensure reasonable compliance with the recently introduced *Administrative Inquiries Manual*. The Military Inspector General should also create and manage a Register of persons qualified to carry out various types of inquiries, so that a Commander can readily obtain information about suitable and available persons. An

additional advantage to the bringing in of such an investigator would be independence, a matter which has been emphasised by the Joint Standing Committee on Foreign Affairs, Defence and Trade in its 1999 report *Military Justice Procedures in the Australian Defence Force*.

Recommendations arising out of this section are recommendations 40 and 41.

45. Under the heading "*Peer Group Discipline*", the report refers to the healthy reinforcement which peer group discipline in a dedicated team may provide to the discipline of the ADF. However, it is acknowledged that, with poor leadership, peer group discipline may take a destructive form, isolating and ultimately excluding individuals, and involving threats, intimidation and actual assault. These undesirable features are particularly likely to manifest themselves where a regime of group punishments is imposed. Repetition by a team of some evolution that was spoilt by a failure on the part of one member may be a salutary tool of teaching; but its overuse will obviously cause resentment, and may lead to undue and unhelpful pressure being imposed on an individual with a weakness. A recommendation as to the use of peer group discipline is made at number 42.

46. Under the heading "*Drug Policy*", reference is made to the extremely limited provisions of section 59 of the *Defence Force Discipline Act*, and to the difficulties those provisions create for the enforcement of Australian Defence Force policy on involvement with illegal drugs. It is noted that the discussion groups showed there is an attitude of some cynicism and frustration in the ADF towards the enforcement of drug policy. The frustration no doubt contributes to the small number of cases where individuals have taken the matter into their own hands by inflicting unofficial punishment.

47. Recommendations numbers 43 and 44 suggest an amendment to the terms of section 59, and the bringing of certain prosecutions in respect of the possession of cannabis as test cases.

48. Under the heading “*Presumption of Guilt*”, reference is made to the repudiation in the ADF today of the former attitude embodied in the expression “March the guilty bastard in!” However, it is pointed out that the very same assumption exists in a different form in the statement, still often made, that charges are not brought unless it is quite definite that the person charged has committed the offence. This approach equally deprives the accused of the benefit of a genuine examination of the case against him or her from the point of view of the true presumption of military, as well as civil, law of innocence. Other undesirable consequences are pressure applied to an accused to plead guilty, and a feeling of “loss of face” on the part of those whose job it is to bring charges if an accused is actually found not guilty. Recommendations numbers 45 and 46 are made in respect of this topic.

49. Under the heading “*Director of Military Prosecutions and the Administration of Courts Martial and Defence Force Magistrate Hearings*”, the controversial question is discussed of the establishment of an “independent” Director of Military Prosecutions (DMP). As contemplated in my report, a DMP is a tri-service authority, separate from existing Convening Authorities, who would handle the prosecution of members facing trial by Court Martial or Defence Force Magistrate. The DMP would *not* be concerned with summary proceedings.

50. I refer to the cases overseas, in Europe and Canada, where arrangements similar to those presently existing in Australia have been held to involve elements of unfairness, and to the history of the discussion of the topic in Australia. I accept that the *International Covenant on Civil and*

Political Rights, although Australia has signed it, is not domestically binding and that, under the existing law, a DMP is not compulsory. However, as the JAG has pointed out in his most recent report, there are powerful considerations which favour a DMP, and the considerations which once operated in the contrary direction are less powerful in the presence of the growing ease of communication in the modern world. There are practical concerns, but they are capable of solution. I do not think it is correct that the office of DMP would introduce unacceptable delays into the military justice process. It might do so if it were proposed for summary hearings, but I do not propose it for them. On the contrary, I think the unified procedure which would come with the DMP would involve a concentration of expertise that would eliminate many sources of delay. In association with a DMP, I have concluded there should also be a Registrar of Courts Martial, to provide a comparable unification, and resulting efficiency, in administration, and to introduce a case management system such as is now invariably employed by the civil courts.

51. The other objection to a DMP which has been raised is that the decision to prosecute must take into account discipline and command issues best addressed by the Commander. I accept that there are such issues, and I suggest that the model that ought to be adopted be designed to preserve the Commander's role. Under the proposed scheme, the CO would recommend a prosecution to a superior authority in the chain of command, who would either refer the matter to the DMP or refer it back to the CO if the superior authority thought it should be dealt with summarily or by some administrative measure at the CO's level. The DMP would make the decision whether to prosecute if the matter were referred to him or her, but that ought to be a legal decision in any case; under any system at all, a prosecution that is not legally justified will not succeed.

52. It is a separate question whether the DMP should also have power to prosecute crimes revealed by investigations reported to him or her by the Inspector General or by the proposed Military Inspector General. I suggest this could have little practical effect on a CO's position, since cases of that type, in which a crime had actually been committed, could not in general be dealt with otherwise than by prosecution. The DMP would not be prosecuting unless in his or her expert legal opinion it *was* such a case. However, there could be exceptional situations in which a Service interest ought to be taken into account. For that reason, I suggest the DMP should be required before making a decision in a matter that comes other than from the CO, to seek, from a senior officer in the chain of command, information as to any service interest that should be taken into account. With that qualification, the DMP should have power to decide whether to prosecute in a matter of this kind. Recommendations to establish the office of the Director of Military Prosecutions are at numbers 47 and 48.

53. Under the heading "*Keeping Things 'In-House'*", reference is made to the suggestion, which came up in discussion groups, that COs were tempted to maintain appearances in respect of their commands by keeping matters that ought to be prosecuted "*in-house*". Sometimes, of course, this may have been the observer's perception. But sometimes it may really happen. The answer which is recommended is that the training of COs should emphasise the proposition that low prosecution statistics are not necessarily a plus, and a failure to expose indiscipline or error may be a serious blot on command performance. Doubtless, training already covers this, but further emphasis may be required. A second prong to the attack on the problem would be the creation of some agency able to intervene in the chain of command so as to ensure that it does work effectively in cases where, at some stage, it may not have done so; and this may be a function for the proposed Military Inspector General. My recommendation is number 49.

54. Under the heading “*Availability of Avenues of Complaint*”, reference is made to the fact that the Inquiry covers a period of about 16 years, during which a very large number of persons passed through the ranks of the ADF. The Inquiry was widely advertised, both within and without the ADF, persons with complaints being invited to come forward. I draw the conclusion from the relatively small number of complaints, made in submissions to the Inquiry, that the great majority of complaints have been handled responsibly by the chain of command.

55. Nevertheless, there is a small number of members and ex-members who presented lengthy submissions pressing complaints that had often been dealt with years ago. Many of the complainants had settled down to a fixed state of indiscriminate suspicion towards any person connected with the military. They are costing the ADF a considerable amount of money in dealing with them and, when they achieve media attention, they damage reputations. Accordingly, it is suggested there may be a benefit in identifying these long term matters, and examining them as a separate problem with a view to endeavouring to find some step which could be taken to achieve a closure. Some might usefully be referred to the proposed Military Inspector General, as auditor of Commanders’ dealings with complaints, and a person to whom a complainant could go in the event of a failure of the chain of command. He or she, of course, would be concerned with any systemic problem which a complaint revealed.

56. Further, I suggest that the problem of the chronic complainant would be worth the obtaining of professional advice from a psychologist who has specialised in this particular syndrome, in order to ascertain ways of handling the kind of complainants likely to become chronic complainants. My recommendation is number 50.

57. Under the heading “*Professional Reporting - The ‘Whistleblowers’ Scheme*”, I discuss the problem of the “Whistleblower” who reports a complaint about wrong-doing by some other member, particularly a superior officer. A number of submissions show that, in cases of this kind, complainants have a tendency to feel that they must *prove* the matters raised by them or lose all credit. That feeling transforms them into zealots personally pursuing the suspect, and likely to be affronted by any finding on the part of the military police or other investigators that does not amount to total condemnation of the conduct reported. This is unfortunate, when the complaint may well have started out as an honest report of a suspicious circumstance, made with the best of motives and objectively. Emotional involvement is destructive in several ways, and may result eventually in a yet further complaint alleging unfair treatment as being a result of the making of the original complaint. A number of submissions to the Inquiry illustrated this problem.

58. I have concluded that an attempt should be made to encourage an understanding that early reporting is the best course, and that reporting of a suspicious circumstance does not involve being bound to prove any case against anyone, the preferable approach being to leave the result of investigations to those qualified to carry them out. Should there be a problem about reporting through the chain of command, the Inspector General or the proposed Military Inspector General (according to the nature of the complaint) would be an appropriate person to receive a report of the suspicious circumstance in question. The supervision of the protection accorded to “Whistleblowers” (or as the Australian Federal Police call them, professional reporters) should be committed to the proposed Military Inspector General. My recommendation is number 51.

59. Under the heading “*Regional DFDA Units*”, the report discusses the appointment of a regional cell or unit in an area of significant military presence to handle all summary trials (other than discipline officer matters)

in the area. This is an idea that was raised at a number of the discussion groups. It may be that it could be implemented under existing legislation by the use of the provision enabling an officer to be appointed as CO for disciplinary purposes. It could provide a solution for a problem encountered in some areas where the chain of command is ambiguous, or where there are insufficient resources available to a Commander for the purposes of summary trials. My recommendation is number 52.

60. Under the heading "*Medical Issues*", the report refers to the surprising number of complaints made by submissions to the Inquiry that raised medical issues.

61. Several complaints of harassment or maladministration involved medical facilities, where there appeared to be tensions between health service staff arising out of leadership issues.

62. A different medical issue is that relating to the treatment of medical certificates. Repeatedly during the Inquiry, the reaction of officers and non-commissioned officers to medical certificates was criticised. Certificates seemed frequently to be brushed aside. It is acknowledged that sometimes medical certificates may be issued too easily, including to malingerers. However, there is a clear risk of incurring legal liability for the Commonwealth, where a decision maker substitutes a lay judgement for expert medical opinion. In fact, more than one matter raised before me involved further injury or exacerbation of illness as a consequence of the ignoring of a medical certificate.

63. It is suggested the appropriate action, where there is reason to believe that a particular medical certificate was wrongly given, is to take the question up with the doctor. In view of the number of cases raising this issue, it is suggested some general guidance be provided to Commanders concerning the weight to be given to medical certificates, and the course to

be taken if there is reason to be doubtful about a particular certificate. My recommendation is number 53.

64. Under the heading “*Procedural Fairness and Command Prerogative*”, the report discusses the problem of reconciling the exercise of the command prerogative in certain cases with the observance of the principle of procedural fairness (generally referred to as natural justice). I accept the correctness of the view that the Chief of Service or Superior Commander has a command prerogative to remove an officer from a command position for safety, operational or other reasons fundamentally depending on a loss of confidence in the capacity of the officer in question to perform the duties of the relevant command. But this is not a power for everyday use; it is to meet some imperative necessity calling for immediate action. Where there is no true urgency, the principle of procedural fairness should have priority. Increasingly, in the modern law, the courts insist upon the observance of the rules of natural justice which require that a person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters, adverse to his or her interest, that will be taken into account in deciding upon the exercise of the power.

65. Whatever the legal position might be in the absence of some overriding direction, it seems to me that consideration should be given to the issue of some general policy guidance, limiting the exercise of the command prerogative to remove a subordinate commander, to cases where there are situations of emergency, and then requiring that exercise to be followed, as soon as possible, by the supply of adequate particulars of the facts upon which the action was based. This would reduce the present level of dissatisfaction, revealed by submissions to the Inquiry, and would bring an aspect of the administration of the ADF into line with modern administrative law, so as to make for a more just Service working environment. Adequate particulars would at least facilitate the mounting of some challenge, where

the decision made in the exercise of the command prerogative was actually questionable. My recommendation is number 54.

66. Under the heading "*Military Inspector General*", the report answers the last term of the Terms of Reference which requires the identification of "the role and functions of an Inspector General of the Australian Defence Force". First, the reasons for the making of such an appointment are rehearsed. It is pointed out that, although the Inquiry has not found anything in the nature of a "culture" of illegal enforcement of discipline, the diversity of the ADF, and the upheavals it has gone through in recent years, make for the possibility of occasional lapses, unless preventative steps are taken. It is important to set in place some means of detecting misconduct promptly, when it occurs, so that its perception by the ADF does not have to await an eruption in the form of notorious events. It is necessary to maintain constant vigilance, including the monitoring of key indicators and the provision of means for problems to be aired and dealt with, as they arise.

67. The report discusses key indicators to be monitored, such as police investigation reports, reports of administrative inquiries and investigations, Unit and service discipline statistics, records of significant administrative action taken in respect of members of the Services, records of grievances, and spot checks of Unit military justice records.

68. The difficulty in the resolution of problems, where it is the operation of the chain of command itself that is impeached, is discussed. The actual difficulty is increased by the perceptions, of those who are concerned, of possibilities of command influence and lack of independence.

69. A Military Inspector General independent of the normal chain of command and answering directly to the CDF would provide greater assurance of independence for those cases where complaints do need to be brought forward. The result would also be to give the CDF some additional

flexibility of action in responding to a crisis involving any risk of a suggestion of improper concealment or cover-up.

70. In formulating a statement of the role and functions that a Military Inspector General might fulfil, this Inquiry has been aided greatly by the insights provided by the group discussions with so many members of the ADF, and by the nature of the issues which emerged in the submissions received. The role and functions are set out in detail in the recommendation which is number 55.

71. In a final section of the report I list brief details of a number of matters put before me in submissions which, pursuant to the third of my terms of reference, I have referred to appropriate authorities for investigation and any necessary action. I have, of course, sought to be kept informed of the results of these referrals; but many of them could not be dealt with during the relatively short life of this Inquiry. I have recommended that issues remaining to be examined be referred to the proposed Military Inspector General.

Recommendations

It is recommended that:

Training in relation to the Defence Force Discipline Act

1. Common legal training courses in Disciplinary Law should be produced for Australian Defence Force personnel at all levels as soon as practicable.
2. In particular, a course for all officers covering basic legal principles should be introduced.
3. The training for officers about to assume command appointments should, for all services, include a component comparable to that presently provided in the case of the Air Force in respect of Disciplinary Law.

4. Competency Standards should be devised and introduced for personnel involved in the disciplinary process at the summary level (for example, Defending Officers might be required to complete an interactive module on pleas of mitigation and attend a summary hearing before being available to represent someone).
5. Steps should be taken to encourage a closer involvement of junior officers in the disciplinary process.
6. The introduction of annual awareness training in military justice issues should be considered.

Discipline Officer Scheme

7. Consideration should be given to making the appointment of a Discipline Officer mandatory in all units.
8. The ranks subject to the Discipline Officer Scheme should be all ranks to and including Captain equivalent.
9. The record of matters dealt with under the Discipline Officer Scheme for an individual member should be discarded not, as at present, upon departure from his or her unit or after twelve months, but upon promotion to a higher rank.
10. The period allowed for members to elect to be dealt with by a Discipline Officer should be reduced from 7 days to 1 day, subject to a discretion in the officer who would bring the formal charge (if one were to be brought) to extend the time up to 7 days.
11. The offences to which the Discipline Officer Scheme relates, and also the maximum penalties, should be reviewed if the scheme is extended to higher ranks.

Extras

12. The nature, purpose and sphere of extras should be clarified by tri-service guidelines, so as to ensure that they may be lawfully imposed.
13. The guidelines should make it clear that, as a matter of policy, extras are to be regarded as an administrative response that may be appropriate in some cases, falling outside the disciplinary measures established by the *Defence Force Discipline Act*.
14. The guidelines should address the questions who may award extras, upon whom they may be imposed, monitoring arrangements, the types of activity covered and the nature of the failure on account of which an order for extras may be made.

15. The power to award extras should not be delegated below the rank of Corporal equivalent in respect of subordinates within his or her command.
16. All ranks up to and inclusive of Captain equivalent should be subject to orders for extras made by a superior.

Utility of Punishments

17. Consideration should be given to reviewing:
 - a. the nature of the punishments which may be imposed under the *Defence Force Discipline Act* in the light of contemporary standards;
 - b. whether some form of Service oriented community work could usefully be made an alternative sanction;
 - c. whether the Act should be amended to confer a power, not merely to impose no punishment, but also, for a special reason, to decline to enter a conviction.
18. The question be examined whether a separate scale of punishments for Navy members is any longer necessary.
19. A review be undertaken of the applicability of the present scale of punishments to Reservists who are not on full time service or undergoing periods of continuous training.

Time Taken for Commencement and Review of Summary and Other Trials

20. The feasibility be investigated of securing a “readiness” undertaking from Reserve legal officers offering themselves for Australian Defence Force work.
21. A mandatory requirement be introduced for a prosecutor to provide a statement specifying the time taken to bring a matter to trial, together with a statement of the reasons for any delay.

Training Charges

22. Consideration should be given to the establishment by regulation of the concept of a training charge, and to its definition and scope.

Administrative Consequences and Administrative Action in relation to Disciplinary Breaches

23. The policy work currently being undertaken to achieve standardisation of application and outcome of administrative sanctions, should be regarded as requiring an urgent resolution.
24. Steps should be taken to improve the dissemination of information upon the true career effects of convictions under the *Defence Force Discipline Act* and of various administrative sanctions.

Equity and Diversity Issues

25. Having regard to the repeated comments of NCOs, and particularly junior NCOs, about the influence of training in equity and diversity at initial entry institutions, consideration should be given to providing more balancing emphasis in that training on the obligations of discipline enshrined in the *Defence Force Discipline Act*.

Unequal Treatment and Consistency of Punishments

26. Consideration should be given to the institution of a system of traffic tickets in military bases for minor infringements of general orders and traffic regulations.
27. Consideration should be given to the issue of policy guidance on summary punishments including the dissemination of information as

to the general level of punishments for particular offences while making it clear a CO's discretion would not thereby be limited.

28. Complete and accurate statistics concerning prosecutions under the *Defence Force Discipline Act* and administrative action having punitive effect be compiled on a common basis for all three services and be made available to legal and administrative agencies of the ADF.

Transparency and Victim Feedback

29. Ways of achieving fair and effective transparency of military justice outcomes (in relation both to prosecutions and administrative actions) be investigated and appropriate steps be taken.
30. Guidelines be issued to commanders designed to ensure effective feedback to complainants, victims and offenders in relation to administrative action or summary proceedings.

Access to Legal Advice

31. The policy regarding the provision of legal assistance to members be reviewed.
32. Steps be taken to reduce the incidence of conflict of interest situations arising out of the location of a single legal officer without an alternative.
33. The total number of legal officers and their location and organisation, required in the modern Defence Force be reviewed.

Legal Officers at Summary Proceedings

34. *The Defence Force Discipline Rules* be amended to provide that a member who desires to be legally represented at a summary trial must

first obtain from the proposed Registrar of Courts Martial a certificate that, for a special reason, legal representation is appropriate.

35. Pre-command legal training of commanding officers should include guidance on the factors to be taken into account in deciding whether to grant leave for legal representation at summary trials.

Need of Commanding Officers to Seek Legal Advice During Trial

36. Pre-command legal training of commanding officers should include clear guidance on how legal assistance during the course of a summary trial may be sought without prejudice to the rights of the parties.

Effects of Defence Reorganisation

37. Command and line management responsibility for the discipline of personnel in joint and integrated organisations, and the dissemination of information about it, be reviewed.
38. Rationalisation of command and line management responsibility for the discipline of personnel in joint and integrated organisations take account so far as possible of geographic convenience.
39. Common familiarisation training on military justice issues and civilian disciplinary processes be developed for use in joint and integrated organisations.

Investigation Issues

40. The level of resources available for police investigative work across the three Services be reviewed.
41. A register of suitable persons to act as Investigating Officers under the *Defence (Inquiry) Regulations* be developed (as to which see the Role and Functions identified for the Military Inspector General).

Peer Group Discipline

42. Specific guidance on the use of peer group discipline be included in pre-command training of COs and in standing orders for training institutions.

Drug Policy

43. Section 59 of the *Defence Force Discipline Act* be reviewed in conjunction with DI(G) PERS 15-2, with a view to the amendment of the legislation to enable military tribunals to deal with charges in respect of small quantities of all appropriate illegal drugs.
44. In the meantime, consideration be given to prosecuting in cases involving cannabis where the civilian police regard the quantity as too small, limiting the military prosecution to the statutory quantity of 25 grams.

Presumption of Guilt

45. Greater emphasis should be placed on the concept of a prima facie case in the training of NCOs, WOs and officers in relation to summary proceedings under the *Defence Force Discipline Act*.
46. The training of prosecutors in summary proceedings should emphasise the principle, which civilian prosecutors are required to observe scrupulously, that a prosecutor does not seek a conviction at any price, but with a degree of restraint so as to ensure fairness.

Director of Military Prosecutions and Administration of Courts Martial and Defence Force Magistrate Hearings

47. An independent Australian Defence Force Director of Military Prosecutions, with discretion to prosecute, be established.

48. A Registrar of Courts Martial be established for the Australian Defence Force.

Keeping Things “In-House”

49. Guidance be included in (a) Command Directives at all levels, and (b) pre-command training courses, designed to discourage any tendency to conceal potential military justice problems from higher authority.

Availability of Avenues of Complaint

50. Consideration be given to reviewing what means (if any) exist for achieving closure on the cases of chronic complainants.

Professional Reporting – The “Whistleblower” Scheme

51. Current policy covering treatment of “Whistleblowers” be reviewed as to its applicability to deal with more general military justice issues.

Regional DFDA Units

52. Consideration be given to the usefulness of establishing a regional DFDA unit in a particular location where the ordinary arrangements are difficult to implement in practice.

Medical Issues

53. General guidance be provided to Commanders (and included in appropriate training courses) concerning the weight to be given to medical certificates, and the course to be taken if there is reason to be doubtful about a particular certificate.

Procedural Fairness and Command Prerogative

54. General policy guidance be developed as to the exercise of the command prerogative, and as to the extent and nature of the observance of the dictates of natural justice which is required in connection therewith.

Military Inspector General

55. A Military Inspector General be appointed with the following role and functions:

Role

The role of the Military Inspector General is to represent the CDF in providing a constant scrutiny, independent of the ordinary chain of command, over the military justice system in the Australian Defence Force in order to ensure its health and effectiveness; and to provide an avenue by which any failure of military justice may be examined and exposed, not so as to supplant the existing processes of review by the provision of individual remedies, but in order to make sure that review and remedy are available, and that systemic causes of injustice (if they arise) are eliminated.

Functions

The functions of the Military Inspector General should be:

- a. To investigate, as directed by the CDF, or as may be requested by a Service Chief, such matters as may be referred to the Military Inspector General, or to investigate a matter of his or her own motion, concerning the operation of the military justice system;
- b. To provide an avenue for complaints of unacceptable behaviour, including victimisation, abuse of authority, and avoidance of due process where chain of command considerations discourage recourse to normal avenues of complaint;
- c. To take action as may be necessary to investigate such complaints, or refer them to an appropriate authority for investigation, including the military police, civil police, Service or departmental commanders or authorities; and, following any

- referral, to receive and, if necessary, to report to the CDF upon, the response of the authority to whom the matter was referred;
- d. To act as an Appointing Authority for investigations (not including Boards or Courts of Inquiry) under the *Defence (Inquiry) Regulations*;
 - e. To maintain a Register of persons who would be suitable to act as members of inquiries or as Investigating Officers;
 - f. To advise Appointing Authorities under the *Defence (Inquiry) Regulations* on the conduct and appointment of inquiries;
 - g. To monitor key indicators of the military justice system for trends, procedural legality, compliance and outcomes, including:
 - (1) Service Police investigation reports;
 - (2) Significant administrative inquiries and investigations;
 - (3) Service discipline statistics;
 - (4) Records of significant administrative action taken for disciplinary purposes;
 - (5) Records of Grievances;
 - (6) Reports of unacceptable behaviour, including victimisation, abuse of authority, and avoidance of due process;
 - h. To conduct a rolling audit by means of spot checks of Unit disciplinary records, procedures, processes, training and competencies relevant to military justice;
 - i. To promote compliance with the requirements of military justice in the ADF;
 - j. To liaise with other agencies and authorities with interest in the military justice system in order to promote understanding and co-operation for the common good;
 - k. To consult with overseas agencies and authorities having similar or related functions;

- l. To make to the CDF such reports as may seem desirable or as the CDF may call for;
- m. To receive documents which were submitted to this Inquiry and finalise complaints brought to the attention of this Inquiry which may require further action.

The Events at 3RAR

73. Before embarking on a full discussion of the issues, I turn back to the events which provided a stimulus for the Inquiry. As a result of a complaint by [Private C] of A Company, 3rd Battalion, The Royal Australian Regiment (3RAR), which involved an allegation that he had been assaulted, a Military Police investigation began on 29 September, 1998. The investigation uncovered other complaints, and examined allegations, which had previously been investigated within 3RAR, of mistreatment (including assault) of a [Private E]. As the Military Police inquiries widened, it became necessary, progressively, to assign more police to the task, up to the eventual number of fifteen. A considerable effort was made to ensure that the full extent of the wrongdoing was exposed. The investigation was prolonged into late April 1999, and charges were recommended in respect of a number of matters, to which it is necessary to make reference. I do so seriatim, as follows:

73.1 [Private F] was alleged to have assaulted [Private C] on 25 November 1997 in the showers and latrines block (being Service land) at Holsworthy. [Private C] had been accused of stealing \$50 belonging to a third soldier, although the evidence was that the money had been lost, and he had found it in a breezeway at the barracks. Later, [Private C] was charged with and convicted of a “prejudicial conduct” charge, on the footing that he knew at a relevant time of the loss of the money, and was dishonest in not returning it. On the occasion of the assault, which was the day after [Private C] was accused of stealing, he had been ordered to clean the latrines. [Private F] came in, accompanied by [Private G], who just stood there.

Then, after some words in the course of which [Private F] said: “Sorry, I’ve been ordered to” (it was stated at the hearing I shall mention that the two were friends), [Private F] punched [Private C] twice, causing his mouth to bleed and breaking a tooth, so as to require dental attention. I have taken these facts from the transcript of the summary hearing before [Lieutenant Colonel H] on 5 December 2000, at which [Private F] pleaded guilty, and was punished by 28 days loss of pay.

73.2 [Private G] was alleged to have aided and abetted [Private F] in the assault just described, at least by an approving presence. On 27 October 2000, [Lieutenant Colonel I], “dealing” with the charge, ruled: “I see no compelling evidence that could demonstrate beyond reasonable doubt that [Private G’s] presence was intended to execute a common purpose with [Private F], that being the committal of an assault, and therefore I think there is little potential for conviction. Accordingly, I find that there is insufficient evidence to support the charge ... and ... direct that the charge not be proceeded with”.

Although this was not technically the appropriate course, the view of the evidence taken by [Lieutenant Colonel I] was expressed in terms of Section 110(1)(b) of the *Defence Force Discipline Act 1982*, as to which see *Hogan v. Chief of Army* (1999) 153 FLR 305 at para 20.

73.3 (a) Sometime towards the end of 1997 (the date is unclear as the matter does not seem to have been reported until November 1998, during the police investigation), [Private J] allegedly assaulted [Private F]. The incident was said to have followed a Battalion dining in night at which [Private F] became intoxicated. In his own words, he was “gobbing off”; as [Private J] put it, “he was up walking around while the colours were still there, carrying on like an absolute idiot”. After the dinner, and outside, when both were leaving in an

intoxicated state, there was a scuffle. On the version originally given by [Private F] to the police, [Private J] punched him, causing considerable bleeding. [Private F] added: "I did not report the matter to any of my superiors or the Military Police, as I believed that I may have deserved it by my actions in the mess". Later, on 19 February 1999, [Private F] signed a further statement, in which he said: "I wish to withdraw my initial statement in relation to the allegation of assault by [Private J] against me". The charge of assault was dismissed.

(b) [Private J] was also alleged to have assaulted [Private E], so as to require his hospitalisation, on a date in late 1997. Although a complaint of harassment of her son, made by [Mrs K] on 18 March 1998, resulted in the immediate appointment of [Captain L], then the second in command of A Company, to carry out an investigation, no charge was laid against [Private J] until the matter was raised again during the Military Police investigation. It seems likely that the reason for this was the deployment of A Company in Malaysia at the time of [Captain L] investigation, and the disappearance of [Private E] absent without leave almost immediately upon returning to Australia. The report had been forwarded to [Warrant Officer M] in Australia for action. After the completion of the Military Police inquiries, [Private J] was charged, and he was found guilty of this assault on 2 February 2001.

73.4 Allegations were made in October 1998, during the police investigation, against [Private N] in respect of assaults upon a [Private B]. [Private B] had been accused of stealing an amount of \$50 from [Private O]. It was alleged that, on 24 November 1997, [Private O] assaulted [Private B] in the showers and latrines block at Holsworthy, being encouraged to do so (so as to amount to aiding and abetting) by [Private N]. It was also alleged that [Private N] assaulted

[*Private B*] himself, on 26 November 1997, in [*Private B's*] room at the barracks.

There is no reason to doubt that [*Private O*] did strike [*Private B*] in order to inflict punishment upon him for the stealing. When interviewed, [*Private N*] readily admitted that he had himself told [*Private B*] a number of times: "Next time you muck up, I'm going to belt you". He also made specific admissions that he had assaulted [*Private B*] in his room. However, at a summary hearing before [*Lieutenant Colonel H*] on 30 October 2000, [*Private N*] denied both the alleged aiding and abetting and the alleged assault by him. He explained that he had thought [*Private O*] must have assaulted [*Private B*] a second time, and that, in making admissions, he was just taking the blame for [*Private O*]. [*Lieutenant Colonel H*] took the view that conflict between the details given in the admissions and the details of the second assault, as recounted by the complainant, tended to confirm the defence. He found there was "insufficient evidence to support a finding of guilty" on either charge.

Be this as it may, there is no doubt that statements made by [*Private N*] during his interrogation by the police are evidence that he and perhaps others entertained a belief that physical punishment of a soldier by another soldier is an appropriate response to a misdemeanour.

73.5 An allegation was made against [*Corporal P*] that, on 25 June 1998, he assaulted [*Private Q*], occasioning him actual bodily harm, by striking him in the head. [*Private Q*] was extremely intoxicated after a dining in night at 3RAR, and there is no doubt that somehow he sustained injuries in the vicinity of the car park area immediately after the dinner. He spent the night in hospital, and he said he had no

memory of events at or following the dinner. No timely complaint came from him, his first statement in relation to the matter being made on 19 October 1998, to the Military Police. There was evidence that, at the dinner, when the colours were being marched in, he was disrespectful, swearing at other battalion members, and continuously leaving his seat, only to fall over. After the dinner, he was seen in the company of [*Corporal R and Corporal P*]. They walked together around a corner; then a witness heard what sounded like a scuffle, two soft thumps and a slight moan. Within seconds, the witness rounded the corner, to see [*Private Q*] lying on the ground with his head against a brick wall. Both [*Corporal R and Corporal P*] had disappeared by that time. However, shortly afterwards, [*Corporal R*] was heard to say that [*Private Q*] “got what he deserved”.

On these facts, it may have been that there was an assault by [*Corporal R*] , or an assault by [*Corporal P*], or an assault by both of them, or a drunken collapse by [*Private Q*] against the brick wall or the concrete pavement. There was no direct evidence of a blow struck by either [*Corporal R*] or [*Corporal P*]. On 14 December 2000, [*Lieutenant Colonel S*], hearing the case against [*Corporal P*] as a Summary Authority, directed that the charge not be proceeded with “on the basis of insufficient evidence”.

- 73.6 The last mentioned matter raised, of course, an allegation also against [*Corporal R*], but the case against him suffered from the same problems. On 16 November 2000, [*Lieutenant Colonel T*] found there was no evidence to support the charge against [*Corporal R*] and that it should not be proceeded with. The prosecution, upon the advice of senior counsel, accepted that this was indeed the position.

73.7 [*Private C*] was the subject of yet another allegation, this time against [*Corporal U*], a Physical Training Instructor. While [*Private C*] was in custody, following his prejudicial behaviour conviction, [*Corporal U*] conducted a physical training session with him on 12 December 1997. That session involved [*Private C*] running whilst wearing army boots with no laces in them. It is, of course, usual to remove the laces of prisoners, but not to require them to do exercises involving running in unlaced boots. [*Corporal U*] was charged, following the police investigation, with ill-treating an inferior and with negligent performance of duty. He was acquitted on the former charge but convicted on the latter. It seems clear that the view taken at the hearing was one which exonerated [*Corporal U*], who had had no prior experience with prisoners, of any intention to make [*Private C*] suffer. He was simply negligent in failing to appreciate the effect of requiring [*Private C*] to do the exercises dressed as he was.

73.8 It was alleged that [*Private V*] committed an assault on [*Private W*] on 30 November 1997, causing actual bodily harm. There was no complaint of this assault until 19 November 1998, during the police investigation. [*Private V*] was found not guilty by a Defence Force Magistrate on 6 April 2001, but, in any case, the allegation did not relate to the illegal enforcement of discipline. What was involved was a dispute about the ownership of an electronic game known as a Playstation.

73.9 It was alleged that, on an occasion in late November 1997, [*Private O*] assaulted [*Private B*]. As has already been said, in relation to [*Private N*], [*Private B*] had been accused of stealing \$50 from [*Private O*]. The assault on [*Private B*] came to notice on 30 October 1998 during the police investigation. Upon questioning on 8 December 1998, [*Private O*] gave a straightforward account of punching [*Private B*]

several times in the showers and latrines block at Holsworthy. This account makes clear his belief that “if [he] did not do so then [*Private N*] would assault [[*Private B*]]”. He thought that would be more severe, and he said: “I did this to avoid any further fighting. At this stage, I firmly believe [d] that my actions in striking [*Private B*] would save a serious beating in the future. I was concerned that other members would bash him”. He explained himself in a little more detail: “That’s what I mean by an old school sort of thing is they believe that that sort of lifestyle is the way to be. That’s all I mean by that. Their way of always taking things into their own hands, all that sort of thing is dealt with within platoons, and things like that. If someone steals then they get thumped by their members and that’s it. And nothing else is said. Or they believe in, you know, black drumming people and kicking them out of battalions and all this sort of rubbish. And I certainly didn’t want that to happen.”

[*Private O*] was also present when [*Private F*] struck [*Private C*]. At that time, he said, he “believed [*Private F*] was about to enforce some kind of physical discipline on [*Private C*].” [*Private O*] was charged with assault, but the charge was never dealt with. That was because, as a result of an administrative mix-up, his discharge from the Army was allowed to go through before the case was heard, and he went to live in the United States. He had sought a discharge on 21 November 1999, and obtained it on 11 June 2000. There is no reason at all to think that the sequence of events was other than the result of chance, but of course it should not have happened. Procedures are in place designed to ensure that a discharge from the Army does not occur until a pending charge has been disposed of.

73.10 During the police investigation, allegations arose that [*Warrant Officer D*], had incited or condoned a number of assaults. His trial by Court

Martial was adjourned several times because of legal problems and problems about the availability of senior counsel. It was finally heard in June 2001, when the prosecution was substantially dependent on three witnesses, none of whom was of unimpeached credit:[*Corporal A*], [*Private C*] and [*Private B*]. [*Warrant Officer D*] was acquitted.

73.11 Also, during the Military Police investigation, an allegation surfaced that [*Major X*], during a training exercise on 11 and 12 March 1998 in Malaysia, had subjected [*Lieutenant Y*] to inappropriate training in resistance to interrogation. A Defence Force Magistrate, , convicted [*Major X*], on 30 March 2001, under s.34 of the *Defence Force Discipline Act* of a charge of ill-treatment of a member of inferior rank, and fined him \$2,000. The decision is presently under review, but it should be noted that the Defence Force Magistrate expressly acquitted [*Major X*] of any animus against [*Lieutenant Y*]. The case did not involve some illegal punishment for a perceived offence.

73.12 Finally, during the police investigation, evidence came to light of a conversation, on 17 February 1999, between [*Lieutenant Colonel Z*], who was undoubtedly anxious to leave no stone unturned to remedy such of the problems in A Company as had by then become apparent, and a fellow senior officer, [*Lieutenant Colonel AA*]. [*Lieutenant Colonel AA*] had been selected to preside over a Court Martial to hear a charge of disobedience of a lawful order against [*Corporal A*]. [*Lieutenant Colonel Z*] [*section deleted*] made plain his view that the Court Martial should determine upon a conviction. In fact, there was a reconstitution of the Court Martial board, so that [*Lieutenant Colonel AA*] was not involved, and ultimately the charge against [*Corporal A*] did not proceed, because a significant witness, [*Private AB*], was compromised, having previously secured [*Corporal A*]

acquittal on another charge by evidence he subsequently admitted had been false. [*Private AB*] was convicted of perjury, for which he served a substantial sentence of detention. [*Lieutenant Colonel Z*] misguided intervention in the prosecution of [*Corporal A*] was motivated by a desire to condemn, not to condone, misconduct in A Company. I shall return to this point when dealing with the management of the allegations relating to 3RAR.

74. Two further assaults were later shown to have been committed against a member of A Company, [*Private AC*], in June and July 1997. These assaults, by [*Corporal R*], involved, in the case of the earlier, his striking [*Private AC*] in the face with his fist for lagging behind the rest of the section, and in the case of the later, his asserting his leadership of the section, having called it together, by an assault with his fists. [*Corporal R*], who is no longer a member of 3RAR, was convicted on 4 April 2001, on his pleas of guilty, of two counts of assault and one of prejudicial behaviour, and fined \$1,423.00. The delay in the prosecution of these assaults was due to their not having come to notice during the lengthy police investigation to which I have referred, notwithstanding its thoroughness. That they might have occurred was revealed during further police inquiries in October 2000, but workload problems delayed completion of necessary investigations until early 2001. Appropriately prompt prosecution then followed.

The Inquiry Procedures

75. When this Inquiry was set up, much of what I have just stated was already known. But what could not then be known with any certainty was how wide-spread and pervasive in the Defence Force might be the idea that discipline should be enforced with the fist, by-passing the law. Plainly, out of their own mouths, and by their own conduct, some members of A Company asserted that view. The CDF responded by dramatically emphasising how essential to our constitutional democracy is a law-abiding defence force. He announced by general message not only this Inquiry, but also an unprecedented stand-down period on 5 February 2001, at which each unit was addressed (by video) by the CDF and the appropriate Service Chief. The existence and purpose of the Inquiry were explained in terms which showed how widely it would range over the area of military justice, and members were urged to make submissions, if they had any relevant knowledge or opinion. Everything possible was done to facilitate communication with us, and to provide for privacy of access, where that was required. Advertisements were placed in general and service newspapers and a toll-free telephone line was provided. When, as I shall describe, the Inquiry visited bases around Australia, its visits were publicised in the local media.

76. As a result, the Inquiry has received a total of almost 600 communications. Of these, over 480 have involved the making of a submission. A full list of submissions is at Annex A. Although a substantial body of these submissions has been of immense help, it was inevitable that there would be included a number representing personal complaints, more or less justified, or quite unjustified, bearing no relation to the Terms of Reference of the Inquiry. We have been careful to state, repeatedly, that the Terms of Reference do not set up a super-ombudsman to resolve individual

problems, but are concerned with wider questions of the operation of military justice in the services. At the same time, I have, on a number of occasions, exercised the power in my third term of reference by referring a particular problem to an appropriate authority. I am pleased to be able to say that some issues have already been resolved by that means. A list of referrals is at Annex G, and further details of matters referred are contained later in this report. I should add that the majority of those making submissions have appreciated the purpose for which they were invited to do so, and have sought to make a contribution to the Australian Defence Force, rather than merely to seek a personal benefit.

77. Submissions have differed widely in the subjects they have addressed. Some have recounted an incident, perhaps far in the past, perhaps more recent, involving an assault, sometimes a result of intoxication, and not necessarily for purposes of illegal discipline. Some have concerned a question of equity and diversity policy, and alleged acts of harassment; some, an act of bastardisation of varying seriousness; one, an inappropriate and hurtful so-called practical joke [*section deleted*]; many, the inevitable consequences of human conflicts in the workplace, maladministration, mismanagement or abuse of authority. Others have raised important questions of principle, and large issues which confront the Australian Defence Force. A schedule showing the variety in nature of submissions received is at Annex I.

At the beginning of the task, my assistant investigators and I decided that we could not adequately answer the questions asked of us in relation to the functioning of the military justice system without going to the units of the Defence Force and speaking to those who must apply, and those who are subject to, military justice in actual practice. We have visited, in some cases more than once, a large number of military bases and training establishments all over Australia, details of which are set out in a list contained in Annex C

to this report. We have talked to officers and crews aboard ships and a submarine, also listed in Annex C. We have gone to Timor, to Dili and also to the forward base at Balibo, in order to explore the functioning of military justice in an operational setting. Its ability to function in such a setting is, of course, of the essence of military justice: see the Defence Submission presented by General Baker at para. 2.17, *Submissions to Defence Subcommittee of Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into Military Justice Procedures in the Australian Defence Force, vol.3, p552*. Altogether, we have spoken, in groups, or individually, to over 2,350 members of the Australian Defence Force. Statistics concerning the group discussions are at Annex F.

78. A general procedure was evolved for these visits. The CO would be interviewed, and any problems particular to the base or unit would be discussed, the CO's views on aspects of the Inquiry being ascertained. Frequently, a second-in-command or executive officer would also be involved. Separately, there would be convened discussion groups (each usually not larger than about 20) of other officers, senior NCOs, junior NCOs and trainees (where appropriate). Also, chaplains were seen as a discrete group with the potential to provide a unique observation window into the military. Of particular interest was the discovery that very nearly 50% of the chaplains who provided information and views had had some military experience, whether as officers or more often other ranks, before taking up the vocation of chaplain. They thus not only had a special standpoint, but they also had prior knowledge with the aid of which to evaluate what came to their notice.

Systemic Substitution for Law of Discipline by Violence?

79. In the discussions with groups and with individuals, questions raised by the Terms of Reference were explored. Groups and individuals were probed as to whether their experience in the military involved knowledge, by observation or otherwise, of anything in the nature of discipline by the fist, or of deliberate evasion of the lawful enforcement of discipline and substitution of unlawful measures. A generally consistent picture emerged from the discussions, whether in Western Australia, the north, the east or the south. A significant number of older members recalled in the past either some association with, or at least hearing about, bastardisation activities at training institutions, or some physical assault (not generally in the severe category). Some of the assaults would have been directed to a disciplinary end; others were the result of intoxication or a disposition to quarrel. In general, those who spoke of them, however, firmly asserted their belief that no discipline by assault was or could be tolerated in their own unit, or in the military as they knew it, today. They pointed out that young soldiers, sailors and airmen were told their rights, and that the modern ethos of the Defence Force was directly contrary to such a practice. Reference was made to the reforms at Kapooka and at the Australian Defence Force Academy, and the conduct mentioned was related to an earlier period.

80. Leaving aside, for the moment, the events at 3RAR and certain other matters I shall mention, I believe it is true to say that nothing points to the existence in the Australian Defence Force of any *systemic* substitution of violence in any form for the due processes of lawful discipline. I am glad to note that this conclusion is in accord with that of the Joint Standing Committee on Foreign Affairs, Defence and Trade in its report published in April 2001 entitled *Rough Justice? An Investigation into Allegations of*

Brutality in the Army's Parachute Battalion. At para. 6.16, the Committee said:

“We do not feel that the evidence shows that this system of illegal justice was employed outside of A Company 3RAR. There is certainly no evidence to show that it occurs in the wider Army or Defence Force.”

Of course, the Committee had not had the benefit of the extensive consultations throughout Australia that I have undertaken, nor of many of the submissions I have received.

81. It would be disingenuous, and ultimately dangerous, to leave the matter there – dangerous, because a problem overlooked is a problem against which there is no forearming. Entrenched traditions die hard, and it is not many years since there existed bastardisation practices which created an atmosphere favourable to the use of illicit means of discipline. It is not only, or even perhaps chiefly, the influence of these practices that must be guarded against; but also attitudes which some who join the Australian Defence Force bring with them from their community, or from the media, or from Hollywood portrayals of military life. That they come with views already formed in this way was repeatedly shown by discussion groups with trainees who said they had expected the military environment to be much tougher than it was. There are, in the services, some officers and non-commissioned officers who may have been influenced by attitudes that are unacceptable in today's military. Those attitudes - they were well explained by [*Private O*] in a statement to which I have referred - may be hidden for a time, to surface in favourable circumstances. Therefore it will be necessary to remain watchful against any resurgence.

82. The events at 3RAR occurred in A Company during a period of perhaps two years which, if it had not already come to an end, certainly did so when police investigations began on 29 September, 1998. The intense

scrutiny to which 3RAR has since been subjected by the Joint Standing Committee, by the media, and not least, within the Army, has failed to uncover any evidence of ongoing actions of a similar kind. For our part, my assistant investigators and I have afforded ample opportunity for confidential submissions, if there were continuing oppressions to be complained of, and we have interviewed the current CO, as well as the two preceding COs, the chaplain, two of the former OCs of A Company, and others connected with 3RAR, such as spouses and medical practitioners, and 75 junior NCOs and privates. I have concluded there has not, over at least the past two and half years, been any practice at 3RAR involving the commission of assaults in the name of discipline.

83. The question remains whether what was occurring in A Company, during the period I have mentioned, merits the description of a culture of systemic avoidance of due disciplinary processes. One apparent pointer to the conclusion that such a description is fitting, which has been put forward, relates to what was said to be a marked diminution in the number of summary proceedings under the *Defence Force Discipline Act* at 3RAR during the time of one of its COs. However, the Inquiry received evidence that the relevant statistic is erroneous. Because of the importance of the matter, I had the original records checked, and have ascertained that, in fact, prosecutions during the period in question did not show the alleged diminution at all. When the confusion of a false statistic is removed, the situation in 3RAR during the period in question – serious as it was – does not suggest the prevalence of unlawful practices so as to constitute something in the nature of a culture. Discounting allegations which did not relate to discipline, or which were rejected at a hearing, there were three privates and one corporal who individually committed assaults under the guise of disciplinary measures. It may be inferred that several others were in agreement with this type of behaviour, although at least one soldier participated unwillingly. No officer promoted these actions, or has been

shown to have expressed himself as condoning them. Upon one of the assaults being reported, a military police investigation was undertaken, resulting in the prosecution of those alleged to have offended.

84. Although I have not found evidence of a culture of systemic avoidance of due process, the fact that there were individuals in one company of 3RAR who were able to commit a number of assaults, unchecked for a time, is a matter of concern. The extensive discussions the Inquiry has had show that, while the overwhelming majority of the Australian Defence Force rejects unlawful violence, there is a number still influenced by outdated ideas of macho behaviour, sometimes imbibed from parents or grandparents, or learned in military institutions of the past, or simply brought with them from the community they have left, who continue to see some degree of physical force as an appropriate tool of training or discipline. I have already referred to this matter, and do so again only to emphasise that the events of the recent past in A Company make the point peculiarly applicable to 3RAR. Special vigilance will there continue to be required.

85. Notwithstanding [*Private C*] and [*Corporal A*] have alleged they were threatened with death following their making complaints, I have received no acceptable evidence to demonstrate the reality or the source of a threat. Any anonymous threat made could quite possibly have emanated from some deranged person. If such a threat was made, unless it could be discounted on the ground of insanity, it would, of course, be a crime of some gravity, and thus a matter for the civilian police. There has not been any police prosecution. An allegation has also been made that [*Corporal A*] has himself uttered threats, against [*Private AB*]. That allegation forms part of the tangled skein of proceedings involving him and [*Corporal A*]. So far as [*Private C*] is concerned, whether or not he was ever genuinely threatened by someone who objected to his complaining about 3RAR, I can see no acceptable evidence of any continuing threat to him at any time over the past

year or more. I certainly do not regard the Army's readiness to comply with his request for protection when he was attending to give evidence for the prosecution at the Court Martial of [Warrant Officer D] as such evidence.

86. Before turning to examine some other elements of the Defence Force, I mention a separate aspect of the events at 3RAR. [Private C] was not released from the detention to which he had been sentenced until a number of hours after he should have been. What happened was the result of a misunderstanding as to the precise time at which the sentence ended. There is no reason to think there was involved any deliberate infliction of additional unauthorised punishment on [Private C]. The same mistake has, I understand, been made on a few other occasions, and action has been taken to ensure it should not be repeated. For that reason, it is unnecessary to say anything more about it.

87. [Paragraph deleted] *The following paragraphs are an abstract of Mr Burchett's report relating to ongoing and recent investigations.*

The Inquiry surveyed evidence of recent and current allegations of unlawful behaviour across the Australian Defence Force. These allegations concerned only a small number of units, and included:

- *Unacceptable initiation practices;*
- *Illegal methods of enforcing discipline;*
- *Threats as a means of exercising authority;*
- *Directions to junior members to "contact counsel" (discipline by assault) on an under performing member; and*
- *Unacceptable behaviour in the form of harassment, sexual harassment, and allegations that senior members of a unit condoned such behaviour.*

Where appropriate, matters have been referred for investigation under the Defence Force Discipline Act pursuant to the Terms of Reference.

88. [Paragraph deleted]

89. [Paragraph deleted]

90. [Paragraph deleted]

91. [Paragraph deleted]

- 92. [Paragraph deleted]
- 93. [Paragraph deleted]
- 94. [Paragraph deleted]
- 95. [Paragraph deleted]

96. This survey of evidence concerning focal points of unacceptable behaviour involving the use of violence in the military does not qualify my conclusion that there is not to be found a culture of systemic avoidance of due disciplinary processes or of the use of violence to maintain discipline. However, there have been instances of avoidance and violence of those kinds on the part of individuals in some of the cases mentioned and also in isolated instances the great majority of which occurred some years ago, as was made clear in the discussion groups and by individual members of the Australian Defence Force. In the light of the evidence, my assistants and I have given some consideration to the question what factors may lead to a small number of persons [section deleted], attempting to enforce discipline by means of assaults. We have identified the following, without suggesting they were all present in any particular case:

- a. The development of an attitude that a particular unit is special, while healthy in itself, may lead to a feeling that it is above the ordinary rules, being (perhaps only in its own eyes) elite;
- b. If its commander is then indifferent to what goes on in the ranks, or even actually eager to see extreme measures taken to achieve eliteness[section deleted], the feeling that the unit is “special” may be acted on;
- c. If a unit with such a commander has also middle management with an ethos of toughness at any price, or perhaps just eager to please the commander, they may execute a regime of discipline by assault;

- d. A final condition of the process continuing for any time, without being halted by prosecutions, is the existence of difficulty for those affected to achieve a hearing of any complaint through the chain of command.

97. I shall return to some of these points, particularly the issue of eliteness, and the question of a remedy where there is a problem with the chain of command, which may be a question that invokes the functions to be proposed for a Military Inspector General.

Management of Allegations re 3RAR

98. As I have stated (in para.73 above), the Military Police investigation of the incidents in A Company 3RAR began on 29 September 1998; it continued until 29 April 1999. Most of the incidents the subject of prosecutions only came to light during that investigation, although two assaults by [*Corporal R*] did not until later (see para.74), and an assault on [*Private E*], which had been investigated internally during 1998, had not then resulted in any prosecution, in the circumstances mentioned in para.73.3(b).

99. An initial question, in respect of the management of the allegations, when made, is whether the period of 7 months taken for the police investigation (albeit including the Christmas holidays) suggests too leisurely a pace of inquiry. As to this, I have discussed the matter with the senior Military Police Officer engaged on the task, during the earlier part of the time [*Major AD*], and I have read the evidence given to the Defence Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade on 2 March 2001 by [*Lieutenant Colonel AE*], the Provost Marshal of the Army. It must be remembered that the investigation grew as it proceeded. There was no foresight of its complexity or of the number of incidents and witnesses with which it was eventually to be concerned. At the time (the Military Police structure has since been reformed), there were difficulties in reassigning a significant number of investigators at short notice when the magnitude of the task became apparent. In the circumstances, the Provost Marshal expressed the view that the time taken was “not overly long”. That seems to be a fair assessment. From my experience of civilian inquiries, I do not think a comparison with them would in general be unfavourable to the efforts of the Military Police over this investigation.

100. It should be noted that the police inquiries consumed 5,437 investigator man-hours, and over 200 statements were recorded. Locations visited ranged from Cairns to Adelaide, with many places in between, and some inquiries directed to units in Darwin and Malaysia. The way Army personnel are frequently sent on what, in civilian life, would be regarded as short-term postings, inevitably complicates any large inquiry of this sort into events that occurred in a unit months or a year or two earlier.

101. I turn to the management within 3RAR of the allegations of assaults, when those allegations were made, and also the involvement of the unit's external higher chain of command. In the examination of this aspect of the management of the 3RAR allegations, information was sought from victims, officers, senior and junior NCOs, service legal officers, investigators, unit and higher commanders.

102. Within the sphere of internal unit management of the allegations, the Commanding Officer, [*Lieutenant Colonel Z*], was responsible to initiate investigation and corrective or disciplinary action when they were initially brought to notice. This responsibility stems from the *ultimate responsibility* of a commanding officer as described at para 2.11 of the Joint Standing Committee report *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion*. I am satisfied that, from the point at which [*Lieutenant Colonel Z*] first became aware of the allegations of unacceptable behaviour within his unit, he took prompt and zealous action. His position of Commanding Officer was complicated by such additional pressures as having elements of his battalion in different locations, including Malaysia, and possibly having his investigations hampered by the intimidation of witnesses, as is likely to have been the case at least in respect of [*Private AB*]. Unfortunately, his zeal to prosecute the offences which had occurred led him to take the step that resulted in his own

trial and conviction on a charge of conduct prejudicial to good discipline. I am satisfied it would be quite wrong to regard his lapse as part of or as contributing to the breaches of the *Defence Force Discipline Act* to which I have already referred. In other respects, [*Lieutenant Colonel Z*] conduct in his dealing with these matters was exemplary.

103. The first complaint in relation to 3RAR was that made by [*Mrs K*] in March 1998, alleging that her son had been assaulted and harassed whilst in Malaysia. [*Lieutenant Colonel Z*] promptly initiated an investigation that was completed by [*Captain L*]. His Investigating Officer's report included a Service Police report. Both investigators were unable to find conclusive evidence of an assault. The allegations made by [*Mrs K*] were of an isolated incident, so that there was then no indication of the wider problem within A Company 3RAR. However, by 24 August 1998 there were two further incidents of note. First, [*Mr AF*], the father of a 3RAR soldier, had complained that his son was ill-treated by members of the unit (though this complaint, which was not ultimately pursued, was not related to illicit disciplining). Secondly, evidence offered at a service trial included an allegation by [*Private C*], of which the Director of Army Legal Services was notified by a letter dated 17 August 1998, of sanctioned assaults within 3RAR. The allegation by [*Private C*] was serious, and it led to the commencement on 29 September 1998 of the service police investigation into 3RAR. In the circumstances, the proposition that the Army took fully 12 months before the matter of [*Mrs K*] complaint was treated formally is clearly incorrect.

104. The actions by the Commander Deployable Joint Force Headquarters (DJFHQ), in his capacity of superior commander to [*Lieutenant Colonel Z*] were straightforward. The Commander DJFHQ, after the Military Police investigation was completed, and legal advice had been obtained (which took about a month), wrote to [*Lieutenant Colonel Z*] with the intent of

ensuring that the administration of disciplinary proceedings against a number of 3RAR members would be just and expeditious. The Commander DJFHQ wrote to [*Lieutenant Colonel Z*] on 30 June 1999, identifying individuals who, he directed, were to be charged with offences that had been identified by the Military Police investigation. The direction by the Commander DJFHQ related to those charges, in respect of what are known as prescribed offences, for which [*Lieutenant Colonel Z*] did not have the legal authority to conduct a trial, requiring that the proceedings for those prescribed offences be referred by [*Lieutenant Colonel Z*] to the Commander DJFHQ, a convening authority for Courts Martial and Defence Force Magistrate trials. But the clear intent of the Commander DJFHQ's letter of expediting due process miscarried when, on 21 July 2000, the charges against [*Private F*] and [*Private N*] came on for hearing before a Defence Force Magistrate. For he considered that the letter constituted an irregularity in the referral process. He held there had been impermissible and invalidating command interference. Whether or not the ruling was correct, it is plain the Commander DJFHQ did not intend to circumvent due process, but to enforce it without delay. At worst, what was involved was a drafting slip in his letter.

105. Unfortunately, in consequence of the Commander DJFHQ's letter of 30 June 1999 and the Defence Force Magistrates ruling with regard to it, time was lost, and further time had to be spent seeking a way to get the prosecutions back on track.

106. Before discussing the course of administrative management taken to get the prosecutions back on track, it is important to draw attention to a period of perceived inactivity with respect to these matters. This period was from 26 August 1999, when [*Private V*] was referred to a convening authority, until 29 March 2000 when the Acting Chief of Staff DJFHQ wrote

to commanding officers and specified the disciplinary action to be taken in respect of [Major X], [Warrant Officer D] and [Corporals R, V and P].

107. The principal reason that a hiatus in the proceedings appears to have occurred from August 1999 to March 2000 was the deployment to East Timor by Major General Cosgrove and the majority of his staff at DJFHQ and by 3RAR itself. Apart from the immediate effects of the East Timor deployment, I accept that significant contributing influences were: the complexity of the accumulated matters to be dealt with in 3RAR; that a number of involved individuals had at that time been posted to other units; possibly that a degree of practical difficulty may have been seen in conducting numerous complex trials in Timor, due to a lack of infrastructure and administrative support; and, not least, that the focus of command at the time was undoubtedly on conducting military operations in an unpredictable environment. Nevertheless, the pause in the proceedings against members of 3RAR during the operations in East Timor, should not be taken to indicate that application of the *Defence Force Discipline Act* is not entirely practicable whilst on operations. There is ample evidence that the *Defence Force Discipline Act* was effectively applied throughout the period of the operational deployment in many different ADF units, in accordance with its design as an instrument of justice in time of peace and in time of war, at home and abroad. Perhaps the lesson to be learned, for future deployments overseas, is that some resolution should be sought of any outstanding disciplinary issues at an early stage, a resolution including the deployment or not of affected personnel.

108. After the return from East Timor and Colonel Morcombe's ruling on Major General Cosgrove's letter to Lieutenant Colonel Welch, Brigadier Evans, Commander 3rd Brigade, of which 3RAR formed part, sought legal advice from the ADF's Director of Discipline Law, Captain Marks RAN.

She then gave Lieutenant Commander Rush QC RANR the task of conducting an audit of all outstanding 3RAR matters and continuing with the prosecutions. This unusual intervention by Captain Marks RAN was considered by her, at the time, to be the most effective way of providing expert assistance to the commanding officers who were still to deal with the outstanding matters. In hindsight, that audit and the centralised management of the prosecution were not without their own delaying effects on the conduct of proceedings, although they probably avoided delays and confusion of other kinds that would otherwise have occurred as a consequence of the ruling (which, of course, reflected indirectly on all matters referred to in Major General Cosgrove's letter). Thus, from the time Captain Marks intervened, any further delays really resulted from the difficulty of conducting disparate but related proceedings in a co-ordinated and efficient way, using the current military prosecution system. That is a systemic problem, to which I shall return when discussing the proposal for a Director of Military Prosecutions.

109. The conclusions I have reached on the management of allegations arising in connection with 3RAR are, first, that the investigation and prosecution of offences were not delayed by anything in the nature of a cover-up; and secondly, that some delays did occur which were attributable, in part, to limitations in police resources, in part, to the distraction of 3RAR's significant involvement in Timor, in part, to a genuine, but unfortunately worded, direction aimed at expediting prosecutions, and, in part, to the inevitable tendency of the current system of military prosecutions towards administrative delays in the prosecution process.

**The Sources of Failure to Apply the Disciplinary Law and of Illegal
Methods of Discipline**

110. Any serious examination of the question whether there is “evidence of a culture of systemic avoidance of due disciplinary processes”, and whether there are “any irregularities in the administration of military justice” in the nature of the use of “illegal punishments ... for disciplinary purposes” or of the use of “acts of violence ... to maintain discipline in lieu of due process under the *Defence Force Discipline Act*”, must consider those influences that might divert an officer or non-commissioned officer from the proper course, whether or not instead punishment is inflicted without any proper hearing by a beating, or by the illegal imposition of some burden. My assistants and I have therefore spent much time investigating the lawful alternatives that are available for the enforcement of discipline. Are there obstructions to their use? Are they as effective as they could and should be? Are there improvements that could be made to the military justice system, so as reduce any temptation to try illegal short cuts? Many of the matters we have had to examine to answer these questions are also relevant to independent issues raised by the Terms of Reference.

111. Apart from real or perceived difficulties with the lawful methods of enforcing discipline, there may be influences directly favouring the use of violence. In the past, bastardisation was rife at various military institutions: the Royal Military College, Duntroon; the Royal Australian Naval College at Jervis Bay; the Recruit Training Centre at Kapooka; and various other training establishments. When the Australian Defence Force Academy was set up in association with the University of New South Wales, as the well known *Grey Report* shows, it became seriously infected with the same virus. In all the places I have mentioned, the Australian Defence Force has taken vigorous steps to stamp out objectionable practices. The evidence put before

me has been unanimous that those steps have been successful. But it would not be good to be complacent: as the reported problem in [*unit*] shows, bastardisation is not a dead practice. Also, it is quite certain that, if bastardisation has been eliminated in training institutions, its influence, creating a tolerance and even a taste for unlawful violence in association with discipline, could not have been wholly eliminated at one stroke with it.

112. There is not the need for me to say very much about the evils of unlawful violence, whether it is involved in bastardisation or discipline by assault, since my very appointment to investigate attests the determination of the Australian Defence Force to eliminate it. As discipline, it is, of course counterfeit, since, by usurping true authority, it must be contrary to good order and discipline. But, in this report, I should note one matter in particular. Australia seems likely, in the modern world, to be involved in peace keeping missions overseas, as in Timor. Such missions are subject to international scrutiny. If Australian troops are allowed to treat each other with unlawful violence, they may be apt to treat foreigners in at least a similar fashion. That would injure Australia's good name, and could lead to international prosecution of Australian personnel. [*section deleted*]

113. Another factor affecting lawful discipline is elitism. To be elite, of course, is to have a virtue, in the full strong sense of the word's Latin derivation, not a vice. But it is observable that units in which some acts of unlawful disciplining may have taken place, or in which lawful disciplining may have been by-passed, are often units the members of which appear to see themselves as special in some way, and therefore, perhaps, as in some way above the ordinary law [*section deleted*]. It is important that the training of such groups, while making full use of the boost to morale to be got from a proper esprit de corps, should specifically counteract any tendency to contempt for the rule of law that applies to all.

114. A number of other factors were identified which may inhibit the full and proper use of the *Defence Force Discipline Act*. I shall refer to them under some of the separate headings that follow. At this point, I note only that it has been suggested a more lenient approach to the enforcement of discipline may be taken in the case of personnel belonging to categories in which severe shortages affect the military, such as pilots and some technical persons.

Training in relation to the Defence Force Discipline Act

115. Lack of familiarity with the *Defence Force Discipline Act*, and any insufficiency in training to use it efficiently and effectively, must be a significant disincentive to the taking of formal disciplinary action. That there are deficiencies in training in this area is, I think, in part a reflection of a failure to keep pace sufficiently with the increasing complexity of the legal framework within which members of the Australian Defence Force must carry out their duties. The enactment of the *Defence Force Discipline Act* itself introduced new requirements; joint service activities have further complicated those requirements; civilianisation has introduced fresh connections governed by legal rules, and fresh complexities to be overcome; and equity and diversity policies have confronted many with questions as to the true meaning of disciplinary requirements. I shall say more, when speaking of legal officers, of the increased complexity of the legal requirements governing the military, but it is sufficient here to note that whatever time should once have been devoted to training in disciplinary law, that time should now be increased. It is no answer to say that the training time is all required for training in military matters; for, in the modern Defence Force, more than ever, the operation of a sophisticated system of disciplinary law is a military matter. A point frequently made to us in discussion groups was that there is a requirement to hold annual awareness and refresher training in relation to other management issues, including security, occupational health and safety, fraud awareness and equity and diversity, but no requirement to do the same in respect of the obligations laid upon every member of the Australian Defence Force by the *Defence Force Discipline Act*.

116. Having noted earlier that international operations, such as that in Timor, are likely to be a feature of the Australian Defence Force's future, I

should emphasise the importance of the *Defence Force Discipline Act* as a tool of discipline and a repository of military law for use both at home and abroad. The necessity for the military to have such a means of maintaining itself as a body of persons disciplined according to law is, indeed, the essence of the Constitutional justification of tribunals that are not Courts in accordance with Chapter III of the Constitution.

117. The effects of lack of training in the *Defence Force Discipline Act* are especially evident amongst officers. My experience in discussion groups has been that many frankly avowed their lack of knowledge. One middle ranking officer was prepared to say, in front of a large group of other officers, that he pitied anyone who had him as Defending Officer in a proceeding under the Act, because he simply knew little about it. Some instruction, of course, is received in initial entry training institutions, but over time, and with little opportunity to reinforce the memory, the understanding gained becomes attenuated. In the Air Force, there is a four to five days package of training in the *Defence Force Discipline Act* given to officers about to take up a position of command which will require them to perform the duties of a Summary Authority. However, this training is not given to new COs in the Army. The Navy, with some training, falls in this regard somewhere in between the other two services. No other continuation training is generally available to officers. I cannot do better, regarding this matter, than refer to two relatively recent authoritative statements on the situation. One comes from the Defence Submission that I have already cited, presented by General Baker to the Inquiry into *Military Justice Procedures in the Australian Defence Force*. At para 2.22, he wrote:

“[T]he need for education and training of everyone involved in the discipline process is an essential ingredient. Indeed, it would not be drawing too long a bow to suggest that the existence and effectiveness of education and training concerning all aspects of the system of military justice and investigation will determine the degree of efficiency and

effectiveness of the system itself. It follows that an effective education and training program is an essential ingredient of the entire system of discipline in the ADF”.

See also para 2.90. The other comes from the 1999 *Report of the Judge Advocate General*, Major General Duggan, who is also a judge of the Supreme Court of South Australia. He wrote:

“As there is no involvement of legal officers in the majority of summary proceedings it is essential that training in the conduct of the hearings is provided to those involved. At present training is provided on a single service basis and varies widely. There is room for improvement in the training of the summary authorities themselves, as well as for prosecutors and defending officers. Concerns were expressed by a number of those exercising these roles that the initial training loses much of its effect because of the limited opportunities to put it into operation. It would appear that ongoing training would be of assistance in this regard.”

It is encouraging to note from Major General Duggan’s 2000 report (at para 26) that the Military Law Centre is pursuing this issue; it should receive every assistance to achieve early results.

118. The standard of training for senior army NCOs, naval coxswains and WODs is much better, and was not the subject of complaint. Of course, the training of these groups, having regard to the nature of their duties, tends to be training in the literal terms of the legal rules, and in the processes to be applied, rather than training designed to produce an understanding of any broad principles. I do not suggest that either officers or NCOs should receive legal training outside the actual requirements of the tasks they have to perform. But there is evidence that lack of familiarity on the part of officers may lead to over-reliance on advice from senior NCOs, amounting, in some cases, almost to an abrogation of responsibility. Officers who act as summary authorities, or as defending officers, should have a general

understanding of the principles of natural justice and other very general, but supremely important, underlying principles of the criminal law, and, particularly, of what constitutes evidence and how circumstantial evidence may be used, and of the meaning and effect, in the military context, of the presumption of innocence. (As to the last, it is not good enough, as a protection for the accused against mistake or malice, to say that the Service is careful to charge only the guilty – on the contrary, this is an invitation to start a hearing from a position of almost invincible prejudice.) Officers' training was also the subject of recommendations in the report of the former Deputy Judge Advocate General, Brigadier Abadee, in his report, *Study into Judicial Independence under the Defence Force Discipline Act* (the *Abadee Report*) at paragraphs 6.177-6.184.

119. No competency standards are applied to persons involved in the disciplinary process. The independence required of those who hear summary proceedings and of defending officers, poses some special difficulties in the military context, where the ethos and the overwhelming tendency of military training point the individual towards obedience. The practice, principally in the Army, of using junior NCOs to fulfil the role of defending officers, as well as that of prosecutors, in relation to minor charges, if it were extended to more serious charges, would have a potential for the achievement of almost automatic convictions. It may be enough simply to be alert to this danger. On the other hand, it may be that junior officers, who otherwise tend to remain remote from the process, could more often be used to perform this role.

120. I understand that work has commenced on the production of common legal training courses for Australian Defence Force personnel. What was said at numerous discussion groups, suggests to me that this work should be given priority.

Recommendations

It is recommended that:

1. Common legal training courses in Disciplinary Law should be produced for Australian Defence Force personnel at all levels as soon as practicable.
2. In particular, a course for all officers covering basic legal principles should be introduced.
3. The training for officers about to assume command appointments should, for all services, include a component comparable to that presently provided in the case of the Air Force in respect of Disciplinary Law.
4. Competency Standards should be devised and introduced for personnel involved in the disciplinary process at the summary level (for example, Defending Officers might be required to complete an interactive module on pleas of mitigation and attend a summary hearing before being available to represent someone).
5. Steps should be taken to encourage a closer involvement of junior officers in the disciplinary process.
6. The introduction of annual awareness training in military justice issues should be considered.

Initial Training

121. Another aspect of training which was frequently mentioned in discussion groups was the initial training of recruits. Plainly, a new recruit's first experiences of the military and of discipline are enormously important in forming the character of those who make up the Defence Force and their ideas about the duties to which they are bound. When initial training was discussed in Army groups, there was generally critical reference to the reduction in the length of the training at Kapooka. The perception is that time is required to inculcate in the raw recruit a military discipline which will both lead to self-discipline and to an understanding of the Army's ethos. As my Report is not about recruit training, I mention the matter only because this perception was so general, and it bore on discipline, and to add that, of course, the *length* of training is not the only relevant aspect of it; the *quality* of the instructors, whether at recruit schools or in officer training, is vitally important. Only the best possible persons should mould the new member's impressions of the requirements of discipline and of military justice. This is an issue for those responsible for postings, but it is also an issue of discipline. That "*[i]nstances have occurred in the past where [inappropriate] personnel have been posted to instructional positions*" is expressly stated in the submission of the Commander, Training Command – Army.

Discipline Officer Scheme

122. An issue quite directly involved in the enforcement of discipline is the Discipline Officer Scheme, which is governed by Part IXA of the *Defence Force Discipline Act*. The scheme was introduced following reviews in the late 1980s of the operation of the *Defence Force Discipline Act* as originally enacted. In the 1988 *Report of the Judge Advocate General* (Air Vice Marshal AB Nicholson) it was stated (at para 12):

“I consider that there is a need for a system of minor non-judicial punishments such as extra duties for minor singularly disciplinary offences rather than having to comply with all of the panoply of a trial under the adversary system. Desirably such a system should not be subject to a formal review, and should be administered at the junior officer or senior non-commissioned officer level. I believe that this proposal has also received the consideration of the Board of Review. A system of this type has operated successfully within the armed forces of the United States (Article 15) and it was apparent from my discussions with senior lawyers and military officers in Washington that it is regarded as an essential adjunct to military discipline”.

Similar statements had been made in previous reports from 1985 onwards.

123. Chapter 4 of the May 1989 *Report of the Defence Force Discipline Legislation Board of Review* chaired by Xavier Connor QC took up this theme in a detailed discussion, in which reference was made to the cumbersome character, complexity and slowness of summary proceedings. The Board concluded (at para 4.06) that, because of these problems, some charges were not brought where they should have been, and some persons were being punished unofficially. It stated (at para 4.07):

“The Board is firmly of the view that in the case of infringements which are purely disciplinary and which are neither serious nor of a criminal nature it is

essential that a system be established which will enable such infringements to be dealt with speedily and without undue formality but which, at the same time, will adequately protect defence members from unfair treatment. A speedy, informal system would assist in avoiding the waste of resources involved in the present process. It would also have considerable advantages for the offender, as it would avoid the trauma of a drawn out process and the stigma involved in a 'criminal' conviction entered on the offender's record".

In a series of subsequent paragraphs, the Discipline Officer Scheme is elaborated.

124. It was not until 1995 that Part IXA was inserted into the Act by the *Defence Legislation Amendment Act* of that year, in response to the Board's recommendations. Part IXA provides a much simplified procedure for dealing with some minor offences, avoiding any permanent record. Under the scheme, COs are authorised, but not required, to appoint in writing "officers or warrant officers to be discipline officers" (s.169B). The scheme then applies to members of below non-commissioned rank, who may be given an infringement notice and elect to be dealt with by a Discipline Officer, having admitted the infringement. Punishment cannot exceed limits set by s.169F, and the Discipline Officer may decline to deal with the case on the ground it is too serious.

125. Frequently in the discussion groups, including in groups of junior NCOs or officers, almost complete ignorance of the Discipline Officer Scheme was expressed. This was particularly common in the Air Force. Of course, where the scheme is not known, it is also not used. But there were many units, especially in the Navy, where the scheme, though known, is not implemented. Not uncommonly, no Discipline Officer is appointed, particular COs holding the view that the scheme is inappropriate for their

units. In some cases, this view may have been formed without practical experience of the utility of having a Discipline Officer.

126. At the same time, in the discussion groups, those who did have experience of the operation of the Discipline Officer Scheme universally praised its benefits. Those who had not had experience of it rarely expressed disagreement when it was explained to them. The principal benefits are:

- a. it is relatively quick and informal;
- b. no permanent conduct record is generated;
- c. since it operates by consent in the sense that it only applies where there is an acknowledgment of guilt, it tends to bring with it a harmony and acceptance in the area of discipline; and
- d. it avoids indiscipline through failure to prosecute in minor cases where more formal proceedings would be seen as troublesome to administer and too harsh in ultimate consequence, or through attempts to impose discipline by illegal means.

127. A perceived fault in the scheme, to which reference was made at several of the discussion groups, is no more than a side effect of one of its chief advantages - the lack of a permanent record. It is suggested that, on transfer to a new unit, a member who had been pushing the limit in the commission of minor offences before transfer, would start with an undeserved and inappropriate clean sheet. [*section deleted*] A possible solution would be to preserve the member's record from the previous unit until promotion, and then start the new rank (instead of the new year (s.169H) or the new unit, as at present) with a clean sheet.

128. A far more frequently cited difficulty is the limitation of the scheme to the level of Private equivalent. As a result, it is pointed out, non-commissioned officers and junior officers can only be prosecuted formally, and with consequences which may be out of proportion to some minor offence. There was very wide-spread support at the discussion groups for

some reform along the lines of the recommendation made in the *Abadee Report* at pp 229-231 in paras. 6.193-6.197. A version of this recommendation very generally favoured is to extend the scheme up to and including the rank of Captain equivalent. That would also involve reconsidering the penalties available under the scheme, and the list of offences to which it applies - not to change the nature of the scheme, but to adapt it to different ranks. There was no indication of dissatisfaction with the fundamental nature of the scheme. There was, however, debate about whether senior NCOs (especially Warrant Officers) should be included, having regard to their maturity and experience in the Defence Force. As to this, it should be borne in mind that the scheme has benefits both for the Service and for the individual subjected to it. The Service gains in the flexibility of the means of enforcing discipline, by the addition of a special tool. The individual gains by the speed with which an embarrassment is dealt with, and the lack of permanent damage to his or her record. Both the Service and a particular senior NCO would gain in those cases where, otherwise, no action at all might be taken, ordinary prosecution being seen by the CO to be too draconian, while other ranks might see the absence of prosecution as an unfair perquisite of rank. In any event, it is an important consideration that to make the Discipline Officer Scheme *available* is not the same thing as to make it the required remedy in a particular case. There would remain a discretion as to whether to apply it in that case.

129. Having regard to all these considerations, the better course seems to be in accordance with the approach supported by Brigadier Abadee, but limiting the scope of the scheme to Captain equivalent. I am encouraged, in reaching this conclusion, by the submission of the Commander, Training Command-Army, made after “detailed consultation with each of the Command’s training establishments”, that “the initiative that would most effectively assist the Command to conduct its business would be to extend

the coverage of the Disciplinary Officer System in terms of both rank and nature of offences”.

130. In the discussion groups, the speed and simplicity of the scheme were seen as important advantages. There was therefore some support for reducing the election period from 7 days to 1 day, always recognising that in practice there would be a discretion to allow longer in a proper case.

131. A consequence of the general approval of the scheme was that there was support in the discussion groups for the proposition that the appointment of a Discipline Officer (as distinct from the exercise of the discretion in any particular case to take a matter to the Discipline Officer rather than to prosecute formally) should no longer be optional. Policy guidelines of some kind should provide for a CO to appoint a Discipline Officer, because members in a particular unit should not be denied all possibility of having the benefit of a scheme which the legislature approved a number of years ago, and which has been found so beneficial.

132. If the RSM, Coxswain or WOD of a unit were appointed Discipline Officer, there could, it was pointed out, be a conflict, or appearance of conflict, between roles. These persons may have been involved in the decision to prosecute. Where practicable, it may be advantageous to appoint another Warrant Officer (if available), or to appoint a junior officer, who may gain experience with the *Defence Force Discipline Act*, so as to be better prepared for command in the future.

133. While some of the reforms suggested might be implemented as matters of policy, any substantial reform of the Discipline Officer Scheme would require legislative amendment, as the scheme itself is statutory.

Recommendations

It is recommended that:

7. Consideration should be given to making the appointment of a Discipline Officer mandatory in all units.
8. The ranks subject to the Discipline Officer Scheme should be all ranks to and including Captain equivalent.
9. The record of matters dealt with under the Discipline Officer Scheme for an individual member should be discarded not, as at present, upon departure from his or her unit or after twelve months, but upon promotion to a higher rank.
10. The period allowed for members to elect to be dealt with by a Discipline Officer should be reduced from 7 days to 1 day, subject to a discretion in the officer who would bring the formal charge (if one were to be brought) to extend the time up to 7 days.
11. The offences to which the Discipline Officer Scheme relates, and also the maximum penalties, should be reviewed if the scheme is extended to higher ranks.

Extras

134. An important practice in the Australian Defence Force, much discussed in the discussion groups, was referred to variously by the expressions “extras”, “correctional training”, “motivational training”, “positive reinforcement”, “attitudinal correction”, “memory enhancement training”, and – ironically enough, by some who follow the practice – “illegal punishment”.

135. What is meant by extras is well illustrated by a passage from the famous autobiography of Robert Graves, *Goodbye to All That*. Graves, then a young Lieutenant fighting in World War One in France (the period shows how long established the practice is), saluted his Battalion Commander in the Royal Welch Fusiliers. Asked where he had learned to salute, he replied: “At the depot, Sir,” to be told: “Then, by heaven, Mr Graves, you’ll have to learn to salute as the battalion does! You’ll parade every morning before breakfast for a month under Staff-sergeant Evans and do an hour’s saluting drill.”

136. As employed in the Australian Defence Force, extras may vary from duties extra to those ordinarily required or rostered to physical activities, such as push-ups or running around a large parade ground. A variant is to require the writing of an essay having more or less relevance to a duty inadequately performed. As a tool of discipline, the method is in very wide use – sometimes, the Inquiry found, even in units the CO of which may profess to eschew the use of extras.

137. In discussion groups, a number of advantages of the use of extras were identified. As is also true of the Discipline Officer Scheme, to deal with a lapse in this way is to insist upon observance of the requirement that was

neglected, but without attaching to what may be a relatively minor matter the severe consequence of a permanent record. Both officers and other ranks would prefer to be ordered to do extras, rather than to be charged. This preference was frequently stated at discussion groups.

138. Because extras carry no permanent record, there is the less reluctance to impose them as the appropriate response to some minor failure. The result is that something is seen to be done about the failure, whereas, if extras were not ordered to be done, there might not be any action taken at all, with the consequence of the creation of a perceived lack of concern about the matter, or of a perception that a person involved was being improperly favoured by having a fault overlooked, particularly in the case of an officer. Frequently, in discussion groups, it was pointed out that when an officer was seen to be doing extra duties, it was demonstrated that a failure to perform appropriately had consequences for officers, as well as for other ranks. This was good for discipline and for morale.

139. While there was general acceptance in discussion groups that the *Defence Force Discipline Act* operates effectively as a code, so as to render illegal the infliction of *punishment* informally through an order to do extras, many saw such an order as operating consensually. That is to say, it was considered that the person ordered to do extras had the alternative of insisting on being charged instead. However, there is an air of unreality about the idea that a soldier has a real choice to take the risk of refusing to obey an order, in all cases where extras are ordered, on such a basis. I think the true justification for an order to do extras is that its nature is corrective rather than punitive. Doubtless, Mr Graves actually did learn to salute more perfectly! The fact that a punitive effect might also be felt does not deny the corrective purpose of the extras, and therefore their legality, any more than the severely punitive effect of an administrative discharge, following a drug

conviction, would deny the administrative nature of what was done so as to convert the action into an unlawful double punishment.

140. It is a corollary of the last matter that extras are not an appropriate alternative to a charge under the *Defence Force Discipline Act*, where what is in question is an act that is criminal in nature. In such a case, punishment is called for, and punishment may only be awarded in accordance with the statute. But the vast number of matters, which could be prosecuted as minor disciplinary offences, are likely also to provide suitable subjects for corrective training. In such cases, an order for the doing of extras may be perfectly appropriate.

141. There was very general agreement that it would be a valuable reform to require all orders for extras to be recorded in a book kept by the unit for the purpose, which should be regularly monitored by the CO or an appropriate person, such as the RSM or equivalent. The purpose is to keep control over the awarding of extras, so as to ensure that reasonable limits are not exceeded.

142. There was also general acknowledgment that the nature of extras may need to be tailored to the service and unit environment. Many activities, that once provided fit subjects for orders for the doing of extras, no longer do so in the modern integrated Defence Force, from which some suitable tasks have virtually disappeared.

143. I have discussed this topic at a little length because of the obvious importance of an order for extras as an alternative to the prosecution of a charge in the case of minor disciplinary matters, and because, importantly, the discussion groups showed that confusion and uncertainty about the legality of such an order have both inhibited the making of orders and restricted their scope when made. In my opinion, it would add to the

effectiveness of discipline in the Defence Force, if there were greater clarity concerning the legality of extras. Clear guidelines would encourage and assist those who should be making such orders, and appropriate monitoring and controls would prevent abuses. That we should have been told, on a number of occasions, that the extras with which our informants were familiar were also called “illegal punishments”, is plainly an indictment of the confusion that presently exists in some quarters.

Recommendations

It is recommended that:

12. The nature, purpose and sphere of extras should be clarified by tri-service guidelines, so as to ensure that they may be lawfully imposed.
13. The guidelines should make it clear that, as a matter of policy, extras are to be regarded as an administrative response that may be appropriate in some cases, falling outside the disciplinary measures established by the *Defence Force Discipline Act*.
14. The guidelines should address the questions who may award extras, upon whom they may be imposed, monitoring arrangements, the types of activity covered and the nature of the failure on account of which an order for extras may be made.
15. The power to award extras should not be delegated below the rank of Corporal equivalent in respect of subordinates within his or her command.
16. All ranks up to and inclusive of Captain equivalent should be subject to orders for extras made by a superior.

Utility of Punishments

144. An obvious deterrent to the institution of due disciplinary processes will exist whenever the penalties likely to be imposed are seen as inappropriate. I have therefore given some consideration to the question of the utility of punishments under the *Defence Force Discipline Act*.

145. The present scale of punishments was formulated between 15 and 25 years ago. The working party which produced a report on the *Defence Force Disciplinary Code* in 1975 described (at p.vi) a major feature of the revision of offences as “the reduction of maximum punishments to modern levels”. Over the period since this task was performed, some punishments have become difficult to administer (and therefore hazardous to impose) because of changing workplace structures, downsizing and outsourcing. For example, punishments involving restriction of privileges can be difficult to administer in outsourced bases or in an operational area such as Timor. Attitudes, including those that might be regarded as cultural in nature, also affect the imposition of penalties. For example, there is a reluctance in the Army to impose significant fines which could have an impact on members’ families; restrictive orders are preferred. In the Navy, where sea duty results in a greater premium being placed on free time ashore, the opposite seems to be the case.

146. A particular question was raised regarding the disciplining of Reservists in the Army, effective punishments being hard to find. It was difficult to gauge the extent to which this might constitute a real problem, but the topic was agitated sufficiently to warrant consideration being given to reviewing the need for a special scale or category of disciplinary sanction more readily applicable to the circumstances of Reservists who are not on full-time service or undergoing periods of continuous training.

147. A special problem created by the separate service history of the Navy, which is acknowledged in the *Defence Force Discipline Act*, is the problem of differing scales of punishment for sailors. The Working Party (at pp iv-v) made it plain that compromises were involved in the adoption of maximum punishments in the Act, and that the Navy made particular concessions from its preference for longer maximum periods of detention. Twenty-five years on, changes in service conditions in the Navy, including shorter periods of sea time, and the growing incidence of joint units, may have eroded the basis on which even the shortened maximum period has been fixed at a much longer period than applies to the Army or Air Force. It may be time to remove such an obvious inequality, which may not be thought compatible with modern notions of fairness as between members of the respective Services, especially where there is no material difference between the normal daily working conditions of the three Services, as, for example, in Canberra.

148. By provisions such as s.556A of the *Crimes Act 1900 (NSW)*, the ordinary Courts are empowered, not merely to enter a conviction without punishment, but also, in special circumstances, and particularly for a first offence, to refrain from entering any conviction. This power is useful where circumstances make it undesirable that any conviction should be recorded against an accused person who does not deserve either the stain of a conviction or some collateral or administrative consequence that it would attract. In my view, the *Defence Force Discipline Act* should be amended accordingly, and I note that the *Abadee Report* takes a similar view at paras 6.114 - 6.120, and that General Baker, at para 2.83 of the submission cited earlier, indicated the *Defence Force Discipline Act* would be amended to reflect Brigadier Abadee's approach.

Recommendations

It is recommended that:

17. Consideration be given to reviewing:
 - a. the nature of the punishments which may be imposed under the *Defence Force Discipline Act* in the light of contemporary standards;
 - b. whether some form of Service oriented community work could usefully be made an alternative sanction;
 - c. whether the Act should be amended to confer a power, not merely to impose no punishment, but also, for a special reason, to decline to enter a conviction.
18. The question be examined whether a separate scale of punishments for Navy members is any longer necessary.
19. A review be undertaken of the applicability of the present scale of punishments to Reservists who are not on full time service or undergoing periods of continuous training.

Time Taken for Commencement and Review of Summary and Other Trials

149. The inquiry received various comments about delays in the commencement and review of all types of trials. The subject is important for a reason to which I shall refer. There was no significant evidence that reasonable time-frames are exceeded in the case of most summary proceedings, although in those cases where legal officers, particularly Reserve legal officers, are involved, their commitments may produce delays.

150. The review of trials at Defence Force Magistrate or Court Martial level is undertaken by selected legal officers of the Reserve who are appointed on the recommendation of the Judge Advocate General as section 154 Reporting Officers. Again, it may be that some delays are caused by the other commitments of Reviewing Officers, but there were not many complaints of delays of this kind coming from the discussion groups.

151. The time taken for commencement of proceedings is sometimes lengthened by the necessity to complete police investigations which can be delayed through lack of police manpower resources. That point, being important, is taken up later in this report. In the Navy, summary matters are sometimes delayed by a desire not to finalise the imposition of a penalty for an offence until just before a ship comes into port, so that any restriction of privileges, such as leave, will be more meaningful.

152. The Inquiry was told of a practice in the United Kingdom to require a military prosecutor to provide a statement to the Judge Advocate at each trial specifying the time taken to bring the matter to trial, with reasons for any delay. In my opinion, a salutary effect could be achieved by the imposition of such a requirement for all proceedings, including summary proceedings, brought under the *Defence Force Discipline Act*. There should then be a

report of the details to the Judge Advocate General for any necessary action. Once the practice was established, compliance would not be difficult, and the express exposure of delay to a CO or other person presiding, who might have something to say about it, with the necessity to offer an explanation, would promote efficiency. Perhaps guidelines could fix a period (such as 14 days) from date of incident to date of trial which, if exceeded, would require explanation in the case of a summary matter. It is important to appreciate that delay is a major cause of disrespect for the military law, and therefore of failure to implement it. As well, there can be no doubt that delay reduces the disciplinary value of a charge under the *Defence Force Discipline Act*.

Recommendations

It is recommended that:

20. The feasibility be investigated of securing a “readiness” undertaking from Reserve legal officers offering themselves for Australian Defence Force work.
21. A mandatory requirement be introduced for a prosecutor to provide a statement specifying the time taken to bring a matter to trial, together with a statement of the reasons for any delay.

Training Charges

153. There was some degree of confusion evident, both in discussion groups and in submissions to the Inquiry, as to whether there exists in the Australian Defence Force a “training charge” regime, according to which convictions entered by Summary Authorities at training institutions are excluded from a member’s conduct record. Confusion of this kind can only be inimical to the implementation of the *Defence Force Discipline Act*.

154. The general statutory provision made by section 148 of the *Defence Force Discipline Act* is to the contrary of any notion of the existence of a mere training charge, having different consequences from those of ordinary charges. It provides:

“A service tribunal shall keep a record of its proceedings and shall include in that record such particulars as are provided for by the rules of procedure”.

For the purposes of this provision, “service tribunal” is defined by section 3 so as to include a Summary Authority, an expression which itself includes a CO and a Subordinate Summary Authority. Rules of procedure may be made by the Judge Advocate General pursuant to section 149. By section 6, there is provision for regulations to be made in respect of “members receiving instruction or training”, so as to “make further provision relating to the discipline of [such] members of the Defence Force”. Those regulations may effect “the exemption of those members from any provision of [the] Act”. They may also modify any provision, so far as it relates to those members, but not so as to increase the severity of the punishment provided by the Act for a service offence. It follows that a record must be kept, by virtue of section 148, of the proceedings of a service tribunal, notwithstanding that it sits in a training environment, unless section 6 has

been availed of by the making of an appropriate regulation. Regulations 33 and 47 of the *Defence Force Discipline Regulations* are relevant, but they do not have the requisite effect of excluding the obligation to keep a record. An amendment could be inserted to do so.

155. There was strong support in the discussion groups for a training charge concept to be established for initial entry training institutions. Recruits, it is thought, should be allowed to make mistakes without long term adverse consequences. There is also advantage in their being subjected to hearings upon charges brought, at least in part, for the purpose of teaching them the impact of discipline and military justice, and how military justice operates, in respect of matters which otherwise might have been dealt with administratively. The consequence of such training should not be a blot on a member's record.

156. There are qualifications upon this principle. It should apply at initial training institutions, not at institutions where further training is undergone by persons who are already fully incorporated into the Defence Force. Also, the nature of the charge must be considered. If it is based on facts that would constitute a criminal offence under the civil law, there is no reason why the full consequences should be ameliorated.

157. Possibly, the test could be that all offences directly referable to training activities, or referable in their nature to training activities, should be regarded as "training charges", no permanent record of which would be kept. Alternatively, the test could look to the nature of the penalty, as was suggested in the *Report of the Defence Force Discipline Legislation Board of Review* chaired by Xavier Connor, QC (May 1989) at para 1.27.

Recommendation

It is recommended that:

22. Consideration should be given to the establishment by regulation of the concept of a training charge, and to its definition and scope.

*Administrative Consequences and Administrative Action in relation to
Disciplinary Breaches*

158. As I have already noted, the administration of military justice embraces, not only prosecutions under the *Defence Force Discipline Act*, but also administrative measures which may be a lawful and appropriate response to some unlawful or inappropriate conduct. Administrative action may follow a civil or military conviction, as a consequence of the conviction. Or a discretion may be exercised to take administrative action rather than to initiate a military prosecution. I was frequently told that administrative action was preferred in the Air Force to deal with situations which might, in the other two Services, result in prosecution.

159. There was a strong perception, at all rank levels, in the discussion groups that any conviction under the *Defence Force Discipline Act*, except perhaps of a person of quite junior rank, would be apt to have a serious impact on the offender's career progression prospects. It is felt by many that a conviction can translate into administrative consequences out of proportion to the original offence. Promotion, selection for courses, and selection for desirable positions could all be affected. It was considered that these administrative consequences were a major consideration when prosecution was contemplated, and often led to the use of alternative means, perhaps purely administrative, of dealing with an offender. Another factor reinforcing any inclination to take the administrative route is the absence of a requirement to prove the matter in question beyond reasonable doubt.

160. A view commonly expressed in the discussion groups, particularly at the junior level, was that in matters not involving criminal conduct officers and senior NCOs were rarely charged under the *Defence Force Discipline*

Act. It was suggested that the career impact of a charge was the reason, and that often nothing was done, although it was accepted that extras were sometimes given or administrative action might be taken of some nature that could remain undisclosed and invisible to other ranks. In the case of senior officers, particularly, the impression that they have “got away with” misconduct is often difficult either to prove or disprove to their juniors, because the full facts are not necessarily known to them. Nor is it necessarily right that a senior officer should be treated in the same way as others, since he or she is differently situated.

161. Where administrative action has been taken against an officer or senior NCO, the discussion groups and a number of written submissions showed there may be a perception that the administrative sanction was too “soft” or too lenient by comparison with the conviction which would probably have befallen a more junior offender. It seemed to my assistants and to me that this perception was frequently either produced or reinforced by a lack of transparency of the outcome and a lack of feedback to complainants or persons affected by the offending conduct. Unaware of the true result, complainants and others may see the administrative process as inactive or weak at best, and as sweeping the problem under the carpet at worst. This feeling is not confined to the lower ranks. A number of submissions showed that a person of quite senior rank who incurred the unpleasantness, and even perhaps odium, of reporting someone for a suspected offence might not ever get to know the precise outcome. Cynicism and discontent may follow, to the detriment of the disciplined cohesion for which the military strives. The nature of administrative action, and legitimate concerns for the privacy of a person the subject of it, must of course be taken into account. But I think that strong guidelines should be laid down to ensure that persons with a real interest, such as victims and complainants, are not left in the dark. I shall return to this point in the

section headed “*Transparency and Victim Feedback*”, and make an appropriate recommendation.

162. Another source of uncertainty with regard to administrative action is the difference in the procedures adopted by the three Services. Each has some form of rebuke or censure which it may impose, but a censure may take a number of forms, and also its impact on career progression may vary, depending upon which Service is involved. In an era in which the Services engage in more and more joint operations and establishments, inconsistencies of this kind are hard to justify. I understand moves have been made towards improving this position, and recommend they receive some priority. It should be recognised that the confusion which exists may result in some persons imposing an administrative sanction, and some persons upon whom it may be imposed, actually misunderstanding its effect.

163. Discussion with Service career managers indicated that the supposedly “soft” administrative sanction might in fact, in some cases, have a more prolonged and severe impact on a career than a conviction under the *Defence Force Discipline Act* would have had. An actual conviction, according to the career managers, may not have the consequences that members of the Australian Defence Force attribute to it. Thus, misunderstanding of the effects of a conviction or of administrative action, combined with lack of transparency of outcome, could lead to cynical views that do not accord with the reality.

Recommendations

It is recommended that:

23. The policy work currently being undertaken to achieve standardisation of application and outcome of administrative sanctions, should be regarded as requiring an urgent resolution.

24. Steps should be taken to improve the dissemination of information upon the true career effects of convictions under the *Defence Force Discipline Act* and of various administrative sanctions.

Equity and Diversity Issues

164. Two quite different issues were raised about the interface between discipline and equity and diversity. On the one hand, a number of submissions suggested the discipline system was remiss in allowing “serial harassers” to flourish. On the other hand, it was a common theme at discussion groups that equity and diversity policy could get out of balance, and inhibit discipline.

165. Several of the submissions seemed to demonstrate that “serial harassers” can indeed exist. The difficulty arises where, on a succession of occasions involving complaints against the same person, there is thought to be insufficient evidence to prosecute, or the matter is not serious enough to warrant more than administrative measures. It may be that too much emphasis has been placed, at times, on resolving the instant complaint (perhaps by a method of alternative dispute resolution which focuses on just that), and not enough on educational or administrative measures to ensure that there is no repetition of the problem. Sometimes it may be tempting to see a relatively minor complaint of harassment as an embarrassing episode, to be got through, and forgotten, as soon as possible.

166. It is understood that if a name recurs as the subject of a complaint to the Equity “hotline”, a record is made of this recurrence. But, of course, a “hotline” complaint is not the same thing as a determination of guilt in a proceeding or a positive finding of an investigation. It would be extremely unfair to treat it as if it were. What is needed is a means of ensuring that, where harassment has actually been shown to have occurred, some watch is kept on the problem by those responsible for personnel and postings. This has not always happened; in one case, a sexually harassed young female

sailor was twice posted to a position that brought her into contact again with her harasser (whose alleged conduct had been gross).

167. The claim that there is a clash between discipline and equity and diversity policy has several roots. No doubt, one of them is to be found in the entrenched attitude of some dinosaurs who simply do not see a place for equity and diversity in the military. But that is not all. We were repeatedly told in group discussions that a claim of harassment, particularly but not only of sexual harassment, leaves a persisting stain even after the claim has been investigated and found to be baseless. The consequence, many persons asserted, particularly the inexperienced junior NCOs, but also some senior NCOs, was a reluctance to enforce compliance with orders where a counter-attack on the ground of harassment might possibly be brought, or was actually threatened. The emphasis at training establishments like Kapooka, with its yellow cards, on equity and diversity rights was said to have created a situation in which such a counter-attack was always possible. Once accused, the NCO was forced completely onto the back foot, and was virtually required to give proof of innocence. As a consequence, if threatened with a harassment complaint, he or she would be inclined to “back off”, and discipline would suffer.

168. The argument was reinforced by reference to the requirement of annual equity and diversity training, which is not balanced by any corresponding requirement of training in the obligations imposed by military discipline. Furthermore, it was said, harassment complainants are protected by the application of privacy principles which are allegedly accorded precedence in practice over any principle of fairness to the accused.

169. These perceptions are certainly held by a considerable number of people. On the other hand, many senior NCOs and officers take the robust view that anyone who is deterred from enforcing discipline by fear of an accusation of harassment does not deserve to be in a position of

responsibility. They also say that the problem is abating as understanding of equity and diversity principles grows. I think these are valid propositions. On the other hand, I do not think it is valid to say, as is sometimes said, in answer to the fears of a corporal who is concerned at the prospect of an unjustified attack, that the making of a complaint is also a stressful experience. The fact is that false, or perhaps more often greatly exaggerated, complaints have been made.

170. Accepting, as I do, that the problem is likely to lessen with time, although it will not disappear, some false or exaggerated complaints are the price to be paid for making necessary provision for real complaints. The remedy is vigilance (and here the proposed Military Inspector General may play a part), together with training and education that keep the issues of discipline and equity and diversity in balance. A mere matter of personal disagreement, or being ordered to comply with requirements, must not be seen as harassment.

Recommendation

It is recommended that:

25. Having regard to the repeated comments of NCOs, and particularly junior NCOs, about the influence of training in equity and diversity at initial entry institutions, consideration should be given to providing more balancing emphasis in that training on the obligations of discipline enshrined in the *Defence Force Discipline Act*.

Unequal Treatment and Consistency of Punishments

171. An issue having a serious impact on respect in the military for disciplinary law is the issue of equal treatment by the law. The discussion groups showed that there is a perception by many that officers and certain other groups, such as senior non-commissioned officers, aircrew, critical trades categories and Reserves, are dealt with more leniently than others. In part, this is a matter of transparency to which I have already referred, and shall refer again. Sometimes, the apparent leniency is the incurring of an administrative penalty which is actually quite severe. But sometimes there is a real inequality which is plainly bad for morale. A senior officer may not be charged with a speeding offence on the base, perhaps because a lieutenant colonel would have to be court martialled, which would be out of proportion to the minor nature of the offence. A solution to this and other problems would be the introduction of legislation enabling a ticket like that used by the police in New South Wales, and in other places, to be issued for minor traffic offences. The legislation should also enable the same ticket to be issued to civilians on a base, or using it, and should make it clear, in the case of service personnel, that the ticket would not affect their records.

172. Another matter frequently mentioned in discussion groups was the unevenness of penalties imposed for unauthorised and negligent discharges. These cases have different outcomes in different Services, and even within the one Service. The circumstances of discharges may be different and offenders may have had a very different intensity of training in the use of weapons. There may also be a different degree of danger involved as between different cases. For these reasons, I do not think widely different penalties are necessarily unjustifiable. However, where the circumstances are similar, penalties should be consistent. It is difficult to see why a policy guideline should not be appropriate, provided the unimpaired discretion of

the summary authority with respect to its application, in the particular circumstances of each individual case, is made quite clear. Guidance on summary punishments, to the extent of indicating “what would amount to ‘the going rate’ for particular offences”, was plainly approved in the report of the Defence Force Discipline Legislation Board of Review chaired by Xavier Connor QC (May 1989) at paras 6.145-6.147. For this purpose, complete and accurate statistics are required. It will be remembered that I found statistics assembled for summary convictions at 3RAR during one year to be completely wrong, and I note the Judge Advocate General, in his last report, referred to a difficulty in obtaining adequate data. Discipline being important, correct information about it should be available.

173. Inequality of treatment of officers may be a perception that feeds particularly on lack of transparency with regard to administrative outcomes. Where it actually exists, it may be a cause for concern. If the proposed Military Inspector General’s responsibilities are to include the oversight of commanders’ responses to infringements of military law, this oversight could enable unequal treatment of officers or other categories to be reviewed in appropriate cases and dealt with.

174. In the United States military, I understand, a policy has existed of publicising disciplinary outcomes. Consideration could be given to the extent to which it would be appropriate to take steps in this direction in order to achieve a transparency of outcome that would reassure all ranks of the even-handed application of military discipline.

175. A special problem is the case of Reserves, who may decide with their feet against submitting to disciplinary sanctions.

176. It should be made clear that information obtained from discussion groups on the topic of failure to enforce disciplinary law against certain persons, in its nature, could not generally be first hand. It is not like a number of other topics on which members of the groups would have personal knowledge. Just because there is a lack of transparency with respect to many outcomes, the result of action taken against people belonging to particular groups, such as aircrew or officers or technical persons, may simply not be known. Many senior officers strongly asserted that action would be taken against persons belonging to any of these groups, if warranted. It would require a very arduous and specifically targeted survey to establish whether, among those individuals who do manage to evade any form of action for a breach of discipline, any particular group predominates. In my opinion, there would be more value to be gained from a study of the extent to which greater transparency of outcome can be obtained, since transparency must tend to prevent evasion. As I have already pointed out, transparency, together with what might be called victim feedback, is important for other reasons. Therefore, I shall turn to transparency and victim feedback, to give them separate consideration.

Recommendations

It is recommended that:

26. Consideration should be given to the institution of a system of traffic tickets in military bases for minor infringements of general orders and traffic regulations.
27. Consideration should be given to the issue of policy guidance on summary punishments including the dissemination of information as to the general level of punishments for particular offences while making it clear a CO's discretion would not thereby be limited.
28. Complete and accurate statistics concerning prosecutions under the *Defence Force Discipline Act* and administrative action bearing

punitive effect be compiled on a common basis for all three Services and be made available to legal and administrative agencies of the ADF.

Transparency and Victim Feedback

177. An important source of complaint about the operation of military justice is the victim's and the complainant's lack of information concerning the outcome. A number of the submissions made to me were the direct result of this problem. It is, of course, impossible to be sure empirically, because the events cannot be run through twice by way of experiment, but I think it can be concluded that at least some of the long running complaints which have plagued the Australian Defence Force for years might have been avoided had the complainant, as a victim, been fully enlightened about the action taken and the reasons for it at an earlier stage. Certainly, cases have been referred to me where administrative action was taken in order to meet a victim's need, but without satisfying the victim, because insufficiently explained, or not explained at all. Similarly, many of the cynical allegations of unequal treatment of officers, or of persons "in the club", might never have been made if the true facts had been known. I have referred to this matter earlier under the heading "*Administrative Consequences and Administrative Action in relation to Disciplinary Breaches*".

178. In the United Kingdom, I understand there is a pilot study by the Crown Prosecution Service, which there is responsible for military prosecutions, into the provision of feedback to victims and complainants in particular sensitive situations. Those situations are where a decision has been taken to terminate or substantially to change a prosecution upon a complaint made by the victim. The idea is that the victim ought to have the benefit of an explanation by a trained expert, so as to minimise distress which may be caused by the decision. In the special case of prosecutions by Court Martial or before a Defence Force Magistrate, a Director of Military Prosecutions (if one were appointed) would be able to perform this function. But, in my opinion, something of the sort ought also to be done, pursuant to

guidelines which should be issued to all COs, in many cases which are dealt with by way of administrative action or by summary proceedings. This would tend to give closure to incidents having the potential of causing ongoing psychological harm.

179. I note that, particularly in the Army, much use is made of investigating officers appointed under the *Defence (Inquiry) Regulations*, and there is then an inhibition upon the provision of information concerning the outcome because of the terms of the regulations. It may be that sometimes the regulations are read in a sense going beyond their meaning. But, in any case, it seems undesirable that a formal investigation should be instituted in many situations where the problem could be resolved by more informal inquiries which have no potential to prevent full disclosure. Both victims and other persons with a legitimate interest should often be informed if an inquiry is to clear the air fully and effectively.

Recommendations

It is recommended that:

29. Ways of achieving fair and effective transparency of military justice outcomes (in relation both to prosecutions and administrative actions) be investigated and appropriate steps be taken.
30. Guidelines be issued to commanders designed to ensure effective feedback to complainants, victims and offenders in relation to administrative action or summary proceedings.

Access to Legal Advice

180. Lawyers are accustomed to jibes based on the statement of the Shakespeare character (in *Henry VI Part 2*): “The first thing we do, let’s kill all the lawyers!” But on a number of occasions, in the discussion groups, the cry was the opposite. Not infrequently, there is only one lawyer available at a base, whose availability is limited by problems of conflict of interest. Having advised the CO, he or she cannot advise the person being prosecuted. In some circumstances, the difficulty is met by resort to another lawyer at a distance, or by the use of Reserve lawyers. But it was frequently suggested that the Defence Force should have more lawyers because there are not enough in-house resources to meet the demand. I have previously pointed out that there is more legal work to be done today because of the increasing complexity of administration and regulation in the new military. There are more requirements for commanders to navigate through, arising out of occupational health and safety, environmental controls, freedom of information provisions, and the whole burgeoning area of modern administrative law. Increasingly, also, international operations such as that in Timor may have to be undertaken, in which reliance may be placed on lawyers with very special knowledge of aspects of international and military law, and ability to take account of issues raised by local laws as well. They are as essential as any other capability to an ultimately successful deployment.

181. At the same time, access to legal advice for members is coming to be regarded as an entitlement. But it is an entitlement that is not always met by lawyers whose primary function is to advise the command. Nor do the practice commitments of Reserve legal officers always permit of their prompt availability, which, in any case, may come at an additional cost in sessional fee payments.

Recommendations

It is recommended that:

31. The policy regarding the provision of legal assistance to members be reviewed.
32. Steps be taken to reduce the incidence of conflict of interest situations arising out of the location of a single legal officer without an alternative.
33. The total number of legal officers and their location and organisation, required in the modern Defence Force be reviewed.

Legal Officers at Summary Proceedings

182. The *Defence Force Discipline Act* makes provision for members to be legally represented at Commonwealth expense in trials before Defence Force Magistrates and Courts Martial. Representation is drawn primarily from the Reserve legal panels. This right does not extend to summary trials.

However, in respect of summary trials, a member may request to be assisted by a specified Defence member, unless that person is not reasonably available. Where the Defence member whose assistance is requested is a legal officer, leave must be obtained from the Commanding Officer or Superior Summary Authority. The decision made in that regard is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977*: s.3(1) and Schedule 1(o). An improvement of the system would be to require a member who desires to be legally represented at a summary trial to obtain from the proposed Registrar of Courts Martial a certificate that, for a special reason, legal representation is appropriate. This would require an amendment to the *Defence Force Discipline Rules*.

183. Bearing in mind that summary proceedings are normally heard by officers who are not legally qualified, the involvement of lawyers may create complexities that are difficult to manage. Summary proceedings are intended to be relatively simple, straightforward and expeditious. At the same time, they may involve a substantial fine or some period of detention. The Inquiry was informed that the practice of allowing legal officers to represent persons at summary proceedings was becoming more common, particularly in the Air Force. Delay, technicality and perplexity for COs were said to result.

184. It seems to me that the remedy lies in the hands of the Summary Authorities themselves. It was stated in the *Report of the Defence Force Discipline Legislation Board of Review* (May 1989), to which I have already referred, at para 10.28:

“The Board therefore is of the opinion that, as a general rule, legal officers should not be permitted to appear in proceedings before summary authorities but that commanding officers and superior summary authorities should be able, if it is thought desirable in special circumstances, to give permission for legal officers to appear to prosecute and defend in proceedings before them”.

So long as it is clear that the discretion remains to determine each application for leave on its merits, I think such a general approach is appropriate. Special circumstances need not be seen as common. They are such circumstances as take the particular matter out of the ordinary course. The issues should be discussed in the training of COs which is dealt with elsewhere in this report.

Recommendations

It is recommended that:

34. The *Defence Force Discipline Rules* be amended to provide that a member who desires to be legally represented at a summary trial must first obtain from the proposed Registrar of Courts Martial a certificate that, for a special reason, legal representation is appropriate.
35. Pre-command legal training of Commanding Officers should include guidance on the factors to be taken into account in deciding whether to grant leave for legal representation at summary trials.

Need of CO to Seek Legal Advice during Trial

185. Just because the CO is generally not legally qualified, there has been a widespread practice in the past of adjourning summary proceedings, upon a difficulty arising, for the purpose of seeking legal advice. The practice had obvious practical advantages where a technical legal problem became apparent at some stage after the commencement of the hearing. However, if it meant that the Summary Authority charged with the responsibility of hearing the matter was abrogating that authority in favour of reliance upon a private communication outside of the hearing room, albeit from a lawyer, there was an obvious breach of the principle of natural justice. Accordingly, the Judge Advocate General has recently made it clear he considers the practice not to be legal.

186. It seems clear to me, from the information obtained from commanders and in discussion groups, that the ruling of the Judge Advocate General is neither well known nor well understood, and also that commanders feel the need of advice on technical problems as they arise in summary proceedings. The solution is, I think, to have the necessary legal advice given in the presence of the parties at the summary hearing, rather than behind closed doors. If that course is followed, a fair opportunity is provided for differing viewpoints to be put forward, and both the commander's need of assistance and the necessity to observe a fundamental principle of fairness will be satisfied. A similar practice is followed by lay justices in England.

Recommendation

It is recommended that:

36. Pre-command legal training of Commanding Officers should include clear guidance on how legal assistance during the course of a summary trial may be sought without prejudice to the rights of the parties.

Effects of Defence Reorganisation

187. Tensions of significance for the lawful enforcement of discipline have been caused by the great changes which have occurred in recent years in Defence organisation. Traditional command and control relationships have been disrupted in some areas. Those relationships, and the system of military justice enshrined in the *Defence Force Discipline Act*, are based upon the notion of the “Commanding Officer”. Changes in disciplinary law have not kept pace with the rate of structural change, particularly the drawing together of the three services and the bringing in of civilians. The increasing incidence of joint and integrated units has revealed problems which were not so apparent when each Service was going its own separate way.

188. The changes have resulted in a transformation of the workforce profile of the Defence Force from three individual Services, each predominantly homogeneous, to a mix, for the purposes of many functions, of three Services, of public servants and, increasingly, of contractors. Uniformed members are more and more likely to be supervised by civilians, and vice versa. The 1975 *Report of the Working Party re the Defence Force Disciplinary Code* contemplated (at p vii):

“Since the proposed legislation [ie the *Defence Force Discipline Act*] will apply to all members of the Defence Force, powers of command will run as a matter of course throughout the Defence Force instead of as now being limited to a particular service unless expressly extended. ... [A]uthority now flows as much from the office, post or appointment held by a member as from his rank.”

This may have been the objective, but there is evidence of confusion in joint organisations as to the command chain of responsibility.

189. There is also anecdotal evidence of impractical outcomes in the tracing of command chains to comply with integrated or joint organisation line management. [*section deleted*].

190. A danger exists of creating by default different disciplinary regimes for military members who are posted from single Service or predominantly military environments to integrated civilian workplaces. In amalgamating military and civilian resources, it may be that insufficient attention was paid to the requirements of the maintenance of discipline and the difficulties involved in serving two masters. This problem hopefully will be addressed as a result of the forthcoming report of the Sherman/Cox Review entitled *Review of Management and Command Arrangements in Integrated Defence Organisations*. Perhaps a contribution to the solution of the problem might be made by special training for military and civilian supervisors, working in integrated organisations, with respect to both military justice and civilian disciplinary processes.

Recommendations

It is recommended that:

37. Command and line management responsibility for the discipline of personnel in joint and integrated organisations, and the dissemination of information about it, be reviewed.
38. Rationalisation of command and line management responsibility for the discipline of personnel in joint and integrated organisations take account so far as possible of geographic convenience.

39. Common familiarisation training on military justice issues and civilian disciplinary processes be developed for use in joint and integrated organisations.

Investigation Issues

191. Many of the problems the subject of submissions to the Inquiry had a strong link to a flawed investigation. It is obvious that if an investigation is conducted carelessly or incompetently, so as to miss the real point, or if it is conducted in such a manner that, although its actual conclusions are realistic, the persons most concerned are left with a feeling that they have not been treated fairly, no decision dependent upon the investigation is likely to be received with general satisfaction. A truism in the area of judicial work is perhaps apposite: the person it is important to convince that all arguments have been fairly and fully considered is the party who loses.

192. The investigations to which I am referring are of two types: those carried out by the Service Police, and those carried out by investigating officers under the *Defence (Inquiry) Regulations*, or by informal investigators.

With regard to Service Police investigations, complaints were commonly about the time taken. This, of course, is related to the resources available to the Service Police for the conduct of investigations. Police themselves complained that commanders sometimes sought to exercise unreasonable influence over investigations or failed to act on reports. It was also said that effective procedures were lacking to ensure that police received advice of what was done, or not done, as a result of a police investigation. This is a problem to the solution of which a Director of Military Prosecutions or a Military Inspector General, or both, could provide some remedy.

193. The quality of the actual investigation, and also the problem of perceived command influence, were major concerns raised by submissions, and by comments in discussion groups, in respect of investigations under the *Defence (Inquiry) Regulations* by investigating officers. Procedural fairness

was an issue, as well as competence. It seems to me that one of the roles which could, with great advantage, be committed to a Military Inspector General is the role of examining the conduct of administrative inquiries and ensuring reasonable compliance with the recently introduced manual. This had not been issued at the time of many of the inquiries about which complaints were made. In my opinion, a very valuable function the Military Inspector General could perform would be to create and manage a register of persons qualified and experienced for the purposes of various types of inquiries, so that a commander wishing to appoint an investigator could obtain information about suitable and available persons. In France, such a register is maintained in respect of expert witnesses able to give evidence in Court upon a range of topics the province of those with specialist qualifications, and expert evidence may be limited to the calling of a registered expert. In the case of the Australian Defence Force, the advantages of an investigating officer who is already familiar with the required procedure and the principles governing the task need no elaboration. I shall return to this topic under the heading of the role of the Military Inspector General.

194. As was explained in the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade of June 1999 entitled *Military Justice Procedures in the Australian Defence Force*, at paras 3.26 et seq the independence of an officer appointed to conduct an investigation is sometimes a matter of concern. Resort to such a register as I have suggested would also assist in overcoming this problem. The committee made the point (at para 3.28) that “*in all but exceptional cases, Investigating Officers should be appointed from outside the chain of command of the individual(s) or element immediately under investigation and should not be personally acquainted with any of the parties involved in the incident*”.

Recommendations

It is recommended that:

40. The level of resources available for police investigative work across the three Services be reviewed.
41. A register of suitable persons to act as Investigating Officers under the *Defence (Inquiry) Regulations* be developed (as to which see the Role and Functions identified for the Military Inspector General).

Peer Group Discipline

195. In most units of the Australian Defence Force, team work is an essential ingredient of success. The reliance of each member on the skill and dedication of other members engenders peer group discipline. This is healthy, and a valuable reinforcement of the wider discipline of the Australian Defence Force. Good leadership will take steps to harness and direct it.

196. However, peer group discipline, in the presence of poor leadership, has the potential to take a destructive form, to the point of isolating and ultimately excluding individuals. It may descend to ostracism or go on to threats, intimidation and actual assault. It may be imposed for real breaches of discipline, or because a victimised member of the peer group simply does not fit a group pattern which may, itself, be quite flawed.

197. The undesirable features of peer group discipline are particularly likely to manifest themselves where a regime of group punishments is imposed. In the training of a team, a reasonable requirement that the whole team repeat a manoeuvre which was spoiled by some failure on the part of one member, may be a salutary tool of teaching. But overuse of this method will obviously tend to build up resentment in other members of the team, and may lead to undue and unhelpful pressure being imposed on an individual with a weakness.

198. All this is obvious, and its relevance to the Inquiry is also obvious. In extreme cases, peer group discipline can lead to a breakdown in the proper methods of enforcement of discipline, and to the substitution of improper methods. As peer group discipline is extensively used, particularly in

training establishments, it is important that the potential for distortion not be overlooked.

Recommendation

It is recommended that:

42. Specific guidance on the use of peer group discipline be included in pre-command training of Commanding Officers and in standing orders for training institutions.

Drug Policy

199. Defence Instruction (General) PERS 15-2 contains a number of provisions relating to the use or possession of, or dealing in, illegal drugs (referred to as “involvement with illegal drugs”). Under the heading “AUSTRALIAN DEFENCE FORCE POLICY ON INVOLVEMENT WITH ILLEGAL DRUGS”, it is provided (inter alia):

“5. Involvement with illegal drugs by members of the ADF is not condoned. Disciplinary and/or administrative action that may result in termination of a member’s appointment or discharge is to be initiated against any member involved with illegal drugs.”

Under the heading “DISCIPLINARY AND ADMINISTRATIVE ACTION”, it is provided (inter alia):

“9. Disciplinary and/or administrative action, as appropriate, is to be initiated against ADF members found to have been involved with illegal drugs. Whenever ‘prima-facie evidence’ exists of a Service offence, and Service jurisdiction also exists, disciplinary action is to be taken under the provisions of the *Defence Force Discipline Act 1982* (Cwlth). ...”

200. There are multiple difficulties with the implementation of these provisions. The relevant section of the *Defence Force Discipline Act* is section 59, a number of the prohibitions in which apply only while a Defence Force member is outside Australia. Provisions applicable within Australia specify the use of cannabis or the possession without lawful authority of “a quantity of cannabis, not exceeding 25 grams in mass, knowing that he or she possesses it and knowing its nature”. Not only are these drug offences limited to cannabis; cannabis is defined so as expressly to exclude cannabis resin or cannabis fibre, whilst hashish is not mentioned at all. Presumably, the intention was that possession of a larger amount than 25 grams of cannabis and possession or use of cannabis resin, cannabis fibre

or hashish, as well as possession or use of other illegal drugs, should be prosecuted in the ordinary courts of the land. But, of course, there are many cases where the ordinary police would not prosecute in respect of merely personal use or possession of a small quantity of drugs, although exceeding 25 grams (in the case of cannabis). An interesting question might be whether, where the drug involved is cannabis, a military police prosecution could be launched in respect of so much of the cannabis in the possession of the accused as did not exceed 25 grams in mass. For myself, I can see no reason why not. Even if such a prosecution failed, there would be something gained, insofar as the argument for amendment of the Act would be strengthened.

201. The narrowness of the offences created in respect of illegal drugs by the *Defence Force Discipline Act* certainly causes problems for the enforcement of drug policy in the Australian Defence Force, particularly when civilian police are frequently unwilling to prosecute. However, it is likely that not all members of the Defence Force understand the legal technicalities involved. Their attitude, as displayed at many group discussions, is one of some cynicism. They believe that the drug policy is not enforced strictly; that it is not enforced consistently; and that it is, in any case, too lenient. Quite plainly, the majority attitude is one of strong intolerance towards illicit drug use.

202. A considerable amount of frustration was expressed by officers and NCOs at their inability to obtain the administrative discharge of individuals who have, in their opinion, clearly been involved with illegal drugs, because there is no conviction to support the action they want pursued. I do not doubt that this frustration has contributed to the small number of cases where individuals have taken the matter into their own hands by inflicting unofficial punishment.

Recommendations

It is recommended that:

43. Section 59 of the *Defence Force Discipline Act* be reviewed in conjunction with DI(G) PERS 15-2, with a view to the amendment of the legislation to enable military tribunals to deal with charges in respect of small quantities of all appropriate illegal drugs.

44. In the meantime, consideration be given to prosecuting in cases involving cannabis where the civilian police regard the quantity as too small, limiting the military prosecution to the statutory quantity of 25 grams.

Presumption of Guilt

203. There is, under military law as under civilian law, a presumption of innocence. However, I was many times told that, “in the old days”, it was common to hear the expression: “March the guilty bastard in!” While this approach is today explicitly rejected, the very same assumption exists in a different form. The view was frequently expressed, in the discussion groups and by individuals, that charges are not brought unless it is quite definite that the person charged has committed the offence. I have no doubt that this view is sincerely held, and that generally it reflects the reality of the situation. But it has a seductive tendency to reduce a hearing to a formality, depriving the accused of the benefit of a genuine examination of the case against him from the point of view of the presumption of innocence.

204. There are other undesirable consequences attaching to the view that only those known to be guilty are charged. It leads to pressure being applied to an accused to plead guilty, and it can involve a feeling of “loss of face” on the part of non-commissioned officers who bring charges if an accused is actually found not guilty. That is bad for discipline, both in itself and because it may introduce a temptation to distort the evidence in order to ensure a conviction. The underlying approach of only charging the guilty ignores the concept of prosecutions proceeding on the basis of the existence of a prima facie case.

205. There is general acceptance that those responsible for the administration of Unit discipline usually do a very good job. But the system does have a vulnerability if a particular individual lacks the required professional and personal integrity.

Recommendations

It is recommended that:

45. Greater emphasis should be placed on the concept of a prima facie case in the training of NCOs, WOs and officers in relation to summary proceedings under the *Defence Force Discipline Act*.

46. The training of prosecutors in summary proceedings should emphasise the principle, which civilian prosecutors are required to observe scrupulously, that a prosecutor does not seek a conviction at any price, but with a degree of restraint so as to ensure fairness.

Director of Military Prosecutions and Administration of Courts Martial
and Defence Force Magistrate Hearings

206. My attention has been drawn on a number of occasions, through mention in submissions, in discussion and by examination of related reviews of military justice, to the somewhat controversial question of the establishment of what has been described as an “independent” Director of Military Prosecutions (DMP). Although I am aware that, from time to time, this term has been used to denote a number of variations on a theme, for the purposes this report, I have understood it to refer to the creation of a tri-service authority, separate from existing Convening Authorities, which would handle the prosecution of members facing trial by Court Martial or Defence Force Magistrate. The pivotal issues associated with this idea are, first, whether the discretion to prosecute should continue to reside with Convening Authorities or be transferred to a DMP, and secondly, whether a DMP (with or without the discretion to prosecute) should actually conduct the prosecution or merely act as an advisory body. I should make it clear that I have not considered the possibility of the DMP functioning at the summary level because that has not been advocated strongly by anyone, and it was specifically rejected by the Joint Standing Committee on Foreign Affairs, Defence and Trade in its 1999 report *Military Justice Procedures in the Australian Defence Force*, when (at paras 4.56 and 4.63) it “acknowledged that the introduction of a DMP to operate at the summary level would be impractical and would complicate the process and impose a massive cost, in time and resources, on the summary trial process.”

207. As a discrete issue, the idea of a DMP appears to be relatively recent. So far as I am aware, it was first specifically raised, in an Australian Defence Force context, in 1994 by the then Judge Advocate General, Rear Admiral

Rowlands, in a paper entitled *The Civilian Influence on Military Legal Structures*. The following year, in his annual report for 1995, he stated:

“I believe there would be an advantage in establishing a legal officer of the Colonel (or equivalent) level as a Director of Military Prosecutions. The office would encourage consistency in approach and more professional supervision of the prosecution process before Defence Force Magistrates and Courts Martial (and, perhaps, more serious charges at the summary level).”

208. The catalyst for the interest in a DMP seems to have been developments in military justice overseas, flowing from the landmark cases of *R v Genereux* [1992] 1 SCR 259, in the Supreme Court of Canada, and *Findlay v United Kingdom* (1997) 24 EHRR 221, in the European Court of Human Rights. These cases, which were essentially concerned with the independence and impartiality of military courts, led to major changes in military justice arrangements in Canada and the United Kingdom including, inter alia, the establishment of independent Directors of Military Prosecutions. Both cases found that arrangements for the convening, administration and conduct of Courts Martial followed in Canada and the United Kingdom at the relevant times (which were substantially similar to arrangements presently in use in the Australian Defence Force) were invalid. More specifically, the multiple roles of Convening Authorities in determining whether to prosecute, determining the charges and type of tribunal, selecting the judge, court members and prosecutor, and reviewing the proceedings, were found to be unfair, in that proceedings pursuant to such arrangements could not be perceived to be either independent or impartial.

209. While it is true that the constitutional arrangements of Canada and the United Kingdom (and specifically in the case of the latter, the application of the *European Convention on Human Rights and Fundamental Freedoms*) are sufficiently different from those of Australia that similar changes in this

country would not necessarily have to follow, the essential principles are no less important in Australia than they are overseas.

210. No doubt for this reason, there has been a continuing, and apparently growing, interest in the matter since then, with the arguments being addressed in detail by Brigadier Abadee in his 1997 report already cited, and then by the Joint Standing Committee on Foreign Affairs, Defence and Trade in its report *Military Justice Procedures in the Australian Defence Force*, published in 1999.

211. Brigadier Abadee's comprehensive study focussed on the arrangements for the conduct of military trials with a view to determining whether those arrangements satisfied current tests of judicial independence and impartiality. His report, informed as it was by reference to military justice developments in Britain, Canada and the United States, made a total of 48 recommendations, the most significant of which related to changes designed to reduce the multiple roles then vested in Convening Authorities. The large majority of those recommended changes (40 of 48) were agreed to by the Australian Defence Force, and most have since been implemented. As a result, while unfairness by reason of lack of independence or impartiality may not have been the reality in military trials, there seems little doubt that the adoption of the following Abadee recommendations, in particular, helped significantly to reduce any risk of it, and any *perceptions* of unfairness:

- the establishment of the office of Judge Advocate Administrator (JAA) responsible to the Judge Advocate General;
- transfer of responsibility for selection of the trial judge and court members to the JAA;
- transfer of responsibility for automatic review of proceedings from the Convening Authority to a separate Reviewing Authority;

- transfer of responsibility for technical management of Judge Advocates, Defence Force Magistrates and s.154 Reviewing Officers to the JAG; and
- the development and adoption of an Australian Defence Force prosecution policy for the guidance of Convening Authorities.

212. On the specific matters of where the discretion to prosecute (for Courts Martial and DFM trials) should lie, and the closely related issue of the establishment of an independent DMP, Brigadier Abadee adopted a cautious approach, recommending that:

“Careful consideration should be given to examining the question of the appointment of an ‘independent’ Director of Military Prosecutions upon a tri-service basis”.

213. I suspect that this recommendation was framed as it was in full knowledge that the issue would be contentious, as indeed it proved to be. In its consideration of this aspect of Brigadier Abadee’s recommendations, the Chiefs of Staff Committee members, whilst accepting the need to reduce the multiple roles of Convening Authorities, nevertheless took the view that commanders, as Convening Authorities, must retain the power to decide on prosecution. This was considered vital during operations, especially when forces are deployed overseas. It was thought that the introduction of a separate DMP would result in unacceptable delays in the administration of discipline.

214. Thus, at the time the Joint Standing Committee on Foreign Affairs, Defence and Trade commenced its inquiry into military justice procedures in the Australian Defence Force in late 1997 and into 1998, most of the Abadee recommendations had been, or were in the process of being, implemented. The significant exceptions were the retention by the Convening Authority of, first, the discretion to prosecute, and secondly, the selection of the prosecutor, and the rejection of the idea of an independent DMP.

215. The report of the Joint Standing Committee contains a detailed review of the issues affecting perceptions of independence and impartiality of military tribunals and goes on to address the specific question of the establishment of an independent DMP. The Committee observed that central to the whole question of the independence and impartiality of Service tribunals, was the *International Covenant on Civil and Political Rights (ICCPR)* to which Australia became a signatory in 1980. In particular, reference was made to Article 14(1) of the ICCPR which, inter alia, states:

“All persons shall be equal before the Courts and tribunals. In the determination of any Criminal charges against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

216. The Committee noted that the significance for Australia of *Findlay v United Kingdom* lay in the close similarity between Article 14(1) of the ICCPR and Article 6(1) of the *European Convention on Human Rights and Fundamental Freedoms*, which was the relevant provision in the *Findlay* case. Whilst accepting Brigadier Abadee’s view that, “*as the law now stands in Australia, the military justice system is not required to be consistent with Article 14(1) of the ICCPR*”, the Committee nonetheless noted that “*there is an obligation within public international law which is placed upon Australia to comply as an original signatory to the Covenant*”. The conclusion the Committee appears to have reached from this, regardless of the direct applicability in domestic law of Article 14(1) of the ICCPR, was that “*a principal tenet of Australia’s military discipline system must be an entitlement to an independent and impartial trial*”.

217. In this sense, the Committee accepted that the establishment of a DMP, based upon an adaptation of the British model, would serve to add to

the perception of independence of the post-Abadee arrangements, would provide consistency and would help to ensure the impartiality of the prosecution process. Notwithstanding the views it expressed, however, the Committee declined to recommend adoption of a similar system for the Australian Defence Force at that time. In so deciding, it accepted that the post-Abadee reforms “*appeared*” to establish a balance between what Australian Defence Force submissions to it described as “*the needs of the Australian Defence Force, the interests of justice per se and its practical administration in the Australian Defence Force*”. This conclusion was not, apparently, without reservation, as the Committee recommended that the issue of institutional independence in relation to prosecution should be reviewed after the post-Abadee reforms had been in operation for three years.

218. The Committee revisited the issue, briefly, in its April 2001 report *Rough Justice? An Investigation into Allegations of Brutality in the Army’s Parachute Battalion*. Referring to its earlier recommendation to review the DMP issue after three years, it concluded that the timing of consideration of the introduction of a DMP would seem to hinge on the outcome of a number of reforms and initiatives under way in the Australian Defence Force, including the outcome of my Inquiry.

219. From the material available to me it is clear that, at the time, Australian Defence Force reluctance to agree to the DMP concept was not based only on doctrinal views of the commander’s prerogative to decide whether to prosecute as a paramount tenet of military discipline, but also upon concerns about the practicality of the proposal, particularly in situations of conflict.

220. In summation of these concerns, the Australian Defence Force's supplementary submission to the Joint Standing Committee in July 1998 included the statement:

“Outside of the considerations raised by Abadee, the Chiefs of Staff Committee would want to be much more convinced than at present that the introduction of a Director of Military Prosecutions would provide worthwhile enhancement to our standards of military justice ...”

221. I have referred particularly to these views, expressed as they were in mid-1998, because it appears to me there is reason to believe that some softening of approach towards the general idea of a DMP may have occurred since then. I say this because the impression I gained in discussions with many of the most senior officers of the Australian Defence Force, in the course of this Inquiry, did not indicate strong levels of opposition to the concept of a DMP, especially when it was made clear that its application to summary proceedings was not contemplated. Indeed I was left with the impression, overall, that the establishment of a DMP carried with it a certain sense of “inevitability” in the longer term, notwithstanding the absence of a clearly articulated model of how it would operate in practice.

222. In the course of my Inquiry, I sought and was greatly assisted by the views of the Judge Advocate General of the Australian Defence Force, Major General Duggan, on this and other matters concerning my Terms of Reference. His views on this matter are to be found in the 2000 *Report of the Judge Advocate General*, in which he summarised the principal arguments for and against the establishment of a DMP in a manner with which I would respectfully express my entire agreement. That summary is reproduced below:

“Points in favour of a DMP

- The exercise of the prosecutorial discretion is a most important one and often gives rise to considerable difficulty. It is appropriate that it should be exercised by a legally trained officer of appropriate rank.
- A DMP would assist in achieving uniformity in the exercise of the prosecutorial discretion.
- Conflicts of interest can arise if a commanding officer or convening authority within the same command as the alleged offender is to make prosecutorial decisions. These include the possibility of a reflection on the commanding officer or convening authority if lack of discipline is suggested as a result of the laying of a charge or charges.
- It is preferable that the decision to prosecute for a criminal or quasi-criminal offence as opposed to a purely disciplinary matter be made by someone who has no connection with the alleged offender.
- A commanding officer or convening authority may be placed in a particularly difficult position when deciding whether to lay charges against fellow officers.
- The appointment of a DMP would be following the civilian trend of appointing a Director of Public Prosecutions.
- The conflicts of interest referred to above may lead to a tendency for the commanding officer to deal with the conduct personally rather than referring it to a higher authority. On the other hand the commanding officer might wish to demonstrate control over the situation and overreact.
- It is important to have regard to the following considerations raised in a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia: [James W O'Reilly and Patrick Healy, 'Independence in the Prosecution of Offences in the Canadian Forces – Military Policing and Prosecutorial Discretion'.]

‘To raise these possibilities is not to suggest in any way that the main concern of commanding officers in executing their

prosecutorial responsibilities is self-interest. Rather, it is simply to suggest that among the many considerations that commanding officers must take into account, their own situation may, unconsciously or otherwise, figure as well.’ (p64)

The study reached the following conclusion:

‘In terms of the characteristics of the offices of those executing the prosecution authority in the military, it is clear that the commanding officer is in no position to execute independence of judgment in the exercise of the discretion whether to proceed on particular charges. This conclusion is inescapable when one considers the variety of roles the commanding officer must discharge in the events leading up to a trial within the military justice system. Again, given that the overriding consideration in the process is the good order and discipline of the military, the commanding officer is responsible to his or her superiors in relation to that consideration and, as such, subject to “command influence” in relation to how disciplinary matters are handled within his or her sphere of responsibility.

If the sole function of the military justice system were to address matters relating to the efficiency, discipline and morale of the military, then this state of affairs would be uncontroversial. The commanding officer is obviously in a position to judge what effect certain forms of misconduct are likely to have on the smooth functioning and operational readiness of military units. Insofar as the military justice system addresses these concerns, the existing system is reasonably fit for its purpose. However, the fact that there are public interests far broader than this gives rise to a

concern about the manner in which prosecutorial authority is exercised within the military.’ (pp75-76)

- Now that the concept of an ADF military prosecution team has been accepted and is being put into place by the DLO the apparatus is available through which a DMP might work.
- It has been considered appropriate to appoint a DMP in the United Kingdom and Canada.

Points against a DMP

- The decision to prosecute must take into account discipline and command issues and these are best addressed by the commander.
- The creation of an office of DMP could introduce unacceptable delays into the military justice process. There might also be practical problems during conflict.”

223. The Judge Advocate General’s comments on the DMP issue are particularly interesting, not only because they cover all the principal issues, but also because they provide a significant example of how attitudes towards the idea of a DMP seem to have evolved. For he introduced his remarks by stating (at para 43) that, at the time of the Abadee study, he was of the view that the creation of an independent DMP following the UK approach post *Findlay*, was unnecessary - that such an office was not essential in order to secure “independence”. Having given the matter further consideration since then, he now would favour such an appointment to bear responsibility for prosecutions, other than in purely disciplinary matters, which were recommended by a commander or convening authority or brought on the initiative of the DMP. In the opinion of the Judge Advocate General, such a system, if properly administered, should not cause increased delay, would enhance independence, and would provide for a more professional, unified and consistent approach to prosecutions, as well as permitting an increased

degree of flexibility by permitting the amendment, augmentation or withdrawal of charges by the DMP. The importance of the last point is underlined by the difficulties created by the decision in *Hogan v Chief of Army* (1999) 153 F.L.R. 305.

224. Having considered these matters and the views expressed to me on the subject during the course of the Inquiry, I believe the following conclusions can be drawn:

- a principal tenet of Australia's military justice system is an entitlement to an independent and impartial trial;
- there is no legal imperative (in the sense the legislation is threatened with a High Court ruling of invalidity of the kind that was encountered in UK and Canada) for the establishment of an independent DMP;
- although there is little by way of hard evidence to support a contention that the Court Martial or Defence Force Magistrate trial process suffers from a lack of independence or impartiality in practice, the present system, post Abadee, still encourages a perception that command influence in the prosecution process is a real possibility, and involves some risk of that possibility materialising;
- the role of the Convening Authority in the prosecution process as presently followed in Australia is substantially similar to that which was found to lack independence and impartiality by an international tribunal;
- the establishment of an independent DMP with the discretion to prosecute is likely to reduce significantly perceptions that the prosecution process (in its present form) lacks independence and impartiality;

- there is a strong conviction that the traditional linkage between command and discipline must be reflected in the prosecution process for Courts Martial and Defence Force Magistrate trials;
- the concept of an independent DMP appears to be more acceptable within the Australian Defence Force now than it was previously, provided a practicable model can be devised.

225. As may be apparent from these conclusions, I have reached the view that, on balance, there is more to be gained from the early introduction of an independent DMP than from postponing the decision any further. In my opinion it would not only enhance the perception and reality of fairness in the system but, as the Judge Advocate General has observed, would also provide a more professional, unified and consistent approach to prosecution decisions.

226. As to the matter of a model which would not only be practicable but would take account of the need to keep the chain of command involved in the process, an adaptation of what I understand to be the approach that has been followed in the Army and Air Force in the United Kingdom since 1997 may be suitable. Essentially, such a model in an Australian Defence Force context might, in outline, involve the following:

- The appointment of a suitably qualified and experienced person as the DMP. Important considerations are that the position demonstrably be separate from the ordinary chain of command and that the appointee be familiar with the military environment.
- That the DMP would be empowered to decide, on grounds similar to those used by a Director of Public Prosecutions (DPP) in the civil sphere, and as reflected in the *Australian Defence Force Prosecution Policy*, whether a matter should go to trial or not.

- That the conduct of prosecutions would be undertaken by the office of the DMP using suitably trained and experienced Service Prosecutors, Permanent and Reserve. The recently established Prosecution Office could no doubt provide the nucleus.
- That an arrangement would be made with Federal and/or State DPPs to enable outplacement (I would suggest for significant periods) of Service lawyers for training and to gain experience on an ongoing basis.
- That receipt of matters by the DMP would be via a process of referral by a Commanding Officer through a *Superior Authority*. That is, the involvement of the Commanding Officer in dealing with a matter would be similar to that in use at present. Where a matter, for whatever reason, appeared to warrant trial by Court Martial or DFM, the Commanding Officer would refer it to his *Superior Authority* (which might correspond to current Convening Authorities) to confirm further referral to the DMP or back to the Commanding Officer to try as appropriate. Such a process would allow the chain of command to remain involved in the matter while being separated from the technical decision to prosecute which would be made by the DMP according the Australian Defence Force prosecution policy.
- That referrals by a Superior Authority could be accompanied by a statement of the “Service interest” in the matter and possibly a recommendation as to what type of trial (DFM, General or Restricted Court Martial) might be appropriate if the DMP decided to proceed. There would then seem to be no particular reason to differentiate between matters referred to the DMP as being “disciplinary” or “criminal” in nature, and on this point I would take a slightly different view from that suggested by the JAG. It seems to me that even matters which are clearly of a disciplinary kind can attract quite severe punishments and ought therefore, if they warrant trial by Court Martial

or DFM, to be handled by the DMP for precisely the same reasons as would apply to any other matter. The distinction between a disciplinary offence and a criminal one is fraught with some difficulty.

227. I see no compelling reason why a system such as that outlined above would not be practicable. It would not interfere with the present pivotal role of the CO or, indeed, substantially alter the existing process up to CO level. Thereafter, for matters potentially requiring trial by Court Martial or DFM, importantly, it allows the chain of command to remain involved in the process without the potential to attract criticism on the ground of lack of independence or impartiality in the exercise of the discretion to prosecute.

228. Given the availability of modern electronic communications, and assuming personnel of the office of the DMP would be deployable, there appears to be no particular reason to fear that a DMP would nowadays add unacceptable delays to the process, or be unable to function effectively, in times of conflict or operational service. Indeed, there is every reason to expect that the availability of a professional prosecution staff, with opportunities to make gains in experience over a succession of prosecutions, would reduce delays and inefficiencies which can, and sometimes do, occur under the present arrangement.

229. I am reinforced in this view by my examination of the present process as it has applied to matters arising from the 3RAR allegations. Although it is true that the particular circumstances of the 3RAR matters (numbers, timing, geographic locations, operational requirements, etc) were unusual in many ways, so that the co-ordination of the task of dealing with them became quite complex, the proliferation of authorities involved in the prosecution process illustrates the difficulties that can arise. The plain fact is there were difficulties over witnesses, documents, interlocutory questions and administrative arrangements connected with the 3RAR prosecutions

which caused unnecessary delays and expense; and those difficulties would have been much less likely to have arisen had not the prosecution process been fragmented by the necessity to utilize the traditional system. A valiant attempt was made to unite several prosecutions through the engagement of one senior counsel, but this had its own problems and was, at best, an ad hoc and partial solution. Decentralisation of prosecution authority, with resultant compartmentalisation and attenuation of legal and administrative expertise, data and information relevant to the prosecution process in the Australian Defence Force, is one consequence of taking too rigid a view of command chain boundaries and the need for matching Convening Authorities.

230. The *Discipline Law Manual* Volume 2, Part 4 discloses that 30 Convening Authorities have been appointed throughout the Australian Defence Force to convene Courts Martial (20 Army, 5 Air Force, 2 Navy and 3 Joint). Statistics from the JAG's annual reports indicate that there has been an average of 58 trials by Court Martial or Defence Force Magistrate per year since the introduction of the *Defence Force Discipline Act*. Such a relatively small number of trials each year requiring action by a Convening Authority means that there are few opportunities for the staff of Convening Authorities to gain experience in managing trials, and therefore there is a dilution of relevant legal and administrative expertise overall. This is a problem that was brought to my attention on a number of occasions in relation to some of the 3RAR matters. It is a systemic problem that is a source of frustration and delay, and which no doubt contributes to a lowering of confidence in the integrity of the military justice system.

231. While the introduction of a DMP should substantially improve the prosecution process for all the reasons discussed, the deficiencies in the process which need to be remedied are not only related to the functions of the prosecutor. The proper *administration* of the prosecution process, including the setting up and management of trials, can be equally critical.

232. The dilution of expertise arising from the multiplicity of Convening Authorities also manifests itself in a lack of para-legal staff who are sufficiently familiar with the prosecution process and trial requirements. This deficiency could be addressed by the establishment of a tri-service office of Registrar of Courts Martial. The Registrar, suitably staffed, could be responsible for the publication of convening orders, trial venues, the provision or co-ordination of court officials and recorders, co-ordination of witness requirements and payment of accounts. The efficiency of the whole system, the speed with which trials could be brought on, and the avoidance of unnecessary interruptions to the process and adjournments of proceedings, could all be improved by the introduction of a modern case management system (such as those in operation in the civil courts) under the management (subject to a judge advocate) of the Registrar. There would also be scope for a Registrar to assist in the preparation of material for appeals and liaison with the Registry of the Defence Force Discipline Appeal Tribunal. I note that the Judge Advocate General, in his 2000 report (at paras 32-40) also favours the creation of a central registry and the institution of a system of case management. These reforms would, I think, be much more effective in practice if the registry were able to deal with a permanent prosecuting authority, such as a Director of Military Prosecutions.

233. In my opinion, many of the difficulties that were encountered in dealing with those 3RAR matters which went to Court Martial or Defence Force Magistrate trial might have been lessened or avoided altogether if a DMP and Registrar of Courts Martial had then been in place.

234. It would be presumptuous of me to discount the discipline and command issues which have been thought to require the prosecutorial discretion to remain, through the Convening Authority, in the appropriate

chain of command. But the model I have proposed leaves the chain of command precisely where it is, for all practical purposes. It is the CO who, faced with some misconduct which might warrant trial by court martial or a Defence Force Magistrate, will choose from the available options - prosecution, alternative dispute resolution, some other administrative action, or no action – that the case ought to be prosecuted. That choice will be referred to a superior in the chain of command, and presumably, will usually be approved. But, as at present or under any system, a decision to prosecute will be of no use if, in fact, a prosecution would fail. To give the power to withdraw a prosecution to a senior legal expert, whose decision would always involve a legal question, is not to detract from the powers and position of a commander, who could never, in any case, guarantee the viability of the prosecution from the legal point of view.

235. These considerations would apply to almost all cases. It is a separate question whether the DMP should also have power to prosecute crimes revealed by investigations reported to him by the Inspector General or by the proposed Military Inspector General. I would suggest this also could have little practical effect on a commander's position, since cases of that type, in which a crime had actually been committed, and prima facie proof was shown, could not in general be dealt with otherwise than by prosecution. The DMP would not be prosecuting unless, in his expert legal opinion, it *was* such a case. However, there could be exceptional situations in which a Service interest ought to be taken into account. For that reason, I think the DMP should be required, before making a decision in a matter that comes other than from a CO, to seek, from a senior officer in the chain of command information as to any Service interest that should be taken into account. With that qualification, the DMP should have power to decide whether to prosecute in a matter referred in the manner I have described.

236. It will be apparent that if the proposals to establish a DMP and Registrar of Courts Martial were to proceed, the remaining functions of Convening Authorities, post Abadee, would become defunct, and the requirement for these appointments would lapse. The changes proposed would appear to require legislative amendments. Some reconsideration of the role and functions of the present position of Judge Advocate Administrator may also be involved.

Recommendations

It is recommended that:

47. An independent Australian Defence Force Director of Military Prosecutions, with discretion to prosecute, be established.
48. A Registrar of Courts Martial be established for the Australian Defence Force.

Keeping Things “In-House”

237. It was suggested in discussion groups that COs were tempted to maintain appearances in respect of their commands by keeping problems “in-house”. Of course, such a view may often involve an element of subjectivity. It may be a good thing to deal with a problem immediately and at the unit level. On the other hand, if it is not really dealt with but concealed, when the right course was some administrative action, or some action under the *Defence Force Discipline Act*, that was avoided because it might have drawn attention to difficulties within the unit, plainly, good order and discipline must suffer, as ultimately must the morale and integrity of the unit itself. Unfortunately, the importance of the chain of command in the structure of each of the services might give some shelter to a CO who acted in this manner.

238. The answer may be two-pronged. First, the training of COs should emphasise the proposition that low prosecution statistics are not necessarily a plus, and a failure to expose indiscipline or error may be a serious blot on command performance. I do not doubt that training already covers this. The second prong of the attack on the problem is the existence of some agency able to intervene in the chain of command so as to ensure that it does work effectively in cases where, at some stage, it may not have done so. This may be a function for the proposed Military Inspector General.

Recommendation

It is recommended that:

49. Guidance be included in (a) Command Directives at all levels, and (b) pre-command training courses, designed to discourage any tendency to conceal potential military justice problems from higher authority.

Availability of Avenues of Complaint

239. The availability of avenues of complaint is an important aspect of the maintenance of discipline in accordance with the *Defence Force Discipline Act*. There are many avenues of complaint available. They include the redress of grievance system, the divisional system, chaplains, equity officers, the equity 'hotline', the Defence Force Ombudsman and several other means. Indeed, it was not suggested at the discussion groups that avenues of complaint were lacking; but rather that particular complaints did not appear to have been handled properly, either because the wrong result was obtained, or because the process was too slow.

240. There is no doubt that some members believe they are unable to get satisfaction through the system, particularly where the problem is itself seen to be linked to the chain of command. Sometimes, and increasingly, some individuals take their complaints to the media, or to members of parliament or ministers, because they do not like the result they have obtained; but it should be realised that, in at least some of these cases, they might have accepted the result with grace had it been obtained more promptly. Delays may prove fertile ground for dissatisfaction.

241. It is important to bear in mind that my Inquiry covers a period of about sixteen years, during which a very large number of persons passed through the ranks of the Australian Defence Force. The Inquiry was widely advertised within the Australian Defence Force and also to persons who had been in the Australian Defence Force in the past, anyone with a complaint being invited to come forward. In those circumstances, even allowing for the effects of time and lethargy, the number of persons with persisting dissatisfaction about the treatment of complaints they had made cannot be regarded as proportionately large. I think the proper conclusion is that the

great majority of complaints have been handled responsibly by the chain of command. This is very important, since maladministration and poor management, in the first place, are the source of many disciplinary problems; so it is essential that there be maintained appropriate means of affording prompt redress to complainants.

242. There was a small number of members and ex-members who presented voluminous, extremely detailed and articulately expressed submissions pressing, yet again, complaints that had been dealt with, most of them, many years ago. Some of these had been exhaustively considered by previous Inquiries and had been through every level of review. The complainants, not having had their hopes satisfied, had settled down to a fixed state of indiscriminate suspicion towards any person connected with the military.

243. Cases of this kind are something of a running sore. Their renewal regularly over a period of many years by the dissatisfied complainant must cost the Australian Defence Force a considerable amount of money. If they achieve media attention, they may also be damaging to reputations, however baseless the original claim might have been (of course, not all such claims are baseless). Accordingly, it seems to me there may be some benefit in identifying these long term matters, and examining them as a separate problem, with a view to endeavouring to find some step which could be taken to achieve a closure. Some such cases might usefully be referred to the proposed Military Inspector General, as auditor of commanders' dealings with complaints, and a person to whom a complainant could go in the event of a failure of the chain of command. The Military Inspector General would look at the complaint in its context in the system, so as to provide, not a mere remedy for the particular complaint, but a remedy for any breakdown in the system that permitted it to occur, or impeded its resolution. I think there is importance in distinguishing this function, reserved for special cases,

from the ordinary operation of the redress of grievance system, as to which I say nothing here, since it has been the subject of very recent review.

244. A final comment on the chronic complainant. There is no doubt that, once the syndrome has fully developed, the chronic complainant is a most intractable problem. There is also no doubt that any organisation as large as the Australian Defence Force will have some such complainants. However, it may be that the number of them could be reduced by taking appropriate measures. To this end, a suitable expert, such as a professor of psychology, who has studied this particular syndrome, could be asked to furnish advice on the handling of persons likely to become chronic complainants. They do, I understand, present certain recognised psychological features. It might be very useful if any psychological advice so obtained were communicated to persons who do investigations, since investigations frequently provide triggers for a chronic state of complaining.

Recommendation

It is recommended that:

50. Consideration be given to reviewing what means (if any) exist for achieving closure on the cases of chronic complainants.

Professional Reporting – The “Whistleblowers” Scheme

245. A distinct question (although the one case may involve both questions discussed in the last section and this question) is raised by the position of the member of the Defence Force who reports a complaint about wrong-doing by some other member – colloquially, and perhaps even pejoratively, referred to as a “whistleblower”. Particularly where the suspected wrong doer is a superior officer, the complainant may have concerns about the chain of command. A number of submissions made to me show that complainants also have a tendency, in cases of this kind, to feel that they must *prove* the matters raised by them or lose all credit. From an honest reporter of a suspicious circumstance, the complainant (as perhaps the very term “whistleblower” suggests) can undergo a transformation to a zealot personally pursuing the suspect, a zealot who will be affronted by any finding on the part of the military police or other investigators that does not amount to total condemnation of the conduct reported. Such a degree of emotional involvement is, of course, destructive in many ways, and it may lead to career consequences, which are then the subject of a yet further complaint alleging unfair treatment as being a result of the original complaint. A number of submissions in the Inquiry illustrated this problem.

246. Those who reported circumstances that they regarded as indicating wrong-doing, sometimes made it clear their reporting had been delayed by fears of the consequences. Anxious procrastination probably exacerbated the personal strain on them, and contributed to the very consequences that they feared.

247. In my opinion, the only remedy is to make it clear (in training and by guidelines) that early reporting is the best course, and that the reporting of a suspicious circumstance does not involve being bound to prove any case

against anyone – indeed it is preferable to take a more objective approach that leaves the result of investigations to those qualified to carry them out. For a case of fraud, should there be a problem about reporting through the chain of command, the Inspector General is an obviously appropriate recipient of the report; for a wider Defence matter, in the same circumstances, the proposed Military Inspector General would be an appropriate recipient of a report raising issues of justice, discipline, harassment or administration within the Australian Defence Force.

248. Currently, the Australian Defence Force has a “Defence Whistleblower Scheme”, the terms of which make it clear that it is directed, at least primarily, to wrong-doing of the kind that would fall within the purview of the Fraud Investigation and Recovery Directorate of the Inspector-General Division. The policy is the subject of a review. One of the submissions made to me alleges a failure of the scheme to provide protection to a particular complainant. However, it is not entirely clear how the identity of that individual came to be disclosed and, in any case, one human error should not be equated with a failure of a system.

249. Whistleblowing (or professional reporting, as I would prefer to call it, adopting the more neutral expression used by the Australian Federal Police) is not confined to fraud. Adequate protection of professional reporters is an essential part of a strategy to ensure that wrong-doing does not flourish in any part of the Australian Defence Force, and thus to prevent any future eruption of events like those that occurred in A Company, 3RAR. The important task of supervising the protection of professional reporters outside the area of fraud should be given to the proposed Military Inspector General. That is because this official is likely to be concerned with the reports the making of which attracts the protection.

Recommendation

It is recommended that:

51. Current policy covering treatment of “Whistleblowers” be reviewed as to its applicability to deal with more general military justice issues.

Use of ADR

250. Alternative Dispute Resolution (ADR) techniques are being increasingly used to resolve intractable problems, to establish a new context for a problem, to change relationships so that the difficulty disappears or becomes manageable, and to sort out harassment and other workplace conflicts. In the disciplinary area, they may be utilised by commanders and managers to avoid a foreseeable conflict with disciplinary implications, particularly one involving equity and diversity issues or otherwise involving relationships.

251. The Inquiry is aware that work has been proceeding for some time on the production of a comprehensive policy on the use of ADR in the Australian Defence Force. A Director of ADR is now in place in the Defence Legal Service. In the circumstances, it does not seem necessary to say more than that this is obviously a desirable development. Experience elsewhere, particularly in industry and in the courts, has shown that ADR can be a useful adjunct to other remedies.

Regional DFDA Units

252. This was an idea raised at a number of the discussion groups. It envisages the appointment of a regional cell or unit in an area of significant military presence to handle all summary trials (other than Discipline Officer matters) in the area. The suggested advantages are:

- the release of units from the administrative burden of organising summary trials;
- the overcoming of perceptions of bias on the part of COs and other summary authorities;
- the achievement of a greater degree of expertise in the conduct of summary trials by all involved in the DFDA unit;
- more consistency in outcomes;
- the overcoming of some problems of joint or integrated organisations, situations where the chain of command is ambiguous, or where there are insufficient resources available to a commander for the purposes of summary trials.

The disadvantages would include:

- a perception that command is distancing itself from the maintenance and enforcement of discipline, being an acknowledged responsibility of command;
- there could be an added level of inconvenience and delay if the DFDA unit were not sufficiently proximate, although the DFDA unit might be mobile;
- there would be a loss of expertise by principals (summary authorities, DFDA administrators) in dealing with summary matters;
- the scheme would be difficult to use on operations or in ships at sea.

253. It may be that the idea could be implemented under existing legislation by the use of the provision enabling an officer to be appointed a CO for disciplinary purposes. The officer could be, but need not be, a legal officer.

Recommendation

It is recommended that:

52. Consideration be given to the usefulness of establishing a regional DFDA unit in a particular location where the ordinary arrangements are difficult to implement in practice.

Medical Issues

254. A surprising number of complaints made by submissions to the Inquiry raised medical issues.

255. In the first place, several complaints of harassment or of maladministration involved medical facilities. There appeared to be tensions between health service staff, which may include tensions between those who consider they are professional soldiers providing medical support and those who see themselves as health professionals wearing uniform. Principally, the problem appears to be in the leadership of some facilities. Whatever the causes, the Inquiry has met with an impression of a disproportionate number of complaints of maladministration and equity issues arising out of medical facilities.

256. A quite different medical issue relates to the treatment of medical certificates. The reaction of officers and non-commissioned officers to medical certificates was repeatedly raised in the Inquiry. Certificates seemed quite frequently to be brushed aside.

257. It is acknowledged that sometimes medical certificates may be issued too easily, including to malingerers. However, if an appropriately qualified medical practitioner has expressed in writing the view that a person he or she has examined is suffering a particular illness or lesion, a layman is not in a strong position to assert the contrary. Indeed, in *Bushell v. Repatriation Commission* (1992) 175 CLR 408 at 430, Brennan J pointed out that “the decision-maker is bound to have regard to its own want of scientific expertise in comparison with the expertise of a responsible medical practitioner”. There is a clear risk of involving the Commonwealth in legal liability where a decision-maker on its behalf acts otherwise. More than one

matter raised before me involved further injury or exacerbation of illness as a consequence of the ignoring of a medical certificate, so the point is far from academic.

258. If there actually is reason to believe a particular medical certificate was wrongly given, it would seem to be appropriate to take the question up with the doctor. Military doctors, of course, should be well aware of the special considerations which may apply to Service personnel. In view of the number of cases raising this issue, it seems to me some general guidance should be given to commanders concerning the weight to be given to medical certificates, and the course to be taken if there is reason to be doubtful about a particular certificate.

259. Finally, several persons suggested that referral for psychological assessment had been used as a device, for an indirect motive, and not genuinely. Although this issue was raised, I could see no reason to accept that there was any substance to it. It was, of course, as much a slur on the professional integrity of the psychologists involved as it was on that of commanders.

Recommendation

It is recommended that:

53. General guidance be provided to Commanders (and included in appropriate training courses) concerning the weight to be given to medical certificates, and the course to be taken if there is reason to be doubtful about a particular certificate.

Procedural Fairness and Command Prerogative

260. A number of submissions raised questions of natural justice (that is, of procedural fairness) in the context of the exercise of the command prerogative by a Chief of Service or Superior Commander to remove an officer from a command position. In these cases, it was not questioned that a Superior Commander does have the right to remove an officer from a position of command for safety, operational or other reasons fundamentally depending on a loss of confidence in the capacity of the officer in question to perform the duties of the relevant command.

261. I see no reason to doubt the general correctness of this view, which depends upon operational necessity. It is, perhaps, analogous to the principle upon which the Full Court of the Federal Court proceeded in *Barratt v. Howard* [2000] FCA 190, where the court accepted (at para 86) that “*loss of trust and confidence on the part of the Minister in the Secretary’s ability to carry out his duties and the resulting detriment to the public interest is, of itself, a sufficient ground for termination [of the Secretary’s services]*”. Of course, that authority cannot be regarded as directly applicable, since an officer’s command is not held upon the same terms as the Secretary’s appointment.

262. Granted the power exists, it can hardly be thought that it exists for everyday use; but to meet some imperative necessity calling for immediate action. In *Barratt* (at para.72) the Full Court said that, “*like all statutory discretions*”, *the discretion to terminate there in question must be exercised “according to the rules of reason and justice, not according to private opinion; according to law, and not humour and within those limits within which an honest man, competent to discharge the duties of his office, ought*

to confine himself” – for those words, citing the authority of Kitto J in *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189.

263. Where the boundary should be drawn may be a matter of great difficulty since, even in time of peace, the Commander in whom a Superior Commander has lost confidence may be called upon to exercise important powers at short notice. The Superior Commander must exercise a judgement as to whether his or her loss of confidence has to be acted upon immediately. But where the reality is that there is no true urgency, the principle of procedural fairness should have priority. For the past half century, there has been a growing trend in administrative law towards insistence upon the observance of procedural fairness in many situations involving the exercise of a statutory power so as to prejudice a person’s rights, interests or legitimate expectations. Procedural fairness (traditionally called natural justice) requires the provision of some opportunity to present an answer to what is asserted against the person. A recent restatement of this principle is to be found in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22 at para.140:

“A basic principle of the common law rules of natural justice is that a person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his or her interests that the repository of the power proposes to take into account in deciding upon its exercise”.

264. Whatever the legal position might be in the absence of some overriding direction, it seems to me that consideration should be given to the issue of some general policy guidance, limiting the exercise of the command prerogative to remove a subordinate commander to situations of emergency, and then requiring that its exercise be followed, as soon as possible, by the supply of adequate particulars of the facts upon which the action was based. Policy guidance along these lines would, I think, reduce a level of

dissatisfaction which, as several submissions to the Inquiry demonstrate, does presently exist. It would also bring this aspect of the administration of the Australian Defence Force into line with modern administrative law, and make for a more just Service working environment. Adequate particulars would at least facilitate the mounting of some challenge, where the decision made in the exercise of the command prerogative was actually questionable.

Recommendation

It is recommended that:

54. General policy guidance be developed as to the exercise of the command prerogative, and as to the extent and nature of the observance of the dictates of natural justice which is required in connection therewith.

Military Inspector General

265. The last term of the Terms of Reference requires me to “identify the role and functions of an Inspector General of the Australian Defence Force.” In various discussions, the proposed office has been described as that of a Military Inspector General and, for convenience, I have used this expression as a generic description, not as a title. My choice of language is not intended to take the discussion back to the various types of Military Inspector General that exist or have been proposed overseas, particularly in the United States, France and Canada. None of those has or would have the precise focus on the maintenance of the rule of law in the armed services which, in the context of my Terms of Reference, I understand the CDF to have had in mind. In France, for instance, I believe there are Inspectors General having what Wing Commander McGarry, in a paper dated 3 February 2000 dealing with the possible role of a Military Inspector General, described as “a wide remit including inspection of his ... service as to its ability to conduct joint operations”; I do not understand it to be my responsibility to advise on a position of that kind.

266. The proposal to appoint a Military Inspector General was, together with the setting up of this Inquiry, a principal initiative taken by the CDF in response to the situation created by the events at A Company 3RAR. It was supported by the Service Chiefs, and was welcomed by the Joint Standing Committee on Foreign Affairs, Defence and Trade.

267. My assistant investigators and I began the task of identifying the role and functions of a Military Inspector General with no preconceived notions of that role, or of those functions, apart from the basic proposition that we understood the CDF to intend to put in place a long term measure to deal with matters relating to the avoidance of due process, abuse of authority and

any failure of the chain of command. In other words, we understood that the Military Inspector General would carry on the role we have performed, on a continuing basis, and so as, if possible, to forestall the emergence of situations such as that which developed at A Company 3RAR.

268. We have chosen to address the other terms of reference first, before examining this question, so that we could consider it in the light of what had been found to be the nature and scope of the problems with which a Military Inspector General might be required to deal. It will now be apparent, from the foregoing sections of this report, that the Inquiry has not found evidence of widespread practices involving serious flouting of the law, or of proper standards, in the command and management of the Australian Defence Force, such as might justify the use of the words “systemic” or “culture”. As was to be expected in an organisation as large and diverse as the Australian Defence Force, particularly one that has undergone the upheavals of organisation and the transformation of personnel structure involved in the reforms of the past decade and a half, and in the broadening of employment opportunities for females, breaches of the required standards have occurred. They have extended to instances of unfairness, infringement of individual rights and circumvention of due process, both disciplinary and administrative, in individual cases, or, occasionally, in spates. If no remedial steps are taken, practices can develop, and have developed in the past, of a sufficiently pervasive nature to be described as a sort of sub-culture, as for example, at the Australian Defence Force Academy prior to the *Grey Report* and at the Royal Military College in earlier days. It is important to set in place some means of detecting misconduct promptly, when it occurs, so that its perception by the ADF does not have to await its eruption in the form of notorious events.

269. The only effective way that has been suggested to guard against lapses developing into serious situations, such as those that have been mentioned, is

to maintain a constant vigilance, including the monitoring of key indicators, (to which I shall return), coupled with some effective mechanism to enable problems to be aired and dealt with, as they arise, and before they grow into really grave issues. The fact is that complaints may not always be made easily by the use of the avenues currently available, as is amply demonstrated by the situation that developed in A Company 3RAR. Those channels which are available for private communication of complaints are not seen as necessarily effective to resolve situations that may have, or be feared to have, a systemic aspect to them. In the same way that the establishment of this Inquiry may have provided an opportunity for a number of festering problems which did exist to be exposed and dealt with, so an ongoing “audit” aimed at exposing the same kinds of problems is likely to provide a regular mechanism for relief capable of resolving at least the majority of such issues at an earlier and less damaging stage.

270. Key indicators to be monitored would include the following:

- Police investigation reports. Central oversight of significant police investigation reports could act as a quality control check on the process of investigation and reporting. Significantly, the knowledge that an official of the status of the Military Inspector General was keeping a watch on such reports would provide a powerful incentive for appropriate action to be taken on the reports by those whose duty it is to do so, more especially if the Military Inspector General also had power to take the independent action of referring a report to a Director of Military Prosecutions.
- Reports of administrative inquiries and investigations under the *Defence (Inquiry) Regulations*. This Inquiry found that a pivotal factor in many of the submissions alleging unfair treatment, which it received, was the poor quality of some report undertaken by an Investigation Officer. A complaint about the outcome of an Inquiry was often the result of an inappropriate choice of

investigative vehicle or an inappropriate choice of investigator. Too often the investigator lacked experience or could be seen to be affected by an actual or potential conflict of interest. Lack of suitable personnel resources from within their own commands to conduct investigations, was seen by commanders as a significant problem. A broad oversight of administrative inquiries, to ensure that their procedures are fair, and that any necessary remedial action that they reveal to be required is actually taken, would provide a quality assurance that appears at present to be lacking.

- Unit and Service discipline statistics. The monitoring of trends in discipline statistics can reveal details of the state of health of the military justice system. This Inquiry has seen clear evidence that the collection and recording of data of this kind is presently inadequate, and can be positively misleading. Except for the annual report to Parliament of the Judge Advocate General, there is at present no co-ordinated attempt across the three Services to analyse discipline statistics.
- Records of significant administrative action taken in respect of members of the Services. Administrative action taken for disciplinary purposes, such as censures and adverse reports, although an important part of the military justice system, is rather invisible. It is not at present easy to obtain information of this kind for the three Services. Again the trend analysis and monitoring of administrative action would represent a useful indicator of the state of health of the military justice system.
- Records of grievances. While records of grievances dealt with are presumably kept by the Complaints Resolution Agency and the Defence Force Ombudsman, this information should be examined together with the other data mentioned, in order to build a complete picture of the military justice system in operation.

- Spot checks of Unit military justice records. This is an obvious audit function, which might be performed randomly, but so as to cover the entire Defence Force over a period of time, in the same manner as a financial audit might do. A spot check would include inspection of Unit disciplinary records, administrative and Police investigations, grievance records, the competency of officials performing functions under the *Defence Force Discipline Act*, and relevant training programmes.

271. In the course of this Inquiry, I have frequently found that complainants or victims may suffer from a suspicion that the ordinary processes available to them to deal with their problems are lacking in impartiality and independence and are not free from command influence. This attitude, often strongly entrenched, makes complaints that are *about* the chain of command, including complaints of failure to act, or of inappropriate action and complaints of abuse of process or authority, very difficult for some individuals to launch.

272. Where a general complaint is made through the grievance system, the Complaints Resolution Authority, the Equity and Diversity Organisation, Chaplains, Social Workers, Hotlines, or the Defence Force Ombudsman, concerning some issue of military justice, such as avoidance of due process, abuse of authority or some other command failure, the complaint may not be easily resolved, even if it is thought it should be upheld, because the resolution will depend upon the response of the chain of command. Having regard to the large number of matters this Inquiry has examined and the information it has received, the establishment of a new office of Military Inspector General, would fulfil the need for a specific focus on the military justice system in its entirety which none of the existing agencies, with their overlapping functions, at present provides. If the Military Inspector General were given a power of referrals similar to that which I have been given in the

third of my terms of reference, my experience suggests that such a referral coming from an agency reporting directly to the CDF would be a very powerful instrument.

273. This leads me to emphasise an essential aspect of the office of Military Inspector General. Such a position must be, and be plainly seen to be, independent of the normal chains of command. It should be directly under the command of the CDF. Thus it will be seen that the Military Inspector General is not susceptible to undue influence by anyone in a chain of command. This does not mean that the position would have to be completely outside the Australian Defence Force and the Department of Defence, any more than it is necessary for the present Inspector General to be outside the Department. It does mean, however, that the Military Inspector General should be seen as a distinct entity from the three Services and from the principal joint organisations, under which all military personnel are administered. Organisationally, as I have indicated, the Military Inspector General should be responsible directly to the CDF.

274. There are other advantages to this arrangement. It would allow the CDF some additional flexibility of action in responding to a crisis involving any risk of a suggestion of improper concealment or cover up. It would help to put the Australian Defence Force in a position of solving its own problem in such a case, rather than having to refer the matter to an external authority. In this sense, the analogy drawn in the CDF's submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade, in its "Rough Justice" inquiry, is relevant – the Military Inspector General would have features in common with the Police Internal Affairs Bureau.

275. The Military Inspector General will require to be a figure who can actually maintain independence. For that reason, the appointee should ideally not be a person who could be thought to have career expectations in

Defence. Of course, the appointee should have a close familiarity with the Australian Defence Force environment or should be at the apex of a highly expert staff with that familiarity. An understanding of the military justice system would be essential. The staffing of the office could be drawn from a mix of suitably qualified full time, Reserve and civilian staff.

276. Some legislative amendment may be required. The Military Inspector General will need to be given all the powers, authorities and protection of an Investigating Officer, with appropriate specific powers to call for documents and information.

Recommendation

It is recommended that:

55. A Military Inspector General be appointed with the following role and functions:

Role

The role of the Military Inspector General is to represent the CDF in providing a constant scrutiny, independent of the ordinary chain of command, over the military justice system in the Australian Defence Force in order to ensure its health and effectiveness; and to provide an avenue by which any failure of military justice may be examined and exposed, not so as to supplant the existing processes of review by the provision of individual remedies, but in order to make sure that review and remedy are available, and that systemic causes of injustice (if they arise) are eliminated.

Functions

The functions of the Military Inspector General should be:

- a. To investigate, as directed by the CDF, or as may be requested by a Service Chief, such matters as may be referred to the Military Inspector General, or to investigate a matter of his or her own motion, concerning the operation of the military justice system;
- b. To provide an avenue for complaints of unacceptable behaviour, including victimisation, abuse of authority, and avoidance of due process where chain of command considerations discourage recourse to normal avenues of complaint;
- c. To take action as may be necessary to investigate such complaints, or refer them to an appropriate authority for investigation, including the military police, civil police, Service or departmental commanders or authorities; and, following any referral, to receive and, if necessary, to report to the CDF upon, the response of the authority to whom the matter was referred;
- d. To act as an Appointing Authority for investigations (not including Boards or Courts of Inquiry) under the *Defence (Inquiry) Regulations*;
- e. To maintain a Register of persons who would be suitable to act as members of inquiries or as Investigating Officers;
- f. To advise Appointing Authorities under the *Defence (Inquiry) Regulations* on the conduct and appointment of inquiries;
- g. To monitor key indicators of the military justice system for trends, procedural legality, compliance and outcomes, including:
 - (1) Service Police investigation reports;
 - (2) Significant administrative inquiries and investigations;
 - (3) Service discipline statistics;
 - (4) Records of significant administrative action taken for disciplinary purposes;
 - (5) Records of Grievances;

- (6) Reports of unacceptable behaviour, including victimisation, abuse of authority, and avoidance of due process;
- h. To conduct a rolling audit by means of spot checks of unit disciplinary records, procedures, processes, training and competencies relevant to military justice;
- i. To promote compliance with the requirements of military justice in the ADF;
- j. To liaise with other agencies and authorities with interest in the military justice system in order to promote understanding and co-operation for the common good;
- k. To consult with overseas agencies and authorities having similar or related functions;
- l. To make to the CDF such reports as may seem desirable or as the CDF may call for; and
- m. To receive documents which were submitted to this Inquiry and finalise complaints brought to the attention of this Inquiry which may require further action.

Referrals

[section omitted]