

**Senate Foreign Affairs, Defence and Trade
References Committee**

SUBMISSION COVER SHEET

Inquiry Title: Effectiveness of Australia's Military Justice System

Submission No: P16F

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CHIEF OF
THE DEFENCE FORCE

CDF/2004/OUT/699

Senator the Hon. Steve Hutchins

Chair

Senate Foreign Affairs, Defence and Trade References Committee

S157

Parliament House

Canberra ACT 2600

Dear Senator Hutchins,

Inquiry into the effectiveness of Australia's Military Justice System

I enclose for consideration by the Senate Foreign Affairs, Defence and Trade References Committee, the Final Defence Submission to the Inquiry into the effectiveness of the Australian Military Justice System.

Yours sincerely,



P.J. COSGROVE, AC, MC

General

Chief of the Defence Force

28 July 2004

Enclosure:

1. Final Defence Submission to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the effectiveness of the Australian Military Justice System

INTRODUCTION

1.1 This is a supplementary Defence submission to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the Effectiveness of the Australian Defence Force (ADF) military justice system.

Purpose

1.2 This submission addresses some of the public submissions and evidence provided to the Committee during the Inquiry. It provides some follow-on comments, in light of the Defence position articulated in the main Defence submission of 23 February 2004 and CDF's opening statement of 1 March 2004. The submission also addresses a range of comments, propositions and recommendations made in evidence to the Inquiry, in connection with the legal functioning of the military justice system, for both disciplinary and administrative matters. It also provides supplementary information relating to particular submissions or evidence that have been put before the Committee. CDF will provide concluding comments to the Committee during the final hearings. These will summarise the Defence position in light of the public evidence presented to the Inquiry, including any issues that may be raised by the Committee in the meantime.

Overview – Key Issues

1.3 The main Defence submission reinforced the operational need for an effective military justice system in response to the unique requirements of military service. It stressed the link between operational effectiveness and the military justice system as part of an effective chain of command to support commanders in both peace and on operations. The control of the exercise of discipline, through the military justice system, is an essential element of the chain of command. This has not been challenged during the Inquiry and remains a significant distinguishing feature of the military justice system.

1.4 The Defence submission discussed in detail how the military justice system works and how it interacts with, and complements, the wider civilian legal framework. It remains the Defence position that the system is fair, open and effective. This is not to say that it functions perfectly, nor that all ADF members or their families are necessarily satisfied with the results and decisions it produces. The same can be said of the wider Australian judicial system. However checks, balances and the right of appeal remain available to the individual and are

applied when necessary. The evidence made available during the conduct of the Inquiry does not indicate a system of military justice that is broken.

1.5 Unfortunately, the evidence presented has been distressing and emotive in some cases, indicating perceived failings, whether pertaining to a matter of discipline, the investigation of an incident or death, alleged professional misconduct or a perceived administrative failure. As the military justice system is available and intended to deal with situations where there have been individual or system failures, it is perhaps inevitable that such contentious circumstances will arise.

1.6 Evidence presented to the Inquiry includes a number of cases where facts and their interpretation were either in doubt or in open dispute. In any form of legal case, the genuine or asserted recollections of witnesses may differ, especially when emotions run high. Where it has seen a requirement to do so, Defence has provided supplementary submissions to the Inquiry seeking to correct perceived errors of fact or include matters of fact, and present alternative views or additional clarifying information. This final submission contains some additional information of this nature. However, the over-arching principle remains that a collection of contested or contentious decisions, or unacceptable behaviour that has been revealed and punished, are not of themselves proof of a failed justice system. They are in fact an inevitable characteristic of any functioning system of justice.

1.7 It is important to remember that the military justice system has a specific operational role and complements the existing civilian justice framework. It remains subject to internal, external and judicial review. Recent appointments, such as the Inspector-General ADF and the Director of Military Prosecutions are important recent Defence initiatives aimed at further increasing transparency and professionalism within the military justice system. They are tangible and substantive evidence of a process of continuous improvement. Similarly, the military justice system will be further modernised and improved as recommendations from a range of recent reviews, studies and inquiries continue to be implemented.

PART 2 - RESPONSE TO SUBMISSIONS

2A – GENERAL JUSTICE SYSTEM ISSUES

General Description

2.1 As described in the Defence Submission (P16) the Military Justice System is generally considered to contain two ‘sub-systems’ - the discipline system and the administrative system. While both systems operate within the one military organisation, they have different legislative sources and serve different purposes. In addition to various avenues for internal review and protections afforded to ADF personnel, both systems operate within the civil legal system that applies to all Australia citizens. Both systems are subject to external judicial review processes such as those available through the Federal Court and the High Court. Neither system operates to undermine the standards of justice and fairness expected in the Australian community. Both systems operate alongside the confines of legislation and other legal authority. Both systems operate in conjunction with civilian law enforcement and executive or administrative functions, such as the Federal, State or Territory civilian policing, State and Territory coronial functions, COMCARE and other Government undertakings.

2.2 The legal and operational justification for an additional system of military justice has been clearly established in previous Senate inquiries and reports, as well as by the Federal and High courts. This justification has been reinforced and restated in the Defence Submission (P16) and was endorsed through the written submission and oral testimony by the Judge Advocate General (JAG) of the ADF. None of the written or oral testimonies presented to the Committee during this inquiry, of which Defence is aware, demonstrate otherwise. Moreover, none of the written or oral testimonies have demonstrated that the laws, processes and policies that underpin the military system are deficient so as to deny ADF personnel inherent rights of fairness expected for all Australians.

2.3 However, some evidence presented to the Committee demonstrates that there may be concerns, based on individual experiences or perceptions arising from either isolated or selected cases that may, in some instances, suggest the need for improvements to the military system. This evidence may also suggest the need for the ADF to better explain the purpose, effect and application of the military justice system to ensure greater confidence in its quality. The Senate Inquiry has provided another opportunity for the ADF to achieve this objective. However, the ADF will continue to monitor and review laws and policies to seek

opportunities to improve the military justice system to promote its transparency, independence, fairness and quality.

2.4 The military justice system is not perfect, nor is the civilian legal system. Cases will inevitably arise that demonstrate legal or policy irregularities, or where individuals fail to apply laws and policies correctly. But, like the civilian justice systems, the military justice system includes laws, policies and processes to identify those cases. In the ADF, this includes internal and external administrative and judicial reviews, which apply to the discipline and administrative components of the military justice system, to protect the rights of ADF members as well as the integrity and quality of the system. The protections afforded to ADF personnel exceed those available to members of the civilian community. The nature and scope of these reviews and protections have been described in the Defence Submission (P16), including the recent appointments of the Director of Military Prosecutions and the Inspector-General ADF.

2.5 In the course of the written submissions and oral testimony to the Inquiry, there has been some evidence that may demonstrate a lack of understanding of the nature and application of the military justice system. There were also a number of complaints that do not appear to deal with military justice issues. For example, there have been some complaints regarding the quality of psychological treatment or support in certain cases. Evidence from the Service Chiefs and other ADF personnel have addressed these issues.

2.6 Some evidence to the Inquiry highlighted instances where individual perceptions or views of selected facts, situations and outcomes in individual cases have been used to condemn the military justice system as a whole. However, these individual and isolated cases do not reflect the true legal character, integrity and application of the military justice system. This submission highlights selected general and specific issues arising from the evidence and is offered to assist the Senate Committee. Where appropriate, Defence views on a range of suggestions or recommendations are provided. Where the further examination of some options is considered beneficial, this should be considered in the context of an holistic approach or review of related issues. A piecemeal approach to single issues is not appropriate, as the military justice system needs to be considered holistically.

Transparency, Accountability and Quality of the Military Justice System

2.7 **Transparency.** The disciplinary and administrative processes that comprise the Military Justice System promote transparency. The system is regulated by legislation, which is publicly available on the internet. Internal policies are available to ADF members on the Defence intranet. Further, all decisions made under the Military Justice System and the reasons for those decisions are available to both complainant and respondent, or victim and accused.

2.8 **Accountability.** The Military Justice System is also accountable, both internally and externally. Decisions under the Defence Force Discipline Act (DFDA) are subject to automatic legal and command review, as well as oversight by Inspector-General ADF. Further, convictions by Courts Martial and Defence Force Magistrate are subject to external judicial review by the Defence Force Discipline Appeals Tribunal, the Federal Court and the High Court. The processes and quality of discipline investigations are also subject to internal review by the Director of Military Prosecutions, the Inspector-General ADF, as well as external review by the Defence Force Ombudsman. Administrative processes and decisions are subject to internal review through the Redress of Grievance system, which is established under the Defence Force Regulations. In addition, administrative processes and decisions may also be subject to external review through the Defence Force Ombudsman, Human Rights and Equal Opportunity Commissioner, State or Territory Coroners, COMCARE and the Privacy Commissioner, as well as judicial review through the Federal Court to the High Court. During all stages of internal discipline and administrative processes, and through external review by Commonwealth agencies, ADF personnel are entitled to legal advice from a Service lawyer at Commonwealth expense. ADF personnel have the same level of access to legal aid or legal costs as do people within the civilian community in respect of judicial review in the Federal Court or High Court.

2.9 **Quality.** The processes and outcomes of the military justice system are of high quality. For example, administrative processes and decisions, such as Boards of Inquiry under the Defence (Inquiry) Regulations, may be subject to internal legal review or legal review by the Australian Government Solicitor. They are also subject to external comment in the case of death by a State or Territory coroner, review by COMCARE for occupational health and safety issues and to judicial review by the Federal Court to the High Court. Of note, there are very few instances where external review of the content and application of the

various aspects of the military justice system has resulted in an invalidation of its outcomes. Accordingly, the ADF has confidence in the quality of the military justice system.

2B - INDEPENDENCE OF THE MILITARY DISCIPLINE SYSTEM

2.10 The written submission from the Judge Advocate General (JAG) of the ADF set out a number of proposals. The JAG highlighted that the discipline system is carefully monitored through the existing arrangements providing for oversight by the JAG and that there was ample provision for procedural fairness in the process. In his oral testimony, the JAG further contended that the procedures for Defence Force Magistrates and Courts Martial were as good as, and in many respects better, than many of the procedures which apply in the civil jurisdiction.

2.11 With regard to summary trials, the JAG identified that there were delays from time to time but that to some extent this was inevitable in any system – civil or military. It was also fair to say that after a member is charged, there are few instances of unreasonable delay – rare exceptions to the norm – and that the system works reasonably effectively and in a timely fashion. However, the JAG acknowledged that there had been criticisms about delays in investigations.

2.12 The JAG noted, in regard to his proposals, that before recommending any changes to the discipline system, there is a need for a detailed study to look at how any proposed changes might impact upon operational capabilities of the ADF and the requirements of military discipline.

2.13 The JAG does not support the views of Mr Richards that civilian lawyers should preside over discipline proceedings in a military court. The JAG supported retention of the use of ADF Officers for five reasons, in effect, as follows:

- The discipline system is not an exercise of the ordinary criminal law because it serves the purpose of military discipline. The historical need for a discipline system internal to military forces has been recognised by the High Court. The High Court has also accepted that the system embodied in the DFDA accords procedural fairness and due process, and meets requirements of judicial independence and impartiality.
- It is essential to have knowledge and understanding of military culture and context, including the military operational and administrative environment as well as the

unique needs for the maintenance of military discipline, both in Australia and on operations and exercises overseas.

- The discipline system must have credibility with, and acceptance by, people in the Defence Force.
- Canada, which is comparable to Australia in this context, is firmly of the position that military judges should be serving military officers but with structured, legislative, guaranteed independence.
- Discipline tribunals need to sit in theatres of operation and be deployable.

2.14 Written submissions and oral testimony from Mr Richards expressed concerns about the lack of independence in the discipline system. However, the submission, perhaps understandably, does not appear to take into account changes proposed by Defence for the drafting during 2004 of a Defence Legislation Amendment Bill (which will establish the positions of Director of Military Prosecutions and Registrar of Military Justice) and a range of amendments from the *Defence Legislation Amendment Act 2003* (which came into effect from 14 January 2004).

2.15 Other evidence in the submissions by Mr Richards appears to be predicated on a false assumption, that is: that 'military justice is presently under the sole authority and control of the military and information relating to the law and process is not readily available to the public'. The assumption fails to consider that the primary material is publicly available Commonwealth legislation, the level of external oversight and scrutiny or the fact that matters can be reviewed by Federal courts and tribunals. Further, the assertions that the ADF is currently operating in an environment of 'few Australians in operational service over recent years' and where matters can be 'delayed until the accused returns to Australia', are incorrect.

Other Discipline System Issues

2.16 In his submission and oral testimony, Mr James, raised a concern that in serious discipline cases, an accused ADF member should have the right to insist on being charged to clear his/her name. Further, that this right should apply in all cases where charges threaten continued service, promotion or reputation.

2.17 In serious discipline cases, DFDA charges are considered by the Director of Military Prosecutions to determine if there is sufficient evidence and the likelihood of successful

prosecution. A convening authority will determine if charges proceed. Whether or not a charge should be preferred is not a matter for decision by the accused and is not consistent with the constitutional legal basis for the DFDA, which is to serve the disciplinary needs of the ADF. The ADF approach is similar to the civilian justice system.

2.18 Mr James also proposed that all witness statements taken during Service Police investigations, be taken on oath or tested in cross-examination. This would eliminate an allegedly common situation where witnesses make false or otherwise maliciously prejudicial statement but cannot be charged with an offence (such as perjury) or be subject to defamation action (because the witness statements are not public). Defence does not support this approach, as there is no genuine or practical requirement to deal with all witness statements in the manner proposed. The ADF does not endorse the view that it is common for witnesses to make false statements. However, where this situation does occur, it is already possible for appropriate legal action to be taken for the making of a false statement. Further, Mr James acknowledged that not all witness statements in civil proceedings are taken on oath, but where those statements are used there is the ability for them to be tested.

The JAG set out a number of proposals for changes to the discipline law system and highlighted the need for a detailed study of any proposed changes, including their impact upon the operational capabilities of the ADF and the requirements of military discipline, before recommending any specific changes. Defence would agree that a detailed study would be required to determine the impact of any proposed changes on the command system and the operational capabilities of the ADF.

2C - 'MILITARY INVESTIGATING MILITARY'

2.19 There is an important distinction between the legal character and purpose of discipline investigations and administrative inquiries. These systems operate alongside the civilian judicial system and other Government legislation and agencies. **Attached** at Annex A is a diagram that graphically depicts the general nature of the interfaces and interaction between the military justice system and civilian elements. The fundamental point that needs to be reiterated is that the conduct of a disciplinary or administrative process by the ADF does not in any way limit the powers or legal authority of existing civilian agencies. The ADF having the authority to conduct an inquiry into how an accident occurred on a military establishment is the equivalent of a private company having the authority to conduct an inquiry into an

accident in one of its warehouses. Neither process prevents the police, coroner or workplace regulatory authority from exercising their own statutory powers.

Discipline Investigations

2.20 The legal authority for investigations under the discipline system is the DFDA. The sole purpose of those investigations is to investigate offences under the Act. The Senate Committee has been provided with statistical data of the number of Summary, Defence Force Magistrate and Court Martial proceedings conducted under the DFDA. The vast majority of these proceedings are conducted without incident and the processes and outcomes are legally sound. Where defects are discovered, there are remedies available through the internal and external review processes. Unfortunately, there are occasional instances of delays in investigations and complaints about process or outcomes. However, these matters are dealt with effectively under the current system for internal and external review.

Defence is currently examining options to establish a tri-service investigative capability to include standing assistance from the Australian Federal Police (AFP). The AFP has indicated its willingness to help establish an ADF capability to deal with more complex DFDA investigations, particularly where they occur on deployments overseas. Development work on this initiative is currently underway.

Administrative Inquiries

2.21 There are several legislative and policy sources that determine the conduct of administrative inquiries. Like all Federal, State or Territory Government agencies, and even private sector organisations, the ADF conducts internal administrative inquiries into matters affecting the Defence Force. Similar types of internal administrative inquiries are carried out in the Australian Public Service, and Federal and State police forces.

2.22 In general terms, the legal sources for administrative inquiries stem from the executive functions of the ADF. In the exercise of executive functions, the ADF conducts internal administrative inquiries into incidents that impact on command and control, operational capabilities and other matters affecting Defence activities. In addition, the primary legal authority of these legal obligations stems from general command obligations under the *Defence Act*. The Defence (Inquiry) Regulations set out the requirements for the appointment and conduct of Investigating Officer Inquiries and Boards of Inquiry. The *Defence Act* provides for legal protections for evidence given during those processes. Recently, a new Part

7 was added to the Defence (Inquiry) Regulations to make specific provision for the Inspector-General ADF to conduct administrative inquiries in performance of his role.

2.23 The purpose of an administrative inquiry is to determine the facts and cause of an incident that impact on the command and control and operational capability of the ADF. Other than identifying causes for incidents, these inquiries are necessary to assist the ADF in identifying the need for improvements in policies, practices and to identify systemic problems. Administrative inquiries are an invaluable executive tool to ensure the operational effectiveness of the ADF is maintained and to ensure the safety of its personnel- a paramount consideration. Selection of the most appropriate form of administrative inquiry to deal with particular incidents is determined through an assessment of the circumstances of each case. This involves consideration of policy guidance and the professional judgement of commanders who are the appointing authorities.

2.24 The purpose of an administrative inquiry is **not** to attribute any criminal or discipline liability, as is the case under the DFDA. An administrative inquiry is not a substitute for investigations under the DFDA. In this regard, an administrative inquiry is not a discipline issue, although the process is identified as part of the military justice system. Administrative inquiries are not criminal or civil courts, and do not impose punishment for misconduct or offences, or determine individual legal liability for incidents.

2D - BOARDS OF INQUIRY

Tasking of ADF Legal Officers

2.25 The military tasking of Permanent and Reserve ADF Legal Officers is subject to operational requirements. ADF Legal Officers, particularly those in the Permanent Forces, are required to have competency and practical experience in operational, discipline and administrative law. ADF Legal Officers are required to provide legal services to commanders and, when tasked, to individual ADF members. They must perform those duties not only in Australia, but on deployment and during ADF operations. Permanent ADF Legal Officers must be available and be capable of providing legal support in relation to the conduct of discipline and administrative processes in time of peace and in a wide range of operational circumstances.

2.26 Reserve Legal Officers are drawn from private practitioners, Government lawyers, judiciary and academics. The tasking of duties for Permanent and Reserve ADF Legal

Officers depends on a number of factors including the location and nature of the duty, the availability of legal officers, as well as various operational and organisational considerations. Together, Permanent and Reserve Legal Officers provide legal support and are essential in supporting the operational capability of the ADF.

2.27 During oral testimony, Mr Collaery raised concerns in relation to the conduct of an ADF Reserve Legal Officer acting as Counsel Assisting on the Air Force Board of Inquiry into an F111 accident. Mr Collaery acted for the next of kin of one of the deceased Air Force officers and alleged that a Reserve Legal Officer failed to advise the next of kin on compensation rights. This demonstrates a misunderstanding of the role of a Counsel Assisting.

The purpose of the Board of Inquiry was to inquire into the cause of the accident and its impact on Air Force operations and safety. The role of the Counsel Assisting the Board of Inquiry was not to act as a personal legal representative for the next of kin, but to assist the Board of Inquiry to determine the facts of the incident. Defence is not aware of the document referred to by Mr Collaery, which he advised he would give to the Committee, and which 'demonstrates conclusively' why it is necessary to have competent Counsel Assisting the Board of Inquiry. Of course, it is necessary to have a competent Counsel Assisting at all Boards of Inquiry. However, it has not been shown that the current system fails to provide competent Counsel Assisting.

Conflict of Interest and Professional Conduct of Permanent ADF Legal Officers

2.28 ADF Legal Officers may be appointed to act as:

- a Defence Force Magistrate, Prosecutor or Defending officer at discipline proceedings;
- Counsel Assisting or Counsel Representing at a Board of Inquiry; or
- an Investigating Officer.

2.29 ADF Legal Officers may also be appointed to provide advice to commanders. Reserve and Permanent ADF Legal Officers alike are tasked to undertake duties to meet the operational requirements of the ADF.

2.30 In written and oral testimony, Mr Clark raises concerns about the content of a Directive issued by the previous Director General The Defence Legal Service. The concerns

focus on a perceived conflict of interest in relation to the appointment of ADF Legal Officers to act as Counsel Assisting a Board of Inquiry or as Counsel Representing potentially affected persons at Boards of Inquiry. Further, Mr Clark asserted that ADF members should have access to a legal officer of their choice.

2.31 During oral testimony, Mr Clark raised concerns that ADF Permanent Legal Officers did not adequately represent the interests of ADF personnel. He addressed inherent tensions that arise when subordinates seek legal advice or assistance, which can result in conflicts of interest between the duties of the ADF Permanent Legal Officer and the interests of the ADF personnel who are represented by those legal officers, particularly in the context of Boards of Inquiry. He claimed that military justice procedures will remain deficient as long as there is involvement from Permanent (as opposed to Reserve) ADF Legal Officers. Moreover, he proposed that ADF Reserve Legal Officers, rather than Permanent Legal Officers, should advise commanders and those involved with Board of Inquiry processes. In addition, he raised concerns that ADF Legal Officers lack competency, professional independence and accountability because they do not have practicing certificates and are not subject to oversight by law societies.

2.32 There is no basis for the assertion that a lack of independence by Permanent ADF Legal Officers is caused by the requirement that commanders write annual reports that impact on promotion. The annual reporting requirements for ADF Legal Officers are the same as those that apply to all other ADF officers, such as engineers, doctors, infantry and aircrew. Performance assessment is a key element in maintaining the quality of the ADF and applies to all personnel. The suitability for promotion of a Permanent ADF Legal Officer is not confined to the input of a commander. A Senior Legal Officer is also engaged in the promotion process for Permanent Legal Officers. All Permanent and Reserve ADF Legal Officers must also complete professional development courses, duty requirements and competency standards under a specialist legal officer scheme, which has been approved by the Defence Force Remuneration Tribunal. Moreover, irrespective of their command or other duty appointments, they are subject to technical professional oversight by The Defence Legal Service in respect of their legal professional conduct and advice.

2.33 *The Defence Act 1903* section 123 (1) provides, in effect, that a lawyer who is a Permanent or Reserve member of ADF does not require a practicing certificate to act as a legal officer. However, all Permanent and Reserve Legal Officers are required to be admitted as a solicitor or barrister in a State or Territory. ADF Legal Officers remain subject to the

professional control of State and Federal courts in which they are admitted as a Solicitor or Barrister. In addition, ADF Legal Officers, both Permanent and Reserve, are subject to censure, termination and other forms of administrative action, and the discipline system, in the same way as any other permanent or reserve member of the ADF, irrespective of the category of employment. The position and obligations of permanent ADF Legal Officers are similar to other in-house lawyers, who are employed by Federal, State or Territories government agencies; for example, lawyers who are public servants employed in legal aid offices.

2.34 With regard to the 2002 “Gurr” Board of Inquiry and 1997 “Butterworth” Board of Inquiry, or any other Board of Inquiry, no conflict of interest existed simply because a Permanent ADF Legal Officer acted for more than one person. Private practitioners within the civilian community often act for more than one person in civil matters. Whether or not there is a conflict of interest in representing more than one person, at a Board of Inquiry or any other matter, will always depend on the circumstances of each case.

2.35 In the written submission and oral testimony by Mr Clark, there were concerns expressed regarding the use of Permanent Legal Officers in the conduct of administrative inquiries, in particular, Boards of Inquiry. He also refers to a situation in which a Permanent Legal Officer at a functional command had been appointed to act as Counsel Assisting at a Board of Inquiry. In early 2003, Mr Clark, in his capacity as a Reserve Legal Officer, and another ADF Reserve Legal Officer, made written complaints about the situation. Mr Clark and the other Reserve Legal Officer were representing potentially affected persons at the Board of Inquiry. In response to the complaints, the ADF appointed an Investigating Officer under the Defence (Inquiry) Regulations to look into the matter.

2.36 The Investigating Officer was a Reserve Legal Officer (and also a District Court Judge). The complaint arising out of the conduct of the Everest Board of Inquiry was that there was a conflict of interest in the conduct of the processes on the basis that the Counsel Assisting was also a command legal officer. The Investigating Officer found there was no actual conflict of interest, although the situation may have lead to perceptions of a conflict. Notwithstanding, the Investigating Officer found that the potential for a conflict of interest would have been known to Mr Clark and others before and during the Board of Inquiry but they had waited until after the Board was concluded to raise any objection. The Investigating Officer recommendations included that Counsel Assisting a Board of Inquiry should not be appointed from the Command or Headquarters that may potentially be affected by the

outcome of the inquiry. Mr Clark was given a copy of the Investigating Officer report, which included the findings and recommendations.

The following observations are offered in relation to the various assertions and suggestions made in this section regarding perceived conflicts of interest and professional conduct of ADF Legal Officers:

- Defence maintains that the appointment of ADF Legal Officers to various positions in administrative proceedings does **not** of itself constitute a conflict of interest.
- As for inquiry appointments, the fact that an ADF Legal Officer, Permanent or Reserve, may at different times be tasked to perform different types of duties or to act in the interests of an ADF member, does **not** of itself raise a conflict of interest. It does not undermine the professional standing or responsibilities for those officers to perform their duties to the best of their abilities and according to the ethical standards applicable to all lawyers.
- Issues relating to the directive from the previous Director General The Defence Legal Service concerning the roles of Permanent and Reserve Legal Officers were addressed in detail through comments provided to the Committee by Director General The Defence Legal Service in the additional ADF submission of 11 June 2004.
- Defence maintains that allegations about the lack professional competency and ethical standards of Permanent ADF Legal Officers are unjustified.
- ADF Legal Officers belong to an organisation with a robust internal disciplinary and administrative system, which is not the case for most private lawyers (where these roles must be performed by law societies and bar associations). Action can therefore be taken under existing discipline or administrative systems to address alleged unethical or unprofessional behaviour by ADF Legal Officers. Accordingly, there is no basis to claim that ADF lawyers without practising certificates are not accountable for ethical and professional decisions. Nonetheless, to assist in this area, the previous Director General The Defence Legal Services appointed a senior ADF Reserve Queen's Counsel as head of a Military Bar to provide the Director General with advice on professional standards and ethics. However, this not a prerequisite for ADF Legal Officers being subject to disciplinary or administrative action for alleged unethical or unprofessional behaviour.

- The fact that a Permanent ADF Legal Officer works at a functional command does not, in every case, preclude the tasking of the legal officer for duties as Counsel Assisting or representational duties at a Board of Inquiry. It depends on the circumstances of each case. Relevant factors may include whether the Service lawyer is responsible for advice to the appointing authority on matters relevant to the Board of Inquiry, and whether the responsibility is of a past or current nature. However, Command Legal Officers should not normally be tasked for Board of Inquiry duties, such as Counsel Assisting, when the Board is appointed by the same Command. The Investigating Officer recommendations will be reflected in the current review and update of ADFP 1.6.4 *Administrative Inquiries Manual*.

Training of ADF Legal Officers in relation to Board of Inquiry Duties

2.37 In his written submission, Mr Clark also raised his concerns regarding the training of ADF Legal Officers in relation to Board of Inquiry duties. This issue was considered by the 2003 Acumen Alliance audit appointed by the Director General The Defence Legal Service. The audit report was submitted in December 2003.

The Acumen audit recommendations include improved guidance and training for legal officers, commanders, and officers who are involved in advising, planning and appointments for Boards of Inquiry, which have been approved by the Director General The Defence Legal Service. Action is being taken to implement the recommendations, which include further development of training and amendments to ADFP 06.1.4. *Administrative Inquiries Manual*.

A National Register of Eligible persons to be President and Members of a Board of Inquiry

2.38 Mr Clark raised this issue in his written submission. The issue was also considered in the 2003 Acumen Alliance audit appointed by Director General The Defence Legal Service.

The Acumen audit report includes a specific recommendation (No 23), which provides for the establishment of a data base for the selection and appointment of Board of Inquiry members. The Director General The Defence Legal Service approved the audit recommendation and action has been taken for its implementation.

The President of a Board of Inquiry must be of Superior Rank to Potentially Affected Persons (PAP)

2.39 Mr Clark raises this issue in his written submission and oral testimony. His concerns are that a President of inferior rank to a PAP creates the perception that the President may defer to the PAP or alternatively make adverse findings to demonstrate his/her 'independence'. He also feels that by making such appointments, the Appointing Authority sends the wrong message to other PAPs. He refers specifically to the appointment of the President in the Board of Inquiry into a climbing fatality during activities conducted by the Army Alpine Association in 2001. This Board of Inquiry is commonly referred to the Big Wall Board of Inquiry. At this Board of Inquiry, the President was a Reserve Legal Officer with the rank of Captain, RAN and also a Queens Counsel. Mr Clark, in his Reserve Legal Officer capacity, acted for a Brigadier who was identified as a PAP.

2.40 Mr Clark raised concerns that the Defence (Inquiry) Regulation 35 were ignored by the Appointing Authority, on advice from Permanent ADF Legal Officers, and on the grounds that there are no officers of appropriate rank available.

2.41 While it is desirable that the President of a Board of Inquiry be of superior rank to all Potentially Affected Persons, this may not always be appropriate or necessary. For example, the priority for selection may be based on specialist skills (certain operational, command or technical knowledge, such as infantry, aircrew, maritime, medical or legal expertise, for example) rather than the rank of the particular officer. Furthermore, in the context of a military organisation, authority to exercise command and control is based on the appointment of the officer and not the rank. For example, a Major or Lieutenant Colonel may be appointed a commanding officer of a unit, or a Lieutenant (RAN) may be appointed as a commanding officer of a ship. An officer of inferior rank is not impeded from the exercise of appointed authority simply by reason of rank nor, in a military context and culture, is there a perception of a lack of independence in the performance of military duty simply by reason of an inferior rank. Moreover, during the course of a Board of Inquiry, the rank of various PAP will vary. In addition, the rank of PAP cannot always be ascertained with certainty either from the outset of the Board of Inquiry or throughout the process. It is not acceptable to attempt to either dissolve or not to appoint a Board on the basis that the President of a Board may or may not have superior rank to all PAP that may be identified at any time in the process.

2.42 Defence (Inquiry) Regulations 1985 reg 35 (1) provides a process for the President of a Board of Inquiry to deal with evidence that may affect an officer who is higher in rank to

the President. Further, reg 35 (3) grants the appointing authority a legal *discretion* to either terminate the appointment of the President of the Board of Inquiry or direct the Board of Inquiry to continue with its inquiry. Before giving a direction, the appointing authority is required to take into account the particular circumstances of each case.

2.43 In respect of the particular concerns raised in the context of the Big Wall Board of Inquiry, and at the outset of that inquiry, Mr Clark (in his Reserve Legal Officer capacity and representing a PAP) made a formal application to disqualify the President of the Board of Inquiry. The grounds were that the President was a lawyer and inferior rank to the PAP (refer Transcript 29.7.02 p 27 >). The issue was referred to the Appointing Authority (Chief of Army) who obtained separate legal advice from a senior ADF Reserve Legal Officer. The Appointing Authority directed the Board of Inquiry to proceed. There was no actual or perceived disadvantage to the PAP as a consequence of the appointment of the President. Further, Mr Clark has not initiated an internal complaint or application for external judicial review to challenge the outcomes of the Board of Inquiry on this ground. Defence is satisfied that the Board of Inquiry was conducted in fairness to all PAP and in accordance with the Defence (Inquiry) Regulations.

While the appointment of a President of a Board of Inquiry who has superior rank to Potentially Affected Persons is desirable, it may not be appropriate or necessary in all cases.

A President of a Board of Inquiry should not be a Lawyer

2.44 Mr Clark also raises concerns that a President of a Board of Inquiry should not be a lawyer. In oral testimony he states that, other than the Big Wall Board of Inquiry, he has never heard of a lawyer being a President of a Board of Inquiry. His concerns relate to perceptions that a legally qualified President may not accept advice of Counsel Assisting or could provide 'private legal advice' to other Board members within the confines of the inquiry offices, which is anathema to transparency of inquiry processes.

2.45 Defence (Inquiry) Regulations allow for the appointment of a lawyer as a President or other member of a Board of Inquiry, which includes an ADF Permanent or Reserve Legal Officer. In addition to the Big Wall Board of Inquiry, in 2000 an ADF Reserve Legal Officer (and District Court Judge) was appointed as President of the Air Force F111 Deseal/Reseal Board of Inquiry.

2.46 Whatever the legal qualifications of Board members, an ADF Legal Officer is appointed as Counsel Assisting at all Boards of Inquiry. Permanent or Reserve ADF Legal Officers are also available to represent people identified as likely to be affected by the process.

2.47 As a matter of Defence policy, all Boards of Inquiry are subject to independent legal review by a Service Legal Officer or other lawyers, such the Australian Government Solicitor, to ensure the requirements of procedural fairness are met and that there is sufficient evidence to support findings and recommendations.

2.48 The appointment of a lawyer as President or other member of a Board of Inquiry is consistent with the composition and processes of civilian administrative inquiries, such as NSW Special Commissions of Inquiry.

2.49 Issues concerning the role of lawyers in Boards of Inquiry have also be canvassed by the Judge Advocate General (JAG). In his oral testimony on 21 June 2004, which followed his discussions with the former Chief Justice of Canada, the JAG expressed the view that a preferable course could be the appointment of a Defence Force Magistrate as President of a Board of Inquiry, although this should occur by way of exception, and only with the specific approval of the JAG. The conduct of administrative inquiries is pursuant to an executive power, rather than judicial. Judicial officers should ordinarily not be involved in administrative inquiries. The JAG's view is that a judicial officer could be compromised in the performance of judicial duties, which could result in a conflict of interest. However, consistent with recommendation 20 of the Acumen Alliance audit report, the appointment of Service Legal Officers as members or Presidents of Boards of Inquiry remains generally available to Appointing Authorities. Although considerations of potential conflict of interest would naturally inform any appointment, this does not necessarily preclude the selection of a judicial officer as a member or president of a Board of Inquiry.

2.50 The Defence (Inquiry) Regulations makes provision for the type of inquiry at which a judge presides, that is, a General Court of Inquiry. In respect of Boards of Inquiry, the Regulations allow for the appointment of an ADF Legal Officer as a President of a Board of Inquiry. This has occurred in two recent Boards of Inquiry. However, the requirement for a lawyer to be appointed as a President of a Board of Inquiry or as a member of a Board (civilian or military) depends on the circumstances and is considered by an appointing authority on a case by case basis.

- The appointment of an ADF Legal Officer as a President or other member of a Board of Inquiry depends on the circumstances, and is considered by an Appointing Authority on a case by case basis. Defence **supports** JAG's views that disciplinary and administrative processes should remain separate and distinct. They are based on different legal principles, different evidentiary standards, different legal consequences and are used for different purposes. That said, Board of Inquiry appointments should continue to be made on a case by case basis, recognising the potential for various types of conflict of interest, but not arbitrarily excluding a particular group or professional specialisation from selection. As part of the implementation of recommendation 20 of the Acumen Alliance audit report, consideration is being given to providing additional guidance on appointing Presidents of Boards of Inquiry.
- Defence is concerned to ensure that the findings of any of its internal inquiries are independent, but this must be understood in context. The independence sought is independence in the process and decision-making from persons who may have an interest in the findings. To seek to make an internal inquiry independent of the ADF itself is to misunderstand the purpose and nature of internal inquiries.

Allegations of Misconduct by TDLs Personnel

2.51 In his written submission and oral testimony, Mr Clark made serious allegations about professional misconduct of personnel at The Defence Legal Service. Some of those personnel have chosen to make private submissions to the Senate Committee.

Mr Clark is invited to consider those private submissions, and if he so wishes, to raise his concerns directly with Defence and to provide further information to substantiate his allegations of misconduct. A determination can then be made on whether further action should be taken in response to those allegations.

Rate of Sessional Fees paid to ADF Reserve Legal Officers who are in Private Practice

2.52 Mr Clark's written submission raised concerns regarding the rate of sessional fees paid to ADF Reserve Legal Officers who are in private practice. The concerns were that the current fees were set in 1995 and are problematic, and that the terms of the financial determination for the payment of those fees were ambiguous.

2.53 Sessional fees are paid to ADF Reserve Legal Officers who are in private practice and perform specified duties during normal business hours. The fee varies according to the

seniority, professional or Service experience of the individual Reserve Legal Officer, among other factors. Travel, accommodation, meal and other duty allowances are payable in addition to the sessional fee. ADF Reserve Legal Officers who are not in private practice are not entitled to the sessional fees and are paid normal Reserve rates of pay and allowances for military duties.

2.54 Over the last several years, there have been various reviews and reports that have commented upon sessional fees and the types of military duties that attract the fees. The 2003 McClelland Review of The Defence Legal Service included a review of the sessional fee and recommended removal of the sessional fee in favour of the existing Employer Support Payment arrangements amended to recognise the normal duration of employment of Reserve Legal Officers. The issue was further considered in the 2003 Acumen Alliance audit, which included, at recommendation 7, that the sessional fee should not be applied to Boards of Inquiry.

The Director General The Defence Legal Service has directed a review of payment options and systems.

Administrative Support for Boards of Inquiry

2.55 Mr Clark's written submission raises concerns about the lack of administrative support provided at Boards of Inquiry.

Proposed updates to ADFP 06.1.4 *Administrative Inquiries Manual* by The Defence Legal Service will provide more guidance to Appointing Authorities, and personnel appointed for Board of Inquiry duties including the Secretary of the Board of Inquiry as to the scope of administrative support required.

Planning for Boards of Inquiry

2.56 In his written submission, Mr Clark proposed that the scoping (or planning) approach adopted during the 2001 Air Force F-111 Deseal/Reseal Board of Inquiry should be used in the management of other Boards of Inquiry. The reason offered is that more time spent by lawyers on scoping and collecting evidence *before* the inquiry commences would result in shorter public hearings.

2.57 The scoping approach successfully adopted by the Air Force F-111 Deseal/Reseal Board of Inquiry is a reflection of the particular case and evidentiary issues. Over a period of

about 12 months, most of the time was devoted to scoping and evidence collection. Public hearings were conducted over about 6 weeks. However, other recent Boards of Inquiry have also taken a similar amount of time to complete, but the approach taken was to spend less time on scoping and more time on public hearings. This suggests that neither model is clearly more efficient or appropriate in time and cost considerations than the other in every circumstance.

2.58 Scoping issues were also considered in the 2003 Acumen Alliance audit appointed by the Director General The Defence Legal Service. The audit report recommended (at Recommendation No. 21) improved guidance on the scoping or planning of Boards of Inquiry by Counsel Assisting and the submission of a project plan to the Appointing Authority and The Defence Legal Service.

- No one model or approach will be appropriate for every matter to be dealt with at a Board of Inquiry. The best approach to be adopted for the scoping of a Board of Inquiry depends on the unique circumstances of each case, which is generally determined by Counsel Assisting as appropriate to the subject matter of the inquiry.
- The Director General The Defence Legal Service has directed the implementation of improved guidance on scoping for Boards of Inquiry by Service Legal Officers to be reflected in an update to ADFP 06.1.4 *Administrative Inquiries Manual*.

Commander's Discretion to Appoint a Board of Inquiry

2.59 During oral testimony, Mr Clark raised concerns that the inquiry into the death of Private Williams was an Investigating Officer Inquiry, rather than a Board of Inquiry. He asserted that while this form of inquiry protected evidence from use in proceedings under the DFDA, there was no protection from the use of that evidence in a civilian court of law.

2.60 As to the form of inquiry to be used in the cases of death, reference was made during oral testimony by Mr Clark that the ADF had failed to apply the outcomes of the Joint Standing Committee on Foreign Affairs, Defence and Trade, Military Justice Procedures in the Australian Defence Force, June 1999. Recommendation 1 of that report stated:

"The Committee recommends that, during peacetime, the convening of a General Court of Inquiry by the Minister of Defence should be mandatory for all inquiries into matters involving the accidental death of an ADF member participating in an ADF activity."

2.61 The Government Response to the Report was tabled in Parliament in March 2001. The Response did not support the recommendation. However, Defence agreed that most cases involving accidental death will result in the appointment of a Board of Inquiry. Other cases of death, such as those involving suicide, may result in the appointment of an Investigating Officer Inquiry. The circumstances of each particular case will also influence the type of inquiry to be used.

- The *Defence Legislation Amendment Act 2003* No. 135, 2003 at Schedule 2 made various amendments to the *Defence Act 1903* including certain provisions of s 124 and in particular, sub-sections 124(1)(gc), (2A), (2C) concerning self-incrimination and the use of evidence given at a court of inquiry, board of inquiry and an investigating officer. In the context of an investigating officer inquiry, the legislative changes provide, in effect:
 - the power to make regulations requiring a witness to answer questions, although the question may tend to incriminate the person;
 - the power does not require a witness to answer a question that may tend to incriminate the person in respect of an offence with which the person has been charged and in respect of which charge has not been finally dealt with by a court or otherwise disposed of; and
 - a statement or disclosure made by a witness in the course of giving evidence is not admissible in evidence against that witness in any civil or criminal proceedings in any Federal, State or Territory court and in a proceedings before a service tribunal.
- The tragic death of Private Williams was a suicide, not an accidental death. The Chief of Army or other Appointing Authority have a legal discretion as to whether to appoint a Board of Inquiry or an Investigating Officer inquiry. Chief of Army appointed an Investigating Officer Inquiry, which was thorough and has been legally reviewed. Currently, the NSW Coroner is considering whether further investigation or action is necessary.

Legal Representation of the Interests of the Next of Kin at a Board of Inquiry

2.62 During oral testimony, Mr Clark raised concerns that the interests of a deceased ADF member and the next of kin are not always the same, and legal representation should be provided. He suggests that both the deceased member **and** the next of kin should be legally

represented at Boards of Inquiry. In all cases, a deceased member is legally represented at a Board of Inquiry. Current regulations allow a next of kin to be legally represented, though this is not mandated and is decided on a case by case basis. What Mr Clark does not make clear is that free legal representation is provided at Commonwealth expense to persons who are likely to be adversely affected by the Board of Inquiry report, rather than everyone who merely has an interest in the outcome of the inquiry.

2.63 Defence (Inquiry) Regulations 1985, sub-regulation 33 (1) provides that where the President of a Board of Inquiry considers that a person may be affected by the inquiry conducted by the Board, the President may authorise that person to appear before the Board. Sub-regulation (3) provides, in effect, that the President or an Appointing Authority may appoint a legal officer to represent the person. The Regulations grant the President of the Board of Inquiry a discretion to determine if a next of kin is an affected person, and then for the President or Appointing Authority to approve the appointment of a legal officer to represent the next of kin.

Acumen Alliance Audit into the Management of Boards of Inquiry

2.64 The Senate Committee has been provided with a copy of the Acumen Alliance audit report, together with the following background information:

- In May 03, Director General The Defence Legal Service appointed Acumen Alliance to conduct a management audit of Board of Inquiry processes. The scope of the audit was to identify, assess and validate the practices and processes to facilitate efficient and effective Boards of Inquiry.
- The scope and duration of the audit was confined to a strategic level review of the overall effectiveness and value-for-money aspects of the Board of Inquiry process. The audit included a paper review of recent Boards of Inquiry and interviews with identified stakeholders at the strategic level. The audit focussed on policy, governance, risk and structure of Boards of Inquiry.
- The identified stakeholders included CDF, Chief of Navy, Chief of Army, Chief of Air Force, Inspector-General ADF, Director General The Defence Legal Service, and Deputy Director General - Reserves (who made a formal submission to the audit on behalf of all ADF Reserve Legal Officers). The audit did not involve interviews with individual Board members, counsel representing, counsel assisting or witnesses.

- The audit report, dated October 2003, was received by Director General The Defence Legal Service in mid-December 2003.
- The audit concluded that the current Board of Inquiry process was 'generally sound and serves the purpose for which it was created'. However, there was a need to improve the process in relation to appointments, monitoring, guidance and support, which required further policy development.
- The audit made 26 recommendations relating to policy, governance, risk and structure of Board of Inquiry management processes. The recommendations focus on improving policy guidance, in particular the guidance contained in ADFP 6.1.4 *Administrative Inquiries Manual*, training and briefing of appointing authorities, and the establishment of a pool of appropriately skilled personnel for appointment to Board of Inquiry duties.

On 26 April 2004, following staff review and analysis of the recommendations of the Acumen Alliance Audit, Director General The Defence Legal Service approved 24 recommendations, and gave in-principle approval for a further two recommendations. Implementation of the recommendations is ongoing. The majority of recommendations will be reflected in amendments to ADFP 6.1.4 *Administrative Inquiries Manual*, the development of a database of skilled ADF personnel suitable for appointment to Boards of Inquiry and development of briefing packages for appointing authorities.

2.65 During oral testimony, Mr Clark make various allegations in connection with the Acumen audit, including that:

- Mr Clark's submission to the Acumen audit was not considered;
- the completed Acumen report went to Chief of Army, who wanted the audit to include interviews with potentially affected persons;
- Chief of Army directed The Defence Legal Service to take the report back, and Chief of Army would not release, endorse or approve the report until there had been significant input from potentially affected persons; and
- this was not done by The Defence Legal Service.

2.66 The correct situation is that the Acumen Alliance audit was appointed by The Director General Defence Legal Service. There was no requirement for the Chief of Army to officially

release or approve the audit report. Further, Mr Clark's response to the audit was taken into account by the Deputy Director General The Defence Legal Service – Reserve, who made a formal written submission on behalf of all Reserve Legal Officers for the consideration of the audit team. Mr Clark was advised that his response would be taken into account for the audit report and, subsequently, for the amendments to ADFP 06.1.4 *Administrative Inquiries Manual*.

2.67 Chief of Army requested that Acumen Alliance interview certain ADF members, who were affected persons arising out of the Big Wall Board of Inquiry. The proposed interviews were outside the scope of the terms of reference for the management audit and Acumen Alliance advised that such interviews were not necessary for it to complete its report. However, those ADF members were invited by The Defence Legal Service to an interview or to make a submission for the purpose of the review and update of ADFP 06.1.4. *Administrative Inquiries Manual*. Only one of the members accepted the invitation from The Defence Legal Service.

2E - INVESTIGATING OFFICER INQUIRIES

2.68 During oral testimony from the Defence Force Ombudsman, concerns were raised regarding the training of investigating officers and the requirement to improve the quality of the outcomes. Mr Collaery also raised the issue of investigating officer training.

2.69 In November 2003, the Administrative Inquiry Training Working Group was appointed to review Inquiry Officer training in the ADF. This Working Group was to review current training and then develop a training, policy and implementation plan to improve the standard of Inquiry Officers within Defence. The review of current training has been completed and the development of a package for Inquiry Officer training is complete in draft form. This package has been developed with the assistance of an external contractor and captures the necessary detail of the competencies required of an Inquiry Officer. The training package is a little less than two days in duration and is aimed at officers of the ADF and APS who are most likely to undertake the more complex administrative inquiries within the Department. Implementation of the training course is being overseen by the Inspector-General ADF.

- Defence acknowledges that the Defence Force Ombudsman has raised concerns about the timeliness of investigations and agrees that it is desirable to improve the training of

investigating officers and to establish a core of skilled investigating officers. However, operational and practical constraints may require the use of other officers to carry out investigating officer tasks.

- ADFP 06.1.4 *Administrative Inquiries Manual* was developed and published to provide practical guidance to investigating officers who conduct administrative inquiries. Investigating officers also have access to legal advice from Permanent and Reserve ADF Legal Officers.
- The Administrative Inquiry Training Working Group, which is chaired by the Chief of Staff to the Inspector-General ADF, intends to confirm the effectiveness of the training package with the conduct of a Pilot Course in August/September 2004. The Defence Legal Service is also reviewing and updating the ADFP 06.1.4 *Administrative Inquiries Manual* (issued May 2000), which will provide further practical guidance for investigating officers.
- Defence will continue to work with the Ombudsman to improve the timeliness and quality of these processes.
- Inspector-General ADF, who has independent review functions in relation to the conduct of inquiries, will also consult with the Ombudsman.
- As discussed in connection with discipline investigations, Defence is currently examining options with the AFP to provide assistance with ADF investigations, for which development has commenced.

2F - 'DOUBLE JEOPARDY' IN THE DISCIPLINE AND ADMINISTRATIVE SYSTEMS

2.70 During the oral testimony of the JAG, the Committee asked for comment in relation to the issue of double jeopardy. The Committee and several witnesses have raised this issue in the context of discipline action and the follow-on use of administrative action in certain cases.

2.71 The ADF supports the comments made by the JAG, which were that, as a general proposition, the discipline and administrative systems are two different systems. The military discipline system under the DFDA is similar to the civilian criminal law, while actions like formal warnings, censure and termination under the administrative system are most easily equated to an employer/employee management system. Thought of this way, it should be easy to understand that the administrative processes within the ADF, the APS and other organisations apply different considerations for different purposes from the disciplinary

system. The interaction between the two systems is not 'double jeopardy' in the same way that concurrent or consecutive police action and employer action against an employee of a company is not double jeopardy.

2.72 Mr McDonald's written submission proposed that the use of the administrative system, such as a censure, should be restricted to circumstances where disciplinary action has either been taken and is completed, or where it is assessed that it does not need to be taken. The concept underlying this suggestion is that administrative action should not be seen as a substitute for disciplinary action or an addition to disciplinary punishments. Similar proposals arose during the written and oral testimony of Mr James, who raised concerns that the use of evidence obtained in discipline matters to support administrative matters can result in double jeopardy. In particular, he was concerned that where a member of the ADF is acquitted under the DFDA, administrative proceedings (such as censure) covering essentially the same matter, should be prohibited or heavily circumscribed. The reasons for the concerns were that:

- the use of administrative action means that the member can, in effect, be tried twice for the same incident;
- using administrative notices-to-show-cause reverses the onus of proof, requiring members to prove their innocence;
- the evidence cannot be tested by cross-examination; and
- administrative decision-makers lack independence, resulting in a misuse of authority.

2.73 During oral testimony, Mr James acknowledged the proposition at law that charges under the DFDA and the conduct of administrative proceedings is not double jeopardy. However, he took the view that it was morally wrong for a member to be subjected to both types of proceedings. He further acknowledged that there were some circumstances where information arising in the nature of a disciplinary (criminal) prosecution should be followed up administratively. Mr James agreed that an absolute prohibition against administrative action would probably not work in every instance.

2.74 There is no 'double jeopardy' in the taking of administrative action based on evidence used in disciplinary proceedings. An acquittal of criminal charges does not forestall administrative or disciplinary action based upon the same alleged conduct. However, any such administrative action could not lawfully be pursued for the purposes of disciplining the

accused for the alleged conduct. In *Hardcastle v Commissioner of Police* (1984) 53 ALR 593 p 11, the Full Court of the Federal Court dealt with a 'double jeopardy' argument in these terms:

In our opinion there is no substance in this submission. ... There is no room for the application of what is sometimes misleadingly called the principle of double jeopardy in this case. If the appellant were charged with, and convicted of, the same unlawful assaults as are the subject of the disciplinary offences he would not face double jeopardy or be punished twice for the same offence. He would be convicted of an offence against the criminal law and be guilty of a breach of the disciplinary code of the Australian Federal Police. The two proceedings are essentially different in character and result.

2.75 In *Stuart v Chief of Army* (1999) FCA 501 (13 April 1999) (Unreported) Beaumont J rejected the argument that the ADF was prevented from taking administrative action where discipline action had been taken under the DFDA, stating at para 29:

It is not the law that a person shall not be liable to be punished twice for the same action, as distinct for the same offence.

2.76 The issue was also addressed by the 1999 JSCFADT Inquiry into Military Justice Procedures in the ADF (refer para 2.136). The Committee noted that the use of administrative action that proceeds from a civil conviction or formal disciplinary proceedings was 'not a case of double jeopardy but rather administrative follow up' (para 2.137 refers).

2.77 Adverse administrative action is not a punishment for an offence committed but rather as a means of protection for the public and the reputation of a profession (for example, *Re A Practitioner; Ex parte The Legal Practitioners Disciplinary Tribunal* [2001] WASC 204 (18 June 2001)).

In consultation with the Australian Government Solicitor, The Defence Legal Service is reviewing ADF policy on the purpose and appropriate use of adverse administrative action, such as censure and formal warning, to ensure that such action is not misused in the context of action under the DFDA. Director General The Defence Legal Service, in consultation with Inspector-General ADF, has written to Head Defence Personnel Executive with a proposed amendment to that effect to *DI(G) PERS 35-6 Formal Warnings and Censure in the Australian Defence Force*.

2G - ADMINISTRATIVE ACTION (SUCH AS CENSURE, TERMINATION)

2.78 During testimony, Mr James proposed that unsworn evidence obtained in disciplinary proceedings should be prohibited from use in administrative proceedings concerning the same circumstances. The argument advanced is that the use of unsworn evidence for administrative proceedings reverses the onus of proof, and that persons have to disprove what has been said in the unsworn evidence.

2.79 In the ADF, all administrative action, such as censure, is initiated or taken on the basis of fair and acceptable evidence. Procedural fairness is afforded to ADF members through the Notice To Show Cause system. Members also have a right to submit a Redress of Grievance. In addition, members can seek recourse through the Inspector-General ADF and the Defence Force Ombudsman or initiate a judicial review.

2.80 The Notice To Show Cause procedure has a long administrative and legislative history, both in the military and other areas of the public sector, at all levels of public administration in Australia (local government, State/Territory and Commonwealth).

2.81 Mr James also suggested that senior officers attempting to proceed administratively against a subordinate should be automatically disqualified from doing so if a conflict of interest exists. To avoid conflict of interest and abuse of authority, he proposed the use of a disqualification process in which a complaint is given to a "neutral third authority" which would have the power of disqualification.

- The Notice To Show Cause process does **not** reverse the onus of proof. A decision-maker must be satisfied that, on the balance of probabilities, there is sufficient evidence to support the allegations, and whether or not administrative action is justified on the merits of the case. This is a requirement of procedural fairness and good decision-making and is reflected in Defence policies such as *DI(G) PERS 35-6 Formal Warnings and Censures in the Australian Defence Force* and *ADFP 06.1.3 Guide to Administrative Decision Making*.
- ADF policy on the issue of censure and formal warnings is contained in *DI(G) 35-6 Formal Warnings and Censures in the Australian Defence Force*, which provides for separate initiating and decision-makers for the issue of Notices To Show Cause for these matters. The policy that effected the separation of the roles was a consequence of a recommendation of the 1999 JSCFADT inquiry.

- Decisions made within the administrative system are subject to the principles of natural justice, including the bias rule. However, the existence of a command relationship is not, of itself, an impediment to all forms of administrative and management action by commanders and subordinates. Whether a conflict of interest or bias exists in a particular case depends on the particular circumstances.

2H - CORONERS

2.82 During oral testimony, Mr Clark raised concerns that Defence does not follow the legislation or rules or apply procedural fairness and that a Commonwealth Coroner should be appointed to investigate all deaths of ADF members, or that they should be investigated by State or Territory Coroners.

2.83 In his written and oral testimony, Mr James proposed that the Commonwealth and States reach agreement on there being only one, or if necessary a joint, inquiry into incidents resulting in the death of ADF members. The reasons provided were that there is a growing lack of public confidence in the probity and efficiency of inquiries into ADF deaths.

2.84 State and Territory Coroners have responsibility for the investigation of the death of any person who dies within their jurisdiction. The ADF has certain statutory powers in relation to deaths of ADF members occurring while on service. In March, 2001 the Government agreed that State and Territory Coroners should not be precluded from investigating the death of an ADF member, other than in the following limited circumstances: where an ADF member dies while on service overseas, or dies while on a ship at sea in waters outside State or Territory jurisdiction, or as a result of armed conflict occurring in Australia.

2.85 In practical terms, all overseas operations include arrangements for contract mortuary services to be available if required. Procedures for dealing with State and Territory coroners for deaths are well established and are reflected in Defence policy - Defence Instruction (General) Personnel 20 - 6 Deaths within and outside Australia of Australian Defence personnel.

2.86 Further, Defence is currently negotiating a memorandum of agreement with State and Territory coroners. The purpose of the agreement is to develop a protocol between the ADF and State and Territory coroners to facilitate efficient management of unexpected deaths of

ADF members, and to clarify the conduct of the Coroner's power of inquest, inquiry and investigation involving the death of ADF members while on service. A factor which underpins the arrangements is that ADF administrative inquiries, such as Investigating Officer Inquiries and Boards of Inquiry, are concerned with determining facts surrounding incidents that have the potential to detract from the operational capability of the ADF. They are not used to investigate disciplinary or criminal matters and do not replace the role of a coroner. The ADF will continue to work with State and Territory coroners to ensure the proper management of deaths of ADF members.

PART 3 - GENERAL POINTS

3.1 This section provides Defence views on some other matters raised during the course of the Inquiry that have not been discussed in Part 2 or in previous Defence submissions, responses or evidence.

Redress of Grievance Procedures

3.2 In 1999 the Australian National Audit Office conducted a review of Redress of Grievances in the Australian Defence Force. This review measured the time taken to resolve a sample of 73 redresses. It revealed that discharge-related grievances took an average time of 239 days to resolve, administration-type grievances 330 days and personal grievances 493 days. By comparison, a sample of an identical number of grievances finalised in 2004 revealed that discharge redresses were resolved in 154 days - a 35% reduction in processing time. Also, reductions of 15% and 47% respectively have been achieved in resolving administration and personal grievances.

3.3 Analysis of the two samples shows that more redresses are now finalised at unit level, without referral to higher authority. The current average time from lodgement of a redress of grievance until determination by a commanding officer is three months. If the grievance is referred to the Complaint Resolution Agency, the time from allocation of the complaint to a case officer and decision by a Service Chief or delegate averages 2.3 months. To put this in perspective, it is worth noting that around 2,000 applications for redress have been handled in ADF units in the last six years.

3.4 In 2000 a further review of the redress system was conducted by Defence, assisted by a member of the Defence Force Ombudsman's staff. This review made 24 recommendations for improvements to the process, the majority of which have been implemented. The only outstanding actions are those that require legislative amendment. In line with changes introduced under the Public Service Act 1999, the Defence review in 2000 recommended that certain types of complaint be excluded, such as complaints about Defence policy, when commanding officers should have the right to refuse to investigate complaints deemed to be vexatious or frivolous, and that complaints about matters which have been referred for investigation to external bodies (such as the Human Rights and Equal Opportunity Commission) be terminated to avoid duplication of effort. Defence has not proceeded with these changes at this time, even though they would allow greater focus on handling other

complaints, due to ongoing concerns that such changes would curtail a member's right of complaint.

3.5 Defence acknowledges that some complaints take too long to finalise. A number of complainants, and the Defence Force Ombudsman, have already made this point to the Senate Inquiry. But the level of dissatisfaction expressed about the redress process needs to be viewed in the broader context of an organisation that has handled almost 2,000 applications for redress in units in the last six years. Units do not have dedicated resources for complaint handling. Importantly, the number of complaints that are not handled well represents only a very small percentage of complaints received. Significantly, the Defence Force Ombudsman recognised that timeliness and delay can be a problem that 'besets all organisations that undertake inquiries, investigations and complaint handling', including his own office. This does not mean that improvements should not be sought, but the delays that do occur must be viewed in context.

3.6 There are many reasons for complaint handling delays, and perhaps a range of measures that can be taken to address them. For example, the Complaint Resolution Agency believes that many COs try to do too much, rather than too little, in investigating and making a decision on an application for redress. This suggests a requirement to educate Commanders and their administrative staff regarding complaint handling. Furthermore, additional advice could be provided to them when considering these cases. The Complaint Resolution Agency monitors the time taken at unit level to finalise complaints. It may be that a more formal progress reporting process might be of benefit, facilitating earlier intervention where it appears that a unit needs assistance.

3.7 Defence has a number of elements and organisations that manage certain types of complaints. Apart from the Complaint Resolution Agency, these organisations include the Defence Equity Organisation and the Directorate of Alternative Dispute Resolution and Conflict Management. This can create some confusion for complainants and, to an extent, the organisations themselves, about their respective roles. This can result in the duplication of effort and delays. Closer cooperation would provide more effective outcomes, without compromising the necessary independence of their processes.

Defence and the Defence Force Ombudsman are considering conducting another joint review of the redress process. This would allow a decision to be made on whether to progress any outstanding actions from the 2000 review and, at the same time, identify further areas for

improvement. Realistically, however, there will always be some cases that require detailed and thorough investigation that will necessarily take longer than the average processing time. There will also be cases of poor administration, despite our best efforts. In such cases, the Ombudsman will remain a valuable external point of review for ADF members who are not satisfied with the results or conduct of a grievance investigation.

Defence Force Cadets

3.8 The Defence Force Ombudsman has instigated an own motion investigation into the treatment of minors by the ADF. This investigation is divided into two separate research areas: ADF employed minors (for example ADFA Cadets) and the ADF Cadets. It is understood that the Ombudsman's investigation is concentrating on the legal duties of care owed by Defence to minors. This may include a review of the control Defence has over the Officers and Instructors of Cadets, albeit not as the primary focus of the investigation.

- Defence supports and is co-operating with the Defence Force Ombudsman investigation.
- Defence is currently examining the legal status of its relationship with Cadet Staff and will provide advice to Government as necessary if the legal relationship needs to be revised.

Family Access to ADF Member Information and Privacy Issues

3.9 Some of the cases raised with the Committee have highlighted the ethical issues associated with the rights of individual ADF members to make decisions about their medical treatment and what they elect to tell their next of kin. This is of course a separate issue to that of providing information to next of kin after the death of a member.

Defence has a legal responsibility to ensure that the individual rights of ADF members to privacy are complied with when dealing with the desire of families to know information about their family members in the Services. Current policies reflect that legal responsibility.

The Defence Community Organisation

3.10 The Committee has heard evidence from Colonel Cotton, the Director of Mental Health, and from Principal Chaplain Eacott in regard to mental health strategies and support to members and their families. Defence has not yet provided the Committee with information

on the Defence Community Organisation (DCO). This organisation is the primary means through which Defence supports the families of ADF members. It also supports the ADF chain of command to care for Service personnel.

3.11 When members are separated from their families, and especially when they are deployed on operations, they need to be confident that the Defence organisation will fill the breach by providing support, information, advice and communication to their families. Recognising these special needs of members and families, the Defence Community Organisation (DCO) was established in 1996.

3.12 The establishment of the DCO brought together four separate Defence member and family support organisations to provide an integrated professional social work and allied family support organisation of about 230 people. The DCO has a network of teams positioned on or near major military establishments around Australia. These teams comprise experienced social workers, uniformed military support staff, family liaison officers and regional education liaison officers.

3.13 The DCO operates with its management team, social workers and military support staff on 24-hour call, 7 days a week. In times of crisis or tragedy involving a serving member - for example, death or serious injury - it is usually the Command who activates the DCO services for the family. In the event of a major crisis, the DCO Crisis Support Centre (Headquarters in Canberra) is immediately activated to enable widespread communications with large numbers of families at one time.

3.14 In supporting families who lose a serving member, on duty or off duty, DCO staff members take a four tiered approach. First, they liaise with their colleagues in the Unit and Chaplaincy to allocate roles and responsibilities. This ensures the most comprehensive notification of the casualty and delivery of follow-up support, information and counselling to the family.

3.15 Secondly, DCO appoints a Military Support Officer as the family's "case manager". This officer is responsible (with the Chaplain) for funeral arrangements, assisting with managing the estate, and providing a conduit between the Unit and the family to ensure information is communicated clearly, accurately and in a timely manner. The DCO also allocates a social worker to the family who, in the early stages, assists the family grapple with the "why" questions, provides information, and assesses and intervenes with grief

counselling. The Military Support Officer and the social worker are both formally trained to deliver these vital services on behalf of Commanders and are very experienced in the Defence environment. It is not uncommon for them to maintain their relationships with the families for a period of two or more years.

3.16 Thirdly, DCO staff partner with their medical, psychology and chaplaincy colleagues to provide, as appropriate, Critical Incident Mental Health Support (CMS) services and counselling to the community affected by a loss - the deceased member's immediate work colleagues and families in the local Defence community. All DCO staff participating in such interventions are formally trained by Defence, through its Mental Health Strategy.

3.17 Lastly, the DCO ensures a system of support is built around the family, from within the wider community, to support the longer-term recovery and support needs of the family. Any member of the ADF community can initiate access at any time to the DCO. The pathways to access the DCO services are widely and regularly advertised to Commanders, Duty Staff, to Base telephone operators, to community agencies, to members and to families. Defence has staffed and structured the DCO to respond to Defence's family support needs whenever and wherever they are needed.

'In Camera' Evidence

3.18 Some 'in camera' evidence was heard during this Inquiry. Defence acknowledges that the Committee would not authorise this procedure lightly. However, it does present a difficulty with what is otherwise intended to be a public inquiry process.

Defence has had no opportunity to consider or address the concerns raised as a result of testimony in a number of cases heard in camera. Where this has occurred, Defence has been unable to attempt to correct any perceived errors of fact or criticism of individuals, nor to present any alternative views.

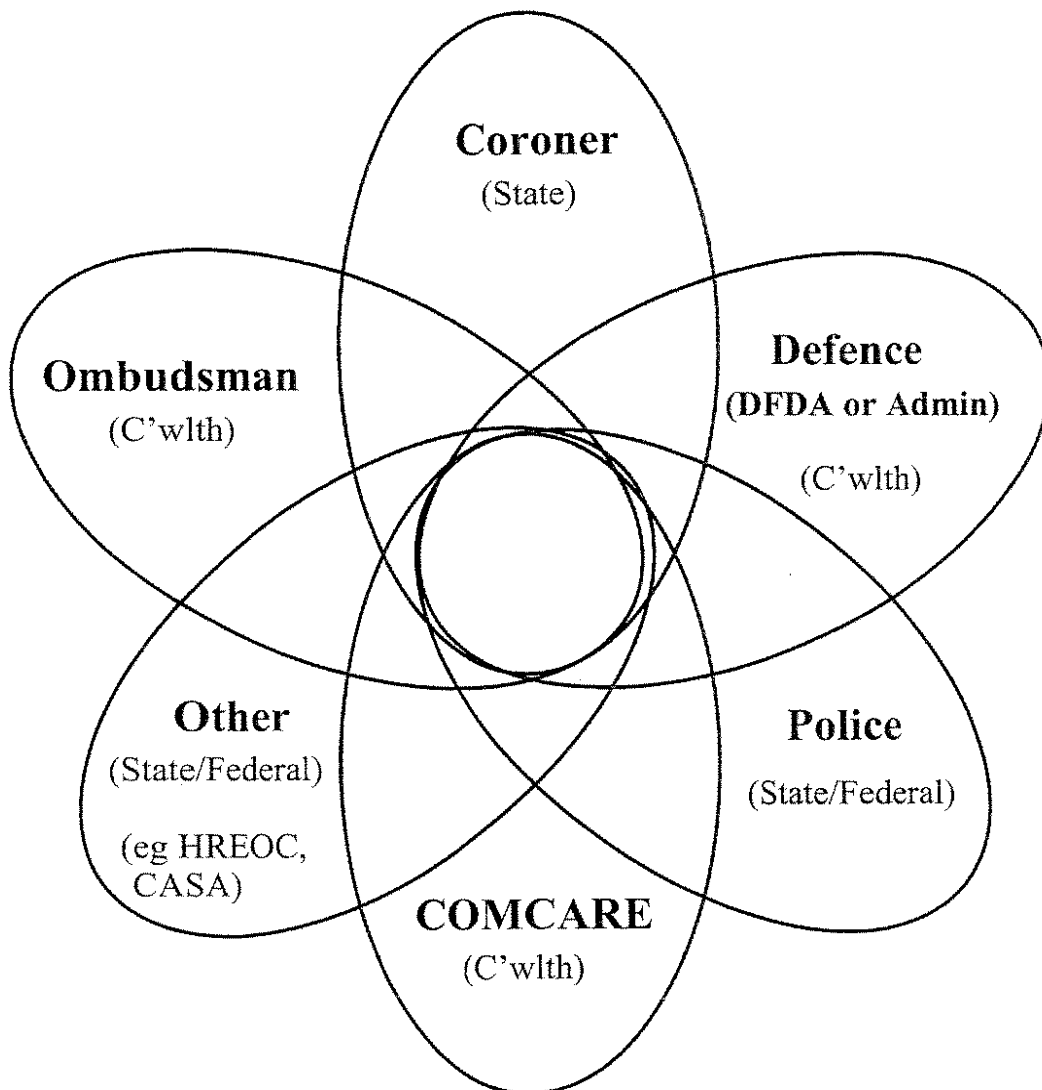
Annexes:

- A. Legal Aspects – Diagram
- B. Navy – Supplementary Submission
- C. Army – Supplementary Submission
- D. Air Force – Supplementary Submission

ANNEX A TO
DEFENCE SUBMISSION
DATED 13 JULY 2004

LEGAL ASPECTS – DIAGRAM

1. This diagram graphically depicts one aspect of the relationship between the military justice system and applicable civilian legal and administrative processes. It shows how in any given case that the Defence administrative system has areas of overlapping interest with, for example, the Coroner, but at the same time, the Coroner and Defence will also have discrete areas of interest. It is also intended to indicate how, for example, the State police may have a matter that has nothing to do with Defence, and vice versa Defence may have a matter that is not within the jurisdiction of the State police.



ANNEX B TO
DEFENCE SUBMISSION
DATED 13 JULY 2004

NAVY – SUPPLEMENTARY SUBMISSION

1. Throughout the hearings there were a number of situations where evidence presented was quite specific and did not reflect Navy's understanding of the situation. This was particularly relevant when addressing issues such as requests for postings and dates of psychologist appointments. It was also apparent questioning resulted in some witnesses addressing issues out of sequence. This possibly led to a confused understanding of events. Consequently, Navy's chronologies for certain incidents are attached to clarify evidence provided by other witnesses, in the interests of correcting the public record.

2. Mr Collaery, in addition to his written submission (Submission No: P22) gave evidence to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the Effectiveness of Australia's Military Justice System on 9 June 2004. In his evidence Mr Collaery accused Navy of welcoming home a vessel from the Gulf War with fanfare on the same day that an inquest opened into a fatal fire on HMAS Westralia. It was inferred the arrival of the ship was planned to "force Westralia to the back pages". This conjecture is not supported by the facts.

3. The WA Coroner's Inquest was held in several sittings: 14 June and 2 December in 2002; as well as 28 April to 9 May, 12 to 15 May and 23 to 27 June in 2003. The Coroner handed down his findings on 19 December 2003. There were no arrivals of any Royal Australian Navy warships in WA on any of these commencement or findings dates.

4. No ships returned from the Gulf in April 2003. Mr Collaery may have erroneously referred to the arrival of HMA Ships Anzac and Darwin from their Northern Arabian Gulf deployment. They arrived in Fremantle on 17 May 2003, after the inquest hearings. Their welcome home was moved from Fleet Base West at HMAS Stirling to Fremantle harbour because of bad weather.

5. Operational issues and weather conditions are the drivers of ship programs. Navy has never engineered a ship program to cater for any reason related to the coronial inquest.

6. This submission and the attached chronologies should be read in conjunction with Navy's previous clarifying Submissions Nos P16A and 16B. Ms Liddell also provided oral

evidence to the Committee at the hearing on 22 April 2004 in Brisbane. It was apparent that questioning resulted in Ms Liddell addressing issues out of sequence. Consequently Navy has also provided a Chronology by way of a Confidential Additional Submission on the basis the chronology includes information of a medical and sensitive nature to assist the Committee's consideration of the issues raised by Ms Liddell.

Attachments:

1. Chief Petty Officer Hyland – Chronology
2. Ms Munday – Chronology

CHRONOLOGY CHIEF PETTY OFFICER HYLAND - SUBMISSION NO P15

DATE	COMMENTS
9 May 2002	CPO Hyland allegedly assaulted at <i>RAAF Williams</i>
9 May 2002	CPO Hyland presents to 6 RAAF Hospital, Laverton (<i>RAAF Williams</i>) with fractures of the left orbital floor, left zygoma and the nose.
9 May 2002	RAAF Police investigation commences
10 May 2002	Victorian police investigation commences
10 May 2002	<i>HMAS CERBERUS</i> Naval Police attended scene and Werribee Police Station. Informed that Victorian Police would take carriage of investigation.
24 May 2002	CPO Hyland returned to <i>HMAS ALBATROSS</i> . Granted convalescent leave until 3 June 2002
20 February 2003	Victorian police decide 'the matter will fail at court' and refer incident back to RAAF POL
9 May 2003	RAAF Police refer the incident to Naval Police <i>HMAS ALBATROSS</i>
9 May 2003	CPO Hyland formally complains to CO ALBATROSS of inaction by authorities, requesting update on status of police investigations.
9 May 2003	Commanding Officer (CO) <i>HMAS ALBATROSS</i> initiates Defence Force Discipline Act (DFDA) investigation of alleged assault through the Naval Investigative Service (NIS)
4 September 2003	CPO Hyland commences sick leave after surgery
18 September 2003	NIS informs CO <i>HMAS ALBATROSS</i> of result of NIS investigation, that ' <i>NIS do not believe a prima facie case could be sustained</i> '
27 October 2003	CPO Hyland informed of NIS recommendation and CO <i>HMAS ALBATROSS</i> decision not to proceed with DFDA action
28 October 2003	CPO Hyland submits request for Compassionate Posting to South Australia to CO <i>HMAS ALBATROSS</i>
29 October 2003	CPO Hyland submits Redress of Grievance to CO <i>HMAS ALBATROSS</i>
6 November 2003	CO <i>HMAS ALBATROSS</i> refers CPO Hyland's redress of Grievance to Director of Military Prosecutions (DMP) for legal advice. DMP to review all evidence in relation to alleged assault.

6 November 2003	Redress of Grievance Update provided to CPO Hyland
17 November 2003	CPO Hyland granted three month stress-related leave on medical grounds
17 November 2003	'Today Tonight' TV program in relation to CPO Hyland's allegations aired on national television
21 November 2003	Director General Public Affairs Operations and Plans sends a letter to 'Today Tonight' protesting the accuracy of the segment
09 December 2003	Redress of Grievance Update provided to CPO Hyland
22 December 2003	RoG Update provided to CPO Hyland (Informal Email from Personnel Officer <i>HMAS ALBATROSS</i>)
19 January 2004	CPO Hyland posted to South Australia on compassionate grounds
5 February 2004	Redress of Grievance Update provided to CPO Hyland
30 March 2004	Redress of Grievance Update provided to CPO Hyland
Current	DMP is currently reviewing relevant documentation, including the Victoria Police investigation report before providing advice on the assault incident.

CHRONOLOGY MS MUNDAY SUBMISSION NO. P37

Date	Event
5 May 1998	HMAS WESTRALIA Fire. Involved in fire fighting and handling of deceased personnel.
7 May 1998	Group Critical Incident Stress Management debriefing (CISM)
20 May 1998	CISM Survey – in response indicated she did not wish to be contacted and that if she was she preferred to be contacted by a social worker.
13 July 1998	Advised Directorate of Sailors Career Management (DSCM) via Posting Preference Form PE42 her first choice for posting was to WA based replenishment vessel, ie <i>HMAS Westralia</i>
3 August 1998	Advised DSCM in writing on PE42 Form - <i>"I am currently onboard HMAS Westralia and would like to remain on it for as long as possible"</i>
20 August 1998	Follow up Psychological Survey – advised did not wish to be contacted.
16 October 1998	Minute to DSCM – <i>"I am foregoing my shore time in a hope to stay onboard HMAS Westralia.....As I was on Westralia when the fire took place onboard, I would like to remain here to help fix her and take her back to sea"</i>
11 November 1998	Minute to DSCM – <i>"I am still very keen on staying on WES to help with repairs....."</i>
8 February 1998	Minute to DSCM – <i>"I would like to remain on Westralia to assist in repairs.....it would be good therapy for myself after the fire onboard"</i>
25 March 1999	<i>Self referred to HMAS STIRLING Psychology Section. Assessed as severe depression and anxiety. Told she would be supported if she wished to leave HMAS WESTRALIA. Decided to put decision on hold until after leave and a 3 month training course.</i>
21 April 1999	Follow up CISM survey – did not respond.
27 May 1999	<i>WESTRALIA</i> requested DSCM for posting intentions for Munday and noted her preference for posting to HMAS CAIRNS.
17 June 1999	DSCM advised intention to leave Munday onboard <i>WESTRALIA</i> until mid 2000 to both train new reliefs and aid ship with Light Off Examination (LOE) requirements. Indicated only available billets were in Sydney and Darwin areas but there was a strong possibility that billets may become available in desired area (Cairns)early to mid 2000.

Date	Event
29 June 1999	Minute to DSCM "...There is currently no billets available in Cairns. As a result of this I am prepared to stay onboard HMAS WESTRALIA to assist in training personnel until a billet becomes available in Cairns. I may consider remaining onboard after the workups to do the up top trip if no billets are available still ..."
1 September 1999	Contacted HMAS STIRLING Psychology Section – experiencing symptoms related to fire (flashbacks). Provided counselling and assessment indicates significant decrease in symptoms.
14 September 1999	Psychology Appointment.
21 September 1999	Psychology Appointment.
30 September 1999	Psychology Appointment.
4 November 1999	Reviewed by psychiatrist who indicated "her presentation is compatible with PTSD". He prescribed medication. He informed sailor of his diagnosis.
5 November 1999	Psychologist appointment – Ms Munday indicated she had been informed of the PTSD diagnosis and indicated she was yet to commence taking medication. Recommendation that she be posted off WESTRALIA and be posted to STIRLING to continue access to counselling.
15 November 1999	Posted to FIMA-W (HMAS STIRLING)
22 November 1999	Psychologist appointment. Requested to return to the ship – request not supported by psychologist.
14 December 1999	Missed Psychologist appointment
2 February 2000	Psychologist appointment. Requested support be provided for a posting to Recruiting in Hobart. Not taking medication (04Nov99).
8 February 2000	Missed Psychologist appointment
23 February 2000	Psychologist support at fire fighting training ground in response to an acute stress response.
8 March 2000	Missed Psychologist appointment
19 May 2000	Psychologist appointment

13 June 2000	Psychologist appointment
15 June 2000	Issued Notice to Show Cause for discharge (civilian offences)
10 September 2000	Discharged from RAN

ANNEX C TO
DEFENCE SUBMISSION
DATED 13 JULY 2004

ARMY – SUPPLEMENTARY SUBMISSION

1. The Senate Inquiry into Military Justice has provided an opportunity for the Army to examine many of the things it does in a critical light, especially as they relate to the Military Justice System and the Army's management of incidents of sudden death. Army has analysed the evidence provided to the Inquiry by each witness, and the information contained in each submission that has been made public. In some cases Army has provided responses and assistance to those witnesses where appropriate. In other cases Army has provided the Inquiry additional information, clarifying Army's understanding of events when there has been disagreement with certain accounts, or certain views stated by witnesses. Army has also sought and obtained ministerial approval for the release of certain internal investigation reports to concerned parties.

2. This inquiry has assisted in making members of the Australian Army more aware of their rights and responsibilities under the military justice system. The army-wide chain of command has been kept informed of the work of the Inquiry, both through the formal chain of command from the highest level downwards, and by the less formal, though equally important, medium of the "*Army News*". There have been numerous articles on military justice in the soldier's newspaper, as well as articles on the separate but related topic of suicide awareness and prevention. Serving Army members have been encouraged publicly to send submissions to the Inquiry.

3. Military justice must of necessity be open, transparent and fair for all parties. There are always at least two sides to every dispute and at least two points of view to be considered. In the specific investigations mentioned during the Inquiry the Army has indicated that it trusts and has faith in the officers who were appointed to investigate the issues raised, and the reports they have produced. Their investigation processes were sound. Failings, if any, have been primarily in the implementation and continued observance of the recommendations that were accepted from the reports.

4. Army has been criticised for a range of issues that deserve to be considered fairly from both sides. The Army has accepted that some cases have taken too long to investigate and resolve. In some cases protracted delays have been unacceptable and Army is taking steps to rectify these. However, some delays are a reflection of the complexities of the issues. Procedural delays in some instances are unavoidable. Army is continuing to take steps to enhance its system of military justice, such as the creation of a special Directorate of Personnel Operations.

5. Though often not directly related to the military justice system the Inquiry has, as part of its terms of reference, concerned itself with the highly emotional issue of suicide. The Army is aware that there is little that can be done to alleviate the grief felt by the family of those who take the decision to end their own lives. However, Army rigorously examines every suicide to identify if and where aspects of Army service may have contributed to a tragic loss.

6. This Senate Inquiry has made a major contribution to Army's ongoing efforts to critically examine and continuously improve military justice. The very existence of the inquiry, as well as the nature of its work, has given all pause to reflect on military justice, who must be served by it, and under what extreme conditions it must operate effectively and efficiently. However, the military justice system in its current form suits the complex environment in which Australia's soldiers continue to serve, at home and overseas, in peace and in war.

ANNEX D TO
DEFENCE SUBMISSION
DATED 13 JULY 2004

AIR FORCE – SUPPLEMENTARY SUBMISSION

1. Air Force does not necessarily agree with all the statements as presented by the various witnesses in their testimony before the Inquiry nor the detail presented in the numerous submissions as being a factual account of the various incidents considered by the Inquiry. Nevertheless, Air Force accepts that in many cases this represents the witness's perception of the situation. Consequently, Air Force does not consider it appropriate to enter into a detailed rebuttal of errors. Some observations are provided on two cases raised in the course of the Inquiry, to outline action taken in regard to the matters over a period of time.
2. Air Force has not seen Mr Mackelmann's original submission to the Inquiry regarding the aircraft accident involving his son, PLTOFF Craig Mackelmann. However, Mr Mackelmann has been corresponding with Defence for the last 17 years since the death of his son. Defence has done everything possible to assist Mr Mackelmann with his requests for information. The Mirage accident has been the subject of an Accident Investigation; Board of Inquiry; Coronial Inquest; Ombudsman Investigation; Review of Structural Management Practices; Senator the Hon Peter Durack, QC Review; Defence Science and Technology Organisation Aeronautical Maritime Research Laboratory Structural Integrity Review; and Administrative Appeals Tribunal (AAT). The matter has also been the subject of considerable number of Freedom of Information requests.
3. Mrs McNess has raised several points in her submission to the Senate Inquiry and again it should be noted that all of the issues raised in her submission have been formally addressed over recent years in various correspondence between AFHQ and Mrs McNess, as well as in face to face meetings. Organisational change inspired indirectly by the Guyra accident includes implementation of a new flight simulator, improved simulator training and Crew Resource Management training for all flight crews. This has been continued with the introduction of new Aviation Risk Management education and training throughout Defence and particularly the Air Force. In addition, DSTO has been working on a 3-year task, due for completion in Jul 04, on F111 weapons system management.