Senate Foreign Affairs, Defence and Trade References Committee

SUBMISSION COVER SHEET

Inquiry Title: Effectiveness of Australia's Military Justice System

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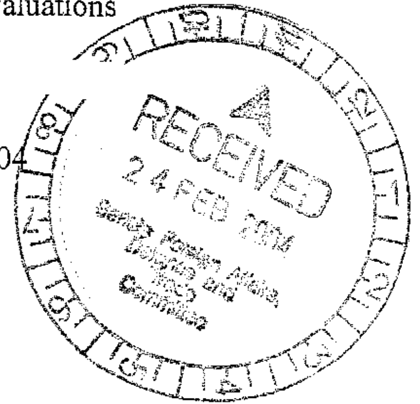

The Secretary
Senate Foreign Affairs, Defence and Trade References Committee
Suite S1.57
Parliament House
CANBERRA ACT 2600

Dear Secretary,

The hard copy of the submission I sent to you electronically on Friday 20 February 2004 is enclosed.

Yours faithfully,

Douglas McDonald
DOUGLAS McDONALD

Enclosure:

1. Submission (11 pages) dated 20 Feb 04

A SUBMISSION TO THE SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE LOOKING INTO THE EFFECTIVENESS OF AUSTRALIA'S MILITARY JUSTICE SYSTEM

Background

I completed 34 years in the Australian Regular Army before transferring to the General Reserve, and although I am still a serving member of the Australian Defence Force, I am making this submission as a private citizen.

During my postings as a Regimental Sergeant Major and particularly as the Service Discipline Law Master at the Army's prestigious Warrant Officer and Non-Commissioned Officer Wing, I gained considerable experience in the conduct of Summary Tribunals, pre and post trial administration and the application of the Defence Force Discipline Act to members of the Australian Defence Force.

I do not consider myself to be a Subject Matter Expert, however I do have a thorough understanding of the processes involved in the Military Justice system.

Aim

The aim of this submission is to bring to the References Committee's attention issues which address the first of the Terms of Reference. This requires the Committee to enquire and then report upon:

"The effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes, and mechanisms to improve the transparency and public accountability of military justice procedures."

I am particularly pleased to see the key phrases of *"providing impartial, rigorous and fair outcomes"* and *"to improve the transparency and public accountability of military justice procedures."* I believe that if you accept the information and implement the suggestions contained in this document, the result will indeed be a military justice system which is impartial, rigorous, fair, transparent and accountable to the Australian public.

References and abbreviations

The reference documents I have used in preparing this submission are the Discipline Law Manuals Volumes One and Two (Australian Defence Force Publication 201) and the Military Enquiries Manual (Australian Defence Force Publication 202). The use of (E) behind an Army rank means equivalent rank in the other two services.

The issues

The issues will be presented in the following sequence:

a. punishments based on the rank of the Accused;
b. substituting Disciplinary action with Administrative action;
c. inability to object to a Summary Authority being biased;
d. members of Courts Martial who have never been Summary Authorities;
e. Summary Proceedings being closed;
f. the additional offence of "Perverting or Attempting to Pervert the Course of Justice";
g. qualifications and experience of Summary Authorities;
h. the Training Liability to qualify all Summary Authorities;
i. the solution to the Summary Authorities issue; and
j. additional items to be given in camera.

Punishments based on rank of the Accused

The Defence Force Discipline Act confers two types of jurisdiction upon Summary Authorities: these are the jurisdiction to deal with a charge (that is, to decide on a course of action), and the jurisdiction to try a charge (to hear evidence, decide guilt and award punishment if appropriate). There are three levels of Summary Authorities, these being:

a. Subordinate Summary Authority, usually Major (E);
b. Commanding Officer, usually Lieutenant Colonel (E); and
c. Superior Summary Authority, usually Colonel (E) but sometimes Brigadier (E).

Summary Authorities are appointed either:

a. in writing using a particular form (form 45 for a Subordinate Summary Authority, forms 28 or 29 for a Commanding Officer); or
b. as an automatic consequence being the Commanding Officer (therefore a Commanding Officer for discipline) of a unit or by the officer holding or performing the duties of a position listed in page 14 of Part 4 Volume 2 of the Discipline Law Manual (for a Superior Summary Authority).

The punishments available to a Summary Authority are contained in Schedule 3 to the Defence Force Discipline Act (Volume 2), and for convenience are also listed in particular paragraphs in Chapter 7 of Volume 1. These are set out for each level of Summary Authority in table format by the band of ranks which each Authority has the jurisdiction to try and then according to the rank of the Accused.

To illustrate how the punishments are linked to the rank of the Accused, I will use an example where three fictitious ADF members (a Private, a Sergeant and a Captain), have been accessing the unit's premises at night and stealing computer parts. The Private is a clerk in the unit orderly room, the Sergeant works as a storeman and the Captain is a Staff Officer. In this example, these members are all single, have no outstanding debts and are all enjoying the highest pay level for

their ranks. Annual salaries only have been used because Service Allowance is not included when calculating fines.

The three are caught, charged with Theft (section 47C of the Defence Force Discipline Act), and all appear before a Commanding Officer who is authorized to try the three of them.

The maximum elective punishments able to be awarded by the Commanding Officer under the Defence Force Discipline Act are as follows:

Rank of Accused	**Maximum Punishments**	**Amount in Dollars**	**Total Financial Impact**
(a)	(b)	©	(d)
Captain ($55661 pa)	Fine of 14 days pay (14 x $152.50 pd)	$2135	**$2135** 3.83% of annual salary
Sergeant ($46685 pa)	Fine of 14 days pay (14 x $127.90 pd)	$1790	**$4862** ($1790 + $3072) 10.41% of annual salary
	Reduction by one rank (reduction to Cpl for 12 months minimum)	$3072	
Private ($40056 pa)	Fine of 28 days pay (28 x $109.74 pd)	$3072	**$4373** (3072 + $1301) 10.92% of annual salary
	Detention for 28 days (Reduction to Recruit level pay for 28 days)	$1301	

Regardless of whether the reader compares the actual dollar amounts, the percentages of annual income or the absence of detention as a punishment for both the Captain and the Sergeant, it is clear that the maximum punishments are based upon the ranks of the Accused.

It is hard to imagine the justification for a system of punishments which has the capacity to impose financial burdens on subordinates greater ($1300 for the Private and $2727 for the Sergeant), than that which may be imposed upon the Captain who is their superior officer. There is also some Victorian-era attitude which considers it appropriate to impose the punishment of Detention upon a Private, while a member of superior rank is provided with immunity from the same punishment.

It is interesting to note that even at the highest level of Service Tribunal, the punishments which may be awarded by a General Court Martial (these are listed in Schedule 2 to the Defence Force Discipline Act), are the same for all members of the defence force except that the punishment of Detention may not be awarded to an officer.

Consider the situation of the fictitious defence force members from the civilian perspective. These three work in a local business - the Private is a clerk in the company's main office, the Sergeant is a senior storesperson and the Captain is an executive working in the main building.

They steal, are caught, are charged and then appear before the local District Court. Do you believe that the Australian public would accept the Judge awarding punishments based on the status or position each of these individuals hold within the organisation and the higher the position, the less the financial loss? How about the Court being restricted to imposing what amounts to 'blue collar' and 'white collar' punishments for committing the same crime?

I don't think so.

I am not suggesting that the maximum punishments available to a Service Tribunal should increase "in line" with the rank of the Accused as we would simply return to another version of the current rank-and-punishment link. The Defence Force Discipline Act does not contain any offences which are rank specific (ie "officer or non-commissioned officer only" offences), and the current discriminatory system where a member's rank provides immunity from certain punishments must not be permitted to continue.

I am suggesting that the maximum punishments able to be imposed by a Service Tribunal should be the same, regardless of the Accused's rank. The removal of all restrictions on the imposition of appropriate punishments from Australia's military justice system will ensure that the application of the Defence Force Discipline Act is both impartial and fair.

Substituting Disciplinary Action with Administrative Action

In addition to the contents of the Defence Force Discipline Act which clearly places officers above being awarded Detention, there is a view that they should not be punished at all in certain situations. It may have already been put to this Committee that a more 'appropriate' way of dealing with these transgressors is for the member to be given a 'Censure' as this can affect an officer's career, posting opportunities or promotion. I understand that a similar point of view was put before the Joint Standing Sub-committee from Foreign Affairs, Defence and Trade when it was looking into all aspects of Military Justice back in 1998.

Section 68 of the Defence Force Discipline Act lists the only punishments that may be imposed by a Service Tribunal and 'censure', 'career', 'posting' or 'promotion' do not rate a mention. The reason for this is because a censure is not a punishment under the Defence Force Discipline Act.

A censure is Administrative action and its substitution for Disciplinary action must be aggressively resisted. Its use when Disciplinary action is appropriate means that there is no trial, no punishment, no conviction recorded and definitely no justice. The preferential treatment it provides the recipient is never lost on the other defence force members who are involved in, or have knowledge of, the particular incident.

The use of Administrative action must be restricted to circumstances where Disciplinary action has either been taken or where there is no need to take it at all. It should never be seen as a way of addressing perceived short-comings in, or adding to the punitive effects of, the application of the Defence Force Discipline Act to the Australian Defence Force. It most certainly must never be used as a substitute for Disciplinary action.

Inability to object to a Summary Authority being biased

Section 141 of the Defence Force Discipline Act provides certain rights to an Accused who is to appear before a Summary Authority. They include the right to make applications (adjournment, securing of witnesses, separate trials, etc) and as stated in subsection 141(1)(b), the right to make objections on any ground including the following:

a. that he is not liable for to be tried for the offence by virtue of previous acquital or conviction;
b. that the charge was made outside the required time limitation;
c. that the offence for which he has been charged has already been taken into consideration by a Court Martial or Defence Force Magistrate;
d. that the charge does not disclose a service offence or is incorrect in law; and
e. that the Summary Authority does not have jurisdiction or is otherwise ineligible to try the charge.

Although subsection 141(1)(b) uses the words "the right to make objections on any ground", there is one which is clearly missing from the above list. Subsection 141(4) specifically denies the right to object to the Summary Authority trying the charge on the grounds:

a. that the authority is biased;
b. is likely to be biased; or
c. is likely to be thought on reasonable grounds to be biased.

Subsection 141(4) is then careful to state that "nothing in this subsection shall be taken, by implication, to authorize trial by a summary authority who is, or is likely to be, biased; or is likely to be thought, on reasonable grounds, to be biased".

Paragraph 5 in Annex Q of Chapter 7 in Volume 1 states that any objection to a Summary Authority's bias can only be raised during the post-trial Review on Petition stage. This effectively means that the Accused must go through the entire trial, the finding, the mitigation, the award of punishment, the automatic review by a Reviewing Officer and the Legal Officer's signing off that the procedures were Correct in Law before being able to bring to anybody's attention, the possibility that the Summary Authority was biased, (or was likely to be biased or was likely to be thought on reasonable grounds to be biased).

In order to do so, the Accused has to petition for a Review to a second Reviewing Authority that the Summary Authority was biased. It would be particularly difficult for the Accused to show this to the Reviewing Authority's satisfaction. The Summary Authority involved would hardly be expected to just step forward and admit it. It is doubtful that any Investigating Officer's Report produced in accordance with the Military Enquiries Manual and signed by that particular officer (or whatever it is that the Accused believes would show the Summary Authority to be biased), would ever be made available. No unit should be expected to allow the Accused or the Accused's Defending Officer to embark on some type of 'fishing trip' through the files hoping to find some documentation which would support the objection on the grounds of bias.

Of course, it would all be an academic exercise if the Accused has already undergone the punishment by the time that the Review on Petition process commenced.

In the situation where the petition for a further Review to another Reviewing Authority was successful and the objection upheld, the Reviewing Authority could direct that:

a. the conviction and punishment be quashed because the Summary Authority was biased; or
b. the case be retried in the interests of justice.

The quashing could then result in a person who actually did commit the crime escaping both the conviction and the punishment.

The retrial before another Summary Authority could result in the same finding of Guilty, in which case the entire sequence (trial, finding, mitigation, award of punishment and automatic review including the Legal Officer's input), was not only a considerable duplication of effort but also a complete waste of time.

The inability of the Accused to object that a Summary Authority is biased is surprising in light of the specific direction for the Authority to try the Accused "without fear or favour, affection or ill-will" and for the Authority not to have access to the details of the case.

Obviously the entire restriction on objecting to a Summary Authority being biased is a carryover from the days when the Defence Force Discipline Act was first drafted and this was considered to be the best way of ensuring that Summary Authorities were not objected to on the grounds of bias merely because the Accused was known to the Authority.

An Accused has the right to object to a member of a Court Martial, a Judge Advocate or a Defence Force Magistrate on the grounds that any one of them may be biased, and there is absolutely no reason why an Accused before a Summary Authority should not have the same rights as those before all other Service Tribunals.

The restriction on an Accused objecting to a Summary Authority on the grounds of bias must be removed and the applicable subsection in subsection 141(4) repealed.

Members of Courts Martial who have never been Summary Authorities

In order to be eligible as a member of a Court Martial, an officer must have held the appointment as an officer for a minimum of three years and not be junior in rank to the Accused. The realities are that in Courts Martial where the Accused is not an officer, it is usual for Lieutenants (E) and Captains (E) to be members of the court.

The inclusion of junior officers is impossible to justify. There are no courses, no postings, no appointments or professional development considerations which have an officer's membership of a Court Martial as a pre-requisite, and the careers of those officers who are never members of a court are not disadvantaged because of it.

The person who is disadvantaged is the Accused who effectively becomes a training aid for the officers concerned and ends up being judged by superiors who are not sufficiently senior to have ever been appointed as Subordinate Summary Authorities. While the junior officers have youth and enthusiasm on their side, I believe the Accused deserves to be judged by those with age and experience.

The minimum rank for members of a Court Martial has to be Major (E), and then only if that officer has held, or is currently holding, an appointment as a Subordinate Summary Authority. This would ensure that experienced officers of field rank sit in judgement upon their subordinates or peers.

I would further suggest that in both the General and Restricted Courts Martial, that a Warrant Officer Class One (E) be included in the court membership.

Summary Proceedings being closed

Unlike the proceedings before a Defence Force Magistrate or a Court Martial, a Summary Tribunal is not open to the public. I have participated in over 100 Summary Tribunals in my usual unit capacity as the Orderly, however I have attended some conducted in other units as a Witness and Defending Officer. In those trials where I was the Orderly, I have never seen anything which would make the attendance of the general public inappropriate.

We rigidly adhered to the requirements contained in Chapter 7 of Volume 1. The Summary Authority was required to conduct the trial according to law, without fear or favour, affection or ill-will. The Prosecuting Officer had a duty to present the evidence in a way which was fair to the Accused and was not to pursue a conviction at all costs. The Defending Officer was required to guard the Accused's interests by all honourable and legitimate means known to the law. The Recorder took an oath or affirmation that the proceedings would be truly recorded and transcribed and all Witnesses gave their evidence on oath or affirmation.

My experience with the Summary Tribunals conducted in my units is that they were shining examples of the Military Justice system at work, and rather than conducting them as closed proceedings, they should have been open to the public and all other interested parties.

It has been suggested to me that one of the reasons for Summary Tribunals remaining closed is because there would be insufficient room in the Commanding Officer's office for spectators. Any number of lecture rooms, conference rooms or theatres are available in every military area and they could be booked, just as they are for a trial by Defence Force Magistrate or Court Martial. There would be no problem setting up the tables and chairs required for the participants and the provision of additional seating for spectators would not be an issue.

On a slightly different track, it has also come up in conversation that the results of a Summary Tribunal (which are currently protected by the Staff-In-Confidence privacy caveat on the Accused's Conduct Record), should be published in Routine Orders so that the deterrent effect of the punishment imposed upon the Accused is not lost. I consider this to be the same as publishing information from a unit member's medical documents (protected by the Medical-In-Confidence privacy caveat) in the same Routine Orders informing the readers that someone is HIV positive.

If the suggestion is to publish the number of particular offences and the punishments imposed, it would be a smart move, however the written word often lacks impact.

Senior officers do not read about how good a unit is – they go and inspect it to see for themselves. Spectators do not read about a particular parade – they go to watch it. The impact of

the visual image is far greater than the written word (which is probably why TV has a greater impact than newspapers), and the most effective way of ensuring that punishments act as a deterrent is to have the tribunals open so that all unit members have the opportunity to see the military justice system in operation.

The easiest way to "*improve the transparency and public accountability of military justice procedures*" is to make Summary Tribunals open in the same way that trials by Defence Force Magistrates and Courts Martial are open.

The additional offence of "Perverting or Attempting to Pervert the Course of Justice"

I understand that The Defence Legal Service has considered the additional offence of "Perverting or Attempting to Pervert the Course of Justice" and believes that it is adequately covered by the Crimes Act, therefore a Territory offence under the Defence Force Discipline Act. I must admit that the Crimes Act is not something that I read on a regular basis, but let me give three instances where I believe this additional offence could have been used if it had been part of the Defence Force Discipline Act:

a. the officer who sat on an investigation into assault so that a fellow member of the defence force could be "discharged with dignity";
b. the officer who did not proceed with charges involving a male soldier assaulting a female of superior rank because he did not like women in the Army; and
c. the Prosecuting Officer who purposely did not prove all of the proofs at a trial so that his friend (the Accused) would have to be found Not Guilty and could not be retried.

Each one of these examples is an abuse of the legal process and was done to obtain an outcome inconsistent with the aims of the Defence Force Discipline Act.

The additional service offence of "Perverting or Attempting to Pervert the Course of Justice" would ensure that the malicious and perverted manipulation of circumstances surrounding an incident does not go unpunished.

Qualifications and experience of Summary Authorities

The Defence Force Discipline Act was introduced to the defence force in 1985, and for almost 20 years those officers appointed as Summary Authorities have never been trained, assessed on an appropriate course of training and then deemed competent to conduct a military court of justice.

This has placed the officers of our defence force in the unenviable position where they have been appointed and authorised by a superior to conduct Service Tribunals, yet have been denied the appropriate training necessary to carry out those responsibilities. This has effectively meant that, in the absence of suitable judicial experience, they have had to give it their "best shot".

Members of the public have a reasonable expectation when the family car is having the brake pads replaced, that the person carrying out that work has been trained, assessed and deemed to be competent by a suitable qualified Subject Matter Expert and is not just giving the brake pad job his "best shot". There would be a similar expectation that the driver of the local school bus has

also received appropriate training, assessment and has been deemed competent rather than giving the trip to school his "best shot".

No one would expect an unqualified member of the defence force to carry out the duties of a Pay Clerk, a Medical Assistant or a semi-trailer driver, yet it has been considered acceptable for Summary Tribunals to be conducted by unqualified officers.

As an additional observation, there is no course which trains, assesses and qualifies those officers appointed as the Presidents or members of either General or Restricted Courts Martial.

This situation cannot be permitted to continue and hilights the need for suitable training to be provided.

Training Liability to qualify all Summary Authorities

I estimate that there are 800 officers in the Australian Defence Force presently holding Summary Authority appointments and the task of ensuring that each has the requisite Skills, Knowledge and Attitude to conduct a Service Tribunal is going to be enormous.

An appropriate Summary Authority course would require duly qualified instructors (holding Certificate IV in Assessment and Workplace Training as required by Defence's Registered Training Organisation status), to deliver a national program of training, and later conduct assessment of the trainees. The training could be given to groups limited only by the size of the venue used, however the assessment would require classes of 10, therefore a total of 80 classes to get through the 800 incumbents.

This would permit the assessment of each trainee as a Subordinate Summary Authority, a Commanding Officer or a Superior Summary depending on their appointment. The only significant differences between the three authorities are the ranks of the Accused and punishments available, so the qualification would only have to be gained once. An Exercise 'Summary Proceedings' conducted with 10 trainees in each class would allow one trainee to be assessed as the appropriate Summary Authority while other course members roleplay the positions of Defending Officer, Prosecuting Officer, Accused, Orderly, Recorder, and two Witnesses for both the prosecution and the defence.

There would be no easy Guilty pleas or referrals to a higher authority, so that each trainee would have to put all of the training into practice. Each exercise scenario would have to be different from the others used by the class, so that one trainee could not be deemed Competent by simply repeating the decisions made during an earlier Summary Tribunal in which he/she played a role. There would be a range of charges, objections, evidence, witnesses, mitigation, and Accuseds' prior convictions so that all the trainees experience the real life situations which occur during Summary Tribunals. This would also ensure a reasonable spread of acceptable punishments although these are actually corrected if necessary during the Review process of real tribunals.

A trainee who arrives at the incorrect finding of Not Guilty (therefore no punishment, no conviction and no retrial), would be deemed Not Yet Competent and would have to be retrained and then reassessed.

As if this is not enough, every year approximately one third of the Summary Authorities are posted and while some would possibly move to another Summary Authority position, there would be a significant annual training liability generated by those who have been promoted to Major (E), and others who have never appointed as a Summary Authority and therefore have never been given the training.

The resources implications are mind-boggling, but there is a solution.

The Solution

The solution is to establish regional Summary Authority Teams (my suggested title) of a Lieutenant Colonel (E), two Warrant Officers Class One (E) and a Sergeant (E).

The Lieutenant Colonel (E) is the Summary Authority and can exercise the disciplinary powers of either a Subordinate Summary Authority or a Commanding Officer (depending on the rank of the Accused). He or she would require to be trained, assessed and qualified using an Ex 'Summary Proceedings' scenario and would replace the unit's officers who would normally conduct the Summary Tribunals.

The two Warrant Officers Class One (E) are the Prosecuting and Defending Officers, also trained, assessed and qualified using an Ex 'Summary Proceedings' scenario and would replace both the Prosecuting and Defending Officers usually provided by the unit. The unit member who investigated the offence and charged the Accused would assist the Prosecuting Officer. Witnesses would be required as is currently the case. In the situation where a member did not want to be defended by the Summary Authority Team Defending Officer, then the Accused could select any defence member who is reasonably available (which is the situation at present).

The Sergeant (E) would act as the Recorder, record the proceedings using the standard courtroom tape recorder, deliver the transcript and act as the team booking clerk.

The Defence Force Discipline Act applies to the three services and so tri-service rather than single service teams would be appropriate. The careful selection of retired members, employed as reservists on two years full time service would ensure that only experienced and competent personnel were team members. The teams would effectively relieve both full and part time component members of defence force units from the time-consuming and labour-intensive tasks associated with Summary Tribunals. HMA Ships at sea and operational deployments do not pose a problem: a team could use the same insertion/extraction system as would be used for a Very Seriously Ill member of a ship's crew and a team could be deployed to a theatre of operations in the same way as are legal officers.

The Defence Legal Service has access to tribunal, offence and punishment statistics and therefore is well placed to identify those areas in which these teams should be based. Units would simply book the team for a designated date and time and areas of particularly high workload would have two teams allocated, either on a temporary or permanent nature.

The advantages of this Summary Authority Team solution are:

a. it would immediately reduce the Training Liability from 800 to 60 (20 Lieutenant Colonels and 40 Warrant Officers Class One);

b. there would be minimal annual followup training required;
c. unit personnel (Summary Authorities, Defending/Prosecuting Officers and Recorders) would be released from those duties;
d. the Commanding Officer would be kept abreast of all investigations and disciplinary issues in the unit but not required to act as a Summary Authority if disciplinary proceedings were appropriate;
e. objections of bias would not occur because the visiting Summary Authority would know nothing about the case;
f. experienced and appropriately trained Summary Authorities would conduct the tribunals;
g. the open to the public tribunal would provide the opportunity for unit members to attend (the deterrent aspect), and allow the system to demonstrate that justice is done and can be seen to be done;
h. officer, warrant and non-commissioned officer training in Service Discipline Law would continue on promotion courses; and
i. the unit would still continue to provide the Orderly, conduct the post trial paperwork (fines, maintenance of conduct records, etc) and ensure the appropriate procedures are followed for Detention, Restriction of Privileges and other minor punishments.

In the case where a charge had to be referred from a Subordinate Summary Authority to a Commanding Officer, the case would be referred to one from another team. If the proceedings were referred to a Superior Summary Authority, the officers currently holding those appointments would be used. They would have to undergo the Ex 'Summary Proceedings' training and assessment (at the same time as the members of the Summary Authority Teams), and this would increase the numbers in the sub-paragraph 'a' above.

Additional issues to be given in camera

There are a number of additional issues which it would be appropriate to raise with the Committee, however these I believe should be delivered in camera.

Conclusion

The focus of this submission has been on those areas of the Defence Force Discipline Act and its application to the Australian Defence Force which are either unfair, ineffective or have just plainly reached their 'use by' dates. I believe that changes need to be made in order to bring Australia's military justice system to the point where it is impartial, rigorous, fair, transparent and accountable to the Australian public.

I have no doubt that by the time this document reaches you, the majority of my concerns will have already been brought to your attention by other interested parties. Regardless, I would like the opportunity to give oral evidence to the Committee and to address additional issues in camera.

DOUGLAS McDONALD

20th February 2004