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Reference: Defence Legislation Amendment Bill 2007

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SENATE STANDING COMMITTEE ON

FOREIGN AFFAIRS, DEFENCE AND TRADE

Wednesday, 5 September 2007

Members: Senator Payne *(Chair)*, Senator Hutchins *(Deputy Chair)*, Senators Mark Bishop, Forshaw, Hogg, Sandy Macdonald and Trood

Participating members: Senators Adams, Allison, Bartlett, Bernardi, Birmingham, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, George Campbell, Carr, Chapman, Cormann, Conroy, Crossin, Eggleston, Chris Evans, Faulkner, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Heffernan, Hurley, Joyce, Kemp, Kirk, Lightfoot, Ludwig, Lundy, Ian Macdonald, Marshall, McGauran, Mason, Milne, Nash, Nettle, Parry, Polley, Robert Ray, Scullion, Siewert, Sterle, Stott Despoja, Watson, Webber and Wortley

Senators in attendance: Senators Mark Bishop, Cormann, Forshaw, Hogg, Hutchins, Sandy Macdonald, Payne and Trood

Terms of reference for the inquiry:

To inquire into and report on:

Defence Legislation Amendment Bill 2007

WITNESSES

Committee met at 9.26 am

WILLEE, Mr Paul Andrew RFD, QC, Chairman, Military Justice Working Group, Law Council of Australia

CHAIR (Senator Payne)—I declare open this meeting of the Senate Standing Committee on Foreign Affairs, Defence and Trade, which is inquiring into the provisions of the Defence Legislation Amendment Bill 2007. These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken. The committee will then determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

I welcome our first witness. The committee has before it a submission from the Law Council of Australia, which we have numbered eight. That is now a public document. Do you need to make any amendments or alterations to that submission?

Mr Willee—I think we do. I did indicate to the committee secretary yesterday that, in the second sentence of the second paragraph of the submission, there is a reference to the comments being applicable to the bill relating to appeals from summary conviction. It is not limited to summary conviction. 'Summary convictions' was not really what it was about; it was about the matters it goes on to deal with. It would be appreciated if there could be a deletion from summary convictions.

CHAIR—On the second paragraph on the first page?

Mr Willee—Yes, the second sentence I think it is.

CHAIR—Is there anything else?

Mr Willee—The only other thing is that in paragraph 2, in the copy of the submission that appears on the website, there is a comment which we should have removed before it was sent to you. That comment is one that was made by me.

CHAIR—I understand it has been removed.

Mr Willee—Then I do not have to worry about it. Thank you very much.

CHAIR—Is there anything further in relation to the submission?

Mr Willee—No, there is nothing further in relation to the submission that I would wish to change. I would indicate to you that the submission was made at very short notice and without a proper opportunity to review the proposed amendments in DLAB7. Having had a little more time since then, whilst I cannot do so in the capacity as the chair of the LCA's working group, I would like to address some comments about another aspect of the bill which concerns me, and that is the one that deals with the evidentiary process.

CHAIR—I now invite you to make an opening statement concerning the Law Council's submission and those points that you have just raised, and we will go to questions after that.

Mr Willee—An opening statement in relation to the submission that we have just referred to is really unnecessary, having regard to the fact that the totality of the material is contained in the submission itself, which is very short and on a very narrow issue. However, for the sake of the record, perhaps I should say that it is directed to a problem which is often caused, particularly for the prosecution but equally for the defence. When a ruling is made which in itself will be so fundamental to the way in which the proceedings will or will not go on, there ought to be a provision similar to the provision that we have extracted from the New South Wales act. That provision ought to enable those issues to be dealt with in appropriate cases to prevent unfairness, a miscarriage of justice and, perhaps equally important, a colossal waste of time by people trying to go through the same process using the prerogative writs.

It is a simple thing to do. We do not say that the model that we have used as an illustration is the only model. It is one that has stood the test of time in New South Wales and has been the subject of litigation—so people understand what it does. But it will not have escaped your notice that it is a model which seems to favour the prosecution rather than the defence. That does not have to be so, but there are good policy reasons for it having been cast in that form. They usually relate to the fact that very often what is the subject of a challenge is the fundamental question of whether the prosecution can ever get off the ground with its case because some vital piece of evidence—usually the record of interview—is ruled against by the presiding finder of fact and the prosecution has no remedy for that.

True it is that the provisions of this bill provide for an appeal in those circumstances after the event, but very often the very event that gives rise to the matter is the one that requires the remedy and is important enough to require action straightaway. In the case of the defence, a huge cost and expense—which usually the defendant does not have to throw away—is occasioned by waiting until after the appeal or having to deal with it because the prosecution brings the matter after the appeal when the defence is not necessarily terribly interested and may not really provide a proper basis for testing what the prosecution is putting in those circumstances when their situation may not be affected by the result. There just does not seem to be any real advantage, other than non-interference with the criminal trial process—which is always a matter of great concern—in leaving it until afterwards. In our view, it would be much better that it happen at the time if it is important enough, and that can be determined in circumstances where it is only done by leave.

I do not believe I need to say anything more by way of opening in relation to that process. There is another matter that I have discovered since the submission went in—and, therefore, these are observations of mine because I do not have the authority of the Law Council to make them. I am very concerned with the provisions of proposed section 146A, which is headed 'Evidence in proceedings before a summary authority'. My opening statement might as well be my full submission, because you have had nothing to date and those seated behind me, who all seem to have accepted this process, have had no opportunity to address anything to the contrary. Proposed section 146A effectively provides that:

(1) In proceedings before a summary authority ... the summary authority:

(a) must comply with the Summary Authority Rules; and

(b) consistently with those Rules:

(i) must act with as little legal formality or legal technicality as possible, while ensuring fairness; and

(ii) is, subject to this Act, not bound by the rules of evidence, whether statutory or common law; and

(iii) may admit any documents or call any witnesses that the summary authority considers to be of assistance and relevance; and

(iv) may give such weight as the summary authority considers appropriate to any evidence admitted under subparagraph (iii), having regard to the importance of the evidence in the proceedings and its probative value.

In my opinion, this would take us back to the time when we first started to do something about the imperial acts and make sure that there are proper rules for dealing with summary matters—the importance of which cannot simply be downgraded, and never were up until this time, as being something that does not matter. If it is worth doing, it is worth doing well and it is worth doing properly.

The problem, then, apart from consistent command interference—which has been dealt with fairly well by this bill—was of course the caprice and ignorance with which summary authorities treated those brought before them. It was encapsulated in the phrase, which you will excuse me using: 'Wheel the guilty bastard in.' It is one that caused a pervasive feeling right through the service that any summary proceeding was predetermined, and that particular pervasive feeling was not misplaced. That is inevitably what happened in many, many cases, but it made it extremely difficult for those who tried to follow the rule of law—however lacking in legal training they were—to provide a reversal of that feeling and to convince people that they were being dealt with appropriately.

That is why nearly 30 years ago steps were taken to provide a system which did away with that and to make sure that there were provisions for the use of rules of evidence in a proper way and instruction, particularly of commanding officers, to a limited extent as to what was required in that regard. The other provision put in place was a provision that was then called a 'command legal officer'.

Senator MARK BISHOP—I am sorry to interrupt; what was the first thing put in place 30 years ago to address that mischief?

Mr Willee—The indication to commanding officers that they were required to follow the rules of evidence. What was put in place, apart from a limited instruction of them for that purpose, was the provision of what was then known as a 'command legal officer', who could stand by while they were doing summary matters and make sure that, if there were obvious breaches of the rules of evidence, they could be drawn immediately to the attention of the presiding finder of fact.

That process went on unimpeded, as far as I know, until the introduction of this bill. Those who have embraced the current proposal to effectively do away with it do so, as I understand it, on the basis that there are review provisions and appeal provisions which make it unnecessary. That view is fundamentally flawed. Firstly, why would we introduce into a system, which we are trying to make as perfect as possible, something which is intrinsically

requiring review and appeal? Secondly, it is flawed because the penalties, which are still extant, are very much serious enough to warrant compliance with those evidentiary rules. They include incarceration of a sort. Even if they were the lowliest penalties, it has to be remembered that the morale of the service dependent on a disciplinary process is only to be enhanced by the following of the appropriate rules as is done in most, if not all, civilian disciplinary processes of this sort. There is a greater need for it in a disciplinary service.

Those soldiers, sailors and airmen who do not see being a member of the forces as just another job can often be cut to the quick by the mere fact that they might be charged. It is extremely important to them and, even though we have in this bill now downgraded summary convictions to a situation which will not affect them in civilian life, if you want to be a career serviceman you want your record completely unbesmirched. It is that important to these people. If you take that away from them then you denigrate the form of their service and the way in which they look at the job. That is bad for morale.

It will be said that the review provisions are a protection, and so they are. But again why are we inviting error, putting further cost expense on the system and removing the very worthy training effect that the process had up until now? It should have been enhanced as a training process, not done away with keeping summary authorities in the knowledge that they had to follow these sorts of rules. There will be no training effect once they can do what this provision allows them to do, which is virtually anything. There will be nothing of that sort so far as they are concerned except for the very conscientious ones who perhaps may be able to get their hands on somebody to assist them in any particular situation.

The appeal provisions are said to be a protection but when one looks at section 168B headed 'Evidence' one wonders what sort of a protection it will be. Section 146A applies to an appeal in the same way as it applies to proceedings before a summary authority. Does that mean that the appeal process sees what is obviously a reliance on fifth-hand hearsay? How does it disturb that when it does not like it and when the particular summary authority is entitled to rely on it, and when section 169B says that the same rules apply on appeal?

For the purposes of subsection (1) references to proceedings before a summary authority are to be read as references to an appeal before the Australian Military Court; and references to a summary authority are to be read as references in that context, except in relation to the exception in subsection 111A(1), which is immaterial for these purposes. It would be my submission that the inclusion of that section seems to make it implicit that, in respect of both reviews and appeals, the reviewing authority and the court are bound to take account of the fact that the rules of evidence need not apply. And just because they have been ignored or have been circumvented in a way would be no reason to set aside the result, because the summary authority was entitled to proceed in that way. Those behind me will say: 'Of course that will never happen. We will have people in place who simply wouldn't do that.'

The other problem is that the reviewing authorities are not legally qualified either. They are required to have, in almost every case, recourse at some stage of the review to the advice of a legal officer, but 'competent reviewing authority' under these provisions does not mean competent in the sense of properly or sufficiently qualified, capable and legally fitted for the task; it just means untainted by previous involvement in the particular matter. They are only guided by a legal officer. I do not wish to in any way be taken to denigrate our legal officers

on that basis. It is no denigration of persons doing a job that they have not had the experience or the training to do this sort of work in review or to assist in doing it or to be forceful enough to tell a summary authority, 'Look, you got it wrong, Boss.' Many of them are and many of them will gain a great deal of courage now from the fact of the provisions in this bill that allow them, at least in law, to escape the influence of a commander. The reality is, of course, that commanders have more than one way of skinning a cat, and it is not a good look.

That is a direct contrast, so far as I can see—and I have not had time to go through this meticulously—with what reviewing authorities' qualifications were before they appear to have been swept away by this piece of legislation. Under the old provisions, section 154 of the act in fact provided for a reporting officer appointed by the Chief of the Defence Force on the recommendation of the Judge Advocate General. Here, I cannot see any provision going beyond 'legal officer'. There is nobody of the type referred to in that section which was:

A reviewing authority shall not commence a review without first obtaining a report on the proceedings from:

(a) in the case of a conviction, or a direction given—

under the subsection—

by a court martial or Defence Force magistrate--a legal officer appointed, by instrument in writing, for the purposes of this section by the Chief of the Defence Force or a service chief on the recommendation of the Judge Advocate General;

I cannot find any equivalent provision. It seems to be reduced to 'any legal officer' and in subsection (b) 'in any other case—a legal officer', as it was under the old provisions. That sort of provision was the bread and butter of the sort of work that the current newly appointed Judge Advocate did, that people of the stature of Air Commodore Kirkham did and that even people as lowly as me did. And it was done with a great deal of consideration, with not only 40 years experience in the service but 40 years experience in civilian practice, dealing with the same sorts of problems. I do not see any provision for that in the current bill, but I could be corrected. I have not had time to go through it with a fine toothcomb. If there is such a provision, that is good. If there is not, I think it is a pretty bad retrospective step.

As we have said in the Law Council submission, regarding the people who we understand are going to be appointed to deal with appeals in this matter, aside from Brigadier Westwood, who has a great deal of military trials experience and a very fine legal mind, the others appear to us to be very sadly lacking in that respect. I think that one who is slated, if I am correct, has had no trial experience at all. The concern then is that there needs to be some way of putting the experience that this process requires back into both these areas.

I will finish on a slightly more serious note by citing an example of the sort of thing that can go wrong in a summary process. I am going to refer to the records of a hearing that came up for review in the matter of 8220918, Private AM Taylor, and the Judge Advocate General's advice of 3 December 2003. This was at a time when the training process should have at least had some effect. It had been in effect to a greater or lesser extent for nearly 30 years by then. Yet the records of that hearing were sparse, incomplete and internally contradictory—so much so that those doing the review decided to make inquiries concerning the onus and standard of

proof that was utilised by the summary authority in that hearing. The answer that they got was this:

In relation to the standard of proof applied at the trial, I applied the criminal standard of proof. In this particular case, I wrote down all the proofs of the charge and then invited the prosecution to prove each of the proofs. When the prosecution had satisfied me—

And that would mean, on the criminal standard, beyond reasonable doubt—

they had proved the proof beyond reasonable doubt, I marked the proof with a tick.

This was before the defence was even heard.

If the prosecution proved the point with several proofs in support, I would tick the proof with a commensurate amount of marks. I would then hear from the defence, who would have to disprove the prosecution's case.

That means that they would have to disprove the proof of something which, of course, has already been proved beyond reasonable doubt on this particular approach. The answer continued:

If the defence is successful in disproving the prosecution's proof then the member is not guilty of the charge. The defence is only required to disprove one of the proofs for a finding of not guilty.

That particular case involved the defence doing what was perfectly proper, accepting all the prosecution's statements as to what the facts and matters were. Without the prosecution calling any witness, the defence then called the accused and, following the evidence of the accused, called the prosecution witnesses apparently for the purpose of them being cross-examined. A very interesting privilege was then accorded to the prosecuting officer, who no doubt thought all his Christmases had come at once. That is an extraordinary departure. None of it would have come to light if the reviewing authority had not taken the trouble to inquire what sort of process was being applied. It is very funny as long as it does not happen to you. I do not think I can be any more helpful, but I am happy to take easy questions.

CHAIR—Thanks you, Mr Willee. I am not sure it is very funny at all.

Mr Willee—I agree that it is not funny.

CHAIR—May I start with your observations in the submission in relation to the right of the DMP to be able to appeal to the Defence Force Discipline Appeals Tribunal—the issue you talked about at the beginning. Is it the council's view that, if that matter is not rectified within the legislation, the bill should not be passed?

Mr Willee—The council does not make those sorts of judgements. What it does is to try to provide improvement. It would certainly not be as presumptuous as to say that the bill should not be passed.

CHAIR—I think the council has recommended that to me in other contexts in other legislation. I just thought I would seek your view on this one.

Mr Willee—I certainly would not be that presumptuous. It is not something that the system cannot live without.

CHAIR—I think you said in your remarks that the section of the Criminal Appeal Act (New South Wales) which you cited has stood the test of time. Given the context in which the

section is drafted, do you think that, if you were to introduce a similar section into this legislation, a concern of the defence might be that it could cause unnecessary delay or that it might fragment the legal proceedings?

Mr Willee—Those sorts of policy considerations are always a matter of some importance. But, clearly, with the hedges that the New South Wales section has put on the process, it has not; otherwise, something would have been done about it. It enhances the process. Very often the defence are in the same position, but it has always been noted that there is a vast difference between being a prosecutor and a defender. A prosecutor must act, as it were, as a minister of justice. The requirement to behave in that way means that prosecutors, and particularly directors of military prosecutions, do not interfere in criminal trials because it is to their advantage to keep them running unless it is absolutely necessary to stop them for this purpose. Defence, on the other hand, must do their utmost within the rules for the person whom they represent. That often means that they are not motivated, from a policy point of view, with the same care and attention to what effect it is having on the trial process unless it is going to work against them.

Since usually delay works in favour of the defence, that is probably the reason behind the policy that requires them to get leave as is set out in the section, whereas the director can have this under the section as of right, as it is spelt out, but a defendant seeking to do the same thing would require leave. That is the safeguard that we thought, in making the submission, highlighted the distinction—which made it more acceptable. But there would be those who would say that they both should be treated equally. I doubt whether the prosecution in defence matters would be concerned if they had to get leave. That would put them on an equal footing and that would stop any undue interference.

CHAIR—In the council's submission, you have effectively reproduced section 5F of the New South Wales Criminal Appeal Act and amended references to the Court of Criminal Appeal with insertion of the Defence Force Discipline Appeals Tribunal. It seems to me that your proposition is that, effectively, this would be a fairly simple amendment to introduce into the process. You do not think it would require complex drafting and substantial amendment?

Mr Willee—There is nothing complex about this proposal.

Senator MARK BISHOP—Mr Willee, you might just put on the record your background of your military capacity or military experience.

Mr Willee—I am happy to do that, but I am not sure there is time.

Senator MARK BISHOP—Briefly.

Mr Willee—I started life as a Reserve Ordinary Seaman. I did an officer's training course and was promoted to sublieutenant. In the process, I became a diver. I cross-trained in both diving disciplines but to a limited extent in the clearance diving area. I then took on being the OC of the only operational diving team in Victoria. At the same time, I procured a law degree. At that stage the Navy was looking for lawyers, and I did their work even though I was not part of the panel. So, from 1971 or thereabouts, I acted in the capacity of both a diving officer and a lawyer. After that, pressure was put upon me to change over. The inducements were extremely bad, and I resisted. I did not want a busman's holiday but, for once in my life, I had to obey a superior authority and did so. Thereafter, I became a counsel in many military

proceedings, both as prosecutor and defence. In the civilian field, I had become a prosecutor for the Queen in Victoria. I was seconded by the minister of defence to do the piracy inquiry in the Northern Territory. At the latter stages of that, I formed and was put in charge of the Victorian commercial crime group. I was then seconded by Gareth Evans as First General Counsel to the National Crime Authority. I went back into private practice in 1986, all the while doing what I could in relation to naval legal matters as counsel, as judge advocate and as a Defence Force magistrate. Eventually I was induced to step out of the arena by becoming a section 154 reporting officer. Ultimately, before I was declared statutory senile in November last year, I became the head of the military bar and that was the position I held when I left.

Senator MARK BISHOP—Thank you. Would you characterise the appeal tribunal, the DFDAT, as primarily a criminal appeal tribunal or primarily an administrative tribunal?

Mr Willee—I would characterise it as a criminal tribunal. It conducts itself as a court of appeal, not as an administrative tribunal.

Senator MARK BISHOP—It being so characterised, in your experience in the various state jurisdictions, and indeed in the Commonwealth jurisdiction in criminal matters where it applies, is it customary in those areas to have interlocutory proceedings part heard in criminal matters?

Mr Willee—It can happen, but I would not call it customary. Interlocutory matters in criminal proceedings are generally dealt with as swiftly as possible.

Senator MARK BISHOP—Getting to the heart of your complaint, if there is an issue as to whether particular material evidence should be admitted to the trier at first instance, in most criminal jurisdictions is that heard and determined at that instance or is there an appeal against his decision part way through the proceedings if either side is of the view that he makes the wrong decision to admit that evidence?

Mr Willee—It depends. Both situations are possible. If either side regards it as that important to their case then they will, as the saying goes, go over the road and get the appropriate order for the proceedings to be stayed and for the application to be made as soon as possible. The court will facilitate that happening as quickly as possible. However, in one case years ago called Beljajev, which took three years to get to the door of the court, I can recall that the matters of concern to the prosecution in relation to that trial were so huge that, when the interlocutory matter was brought before a single judge of the Supreme Court of Victoria, the hearing took three weeks and Justice Brooking had no hesitation in making the declaration. The declaration had the effect that was required. That is at odds with what we seem to be saying in our submission about how difficult it is, but it is very difficult and it was very difficult for the prosecution in that case. They got in by the skin of their teeth.

Senator MARK BISHOP—I certainly understand the seriousness of the issue you have brought to our attention. I am trying to get some advice as to what the customary practice is in non-military criminal jurisdictions, Commonwealth and state, around Australia that might warrant the defence tribunal in this case being treated either the same or differently, if there is a norm outside the defence tribunal.

Mr Willee—I do not think there is a norm, the reason being that there are two streams of competing judicial jurisprudence. One is that a criminal trial should never be interfered with,

except in very exceptional circumstances. The other is that every so often something pops up which stands out so badly that action has to be taken. One is very much at the mercy of what appears to be the capricious nature of the court in that circumstance. But here, as we have cited in Brigadier Westwood's case, there was simply a finding by the appeal judge that such circumstances could never be proved. You still have this tension between the two, but the courts resolve that and, in my experience, if I may say so, they resolve it correctly in the way in which they go about it. It is part of the experience of judicial discretion that they are able to do that. You cannot put that into words—nobody can put a discretion into words—but instinctively in my experience they have got it right.

Senator MARK BISHOP—Okay. Let me ask a question flowing on from that. I asked you earlier to outline your extensive legal and military careers, and you did so. Is the likelihood of a miscarriage of justice, of misuse or abuse, in the summary tribunals—either in Australia or in the field, if necessary—so great that we should seek to insert the sorts of protections that are in the New South Wales act, and which are sometimes a feature of other criminal jurisdictions around Australia, into this bill before it is passed by the parliament? I am asking for an answer in your experience not necessarily the Law Council's formal position.

Mr Willee—Yes. There are several reasons for that. Firstly, because it is such a simple thing to do; secondly, because the military has the capability within its disciplinary process to make sure that it is used appropriately; and, thirdly, because I am concerned about the level of experience of those who give rise to rulings which need to be dealt with in this way. I say that without denigrating them in any way whatsoever.

Senator MARK BISHOP—Protection first is your argument?

Mr Willee—Yes. The judicial process requires—Sorry, I did not mean to interrupt.

Senator HOGG—Sorry, I was making an aside to my colleague that we are dealing with Defence.

Mr Willee—The actual judicial process, be it in Defence or anywhere else, requires fairness to both sides. The prosecution has as much of an interest in preserving discipline as the defendant has in being treated fairly, and there is no reason why both of those things cannot be catered for.

Senator MARK BISHOP—You may not wish to answer this next question; if you do not, certainly you do not have to, Mr Willee. We received six or seven submissions from various arms of the ADF, all of which were in support of the various provisions of the bill almost in their entirety. We also received a submission from the Judge Advocate General, who did not draw to our attention the criticisms that you have mentioned. Why would that be the case?

Mr Willee—There are a number of reasons. The principal one is that it is very attractive for command to get back to a situation where it thinks its people can deal with these matters, because it is very good for the disciplinary process. That is the first reason. So it is easy to slip into the laudatory suggestion that this is a good thing. The second matter of so much concern to me was that Brigadier Tracey had not addressed it. In the short time I had I did not have any time to consult with him, but I did consult with the former Deputy Judge Advocate of the Air Force and say, 'Am I missing something here?' He said, 'No, you are absolutely right.' It

is on that basis that I made the comments. Certainly it gave me pause to think that somebody such as Brigadier Tracey had missed it—if he had missed it; I do not know. I will have to take that up with him at some later time. It is not something I have had a chance to put to him.

Senator MARK BISHOP—Thank you, Mr Willee.

CHAIR—Mr Willee, you raised material in relation to 146A(1)(b)(ii) on questions of the rules of evidence, and I am working from your statements this morning, not from anything more formal than that. It seems that the issues you raise about the manner in which the summary authority can operate, and operate not bound by the rules of evidence, are quite serious, but I note that the preceding subsection, subsection (i), refers to the desire for the summary authority to act with as little legal formality or legal technicality as possible while ensuring fairness. Without wishing to put words in anyone's mouth, I assume that one of the reasons for which subsection (ii) may have been included was to give effect to subsection (i), that if you have a more informal environment—and I absolutely understand the issues that you have raised—then you can have proceedings which are not as formal or technical and are therefore dealt with summarily, as you might say; and that makes the whole process so much more simple.

Mr Willee—Softer.

CHAIR—And softer.

Mr Willee—Yes, and there is a place for that. I doubt whether that place is one that the average serviceman would recognise, where his legal rights were being dealt with in a way which related to discipline. You can hardly come off the parade ground, having been disciplined and understanding the way in which the service works, and feel comfortable with a fireside chat with your CO while he heats the poker with which he is going to brand you. I believe that times have moved on from that position inasmuch as it is possible to have a process such as the one I have just derided, but it has to have some constraints. Those constraints are ones which make people feel comfortable with the process, and there are many ways of doing that—that is what I think is meant by informality—without throwing away the need to make sure that you are not listening to what the warrant officer is telling you Corporal Jones says he saw on the wharf the night before, but Corporal Jones is not available, or what Corporal Jones thought Sergeant So-and-so said to him about such-and-such that relates to the matter. It needs to have some constraints.

CHAIR—While you were making your observations this morning, I was looking at the penalties and punishments aspects of the bill, and I think you then went on to say that these are not insignificant to a service career and in the effect on one's service career.

Mr Willee—What I said was that, even where they appear to us to be insignificant, to the serviceman who does not regard this as just another job but who really wants to be part of a service—and there are still a lot of them left—to be even accused of such a thing is very distressing from the point of view of their attempt to achieve perfection.

CHAIR—You gave us a brief historical analysis, if you like, of the circumstances where due attention was paid to the need to be guided by the rules of evidence in the last couple of decades, as these proceedings have grown and changed. You are advantaged by that perspective, so I rely on your words here today. I summarise, in my own mind at least, what

you said as meaning that this would be a retrograde step to remove the guidance of the rules of evidence and to go back to a point which needed to be addressed and ameliorated by the reintroduction of consideration of the rules of evidence, and that from your perspective you do not understand why we would be doing that.

Mr Willee—Yes, exactly. It is not fair for me to characterise it as a reintroduction. Forty years ago, very often the only advice as to the rules of evidence, or what people thought they were, was coming from non-legally-qualified judge advocates who had through their experience built up an understanding, but there was no real formal attempt to acquaint summary authorities with the absolute rules of evidence as we know them that came in in the Evidence Act and various other provisions. It was not a one-slap process; it was a gradual matter. It was an attempt to breed the evidentiary process into the disciplinary process.

CHAIR—If you combine (ii) with (iii) and (iv), the defendant can find themselves in a quite remarkable situation. You have talked about fifth-hand hearsay, but they can find themselves in a quite remarkable situation in trying to put together a defence that responds to any documents or witnesses that might be helpful or relevant and given weight by the summary authority without any guidance at all on the rules of evidence. How would you suggest a defendant deals with that?

Mr Willee—As a last resort, where a defendant feels that they are disadvantaged because things are brought out of the woodwork, as it were, and they have not had a chance to deal with them, there is always a process of getting an adjournment. In disciplinary matters, it is not all that easy to get an adjournment but it certainly is possible. A summary authority attempting to be fair would give a defendant time to do that if he understood that was one of his rights.

CHAIR—That is a big 'if'.

Mr Willee—Yes. As I say, that is why it is such a retrograde step; it goes back. Defendants have access to legal officers too, but the legal officer can only give advice on the material that the defendant brings to them. If something is sprung later on then there is a lacuna. There is no advice on that particular matter. I am not so much concerned with the unfairness of that aspect, although it is obviously a detail which you have teased out which is part of the real problem.

CHAIR—When you take the next step, which you did, and look at 168B, which transposes the application of 146A in initial proceedings to proceedings on appeal, that also includes, as I understand it, an appeal before the Australian Military Court itself.

Mr Willee—I have not teased that through.

CHAIR—It says:

> (a) references to proceedings before a summary authority are to be read as references to an appeal before the Australian Military Court ...

Mr Willee—Yes. That was the point I was making. You would expect there to be a section that does that in relation to appeals to the Military Court because, after all, in normal circumstances where properly qualified people are appointed to that court the sorts of concerns that I have are going to be lessened. When you have been practising in the civilian field you are constantly dealing with these tribunals which are not bound by the rules of

evidence. The general rule is that most practitioners in those circumstances will follow the rules of evidence unless there is a very good reason not to do so.

CHAIR—But they are not usually dealing with matters of criminal concern.

Mr Willee—Those sorts of tribunals do not really exist in the criminal sphere—

CHAIR—That is right.

Mr Willee—but, where they do, they are generally regarded as pretty awful. I do not want to tar anybody with a particular brush, but medical boards and psychologist boards make some awful decisions.

CHAIR—I might be misreading this—I am very happy to be corrected—but if you read 146A and then look at 168B, you will see that it says, '146A applies to an appeal in the same way as it applies to proceedings before a summary authority.' I read that to mean that the rules of evidence do not apply in the appeal process either.

Mr Willee—In that particular instance—

CHAIR—Yes.

Mr Willee—in relation to an appeal about a summary matter.

CHAIR—Yes. Therefore, does it also mean that the rules of evidence do not apply in relation to an appeal from a summary matter before the Australian Military Court?

Mr Willee—If that is where the appeal is, as I understand it, the application of the section goes.

CHAIR—So we end up with the rules of evidence not applying in the AMC?

Mr Willee—Only in relation to—

CHAIR—Certainly, but it is still the Australian Military Court.

Mr Willee—That is the way I read it. I am happy for one of my colleagues to correct me.

Senator MARK BISHOP—But there would not be any new evidence at the appeal court, would there?

Mr Willee—There could be. There could be new evidence; it could be dealt with on the papers; it could be dealt with by hearing; and, indeed —

Senator MARK BISHOP—Is the appeal court hearing a de novo hearing? Can the appeal court hearing in these summary criminal matters be a de novo hearing as well as an appeal on the—

Mr Willee—I have not analysed that yet, but I do not believe so. What this legislation seems to be saying is that the appeal can be conducted on the papers or it can be conducted by an appearance on behalf of the parties, and indeed there is a provision which requires such a hearing if the court thinks that is necessary.

CHAIR—That is in 168A.

Senator FORSHAW—So you have to make an application to introduce fresh or new evidence on the usual criminal—

Mr Willee—Yes. Those provisions are also there.

CHAIR—But it can be done without observation of the rules of evidence at the level of the Australian Military Court for those matters which may be summary proceedings which flow from a decision of a summary authority—I understand that.

Mr Willee—I believe that to be what it says.

CHAIR—I can seek clarification of that.

Mr Willee—I may be in error about that. As I said, I have not had the greatest amount of time to look at it, but it seems to me that that is what it says.

CHAIR—In that regard, in this process at least.

Mr Willee—The other part of it is that, if it does it in that forum, it does it in reviews as well. So what will a reviewing officer say? 'He was entitled to do that because the statute says that he can proceed in that way,' even though I would not have done it.

Senator MARK BISHOP—At the summary hearing, if the rules of evidence do not apply and a piece of material can otherwise be introduced and have probity of value, when you go to the appeal court, either on merit or a point of law, wouldn't it be logical to have the same lack of rules of evidence applying at the appeal court level as it does at first instance?

Mr Willee—That is how I read what the provision does.

Senator MARK BISHOP—Yes, it is entirely logical.

Mr Willee—But that does not mean that that is what they intended.

CHAIR—That does not mean it is appropriate.

Mr Willee—There may be some other reason why they did not intend that.

Senator MARK BISHOP—The chance is that it may not be appropriate, but I accept that it is certainly logical, otherwise you have different rules applying.

Mr Willee—But, in any event, the argument—

CHAIR—We do not want the court and the AMC not complying with the rules of evidence, frankly.

Senator MARK BISHOP—They do at first instance.

Mr Willee—The argument against my proposition would be that, as happens in the civilian arena, once it gets to that level they are going to follow the rules of evidence, unless there is a good reason to not do that, and that it is the safeguard.

CHAIR—But it is an informal one, not a formal one.

Mr Willee—It is totally informal, but that is generally what is done.

CHAIR—As there are no further questions, I thank you very much for travelling to Canberra to assist us in the hearing this morning. We really appreciate your time and your observations. If there are any further matters which you think the committee should pay attention to, then we would be happy to hear about those. However, today is effectively the reporting date for the committee. I am not sure how we will end up handling that, but your assistance has been most gratefully appreciated.

Mr Willee—Thank you very much. I am very grateful for those remarks and very pleased to have been of some service.

CHAIR—Thank you. You have.

[10.32 am]

BONSER, Rear Admiral Mark, Head, Military Justice Implementation Team, Department of Defence

EARLEY, Mr Geoff, Inspector General, Australian Defence Force, Department of Defence

HARVEY, Air Commodore Simon, Deputy Head, Military Justice Implementation Team, Department of Defence

McDADE, Brigadier Lynette Anne, Director of Military Prosecutions, Department of Defence

CHAIR—Welcome. The committee has before it a number of submissions, including a submission from the Inspector General, Australian Defence Force, numbered 1; a submission from the Acting Chief of the ADF, numbered 4; and a submission from the Director of Military Prosecutions, numbered 7. They are all now public documents. I invite officers to make an opening statement, after which we will go to questions.

Rear Adm. Bonser—Thank you, Madam Chair, I will make an opening statement. As the committee would be aware, the purpose of the Defence Legislation Amendment Bill 2007 is primarily to give effect to key elements of the government response to certain recommendations of the 2005 Senate report *The effectiveness of Australia's military justice system*. In particular, it introduces a right of appeal from a summary authority to the new Australian Military Court and a right to elect trial by the new AMC instead of a summary authority, except for certain service offences that must be tried summarily to maintain the discipline and moral of a fighting force. The bill also provides for a simplified but fair evidentiary framework at summary trials, enhancements to certain offences and punishments and improvements to the jurisdiction of superior summary authorities and discipline officers.

The development of the bill has benefited from very broad consultation both within the ADF and with Defence as a whole and external to Defence. As the committee would note from the submissions to the committee, there is wide agreement to the bill. It not only meets the discipline requirements of the CDF and the services, who are reliant on it to do their jobs, but also reflects the individual views of ADF members, particularly their views on the need for a simpler but fair evidentiary framework for summary procedures which have been informed through the comprehensive audit and review process that is managed by the Inspector General of the ADF, Mr Earley.

The considered advice of the Judge Advocate General, the Director of Military Prosecutions, Defence Legal, the Australian Government Solicitor and the Attorney-General's Department has also contributed greatly in confirming the legal and constitutional validity of the provisions, as well as ensuring the necessary safeguards are in place to protect the rights of individuals. Defence has recently provided clarification on some minor drafting and other matters in the bill, as requested by the committee. I trust that the response met the requirements of the committee.

As the committee would be aware from that correspondence, the key provisions in the bill were quite complex and required considerable drafting effort. I am very grateful to the Office of Parliamentary Counsel for its advice and efforts in amending the DFDA to reflect the agreed recommendations of the Senate report. Regrettably, a number of additional matters that Defence would have liked to address in this bill could not be completed to meet legislative timing for 2007. They will now be brought forward in legislation that Defence will be proposing for 2008. The very important changes in the bill are intended to ensure the right balance between the maintenance of discipline, which is critical to operational effectiveness, and the protection of the rights of Australian Defence Force members. The need to ensure this balance is one of the unique aspects of military discipline. This is unique not just to the ADF but also amongst our allies who share our common-law heritage. The Canadian *Military Justice at the Summary Trial Level* manual recognises these unique aspects similarly to the ADF. It identifies that the broader scope of military law and the unique requirements of discipline were acknowledged by the Supreme Court of Canada, similarly to the acknowledgement by the High Court of Australia. A particular judgement of the Supreme Court of Canada articulates the need for discipline in the following words:

> Without the code of service discipline the armed forces could not discharge the function for which they were created. In all likelihood those who join the armed forces do so in time of war for motives of patriotism and in time of peace against the eventuality of war. To function efficiently as a force there must be prompt obedience to all lawful orders of superiors, concern, support for and concerted action with their comrades and a reverence for and a pride in the traditions of the service. All members embark upon rigorous training to fit themselves physically and mentally for the fulfilment of the role they have chosen and paramount in that there must be a rigid adherence to discipline.

The Canadian manual says:

> ... If obedience cannot be ensured by willing compliance then it must be enforced by corrective action. In some cases the disciplinary problem can be addressed through administrative action. Minor breaches are usually dealt with by summary trial and result in the imposing of a minor punishment. It is by correcting the minor breaches that compliance with all lawful orders is ensured and discipline is maintained. In becoming disciplined members of the armed forces, the individuals conform to the institutional requirements of the military thereby making it more likely that they will fight when required to do so.

Of course it goes without saying that adherence to discipline is part of what ensures that when the ADF is required to fight it abides by the laws of Australian society, the laws of armed conflict, its service values and the military justice system. Similar to the ADF, the Canadian armed forces have clearly recognised that the chain of command is fundamental to the maintenance of discipline. Canada's 1997 *Report of the Special Advisory Group on Military Justice and Military Police Investigations* said:

> Just as it is not possible to understand the military justice system unless it is directly related to the need for military discipline, so it must be recognised that all persons subject to the Code of Service Discipline have a Commanding Officer to whom they are accountable in matters of discipline. Service members are required to obey the lawful orders and instructions of their superiors. Commanding Officers are in turn responsible to their superiors for all matters of discipline within their units. At each level of the military hierarchy, there is an expectation that the person at the next higher level has the authority to hold subordinates accountable, and to impose disciplinary and administrative measures as a

means of enforcing that accountability. Military justice and the chain of command are, therefore, closely intertwined.

It is no different in Australia, where the ADF summary discipline system underpins effective military operations and morale. It also enhances the capability of defence personnel by providing unit commanders with a quick, effective and consistent means of dealing with misconduct that can undermine command authority and impinge on successful military operations. And, as recognised in this bill, the ADF summary discipline system forms one part of the military discipline system, which, taken as a whole, must also provide the safeguards necessary to protect the interests of ADF members. The bill's comprehensive system of elections and appeals in respect of summary authority proceedings provides, for the first time, a direct link to the statutorily independent Australian Military Court and in doing so enhances existing safeguards.

The core initiatives in the bill address recommendations 22 and 23 from the 2005 Senate report. In giving them effect, the bill introduces an automatic right of appeal from a summary authority to a single military judge of the Australian Military Court. The appeal may be in respect of a conviction, any punishment imposed or the imposition of a reparation or restitution order. A military judge will have a statutory discretion to deal with an appeal on its merits by way of a fresh trial, in which case the rules of evidence applicable to the Australian Military Court would apply, and/or a paper review of the evidence, which would be done consistent with the rules of evidence applied at the summary proceeding. Following the appeal process, should the punishment be altered a military judge will not be able to impose a punishment greater than the maximum available to the summary authority at the original trial.

The bill also provides for a review of proceedings of summary authorities, not only as a means of enforcing accountability, as described in the Canadian system, but to provide additional safeguards for members of the ADF. Where a punishment may have been awarded in error, such as having been beyond the authority of the summary authority to impose, the reviewing authority may refer the matter back to the summary authority for it to be reopened and corrected. Certain more severe punishments will also not take effect until approved by the reviewing authority, which may quash a punishment or impose a less severe punishment, which will then be subject to the automatic right of appeal. Additionally, the review process, which is based on legal advice, will provide another avenue by which to correct inappropriately awarded punishments or orders that may not otherwise have been the subject of an appeal to the Australian Military Count, where the military judges replace the previous reviewing officers who were supported by legal officers. The section 154 reports that Mr Willee referred to only apply to court martials and Defence Force magistrate trials, which cease on 1 October. They do not apply to summary procedures.

A right to elect trial by a military judge of the AMC for all but certain disciplinary offences is also provided for in the bill. Initially dealing with these exempt offences at the summary level will, as described in the Canadian example, maintain the expectation that the person at the next higher level has the authority to hold subordinates accountable and to impose disciplinary and administrative measures as a means of enforcing that accountability. It will also prevent minor infractions of discipline, such as straightforward cases of absence without leave, going unnecessarily to the AMC.

The bill also addresses widely held concerns that current summary procedures are overly legalistic and complex and introduces a fair but simple and easily understood evidentiary framework, similar to the Canadian Forces summary trial system. To say that this is flawed gives no credit to the efforts of Canada in modernising summary procedures, since this last happened over 30 years ago. They have introduced a comprehensive training package and simplified plain language rules of evidence that most certainly do not give weight to fifth-hand hearsay, as Mr Willee claims. This is just wrong. Additionally, the process and procedures to be followed will be established by the chief military judge, and this will clearly overcome the flawed process that Mr Willee described as a case example. In conducting a trial, the proposal requires that the summary authority may determine the probative value of any evidence received during the course of a trial that it considers appropriate, including the relevance, reliability and weight to be given the evidence. The onus of proof will remain 'beyond reasonable doubt'. To say that this means cases are predetermined is grossly incorrect and ignores the good judgement of the officers who will be making these decisions.

Finally, I would like to briefly respond to the written submission from the Law Council of Australia. I thank the Law Council for raising an important issue that is related to a proposal in the Defence Legislation Amendment Bill 2007, which, if enacted, would allow the Director of Military Prosecutions to seek a ruling on a question of law that arose from an AMC trial from the Defence Force Discipline Appeal Tribunal. Such rulings would be obtained for precedent purpose only and would not occur until the completion of an AMC trial.

As the Law Council rightly points out, there are two distinct lines of authority that have developed with respect to appeal provisions in criminal proceedings relating to matters arising while a trial is underway requiring the judge to make a ruling on a particular case. In discussing the first approach the Law Council points out:

> ... it reflects the position that there should be no unnecessary interference with the course of a criminal proceeding and that the defence is ultimately protected by a right of appeal.

This view is the basis of the provision that Defence is introducing in DLAB07, which will enable the Director of Military Prosecutions to refer a question of law that arises in a trial before the Australian Military Court to the Defence Force Discipline Appeal Tribunal at the conclusion of that trial. Indeed, Justice Sackville, in Commonwealth of Australia v Westwood [2007] FCA 1282, made the following favourable comments about the proposed provision in DLAB07:

> The 2007 Bill, if passed, will protect the position of an accused person by enabling the Director [of Military Prosecutions] to test the ruling only prospectively. If, therefore, an erroneous evidentiary ruling by the Australian Military Court leads to the acquittal of an accused person, he or she cannot be deprived of the benefit of that verdict even if the tribunal ultimately upholds the prosecution's challenge to the correctness of the ruling.
>
> It follows that the 2007 Bill now before Parliament, if passed, will give the Director the opportunity, if she wishes, to test any future ruling by the Australian Military Court that applies the reasoning of the Judge Advocate in the present case. However, the legislation will protect the accused person in a manner that would or might be denied to the Accused in the present case, should I entertain the applicants' claim for declaratory relief.

The Law Council has noted that it does not favour any amendment to the bill which would allow any overturning of a verdict of not guilty. Defence agrees entirely with the Law Council's view in this regard, and there is no such provision in the bill. The safeguards for the accused remain the overriding consideration in this respect.

The Law Council also makes reference to New South Wales legislation which reflects the second line of authority that has developed with respect to appeal provisions. While Defence does not discount such provisions for future consideration, this particular approach clearly requires further detailed consideration and extensive consultation, particularly in the light of the comments made by Justice Sackville in a recent case in relation to 'denying the accused person the benefit of a favourable evidentiary ruling' and 'delay and fragmentation of the court martial or military court process'.

The appeal of matters raised in interlocutory points by the prosecution is a complex issue that is subject to two differing points of view. It requires considerable deliberation and policy development before being considered for inclusion in the Defence Force Discipline Act. Given this, it clearly cannot be considered in the context of an amendment to the current bill, but Defence is clearly keen to consider it as a possible provision in legislation to be brought forward in future years.

The comments made by the Law Council representative about members of the Australian Military Court are noted. However, as appointments to the Military Court are still being finalised and have not yet been announced it is difficult to understand how the Law Council can comment on the capabilities of the members of the Australian Military Court, especially as they have yet to hear a case. Defence is grateful for the issues raised by the Law Council, which will be given due consideration in future deliberations.

In summary, the Defence Legislation Amendment Bill proposes significant enhancements to the summary system of discipline. It introduces significant new safeguards for members of the ADF but at the same time allows commanding officers to retain the necessary authority to maintain discipline and ensure the operational effectiveness and safety of all the members in their unit.

In conjunction with the new Australian Military Court introduced in Defence Legislation Amendment Act 2006, the provisions in this bill will provide a combination of attributes that will not exist in other military discipline system. These include a statutory director of military prosecutions, a permanent military court with statutorily independent military judges, rights of appeal on conviction and punishment from the military court to the civilian justice system through the Defence Force Discipline Appeals Act, rights of appeal on conviction and punishment from summary proceedings to the military court, a right to elect trial at the military court for most summary offences, fair and simplified rules of evidence for summary procedures and a confined jurisdiction that can only be exercised when it can be regarded as substantially serving the purpose of maintaining or enforcing service discipline. My fellow officers and officials will be pleased to address your questions.

CHAIR—Thanks very much, Admiral. That was what I would describe as a lengthy opening statement. The committee would benefit enormously from a hard copy of that, Admiral, if you can provide one.

Rear Adm. Bonser—I have hard copies which may not contain everything that I said. I note that I was also responding to the Law Council.

CHAIR—It may be some of those points that you have made which we need to pursue, and it is quite hard to do that without the record. But we will struggle along. Thank you very much. I also, on behalf of the committee acknowledge and thank you for the information that you provided to through the Military Justice Implementation Team on a regular basis and in preparation for this bill as well. The committee is grateful for that. At the end of your remarks in relation to the Law Council's observations about the right of the DMP to make the sorts of appeals that were talked about in this morning's proceedings with Mr Willee, I noted that you indicated that you regard that as a complex matter and one which would not be able to be dealt with in the context of this current piece of legislation and its progress through the parliament.

Rear Adm. Bonser—Yes. That relates to those issues that were brought out in the Federal Court case in terms of examining very carefully the aspects relating to denying the accused person the benefit of a favourable evidentiary ruling and aspects relating to significant delays and fragmentation of the court martial or military court process. Perhaps the Director of Military Prosecutions might be able to talk about that in more detail.

Senator MARK BISHOP—Which Federal Court case?

CHAIR—Commonwealth and Westwood, which is cited from opposing directions by the Law Council and now Defence, which is always amusing.

Brig. McDade—It was recently decided. I appreciate that the Law Council has raised these issues. You should not by the fact that they have come from their mouth believe that these issues have not been considered, argued and debated.

CHAIR—I can assure that we would not do that in the first place.

Brig. McDade—We have struggled long and hard for some time in relation to how the DMP should have an appeal to resolve matters, whether they should be done on interlocutory basis or indeed after the event. I am with the Admiral in saying that there is more debate to be had and more consultation to be had as to whether or not it would ultimately be beneficial to our proceedings to have the capacity to take matters at an interlocutory stage. At the present moment in time, given a post-trial capacity to go to the DFDAT is a significant improvement on what we currently have. At the moment, the only recourse I have is to the Federal Court. This for the first time gives us an internal capacity through the Defence Force Discipline Appeals Tribunal, a specialist appeals tribunal, to determine matters. I am more than happy that we leave it at that at the moment in relation to the passing of legislation and that we give time for the thoughts of others to be considered in relation to whether or not ultimately we would come back and say: 'We need an amendment. We've seen how the court operates. It's becoming essentially for us to have the capacity to take interlocutory relief.'

CHAIR—I do not think that you will get any argument from the committee. We also regard the legislation as significantly improving the current situation. But you also should not assume that the committee will not be exploring the proposition put by the Law Council and the alternatives contained in that and the suggestions constructively made to the committee by the Law Council in the process of making its report.

Brig. McDade—I am not suggesting that.

CHAIR—The challenge that we have, of course, is the reporting timetable provided to us so generously by the Senate. We will be determining in a private meeting later on today how we actually deal with that.

Senator MARK BISHOP—This is on that point. Brigadier, you were addressing the two lines of legal argument that the Law Council raised and Admiral Bonser replied to in his opening comment. Admiral Bonser said that you had given a lot of thought within Defence to the first proposition. He did not comment as to whether there had been an equal amount of internal discussion on the second line of legal thought, it now having been raised by Defence as an alternative. Is that a fair comment, or was there an equal amount of internal discussion on both legal lines of thought before you came to a resolution as to the preferred solution to the problem for the time being?

Brig. McDade—I am talking about discussions that essentially I became involved in over the last 12 months internally with my unit and those who were involved with Defence legal, not discussions I have had with the admiral. Discussions we have had internally—and bear in mind we were consulted in relation to what should be in DLAB07 concerning this particular issue—covered all the aspects in both lines of authority in relation to what should be the appropriate course. So far as I was concerned, from discussions—and I am now talking of those internally within my unit for the purposes of our making submissions to Admiral Bonser in relation to it—we were content at this point in time, given that our court is yet to stand up and given also that we do not have a standing appeals tribunal that still remains ad hoc. The concern was about delays and the fragmentation, notwithstanding the other aspect of what the Australian Law Council says. I do not quibble with them at all; we are not at odds at all. It is just a question of timing, if I can put it in that perspective.

Senator MARK BISHOP—From your perspective.

Brig. McDade—Yes. It is just a question of time. Ultimately, down the track, it may well be that those amendments will be sought.

Senator MARK BISHOP—I understand that. I am just trying to get clear in my own mind—and it is probably a question for you, Rear Admiral—as to why, on balance, you came down in favour of the progress as outlined in the bill, as opposed to going for the alternative solution of allowing interlocutory proceedings.

Rear Adm. Bonser—As the Director of Military Prosecutions has said, on balance it was the best way for us to proceed, given the structure of our system. The main issue was that if we had gone the other way with our appeals tribunals system we could well have introduced further fragmentation and delay in the system for justice.

Senator MARK BISHOP—Because, in the first instance, proceedings would be interrupted whilst the interlocutory proceedings were conducted, is it your concern that that will lead to, say, both delays and fragmentation? I can understand delays but why fragmentation?

Rear Adm. Bonser—As was pointed out in, I think, the Federal Court case, the break in the proceedings and having significant delay in them—the DMP can talk about it.

Brig. McDade—If we are talking about interlocutory relief, we can presume that the proceedings have commenced. So we are stopping the trial midstream and we are going away and seeking a determination of a matter with a view to that trial remaining on foot for the duration, until we come back with a determination. The problem with the Defence Force Tribunal, it being ad hoc, is that it was unknown as to how long we would have to go away. I might say that the recent Federal Court example showed us that it is a significant period of time, or it can be. Another reason discussion has to place is that we have to look at what we can do with the DFDAT. Can we get a duty judge, for instance? Can we hear matters quickly? Can we develop some process, if we have interlocutory relief, as to how long it will take and what rules will apply and the like? That is all unknown to us as we speak, and that was one of the main focuses—that we wanted to ensure as best we can finality of the criminal proceedings.

Senator MARK BISHOP—Once commenced.

Brig. McDade—Once commenced, finish them. Bear in mind that we also have to operate overseas. There was a real concern as to what we would do in an area of operations if we had to stop, seek relief and come back. There are a lot of things to be considered. As I say, I am not at odds at all with what the Law Council says.

Senator MARK BISHOP—I now understand your thinking and where you are coming from. I have exhausted my questions on that point and I want to go to another point. I want to come back to the rules of evidence argument.

CHAIR—Go on, Senator; I will come back to this in minute.

Senator MARK BISHOP—I want to talk briefly about the issue of the rules of evidence at first instance and then on appeal. I listened closely to your introductory comments, Admiral. I understand your thinking there. It reminded me a lot of the submissions you have made in the various hearings we have had through the last three or four years on military justice. Can you just cut to this point for me: why should not the traditional rules of evidence apply in routine criminal matters where members of the armed forces are charged with a criminal offence? How does that relate to your need for the maintenance of a hierarchical authority, the maintenance of discipline and conformity to established practice? Why do we have to, in some respects, get rid of the rules of evidence in routine criminal matters?

Rear Adm. Bonser—I might get Mr Earley to talk about the first part of the issue you raise, and perhaps later we can go on and discuss some of the safeguards that are retained and inherent in the system that we are going to have.

Senator MARK BISHOP—I do understand that you have reviews, appeals and safeguards, but I really want you to answer the question: why do the rules of evidence not apply to people charged with routine criminal offences, as they would in any Magistrates Court in Australia?

Mr Earley—Thank you for that question. I am of a similar vintage to Mr Willee and was around, like he was, at the time when the present DFDA summary system was introduced, in 1985. I agree with him to the extent that it is a good system, having retained the formal rules of evidence, but with this proviso: if it is implemented properly. That is the key thing to understand about this, on a lay basis, and that is where the problem lies—in being able to

implement it properly. This is a summary system which, by definition, has to be administered and applied by laypeople—that is, people who are not lawyers.

Yesterday I was in Sydney, where I go from time to time during the year to speak to pre-command courses. Yesterday it was the major fleet unit's pre-command course at HMAS *Watson*, to prepare them for taking over as commanding officers and XOs of ships, in the Navy's case. Their military justice module, I understand, is three days. It is simply not possible, with all the best will in the world, to bring naval officers, in this case, to a sufficient standard where they really do understand the rather complex formal rules of evidence.

Over the last 25 years or so there have been really good attempts, I think, on the part of those who have had to administer summary trials. I might say that in my previous incarnations, as well as being a legal officer, I was also a general service officer and so I can speak from both sides of the table, having had command myself and having had to run summary trials. As a lawyer doing that, I was amused sometimes by the efforts to which lay defending officers and prosecutors would go to to really try and comply with those rules. It was obviously a big ask, as I said in my submission, and a difficult proposition.

It was always regarded as one of the particular complexities of the summary system. In an ideal world it would be wonderful to have that, but we do not have an ideal world. We have a world in which summary trials are conducted all over the place: on the decks of heaving ships and out in the bush, in places where lawyers are not generally available. So it has to be a system that can be reasonably applied, simply and expeditiously, by laypeople but at the same time preserve the rights of the accused persons. I think that the way in which DLAB07 approaches the changes to the current summary system actually does achieve that, in that those protections and safeguards, from the point of view of the accused person, are there in the appeal processes and also in the right of election, to some extent.

Senator MARK BISHOP—So your response is threefold. Firstly, the reviewing officers are not sufficiently trained—and this is not a criticism, so excuse my language—to understand the rules of evidence. Secondly, there are the operational demands of units in the field for a quick solution. Thirdly, you equate the summary system with a degree of urgency to finalise matters. The totality of those three arguments is, you argue, sufficient not to have the rules of evidence applicable as they normally would in civilian magistrates' jurisdictions.

Mr Earley—That is a pretty good summary of it. I would emphasise your first point, though: we are talking about the formal rules of evidence—the complete law, as you would know.

Senator MARK BISHOP—I know there are intricacies in the rules of evidence.

Mr Earley—I talk from a Navy point of view, but I think naval officers are generally very capable of understanding the concepts of relevance, reliability and weight, which are the underpinning cornerstones of what is being proposed.

Senator MARK BISHOP—Thank you. I understand your thinking now. My question is this: have you done any analysis of the quantum of matters that are related to operational or field demand? I can understand that as a justification for your position if you have people overseas or in training and there is a minor infraction, they have been charged and it has to be resolved. I had been thinking that most infractions of a criminal nature would perhaps be of

the nature of drunkenness, lewd behaviour, common assault and those sorts of offences that are fairly rife in the criminal magistrates' jurisdictions and accordingly would be committed by service people on base or on leave. Is my presumption incorrect that indeed most offences and charges that you are going to bring in the summary jurisdiction are related to offences that occur in an operational or a field situation?

Mr Earley—Yes and no. The summary system must apply whether or not you are on operations, whether you are in Australia or outside of Australia. I imagine that the majority of them would apply not on operations, because folk have things to think about other than infractions.

Senator MARK BISHOP—And that is my recollection of previous evidence that you have given—that when people are on operations and overseas, the degree of infraction of the rules becomes so minimal that it is almost nonexistent.

Mr Earley—Yes.

Senator MARK BISHOP—What I am hearing you say is that most of the infractions or breaches occur in Australia on base or when men and women are on leave.

Mr Earley—Simply because that is where the majority of the ADF is.

Senator MARK BISHOP—That is where the majority are, that is right. They are in Townsville, Garden Island and those places. That being the case, how does that fit with your threefold justification of not having the rules of evidence? Let us take a man on leave who gets drunk in the pub, assaults a patron and gets charged with an offence. Why do we need not to have the rules of evidence in that type of case?

Mr Earley—The same principles apply whether it is overseas or in Australia. Summary, by its very nature, definition and the purpose of it, means that it must be done expeditiously. It is still going to be undertaken by lay people, whether it is in Australia or overseas. The commanding officer or the trial officer—subordinate summary authorities and indeed superior summary authorities—that hear these trials are not going to be lawyers simply because the offence may have occurred in Australia. Almost all of the offences that are dealt with at summary level are what we would call relatively minor disciplinary types of offences—offences which go to the normal operation of the unit on a day-to-day basis and therefore need to be dealt with and be seen to be dealt with as part of the management or command response without excessive delay.

Senator MARK BISHOP—So are those types of offences not in the nature of common assault, drunkenness, lewd behaviour and those sorts of things that are rife in the magistrates' courts? Are they different types of offences?

Mr Earley—They are generally of a lesser nature than those types, yes. They would be, in the main, leave breaking, disobedience and those sorts of offences.

Senator FORSHAW—Is there a higher liability test, if you like, in these situations than would occur in the general community? Let me use the example of a rugby league player who gets involved in a drunken fracas in a pub. The club takes action, irrespective of whether or not there is a prosecution through the courts for an offence, because of the very nature of the activity, employment or pursuit that the player is involved in and the incident that occurs. In a

sense there is more of a strict liability—although I am not trying to use that term in the legal sense. Does the idea that you can use a summary process with lesser standards in terms of the rules of evidence and so on flow from the idea that a serviceperson should not get involved in that circumstance in the first place and therefore it does not matter whether you can prove an offence committed under civilian law for assault, lewd behaviour, public disorder or drunkenness? Do you understand where I am coming from?

Mr Earley—I can see what you mean. I think it is true to say—and Admiral Bonser, I think, has pointed it out already—that when you join the Defence Force you accept, in some instances, that additional rules will apply to you and higher standards will be expected of you in your work. Being late for work in the military is a more serious matter than, perhaps, being late for work at McDonald's.

Senator FORSHAW—Is that the concept behind what then allows the judicial process, at this stage at least, to be more instantaneous and more severe, in some respects, upon the individual's rights?

Mr Earley—It will be more severe than if they were a civilian because those sorts of infractions are regarded more seriously, and that is part and parcel of being a military member. That having been said, though, there must be some way of dealing with that from a disciplinary point of view that does not disrupt the normal routine. I am not necessarily talking about operations overseas; everyone can understand the reason for not disrupting that. But the normal routine of the ADF, the training routine and the daily work that has to be done must go on without undue disruption, so there must be a method of dealing with those relatively minor matters so that discipline is enforced and maintained, and can be seen to be enforced and maintained, in a way that does not detract unduly from the normal work of that unit. The way that they do that is via the summary system.

Senator MARK BISHOP—It is the totality of those work demands that lead to the need for the summary system, with very quick resolution on matters in the sense of discipline, and there is that package of arguments that leads you to the conclusion that in that instance rules of evidence are a hindrance to the discipline and work needs of the unit.

Mr Earley—Certainly that is the case.

Senator MARK BISHOP—That is your argument.

Mr Earley—There is one other dimension that I should mention which is connected to what you just said. In our audit program, about which I have briefed the committee on previous occasions, we conduct surveys and focus groups. We ask people in the field—those who administer the summary system and those who are deemed subject to it from time to time—what they think of it. You may be surprised to hear that the majority of ADF people think that it is basically a fair system. Indeed, the stats show that it works well more often than not. There is, though, as I said in my written submission, a fairly commonly-heard criticism or concern from all of the folk that we talk to that it is a bit hard to understand, it is a bit complex. Of the bits that are complex, the bit that is probably the most complex relates to having to apply the formal law of evidence for relatively minor matters. It is important that this is changed and not only for the reason that this is what is happening in other parts of the world—the admiral has mentioned the UK and Canada—but the formal rules of evidence do

not, as I understand, apply in the AAT either. They have a test of relevance, so there are jurisdictions in Australia where that sort of system applies as well.

Senator MARK BISHOP—But the AAT is not a criminal jurisdiction.

Mr Earley—No, it is not, but—

CHAIR—May I clarify that, Mr Earley: are you equating the operations of the AAT with the operations of this—

Mr Earley—No, I am just raising that as an instance where there is another jurisdiction in which they get by without having to have the formal rules of evidence.

Senator MARK BISHOP—The VRB does not apply the rules of evidence either, but there are a stack of administrative tribunals that do not apply—

CHAIR—Yes, but it does not necessarily end up in your service record either. It is quite different.

Mr Earley—The point that I am coming to is: if the system which is—as the chiefs have said in their submissions—the backbone of the disciplinary system and the military justice system in the ADF is the principal means by which discipline can be maintained in force and it is considered to be complex by those who apply it, then there is a risk created. That risk is that the system will be circumvented. I am not saying that this is done, but you would know more than most that there have been inquiries into what has been termed 'rough justice' in the past. If they think that it is a waste of time, that it takes too much time, that it is too complex, that they cannot understand it, or that it is likely to disrupt routine too much, there is a temptation perhaps—and it is only that, and I am not saying that it happens now—to find an alternative means of dealing with a minor disciplinary infraction. And we do not want that to happen.

Senator MARK BISHOP—Having introduced into the discussion all of those bad cases that we in this committee are particularly familiar with, do you assert to us that the role of the reviewing officers and the role of the AMC and the Defence criminal appeal tribunal is sufficient protection at this stage to overcome the deficiencies in the system that led to legal abuses which have now resulted in this bill in a criminal sense?

Mr Earley—No, I do not think I said that. I am not sure that I said that. The point that I am making is that—

Senator MARK BISHOP—You referred to a set of bad cases in the military justice dialogue—

Mr Earley—I think I was talking about the temptation to circumvent the system. What I was referring to was the inquiry seven years ago where Justice Burchett was specifically asked to look into rough justice—that is to say, an alleged practice or culture of circumventing the system in order to apply rough justice. Let me add that the outcome of his inquiry was that he did not find a culture of rough justice.

Senator MARK BISHOP—Thank you, Mr Earley. I understand where you are coming from.

CHAIR—I would like to clarify one thing. At the moment, in proceedings at this level, are we operating under the general guidance of the rules of evidence?

Mr Earley—Under the present system?

CHAIR—Yes.

Mr Earley—Formally, we are supposed to be, yes.

CHAIR—That is not a response that gives me an enormous amount of confidence: 'Formally, we are supposed to be.'

Mr Earley—We are. That is the rule. That is what Mr Willee was alluding to. That arose from the change, as he said, from the old imperial system—

CHAIR—From the period of the 1980s, which he was referring to—

Mr Earley—to a more modern way.

CHAIR—So now, because of the observations you have made in relation to the adequate equipping of officers and training of officers to deal with these matters, because of operational demands and because of the often urgent nature of the processes, you have decided that you do not need to be bound by the rules of evidence at this level.

Mr Earley—Sorry?

CHAIR—The processes do not need to be bound by the rules of evidence at this level because of those three factors that, as you agreed with Senator Bishop, were relevant in this consideration.

Mr Earley—Yes. I think a bit more than 20 years experience with the present system, and the experience of other countries—UK and Canada have been mentioned—has shown that the summary system can be run perfectly adequately to meet the needs of enforcing and maintaining discipline on the one hand and protecting the rights of the individual on the other by going to the system that is being proposed by DLAB07.

CHAIR—I am not sure that the committee has enough persuasive evidence that a change of this significance is necessarily based on the experience you have put before us. I noted in the admiral's opening remarks that there was some concern that, in pursuing these issues, we were reflecting in some way on other systems. We were not doing that at all. We were merely looking at it in the context of what is before the committee. I do not know that I am persuaded that the material that we have had before us from the submissions and the evidence today really addresses the concerns that were raised by Mr Willee and the Law Council in their submissions as to why this is a bad plan. So if you have anything else that you can assist us with, that might be useful.

Mr Earley—I am sorry if you got that impression. From the point of view of the IGADF, I am very supportive of what is being proposed here. I believe that it is an overdue simplification to the system that will be well received by the ADF. I believe that it will not, in any significant way, detract from the rights of members, and I think that it will improve the administration of the summary system.

CHAIR—You would understand, Mr Earley, having been with the committee through almost all—if not all—of this entire process of examination of these issues—through the

inquiry and the iterations and legislation that have come before the committee—that the rights and capacity of members to protect themselves adequately within the system that obtains in Defence has been a major concern for the committee. I cannot see how this is going to help members protect themselves where they have every right to be adequately protected, particularly in legal proceedings, or even in summary proceedings.

Mr Earley—As I started off by saying, the system would work really well and is a good system if it can be implemented to its full extent. But the reality of the situation is that it cannot because the people who perform in most of the summary proceedings are not lawyers and they never will be.

CHAIR—But they have been for all this time. I am sorry; the same people have been doing this job for all this time with the operation of the rules of evidence. So where is the sudden volcanic explosion that necessitated this change that made that all so bad?

Mr Earley—Those same people have made comments that they find it difficult to cope with.

CHAIR—They might find it difficult to cope with, but what about the protection of the members.

Mr Earley—It simply stands to reason that you cannot teach the rules of evidence in a matter of days to people who are going to run this system.

CHAIR—It is a bit late to have worked that out, I would have thought.

Mr Earley—Sorry?

CHAIR—If we are talking about the way the system works currently—the same people doing effectively the same job but in a new structure which we are discussing here today—I would have thought we would have worked out at some time since 1984 that it was a bit hard, apparently, to adequately teach those people the rules of evidence.

Senator MARK BISHOP—Mr Earley, I think I share almost the same views as the chair. I understand your three-part intellectual justification for the approach. I certainly understand the argument raised by Senator Forshaw —and I think it has some strength—that you have sports and other tribunals that administer their own instant justice, often with hefty fines, and the players cop it.

Senator FORSHAW—Except that they can often appeal to a judicial body such as an industrial commission.

Senator MARK BISHOP—In the west we fine footballers $10,000 for having a drink, for goodness sake, and everyone seems to accept that. So I understand that analogy to your needs of servicepeople. What the chair is asking and what I am seeking an answer to is: what is the breakdown in the system that is so extraordinary that persuades you that DLAB07 should take away the rules of evidence in summary matters? What has occurred in the last one, two or four years to overturn that 30 or 40 years of history that Mr Willee referred to? That is the question we are looking for an answer to.

Mr Earley—It is mainly that it was never really able to be applied to its full extent in the way that might have been imagined back in 1985. There is the training burden to raise to a

certain level people who are involved in administering this. We are simply not capable of producing people with enough knowledge to apply that to its fullest extent in the sense that a lawyer might be able to. The ADF is looking to try to improve the system to the benefit of its administration so that there will be less work around and at the same time enhance and protect the rights of the individuals who are subjected to it.

Senator MARK BISHOP—So your response is that the demands of the system in recent years have become so complex that you need to change the rules of evidence in the system to meet current operational and training requirements?

Mr Earley—What I am saying is that it has been recognised that the system could be improved by moving to the proposed scheme.

Rear Adm. Bonser—It is for these very same reasons that the Canadians made this change and modernised their system. I think it is only fair to make the point that this does not remove rules of evidence completely. It simply says that the formal rules of evidence in the Evidence Act do not apply and that they are replaced by another set of rules to protect the individual.

CHAIR—They are the rules of a summary authority.

Rear Adm. Bonser—The rules of a summary authority. In the Canadian example, which is the model we intend to follow, that is accompanied by a very comprehensive training package which explains the entire application of the summary rules of evidence in plain, simple English—that is, it is easy to teach, easy to learn and easier to apply, but is entirely fair to the individual.

Senator FORSHAW—They could learn it in three days, then?

CHAIR—Apparently.

Rear Adm. Bonser—It is actually a good read. It is one of the few books that I have been able to read from cover to cover without falling asleep.

CHAIR—You do not suggest *Harry Potter*, then, Admiral!

Senator FORSHAW—I do not know if you could push 'trust us' that far.

Rear Adm. Bonser—I have read them all, Senator.

Senator FORSHAW—It is like *Hansard*.

Rear Adm. Bonser—It is not true to say that all of the safeguards are being removed. We have made this clear in the explanatory memorandum where we talk about the requirements in the Criminal Code which are applied in section 10 of the DFDA: applying the principles of criminal responsibility, including the burden and onus of proof, will remain applicable in summary trials. The very important protection against self-incrimination has also been enshrined in the DFDA to put that beyond any doubt.

The trial process itself has to be fair and has to be seen to be fair, and all those summary authorities are not courts in the ordinary sense. It is important that the requirements of natural justice and procedural fairness are adhered to; that is the purpose of the rules. This includes the absence of bias and the ability for a person to know and to answer a case made against them. The application of the simplified rules of evidence for summary procedures will reflect

that relevance is determined by looking at the substance and contents of the evidence put forward and how it is related to a fact in the issue

Senator MARK BISHOP—What is the problem with including NCOs and senior NCOs at this stage?

Brig. McDade—I am not quite sure. There is some talk that there had to be some discussion about what level of punishments could be applicable to them. I frankly do not see any reason why we should not include them now. I would have thought that the bill could be amended quite readily to include them in the disciplinary officer scheme.

Senator MARK BISHOP—Excluding NCOs and senior NCOs, who does it apply to—everyone else?

Brig. McDade—Yes. Requisite rank—it increases it into some commissioned ranks, but it has forgotten them. I think it was an oversight. The admiral can probably address you on that. I would have thought that, rather than leave it, we could put them back into the system.

CHAIR—Admiral, in your opening statement you said that the development of the bill has benefited from very broad consultation within the ADF, Defence as a whole, and external to Defence. You would know that as a matter of process this committee consults regularly with organisations like the Law Council—they are the peak body in these matters. To the best of my knowledge Defence does not consult with the Law Council. Is that the case?

Rear Adm. Bonser—We have had discussions with the members of the Law Council and—

CHAIR—On this bill?

Rear Adm. Bonser—where we are able to contact people like Mr Willee—where they are clearly very busy with their civil practices that is not an easy thing to do. We have had no consultation back the other way, even asking us to explain the purpose behind some of the changes we have made.

CHAIR—As I understand their submission—I may be misreading it—there is no indication that they had any input into the process, so could you outline to the committee on notice what the Law Council's input was, what the formal consultation was—and informal, for that matter—so that we can get that clarified. We talk to them all the time and a lot of the toing and froing could be avoided if they were in the process earlier. Given that they do have quite eminent practitioners in their ranks—eminent both in terms of their legal experience and their military history—we could probably cut a lot of this process short if it was avoided at your end before it comes to us. I indicated at the beginning that the committee would deliberate on the reporting process. Obviously, as a result of this morning's hearing that will be the case even more so. We will advise the Senate as soon as possible of a resolution in that regard.

I thank all of the witnesses who have appeared here this morning for their assistance, and thank you, Admiral, for the assistance of your organisation in this entire military justice process, as I recorded at the beginning of your appearance.

Committee adjourned at 11.32 am