



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES  
COMMITTEE

**Reference: Effectiveness of Australia's military justice system**

THURSDAY, 5 AUGUST 2004

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**SENATE**  
**FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE**  
**Thursday, 5 August 2004**

**Members:** Senator Hutchins (*Chair*), Senator Sandy Macdonald (*Deputy Chair*), Senators Hogg, Johnston, Marshall and Ridgeway

**Substitute members:** Senator Bartlett for Senator Ridgeway and Senator Chris Evans for Senator Marshall

**Participating members:** Senators Abetz, Allison, Bartlett, Boswell, Brandis, Brown, Carr, Chapman, Collins, Conroy, Coonan, Denman, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fifield, Forshaw, Harradine, Harris, Knowles, Lees, Lightfoot, Mackay, Mason, McGauran, Murphy, Nettle, Payne, Santoro, Stott Despoja, Tchen, Tierney and Watson

**Senators in attendance:** Senators Hogg, Hutchins, Johnston, Sandy Macdonald and Payne

**Terms of reference for the inquiry:**

To inquire into and report on:

1. (a) the effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes, and mechanisms to improve the transparency and public accountability of military justice procedures; and  
(b) the handling by the Australian Defence Force (ADF) of:
  - (i) inquiries into the reasons for peacetime deaths in ADF (whether occurring by suicide or accident), including the quality of investigations, the process for their instigation, and implementation of findings,
  - (ii) allegations that ADF personnel, cadets, trainees, civilian employees or former personnel have been mistreated,
  - (iii) inquiries into whether administrative action or disciplinary action should be taken against any member of the ADF, and
  - (iv) allegations of drug abuse by ADF members.
2. Without limiting the scope of its inquiry, the committee shall consider the process and handling of the following investigations by the ADF into:
  - (a) the death of Private Jeremy Williams;
  - (b) the reasons for the fatal fire on the HMAS Westralia;
  - (c) the suspension of Air Cadet Eleanore Tibble;
  - (d) allegations about misconduct by members of the Special Air Service in East Timor; and
  - (e) the disappearance at sea of Acting Leading Seaman Gurr in 2002
3. The Committee shall also examine the impact of Government initiatives to improve the military justice system, including the Inspector General of the ADF and the proposed office of Director of Military Prosecutions.

## WITNESSES

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**Committee met at 4.07 p.m.****LEAHY, Lieutenant General Peter Francis, Chief of Army**

**CHAIR**—I declare open this meeting of the Senate Foreign Affairs, Defence and Trade References Committee. Today the committee will conduct its ninth public hearing into the effectiveness of Australia's military justice system. The terms of reference were referred to the committee on 30 October 2003, and an interim report is due to be tabled in the Senate on 9 September 2004.

Witnesses are reminded that the evidence given to the committee is protected by parliamentary privilege. It is important for witnesses to be aware that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. An officer of a department of the Commonwealth will not be asked to give opinions on matters of policy. However, they may be asked to explain government policy, describe how it differs from alternative policies and provide information on the process by which a particular policy was arrived at.

Today's hearing is largely open to the public, but at approximately 5 p.m. the committee will ask for the room to be cleared to hear evidence in camera. I point out that the hearing of evidence in camera does not preclude its later publication by the Senate or by the committee, but witnesses would be advised of such action in advance. All witnesses have previously made statements to the committee, so the committee will begin with questions.

Welcome, General. Our terms of reference deal with peacetime deaths, including that of Private Jeremy Williams. On page 77 of your submission it states that an investigation into why the recommendations of an earlier report into inappropriate behaviour at Singleton were not implemented 'found that the recommendations were implemented but did not endure' because 'investigation outcomes were not formalised in unit procedures'. What does 'formalised in unit procedures' involve, and where did the chain of command break down?

**Lt Gen. Leahy**—The lack of formalisation in unit procedures essentially means that the recommendation into this particular incident suggested quite strongly that changes should have been made to what we call standard operating procedures. Those changes either were not made or were made but were not included inside the documentation of the unit and therefore, on the changeover of command or staff officers, not followed through. That is, they did not become embedded in the process of the unit. As to the question of how it broke down, I think I partly alluded to it, in that there were changes in the staff and, in their handover procedures, they did not cover in sufficient detail the incident, the consequences or the changes that were recommended by the investigating officer.

**Senator JOHNSTON**—Have they been implemented now?

**Lt Gen. Leahy**—They have, and I think you are aware that there was also an investigation into why these changes were not made and the failings in the staff. That investigation has concluded, and administrative actions are currently being carried out against five Army officers. Also, not only have the changes recommended in that particular investigation been included, but there have also been substantial additional recommendations and changes to operations, procedures and activities, particularly of training command.

**Senator JOHNSTON**—Are they in written form?

**Lt Gen. Leahy**—Yes, and I believe that I provided them separately to Senator Hutchins as the chair before members of this committee visited the infantry centre at Singleton. They are in the form of the training command code of conduct, training command directions and activities, and the instructions and amendments in relation to courses conducted by NCOs and officers, and particularly by the instructors who attend the School of Infantry. They are very much in written form, and if you are not able to find them through the secretariat I can make them available.

**Senator JOHNSTON**—Is that what you mean by the formalisation in unit procedure?

**Lt Gen. Leahy**—That is what I mean. I also mean activities such as: the restructuring of the depot company at the School of Infantry; new rehabilitation processes that have been carried out; the opening of a new facility; the type and level of support provided to trainees; an extensive amount of work done to ensure that we reduce the injury rates of our trainees; medical and psychological support; instructor development; training standards; external audits of our training institutions; increased staff skills and levels in our training institutions; life skills training for our individuals, trainees and instructors; the way we select staff; and, as this committee is aware, many of the suicide protocols and training that we have introduced, both through the mental health strategy for the ADF and through Army's efforts.

**Senator SANDY MACDONALD**—You talk of an external audit. Is that the way that you propose to monitor the implementation of these changes?

**Lt Gen. Leahy**—We propose that we will monitor this at a number of levels. One is normal unit monitoring and the procedures that go on there. Training command have also established an organisation that is tasked to both inspect and audit training, the training establishments and the procedures carried out, particularly in support of our trainees.

**CHAIR**—Just to refresh us, can you recall off the top of your head what the rank of the commanding officer at Singleton is?

**Lt Gen. Leahy**—The rank of the commanding officer is Lieutenant Colonel.

**CHAIR**—Has it always been a Lieutenant Colonel?

**Lt Gen. Leahy**—For approximately the last 10 years, yes. Prior to that, it was the rank of Colonel.

**Senator JOHNSTON**—Can I inquire as to the rank of the five officers or men who were prosecuted?

**Lt Gen. Leahy**—Yes. They are of the rank of Lieutenant Colonel and above. I will correct you: they have not been prosecuted. The investigating officer has found that their actions were not of the standard that we would expect of officers of that rank and the action that is being taken against them is administrative in nature. They have been asked to show cause why they should not be censured. There are a variety of actions that could result from that. That process is ongoing. I would prefer not to give too much more detail of that.



**Senator JOHNSTON**—That is fine. When did you succeed in formalising into unit procedures the changes that you have?

**Lt Gen. Leahy**—That would be difficult to answer in detail. I could do it if you wanted it. I will take it on notice. But if I could give you a general impression it might help soothe some of your concerns. I would say that the formalisation of those processes—and I will say that we are not finished; there are still other activities going on—gathered pace through the last quarter of last year. If you could just give me a bit of time here, I will try and refer to some of my notes in terms of the dates for, for example, the code of conduct for training command. Training command put out a directive—directive 04/05—titled ‘The safety and welfare of trainees campaign plan’. That was signed by GSO training command on 1 March this year. There were other staff papers through that time. There is the training command code of conduct, which was issued on 19 December 2002. There are other documents and a very extensive range of investigations looking at our procedures that stretch, essentially, from December 2002 through till now. I would say that the concentration of work was in the last half of last year and has been ongoing until now.

**Senator JOHNSTON**—Do you think that the reference that this committee received from the Senate in October last year is relevant to the pace of the implementation of the changes?

**Lt Gen. Leahy**—I take you to mean, ‘Did we hasten after the Senate began investigating these issues?’

**Senator JOHNSTON**—Yes. Did you start to get this whole act together as a result of the pending inquiry—the one that we are now in?

**Lt Gen. Leahy**—I would say that the Senate interest in this has provided some impetus but it has not provided the entire impetus. It was clear to us that there were difficulties and we were taking independent action. For example, on 19 December 2002 a training command code of conduct was issued, and there are other documents that date prior to the Senate reference that deal with this quite specifically as well. Certainly the interest of this committee and the help and assistance of this committee has provided us with more work to do—quite properly—but also an impetus to continue our work.

**Senator JOHNSTON**—But all of those things prior to October and to the second half of last year were pretty futile, given that Williams committed suicide in February 2003.

**Lt Gen. Leahy**—I would not agree at all that they were futile. I would acknowledge that there have been isolated instances where our soldiers have not followed what is clearly outlined to them in terms of their rights, their responsibilities and their duties as supervisors and instructors. What I see—and what I hope this committee saw when it visited Singleton recently—was that the vast majority of our people are doing the right thing. Sometimes we get it wrong. I have admitted that. I have accepted responsibility for that and I have made apologies. But I would say that the vast majority of our people are fulfilling their obligations and their duties to the highest order.

**CHAIR**—The recommendations contained in the Amos report were not implemented, were they?

**Lt Gen. Leahy**—That is correct.

**CHAIR**—Why weren't they implemented?

**Lt Gen. Leahy**—As I attempted to describe earlier, it was largely because of failings in the staff process occasioned by a fairly rapid movement of staff in training command, the combined arms training centre and the infantry centre. The recommendations were made but procedures to follow them up were not implemented to the degree that they should have been and the individual staff officers did not place adequate importance on the recommendations.

**CHAIR**—So no-one took responsibility to implement the recommendations because of the movement of officers?

**Lt Gen. Leahy**—A number of officers gave directions to implement the recommendations but then did not adequately check that they had been made to ensure that they had become embedded in the procedures.

**CHAIR**—Does that happen now?

**Lt Gen. Leahy**—I cannot say that it will never happen again.

**CHAIR**—It will not happen again?

**Lt Gen. Leahy**—We have taken firm steps—for example, we have a very formal process of handover so that every officer in a responsible position, when he hands over to someone taking on his position, goes through a formal process of taking on actions outstanding, recommendations outstanding and other issues that might be of significant importance. Responsibility is firmly and formally passed to the oncoming officer.

**CHAIR**—Is it anybody's duty to make sure that the recommendations of a report are implemented?

**Lt Gen. Leahy**—Yes, it is. As I have indicated, in this case the administrative actions that we are proposing to take against five senior officers—that is, five officers of the rank of lieutenant colonel and above—would clearly indicate that it was their responsibility. It is our contention—to be tested by their replies to a notice to show cause—that they have not carried out their duties adequately.

**CHAIR**—When were they, to use my term, 'charged'? Is that the right term to use?

**Lt Gen. Leahy**—'Charged' is not the right word.

**CHAIR**—Investigated?

**Lt Gen. Leahy**—The right term is 'show cause'. Would you like the exact date on which the notice to show cause was issued?

**CHAIR**—Was it October 2003?

**Lt Gen. Leahy**—No, it was late last year.

**CHAIR**—Was it in November or December last year?

**Lt Gen. Leahy**—More than likely very late last year.

**CHAIR**—After our inquiry commenced?

**Senator JOHNSTON**—That is certainly nine or 10 months after the death.

**Lt Gen. Leahy**—The death of whom?

**CHAIR**—Private Williams.

**Lt Gen. Leahy**—I am confused now. Are we talking about—I am not going to use the fellow's name, because he has asked us not to use his name—the private soldier in the initial investigation or the death of Private Williams? I am taking administrative action against five officers for their failure to properly implement recommendations from an incident that occurred in 2002. That is not related to Private Williams.

**Senator JOHNSTON**—Aren't there five people that you are taking action against with respect to Williams?

**Lt Gen. Leahy**—No, there are more; there are a total of 10.

**Senator JOHNSTON**—Are they of the rank of lieutenant colonel and above?

**Lt Gen. Leahy**—No, they are mostly of the rank of corporal and sergeant. I can go through them in detail if you like.

**Senator JOHNSTON**—Hang on; I am very confused. I thought we were talking about Williams, initially.

**Lt Gen. Leahy**—I thought Senator Hutchins was talking about the private soldier from 2002.

**Senator PAYNE**—We are talking about the recommendations made arising out of the investigation into that event, which were not implemented.

**CHAIR**—We have straightened that out a little bit. So arising from the complaint from 2002—the show cause issued to the lieutenant colonel and above—those fellows were delivered that document or what ever it is called in December 2002?

**Lt Gen. Leahy**—Late last year.

**CHAIR**—With Private Williams, it is 10.

**Lt Gen. Leahy**—That is right.

**CHAIR**—And you said it was corporals, sergeants—

**Lt Gen. Leahy**—If you like, I will go through a list.

**CHAIR**—Yes, please.

**Lt Gen. Leahy**—Administrative action was taken against one major, three sergeants, four corporals, a lieutenant colonel and a colonel.

**CHAIR**—That is more than five.

**Lt Gen. Leahy**—As I say, these have been detailed to you in a letter that I wrote to you on 4 June.

**CHAIR**—When were they delivered their show cause documents of notice?

**Lt Gen. Leahy**—There are a variety of dates involved in this.

**CHAIR**—What period are they from?

**Lt Gen. Leahy**—They would mostly be this year.

**CHAIR**—What stream of military justice does the show cause process go down?

**Lt Gen. Leahy**—I would broadly explain that as the administrative side of military justice, in that, when a soldier has not done something or has done something overtly that he should not have done—he has contravened standing orders or he has carried out actions that he should not have done—it goes through an administrative process. Normally—and it is hard to say, locked tight, that this is what happens each time—there would be an investigation of some type and the investigating officer would determine that an individual has done something wrong or that an individual has not done something that he should have. What is open to us then is that we can take either disciplinary action or administrative action.

**CHAIR**—So there is an investigating officer in these cases, and you said two have already been concluded—is that correct?

**Lt Gen. Leahy**—No. More than two have been concluded. There are a number. If we are now talking about the Private Williams case—and I assume we are—

**CHAIR**—Yes.

**Lt Gen. Leahy**—Brigadier Anstey, who was the investigating officer, determined that action should be taken against a number of people, in the order of 10. If you like, I can go through each one of those. But, as I say, you had the documentation on this from 4 June. If you do not have it now, I can copy it and give it to you.

**Senator PAYNE**—We have it.

**Senator JOHNSTON**—But these Williams matters are underneath and after the five administrative charges against—is it lieutenant colonel and above?

**Lt Gen. Leahy**—They are separate to the lieutenant colonel and above.

**Senator JOHNSTON**—Those charges relate to the failure to—what is the expression you used?—formalise within unit procedure the sorts of things that might have gone some way towards preventing the Williams—

**Lt Gen. Leahy**—I would stress ‘might have gone’.

**Senator JOHNSTON**—Yes, it is hypothetical, but we have got these procedures because we think that that is what they will do.

**Lt Gen. Leahy**—That is right, and clearly there is a question in all our minds about whether, if that had been done properly—

**Senator JOHNSTON**—Can we just pause for a moment, with the chairman’s indulgence. These five officers of lieutenant colonel and above have been required to show cause why they should not be censured or whatever.

**Lt Gen. Leahy**—Yes.

**Senator JOHNSTON**—Is there a convening authority required in those show cause matters?

**Lt Gen. Leahy**—No. The process there was that Brigadier Brian Dawson was appointed as an investigating officer to investigate that matter.

**Senator JOHNSTON**—By whom?

**Lt Gen. Leahy**—I believe by me. He was required to report—

**Senator JOHNSTON**—Let us just pause there. Has Brigadier Dawson ever served with any of these five people in any theatre?

**Lt Gen. Leahy**—We are a small army. I would assume that at some stage he has, yes.

**Senator JOHNSTON**—Has anybody asked the question: ‘Have you ever had a relationship serving together anywhere?’ What I am concerned about is that someone asks the question about the investigator: ‘Does he know the people to be investigated?’ Has anybody asked that question?

**Lt Gen. Leahy**—I do not believe so.

**Senator JOHNSTON**—Do you think it is an important question?

**Lt Gen. Leahy**—I think it is a question that we can ask and invariably the answer will be that they will know the other officer, because of the size of the Army.

**Senator JOHNSTON**—What do you think the next question should be?

**Lt Gen. Leahy**—You might say, ‘Is he prejudiced because of his knowledge of the other officer?’

**Senator JOHNSTON**—That is a bit of a rhetorical question because no-one is going to admit to prejudice, surely. What you are going to ask is: ‘What is the relationship?’

**Lt Gen. Leahy**—I have the assumption that, when I give an investigating officer the appointing authority and the terms of reference, he will answer that impartially.

**Senator JOHNSTON**—I think you are right. You can have some degree of confidence, but the point I am making is that surely you have to ask the question.

**Lt Gen. Leahy**—I agree, but I do not believe that we ask the question formally like that.

**Senator JOHNSTON**—What I am worried about is that the five no doubt quite distinguished members of your service are listening or watching this and they are going to say, ‘No-one has asked that question.’ I am concerned that they are going to think back and say, ‘Hang on; I was in East Timor with this bloke, and we had a bit of a blue over something.’ I would have thought that the whole investigation collapses on that basis, if we do not ask the question.

**Lt Gen. Leahy**—I do not believe that it collapses. For an individual who might feel that he has been wrongly assessed or judged, it might later become an object of redress for him, but I would say that, with the very many investigations that go on, in nearly every instance the investigating officer will know of, or perhaps has been associated with, the person that he is investigating.

**Senator JOHNSTON**—Surely then that makes the question more important for us to ask. We should be asking: ‘In what capacity do you and have you had dealings with any of these five personnel?’

**Lt Gen. Leahy**—We do many of these investigations. I am not aware of anyone who has called into question the objectivity of the individual, the investigating officer, to say that he is impartial.

**Senator JOHNSTON**—We are.

**Lt Gen. Leahy**—And that is your prerogative, but it is not something—

**Senator JOHNSTON**—That is why I am asking the question.

**Lt Gen. Leahy**—It is not something that is of primary concern to me, because I expect impartiality from my officers. If the officer who is assessed feels that impartiality is not present, he has very clearly open to him a whole range of further redresses.

**Senator HOGG**—How does an officer come to that conclusion—that impartiality might not be present?

**Lt Gen. Leahy**—I assume that is for him to say. As Senator Johnston has explained, perhaps some time before they have had a bit of a spat, and the officer says, ‘We do not like each other. I do not accept his judgment.’

**Senator PAYNE**—In the context that you are putting to us, is it realistic to expect that a lieutenant colonel questions the impartiality and professionalism of a brigadier, if the lieutenant colonel ever wants to become a colonel or even move further than that?

**Lt Gen. Leahy**—People are promoted in the Army through a very rigorous process that is not based on one person’s view.

**Senator PAYNE**—I understand that.

**Lt Gen. Leahy**—I think we have a process whereby all views are taken into account and, if somebody has a view like that—and I am now talking about being in the formal process of promotion for a senior officer—he is asked to excuse himself from further consideration of that individual.

**Senator PAYNE**—I also understand that what goes on your record stays on your record, effectively.

**Lt Gen. Leahy**—Not in every case. Some of the censures and others are time limited—that is, they will go on the file for a particular stated period of time and then they will come off the file.

**Senator SANDY MACDONALD**—A bit like the police point system. I want to pick up on that point before we leave it. Could you ever foresee a situation where an investigation at any level would be better carried out by a third party ‘investigating officer’?

**Lt Gen. Leahy**—If you ask the question that way, yes, I can; but I am not sure that I can describe it to you. I would not rule out that as a course of action for perhaps the most serious of offences, but I could not describe it any further than that. I would not rule it out, but I find it hard to imagine.

**Senator SANDY MACDONALD**—I do not expect you to rule it out, or rule it in for that matter. It is just that where you have very high levels of administrative knowledge required in public administration, which obviously includes the administration of the ADF, clearly the level of knowledge that is required to have a proper investigation is made much simpler by having an ‘insider’ who understands the system. That is not a criticism.

**Lt Gen. Leahy**—No, and I do not take it as a criticism. I was about to say that I think it is an important part of making assessments and judgments that you understand the context of what is going on. But as this committee knows in relation to other investigations—and I think we are about to discuss it at 1700 hours in the private briefing—we have sought that impartiality through the way that we investigate things, through the way that we have sought outside advice, through the way that we seek on occasion to frame the terms of reference with the assistance of

affected parties and through our courts of inquiry, where our affected parties can be represented in the disciplinary process.

**Senator SANDY MACDONALD**—I understand that, but from a public policy point of view—and you are very conscious of this; I suspect that you were very conscious before this inquiry but are even more conscious now—public confidence in the ADF and the way it manages its affairs is vital for all sorts of good reasons, apart from recruiting. All those things are so vital to pass that message through to the public.

**Lt Gen. Leahy**—I agree. I am grateful because I think that we enjoy that public confidence. I know that this issue goes to the heart of one of the very important problems that you are facing, and I would remind you that in the opening statements from CDF and the chiefs we pointed out—hopefully well enough—that military justice has two components. The most important one to us is the operational component—that is, that justice and discipline can be applied in the field. We see some difficulties with independent, outside authorities on the operational side of the military justice equation. That is something that I think we would all ponder and see how we can implement.

In the administrative sense, there have been examples where we have sought the assistance of very highly qualified people, and I am thinking now of the Royal Australian Air Force reseal and deseal incident, where the president of the board was a civilian reservist lawyer who brought his particular skills to that board. I know of other examples from other courts of inquiry where we sought the assistance of independent authorities—people with particular skills. In inquiries that Army has conducted—and, again, we may discuss this at 1700—we do not just pop out a recommendation and accept it; they are then considered in detail. For the case of the SAS soldier, they were considered in detail by eminent reservists, both as QC, SC, as practising Crown prosecutors and others. I think that brings a sense of impartiality, transparency and objectivity.

**Senator JOHNSTON**—It does if we can see what they considered in detail and can arrive at the same conclusion you have. I would love to take your word for it, but, when I am as intimately involved in that case as I am, I have grave doubts about what you have just said.

**Lt Gen. Leahy**—Perhaps we can discuss it later.

**Senator JOHNSTON**—I think we can.

**CHAIR**—I turn now to the issue of the 10 people who have been given notice to show cause. If I recall correctly, you said that two of them have been administratively dealt with. Is that correct or are there more of them?

**Lt Gen. Leahy**—I think we are all getting ourselves confused here. It might be worth while if I went through the list. I do not have it tabulated, but there is a variety of disciplinary and administrative action that has been taken. Would it be useful if I went through that, noting that you do have it as a submission to the secretariat from Army, prior to your visit to the infantry centre?

**CHAIR**—If you would not mind, yes.



**Lt Gen. Leahy**—In the investigation conducted by Brigadier Anstey as a result of Private Williams's death at the infantry centre, a major was issued a formal warning for unacceptable behaviour and judgment.

**CHAIR**—I do recall that. In one of the cases—I cannot recall which one—one of the sergeants was charged under the Defence Force Discipline Act.

**Lt Gen. Leahy**—A sergeant was charged with three charges under the Defence Force Discipline Act. One related to a parade ground incident where a soldier was made to stand on parade contrary to medical restriction. He was found not guilty on that charge.

**CHAIR**—He was found not guilty—what sort of trial was it and what was the process that went through there?

**Lt Gen. Leahy**—This was a lieutenant colonel. A charge came out of the investigating officer. The report was made and there was a recommendation that disciplinary action should be taken against this individual because of his actions.

**CHAIR**—So the investigating officer made a recommendation that there should be a reason to show cause. Is that right?

**Lt Gen. Leahy**—No. In this case, he made a clear recommendation that the soldier involved may have committed an offence under the Defence Force Discipline Act and that he should be charged so that it could be tested before a summary authority. In this case, that authority was a lieutenant colonel.

**CHAIR**—It was not a court martial?

**Lt Gen. Leahy**—No. The charge was of a nature that it did not need to go to a court martial. For very serious offences—

**CHAIR**—And that decision is made by the investigating officer as a recommendation—

**Lt Gen. Leahy**—A recommendation is made. In this case I believe it was made to me. Then I concurred with the recommendation and therefore charges were preferred.

**CHAIR**—That is when the commanding officer investigated one of his sergeants?

**Lt Gen. Leahy**—It was the commanding officer from another unit because of the concern, as Senator Johnston has said, that there might be some impartiality or prejudice. We sought another unit commander to hear this charge. He heard the three charges.

**Senator JOHNSTON**—Was that an exception to the rule?

**Lt Gen. Leahy**—No, not at all. It is quite frequent. When I was a commanding officer myself, in 1991 and 1992, a number of charges were preferred on soldiers in the unit. Because I knew too much about the case and I felt that I might have been prejudiced, I asked one of my fellow

commanding officers in the area to hear the charge. Quite often it came to me to hear their charges.

**Senator PAYNE**—In relation to the commanding officer to whom you have just referred, what experience does that commanding officer have as an investigating officer and what training does he have?

**Lt Gen. Leahy**—We are not requiring him to be an investigating officer. We are asking him to make judgments on the basis of the Defence Force Discipline Act. That act clearly asks him, as the summary authority in the room—let us call it a court—that he will hear evidence for both the prosecution and for the defence.

**Senator PAYNE**—What training specifically does he have to do that?

**Lt Gen. Leahy**—He has received training throughout his career. Let me say that a lieutenant colonel at this level has perhaps had 15 years of experience as a commissioned officer. In the early part of his training at the Royal Military College Duntroon he would have received training in the Defence Force Discipline Act. He would apply that throughout his career. Then at various stages through his career at officer professional development courses he would receive further instruction. As a lieutenant he has probably done a number of investigations. He may have been at various times a prosecuting or defending officer. As a major he would deal with lower level cases as a disciplinary authority. He would receive further training at the staff college. Prior to taking up his duties as a commanding officer, he would receive further training on his precommand course, where he is lectured to and given a further view of the Defence Force Discipline Act. There is included in the act and its regulations quite an extensive user's guide—let me call it that—for how you go about a charge. He is assisted by the prosecuting or defending officer, the regimental sergeant major of the unit and other people who would give him advice and support. If he needed to, he could seek the advice and support of a legal officer, normally at brigade level, who would talk him through it.

**Senator PAYNE**—So, in this specific instance, what led you to choose this particular individual of all of those possible?

**Lt Gen. Leahy**—All our commanding officers have received this training. This guy was in a unit that was close by, and therefore he was available. He had the skills, and he was able to do it.

**Senator PAYNE**—I am not sure that 'proximity and availability' gives me the greatest confidence in the other side of my question. I am sure they are very important but, in the case of the other investigation we were discussing, where I think the brigadier in question was appointed as an investigating officer, does the same situation apply—that is, proximity and availability as opposed to specific skills that you may have identified that were appropriate to be exercised there?

**Lt Gen. Leahy**—Before I turn to the case let me say that there is proximity and availability but there is also an assumption—and I think it is a correct assumption—that all our commanding officers have received appropriate training to do this job.

**Senator PAYNE**—With enormous respect, the evidence we have received over many months—and most specifically I point to the evidence of the Defence Force Ombudsman with very direct reference to the capacity of investigations held within the ADF—says to us there are serious shortcomings in the capacity of investigating officers.

**Lt Gen. Leahy**—Right now I am not talking about investigating officers; I am talking about summary authorities implementing the Defence Force Discipline Act.

**Senator PAYNE**—I think we are talking about both.

**Lt Gen. Leahy**—I am aware of what the Ombudsman said. I am not aware of some of the other evidence you have received, perhaps in camera.

**Senator PAYNE**—Do you accept the premise of the Ombudsman's comments?

**Lt Gen. Leahy**—I accept that, in some instances, there are difficulties. I have already said that, in those instances, we have sought outside assistance for courts of inquiry. In the case of the sergeant charged with offences under the DFDA, I do not think these charges require bringing in some heavy outside lawyer. These require a knowledge of the context and they require the sort of training we have given our officers for them to make a judgment on whether or not a soldier was made to stand on parade contrary to a medical check. In relation to the more serious cases, we already do that.

**Senator PAYNE**—Do what?

**Lt Gen. Leahy**—In this case, if the charge were serious enough a CO might say, 'I disqualify myself or I don't think I'm able to pass an adequate judgment.' It is then passed up. The next level might be that a Defence Force magistrate will hear this. Typically, a DFM would be a colonel in the reserve—an Army lawyer—who is probably practising outside. If it were not appropriate for a DFM, it would then go up to the next level of a court martial, where there would be higher level lawyers and senior officers involved. There is a process by which we can do that, but if you are proposing that a commanding officer is not capable of hearing every charge—let us say, the charge of 'absent without leave'—I think we are going far too far to the other extreme.

**Senator PAYNE**—I was not aware that I had made any proposition; I thought I was just asking questions.

**Senator JOHNSTON**—If he is absent without leave because of something that commanding officer has done then, yes, he is inappropriate. Nothing you have told us to this point tells us that there is any oversight on such an important issue.

**Lt Gen. Leahy**—Part of the process of setting up and establishing the court—and I will not get the words exactly right, because it has been some years since I have sat as a summary authority—is that the commanding officer says to the defendant, 'Are you 314429, P.F. Leahy?' The defendant answers, 'Yes, sir.' The commanding officer then asks, 'Do you have any applications or considerations that you wish to make before this court?' That soldier can then say quite clearly—and it is well within his right, 'Sir, I make application that I don't think you

should hear this.’ It is open to him to say that. I know that you will say: ‘What’s he going to do? He can’t say that to his commanding officer.’ Well, it has happened to me and they do say that.

**Senator JOHNSTON**—I have a lifetime of experience of people being told, ‘You are not obliged to say anything but anything you do say will be taken down and given in evidence.’ They are told to sit in front of the camera and make a confession—and they think that they have to.

**Lt. Gen. Leahy**—That is your experience; it is not my experience of the administration of the DFDA.

**Senator JOHNSTON**—You know it is your troops’ experience. They are not going to take up an issue of jurisdictional bias with a commanding officer.

**Lt. Gen. Leahy**—All I can say is it is open to them and they use it.

**CHAIR**—I think Senator Payne was about to explore the difference between the administrative side and the discipline side.

**Senator PAYNE**—I wanted to make the point that the conversation is slightly conflated because of the discussion of the 2002 and 2003 inquiries and the two separate processes which have flowed from both of those events. The discussion is conflated, but I am not confused about the questions I am pursuing generally in relation to investigating officers and, similarly, in relation to the matters under the DFDA, to which you have also referred. The Ombudsman and other witnesses before the inquiry have made quite specific observations and quite critical comments in relation to the capacity of investigating officers and questions of apprehended and perceived bias.

**CHAIR**—On the administrative side.

**Senator PAYNE**—Most particularly on the administrative side, yes, and questions of apprehended and perceived bias. We are concerned—and I think I can make that observation in the plural—that these issues are routinely dismissed when raised with the ADF. Even today, you have said that you have complete confidence in your COs to do the job that you put before them. It is not a question of a lack of confidence; it is a question of training, skills and adequacy to perform this particular role. We think this is a very important issue.

**Lt. Gen. Leahy**—I agree entirely, but I might say I am not sure you are comprehending the entire nature of the disciplinary process.

**Senator PAYNE**—We are trying our best, General.

**Lt. Gen. Leahy**—I am trying to explain it. If the commanding officer in this case has found the soldier guilty, what happens is that that piece of information goes off to the next level of formation—that is, a brigade headquarters or somewhere where the legal officer reviews it. His task is to review whether it is safe in law, whether the punishment is appropriate and whether the whole thing has been proper, so there is a level of assessment beyond the commanding officer. It is not as though that is the end of it. That then comes back and on many occasions the

punishment is changed or quashed or the finding is changed or quashed. If the soldier is still guilty and not satisfied with that, he has open to him all of the redress processes open to a soldier at any time—that is, to his commanding officer, to his formation commander, to me as Chief of Army, to the Inspector-General of the ADF or to the Ombudsman.

**Senator PAYNE**—The most fundamental point in this particular aspect of the argument is that if the initial investigation was adequate then we would not be talking about review and redress and eventually ending up at Chief of Army; we would be talking about matters handled properly the first time that do not have to progress like that through the military justice system in all of its incarnations. The point that we are making—that I am making at the moment—relates specifically to getting it right the first time.

**Lt. Gen. Leahy**—Which I take to be the question that I did not quite get to answer about the training for some of the authorities administering DFDA. I think you then asked me about the training for investigating officers—is that correct?

**Senator PAYNE**—Yes.

**Lt. Gen. Leahy**—Similarly, the training is inherent in the upbringing of an officer. The training is as an investigating officer, his duties and responsibilities are through the Royal Military College conducting lower level investigations as a young officer at the staff college and at other colleges that he attends and, again, at the precommand course what needs to be done as an investigating officer. In the two cases that we are talking about here—one I will call the Dawson investigation, which was into the soldier at the infantry centre in 2002, and the other is the Anstey investigation, which was into the death of Private Williams—both were senior officers, both were brigadiers and both came from commands other than the command where the incident had occurred and therefore we are assuming that there was a level of impartiality and an increased chance that they would not have known the people involved. As I have said, because of the size of our Army, I cannot rule that out but these officers were given terms of reference signed by a senior officer—and I think in both of these cases they were signed by me. Lawyers were involved and, in one case, a family was involved in the compilation of the terms of reference. Legal advice was available to these officers throughout. A user's guide is always available to these officers, and we expect that they use that guide. I feel that the judgments that they made were fair, open and available to them.

**Senator PAYNE**—Are you still talking about the application under the DFDA, or administrative—

**Lt Gen. Leahy**—Administrative processes under a board of investigation.

**Senator PAYNE**—If the capacity is inherent in the upbringing of an officer, how then do we deal with the observations of the Defence Force Ombudsman and how do we deal with the establishment of the administrative inquiry training working group, which is, as I understand it, aimed at officers of the ADF and APS most likely to be undertaking more complex administrative inquiries? You are telling me that it is inherent in the upbringing of the officer—

**Lt Gen. Leahy**—No, I am not saying that that is all there is for the very complicated investigations.

**Senator PAYNE**—Isn't this a very complicated investigation?

**Lt Gen. Leahy**—And I think we have a good result. We have got a good answer from these officers. In the first instance, what went wrong was not the observations; it was the implementation of them.

**Senator PAYNE**—In fact, we are probably not specifically talking about the results of this investigation. Could you just come back to the question of the Defence Force Ombudsman's observations and how they sit with your observations about the capacity being inherent in the upbringing of an officer and then the establishment of such a working group.

**Lt Gen. Leahy**—Senator, I think it is down to the issue of frequency. We do a lot of investigations; I cannot tell you how many. I do not know exactly what the Defence Force Ombudsman told you in terms of his concerns.

**Senator PAYNE**—Have you seen his submission? It is in black and white.

**Lt Gen. Leahy**—I cannot recall the numbers. You may be able to, but I cannot. I do know that you had a number of submissions, and I assume that some of those, as part of your inquiry, are complaints. However, I think that if we added up the ones that the Ombudsman has called into question and if we added to them those that people who have made submissions to you have reason to complain about, I think you would see that they are a small percentage of the overall number of investigations. Frankly, I guess it is up to this committee to determine whether or not that is important enough to change the system.

**CHAIR**—I would like to go back to the Williams investigation. You said that one of the sergeants was, if I am correct, given notice by an investigating officer to show cause. Is my understanding correct?

**Lt Gen. Leahy**—I would not have said that. The investigating officer would have made a recommendation that his conduct was not of an appropriate standard. Someone would then formally apply, through the personnel process, a notice to show cause. There is then a formal process where a letter is sent to him, and then someone else is appointed to determine whether or not, on the basis of what the investigation has said and, using natural justice, what the soldier has replied, the recommendation stands and the censure or administrative action is imposed.

**CHAIR**—Has this sergeant or any other person involved in the Williams case been investigated subsequently by the military police?

**Lt Gen. Leahy**—No. The military police were involved in the investigation initially. They would not have been involved subsequently. The evidence was gathered beforehand, and that would have allowed us to form a view as to whether or not a charge should be laid or administrative action should be taken.

**CHAIR**—So the administrative action was taken against this particular sergeant. Then the inquiry was undertaken—

**Lt Gen. Leahy**—No. The sequence is: the inquiry investigation is undertaken, the military police are involved in that—

**CHAIR**—So they are involved in an investigation?

**Lt Gen. Leahy**—They are involved prior to the consideration for administrative action.

**CHAIR**—Is that usual?

**Lt Gen. Leahy**—It is absolutely normal; that is the process.

**CHAIR**—And people were charged administratively rather than disciplined?

**Lt Gen. Leahy**—The investigating officer is required to make a judgment, based on the offences in the DFDA, as to whether or not it will be administrative action or disciplinary action. Based on that, administrative action may be taken. Depending on the severity of the disciplinary action, it might be referred to lawyers for advice or—and I think you have received testimony here—to the Director of Military Prosecutions, which is another element of the impartiality of the system. We are obliged to pass certain cases to the DMP, who is, in the case of the current colonel, a practising barrister with prosecutorial experience. He will make a judgment as to whether it should proceed or not. We do not just think this up at a CO level or a brigade level.

**CHAIR**—I am sure you do not. I am interested in who investigated. The military police involved, the investigating officer involved and the sergeant or sergeants involved were found guilty of an administrative error—to use my words—rather than one under the DFDA. Is that appealable?

**Lt Gen. Leahy**—Yes.

**CHAIR**—Was it appealed? And who conducts that—

**Lt Gen. Leahy**—Let me give you the process of one of them, without the detail. It is the case of a corporal. The Director of Military Prosecutions recommended that administrative action be considered against this corporal for the use of abusive language against several trainees. The CO considered, the training commander considered and the soldier has had administrative action carried out against him.

**CHAIR**—The investigating officer is a line officer, not an officer who is legally trained, isn't he or she?

**Lt Gen. Leahy**—He is not a professional investigating officer but is in an experienced—and, in these cases, vastly experienced—officer of the rank of brigadier who was following a process using his experience to determine what went on in each case. Those cases then came to me. I received the inquiry in relation to Dawson in November last year. I recall very well, when travelling to the Solomon Islands, taking four hours to read it, because I was required to make judgments in relation to the recommendations. There were 53—although I might be wrong; there might have been 51. In each case, I was required to make recommendations either agreeing or

not agreeing. It is an exhaustive process. It takes a long time. I would say, in the vast majority of cases, it is fair and proper.

**CHAIR**—As you would be aware, we had members of the Williams family before us in Melbourne in April. They spoke, as you might imagine, quite emotionally about what had happened to their son and brother. One of the things that they said is that there would have been no investigation into what happened to their son and brother if they had not made a hullabaloo about it. That is correct, isn't it?

**Lt Gen. Leahy**—No, it is not.

**CHAIR**—When did you start an inquiry into Private Williams's death and the events surrounding it?

**Lt Gen. Leahy**—I have a chronology; it will come forward in a moment. I believe Private Williams died in February. The Army was waiting for the police and coroner's report. Mr Williams and I spoke—I believe it was some time in late April—and we had not commenced an investigation then. That does not mean that we were not going to do an investigation; it means that our procedures then were to wait for the coroner's report. Those procedures have changed. Procedures now are that, immediately upon a serious incident of death, suicide or some other activity, we have sudden death protocols, which are an administrative procedure that our units go through which includes what we call a quick assessment.

**Senator JOHNSTON**—When did you institute those?

**Lt Gen. Leahy**—I will get you the date. I think I signed the sudden death protocols early this year. We require a quick assessment. In a quick assessment or an inquiry, we are not seeking to apportion blame. We are seeking to find out what happened, how we can make sure it does not happen again and what immediate steps are available to us to make sure that that goes on.

**CHAIR**—Is it mandatory for an investigation or a board of inquiry to take place for suicides now? Is there a requirement in your manuals or procedures for an inquiry to commence?

**Lt Gen. Leahy**—I will ask Colonel Overall to get me the sudden death protocols and the regulations on that so I can give you a definitive answer, but I would find it absolutely unusual that in the case of a suicide we would not investigate it. Some years ago sometimes we would just say, 'The coroner has reported on that; that was a suicide.' What we want to do now is try to determine the reasons behind the suicide. We want to try to figure out whether there are other things that we could be doing, whether there is something in the environment or something that we are doing wrong.

**CHAIR**—Wouldn't you have found out in the Amos report that there might have been something you were doing wrong at Singleton?

**Lt Gen. Leahy**—Clearly we were doing something wrong and we failed. That is why I am seeking administrative action against five officers for not performing their duties.



**CHAIR**—Senator Payne and Senator Johnston have been pursuing this with you. As an observation, you probably have the best policies, procedures and protocols that could be written. But, on the surface, it does not appear that they get followed up.

**Lt Gen. Leahy**—In a very small number of instances, unfortunately you are right.

**Senator JOHNSTON**—But those instances are usually deaths or very serious instances leading to injury or some other tragedy. Whilst they are probably rare, they are severe—for example, Williams et cetera. If I might interrupt, you mentioned that you conduct an inquiry with no objective to apportion blame. So why do you do the inquiry?

**Lt Gen. Leahy**—So that we can take steps immediately to find out what happened and put into place actions and procedures so that it does not happen again. We then, taking the recommendations from that inquiry, go through either an administrative or a legal process to apportion blame. The task of the investigating officer is not to apportion blame and to hold people accountable. His task is to find out what happened.

**Senator JOHNSTON**—With the greatest of respect, if you are using that initial inquiry to then take the next step to action, administrative or DFDA, there must be some blame flowing from the appraisal of the circumstances.

**Lt Gen. Leahy**—But I am not asking the investigating officer to make that judgment. That task belongs to someone else.

**Senator JOHNSTON**—But it is implicit in the task that he does, is it not?

**Lt Gen. Leahy**—It is implicit that he determines what happened and makes recommendations.

**Senator JOHNSTON**—If someone shot someone, then I tell you that no matter how much he seeks not to apportion blame he has no alternative but to apportion blame.

**Lt Gen. Leahy**—He would say that that is what happened. It might be that at some DFDA hearing or some other form of hearing later, where people have the responsibility and the authority to judge whether it was innocent or guilty by hearing all of the facts from both defence and prosecution and by considering the law, that is where judgments are made and blame is apportioned. The investigating officer tells us what happened.

**Senator JOHNSTON**—But, if the investigating officer simply tells you what happened without getting the excuses and the background, can you see the point I am making? Senator Payne raised this with you. In the first instance, while the evidence is warm and memories are fresh, we need trained, skilled professionals to completely analyse the situation and provide the people you are talking about in the second step with a capacity to make the right decisions. Of necessity, there have to be some value judgments made arising from the direction of the inquiry, who the witnesses are and all of those sorts of things. What worries us is that we see in that first instance a very low level of selection criteria, first of all, and a very low level of training. Do you not agree with that?

**Lt Gen. Leahy**—No, I do not agree. In the totality of the military justice system, I think the vast majority, nearly every one of them, goes well. We get the right judgments, we get the right decisions, and people have the appropriate and adequate training. For the really complicated ones—

**Senator JOHNSTON**—The big ones?

**Lt Gen. Leahy**—the really big ones, we seek support and assistance. For the operational ones, I suppose I have already challenged you to come up with a solution, using your thesis, for operational law. I think our people, with context, with the ability and the knowledge gained over very many years, are doing a good job. They are doing it properly.

**Senator JOHNSTON**—The solution is a simple one, General. It is simply to train these people specifically for the task. Train them properly. Give them to the police forces in the states, take them through how to investigate and how to do things; take them to the coroners and give them to the coroner's inquiry. Let us get them trained. That is the solution, isn't it?

**Lt Gen. Leahy**—The military police who do this investigating are trained to that extent.

**Senator JOHNSTON**—Well, if they are that is a—

**Lt Gen. Leahy**—We can discuss that.

**CHAIR**—In your inquiries manual, it indicates that a board of inquiry or court is appropriate for death or serious injury and in the case of 'serious systemic breakdown of service discipline or morale'. We have received a number of submissions outlining instances of serious systemic breakdown but where no board of inquiry was convened. That was so in the cases of Private Amos and Private Andrew, and it looks as if it was so in the cases of Private Satatas, Private Palmer and even Private Jason Gutteridge in 1997. Can you say why they have—

**Lt Gen. Leahy**—For some of those names you mentioned there I am pretty sure that there were boards of inquiry.

**CHAIR**—Would you like to come back to us on that?

**Lt Gen. Leahy**—Can I take that on notice?

**CHAIR**—Yes.

**Lt Gen. Leahy**—I think that is probably the best thing to do.

**CHAIR**—I mean an actual board of inquiry, not an investigating officer as you and Senator Johnston were discussing.

**Lt Gen. Leahy**—No, a board of inquiry—correct. With the terms of reference issue I am pretty sure that, in the case of some of those names that you read out, they were done. But, as I think I explained—you mentioned 1998, I think?

**CHAIR**—1997.

**Lt Gen. Leahy**—In 1997, way back then, it was not automatic. But now, under the sudden death protocols which were issued—and I can give you a copy of those—

**CHAIR**—Do the sudden death protocols involve how the next of kin are to be dealt with as well?

**Lt Gen. Leahy**—Yes. They were issued in November last year, and I think as part of my original submission I have passed them to you.

**CHAIR**—We have only today received a submission from a Mr and Mrs Hayward. I do not know if you have had a chance to see that.

**Lt Gen. Leahy**—I saw that today.

**CHAIR**—You have not had the chance to investigate it?

**Lt Gen. Leahy**—I have not had the chance to study it, but I know that the staff are working on that now and will attempt to get you some form of briefing before the proceedings close tonight. It may be in written form.

**CHAIR**—In that case, as you may or may not recall, the family were advised of their son's death by a policeman.

**Lt Gen. Leahy**—What I am aware of in that case, which may help, is that Private Hayward was absent without leave. I am fully aware that one of the tasks on a unit is that, when a soldier goes AWOL, the next of kin are notified. In this case, the next of kin were not notified, and Army has had correspondence with Mrs Hayward. She made the statement, 'If you'd told me, I might have been able to talk him into going back to his unit.' I think we can all draw the conclusion that, if that had happened, the tragedy of his suicide may not have occurred.

**CHAIR**—Okay, but you can see that this is one of the breakdowns that occur—

**Lt Gen. Leahy**—I see it very clearly, and I think it is a great tragedy.

**Senator JOHNSTON**—When this man's death was realised, what was the process that went into action? You have talked about a standard operating procedure—now take us through it. I want to see that what you have told us is borne out in action. Hayward is a recent one. Let us see what happened.

**Lt Gen. Leahy**—The sudden death protocol was put into action, and the investigation is under way now. That is why I do not know much more than that, but I am aware—

**Senator JOHNSTON**—We have made an appointment of an investigator.

**Lt Gen. Leahy**—Can I wait for the briefing to come over?

**Senator JOHNSTON**—Sure.

**Lt Gen. Leahy**—I am being told that Colonel Paul Appleton has just completed the investigation and it is being reviewed now. This was after a quick assessment. I can recall that, when this occurred, I was pretty agitated and we got directly in touch with the unit. The quick assessment occurred, the terms of reference were issued and the investigation was carried out. We have been in touch with Mrs Hayward.

**Senator JOHNSTON**—When you say ‘in touch’, that term worries me. Surely it is a lot more than being in touch with Mr and Mrs Hayward and the family. What are we doing with respect to the Haywards?

**Lt Gen. Leahy**—I would prefer to wait for the details. I am speculating now.

**Senator JOHNSTON**—That is fine.

**Lt Gen. Leahy**—I can tell you what I expect to happen.

**Senator JOHNSTON**—Tell us what you expect to happen, because I would like to see whether it does.

**Lt Gen. Leahy**—Both the Defence Community Organisation and the unit would be in touch with the family. I think in this case there would be unit involvement with the funeral and support and assistance to the family as best we could. The family would have been asked if they wanted to make any contribution to the development of the terms of reference for the inquiry. The family would be asked if they wanted to make any submissions to the terms of reference or to the inquiry, to make statements and be involved. I would be very surprised if that has not occurred. This is a test for me a bit later tonight when the report comes over.

**Senator JOHNSTON**—Are we going to provide them with copies of the report that set out why he is AWOL and what the circumstances are?

**Lt Gen. Leahy**—There is a process whereby that would happen in that we would seek permission from the minister for the release of the report to the family. That has become a matter of course and I would expect that that would happen.

**Senator JOHNSTON**—Have we returned his belongings to the parents?

**Lt Gen. Leahy**—I do not know the detail of that. I would expect that they would have been.

**Senator JOHNSTON**—Have we had the DCO around to see them to follow them up?

**Lt Gen. Leahy**—Again, that is detail. I would prefer to wait for the briefing.

**Senator JOHNSTON**—Have we paid for the funeral?

**Lt Gen. Leahy**—That is detail and, if you do not mind, I will wait for it.

**Senator PAYNE**—In principle, a QA and a report such as that would explain to you as Chief of Army why or how somebody can go AWOL for two and a half months and how that is not notified to the next of kin and not pursued to the fullest extent.

**Lt Gen. Leahy**—That is right.

**Senator PAYNE**—Will that report give you that answer?

**Lt Gen. Leahy**—It certainly will.

**CHAIR**—We have had evidence before us from parents who, when they wanted to visit the place of a son's death, had to meet their own expenses. A lot of this has come through them having to borrow money. Is that dealt with in your next of kin policy? Some of these lads and their parents live a long way away. Do you do it differently now?

**Lt Gen. Leahy**—I hope we do. I will go to the process here. This one does not cover it in the fullest of detail. I think that, in the case of the evidence you are referring to, the individual may have been reimbursed.

**Senator SANDY MACDONALD**—In fairness, it is a mixed bag. We have had evidence where the treatment of the next of kin has been exceptional.

**Lt Gen. Leahy**—In the interest of accuracy, I think it is best that I take that one on notice.

**CHAIR**—You can take on notice what the procedure is. It would be of assistance to know how you make a decision about what assistance you provide.

**Senator JOHNSTON**—The Judge Advocate General says in his opening paragraph:

The purpose of the Submission is to raise for the Committee's consideration the desirability of formally establishing a standing military court to try offences against the ... (DFDA) currently tried the level of court martial or Defence Force magistrate (DFM).

What is your attitude to that?

**Lt Gen. Leahy**—My attitude is that we have a process to hear court martials and I think it is adequate.

**Senator JOHNSTON**—Have you read the submission?

**Lt Gen. Leahy**—I have—probably three weeks ago.

**Senator JOHNSTON**—Do you see the tenor of where he is taking the matter?

**Lt Gen. Leahy**—I certainly do.

**Senator JOHNSTON**—You know he is a Supreme Court judge in Western Australia?

**Lt Gen. Leahy**—I do; I know him well.

**Senator JOHNSTON**—He is indicating, is he not, that time is running out for an internal administration of court martials and Defence Force magistrates.

**Lt Gen. Leahy**—He has considered other jurisdictions overseas and has made some observations on those.

**Senator JOHNSTON**—Do you agree with those observations?

**Lt Gen. Leahy**—Not entirely, as I have indicated.

**Senator JOHNSTON**—Why not?

**Lt Gen. Leahy**—Frankly, I see that the system is working.

**Senator JOHNSTON**—Why would a Supreme Court judge who knows the system want to change it to that extent?

**Lt Gen. Leahy**—That is something you would have to ask him.

**Senator JOHNSTON**—I have. He has given us some good reasons.

**Lt Gen. Leahy**—What I see is that in the vast majority of the cases the system is working. It works operationally and it works administratively. I am not denying that for the most extreme cases assistance might be provided. It is available in a form other than what the Judge Advocate is proposing.

**Senator JOHNSTON**—Isn't he suggesting that the way we do our business in terms of administering our internal justice is a dinosaur and we have to get with the times? The Australian Defence Force cannot be the standout—New Zealand has done it, Canada has done it and the Poms have done it.

**Lt Gen. Leahy**—As I said, it was three weeks ago that I read his report. I am not sure that he said 'dinosaur'.

**Senator JOHNSTON**—That is my word; you are quite right to take me to task over that. It looks to me that that is a legitimate interpretation of what he is saying. He has talked to the other jurisdictions and we are the standout.

**Lt Gen. Leahy**—Frankly, our assessment is that the process is working now. It is over to you and your committee to make a judgment like that or otherwise.

**Senator JOHNSTON**—General, are you in a position to judge? That is what we are talking about—your capacity to judge the efficiency of your system.

**Lt Gen. Leahy**—I am certainly a user of it.

**Senator JOHNSTON**—You are responsible for it.

**Lt Gen. Leahy**—I am aware that there have been difficulties with it, that some people have made complaints to you and that some people have been hurt. Some people, I think, have made complaints in cases where they are not quite able to see that, in the full extent, the justice system has worked. They may have used the redress procedure, they may have used the IG, they may have used the service chief and they may have used an ombudsman and at each level a finding has been determined and they are not prepared to accept that. Does that mean the system is wrong? Or does it mean that individuals are not prepared to accept the system?

**Senator JOHNSTON**—There are a lot of them and they talk very freely. They come before this committee and we give them what we are giving you now. We give them a really thorough examination.

**Lt Gen. Leahy**—Senator, your task is to determine the validity of their statements.

**Senator JOHNSTON**—They are pretty persuasive, General.

**Lt Gen. Leahy**—Yes, they are. Whether it is persuasiveness or validity is the important thing.

**Senator JOHNSTON**—I want to talk to you about this legislation. There are two things that you have been seeking to do recently with regard to the DMP, the Director of Military Prosecutions, and the CJA, the Chief Judge Advocate. There are two parcels of legislation as I understand it. You can correct me—I have no idea what is going on here. Why is it that this very good prosecutor that you have, Hevey, does not have the independence that he needs? Where is the legislation? What is the hang-up? What is the problem? Be bold. If it is a political matter on our side of the fence, tell us. If it is not—

**Lt Gen. Leahy**—I cannot tell you either way. I am not familiar with where it is. I do know that Colonel Hevey has asked for the legislation. Before I came in here I read his submission to you. He is not well pleased. I cannot help you, I am afraid. If you would like, I can take it on notice but I think it is properly for TDLS, the Defence Legal Service, or the drafters.

**Senator JOHNSTON**—Air Commodore Harvey.

**Lt Gen. Leahy**—It is not a matter that I deal with on a day-to-day basis. Frankly, I just cannot help you.

**Senator JOHNSTON**—Let me ask you this: do you think that judicial independence as a statutory officer for the ADF is an important matter?

**Lt Gen. Leahy**—Absolutely. In the case of Colonel Hevey—the individual that you have acknowledged as a high quality individual—I was actually involved in the selection panel which selected him and I saw that the establishment of that position was a very important part of the whole process of us reviewing and making amendments to the military justice system.

**Senator JOHNSTON**—I think you have done a very good job in choosing the man you have chosen. Can we come back to these five officers. They have to show cause. Who are they showing cause to?

**Lt Gen. Leahy**—I believe it is the director-general of personnel for the Army, Brigadier Craig Orm.

**Senator JOHNSTON**—Have we asked the question about the brigadier as to what his relationship with these five officers was?

**Lt Gen. Leahy**—The answer would be the same. He knows them. The job of the director-general personnel Army is to know his officers.

**Senator JOHNSTON**—He knows them but in what context does he know them?

**Lt Gen. Leahy**—He has probably worked with them on occasions. I daresay he has been to parties and functions and mess happy hours and so on.

**Senator JOHNSTON**—Do you not think that that question is important?

**Lt Gen. Leahy**—Yes, it is important. But I take it as an implicit question. Officers know each other. But I also take it implicitly that if I give a job to an officer he is going to carry it out impartially and properly and will not be prejudiced by his knowledge of the other officer. And, if he is, he will come to me and say, 'I don't think I'm the right guy to be doing this. Get someone else.'

**Senator JOHNSTON**—But what if he does not?

**Lt Gen. Leahy**—What is available to the officer against whom an adverse administrative finding might be determined is that he can go to the next level using the redress process to say, 'That bloke is dodgy. He and I had a spat in Timor three years ago and I don't think he should be making those judgments.'

**Senator JOHNSTON**—But what if the bloke he is to go to—the appellate jurisdiction—has a relationship with the judge of first instance?

**Lt Gen. Leahy**—I guess he can appeal again.

**Senator JOHNSTON**—It is not beyond the realms of possibility that everybody knows everybody and everybody takes the side of the institution. Everyone loves the institution.

**Lt Gen. Leahy**—Let me ask you a question. You come from the legal fraternity. I guess most lawyers and judges know each other. Is there not the same problem there? Do we not expect that there will be impartiality from the legal fraternity when they are judging people? I expect the same sense of professionalism—

**Senator JOHNSTON**—You are dead right. There is a problem.



**Lt Gen. Leahy**—from my officers that you would expect from your legal fraternity.

**Senator JOHNSTON**—Let me tell you what we do about the problem. First of all, we give them security of tenure, so they cannot be hired and fired by the executive or the chain of command. Then we give them a stipend that is appropriated through the parliament so that their wages cannot be affected. They cannot be promoted or moved sideways or anything like that, so a career-limiting move cannot be enacted upon them. Then we do a whole lot of other things that make them totally independent from what happens below them—that is, in the body of the court. None of that happens in here. If you want to, have a look at that famous Canadian case that talks about judicial independence. There is not one single shred of judicial independence in this process that you have described. In civil law, there is a huge body of things that are done about judges. We have none of it. That is the difference.

**Lt Gen. Leahy**—I accept your knowledge and experience of the legal profession. But I also would say that, from my knowledge and experience of the military profession, officers and soldiers will do their job impartially.

**Senator JOHNSTON**—You see, that is why we are sitting here: because they are not.

**Lt Gen. Leahy**—In a tiny minority of cases. I do not think it is about their judgment. It is more about the mistakes in terms of their knowledge of the law and their application of recommendations. That does not go to the heart of what an officer is trying to achieve.

**Senator JOHNSTON**—When you stood before the person who was judging you, who you referred me to earlier today, did you think it was a minor case?

**Lt Gen. Leahy**—No. None of these things are minor.

**Senator JOHNSTON**—When someone has been a two star, has been a colonel or has been a sergeant and has given his whole life to his country and he is treated really badly, do you think he is going to think it is a minor case?

**Lt Gen. Leahy**—Not at all.

**Senator JOHNSTON**—They are the ones we have to look after, aren't they?

**Lt Gen. Leahy**—Yes, but we also have to acknowledge that sometimes people cannot comprehend the fact that they have done something wrong and that there is another point of view.

**Senator JOHNSTON**—All right. You will be pleased to know that in this section I have no further questions.

**CHAIR**—I have a question. Ernst and Young have done a report into the Army police, haven't they?

**Lt Gen. Leahy**—That is correct.

**CHAIR**—Is that available?

**Lt Gen. Leahy**—It is still being considered. In fact, I am considering it tomorrow at my Chief of Army's advisory committee, so I would say at this stage it is an internal Army document which we are considering. It is not readily available.

**CHAIR**—Is it not available until you consider it tomorrow or not available at all?

**Lt Gen. Leahy**—It is not available until I have considered it. Are you formally requesting it?

**CHAIR**—Yes, I am.

**Lt Gen. Leahy**—In that case I would need to seek ministerial clearance to make it available to the committee.

**CHAIR**—Thank you all for being in this part of the hearing.

*Evidence was then taken in camera, but later resumed in public—*

[6.25 p.m.]

**RITCHIE, Vice Admiral Christopher Angus, Chief of Navy**

**CHAIR**—Welcome, Vice Admiral Ritchie. We are almost into the last sessions of the inquiry. Section 15 of the board of inquiry report into the *Westralia* accident, which is headed ‘Recognition of personnel’, was suppressed. Was there any reason for that not being released?

**Vice Adm. Ritchie**—Yes, there was a very good reason. We never release recommendations for honours and awards.

**CHAIR**—You do not release them?

**Vice Adm. Ritchie**—Not anywhere, ever, no. I do not know of any organisation that does. They are all done in confidence.

**CHAIR**—Admiral, have you had an opportunity to see the submission to the inquiry from Mr Bernard Collaery?

**Vice Adm. Ritchie**—I have read it at times in the past, yes.

**CHAIR**—I am going to ask you a few questions based on his submission, and I welcome your comments on them. Mr Collaery said:

A culture that allowed a potentially dangerous engine room configuration to be in use in the knowledge of persistent diesel fuel leak; unlagged indicator cocks; steep ladders; dry fire main practice; no exhaust fan capacity; ventilation flaps that could not be reopened from the outside; and no standing instruction for ELSRD use is of great concern to the relatives of the deceased who entrusted their children to the care of the RAN.

Would you like to comment on that statement?

**Vice Adm. Ritchie**—Only to the extent that I would say that we are talking about six years ago. We are talking about a tragic accident that was extensively investigated by the Navy and by civilian experts. As a result of that extensive investigation, the Chief of Navy at the time accepted the fact that there were systemic failures in the Navy’s engineering system. He put in place procedures to rectify those systemic failures. Subsequent to him doing that, we have had a separate investigation, if you like, by Comcare, who have served notices upon the Navy to improve its system. Those notices have been complied with and the suspensions or strictures that were put on us by Comcare have been lifted. Comcare is currently right in the process of checking again to make sure that Navy has remained compliant with the changes that it had to make.

We have also had a coronial inquiry. With respect to the causes of the fire and the issues of safety, the coronial inquiry made a point of agreeing with the board of inquiry and agreeing with the steps that had been taken. So I hear what Mr Collaery says, I understand the grief of the families concerned and I point you to the fact that right back at the end of 1998 the then Chief of

Navy accepted that the Navy had made mistakes and that the Navy needed to fix them. What I have just described is the process we have gone through to do that.

**CHAIR**—As part of the same submission, Mr Collaery also alleges that a senior officer failed to ascertain whether there was any fire after the fuel line was cut before closing the ventilation flaps. Mr Collaery notes that this is contrary to standard Navy firefighting instruction ABR5476, which emphasises ventilation control as important in controlling a fire and minimising risk. Yet the *Westralia* did not have exhaust fans or ventilation flaps that could be controlled from the outside. Were regular fire drills conducted on HMAS *Westralia*?

**Vice Adm. Ritchie**—They were, but I am not really prepared to go into the detail of what the inquiry discovered and what it did not. We can answer all those questions on notice, but I do not have all that at my fingertips and I am not really prepared to discuss it with you.

**CHAIR**—You were aware that this period of discussion was going to be about the HMAS *Westralia*.

**Vice Adm. Ritchie**—And I am also aware that the last time I was before the committee we discussed the sorts of things that could be talked about regarding this inquiry. You are aware—or you may not be aware because I do not think you were here at that time—that there are legal proceedings between the Commonwealth and ADI with respect to this fire that are still extant. Senator Johnston asked me what I thought would be fair to talk about and I said I thought the things that led to the fire were not fair to talk about because of those extant legal proceedings and that the issues that were perhaps of relevance were what the Navy have done since the fire to make sure, as far as we can, that these things do not occur again. To go back to your question, I would point again to the fact that there has now been an inquiry and a coronial inquiry. The coroner says that, with respect to the causes of the fire, safety issues and the integrity of the board of inquiry, he agrees with the board of inquiry. All of the answers to the sorts of questions you asked are in there. I am not prepared to discuss how the fire was caused. And when I say ‘not prepared’, I am not physically prepared either.

**CHAIR**—You said the case is pending.

**Vice Adm. Ritchie**—Yes, there is a current litigation between the Commonwealth and ADI Ltd. But let me make another point, and that is that, despite what Mr Collaery said—and he said it to a coronial inquiry—the coroner did not find any differently in terms of the cause of the fire and the safety implications than had been found before and have been acted on.

**CHAIR**—I cannot recall if you were at the hearing in Hobart. Did you hear Miss Munday’s evidence?

**Vice Adm. Ritchie**—I was in Hobart.

**CHAIR**—Do you remember when she said that, as part of the recuperation, they forced her—and I wrote it down—to put her mask on. ‘Put the fucking thing on’—that is what they told her to do. Do you remember that bit?

**Vice Adm. Ritchie**—Not specifically, but go on.

**CHAIR**—Do you remember her commenting that she was crying and that she had to stay on the ship—

**Vice Adm. Ritchie**—I remember quite vividly her—

**CHAIR**—and walk over the imprint of Seaman Meek?

**Vice Adm. Ritchie**—I know that, yes.

**CHAIR**—Have you got different procedures now to deal with that sort of trauma for your sailors?

**Vice Adm. Ritchie**—I have made a supplementary submission on Miss Munday's evidence—

**CHAIR**—Yes, I know that.

**Vice Adm. Ritchie**—because I really do not believe what Miss Munday said. Specifically I do not believe that Miss Munday sought to leave the ship or, indeed, was made to stay on the ship. There is written evidence of many occasions—I could tell you how many but I think it is at least five—where she wrote to the person responsible for posting her and said that she wished to stay on the ship.

**Senator JOHNSTON**—Have we seen those letters?

**Vice Adm. Ritchie**—No, but you could see them.

**Senator JOHNSTON**—Can I just say that it would make things very much easier for us, because we are bound to give you every fairness that we possibly can. She has made allegations and we have sought to make sure that you are aware of those allegations so that you can respond to them. When you say that you do not believe what she says and that you have good reason to base that in fact because you have documents, it is important that we publish those documents so she can see that the process is fair, if you follow.

**Vice Adm. Ritchie**—You can publish what I have given to you, and I believe I can show you the documents—

**Senator JOHNSTON**—Why don't you take it on notice?

**CHAIR**—You are going to be back before us for two hours after this, so why don't you discuss it with your officers about it during the meal break.

**Vice Adm. Ritchie**—Let me read to you what I have already written to you, and I wrote this in a supplementary submission. I said:

Miss Munday also suggested that she was kept working in the engine room on *Westralia* against her will for 18 months after the fire and made to stay on the ship. Navy records indicate Miss Munday was insistent that she remain on *Westralia* and she stated these wishes on a number of separate occasions—13 July 1998, 3 August 1998, 16 October 1998, 11 November 1988, and 8 February 1999.

I sent you that some time ago, I think. I cannot guarantee that I can access those records at the moment but I can certainly get them to you. I can show you those letters.

**CHAIR**—That would be fine.

**Senator SANDY MACDONALD**—Section 15 of the BOI report into the *Westralia*, which is ‘Recognition of personnel’, has been suppressed. Can you explain why this section has not been released?

**Vice Adm. Ritchie**—I have been asked that question tonight already, but I can answer it. It is not practice anywhere in the Australian government to release recommendations for honours and awards to public scrutiny. Recommendations for honours and awards are made in the strictest confidence between the people who do the nominating and the body, which is entirely separate from Defence in the case of most of these awards, and that is the Australian Bravery Council. It is not the practice.

**Senator SANDY MACDONALD**—You said you have been asked this question already this evening. Where were you asked it?

**Vice Adm. Ritchie**—Senator Hutchins asked it when I first came in. It was the first question.

**CHAIR**—Senator Macdonald was engaged in something elsewhere—

**Senator SANDY MACDONALD**—My apologies.

**CHAIR**—It is just that you may have read in the *Hansard* that Bradley Meek is mentioned by the people who gave evidence to us as someone outstanding in the accident.

**Vice Adm. Ritchie**—I know where you are headed and I could speak to you about that, but I would rather do it in camera.

**CHAIR**—Sure. We can go in camera.

*Evidence was then taken in camera, but later resumed in public—*

**Senator PAYNE**—I wanted to ask some general questions about the post BOI process—that is, where there are recommendations made in a BOI such as the *Westralia* BOI. We have heard evidence in the past few months that one of the challenges seems to be a proper implementation of recommendations where they are adopted by the service in question. Does Navy have a particular implementation plan for the relevant recommendations in the *Westralia* BOI, particularly those that involve the safety and proper training of personnel?

**Vice Adm. Ritchie**—We certainly do. The *Westralia* BOI had such a significant impact on the Navy that there was no way that we could allow the 114-odd recommendations not to be followed up as firmly as we could, and nor did the government allow us to do that. We were reporting to the government on a regular basis on the implementation of those recommendations. I cannot tell you exactly, but I think it was quarterly for the first two years and then it went to six-monthly or whatever. We have actually implemented all bar one of the recommendations that were accepted. Three recommendations were not accepted because they were about doing things that were quite outside the power of the Defence Force, or indeed the Australian government, to do. All of the rest were accepted, and we have implemented all bar one. The one we have not implemented relates to the fitting of recording devices in every ship of the fleet. We have not yet done it in every ship of the fleet. We have progressed it but we have not got to all of them.

**Senator PAYNE**—So it is not that you rejected it; it is just a part implementation at this stage.

**Vice Adm. Ritchie**—We do not object to it. It is just a matter of doing it over a period of time. But everything else has been done. We have done even more than that. We then said, ‘Are there other things to do with training and qualification?’ We thought there were. So we have implemented those things. Comcare has separately served notices on us with respect to this accident. We have had to comply with them. Comcare has acknowledged that we have complied with them. That was now some time ago. Comcare is in the process right now of rechecking to make sure we have done what we said we have done, that we have not dropped the ball, that we are still at it. Subsequently we have the coronial inquiry. As I have said a number of times here, when we got hold of the coronial inquiry the first thing we look to is to say, ‘With respect to cause, safety and those sorts of issues, is he saying the same thing as us about the ones that are likely, if we got them wrong, to happen again?’ And he was saying the same thing as us.

**Senator PAYNE**—The coroner?

**Vice Adm. Ritchie**—Yes. In fact, he makes the point of saying in his report that the board of inquiry report and the recommendations that came out of it are particularly good. He also, then, has made recommendations of his own. In the way that coroners do things, it is hard to determine what is a recommendation and what is an observation. He has only made one or two real recommendations. One of those is to do with the oversight of maintenance work in ships. As you would know, most of that in a direct sense has moved into the DMO, as we have changed our organisation. Recently we have sought agreement from the DMO that they are complying with the things that the coroner said with respect to that oversight. They agree that they are.

We then looked at everything else that the coroner said. He made observations about certain things. We have treated all of those as recommendations. We listed all of those recommendations

about a month or so ago. I sent all of those recommendations with commentary on who was responsible for fixing them up to the DMO, to the maritime command and to our Director-General of Navy Personnel and Training. I have sought agreement from all of those people—which is coming back to me as we speak—that they are happy, that they are indeed the right authorities to do those things. We will go through the same process as we did with those 114 recommendations from the board of inquiry.

I am happy that all of those things that would stand us into danger tonight if we had not done them have certainly been done. There are more systemic issues—in particular, the coroner said that people who are in command of these sorts of ships should go to sea in similar sorts of tankers, somewhere in the merchant navy or whatever. We have got to come to grips with all those sorts of things. To answer your question, we have been very systematic in how we implement the recommendations, firstly, of the board of inquiry and, secondly, of Comcare's own investigation into the issue. We are now undertaking in a similar way the recommendations of the coroner.

**Senator PAYNE**—To satisfy yourself as Chief of Navy, say, in relation to the recommendations of the coroner, will you have in place a system to follow up your DG training with DMO?

**Vice Adm. Ritchie**—Yes, I certainly will. With respect to the coroner, I now have agreement that we have found the right home for these things. I am the person who should be doing it, and this is how I am going to do it. We will certainly follow it up in the same way that we did with the other one—with a regular reporting regime. I would say to you, too, that they are of lesser significance. We know that we are compliant with his main recommendations, which are to do with oversight. We have checked that. The others are of a different order. But we will still treat them in the same way.

**Senator PAYNE**—In terms of some of the coroner's findings, is his assessment of the monitoring of outsourced contracts, for example, and things like that within the purview of DMO?

**Vice Adm. Ritchie**—Yes, it certainly is.

**Senator PAYNE**—The recommendations about reviewing the tender process in contract management guidelines have gone to DMO for implementation?

**Vice Adm. Ritchie**—Yes, they have gone to DMO.

**Senator PAYNE**—Have they made changes yet?

**Vice Adm. Ritchie**—The DMO are all the time making changes, I suppose. But, with respect to those sorts of issues, they essentially march to the tune of our regulation and certification regime. We set the standards, and we have largely derived those standards since the *Westralia*. A whole change in the process of certification and regulation—the way in which we have changed our business—comes from that fire. The DMO is required to comply with them.



The head of maritime systems in the DMO has written to all of the people who are responsible for these things within his organisation. He has told them that they are to be compliant with the naval technical regulatory system, the regulator of which is sitting behind me. We are fairly sure that they are doing those things. That is not to say that we do not have a part to play in it. So the other part in this is the maritime commander. Once you have given a vessel into the hands of the DMO, there is some process of accepting it back again and asking, 'Okay, where is the compliance with all this technical regulatory stuff?' And we have a process for doing that.

**Senator PAYNE**—That would be described as your check and balance to ensure that that is being adhered to.

**Vice Adm. Ritchie**—Yes. The coroner also said to us that, despite all of that, the commanding officer and the ships engineer have a responsibility. We accept that. We are changing the training processes, the education processes, for those sorts of people so that they can comply with that as well. This is bread-and-butter stuff for us. We have to get it right, and we will get it right.

**Senator JOHNSTON**—Before I ask any questions, can you give us an outline of the situation with respect to personal injury claims against Comcare by the ship's complement arising from the fire? Are there any matters which we should not discuss because liability is in issue, if you follow what I mean?

**Vice Adm. Ritchie**—Are you talking about Comcare-ADI or are you talking about the ship's company against the Commonwealth?

**Senator JOHNSTON**—I want to talk about the health and welfare of the ship's company after the fire, but I do not want to do so if there are issues arising that will impact upon court cases that are current against ADF by any members of the ship's complement where liability might be denied or there is litigation.

**Vice Adm. Ritchie**—I am advised that we know that the families are using some of the stuff that Comcare is using against ADI in a case that they intend against the Commonwealth, but I think probably again we are talking about issues that relate to the cause of the fire and the things that happened on the day. If you want to talk about what we did with individuals in relation to PTSD, I think we can safely talk about that.

**Senator JOHNSTON**—If you—or indeed any of your advisers—have any doubt about the appropriateness of any of my questions against that backdrop, feel free to say, 'No, I'd rather not answer that.' With respect to post-traumatic psychological management, when was the last time we had a professional evaluation of the methodology that we employ in Navy?

**Vice Adm. Ritchie**—We had a professional psychologist—I think that is the right word to use—who went to the Middle East last year in one of our ships, employed as a reserve officer, and who wrote a paper on how we ought to treat these people. I think I am correct in saying that the way in which we have done and do our business now—pre and post—is in accordance with the recommendations of that particular paper.

**Senator JOHNSTON**—Would it be possible for us to have that paper?

**Vice Adm. Ritchie**—I think it probably would—but, again, it is not something I can get hold of tonight.

**Senator JOHNSTON**—I fully appreciate that you would not be able to get it tonight, but the committee would be very obliged if we could see that.

**Vice Adm. Ritchie**—I have a note here which says that PTSD treatment intervention strategies were also discussed at the ADF mental health conference which took place not all that long ago.

**Senator JOHNSTON**—Do we have a statistical analysis with respect to that ship's company—in the nature of 'where are they now'?

**Vice Adm. Ritchie**—When I say yes, I mean there were some questions on notice from the chairman which give part of the answer you are talking about. In terms of saying which ships they are in now, I cannot tell you. The fire happened in May 1998. If we are talking about the sailors—excluding the sailors who were killed, there were 71 sailors, and there were 19 officers, whom I will address in a moment—27 of them are still in the Navy.

**Senator JOHNSTON**—How does that figure compare, as a percentage, to the ship's complement of the *Success* from the same time?

**Vice Adm. Ritchie**—I could not tell you that. The way in which we would look at whether this is an unreasonable figure is to say that between then and now we have had a discharge rate—that is, the percentage of people leaving the Navy—as high as about 13½ per cent per year.

**Senator JOHNSTON**—So to have gone from 71 to 27 is probably not a bad figure?

**Vice Adm. Ritchie**—It is not a bad figure. There are 44 who have discharged and there are 27 who are still in. Given that it is six years ago, that roughly accords with the figure for discharges.

**Senator JOHNSTON**—I accept that.

**Vice Adm. Ritchie**—Of the 44 people who have discharged, 23 have actually joined the Reserve. So they have not left the Navy completely.

**Senator JOHNSTON**—That is good. Did you say 71?

**Vice Adm. Ritchie**—Yes, 71 in total.

**Senator JOHNSTON**—Correct me—I should know the answer to this—do we call them junior sailors? Or do we just call them sailors?

**Vice Adm. Ritchie**—Sailors. The figures that have been done have separated sailors from officers. There were 19 officers. There were 71 sailors, of whom 27 are still in the Navy. There were 19 officers, of whom only four have left.

**Senator JOHNSTON**—How many of the sailors disclosed post-traumatic stress disorder symptoms?

**Vice Adm. Ritchie**—I do not think I have that figure.

**Senator JOHNSTON**—Is it obtainable?

**Vice Adm. Ritchie**—I know of about half-a-dozen, but I would have to take on notice how many of them have actually at some time in that period been diagnosed. You would be interested to know that from 1998 these people were treated on a case by case basis, in as much as certain people were identified right at the start as being people who might well have a problem because of their particular involvement—their proximity to the fire and those sorts of things. Those people were managed fairly carefully. You have heard in evidence from other people that they were not managed well. Again, I would say to you that sometimes people just denied the fact that they had any particular difficulty. Why that was the case I am not sure. In most cases it seems to be about a year later that you actually get a firm diagnosis that there is a problem. Almost none of them were diagnosed at the time. There were people who were diagnosed as being at risk at the time, but nobody was diagnosed at the time. And I suppose that is the nature of PTSD—that is, it happens afterwards.

In late 2002 I asked: what has happened to all these people? We are now in the process of finding everybody, including the ones that have left. We have not completed this process, but we have found 41 of the ship's company and seen them again since 2002 to check whether or not there is anything that needs to be done or any advice that they need to be given. There are a few people still serving to be checked. We have not yet done it but we have the intention to do it for those people who are outside. We have set about trying to find out where they are. We have to get hold of them and get their agreement to come and do it. But since late 2002 we have adopted this notion of saying, 'We need to go back and look at this whole community' and we are about halfway through that process. One person—a psychologist—is doing that.

**Senator JOHNSTON**—So you have retained the services of a psychologist exclusively to go back and conduct a review of all of the ship's complement, including officers?

**Vice Adm. Ritchie**—Yes. He is working for us as a reservist, so he is not doing it full time.

**Senator JOHNSTON**—Including officers?

**Vice Adm. Ritchie**—He is doing everybody.

**Senator JOHNSTON**—I asked you about the sailors. What about the officers?

**Vice Adm. Ritchie**—As I said, there were 19 officers on board.

**Senator JOHNSTON**—That was the total figure, was it?

**Vice Adm. Ritchie**—It was the total complement of officers. As of 30 July, four of those people had left the organisation. Two of them left, I suppose, because the Navy was not a career that they wanted to pursue. The other two left because they had other career opportunities put in

front of them that they wished to pursue. I cannot say that any of those people have been checked, but I am sure that some of them are amongst the approximately 50 per cent of the people that we have checked again since the end of 2002.

**Senator JOHNSTON**—I am very interested to hear you say that you have a specific psychologist assigned to the task of reviewing the ship's complement. What are you seeking to achieve in doing that?

**Vice Adm. Ritchie**—When this happened to us, corporately in the Navy we did not have a good understanding of what PTSD is and what it does to people. I do not think there was any great visibility of these individuals at the higher levels of Navy, as they popped up individually. The sorts of things that have probably occurred to you during the conduct of this inquiry occurred to me when I took over the job of Chief of Navy. What do we do about the mental health of our people? Are we doing the right sorts of things? It is a very useful thing for us to ask how people have been impacted upon. At some time in the future, we might say, 'Let's take Anzacs from the last Iraq war, do a similar thing and see what happens.' This sort of business is relatively new for us, but we are pretty keenly engaged in it, and we understand that it is important.

**Senator JOHNSTON**—I think you did well, and I think that it is a very good review to conduct. Does your psychologist have specific terms of reference? What exactly have you told him to do?

**Vice Adm. Ritchie**—We are calling it the psychological screening of people who were on board *Westralia*. We started out looking at those who were still serving. As I said, we are extending it to those who are outside.

**Senator JOHNSTON**—Was there some concern that there was a latent problem with those still serving that you needed to address?

**Vice Adm. Ritchie**—Within our own medical community, people were saying, 'Maybe we ought to look back and see how we're going.' I do not think that there was any particular concern. I know that in my own mind there was no particular issue—although, having said that, I should say that perhaps I was triggered into doing this by the death of Liddell. I am searching for a reason that I did this, other than a general concern for the welfare of people who have been through something like this. I was the maritime commander when this happened; I was the convening authority for the board of inquiry.

This has affected the way in which I run the Navy. I tell people in the Navy: you are what you are; you are what your experiences are. I came to the position of Chief of Navy, and the very first thing that landed on my desk was about the board of inquiry into the report of the death of Leading Seaman Gurr, who was lost overboard. I am a bit fanatical about the sorts of issues that lead to these sorts of things happening. On reflection, it could not be the death of young Liddell, because he died afterwards. I think the fact that he committed suicide 2½ years after he left the Navy is indicative of what might happen, but I will not claim that that was the reason.

**Senator JOHNSTON**—What springs to my mind in this whole *Westralia* thing is what one of our witnesses said, and I will come back to the person concerned. It struck me that, because of

the nature of the fighting of a fire below decks—with the mask, the suit, the hose, the weight, the air—the whole environment has such an impact on the psychology and the senses of those individuals, and it worries me that, with those who do not disclose any overt symptoms, 12 months later we have got a problem. It worries me that those people may not be capable of fighting a fire, yet we do not know that.

**Vice Adm. Ritchie**—You mean we do not know before the fact? No. How do we get over that?

**Senator JOHNSTON**—We would only find out if we had a fire.

**Vice Adm. Ritchie**—How do we get over that; how do we try to militate against that? I know you have been to sea and you have seen people doing these sorts of things.

**Senator JOHNSTON**—This is what I am saying.

**Vice Adm. Ritchie**—We actually do it—

**Senator JOHNSTON**—Regularly?

**Vice Adm. Ritchie**—in a fire situation as well. In our training ashore, there is fire and smoke and all of the terrible things that you are going to confront in reality. That is the way in which we try to militate against it, by making the training that we do as realistic as we possibly can. I do not know that you have ever been in a ship when it has been worked up—

**Senator JOHNSTON**—I have.

**Vice Adm. Ritchie**—The people who do that are professional. They call them the wreckers because—

**Senator JOHNSTON**—The sea training group, yes.

**Vice Adm. Ritchie**—that is what they do. They fill the ship with smoke and all sorts of things, and life becomes difficult.

**Senator JOHNSTON**—But those smoke bombs are nowhere near realistic, because there is no heat with them. What worries me is that when I was a sailor I could, had I wanted to, have avoided exposure to the sort of reality that I might have had to confront. I could have worked my way through for a long time, not actually getting exposed to that.

**Vice Adm. Ritchie**—You could. But that faces all of us: when the test comes, none of us knows—we do not know, do we, until it comes?

**Senator JOHNSTON**—What worries me is that you have got the hint of a very significant problem, with these symptoms arising as they do—as you say—some 12 months later.

**Vice Adm. Ritchie**—Yes.

**Senator JOHNSTON**—What concerns me when we acknowledge that is to do with this particular witness down in Hobart, Miss Munday—was she an able seaman or a leading seaman?

**Vice Adm. Ritchie**—She was a leading seaman when she left. I think she was an able seaman at the time of the fire.

**Senator JOHNSTON**—I know you have some strong views on her, but she set out a pattern of management, with respect to her psychological disposition, that far too readily accepted her own assessment of herself.

**Vice Adm. Ritchie**—Yes.

**Senator JOHNSTON**—I see that as a problem. Do you see that as a problem?

**Vice Adm. Ritchie**—I accept what you say, but, being a layman, I really do not have an answer as to what you do when somebody asserts that they are okay. I do not know how you say, ‘Well, you might be, but maybe you’re not.’

**Senator JOHNSTON**—I will tell you what I think you have to do. I think you have to get some skilled psychologists that are very adept at knowing what the symptoms of post-traumatic stress disorder are, and it has to be one on one for a start, so that there is no peer pressure on people to be stronger than everybody else. They have to identify for that person the classic symptoms that they are going to experience—in the nature of sleep flashbacks, insomnia and all those things—and then they have to make sure that that person understands that when they begin to go through that process they should get some assistance. I do not think we dealt with this problem as much as we probably could have at the time, and I think we have learnt a lesson, but that is what I want to tell you.

**Vice Adm. Ritchie**—I accept all that. I agree. We learn from all of these things. One of the reasons for surveying everybody is to find out how many people we do not know about are out there with this problem. But in the cases of all of those who did present at some later stage it went almost exactly the way you described. People were okay for 12 months or so, or some for a lesser period, but then they started to feel that there was an issue. As soon as they felt that, they got the treatment that they needed. The question of whether or not the treatment is effective is another thing again—and it is probably outside our particular field of expertise. In some cases it has not been effective, because we have seen these unfortunate cases of suicide that have come from it.

**Senator JOHNSTON**—What we have seen in those cases of suicide is a denial by the person that there was really anything wrong or an attempt to struggle through it. The thing that concerns me here is that we were, I think, too ready to say, ‘Here is an adult person, here is a strong-willed person who knows what they want, and we will take their word for it.’ Indeed, I note in a lot of the papers that we rely on that, and I think it is very hard—irresistible—not to do that. But I think that, with this particular disorder, we now know that when someone wants to avoid acknowledging the potential for a problem we have to do something out of the box to get it through to them that they are experiencing a very complex mental disorder. Do you think we are at that stage? Do you think we do that now?

**Vice Adm. Ritchie**—I would not be so bold as to say we are at the stage where we are as aggressive in our mental health care. I do not say that in an unkindly way—you are proposing an aggressive mental health care strategy. I might agree with you on the need for it. I do not think we are there yet, no.

**Senator JOHNSTON**—I do not think it is aggressive; I think it is just a persistent and an understanding perspective that says, ‘Whilst you tell me that you are okay and refuse my treatment I want to tell you this and we need to discuss this at length.’

**Vice Adm. Ritchie**—But I guess for some people the old adage of ‘getting back on the horse’ does work. We have to be careful that we are not saying to everybody, ‘Don’t get back on the horse because you really have a problem.’ Some people, by getting back on, will solve the problem—and I would suggest to you that is the great majority of people. The great majority of people are mentally quite tough, but there are some who are not. It is a matter of identifying those who are not. That is the issue.

**Senator JOHNSTON**—That is the hard part. I think we have seen the ones that say they are actually have not been, and it is very hard to work out who is and who is not.

**Vice Adm. Ritchie**—Yes. We know that from experience as well: bravado is often a cover for lack of confidence.

**Senator JOHNSTON**—It is the Navy, it is the Army, it is the Air Force: we kill and capture the enemy—and then when there is something psychologically wrong with us we do not want our mothers and we do not want to see the doctor. I think it is logical. To me, the *Westralia* was a large quotient of just that: people saying, ‘I’m okay,’ when they really were not. We did not switch onto it. As you say, you have employed a psychologist to go and do that. I think that shows that we acknowledge that we have a lot to learn in that regard.

**Proceedings suspended from 7.13 p.m. to 8.05 p.m.**

**HARVEY, Air Commodore Simon John, Director-General, Australian Defence Force Legal Service**

**HOUSTON, Air Marshal Angus, Chief of Air Force**

**LEAHY, Lieutenant General Peter Francis, Chief of Army**

**RITCHIE, Vice Admiral Christopher Angus, Chief of Navy**

**CHAIR**—We have suggested that we roll into this session the general questions about the services. As you would be aware, this was going to be a session on drugs and alcohol. Can the committee be provided with a copy of the investigating officer's report into drug allegations made by LAC Moore and others?

**Air Marshal Houston**—Is this with regard to the stuff at Amberley? I think we have referred to it as the McIver report.

**CHAIR**—In 2002?

**Air Marshal Houston**—In 2002 a report was prepared by McIver and I would be delighted to provide that report—obviously subject to the normal protocols.

**CHAIR**—You can take this question on notice. Can the three services provide the committee with the total number of positive drug tests since 2000, and tell us what action resulted—were they discharged, warned or transferred? I realise that you may not be able to answer that now.

**Air Marshal Houston**—Do you want the total number by service or for the ADF?

**CHAIR**—The total number by service would be helpful but if you feel that is a difficulty I leave it up to you.

**Vice Adm. Ritchie**—Do you want it since 2000?

**CHAIR**—Yes, since 2000, please.

**Air Marshal Houston**—I can only give you the figures since 2002.

**Vice Adm. Ritchie**—I do not know that we could go back to 2000, either. We can give you very accurately the figures for the last 18 months, and very accurately since we started random testing.

**CHAIR**—So that is 2002. Are you going to break ranks, General, or are you going to stick with your colleagues and go from 2002?



**Lt Gen. Leahy**—I can go back to 2000 but I can only readily give you the drug related discharges, not the number tested and the number discharged.

**CHAIR**—Fine.

**Lt Gen. Leahy**—Is it best we take that on notice?

**CHAIR**—Yes, if you would not mind. What section of the DFDA provides for targeted testing—with probable cause under the DFDA?

**Vice Adm. Ritchie**—What section of the DFDA provides for it?

**CHAIR**—Yes, could you advise us of that?

**Air Marshal Houston**—Do you mean the targeted testing we are doing at the moment?

**CHAIR**—Yes.

**Air Marshal Houston**—It is not conducted under the DFDA. It is an administrative procedure.

**CHAIR**—Do you have random drug and alcohol testing?

**Air Marshal Houston**—Correct.

**Lt Gen. Leahy**—It is not under the DFDA, though.

**CHAIR**—What is that carried out under? Is it under general instructions?

**Air Marshal Houston**—It is carried out under my command powers.

**CHAIR**—You were recently tested, weren't you?

**Air Marshal Houston**—I was recently tested.

**Lt Gen. Leahy**—Can I ask whether you passed?

**Air Marshal Houston**—I passed; yes.

**Lt Gen. Leahy**—In our case it is a Defence Instruction (Army). As the Chief of the Air Force has suggested it is an administrative instruction. We call it *Army's random and targeted urinalysis drug testing program*. That gives the authority for the program.

**Vice Adm. Ritchie**—Similarly in the Navy it is a Defence Instruction (Navy). It is called *Illegal use of drugs and drug education in the Royal Australian Navy*.

**Air Marshal Houston**—I can perhaps elaborate a little bit more. In Air Force we use two methods. The first method is testing under DI(G) PERS 15-2. We use that in circumstances where people are identified as having a strong probability of having used drugs. The second method is testing under DI(AF) PERS 4-26, which is titled *Illicit drug testing in Air Force*.

**CHAIR**—Maybe it is unfair to ask you to continue to respond separately. Could you come back to us about when this sort of testing was introduced and the regulations under which it came in in the last few years?

**Vice Adm. Ritchie**—The way we currently do random testing was introduced at the end of last year, so it is as recent as the end of 2003. I think that we started in January 2004.

**Lt Gen. Leahy**—We issued the directive on 27 November 2003, and I think we were doing it probably within days after that.

**Senator HOGG**—But you are all doing it under independent Defence Instructions?

**Vice Adm. Ritchie**—At the moment. There is an intention to bring it together and to do it under the one, but we would do it under existing command powers that we have, in order to get it in.

**Senator HOGG**—When will it be brought under the one set of regulations?

**Vice Adm. Ritchie**—I could not give you a date on that, but those sorts of regulations are in draft form now.

**Senator HOGG**—So when was the legislation passed to bring about the consideration of the regulations? Or is there no legislation there?

**Lt Gen. Leahy**—We are expecting that the Defence Instruction (General) would be issued in September this year, which would develop a common ADF testing regime based on the processes and procedures that Army, Navy and Air Force are implementing now.

**Air Marshal Houston**—And it is done under our command powers, under the Defence Act and the Air Force Act.

**Senator HOGG**—It is under the Defence Act now?

**Air Marshal Houston**—Yes.

**Senator HOGG**—That is correct? And you are reliant on a set of regulations being promulgated that will bring a common set of principles, criteria, under which you will test? Is that a reasonable way to describe it?

**Lt Gen. Leahy**—No, I do not think so. As service chiefs, we have the prerogative under the Defence Act to do that now. We have the command prerogative to do both random and targeted urinalysis, and all three services are doing that. What we are waiting for is that in September

there will be an overarching Defence Instruction (General) that will just put into place, at the Defence level, those same procedures.

**Senator JOHNSTON**—But haven't you got one from 28 November 1994?

**Lt Gen. Leahy**—There are pre-existing documents, but we are waiting for one that will establish a common testing regime with processes and procedures.

**Vice Adm. Ritchie**—There is no pre-existing documentation with respect to random testing, but there is documentation for testing in various other forms.

**Senator HOGG**—Sorry, Vice Admiral Ritchie; I am just trying to find out the purpose of the overarching Defence Instruction (General) that you are going to have. It seems to me as if you are going to retain the existing service regimes. Isn't that going to add to confusion?

**Lt Gen. Leahy**—No. The three service regimes will be remarkably similar. Air Force and Army at the moment—

**Senator HOGG**—But will they go out of existence when you have this overarching regime? That is what I am trying to work out. They will?

**Air Marshal Houston**—No, we would have—

**Senator HOGG**—You can understand that from where we sit it looks terribly confusing. You explained to us that you have had a regime and now you are going to have an overarching regime.

**Vice Adm. Ritchie**—We agreed on a requirement to do this. We saw it as an occupational health and safety issue, a duty of care issue. In order to implement it quickly, we did it under the powers of command that we have under the Constitution.

**Senator HOGG**—I accept that.

**Vice Adm. Ritchie**—We also did it under existing rules, if you like. We already had a regulation in Navy. We just amended it, in minor form, to enable us to do this. Army probably did something very similar.

**Senator HOGG**—I accept all of that.

**Vice Adm. Ritchie**—We are looking to get a common process.

**Senator HOGG**—But when you get the common process in place, my question is: surely you will drop the individual regimes that you now have in place? Or will there not be a possibility of conflict between those and the overarching set of regimes?

**Vice Adm. Ritchie**—We will amend whatever single service documentation there is to accord with the overarching regime, so that there is no confusion, but we will continue such that Navy will test Navy, Air Force will test Air Force and Army will test Army.

**Air Marshal Houston**—They are totally consistent right across the board. The only difference, far as I can determine, is that Navy uses a slightly different technique of testing to Army and Air Force, because they had an existing procedure, where Army and Air Force did not.

**Senator HOGG**—If I understand that position—and pardon me for being confused about this—there is a statement in the Defence Act about your capacity to do this. Is that correct?

**Lt Gen. Leahy**—There is a statement that—

**Senator HOGG**—But there are no regulations appended to the act, there will not be any regulations appended to the act, as I understand it, but there will be—

**Lt Gen. Leahy**—Our aim is eventually to amend the Defence Act so that the powers flow from the Defence Act. That will take some time to do.

**Senator HOGG**—Why will that take time? What is the problem? You have been able to come to a common set of standards—

**Lt Gen. Leahy**—Frankly, you would probably understand why bills take a long time to pass better than I do. We need to draft the legislation, get it before the parliament, get it into the timetable and have it passed.

**Senator JOHNSTON**—Who is ‘we’?

**Lt Gen. Leahy**—Defence putting forward the proposal to amend the Defence Act.

**Senator JOHNSTON**—Have you signed off on that?

**Lt Gen. Leahy**—No.

**Senator JOHNSTON**—Have you put in a requisition to begin the process?

**Lt Gen. Leahy**—I am not sure that we have yet.

**Senator JOHNSTON**—We have got the Defence Instructions (General) of 28 November 1994. You gave us these. There is a definition of ‘drug’ in there. I then have the Navy instruction signed by Vice Admiral Ritchie on 19 December 2003. That has a definition of ‘drug’. The two are different. I then have a situation where the Army does not even have a definition of ‘drug’ in its Defence Instruction dated 27 November 2003. I do not think it does, and I am happy to stand corrected and apologise to you if I can find ‘drug’. Also, the authority for command and control of illicit drug testing in Air Force rests with the Chief of Air Force and all activities associated with the Air Force illicit drug-testing program are done under CAF’s authority. I have got, potentially, four different regimes. I am happy to entertain argument as to why I am wrong in that.

**Lt Gen. Leahy**—In relation to your statement that there is no definition of illicit drugs in Army’s DI—

**Senator JOHNSTON**—It is ‘illicit’, is it?

**Lt Gen. Leahy**—on page 2, in paragraph 7g, ‘illicit drugs’ are defined. It is at the bottom of the page.

**Senator JOHNSTON**—Good. Do you know that that definition is different from the other three?

**Vice Adm. Ritchie**—What is the difference? You are one up on us. Give us the 1994 one. What is that definition?

**Senator JOHNSTON**—The 1994 one says exactly the same as Navy’s but it has these words on the end ‘and is not required to sustain the normal functioning of the organism’. The ‘and’ is important for lawyers, and so that is a whole new ball game. Yours says exactly the same thing but it does not have that. It says ‘may modify one or more of the physiological, biochemical or psychological functions of that organism’. The Army one has a definition of ‘illicit drugs’, and this is fascinating. That is a definition we have not used before. There is a whole new concept of ‘illicit drugs’. Therefore they are unlawful. They are not just ‘drugs’ but have to be ‘illicit drugs’ for the Army. Page 2 of the defines ‘illicit drugs’ as ‘narcotic substances, as defined in the Customs Act’, which is light years away from the description we have had so far. There are four different definitions that are totally removed from the situation. The Air Force has the same as Army but with one vital distinction: the authority for command and control of illicit drug testing in Air Force rests with the Chief of Air Force. Who does the authority rest with in Navy, Army and so on?

**Lt Gen. Leahy**—I issued the directive. If you look at the front cover, you will see that it is signed by my authority. It rests with me.

**Senator JOHNSTON**—Why does his mention it? Why do your definitions differ? There is no continuity. Navy is the same as the old order. Tell me where we are on this. We were doing it all last year and we have absolutely no fundamental common thread.

**Lt Gen. Leahy**—I think that is wrong.

**Vice Adm. Ritchie**—I disagree.

**Lt Gen. Leahy**—There is a common thread.

**Senator JOHNSTON**—Argue with me.

**Lt Gen. Leahy**—Each of us has the authority by our command position.

**Senator JOHNSTON**—Show me where.

**Lt Gen. Leahy**—I have issued the directive and that is my authority.

**Senator JOHNSTON**—Why is there no clause in yours like clause 6 in the Air Force’s direction?

**Lt Gen. Leahy**—The front cover shows that the Defence Instruction (Army) listed below is issued by my command, pursuant to section 9A of the Defence Act. That is my authority as the commander to issue that instruction.

**Senator JOHNSTON**—Yes, that is right. But let us just pause for a minute; this is very important. The authority for command and control is explicitly reserved to the CAF by a clause. Yours does not do that.

**Lt Gen. Leahy**—I do not see that that precludes me from having the authority to direct this.

**Senator JOHNSTON**—The first thing I am going to argue when you start doing something with drugs is that you do not have the authority that he has.

**Lt Gen. Leahy**—It is just not stated; that is all.

**Vice Adm. Ritchie**—Except that the Defence Act gives that authority only to the chief of the service.

**Senator JOHNSTON**—Why has he got it and you guys have not?

**Lt Gen. Leahy**—We issued them at different times, and different people drafted them and put them out. We are now headed towards, in September, a common directive, the DI(G).

**Vice Adm. Ritchie**—Just to solve those problems.

**Senator JOHNSTON**—You are telling me that you each have a drugs policy. It is individualistic but different.

**Lt Gen. Leahy**—I am saying that they are remarkably similar but, yes, they are different.

**Senator JOHNSTON**—Why? Drugs are drugs, aren't they?

**Air Marshal Houston**—One of the reasons that Air Force is different is that we decided to spell out my powers. I did not actually have to do that, but I wanted everybody to understand that that was being done under my command powers. I thought it was very important that I do that.

**Senator JOHNSTON**—Did you take any legal advice with respect to that clause?

**Air Marshal Houston**—We took legal advice on the preparation of the instruction, yes.

**Senator JOHNSTON**—Does it have something to do with the fact that you are operating aircraft?

**Air Marshal Houston**—No, nothing to do with that. It is just that we decided we needed to spell it out.

**Senator JOHNSTON**—Did you disclose that legal advice to the other service chiefs?

**Air Marshal Houston**—I know our staff worked closely together but, as Chief of Army has already told you, things were done at different times. Navy had an existing procedure that they were able to modify. Chief of Army put his instruction out in November.

**Senator JOHNSTON**—On 27 November.

**Senator HOGG**—On 27 November last year.

**Air Marshal Houston**—We followed on 24 December, on Christmas Eve. So we were actually behind them. I decided to spell it out.

**Senator HOGG**—I just want to follow up something on the dates. These were put out at the end of last year, as I understand it.

**Air Marshal Houston**—That is right.

**Senator HOGG**—As a result of earlier regulation or discussions in October. Is that correct?

**Air Marshal Houston**—Yes.

**Senator HOGG**—I am just trying to find out what happened. I am also advised that the act in this particular area was consolidated as in force on 5 October 1999 and that part VIIIA: ‘Urinalysis testing of members of the Defence Force who undertake combat and combat-related duties’—

**Vice Adm. Ritchie**—This is not done under part VIIIA.

**Senator HOGG**—It is not done under that?

**Lt Gen. Leahy**—It is done under command authority.

**Vice Adm. Ritchie**—It is deliberately not done under part VIIIA.

**Senator HOGG**—So what is the relationship between part VIIIA and what you are doing here?

**Vice Adm. Ritchie**—This takes it a step further than part VIIIA allows you to take it.

**Air Marshal Houston**—Essentially we had a discussion and we decided that we would all do the same thing under our command powers. I have spelt it out but we all understood that this drug testing regime would be conducted under our single service command powers.

**Lt Gen. Leahy**—There was one other element and that was in October last year. There was a death of a soldier and it was drug related. Army considered that our ability under part VIIIA and other regulations to conduct random urine analysis was not adequate. We took a view—

**Senator HOGG**—What led you to that view? We are not necessarily being critical of what you are doing; we are trying to understand the process, because that is the problem that we have run into during this inquiry.

**Lt Gen. Leahy**—The view was that, without a directive of this nature, attempts to take urine samples might have been illegal. These directives did not exist.

**Senator JOHNSTON**—Did you get legal advice over this?

**Lt Gen. Leahy**—I certainly did.

**Senator JOHNSTON**—Can we see it?

**Lt Gen. Leahy**—I do not have it on me. With the death of this soldier being very directly drug related, Army searched around for something under command prerogative with regard to occupational health and safety issues that we could implement. With the support of the director of legal services and his staff, that resulted in the development of this DI(G). That was issued in November, about a month after the death.

**Senator HOGG**—Just in terms of process, you seem to have led the way. I am not saying that in a disparaging way to the other services. They then followed suit.

**Lt Gen. Leahy**—Navy had an existing system.

**Senator HOGG**—I do not know but that is an assumption on my part at this stage.

**Air Marshal Houston**—That is not the way it happened.

**Senator HOGG**—I am just trying to find out whether there was duplication of process.

**Air Marshal Houston**—As I recall, Army had a death. There was also a problem that Admiral Ritchie was concerned about. We had discussions with the CDF and we decided that there was a need to have something more than what we had in place at that time. We collaborated very closely and then we took action. I think the initial action was putting out a temporary directive to get this process going. That was followed by the DI(Air Force)—

**Lt Gen. Leahy**—In fact, on November 3, Minister Brough issued some instructions as well. So there was a lot going on over a very short period of time. Each of us who have this command prerogative saw fit, I think quite properly, to put out an instruction like this.

**Senator HOGG**—I am not being critical of that; I am just trying to understand the process because, when we get the problems coming to us and we see that there are three different sets of regimes in place—they are not necessarily all one and the same but there is an overarching process—that raises our attention. I am wondering whether or not there was a duplication in the process of each of you arriving at substantially the same set of regimes but with different sets of words applying in different circumstances.



**Lt Gen. Leahy**—Certainly the independent staff from each of the services worked together. As Chief of the Air Force has explained, he saw fit through his staff process, to include the words that he was directly issuing authority.

**Vice Adm. Ritchie**—At the time we thought that that was the only way we could do it—that is, to do it under that command authority that we each had individually. That is why you see different words written around it. But the effect is the same.

**Senator JOHNSTON**—Is it?

**Vice Adm. Ritchie**—The only physical difference is that we use a different testing process from what they use.

**Senator JOHNSTON**—That is very important.

**Senator HOGG**—What you are doing in the overarching sense subsumes what is in part VIIIA.

**Vice Adm. Ritchie**—It does at the moment, yes.

**Senator HOGG**—It does at the moment and it will when you have prepared the appropriate legislation.

**Vice Adm. Ritchie**—Part VIIIA is more restrictive. Perhaps the Director-General can talk to that and explain the difference between what part VIIIA says you can do and what we are now doing.

**Air Cdre Harvey**—The policy ownership for this area rests with DPE. I am not the policy owner but I can certainly give some sort of insight into what—

**Senator JOHNSTON**—What is DPE?

**Lt Gen. Leahy**—Defence Personnel Executive; the head of DP, who is Rear Admiral Adams.

**Air Cdre Harvey**—I will just mention that point because I do not have up-to-date information about the policy side of it. But, from a legal side, the legislation referred to in the Defence Act was passed in 1999. That was the one we were working towards developing regulations to implement. As has been mentioned by the Chief of Navy and all service chiefs, an interim arrangement was made by relying upon the command power of the service chiefs under section 9 of the Defence Act and was implemented through defence instructions for the three services under section 9A.

**Senator HOGG**—I will stop you there. You said you were working towards regulations arising out of the 1999 legislation. What happened to those regulations?

**Air Cdre Harvey**—We are responsible in the legal section for arranging for the drafting of those from instructions from the Defence Personnel Executive.

**Senator HOGG**—But that is five years ago. What we are trying to figure it is where those regulations are.

**Air Cdre Harvey**—The regulations have been provided to the Defence Personnel Executive, but I think what has happened subsequently is that there has been consideration of the issue. I think the concern, which I think the Chief of Navy alluded to, was that the regulations would give effect to a scheme under part VIIIA that would be more restrictive than the command based scheme. I think there was some concern of the service officers—and I believe it was discussed at the COSC, which I obviously was not present at.

**Vice Adm. Ritchie**—We have said, ‘It is too slow, not enough.’ We want to do this more comprehensively. We want to be sure that we have a real deterrent effect. Eventually, we want to be sure that we can have a legal effect. We do not have that at the moment.

**Senator HOGG**—You say you do not have it at the moment?

**Vice Adm. Ritchie**—You cannot use this testing for DFDA purposes. Nor can you use the random alcohol breath testing that we have, but it is our objective to get to a point where you can. That requires legislative change.

**Senator HOGG**—Sorry, Senator Johnston, I am starting to hog the floor a bit.

**Senator JOHNSTON**—That is alright. You always do!

**Senator HOGG**—By name and by nature, I suppose! My next question is: when do you believe you will be in the position to put a proposal to government for legislation to be considered? I am trying to get a time line.

**Air Cdre Harvey**—It is hard for me to answer that because obviously we respond to the policy directives and the policy owner.

**Senator JOHNSTON**—What does that mean?

**Air Cdre Harvey**—It gets back to the point that the head of the Defence Personnel Executive is the policy owner and will provide instructions to the legal section and we respond to those instructions.

**Senator JOHNSTON**—What if he does not?

**Lt Gen. Leahy**—We are keen as service chiefs to get legislative cover so that we can do this with the full cover of the laws of the land. Right now, as we have said, we are using a system whereby we are using our command authority based on occupational health and safety. We would wish that the changes to the legislation are made as soon as possible. I am afraid I cannot tell you when though.

**CHAIR**—Does that mean that a person can refuse to do the test?

**Lt Gen. Leahy**—A person can refuse to do the test but, under the regulations, that then becomes failure to comply with a lawful order and they will be dealt with in a disciplinary sense under the DFDA.

**CHAIR**—This is for all of you but, in particular, it came out in relation to Seaman Gurr. You may recall, Vice Admiral Ritchie, that his mother said in her evidence that she was shocked that sailors were not searched when they came back from leave. I think that the submission from the Navy stated that administrative random bag searching had been underway since Seaman Gurr's accident. Is that correct?

**Vice Adm. Ritchie**—Yes.

**CHAIR**—Can you or the other two services comment on whether there is random bag searching now when you go onto your base ship?

**Vice Adm. Ritchie**—To draw a parallel between that issue and this issue, bag searching used to be pretty standard. You went out of the dockyard and, when you went to walk on board, there would be somebody there who would pick out people and say, 'Do it.' Under the DFDA, it is presented as something that you can do if you have reasonable suspicion. But, again, under the command prerogative you can do it if you think it is necessary for good order, occupational health and safety, and the like. It is the same as the issue with drugs. We have decided, subsequent to the tragic incident with Leading Seaman Gurr, that we need to do that from an OH&S duty of care type thing and we are doing it. It is the same with this drug thing; we need to do it. Random breath testing came from the Gurr incident. We need to do it. We do not have a specific legislative power that says we can do it and charge people under the DFDA if they are found to be positive, but we do have the power to do it for those other reasons. We do it, and we will move towards a point where we can have it in the legislation.

**Air Marshal Houston**—I think this issue about bag searching brings out the different environment in which Navy operates. Air Force operates, essentially, in Australia from peacetime bases. We do not have any bag searching for alcohol as such. We do have random bag searches for other things from time to time but not specifically for alcohol.

**Lt Gen. Leahy**—My answer is similar. It is really not an issue for us in that the bases are large and you can get onto them in many different ways. It is not something that we pursue with any vigour at this stage. I am aware that the prerogative exists, but it is not something that concerns us enormously.

**Senator JOHNSTON**—If I have a joint facility with a captain in the Navy, a colonel a group captain, a defence contractor and someone from the defence department, which of you is responsible for the drug testing of those people?

**Vice Adm. Ritchie**—Whoever is running that particular organisation—there will be somebody who is running it. Even though it is a joint facility, it will be run under the mandate of one particular service. If there are Navy people who are serving on a RAAF base, we will agree that they be subject to the RAAF testing.

**Senator JOHNSTON**—But their testing regime is different from yours.

**Vice Adm. Ritchie**—No, it is not, and I have said that to you before. You are making something out of the words of the instruction. The effect of the instruction is no different—10 per cent of my people will be tested and 10 per cent of his will be tested.

**Senator JOHNSTON**—Don't you use a different system to test?

**Vice Adm. Ritchie**—Yes, but I am doing that because I already had that for other purposes.

**Senator JOHNSTON**—What about if it happens to be an Air Force command?

**Vice Adm. Ritchie**—They can be tested by the Air Force.

**Senator JOHNSTON**—So they do not get your test?

**Vice Adm. Ritchie**—No, they would get the Air Force one.

**Senator JOHNSTON**—What is the difference?

**Vice Adm. Ritchie**—There is no difference: you have either been taking drugs or you have not. You will be found out.

**Air Marshal Houston**—The difference is that in Army and Air Force we have a screening test in the first instance and we do not send all the samples off to a laboratory whereas Navy, I believe, sends everything off to the laboratory—in other words, they do not screen; they take a sample and it goes to the laboratory. We only send the samples that test positive in the screening test.

**Lt Gen. Leahy**—My notes tell me that all service programs accord with the requirements of the relevant Australian standard, which is 4308/2001, for the collection and analysis of urine samples for drugs of abuse. We have applied the relevant national standard. There might be a difference in practice, but in standard they are all the same.

**Vice Adm. Ritchie**—One of point you made—I think I am right in saying this; I stand to corrected if I am wrong—is that we do not test civilians. So we only test people in uniform

**Senator JOHNSTON**—No, but what about if you have people in your establishment who are civilians?

**Vice Adm. Ritchie**—Then we do not test them.

**Senator JOHNSTON**—So you could have a circumstance where your departmental officers, and you have a lot of them embedded, do not get tested?

**Vice Adm. Ritchie**—We have no command power over those departmental officers.

**Lt Gen. Leahy**—Nor are we as concerned with their access to weapons, machinery and equipment—which, for occupational health and safety reasons, has compelled us to do this.

**Senator JOHNSTON**—I want to take you back to paragraph six in the Air Force PERS 12/2003. That is a defence instruction with regard to illicit drug testing in the Air Force.

**Air Marshal Houston**—Yes.

**Senator JOHNSTON**—It says that the ‘authority for command and control of illicit drug testing in Air Force rests with the Chief of Air Force’.

**Air Marshal Houston**—Yes.

**Senator JOHNSTON**—You are telling me that those words apply to Navy and Army should they be in a joint operated facility under the command of Air Force.

**Vice Adm. Ritchie**—Yes, should we agree that that is the case.

**Senator JOHNSTON**—How do you agree?

**Vice Adm. Ritchie**—There are many ways you can agree. You can formally say all Navy personnel posted to that base will come under the discipline area.

**Senator JOHNSTON**—Do you do that?

**Vice Adm. Ritchie**—We do.

**Senator JOHNSTON**—Let us take Norforce Command, where we have a plethora of different service personnel. How do I know, firstly, who is in command?

**Lt Gen. Leahy**—It is stated. The CDF would appoint a commander for that particular command.

**Senator JOHNSTON**—At the moment, is he Navy?

**Lt Gen. Leahy**—It is an Air Force officer.

**Senator JOHNSTON**—Is he an air commodore?

**Air Marshal Houston**—Yes.

**Senator JOHNSTON**—So all of the personnel in that office are subject to the Air Force testing regime.

**Air Marshal Houston**—Essentially we have all got instructions that are totally consistent. They all meet the Australian standard, as Chief of Army has told you, and there would not be a problem in us agreeing on testing. Probably we would talk to CDF about it and the testing would be conducted under the Air Force regime, which is actually also the Army regime. So really we would not have a problem.

**Senator JOHNSTON**—The Army regime does not give the authority for that. It just has a regime, whereas you have a specific authority residing in you to determine the methodology of the testing.

**Lt Gen. Leahy**—But, as I have discussed, mine is issued by authority of the Defence Act, and I think it is implicit in that that the issuing of it means that it has got my authority.

**Senator JOHNSTON**—Okay. Tell me how many random tests we have administered. Let us take last year.

**Vice Adm. Ritchie**—We can only go back to December, when we started.

**Senator JOHNSTON**—Let us pause there. Let me withdraw that question and ask another one.

**Vice Adm. Ritchie**—I know the answer to that one!

**Senator JOHNSTON**—So we have never random tested before these orders came to pass.

**Vice Adm. Ritchie**—We have never random tested, no. We have tested. For example, if you had been convicted of a drug offence and we had decided to keep you, if you had self-referred for drug abuse and we had decided to keep you, the keeping was on a condition that you would be tested on a random basis. It is only those sorts of people.

**Air Marshal Houston**—Can I add that DI(G) PERS 15-2, the policy that was introduced in 1994, addresses informants, self-referral and investigations by security police. Essentially it is based on security police investigations based on reasonable suspicion. So the testing would be done on the suspicion that somebody is using drugs.

**Senator JOHNSTON**—I have got that document, signed by Admiral Beaumont in November 1994. That is the one we are talking about.

**Air Marshal Houston**—That is the one.

**Senator JOHNSTON**—So we used that one but it had no power to random test.

**Vice Adm. Ritchie**—No, not just to go and say, ‘Today, your turn.’

**Senator JOHNSTON**—So we did not random test; we tested upon notice.

**Lt Gen. Leahy**—If there were suspicions of illicit drug use, for example in Army’s case if a company or a group of soldiers had been overseas where there were some indication that there might have been drug use and there was reasonable suspicion, they were able through military police and through command authority then to target and drug test.

**Vice Adm. Ritchie**—But it was random with respect to time, not with respect to the subject of the test. Now it is random with respect to both subject and time.

**Senator JOHNSTON**—So there had to be probable cause.

**Vice Adm. Ritchie**—Yes.

**Senator JOHNSTON**—I am looking to Air Commodore Harvey here. Is it probable cause, reasonable suspicion—what was the threshold issue that had to be pierced in order to carry out your urine analysis as specified in this directive?

**Air Cdre Harvey**—I am afraid I am not familiar with the directive.

**Lt Gen. Leahy**—Referring to my briefing notes, I can tell you that commanders—this would not have changed, because we have done random testing—can target members for testing based on the suspicion of illicit drug use, or reasonable cause to believe.

**Senator JOHNSTON**—Reasonable cause to believe.

**Vice Adm. Ritchie**—In addition to that is the case where you had had a prior conviction and you had agreed—if we had kept you and you were asked to sign away and say, ‘I agree to random testing into the future for as long as you keep me in your employ.’

**Senator JOHNSTON**—Pursuant to the 1994 directive, let us take 2002-03, because we commenced our new directives halfway through the next financial year, and try to get some sort of annual picture. How many tests were conducted?

**Vice Adm. Ritchie**—We cannot tell you that.

**Senator JOHNSTON**—There is no record?

**Vice Adm. Ritchie**—I do not think we kept that record.

**Senator JOHNSTON**—Do you remember the chain of custody and all of the things that are set out in here that have to be carried out if you are going to prosecute someone, if you are going to exact some punishment?

**Vice Adm. Ritchie**—We can tell you how many people were terminated and how many were charged. I cannot tell you and I doubt that I could tell you how many people were tested under that pre-existing regime with any degree of accuracy.

**Senator JOHNSTON**—Is that the same answer to—

**Vice Adm. Ritchie**—If you go back to the original question we can see how many people were done there.

**Lt Gen. Leahy**—I can take that on notice.

**Senator JOHNSTON**—Sure. But the point is that that is a pretty important statistic for us, is it not—how many tests we have rendered and what the positives have been?

**Vice Adm. Ritchie**—Why is it important?

**Senator JOHNSTON**—It indicates what the percentage is; it gives us a feel for what is going on.

**Lt Gen. Leahy**—We can do that now.

**Senator JOHNSTON**—We can do it now but we could not do it then.

**Vice Adm. Ritchie**—That is part of the reason we said: ‘Too slow, not enough. Let us move to a regime where we can randomly test. Let us move to a regime where we do accurately record what happens.’ We have moved on from what we would admit was an insufficient regime.

**Senator JOHNSTON**—Let me establish this: until November-December 2003 we had no statistical analysis of the testing regime in place?

**Vice Adm. Ritchie**—I will take that on notice.

**Lt Gen. Leahy**—I can give you the numbers, and they were quite small.

**Senator JOHNSTON**—The number of tests?

**Lt Gen. Leahy**—The numbers of people discharged. In 2002, Army discharged 19 people for drug related offences. In 2003 we discharged 45 people for drug related offences but you might recall that during 2003 there were a number of fairly substantial targeted incidents—Robertson Barracks is one in particular and also some other barracks around the country. I can get you the figures for how many were tested but it is not substantial.

**Vice Adm. Ritchie**—In 2001 there were 15 people, in 2002 there were 21, and in 2003 there were 16 people discharged from the Navy.

**Senator JOHNSTON**—For positive drug tests?

**Vice Adm. Ritchie**—No, for a conviction. The only way you would have been discharged for a positive drug test without there being a conviction would have been if you had had a previous conviction and been retained and when you were tested you came up positive again. We would say, ‘That’s it.’

**CHAIR**—Is that a civil conviction?

**Vice Adm. Ritchie**—No, under the DFDA.

**CHAIR**—What happens when an allegation of drug abuse is made? If someone says, ‘Private Smith is a heroin user.’ What happens then?

**Vice Adm. Ritchie**—In the Navy it is passed to the Naval Investigative Service and it is investigated.



**Lt Gen. Leahy**—Similarly, with us the military police would become involved and carry out an investigation.

**Air Cdre Harvey**—It depends on what the nature of the allegation is. The jurisdiction under the DFDA is fairly limited in relation to Australia. If it was a case of heroin—I think that was the example—it would be referred outside to civilian police authorities for investigation.

**CHAIR**—If it is marijuana it is different?

**Air Cdre Harvey**—Yes, for marijuana up to 25 grams.

**CHAIR**—Why is that?

**Air Cdre Harvey**—It is in the legislation—the Defence Force Discipline Act.

**Vice Adm. Ritchie**—This is the whole point. The legislation as it exists is inadequate to deal with it today.

**CHAIR**—That gets to part of the difficulties we have heard expressed. A number of the matters that have come before us on military justice have referred to the fact that there are great policies but they are not always followed through. That causes us and, I am sure, you a lot of concern.

**Lt Gen. Leahy**—Do you have an example that we could respond to?

**CHAIR**—Your whole procedure and policy is as in the case of, say, Singleton, where everything is mickey mouse but someone needs to follow it through. It did not happen.

**Vice Adm. Ritchie**—In this case, since December last year a lot of people can bear testimony to the fact that we have followed through on this policy.

**Lt Gen. Leahy**—I think it would be illustrative if we could give you the numbers of people who have been tested, to give you an example of that. In our case, since 27 November last year we have conducted 4,440 tests, of which 4,170, or 93.9 per cent, have been negative. The balance of 270 cases, or 6.1 per cent, were sent to a laboratory for further testing. Of those cases, 53 of the people tested, or 1.2 per cent, have been confirmed positive.

**Vice Adm. Ritchie**—Since we started in January, 1,166 people, or nine per cent of the population, have been tested and 26 have been positive.

**Air Marshal Houston**—Since we started on 1 February, 419 people have been tested, of which 417 were negative and two were positive.

**Senator JOHNSTON**—And all it was was cannabis?

**Lt Gen. Leahy**—In our case, 37 people, or 70 per cent, tested positive for cannabis; 13 people, or 24 per cent, tested positive for methyl amphetamines, ecstasy and speed; one person, or two per cent, tested positive for cocaine; and two people tested positive for steroids.

**Vice Adm. Ritchie**—We had 17 for cannabis, four for methyl amphetamines and seven for ecstasy.

**Air Marshal Houston**—We had one for marijuana and one for ecstasy.

**Vice Adm. Ritchie**—I might add that we got smarter on the testing. We found out that you are better off testing on a Monday than on a Thursday.

**Senator JOHNSTON**—Absolutely. And you are better off testing them when they come back from leave.

**Vice Adm. Ritchie**—On a Monday morning, they have all come back from leave and it does not have time to disappear.

**Senator JOHNSTON**—What is our policy with respect to people who, say, are on leave for two, three or four weeks over Christmas and come back and test positive in early March and are in circumstances where they could not have been smoking any of the drug; they smoked it in their own time in, say, South Australia.

**Vice Adm. Ritchie**—Does doing it in South Australia make it worse?

**Senator JOHNSTON**—Let us just say that it does.

**Vice Adm. Ritchie**—The procedure would be exactly the same. There would be a notice to show cause why we should not—

**Senator JOHNSTON**—Do we have a clear statement of that policy?

**Vice Adm. Ritchie**—Not if they smoke it while on leave.

**Lt Gen. Leahy**—I am not sure if where you smoke it is the issue. The issue is: are you on duty and are you liable to be using equipment and to be put in positions of authority? We do not want that to be the case. Where it came from I am not sure matters.

**Senator JOHNSTON**—Did you know that there is no correlation between the microgram per litre reading of tetrahydrocannabinol and impairment of motor functions?

**Lt Gen. Leahy**—Not only did I not know it, but I not sure I understood what you said.

**Senator JOHNSTON**—If you get a positive result for cannabis from a blood or urine test, that does not mean you are impaired to the extent that you would be, for example, with a 0.08 per cent blood alcohol content. The science with respect to that is very clear, but it is not clear with respect to cannabis.

**Vice Adm. Ritchie**—But it does mean you have used an illegal substance—and that is illegal.

**Senator JOHNSTON**—What I am saying is: do the troops know and understand that a positive reading means ‘curtains’?

**Lt Gen. Leahy**—Yes, very clearly.

**Senator JOHNSTON**—Where do they read that? Where do they get that education?

**Lt Gen. Leahy**—In our case, it is through the Defence Instruction (Army)—and I readily admit that not many soldiers would have read that. There has been very wide publication of this policy in the Army newspaper. There have been command directives that I have authorised and directed to the Army subordinate commanders. There are routine orders in each of our units. This is very widely promulgated. Certainly, as I travel about I get a lot of response from the soldiers that they are aware of it. What is interesting and, I think, very instructive is that there is an enormous amount of support for this from the soldiers. In fact, they are saying to us: ‘Where have you blokes been? We don’t want druggies operating a machine gun or driving an armoured personnel carrier.’

**Senator HOGG**—I understand that.

**Lt Gen. Leahy**—They are being very supportive, so this is widely known—certainly throughout the Army.

**Vice Adm. Ritchie**—There is all that, plus it is embedded in the training and education system from day one.

**Senator HOGG**—General Leahy, I think it was you who mentioned that allegations are made and that sets some sort of investigation in place. Can you tell us the process, because it seems to me that we were involved in a discussion earlier this evening about people making allegations—that some of them are on the rumour mill. One of the things that concerns me is that anyone can allege that someone is doing something. It then requires a proper process to check the allegations before the allegations get up such a head of steam that they become the truth. Obviously, if you make an allegation often enough and hard enough that can sometimes stick as the truth, as people find to their detriment in politics and other walks of life. Can you walk us through the processes? If the other services differ dramatically, they can just chime in, but I do not want it repeated three times.

**Lt Gen. Leahy**—I will use the example of the Robertson Barracks—that is, 1st Brigade—in October last year. What happened there was that there were allegations of drug use made against members of a number of units by other soldiers who were stationed in the barracks.

**Senator HOGG**—Who would those allegations have been made to?

**Lt Gen. Leahy**—They could have been made—and I do not know for sure; for example, there are military police at Robertson Barracks—to a military policeman.

**Senator HOGG**—Is it likely to have come through one of the senior NCOs or one of the junior officers?

**Lt Gen. Leahy**—Quite often what you would find is that a junior soldier might be concerned. He watches his mate using drugs and he says, ‘Hang on. That is not what I expect of someone working in a close environment with me.’ He would go through his chain of command and he might say to his section commander, ‘Hey, I think Smithy is on drugs,’ or is behaving strangely. Maybe he is concerned for his health. He is acting strangely, so there are any number of means. We have got padres out there who might be talked to about these things. We have the Defence Community Organisation who could be informed of these things. Perhaps a family member is concerned.

**Senator HOGG**—Say the allegation is made, how is it checked to see that it isn’t just frivolous?

**CHAIR**—Like at Robertson.

**Vice Adm. Ritchie**—I will give you a personal example—and I will not say when. In recent years a member of my staff was accused of taking drugs. It came from somebody else who was under investigation. In my experience, most accusations happen that way. An existing investigation will turn up other names and all that sort of stuff. A process was followed. The Naval Investigative Service came, and they interviewed that person at considerable length. They searched that person’s belongings. They searched that person’s accommodation. They spoke to other people who knew that person and they very thoroughly went through the whole lot. We were hands-off—we did not wish to interfere in it. We let the process happen and, at the end of it, they came back and said, ‘We don’t believe that there’s any substance to those allegations.’

**Senator HOGG**—In that case, was that person advised of their rights at the outset of the investigation? I know this is not your area, Admiral Ritchie, so I direct this to General Leahy. From our inquiry, there is an accusation that, in the case of at least one of those Robertson people, they were not made aware of their rights and were deprived of their liberty and access to legal representation for a period of time, to their detriment. I do not know if that happens as part of the process.

**Lt Gen. Leahy**—No, it should not. As part of the training under the DFDA, people who might be in a position to and who could prefer a charge against a subordinate, in my recollection, quite often carry a card that they are obliged to read out—just as you would be read your Miranda rights in the United States. Someone who might charge them reads out their rights. That is the proper procedure for military but also, in the case of Robertson, there was the early involvement of the civil police—and I would assume that they know their responsibilities to tell people of their rights. I do not know the cases that you are referring to. But I would have expected that in most of the cases, and clearly there are one or two where it may not have happened, people would have been read their rights and that the military police involved—there were over 50 military police at one stage—would have followed the correct procedures. They may have missed it on a couple of occasions. I am not aware of that.

**Senator HOGG**—What representation are those people entitled to once they have been confronted with the allegation?

**Lt Gen. Leahy**—If they are charged—

**Senator HOGG**—Do they have to be charged to get representation or are they entitled to representation prior to being charged? The reason I ask is that many of these people are young people who are not aware of the law and are not aware of due process, and when placed in the position where they are confronted by a figure in authority they may well be bluffed into doing things that they might otherwise not want to do. I am just trying to find out what the safeguards are.

**Lt Gen. Leahy**—I will ask Simon to answer that.

**Air Cdre Harvey**—It is very hard to answer because it depends upon the circumstances. If we are talking about a DFDA investigation there are provisions in the Defence Force Discipline Act, in a circumstance where a person is in custody, for the person to be advised of their rights and to be given access to legal representation. The act provides for the handing over of a list of legal officers from which they can choose a legal officer. I might add that, quite apart from that, it is always open to ADF members to request legal assistance at any stage from service legal officers.

**Senator HOGG**—Can they ask for assistance from a person who might not be a legal person, from someone who might be a ‘significant other’—and most people do have a significant other in whom they will confide—so that they can seek some advice as to what they might do in the circumstances? Is that available to them in the process?

**Air Cdre Harvey**—It is not provided for under the act, but I would not think there would be any problem with that at all.

**Vice Adm. Ritchie**—In our case, nobody would get interviewed that way without having a divisional officer, or somebody who is charged with looking after them in their chain of command, present to advise them of their rights.

**Senator HOGG**—From what you are saying, Admiral, it does seem as if there could be a difference of process between what might happen in Navy and what might happen in Army. Is that correct?

**Lt Gen. Leahy**—No, I would not have thought so.

**Vice Adm. Ritchie**—I would not think so, no.

**Senator HOGG**—So we can find a reasonably consistent approach across the three defence forces, but it is not necessarily a common approach. Is that a fair way to put it? You do not have exactly the same instructions?

**Vice Adm. Ritchie**—The words are probably not the same, but the effect is the same.

**Senator HOGG**—The words are probably different; the effect is the same. All right. Regarding the processes that you have in place, from the time of the allegation to the time of the person being charged or otherwise, do you audit those processes—and, if so, how often—to see that they are not being misused and that the correct procedures are in effect taking place?

**Lt Gen. Leahy**—I think the answer is that in each case there is a self-audit, in that they are reviewed by a legal officer. If a charge is preferred it is heard by a summary authority, say, or a magistrate and it is automatically referred to a legal officer for review, as I explained before the dinner break this evening, as to its adequacy in law, the appropriateness of the punishment and the decision. So in each case there is what you would say is self-audit.

**Vice Adm. Ritchie**—And if the procedure is not followed then often, on review, it is quashed. If the proper procedure has not been followed, then as you go through the review process that will be revealed and everything will be set aside, if that is indeed the case. So there is an audit process, yes.

**Lt Gen. Leahy**—I might say, from the point of view of someone who 10 years ago was using this fairly frequently, that I would note a fair degree of frustration because the legal officers would overturn, on technical legal matters, what you thought were pretty legitimate and reasonable decisions. So I think this sort of process was going on all the time, and it is quite reasonable.

**Senator HOGG**—Yes, but that then gets back to the issue of the training of the people who are operating the process.

**Lt Gen. Leahy**—We learnt pretty quickly from those things. If we were doing something wrong, we fixed it up—and it would go back into the training process at either the colleges or the pre-command seminars.

**Senator HOGG**—I have one other question to raise. It is in respect of Defence Instruction (General) Admin 45-2, which outlines the processes and procedures for the reporting and investigation of alleged offences within the Australian defence organisation. This states that all drug related incidents are notifiable incidents of which reporting is mandatory. That is the advice that I have. I understand also that this instruction has only been effective since October 2001. Can you tell me firstly what is meant by a ‘notifiable incident’?

**Lt. Gen Leahy**—I do not know the definition exactly, but I will give you what I think. There are lists of incidents, such as assault, drug incidents and theft, that are notifiable and we are obliged to keep records of. It is just a list out there, and we are obliged to keep records of those, and drugs are one of them.

**Air Cdre Harvey**—Does it mention convictions? Could you read the start again?

**Lt. Gen Leahy**—The hissers up the back here are telling us that it is an instruction from the Inspector-General, Mr Claude Neumann. In order for him to keep an eye on what is going on to keep records, he has listed notifiable incidents and we are obliged to reply to him.

**Senator HOGG**—So it is Claude Neumann. Obviously he is not here tonight.

**Lt. Gen Leahy**—We can get him for you, if you would like.

**Senator HOGG**—No. We normally welcome Claude, but no. Can you give me an explanation of what ‘notifiable incidents’ that means? It is something we have come across.

**Lt. Gen Leahy**—It is just that Claude and the defence committee, I assume, have determined that these are serious incidents and we want to keep a record of them.

**Senator HOGG**—It says here:

An incident is a notifiable incident if it raises a reasonable suspicion that an offence may have been committed against the DFDA, the criminal law of the Commonwealth states or territories or the criminal law of any other country and involves a Defence member, a Defence civilian, a Defence contractor, a Defence consultant, other ADO personnel or ADO premises.

That seems—

**Lt. Gen Leahy**—Comprehensive, isn't it?

**Senator HOGG**—very broad. It says:

Notifiable incidents that are to be reported by ADO personnel throughout the chain of command as applicable to a DI(A) are listed below ...

There is a whole list of these.

**Vice Adm. Ritchie**—I think that means that, if somebody becomes aware that somebody might be taking drugs, they are obliged to report it up the chain of command, as opposed to saying, 'I'm aware that Able Seaman Bloggs was done for speeding last week.' That is not a notifiable incident. We might say, 'Fine—we don't really want you to come and tell us about that but, if you think that Able Seaman Bloggs was done for drugs or is doing drugs, we do want you to come and tell us about that.'

**Senator HOGG**—I then go on to read about other factors in determining an incident as being notifiable—and this really starts to interest me. It says:

In addition a matter may be a notifiable incident if it is regarded as sensitive, serious or urgent. Factors to consider to determine whether an incident is sensitive, serious or urgent include the following (a) the likelihood that an incident will bring the ADO into disrepute (b) the likelihood that the incident will attract media or parliamentary attention, (c) the likelihood that an incident may adversely affect the efficiency of the ADO.

How often does that apply?

**Vice Adm. Ritchie**—All the time.

**Senator HOGG**—And what about (b): 'the likelihood that the incident will attract media or parliamentary attention'?

**Vice Adm. Ritchie**—All the time.

**Lt. Gen Leahy**—With increasing rapidity, Senator.

**Vice Adm. Ritchie**—It is the thing that keeps us going from day to night. It is why we are here tonight.

**Senator HOGG**—I am pleased to hear that.

**Vice Adm. Ritchie**—I do not joke about that. We have a formatted signal to notify about incidents that are likely to attract media or parliamentary attention. So, if somebody on a ship overseas goes ashore, steals a taxi and runs over three locals, that is likely to attract that sort of attention and they immediately break out in print and tell us that it has happened.

**Senator HOGG**—I want to return to the drug issues for a moment. How many drug-related incidents are reported as notifiable incidents? What raises them to that level? Is it something that happens immediately, or is it something that happens when you find that you have the problem on your hands and that it is starting to leak into the media that there is a problem? When does it become notifiable?

**Lt Gen. Leahy**—It is certainly before any leak. I do not have the document in front of me, but by way that you have read it I think you said notifiable as ‘anything under the DFDA and civil offences’ and a variety of other things.

**Senator HOGG**—Yes.

**Lt Gen. Leahy**—By definition that is almost everything of a serious nature. For example, if there is an allegation of serious drug offences, I would expect to be told that through our staff processes by the next morning. We would then monitor it and, if necessary, it would be passed over to the minister so that they could monitor it as well.

**Senator HOGG**—Do you keep a record of how many notifiable incidents you get in a year?

**Lt Gen. Leahy**—I certainly keep a record of how many incidents I get in a year.

**Senator HOGG**—So an incident would be quite different from a notifiable incident?

**Lt Gen. Leahy**—I make the distinction: I have not called them notifiable, but they are incidents that we would report here by way of a minsub or by some other way. There are quite a few of them—hot issues briefs.

**Senator JOHNSTON**—With respect to the return of a positive drug test, and all other things being equal, is the provider of that sample to be discharged in every instance?

**Lt Gen. Leahy**—In our case we say that there is a zero tolerance for the use of drugs, and I think that applies to each of the services. That does not mean that the member would be automatically discharged. What it does mean is that each soldier who returns a positive sample will be asked to show cause why they should not be discharged. They are able to make a reply to that with the assistance of a lawyer and to make their case as to why they should not be discharged. The figure for Army at the moment is that, of those people who record positive to drug use and who are issued a notice to show cause, 90 to 95 per cent are discharged. I will get you the exact figures.



We do keep some soldiers. They tend to be the younger soldiers who are experimenters, and we have a list that we would work our way through when considering whether they should be retained. This would include consideration of the type and quantity of the drugs involved, the frequency and level of use, the nature of their involvement, the age and rank at the time of the involvement, the likelihood of repetition and whether they voluntarily admitted they were doing this, and we would have a look at their disciplinary record, their service record. We would then consider it and, with the recommendation of the commanding officer and the delegate from the Soldier Career Management Agency, would make a decision. If a soldier is retained, as Vice Admiral Ritchie was saying before, he is then placed on a fairly strict regime of monitoring and further testing to make sure that he does not commit the offence again.

**Senator JOHNSTON**—Where are those criteria to be found?

**Lt Gen. Leahy**—I do not have the exact reference. I have them in a brief in front of me, and I suspect that they are also involved in the procedures available at our Soldier Career Management Agency. But I will give you the exact references.

**Vice Adm. Ritchie**—With those same sorts of issues—and I am reading from the instruction that you have got that I signed—the commanding officer sends to the sailor's career manager, the same sort of organisation, a termination notice, the member's reply, the recommendation of the commanding officer, the report and recommendation of the divisional officer of the particular sailor concerned, a psychologist's report and recommendation, and a report—because we have these people spread throughout our organisation—of the local alcohol and drug program coordinator. And, if there are any other welfare, medical or additional reports that are appropriate to the case, they go with it. All of that information is then taken by the delegate and the sailor's career management organisation, and decisions are made as to whether to retain.

**Senator JOHNSTON**—Are you aware that there are two different expressed criteria for the retention of a person by Army and Navy? I have not done Air Force while I have been sitting here. For instance, in the Navy's case, paragraph 65 says:

Accordingly, except for in the most exceptional cases, involvement with the illegal use of drugs—

‘involvement with’ is a very interesting expression—

should lead to a recommendation for discharge.

Then in Army's case, paragraph 52 says:

Illicit drug use is totally unacceptable in the Army as it undermines the very basis of trust and teamwork ...

And it goes on. I cannot see anywhere here where there is a similar expression of what the policy is with respect to a positive test. It says in paragraph 44 that a positive screening test means that the person giving that sample has to be removed from the workplace et cetera. On the writing that I have got—the two directives—in Navy's case there seems to be, subject to some interpretation matters, a reasonably clear statement that there should be, other than in the most exceptional circumstances, a discharge, whereas Army does not appear to say that, unless someone can take me to that.

**Lt Gen. Leahy**—I am searching for that now.

**Senator JOHNSTON**—I do not know what Air Force does.

**Air Marshal Houston**—Our approach is very similar to the other two services but specifically Army. What we do is, when we get the positive test, issue the individual with a termination notice. The rules of natural justice will apply, and they obviously have the right to respond. Each case is judged on its merits. With the two cases that we have had so far, one individual was discharged and the other was essentially put on a formal warning for two years because the assessment was made that he probably smoked a marijuana cigarette inadvertently. That is what came out of the process that he went through. So it is exactly as General Leahy described. I think our two instructions are very similar.

**Lt Gen. Leahy**—The source document is *Defence instructions (general)* dated 1994. Paragraph 10 on page 2, under the general heading ‘Disciplinary and administrative action’, says:

Where an ADF member is found to have had involvement with illegal drugs, his/her retention in the ADF is to be reviewed by the relevant Service authority.

Those factors that I read out from the Army instruction are then listed following on from that sentence.

**Senator JOHNSTON**—Do you see a difference between the Navy’s approach and Air Force’s and Army’s approach in the papers? Navy is very clear, I think. Air Force and Army seem to have quite a large number—points (a) through to (h)—of matters that are specified to be taken into account in determining the future of the person.

**Lt Gen. Leahy**—I see a difference in that.

**Senator JOHNSTON**—That might be better or it might be worse. But we have got three services, one of which has a different approach, from the writing that I have got in front of me. I do not think that is a good thing.

**Vice Adm. Ritchie**—We are going to one approach; that is the point.

**Senator JOHNSTON**—I know we are, but we only did this last year. It amazes me how we went off in three different directions, if you do not mind me saying.

**Vice Adm. Ritchie**—Not really. The effect in the end is the same. The words are different, but the effect is the same.

**Senator JOHNSTON**—I do not think it is; I think the Navy personnel who are caught with a positive reading have nowhere near the likelihood of sustaining their career as they would in the Air Force or the Army, on the basis of these documents.

**Vice Adm. Ritchie**—I think that the figures say that we actually discharge a lower percentage than he does. He is the toughest.

**Senator JOHNSTON**—I cannot get into the detail and the facts of the figures.

**Vice Adm. Ritchie**—We will get you the figures.

**Senator JOHNSTON**—All I can go into is what laws you have laid down for your self-administration. I find it really peculiar that we would end up with this differential on this one common issue, where we have a definition difference as to what a drug is. I have showed you what the difference is. For lawyers, it is crucial, I have got to tell you. Have a look at the definition of drug:

...and is not required to sustain the normal functioning of the organism.

I think that applies to Army—

**Vice Adm. Ritchie**—But, if you then talk about the illegal use of drugs, I think that cancels out the absence of ‘and is not required to sustain the normal functioning of the organism’.

**Senator JOHNSTON**—I will take this up with the lawyers later. Notwithstanding that, the point is that it strikes me that, when you sat down at the end of last year, you came out with three essentially different rules.

**Vice Adm. Ritchie**—There is nothing inherently wrong with that, if they were. I would beg to differ that they are, because I think the effect is the same, but there is nothing inherently wrong. Take the example of when we were asked about searching bags. I said we are fanatical about searching bags in ships. They said, ‘We don’t care about searching bags.’ The reason they do not care is that it is different—there are different rules that apply, because the environment we are working in is different. We are different people, we do different things and we work in a different environment. And we have different needs in terms of enforcing command and discipline in those different environments. Therefore we come at things in a different way. The important thing for this is that the effect that we achieve is the same, and I think it is the same. We will get the words right and have the same words on this issue at some time in the not too distant future.

**CHAIR**—Senator Hogg has some questions on the Gurr inquiry.

**Senator HOGG**—On the Gurr inquiry, the ADO submission states:

...legal counsel was provided for nine Navy members determined to be effected persons and for the deceased.

That is a total of 10. Is it very likely that one could find that legal officers represented more than one person in that sort of case?

**Vice Adm. Ritchie**—I do not know. I could not tell you that. If you want to know, I could find out how that was done, but I do not know the answer.

**Senator HOGG**—That is an actual case, so please take that on notice and find out for us.

**Vice Adm. Ritchie**—So you are asking: did one legal officer represent more than one person?

**Senator HOGG**—Yes. Did that happen and is that possible in any of the other services—that, where there are a number of people caught up in the one incident, a legal officer may, in effect, be representing more than one person. I am just wondering what sort of conflicts of interest that might bring into being.

**Air Cdre Harvey**—I might be able to help answer that.

**Senator HOGG**—Good—you are always to the rescue, Air Commodore Harvey!

**Air Cdre Harvey**—I will try, Senator. I am not aware of the Gurr matter—that was quite some time ago—but there have been, I think, boards in recent history where one legal officer has been appointed to represent a number of people. Obviously that needs to be handled with great care to ensure that a conflict of interest situation does not arise, and, if it does arise, then obviously that needs to be dealt with.

**Senator HOGG**—How do you make sure that the conflict of interest does not arise, given that that might not become apparent until some way down the track in the investigation?

**Air Cdre Harvey**—That is why I said that it needs to be monitored. It is pretty much up to the legal representative, who is representing those people as a legally qualified professional, to come to the conclusion that there may be a divergence of interest in terms of representing the two people. In that case he would refer it to the appointing authority and make arrangements for alternative representation. I might add that it is relatively rare that that would happen, and it would only happen where, on the face of it at the start of the inquiry, it was not expected at all that there would be a conflict of interest.

**Senator HOGG**—The terms of reference of the board directed it to make findings on a number of issues, including, in term of reference 7:

Whether the disappearance of Leading Seaman Cameron Gurr was due to neglect, carelessness or misconduct of any person, including Leading Seaman Cameron Gurr, or failure to comply with orders, instructions or safety procedures or any inadequacies in training.

It seems to me that that goes against the grain of what we understand an administrative process to be about. That is looking for culpability. Is that correct? Is that term of reference at odds with the process? That is what I am trying to find out.

**Air Cdre Harvey**—I am not familiar with the terms of reference, other than what you just read out.

**Senator HOGG**—That is all I have before me at this stage.

**Air Cdre Harvey**—Can I ask you to read it again.

**Senator HOGG**—It says:

Whether the disappearance of Leading Seaman Cameron Gurr was due to neglect, carelessness or misconduct of any person, including Leading Seaman Cameron Gurr, or failure to comply with orders, instructions or safety procedures or any inadequacies in training.

The ADF has consistently throughout this inquiry stated that administrative inquiries are fact-finding investigations to evaluate processes and prevent a recurrence. Their purpose is not to find liability or culpability. Yet that term of reference seems to run—

**Vice Adm. Ritchie**—It is about facts. It is about asking: did Leading Seaman Gurr disappear because somebody did not obey an order? Did Leading Seaman Gurr disappear because somebody was negligent? That is fact. You might attach culpability to it later on, but in the first instance it is fact and it is fact that is important for the people who are running that organisation to know. Did he disappear because there was a mechanical failure on the ship or because there was a human failure on the ship? That is effectively what is being asked.

**Senator HOGG**—So it does not prejudice any further inquiry?

**Vice Adm. Ritchie**—It certainly does not.

**Senator HOGG**—How does one draw the line in those circumstances to make sure that it does not transgress that line?

**Vice Adm. Ritchie**—Legally, you cannot use any of the information that is gained, any of the evidence that is given in that inquiry, in any disciplinary proceedings thereafter. All you can do is draw a reasonable conclusion that there might be a case for a disciplinary proceeding against some person. You then start again from fresh.

**Senator HOGG**—Does that lead to the circumstance where one set of facts will be put to the board of inquiry and then not told at the subsequent disciplinary inquiry that will take place? Is that possible? Or are we reading too much into the circumstances? I am not talking about this particular case.

**Vice Adm. Ritchie**—I guess that is possible. I guess that, because everybody knows what is said in an open board of inquiry, when you then come to a disciplinary process people might be a bit careful about repeating some of the things that have been said somewhere else. You know that in a board of inquiry there are potentially affected persons. That really is referring to people who subsequently might have some action taken against them. That is why they are allowed to be legally represented and all those sorts of things.

**Senator HOGG**—How does one overcome that difficulty? Can it be overcome?

**Air Cdre Harvey**—I think you need to ensure that great care is exercised and that the board of inquiry process is what it is supposed to be—that is, a fact-finding exercise. Sometimes it is difficult to differentiate between the fact-finding exercise and the determination of fault, which gets very close to the aspect of culpability. But I think the key point is that, once the board of inquiry investigative procedure concludes and it is the case that the board may have suspicions that an offence has been committed, that will lead, as has been said, to a separate disciplinary investigation. Obviously in that subsequent disciplinary investigation an admission, for example,

that may have been made as part of the administrative inquiry would not be admissible. The defence disciplinary investigation would effectively start afresh and collect evidence, and that evidence would have to be tested in accordance with the admissibility rules of evidence before the subsequent discipline proceedings. The defending officer would obviously be alert to take objection if any evidence that was not in conformity with the rules of evidence was admitted.

**Vice Adm. Ritchie**—And I think there are other ways of doing it. It might well be that a legal review of the board of inquiry report will say, ‘On what has been presented, there are grounds to commence an investigation against X or Y,’ without that ever having been explicitly said in the board of inquiry report. So there are other ways of doing it, without being explicit in the report.

**CHAIR**—There are no more questions on that matter. General, did you want to make a statement in relation to Private Hayward?

**Lt Gen. Leahy**—Yes. I was asked some questions and I think I have the answers to the issue concerning Private Hayward. The report, as I mentioned earlier, has been completed, but it is currently undergoing legal review to determine its validity—to see whether it met the terms of reference—so it would be inappropriate for me to make comment in detail about it now. But there were some questions that I think I can answer.

I indicated that the unit had made an error in not informing the next of kin that Private Hayward was AWOL. There were some questions about the role of the DCO. The investigating officer has reported that the DCO and other support services were made available to the Hayward family in a timely and adequate manner. The DCO was in contact with the next of kin on the day of the death and has remained in support of the family since. The DCO support included the coordination of effort from four DCO locations. Defence paid for the funeral. A member of my staff visited the family in April this year to discuss the terms of reference and has been in regular contact with the family since. As I mentioned, the investigating officer, Colonel Appleton, has provided evidence from his inquiries to the Western Australian coroner, who was also provided with a copy of the investigating officer’s report.

All of Private Hayward’s personal effects have been returned to the family. The DCO personally checked and was present at the time the family received the effects. Whilst payments for families to visit the scene of a death are not automatic, they have been increasingly paid for by Defence. In this case, the parents were invited to go to Perth—and they live somewhere along the Murray River in Victoria. My information is that the parents declined. To this date, they have not requested any funding or reimbursement, and that would be a matter for consideration at the time. There are some other issues with that which will obviously become more available as the report is given a tick by the legal officers and we look at the investigation and recommendations in more detail.

There was one other issue that I said I would try and get an answer on. I can read it into the record now. It relates to the Dawson inquiry and the adverse administrative action that has commenced against five officers of the rank of lieutenant colonel and above. The initiating authority for three of those officers was the Director-General, Personnel, Army. For two it was the Special Operations Commander, Australia—so he has issued the notice to show cause. The imposing authority is another officer who takes the reply and determines whether or not the

censure or the administrative action should be put into place. That in all instances is the Commander, Deployable Joint Force Headquarters.

**CHAIR**—Thank you, General. Can I just go back to Private Williams and ask you to comment. I have copies of three documents here. The first is a copy of a service police report dated March 2003. At the end of that report, it says: ‘There were no suspicious circumstances surrounding the death of Williams. The Singleton coroner’s court is yet to finalise whether an inquiry will be conducted; however, once the coroner’s actions are complete, the appropriate report will be forthcoming.’ The final sentence is: ‘Active inquiries into this matter have now concluded.’ The second document is a copy of a letter to you from Charles and Jan Williams in which they talk about the death of their son, as you would imagine. Finally, I have a copy of a letter you sent to them on 8 April in which you say:

In your letter of 7 April you make a number of observations and allegations about the behaviour and conduct of individuals at the School of Infantry. Today I have directed that an investigation be conducted into your allegations.

It would appear to me from the three documents that I have referred to that there was no intention at all to conduct an inquiry into the death of Private Williams—as it says here in the police service report—until you were effectively hassled by the Williams family to do so.

**Lt Gen. Leahy**—With respect, I think you are probably confusing the statement of the military police, who to my reading are saying that active—

**CHAIR**—Obviously, I am giving you the opportunity to respond.

**Lt Gen. Leahy**—The military police said that active inquiries had concluded. I would read that as saying active inquiries by the military police had concluded. Under our inquiry regulations, an inquiry with terms of reference can be commenced quite separately from a military police investigation. That is the inquiry that I was referring to, saying that we were waiting for the conclusions of the military police’s investigation and also for the coroner to make a statement—and for his conclusion. Once that was done, we would have looked at commencing an administrative investigation, a board of inquiry, into the death. Mr Williams certainly rang me and offered his view. I have said that that was not the deciding factor; it was certainly a factor that helped us. We have since tightened up our procedures so that now there is a quick assessment under the sudden death protocols, and the investigations proceed from there. But to say that without the intervention and assistance of Mr Williams we would not have done an investigation is not correct.

**Senator HOGG**—What actually triggers an investigation?

**Lt Gen. Leahy**—There are a series of regulations. Some of them refer to sudden death; some of them refer to incidents of a particular nature—

**Senator HOGG**—Could I just stop you there so we can truncate this a little bit. Does that mean that in all cases of suicide you instigate an investigative process?

**Lt Gen. Leahy**—No. In fact, that is the issue. Sudden death does not necessarily include a suicide. It might be an accident by—

**Senator HOGG**—Right, like an accident by misadventure?

**Lt Gen. Leahy**—Yes. Prior to, essentially, late last year our practices—through into this year—have been that sometimes we will acknowledge the reports of the military police and the coroner as being enough of an investigation in the case of a suicide. What we are now saying is that a suicide will be investigated through a board of inquiry with terms of reference. In our case, they will now be investigated by senior officers—of the rank of colonel or above.

**Senator HOGG**—So when did that commence? Is that just a recent innovation?

**Lt Gen. Leahy**—It is the administration of incidents of sudden death and the sudden death protocols. I signed that on 19 November last year to put it into effect—that is the regulation that deals with it. But in practice—

**Senator HOGG**—So it is a more recent initiative?

**Lt Gen. Leahy**—Yes. It certainly is a more recent initiative. It was coming into our minds towards the end of 2002 and certainly was there in the period of February, March and April of 2003. But I would not agree that without the intervention and assistance of Mr Williams we would not have done the investigation. There was a coincidence happening here in that we were paying much more attention to suicides to try and find out if there were things that we could do to try and make sure they did not happen again.

**Senator HOGG**—I accept that. But it could also be that the circumstances that were prevailing on the site of Singleton at that stage were a contributing factor, although they might not have been actually causal in the process.

**Lt Gen. Leahy**—That is correct. I have acknowledged in my public statements and media releases that there were a number of things that Army did wrong and that they were contributing factors. Those media statements are, I am sure, readily available.

**Senator HOGG**—Was the Williams family advised that, while you had these other processes in place, at the end of the day an inquiry would be conducted—or was that just left silent at that time?

**Lt Gen. Leahy**—I cannot recall exactly the discussion I had with Mr Williams on the phone. But I recall that I agreed with him that these were very serious matters. What was different here is that Mr Williams actually made allegations—and I think Senator Hutchins used the word ‘allegations’ in relation to my letter back to Mr Williams. As we have discussed throughout the evening, once allegations are made—and these were of a serious nature—we are obliged to investigate them. There are really two things running here: one is the requirement to investigate a sudden death, in this case a suicide; and the other is the question of the allegations that Mr Williams made to me over the telephone and in his letter.

**Senator HOGG**—I accept that. But I have formed the view—whether rightly or wrongly—that the process seemed to have bogged down, in the eyes of the Williams, and was going nowhere and that until the pressure was applied nothing was going to happen. Based on your statement here tonight—and I am not disbelieving you in any way—it seems to me that there



was no expectation in their mind that there would have been an investigation at the end of your process anyway.

**Lt Gen. Leahy**—You have represented them quite fairly. But in my mind the fact was that there would have been an investigation. We were simply waiting for the coroner to make his view known.

**Senator HOGG**—In all the circumstances, while you may be well placed and well intentioned in what you—and I say ‘you’ in the broader sense of the Defence Force—were doing, these people did not have that perception. Maybe there needs to be some way that the gap between what you know and you believe will be done and their perception of what might be done or could be done needs to be bridged.

**Lt Gen. Leahy**—I would say now that we have learnt a lot. Unfortunately, we have learnt through very hard circumstances. Now in instances of suicide or sudden death a quick assessment occurs. Someone is involved very directly. The Defence Community Organisation gets involved. We go out and try and seek input to the terms of reference. Members from my staff, through the director of personnel operations, try and explain to the family what is going to happen. Sadly, we are only getting better at it now. We have learnt from hard experience.

**Senator HOGG**—Given that there was the Amos report because of that unfortunate situation not much earlier, in effect, why would that not have triggered a fairly immediate response in the case of young Jeremy Williams?

**Lt Gen. Leahy**—Because the Amos report did not come to our clear attention at the level of Army headquarters and personnel operations until after the Williams suicide. So we were not aware at my level—

**Senator HOGG**—That is an internal problem with your processes.

**Lt Gen. Leahy**—Exactly. We were not aware at my level that there was actually a problem. We were told that the investigation had come in and the changes had been made but, as I have explained tonight, those changes did not stick. We did not know that until after April of last year.

**CHAIR**—I want to move to asking some questions about the cadet organisations.

**Senator HOGG**—Before you do, can I follow up one thing with Admiral Ritchie on the Gurr inquiry. Navy states at page 67 of its submission:

The Naval investigative service undertook DFDA investigations against nine members relating to illegal consumption of alcohol and failure to report such consumption. In January 2003 they concluded there was insufficient admissible evidence to support the DFDA action.

This is not directly related to that, but what I want to know is why that was the case. Are you aware why there was insufficient admissible evidence in that matter that you cite at page 67?

**Vice Adm. Ritchie**—I think it goes back to the question you asked about the effect later on. I think it gets down to the fact that what people said in the board of inquiry they were not prepared to say when formal DFDA investigations took place.

**Senator HOGG**—So that is the basic problem. That is what I thought.

**Vice Adm. Ritchie**—Subsequent to that, probably somewhere in the paper you have got, we said that one case has been referred to the Director of Military Prosecutions. He has now come forward and said that there is enough to proceed with a disciplinary hearing, and that will happen.

**CHAIR**—Does the ADF have in place a vetting system in relation to cadets similar to the one within state legislation that provides for the vetting of individuals seeking to work with children?

**Air Marshal Houston**—We have a very thorough system of checking the people who work with cadets. I have not got the specific detail for you, but I could take that on notice.

**CHAIR**—Please do, if you would not mind. Would the three services have similar systems in place?

**Vice Adm. Ritchie**—There is a process and people are not allowed to be left in charge of or alone with cadets until they have been through that process.

**CHAIR**—What capacity do the cadet organisations have to investigate allegations when they are made against staff? Do they have any at all?

**Vice Adm. Ritchie**—Very little.

**Air Marshal Houston**—This goes back to the discussions we had right at the outset of this inquiry. We three service chiefs are responsible for the administration of our respective cadet corps. The relationship between us and the cadet staff is codified in the Defence Act, the Naval Defence Act and the Air Force Act and the supporting cadet force regulations of 1977. Each service chief administers the relationship through a single service policy, which is laid out in a manual that sets out policy rules and procedures.

But we have learnt, since we discussed this with you a few months ago, that the cadet staff are not members of the ADF and the defence instructions and the DFDA do not apply to them. The Australian Government Solicitor has advised us that a common law employment relationship exists between Defence and the cadet staff, which places obligations on both us and the cadet staff. There are some issues with that, and the AGS has recommended that Defence amend the cadet force regulations—those are the ones from 1977—to ensure that the rights and responsibilities of Defence and cadet staff are clearly defined. COSC—the Chiefs of Staff Committee—has directed the Director-General Cadets to develop for a submission to the minister a proposal to amend the regulations. I guess I am saying that the matter is well and truly under control, and COSC discussed it at the last meeting. I suppose it will all be sorted out in the fullness of time.

**CHAIR**—Under the Northern Territory's Fire and Emergency Act, volunteer firefighters are subject to the protection of the legislation while they are performing their duty. Is that the direction that the AGS is going?

**Air Marshal Houston**—The problem we have at the moment is that there are deficiencies in the existing arrangements. We have to codify the arrangements in much more detail so that they stand up to close scrutiny. They would not stand up at the moment. There is not sufficient guidance or policy and there are lots of issues with the 1977 legislation, because it essentially established the cadets as a volunteer organisation. We need to put more substance into it so that it stands up.

**CHAIR**—In the inquiry we had it became clear to us that, even though there is a special 'relationship' and they are not covered by the act, they all still think that they are Navy, Army or Air Force personnel, and that is probably where some of your problems come in. Do you know when this may be sorted out? Is it going to the parliamentary business committee or whatever it is called?

**Air Marshal Houston**—We obviously have to go to government in the first instance, but the intention is to draft a proposal and take it to the minister. The minister would then deal with it in an appropriate way. Hopefully we would get the 1977 regulations changed so that they would be more robust in terms of defining the relationship between us and the cadet organisations.

**Senator HOGG**—What sorts of qualifications are required of a person doing an investigation—in terms of level, rank and training? Do you have any set criteria, and does it vary from service to service or is there a common standard?

**Lt Gen. Leahy**—I do not believe there is a common standard but I think, as we have seen with the instructions and so on, that the intent would be similar. I think I discussed it in my earlier evidence.

**Senator HOGG**—I might have missed it.

**Lt Gen. Leahy**—People would be trained, because of formal training.

**Senator HOGG**—I heard that.

**Lt Gen. Leahy**—Also, through practice they would have developed expertise. We would—and I did not mention this earlier—seek to have an investigating officer or an inquiry officer of a rank senior to those people involved. As I mentioned earlier, we would also seek to have, as much as we could achieve it, someone who did not have knowledge of what had occurred—someone who might come from another command, for example—so you could get an independent view.

**Senator HOGG**—I accept that. What would be the lowest rank that you would entrust this sort of investigation to?

**Lt Gen. Leahy**—The administrative inquiry starts with an investigating officer. I well remember that as a lieutenant I was doing investigations into fires and thefts, so we would

appoint to the rank of lieutenant. As we have seen from some of the more recent more serious investigations that we have conducted in Army, we would also appoint to the rank of brigadier. So it would be right across the board. At any time lots of officers are doing investigations, some of them for quite routine matters, where we would want to look at the different points of view and the different aspects. As we have said, in this administrative sense it is to find out the facts of what happened so that we can hopefully make sure that it does not happen again.

**Senator HOGG**—Given the specialised nature of investigations, though, how well equipped would a lieutenant be in the conduct of even the most reasonably routine of investigations?

**Lt Gen. Leahy**—He would have received training at his commissioning school, and part of that would have been in the DFDA and the administrative inquiries. As I mentioned earlier, there is also the ‘idiot’s guide to conducting investigations’. He would be given guidance by a superior officer. He would be given set terms of reference, and those terms of reference are available through our regulations and our manuals, and he would essentially answer the questions. Some investigations are quite simple. There might have been a motor vehicle accident; there might have been an accident out on the range where a vehicle runs into a tree. There could have been a Land Rover at night-time backing into another vehicle. I think a commissioned officer with the advice, support and training we have given them is competent to do that.

Similarly, for more difficult investigations, a more senior officer with a lot of experience, probably having conducted a number of investigations, with appropriate support is competent to do that. As I mentioned earlier—and I might ask Angus to refer to this—with respect to the RAAF reseal and deseal investigation Angus I think quite properly and correctly decided that that one was going to be a bit difficult and put a very experienced officer in charge of it. I think we got a great result.

**Air Marshal Houston**—I do not know if you are aware that the F111 reseal deseal inquiry was headed up by Commodore Taylor from the Naval Reserve. At the time he was a district court judge. On the board of inquiry we also had Andrew Hopkins from the ANU, who is a very experienced investigative sociologist, and we had only one Air Force officer. The issues were, as you are probably well aware, very complex and the inquiry was the most extensive and expensive one we have ever conducted. The outcome was very pleasing. We got a very thorough investigation and the recommendations were very well received. We have implemented a lot of them. All 53 recommendations were accepted. That is one that worked very well.

**Senator HOGG**—What standard of proof is required of these investigating officers in the conduct of an inquiry? Is there a specific standard of proof required?

**Lt Gen. Leahy**—It is balance of probability, recognising that these are not about apportioning blame nor about giving punishment. That would flow through the DFDA. What we are talking about is an administrative investigation under the admin inquiry regulations.

**Senator HOGG**—I now want to go to a specific case—that is, the death of Jason Sturgess. In that instance his vehicle overturned, as I understand it. I remember the family appearing before us. The investigator was able to conclude that despite all the evidence—including that the vehicle was unserviced, unfit for use et cetera—the state of the vehicle did not contribute to the accident. It just seems that the conclusion is at odds with everything else that was found in that

case, and that was put to us by the relatives of Jason during this inquiry. How do we reconcile that type of finding by an investigating officer with the norms that apply to the standard of proof out there in the rest of the community?

**Lt Gen. Leahy**—In relation to that, I would say that, yes, there were problems with the serviceability of the vehicle—I am working largely from memory here, so if I get it incorrect I will seek to correct my statements—but they were problems that were not related to the accident. For example, I think the seatbelts in the vehicle used to restrain the infantry travelling in the back of the vehicle were not serviceable—there was some issue there. Corporal Sturgess was not sitting in the back of the vehicle. I believe he was the crew commander. There were problems with the maintenance records but, again, they bear no relationship to the accident. So, yes, the investigating officer in this case, who was a lieutenant colonel from the area concerned, not associated with the unit, made judgments that, whilst there were problems with the maintenance of the vehicle, they were not related to the cause of death and the accident. I think those were judgments readily available to him and, from the evidence that he was given, they were correct judgments.

**Senator HOGG**—I will not argue with you at this stage of the night, but I must say that I myself found the conclusions there just a little bit strange.

**Lt Gen. Leahy**—I would say that, if you look at what caused the accident and at the issues we found with the maintenance, they were quite separate.

**CHAIR**—General, is the term ‘balance of probability’ in a manual somewhere that an investigating officer—

**Lt Gen. Leahy**—I will now turn to the lawyers, if you do not mind, and ask them.

**Air Cdre Harvey**—Yes, it is dealt with in the administrative inquiries manual.

**CHAIR**—I will just go back to cadets for a moment. The officers in charge of cadets are Reserve officers, aren’t they?

**Lt Gen. Leahy**—No.

**CHAIR**—They are not. They are cadet officers?

**Air Marshal Houston**—They are volunteers. Certainly in Air Force’s case they have no relationship to the Air Force Reserve.

**Vice Adm. Ritchie**—I would say that the majority have no relationship to the Reserve. Some do—some are Reserve officers.

**Air Marshal Houston**—Not in Air Force, though.

**CHAIR**—Do you know what procedures are in place for them to investigate allegations, rumours, particularly as you are dealing with a lot of young men and women?

**Vice Adm. Ritchie**—You asked that question before.

**CHAIR**—I do not think I asked it about cadets.

**Vice Adm. Ritchie**—I do not know exactly what is in the cadet regulations, but I do not think that cadet officers have the qualifications to conduct investigations of that nature. We have just talked about how we appoint investigating officers and about training, education, experience and all those sorts of things. People do not have that in the cadets. It is a volunteer organisation. There is a training program. The training program is more about equity and diversity, conflict resolution, occupational health and safety and all those sorts of things, but I do not think it really fits them to investigate serious allegations of misbehaviour and that sort of thing. In fact I think, in our experience, when those allegations are made they are normally investigated by someone appointed from within the ADF—someone who does have the experience and the training that we talked about before.

**CHAIR**—Is there a requirement for cadet officers to report any allegations back to the permanent officers?

**Vice Adm. Ritchie**—I think that, if a cadet organisation finds it has a problem it cannot resolve internally, it will go through the cadet chain of command and it will get back into the local area and whoever administers that cadet area for the permanent service and they will make sure the right things are done.

**Air Marshal Houston**—I think there are instances of allegations being investigated by cadet officers in the Air Force cadets. I would like to take it on notice, though, and come back to you, because there have also been instances along the lines described by Admiral Ritchie a few moments ago.

**CHAIR**—That is fine.

**Vice Adm. Ritchie**—I would say the answer that I have given is what I think should happen, which is the question you asked. I am not sure whether or not it has happened that they have tried to investigate their own and got it wrong.

**Senator HOGG**—Are you aware of any cases where that has happened?

**Vice Adm. Ritchie**—Not really, no, but I am aware of many cases in which we have appointed someone to investigate.

**CHAIR**—But TS *Hawkesbury* did not get investigated through the normal chain. Didn't the mother have to go to the parliamentary secretary?

**Vice Adm. Ritchie**—It was investigated by an Army colonel appointed by the naval chain.

**CHAIR**—But didn't the mother have to hassle the parliamentary secretary for the permanent forces to do that?

**Vice Adm. Ritchie**—The mother has hassled a lot of people for a lot of reasons, but, when it became obviously that there was a problem within TS *Hawkesbury*, the appropriate chain appointed a Reserve Army colonel—ex permanent service—to do that investigation. Cadet organisations are not the ADF. We do not live amongst them; we do not see what happens on a day-to-day basis. Most often, allegations of things that go wrong do come from parents.

**Senator HOGG**—I accept that, but, at the end of the day, it will be your organisations that wear it. That is the way it will be publicly applied. I am not saying that in a way that is critical of you; that is just the reality of life. My question goes to when there is a difficulty in one of the cadet organisations, and it follows on from what Admiral Ritchie has said. What representation is available to the cadets? Most of them would be minors. How does one handle that? Is it handled differently from the way in which it is handled in the senior forces?

**Vice Adm. Ritchie**—Before we answer that, can I go back to the last question. In the case of TS *Hawkesbury*, the first investigation was done by the New South Wales police. Subsequently, one of the parents was concerned enough to say, ‘I don’t think enough has been done,’ and went to the senior officer of the cadets in New South Wales. That is how we got into the investigative chain.

**Senator HOGG**—If an inquiry is done by the police, does that automatically raise concerns within the unit—or within Navy, in this instance—that something really needs to be done?

**Vice Adm. Ritchie**—It does. In this case, it was something that happened outside the cadet organisation involving two people who belonged to the cadet organisation. It becomes difficult to know where you draw the line in terms of how much of a right you have to interfere in those things. These were two individuals doing something in the privacy of their own home. But, yes, they do raise concerns: those things always ring alarm bells and always cause people to look inside that organisation and see what is happening.

**CHAIR**—I think we welcome the initiative to sort out the relationship because, as we know from the beginning of this hearing—as Senator Hogg said—it is you in the uniform who wears it, whether you have responsibility for it or not.

**Senator JOHNSTON**—We have received, pursuant to our terms of reference, approximately 150 submissions, all of them relating to very diverse subject matter: some of them relating to military justice; some of them relating to death; some of them relating to general educational issues and so on. I take you back to 1995 when Justice Abadee did a study into the judicial system under the Defence Force Discipline Act. Then in 1998 we had the Commonwealth Ombudsman’s own motion investigation into how the ADF responds to allegations of serious incidents and offences. In 1999 there was the Joint Standing Committee on Foreign Affairs, Defence and Trade military justice procedures in the ADF inquiry. In 2001 there was the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade entitled *Rough justice? An investigation into allegations of brutality in the Army’s Parachute Battalion*. Again in 2001 there was an inquiry into military justice in the Australian Defence Force by Burchett QC. I suppose in the same vein we had the coroner’s inquiry into *Westralia* in 2002-03. And now you have our inquiry. Do you have a view as to why there are so many inquiries into this subject matter?

**Vice Adm. Ritchie**—I would be interested in your view! You have 150 submissions and many of them do not even relate to the subject.

**Senator JOHNSTON**—I have a view but I cannot tell you about it.

**Vice Adm. Ritchie**—Given the size of the military justice system, 50,000-odd—maybe 70,000 if we include the Reserve people subject to it day in, day out—it is a system that, because it is helping to enforce command and discipline, we recognise is a bit different to that which is enforced out in the community. Yet we do not really see too many—there are some—substantive complaints about the system itself.

**Senator JOHNSTON**—We have seen a lot of substantive complaints.

**Vice Adm. Ritchie**—You have only seen 150 in total.

**Senator JOHNSTON**—We have seen a lot of witnesses who have sat, as you have sat—

**Vice Adm. Ritchie**—You have only really talked to us about a dozen instances.

**Senator HOGG**—How long do you want this inquiry to go on for?

**Vice Adm. Ritchie**—You are asking me whether we have a view as to why there are all these inquiries. I think it is quite reasonable that people ask whether we are doing things correctly in our organisation. We have evolved considerably over time because of those inquiries.

**Air Marshal Houston**—When you go through each of the inquiries, I think they each had a slightly different focus. The terms of reference were quite different. For example, the Abadee study was into the judicial arrangements in the ADF. The Ombudsman 1998 inquiry that you refer to was an own motion investigation by the Ombudsman on how we handle allegations of serious incidents and offences. I guess the joint committee was a fuller inquiry than perhaps more wide ranging. I accept the fact that it was probably similar to the one we are conducting right now. The rough justice inquiry was quite specific and essentially very focused. Burchett was looking at how we conducted the business of military justice—quite specifically the business of how we run trials, how we conduct hearings and the like.

It was fairly wide ranging but it was not perhaps as wide in its terms of reference as this one is. Then of course you had the Acumen report, which was focused on boards of inquiry. So I think, taken all together, they had different emphases. I accept the fact that there has been a lot of interest in this issue. We are in the business of continually improving the military justice system. We have taken on board most of the recommendations of those various inquiries, and I think the military justice system is the better for a lot of those recommendations and the associated initiatives.

**Senator JOHNSTON**—I think your response, Air Marshal, is a good one, but the problem I have with that is that it seems to me the common thread is a concern for the abuse of the rights of ADF enlisted personnel. Through all those inquiries, whilst they each focused on a slightly different area, the common thread is the abuse, and concern about the abuse, of rights within the defence forces. I do not think you can get around that; that is what it is all about. We do not hold



public hearings like this because we get great joy from having you sit there hour after hour as we talk about case after case. We do not do that because we want to have some sort of ego trip; we do it because there is an enormous body of pressure out there in the nature of complaints and constituency visits that bring to us issues that enliven our concern. We are the end of the chain here. That is 10 years of virtually non-stop scrutiny. I am asking you: is it justified? You all seem to be saying to me, 'Well, it's the price we pay.' I am not sure that is the right answer.

**Air Marshal Houston**—I have not seen all the submissions that you have seen. I think there are only 61 on the Web.

**Senator JOHNSTON**—There are a lot more confidential ones.

**Air Marshal Houston**—You said there were, what—100?

**Senator JOHNSTON**—There are 150.

**Air Marshal Houston**—We have not seen those other ones. You have only heard perhaps one side of the story. We have not had a chance to comment and add our side of the story to those other 100 or so.

**Senator HOGG**—That is a very valid point. I think you should be under no illusion that my attitude to any inquiry that this parliament conducts, whether it be a Senate committee or a joint committee—although I have no hold over what happens in the other house—is that it should be done in public. I hate going in camera to take evidence. We experienced that earlier this evening, for very good reasons, and I understand that will happen from time to time. But it means that some of the evidence that comes forward is not contestable. So you do make a very valid point. Nonetheless, backing up what my colleague says, that evidence does come before us and we do test some of it fairly rigorously, or as rigorously as we possibly can, to see that what is put to us is not frivolous and vexatious. I know you did not imply that at all, but I wanted to reassure you that we do apply ourselves diligently to those witnesses that appear in camera. Of course, we are bound to keep the confidence of what is said there, and that does make putting some of the issues back to you a little bit difficult in that sense. That nonetheless does not detract from what my colleague said, in my view.

**Air Marshal Houston**—Yes, sure.

**Senator JOHNSTON**—Subject to what the chair and the rest of the committee members resolve, in the interim I think we should tell you what the evidence points to, footnote in a detailed way what submissions we have received to substantiate those findings or conclusions, and again give you a chance to come back and respond.

I know that, in some circumstances, you do not want to tell us about things because of the litigation factor or because matters that you have resolved should remain personal to Defence. I can understand that, and that is your prerogative. But we have a chain of scrutiny that just seems to continue to have to be carried out. When we open our terms of reference, we are inundated with people who believe they have been mistreated in some way. I am an admirer of everything that you gentlemen do and of all the people who work below you, and you probably know that because I keep telling you that. But it gets to me that we have so many loose ends, so many

people who are actually in tears. Grown adults who put their lives on the line and do all sorts of things are in tears at the way they have been treated. I worry that we simply say: 'Well, that is the way we do it. It is part of our business to just move forward. If you fall off the wagon and you are not up to the rough and tumble of the way justice is meted out in this organisation, that is life.' What worries me is that here we are again in year No. 9 and we have a ninth scrutiny, and I do not think it is getting any better. Am I wrong? Tell me I am wrong.

**Lt Gen. Leahy**—I would not say that you are wrong, but I would say that we too seek to improve the system; we too have learnt from these inquiries. I think you can see that, as in all policy areas and areas of public administration—and, I would suggest, the law in general—the law has to grow. I think we are growing as we understand what we are doing, as we determine the processes that can be improved and as we look at the social and cultural nature of our environment. I agree that it looks pretty crook that there are so many here, but I would also agree with Angus that some of those are quite specific. I reference the Rough Justice inquiry: the findings did not say it is all broken; they said there are some issues that you need to look at. It was similar, I think, with Abadee and Burchett. We expect that we would be able to learn from what you have experienced. I would have it that these difficulties would not occur; I would have it that our people would come and talk to us. I think we are trying to make it the best system we can and, frankly, we appreciate the assistance you are going to give us.

**Senator JOHNSTON**—I will take you through some of the things we have seen that concern us. Let us just foreshadow these and get them on the record. There have been inordinate delays in the investigation of alleged offences. In some cases investigations have gone on for several years—we will footnote these, and you will see them. There has been poor quality investigation of alleged offences, such as inappropriate questioning of civilian family members, failure to check easily obtainable exculpatory evidence and failure to liaise closely with civilian agencies. There has been lack of independence in the investigation of alleged offences. That is a very common thread, and I will come back to one of the solutions that we have already touched on tonight for that. There has been failure to obtain and/or act on Australian Federal Police and DPP advice—and we will footnote what these are. There has been poor quality prosecution of alleged offences, inordinate delay in the decision to prosecute, lack of independence in the decision to prosecute, inordinate delay in the trial process, inordinate delay in the review of the trial process—four and five years later we are still haggling over what happened, when half the people involved have left. There has been lack of independence in the trial process and lack of impartiality in the trial process. These are the things that we have had to confront time and time again since we started this inquiry in October last year. It is easy for me to sit here and rattle these things off. I will footnote them to you in an interim way. Of course, as Senator Hogg has said, we are determined to allow you fair opportunity to respond to them.

The JAG says, as you know, General, that the purpose of the submission he put to us is to raise for the committee's consideration the desirability of formally establishing a standing military court. He uses the word 'military' court. If you saw me when I talked to him, when he was on the phone to us, you would have noticed that I acquiesced with him on the fact that it is a military court to try offences against the DFDA currently tried at the level of court martial or Defence Force magistrate. Len Roberts-Smith is a very esteemed Supreme Court judge in my home state of Western Australia and he is a very dedicated soldier, I hasten to add. So I have to note that he says, 'I want to establish something that is totally different'—and there are all of the trappings we discussed earlier about judicial independence, legislated, all that sort of stuff—and

then I look at what he says in his submission about how we are the standout against Canada, New Zealand and England. They are the three that we probably benchmark against better than anyone else—correct me if I am wrong—and they do not do it the way we do it. Therefore my argument, Admiral and Air Marshal, is: why are we persisting with what I think is a system that, given this 10 years of scrutiny, is not serving us well?

**Vice Adm. Ritchie**—I would say, in response to that, that the JAG has only just formed this view. It is not something that he has been talking about from the rooftops for a long time, I do not think. I think he has formed that view as a result of recent things that he has done and seen, and perhaps spurred on a little bit by the fact that this inquiry is in existence. We respect his view and I am fairly sure that when you talk to the CDF he will say that he is quite prepared to look at the sorts of things that the JAG has proposed. So I do not think that they are off the agenda.

**Senator JOHNSTON**—I think that is the right answer.

**Vice Adm. Ritchie**—Many of the things that you talked about are about delay in the system. I would ask that when you formulate your report and your views you really consider why that delay is there and that in determining a solution you do not come to one that is going to add more delay to that system.

**Senator JOHNSTON**—I agree with you enormously. I think you are dead right. I think one of the reasons there are delays is that people are uncertain. We are asking non-lawyers to do legal tasks. They want to do their best, and they are uncertain about how to proceed. We will find out some of these things tomorrow but I think there is a problem in accessing good and expeditious advice when you are away in Queensland and—

**Vice Adm. Ritchie**—There is a finite limit to that advice as well. We cannot have all lawyers and no soldiers or sailors.

**Senator JOHNSTON**—I think you are dead right.

**CHAIR**—Or him!

**Vice Adm. Ritchie**—We did think if we could multiskill them they could do the laundry on board as well, and then do the legal bit later on!

**Senator HOGG**—Lawyers are pretty—

**Senator JOHNSTON**—Versatile.

**Senator HOGG**—adaptable and flexible people.

**Senator JOHNSTON**—I have no further questions. I think we have covered where we wanted to go.

**CHAIR**—Thank you, gentlemen.

[10.30 p.m.]

**EARLEY, Mr Geoffrey John, Inspector-General Australian Defence Force, Department of Defence**

**McCONACHIE, Captain Vicki Maree, Chief of Staff, Inspector-General Australian Defence Force, Department of Defence**

**CHAIR**—Welcome. We might commence with some questions.

**Mr Earley**—With your permission, I prepared some very brief comments as an update on the opening statement I made when last I appeared here—on 1 March—simply for the purposes of updating the committee. If you wish, I can very quickly do that. It would take a minute.

**CHAIR**—Okay.

**Mr Earley**—As I said, I do not wish to reiterate what I said four months ago but some things have moved on in those four months. Firstly, I would like to say that general awareness of the existence and function of the office of the IG ADF has continued to widen. On 1 March I advised the committee that since commencement of the office we had dealt with or opened 80 case files. That figure is now up to 105. While the permanent staff that I have have until quite recently been sufficient to deal with the case work I have now begun to use part-time staff—investigators in particular—and that has proved successful so far. As I previously stated, the use of part-time investigators was always contemplated.

The pilot program of the unit level military justice performance checks—that is, the audit side of my business—has been successfully completed in the intervening period. We have conducted trial audits in a number of representative units of all three services. That has enabled us to standardise the process and the program proper will begin in September.

I mentioned in my previous opening statement that my office was sponsoring a training course for administrative inquiry officers. That has now been developed, and I know that it has been the subject of other comment in your recent hearings. The first course for 20 to 25 officers is planned to commence on 7 September, next month, and the intention is that that course will receive civil accreditation in the ACT. The object, to remind you, is to produce a larger pool of officers with a good understanding of how to go about conducting an administrative inquiry. There are just two other issues I would—

**Senator HOGG**—Could I stop you there. You did not mention the length of the course.

**Mr Earley**—Two days.

**Senator HOGG**—And who will conduct the course?

**Mr Earley**—There are a variety of lecturers, ranging from judicial officers to experienced lawyers to other officers—non-lawyers—who have had extensive experience in conducting—

**Senator HOGG**—Are you using an established institution, such as ADFA or ANU, or are you spreading your course around a number of institutions?

**Mr Earley**—We are drawing lecturers from various sources. It is not being established under the auspices of any particular institution other than Defence. However, consultants were engaged to help with the development of the course material.

**Senator HOGG**—Is the course material available?

**Mr Earley**—I have a copy and it could be made available, subject to the usual processes.

**Senator HOGG**—If you could, that would be welcome.

**Mr Earley**—There are two other issues I wanted to mention. The first concerns the initiative to explore options to enhance the serious crime investigation capability of the ADF, possibly with the assistance of civil police. I was given the task of getting the ball rolling, as it were. At CDF's direction, I have had discussions with the Australian Federal Police and they have indicated their willingness to assist. Further examination of how we might go about that is under development right now with the establishment of a working party and a project officer.

Secondly and in conclusion, I would like to say that, again at CDF's direction, action is being taken to move my position of IG ADF from a contractual basis, where it now lies, to a legislative basis. The intention is that the basic role, structure and reporting arrangements, which have actually proven to be quite effective, will remain as presently established, except that the authority for it will have a legislative or statutory basis at some time in the future. I think the earliest, optimistically speaking, that that might happen is probably legislation to go before the autumn sittings next year. That is out of my hands, of course; it is in the legislative drafting section. The object there is to enhance the perception and the reality that the IG ADF and his office are independent from the normal chain of command. That was envisaged by Mr Burchett in his report, whence the notion of an IG ADF came. That is all I have to say by way of opening comments, Mr Chairman.

**Senator HOGG**—Just a quick clarification on the program that you are developing with the AFP: do you have a time line in mind for that?

**Mr Earley**—There is no definite time line. It has been approved in principle that we establish a tri-service investigation capability for the ADF. The project team under the head of Defence Personnel Executive has been very recently established and they will look to the practicalities of how that might proceed.

**Senator HOGG**—I am not going to hold you to this, but is it something that is achievable in three months, six months, 12 months—just so we can get a feel for it?

**Mr Earley**—It is not really for me to say that, because I am not running that team, but I would certainly hope that something could happen in, say, six months.

**Senator HOGG**—And it would be complementary to your role.

**Mr Earley**—No, it would not be complementary to my role. As you gentlemen have pointed out, there have been from time to time various criticisms of the standard of police investigations. As a result of one particular investigation about which I do not wish to speak in public, a recommendation was made that some kind of enhanced investigative capability be established for serious crime, particularly where it occurred on deployment overseas. That is not to be overly critical of the existing service police forces; it is just that by its nature they do not get that much exposure to the serious side of crime. If it happens in Australia, as I am sure you will be aware by now, those things are handed over to the civil police. But it was suggested as a result of this case that some benefit might be gained by drawing on the experience of civil police forces, who have a much more constant exposure to serious crime. I thought that was good idea, the CDF thought that was that idea, and that is what is happening; that is what is being investigated, anyway.

**Senator JOHNSTON**—Have you noticed that everybody in the disciplinary and complaints process has been in the service at some point in time? There is this inflexible rule that outsiders will not be involved in the administration of justice, if you like, inside the ADF.

**Mr Earley**—Yes. I would not agree with you that it is entirely inflexible, however.

**Senator JOHNSTON**—Let me talk to you about the Complaints Resolution Agency, CRA. A very capable lady was here whose name is Sue Harris, I think. She was for 25 years a colonel in the Army. The alternative disputes resolution is run by a Navy captain. You yourself have service. The JAG has service. Everybody has service. It just looks to me that we will not have anybody from outside who is not in some shape or form subject to the executive, within the chain of command or part of the club, for want of a better description, involved in any of the processes. If you can point to someone who is not involved and has never been enlisted who is involved in these processes, I would be interested, because I have not found anybody.

**Mr Earley**—Yes—the author of this report, Mr Burchett QC.

**Senator JOHNSTON**—Touche! I stand corrected. He is someone who has done a review that I think is very worthy of great consideration. Certainly the reviewers and the outside reporters have often, like us, never been enlisted. But I mean someone who is actually involved in the day-to-day processes, and I cannot find anybody.

**Mr Earley**—I would like to comment on that because it does come up from time to time. I suppose what you are getting at really is the issue of independence. Let me say in relation to my own office, for example—and I said this before in my opening statement—that Mr Burchett's visions and his recommendations were never that the office of IGADF would be completely independent in the sense of being external to the defence department entirely, like the Ombudsman. He envisaged it being independent of the normal chain of command but responsible to the CDF—and only the CDF. I am not responsible to any of the service chiefs, only to General Cosgrove. I quote in part the advertisement for the position of IGADF. Apart from the usual entreaties to be of the highest integrity and so on, which you would expect for such a position, it said:

The criteria for the position of IG (ADF) required prospective applicants, among other things, to have a highly developed understanding of the ADF and its culture, military justice issues and their relevance to the role of the ADF.

I make that point simply because it would be difficult for anyone to meet that criterion, given the specialist nature of the military justice system. I am sure after several months of listening to people talk about it you would agree it is a specialised area. It would be very difficult for anyone to meet that criterion without having some close involvement, which normally would mean at some stage being part of it. To accept that anyone who has simply had some involvement with the ADF or who has at some stage been in uniform is incapable of acting impartially is, I would say with respect, a proposition with which I would not agree.

**Senator JOHNSTON**—I would not expect you to. The point is this: I would expect that at least somewhere in the internal processes of the administration of justice—in just one place—there would be an independent, non-military person.

**Mr Earley**—I can see the point you are making, and I do appreciate the point you are making. I will add a couple of things to what I have just said. I am not any longer a military officer. I am not a public servant either. As I mentioned before, the basis of my engagement is a contractual one, precisely for the reason that I would have no career expectation in the military.

**Senator JOHNSTON**—I need to talk to you about that.

**Mr Earley**—Because I have had long experience in the military justice system, I am, I hope, capable of recognising what might go wrong with the system. In order to recognise what is wrong with it, you have to first understand what it looks like when it is right. So that would have been a factor in the engagement of someone like me. However, there is provision under the defence inquiry regulations—and that came in, actually, with the appointment of Mr Burchett when his inquiry began—for any person, including someone with no military experience, to be engaged to conduct an inquiry. For my own part, one of my roles is to establish a register of inquiry officers. Simply because it has been easier, because the people who have volunteered themselves for that register have been people with prior service experience and because it is easier to pay those people as a by-line, we have tended to go with them. But recently I have begun to investigate how we can actually get people onto the inquiry register who have had no prior defence experience.

Just last week I interviewed a distinguished gentleman whose life has been spent in the education system. He is a senior headmaster who is coming to the end of his career. I have been discussing with him how he might have a role to play here. What we are yet to work out is a suitable method of engaging these people. With the reservists, it is easy. With a retired person, it is not so easy. Someone who has had no involvement with the Defence Force at all brings with them their own complications. It appears to me, from my inquiry so far, anyway, that the only way to engage these people is as a professional services provider, in which case you have to have a contract, you have to worry about things like workers compensation and they have to have insurance. It is simply not worth their while to do this for, maybe, two weeks or a month. I feel optimistic that there is a way around it. If we can get people like that onto the team, I, for one, would welcome it.

**Senator JOHNSTON**—You are contracted. Is that a vehicle you chose to connect yourself into the process?

**Mr Earley**—No, that was the condition that was advertised when the position was advertised. That was the deal.

**Senator JOHNSTON**—What is the term of the contract?

**Mr Earley**—Three years.

**Senator JOHNSTON**—Do you think that three years gives you the sort of security of tenure that you need to make the hard decisions that we expect you to make?

**Mr Earley**—I do not know if it is for me to say that. Can I answer it in this way: CDF's decision to make it a statutory appointment is one with which I entirely agree.

**Senator JOHNSTON**—There is a statutory appointment—that is what you are saying?

**Mr Earley**—Hopefully there will be, yes.

**Senator JOHNSTON**—There is not now; it is just a contracted position.

**Mr Earley**—Again, if you want to know the whys and wherefores of how that came to be then you probably should ask someone other than me. I simply applied for the job.

**Senator JOHNSTON**—I will ask someone other than you, but I am interested to know your attitude to the three years. Do you like your job?

**Mr Earley**—I find it an interesting job and I find it one in which I can make a positive contribution. Basically what I am about is exactly what you folk are about: trying to improve the system.

**Senator JOHNSTON**—What worries me is that although you like your job and you are doing a good job—and I think you are doing a good job, from what I have seen—come 2½ years you are up for renegotiating your contract. It worries me that, notwithstanding that it is a report to CDF and CDF does it—CDF has changed, by the way—you are in the position where you have to consider how much of a rock is in the boat in order to extend your term and to be a happy camper and team player.

**Senator HOGG**—As I understand your situation, that will not eventuate because the position by that stage will be one that is covered by legislation rather than being a contractual arrangement—is that correct?

**Mr Earley**—Again, it is not for me to say that because I am not in control of it. But the prospect of that happening is—

**Senator HOGG**—I just took that impression out of what you said, that is all.

**Mr Earley**—You can take that impression, yes. You can draw that inference.



**Senator HOGG**—All right, I am drawing that inference.

**Senator JOHNSTON**—When are your three years up?

**Mr Earley**—January 2006.

**Senator JOHNSTON**—So 15 months away.

**Mr Earley**—I am about halfway through.

**Senator JOHNSTON**—Do we anticipate the legislation will be up, done and through by then? Given what we have seen on some legislation that has been flowing through for many years, it is doubtful, isn't it?

**Mr Earley**—I do not deal with legislation. There are qualified people who would answer that better than I would. I can tell you that they are aiming, subject to the parliamentary schedule for priority of bills and so on, to get it into the autumn sittings.

**Senator JOHNSTON**—Were you ever consulted on the creation of the statutory position?

**Mr Earley**—Yes.

**Senator JOHNSTON**—And what was your attitude?

**Mr Earley**—I welcomed it. I was asked to detail what my role is so that instructions could be drawn for the legislative draftsmen.

**Senator JOHNSTON**—Why did you welcome it in contrast to what you currently do? What is the advantage?

**Mr Earley**—I think, and it sounds as though you do too, that it would enhance the perception of independence and the reality of independence of the position. I think that is fairly obvious.

**Senator JOHNSTON**—As I understand it, you are the former Director-General, Defence Legal Service.

**Mr Earley**—Yes, that was nearly four years ago.

**Senator JOHNSTON**—Please accept this question in the way that it is asked because I am not casting a single aspersion here: has it been the case that you as inspector-general have had to look at cases that you handled or that came across your desk when you were the director-general?

**Mr Earley**—You are talking about conflict of interest.

**Senator JOHNSTON**—I am not really; I am just talking about the perception of independence, if you know what I mean. It probably is a conflict of interest, but what interests

me is whether there is a mechanism, or do you do anything, that would ameliorate the perception?

**Mr Earley**—The purpose of my quoting from the advertisement for my position goes to what you are talking about now. I said then that what they wanted was someone who was very familiar with the culture of the ADF, and in particular with the military justice system. I said then that it would be almost impossible to find someone who fulfilled the criteria who had not had a close involvement with the ADF—that is point No. 1. Point No. 2: I am a lawyer and I have several other lawyers on the staff and, indeed, all of my staff understand very well the concept of conflict of interest. We understand that if a case comes before us with which we have had any significant previous dealings in any capacity we would withdraw from it. That goes for me, for Captain McConachie and for any of my staff.

Let me say that this is also a notion on which the CDF has given guidance. His instruction to me is that, if any case comes before me that involves him, I do not report to him; I am to report to the vice chief or maybe directly to the minister. There are mechanisms in place in order to prevent such an occurrence. This is not unusual; conflict of interest can happen on the bench or anywhere. It is not as though this is the first time it has ever happened. We are very well aware of it. Our case management system has a facility to deny access to any member of staff who has had a previous involvement with a particular case. I think that may have happened twice. It has not happened at all in relation to me, yet.

**CHAIR**—How many of your legal staff are permanent or reserve officers of the ADF?

**Mr Earley**—Captain McConachie is the chief of staff, and she is a naval lawyer. There is one other permanent legal officer, an Air Force squadron leader who for the last several months has been posted on operations to Baghdad. While he is in Baghdad his job is being done by two Air Force Reserve legal officers.

**CHAIR**—So there are four legal officers including you. You are a civilian, aren't you, not Reserve?

**Mr Earley**—Yes, I am a civilian. There have been four legal officers in semi-permanent positions but, normally speaking, other than me there would be two permanent lawyers on the staff. Among the Reserve people who help—for example, with inquiries—there are a number of barristers and solicitors on the register of inquiry officers.

**Senator JOHNSTON**—Does the requirement for an understanding of military culture, if you like, go all the way down to your serving staff, to your lawyers and to your other staff?

**Mr Earley**—Yes.

**Senator JOHNSTON**—Why is that? I am interested to hear you say that because I am not sure it is what I agree with.

**Mr Earley**—I have one civilian officer, a case officer, who is a public servant at EL1 level. There is a lieutenant colonel, who is not a lawyer; I think his background is as a survey engineer. The administrative staff are civilians. It is necessary to understand the culture of the ADF. If you

are to have a proper appreciation of what the military justice system is for and how it is to operate, you must have some good notion of the environment in which it is supposed to operate. That means you have to understand the culture.

If you are in the business of fielding complaints, for example, or making inquiries into complaints, which often requires visiting bases, you need to understand the normal day-to-day jobs of the soldiers, sailors and airmen. You need to be able to understand their jargon. They do not have a lot of respect for someone who is going to barge in, not understand what they are talking about and spend two days trying to find out who it is they are supposed to be talking to. Like it or not, the ADF is a hierarchical structure. There are a lot of protocols involved. The potential for making faux pas is fairly high unless you understand the culture. Each service has its own culture and each service approaches military discipline in a slightly different way, although everyone sings to the same DFDA sheet of music. I think that is entirely understandable.

**Senator JOHNSTON**—Why would you not look for someone with distant military experience who is no longer engaged at all with the military?

**Mr Earley**—I think I answered that earlier. I would like to and have investigated how we might engage someone like that. I would entertain the idea of someone doing my sort of work—I cannot speak for the services, and I do not speak for them—who was capable of appreciating fairly quickly what was required but, more than that, had the ability to conduct an administrative inquiry without mucking it up.

**CHAIR**—I have a few questions that you may have been aware were coming. Has the inspector-general established a panel of investigators?

**Mr Earley**—Yes. I have made reference to that two or three times. It is called the register of inquiry officers. Currently there are 21 names on it, and they come from all three services. Generally speaking, what I look for are people with a solid service background of general experience—they might have command experience; they might have various types of experience. There are some lawyers there. I do not insist that everyone is a lawyer. In some cases it is—even though I say it myself—a liability to have a lawyer doing these sorts of things.

**Senator HOGG**—That is a breath of fresh air!

**Mr Earley**—Previous experience in conducting an administrative inquiry and doing so successfully would be pretty high up on the list. After we get the pilot course settled, an additional tick in the box will be that they have done the familiarisation course and therefore, in my view anyway, would be accredited to undertake these sorts of inquiries.

**CHAIR**—Can you provide us with details of the administrative and disciplinary complaints that your office has upheld?

**Mr Earley**—The short answer is yes, although it is not as simple as it sounds. The reason is this. The way that your question is framed is that you want to know—and quite understandably; if I were sitting in your chair I would probably ask a very similar question—what complaints are upheld. Why I say it is difficult to answer in those terms is that it is not a simple matter to

describe the outcome of submissions which are made to my office in terms of whether or not they have been upheld. Not all of them are in the nature of complaints. Some of them are in the nature of representations and submissions. I do not provide individual remedies. I have no executive power to overturn decisions. I have the authority to make recommendations.

It is often the case that people simply wish their matter to be brought to attention. I have found that it is often the case that people simply want to talk to somebody in authority face to face and have them listen. Sometimes, that is all that is required. It is not a question of upholding it or not upholding it. One of the proper outcomes from my office according to my role and function is that, in appropriate cases, we always make an initial assessment of a submission but, if I believe that it can be better dealt with by the normal process or by an agency which is properly equipped—and by agency, I usually mean one of the services—I would refer it for further investigation and remedy to that service with the one exception that I would monitor what happens. So that it does not simply disappear, there is an obligation for them to report back. Furthermore, if on consideration of what action has been taken I reckon that the answer is insufficient, I can then make a recommendation or make a submission to the Chief of the Defence Force, who may himself decide to take it further. There is a parallel here between that process and, say, what the Ombudsman does. As I presume you know, he has no power to overturn decision but he can make a report to the parliament, so there is a similarity in approach there.

**Senator HOGG**—With regard to the 80 files that you started out with—and you now have 105 files, as I understand it—are you able to tell us file A action and what you did with file B so that we can get some sort of idea what happens?

**Mr Earley**—This might answer your question. To finish what I was saying there, instead of characterising the outcomes of my office as being upheld or not upheld like a complaints resolution agency, what I prefer to do and what is more consistent with our role is to have an outcome that determines whether or not there has been a failure of military justice and, if there has, whether it was individual failure or systemic failure. I think that is more useful. Here is the result: of the 105 submissions so far, we found 39 cases in which there was no failure, 19 cases in which you could say there was an individual failure of military justice, nine cases of systemic failure and the remaining 38 cases are in progress or have been referred.

**Senator JOHNSTON**—What was the systemic failure?

**Mr Earley**—I would have to say that excessive delay is the most commonly recurring factor, although it may not of itself have been the initial complaint.

**CHAIR**—Is that delay whereby there has been a complaint made and there is no action? Is that what that means by systemic?

**Mr Earley**—It might be a delay in a police investigation, it could be an administrative investigation, it could be the completion of administrative action or it could be a decision being made on a notice to show cause. There are delays of various of descriptions. I do not mean to imply that that is endemic. I heard you say you had had 150 cases. Some of those cases are pretty old. I know they are old and some of them go back 10 years. Some of the cases that I have had go back 10 years. There have been thousands and thousands of military people cycling

through the service through them. From point one view, although you might think 150 cases is a lot, when you consider the total number of servicemen who have cycled through since the last inquiry—even the Burchett inquiry four years ago—there are quite a lot. Whether that is a huge number or an extraordinarily small number, I do not know, but it is significant nonetheless. Delay is a common theme that we hear about.

Other types of systemic failures might include some of these. One case, for example, threw up what I would call a systemic failure which we have brought to notice. That occurred in the police interrogation and interviewing of people in the Defence Force who are under 18. You would be aware that in the community such people are allowed to have a friend or a relative present. Actually, the rules do not allow for that in the Defence Force anymore. We have brought that to attention and that is going to be fixed. I would regard that as an example of a systemic failure.

**Senator JOHNSTON**—With respect to that systemic failure, did you uphold the complaint against the under-18 person?

**Mr Earley**—The way that that complaint came to notice was via the Ombudsman's office. It has not yet formally been given to me, but I have had cause to deal with it.

**Senator JOHNSTON**—I am interested in that. My response would be that if a person is under 18 and is being interrogated and the judges rules or the McNaughton rules or whatever legal principles you want to apply are not being adhered to then that is bad in a disciplinary setting. That is my response.

**Mr Earley**—Yes, but that is what the act says at the moment. That is what the law says. I heard you talking earlier—and, with respect, I agreed with what the air marshal was saying—about the evolutionary nature of this: 'Why are you still sitting here having yet another inquiry?' 'Well, that is a good question.' If I may offer a view on it, this whole disciplinary system, the DFDA and the administrative system and the redress of grievance system, all came into being about the same time, in about 1985. At the time it came in it was hailed, and particularly the DFDA was hailed—I know because I was there—as a model system. It was one of the foremost systems or codes, if you like, then in existence in the world in comparable defence forces. The investigation section, section 101, was in fact in the nature of a bit of an experiment, in my recollection, in that it was a little bit ahead of what was normal in the civil community at that time. I do not think anyone really expected then and I do not think they expect now that such a thing would be static. The military justice system, just as the civil justice system, evolves over time with changing community attitudes and changes in the law. It has to react to it, and one of the ways of reacting to it is via the recommendations of committees like yours and now, hopefully, offices like mine that will be able to provide those stages or nodes at which improvements can be made. Senator Johnston, a common theme for you has been the lack of attention to human rights.

**Senator JOHNSTON**—No, not human rights. The abuse of people's rights, of whatever form they take.

**Mr Earley**—Okay. I put the cart before the horse. My response to that would be along similar lines—that it is simply because human rights, individual rights, in the last 20 years have received

a great deal more attention. I think the whole concept of natural justice is probably a growth industry and has been for the last 20 years, I guess.

**Senator JOHNSTON**—Is that a bad thing?

**Mr Earley**—No. I think it is a good thing. It is something that we take very seriously, I can tell you, in the office of the IG(ADF).

**CHAIR**—In Adelaide we had appearing before us a Ms Deborah Knight. Ms Knight advised the committee that you were investigating the circumstances of her son's death and that your report was due to be with her on that day. You may be aware that Ms Knight still has not received your report. Can you advise the committee of what the delay is in that case and when Ms Knight can expect to receive a copy of your report?

**Mr Earley**—That is certainly so. I spoke with Ms Knight yesterday, as it happens. She rang me; I did not ring her. I know that she made the comment to you that the report would be with her that week, or something like that. There was a misunderstanding about that.

**CHAIR**—The next day, I think she said.

**Mr Earley**—That actually did not come from me. The inquiry has finished. That was an inquiry in which I was personally involved. I spoke with her yesterday and said that, if anyone is at fault in her not getting the letter that I said I would send to her, it is me—nobody else, me. I said that I had almost finished drafting that letter but had been sidetracked by other quite serious matters in which I have been personally involved and had not been able to finish it. But I have undertaken to respond to what she wanted to know very shortly.

**CHAIR**—Very shortly—and she will get a copy of that report?

**Mr Earley**—It will not be a report; it will be, now, a pretty lengthy letter.

**CHAIR**—But she will receive that?

**Mr Earley**—Yes. I would tell you what is in it but I do not think that would be proper in advance of her knowing.

**CHAIR**—I do not know whom you are writing the letter to, you see.

**Mr Earley**—I will make this point too, which goes to the question of delay. While I said that that was the most commonly heard issue—the recurring factor; the common denominator—I think there are a couple of points that need to be made about delay in general. The first is that it is my experience—and it may be yours, too, with your constituents—that everyone who makes a complaint believes that their complaint should be on the top of the pile. There are limited resources. Whether the agency is a military agency, an agency that is semi-military like mine, the social security people who handle complaints resolution or the ombudsman's offices around Australia, they only have limited resources. Everyone would like twice as many people.

The outcome of that is that somebody—and in my office it is me—has to make a decision about which complaint gets handled first. Inevitably, complaints which are several years old and on which life and death does not depend in the next few days are not going to get to the top of the pile. I have great sympathy for Ms Knight and I believe that I will be able to answer most of her questions. And it has finished; it is just a question of letting her know. With great respect to Ms Knight, the incident which she was concerned about—the death of her son—was seven years ago.

**CHAIR**—So you let her know yesterday that you—

**Mr Earley**—Yes, I did. If you are faced with the choice of having to deploy your resources to something that happened several years ago or to something that is going to happen next week, then I suggest the answer is pretty obvious: you deal with the highest priority first. Our office is no different to any other office which is in the business of handling people's problems in that regard.

**CHAIR**—Further questions?

**Senator HOGG**—I know we are running fairly late, but on the issue of the length of time that some of these cases have been going, you said you had inherited a number of cases that were a number of years old. Can you characterise how many of the 105 files that you have—and I am not going to hold you to an exact figure; it is just so we can get some sort of appreciation—would fall in the range of beyond five years? For example, how many would be in a bracket of, say, three to five years; how many would be 12 months; and how many would be less than 12 months? Are you able to answer that?

**Mr Earley**—I cannot right now.

**Senator HOGG**—Are you prepared to take that on notice?

**Mr Earley**—Yes, I think our case management system can do that.

**CHAIR**—That will be fine, thank you.

**Senator HOGG**—Just the maturity of the cases that you have.

**Mr Earley**—There are included in that—and I do not mean disrespect to anyone in saying this—some people, of course, whose complaints may never be resolved because they simply will not accept an answer.

**Senator HOGG**—I accept that. I am just trying to get an analysis of the age of the complaints that you have so that we can get an appreciation, because we had someone else appear before us—and I was in and out of the committee—

**CHAIR**—We have had people appear before us to talk about incidents from the early eighties.

**Senator HOGG**—Yes.

**Mr Earley**—I am not surprised to hear that. I can tell you, without mentioning any names, that from your web site I did try to see what cases we may have had in common. There is one case there that is five to six years old, one from 04, one that is seven years old, another one that is seven years old, one that started in 02, one that is three years old and one that is 10 years old. That is out of eight cases.

**Senator HOGG**—That is the sort of analysis that would give us a feel for what is going on. The Director of Military Prosecutions, which has been recently established as I understand it, has run into a situation where there is a backlog cases, some of which are old. He is now starting to move the old cases out and so the workload is changing. The role is not changing, but the workload is changing and they are dealing with more contemporary matters. I want to get a feel as to what you yourself are doing.

**Mr Earley**—I will certainly see if we can produce that information. I should make a distinction though between cases which are simply old and have, to all intents and purposes, finished and those which may be fairly old but are still live, as it were.

**Senator HOGG**—Can you make that distinction for us as best you can? We are not trying to make this a horrendous exercise; we are just trying to get feel for what you are doing.

**Mr Earley**—I will certainly try and do that.

**Senator JOHNSTON**—I note that in clause 11 of the Defence Force general instructions signed by the CDF on 27 August last year, it says that you report directly to the CDF. It also says:

... the role of the IGADF is to provide CDF with internal audit and review of the Military Justice System independent of the ordinary chain of command. This includes both Defence Force discipline and the Defence Inquiries system.

Do you do an annual report?

**Mr Earley**—The original intention was that there would not be an annual report to the parliament as such. However, it has now been agreed that there will be a section in the annual Defence report which will relate to my office.

**Senator JOHNSTON**—You do not have to answer my next question if you do not want to—you may feel that you do not want to be pre-empted in your reporting to the CDF, and I understand that. What is your actual feeling with respect to the state of Defence Force discipline and defence inquiry systems?

**Mr Earley**—I addressed this in opening remarks in the written statement I gave you in March. I guess my overall view would be that the general structure of it is one that was purpose built to accommodate the ADF's needs—that is to say, the ADF needed a system that would work in peace and in war, in Australia and overseas. No existing civilian system is capable of doing that, and that is why you see similar systems in defence forces around the world. Insofar as the basic structure is concerned—and, in particular, the defence inquiry system and the administrative side of it—there was, as you know, a recent review sponsored by the DGTDLs. I think that was done by Acumen Alliance, a consultancy firm. They produced a report. From memory, I think their



general finding was that the structure was basically sound. But nobody is claiming—and I would not either—that the structure, even though it is basically sound, is not in need of improvements in some areas.

With the inquiry system in particular, I would say that a number of aspects require improvement. You have already been dealing with the first one, which is the training of inquiry officers. We are trying to do something about that. The Register of Inquiry Officers has been established. The initial course will happen next month for 25 people. The intention is to run it about four times a year. Over a period of time—and it will not happen overnight—we would expect the general standard of people conducting administrative inquiries to be substantially improved as a result of that. I think the awareness of procedural fairness obligations in administrative inquiries is probably less than desirable, and we need to concentrate a bit more on that. The training course will help there also, and there will be some revisions to the manual.

Visibility, particularly with regard to the outcome of administrative inquiries, needs some attention too. In that regard I can report that, unless you know what is going on—you have visibility across the scene of administrative inquiries—there is not much chance of learning from them because they are rather compartmentalised within commands. Under development at the moment—and I think this is a very good initiative—is a reporting system whereby all administrative inquiries above the level of investigating officer are to be centrally reported to my office. I volunteered to be the manager of that. For the first time that will enable a wider oversight, a wider visibility, of exactly what types of inquiries are going on out there. In particular, the implementation of recommendations and outcomes from those inquiries could undergo some scrutiny and some monitoring, which currently is a bit of a difficult area and, as I think most people would agree, needs some attention. I think that is a very positive step. I might also say that that general approach is available currently with the discipline system—the conduct of trials. A system that has been developed quite recently by the Registrar of Military Justice will allow that sort of information to be available.

We need to guard against there being an overreliance on quick assessment. If you have read the manual or if anyone has told you about the manual, then the process of an administrative inquiry requires something called a ‘quick assessment’ first to determine the scope of it. There is some evidence—not a lot—that, because it is easy and quick, a quick assessment may be used, if we are not careful, as the actual inquiry. It was not intended to be that way but, again, it is understandable in some cases why that might happen. We need to make sure that does not develop.

I move to counsel assisting boards of inquiry. I do not need to dwell on this but I have written to the relevant people about counsel assisting boards of inquiry not being drawn, wherever that is possible, from the commands that are appointing the board of inquiry—in other words, the command legal officer normally should not be the counsel assisting in a board of inquiry involving that command because his job is to advise the commander. There are exceptions to that and they have been dealt with in the Defence submission quite adequately, in my view, by the DGTDLs.

That is what I would say about the Defence inquiry system and the discipline system generally. There was an attitude survey conducted last year about people’s perceptions of the discipline system. I think there was a view that it was probably a bit complex. I do not know

how you can get over that. I am sure you would come to the same conclusion, but that is to be expected.

**Senator JOHNSTON**—Are you the person who has the results of the survey?

**Mr Earley**—It is not my survey but there was a section in it that had a number of questions about military justice for the first time. There is an extract, which could be made available, that addresses those questions. But I sound this note of caution: what was intended there—and it was for the purposes of my office principally—was simply to get people's perceptions. I do not need to tell you that perceptions, although real, do not necessarily represent the truth. For instance, if people are asked, 'What do you think of the inquiry system? Do you think it is a whitewash?' most people—in fact 98 per cent of the ADF—have never had any experience whatsoever of an administrative inquiry. The only information they would ever get about an administrative inquiry concerns the often sensational and sometimes salacious reports of inquiries that have gone wrong that appear in the media.

**Senator JOHNSTON**—All scuttlebutt and hearsay.

**Mr Earley**—Hearsay, yes. Their perceptions may well be moulded by that. So if you were to look at those results—most of them are quite positive, I would have to say—you would need to bear that in mind.

**Senator JOHNSTON**—We would like to look at them, I am sure.

**Mr Earley**—We will take that on notice, subject to the usual process.

**CHAIR**—I thank the witnesses for their attendance and the recording staff for their assistance.

**Committee adjourned at 11.27 p.m.**