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SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES
COMMITTEE

Reference: Effectiveness of Australia's military justice system

FRIDAY, 6 AUGUST 2004

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SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE

Friday, 6 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, Kirk, 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

COSGROVE, General Peter, AC, MC, Chief of the Defence Force..... 39

**HARVEY, Air Commodore Simon John, Director-General, Australian Defence Force Legal
Service, Department of Defence 1**

**WESTWOOD, Colonel Ian Denis, Chief Judge Advocate, Office of Judge Advocate General,
Department of Defence 1**

Committee met at 8.32 a.m.

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

WESTWOOD, Colonel Ian Denis, Chief Judge Advocate, Office of Judge Advocate General, Department of Defence

CHAIR—I declare open this hearing of the Senate Foreign Affairs, Defence and Trade References Committee and call the committee to order. Today the committee will conduct its 10th 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 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. When witnesses are first called upon to answer a question they should state clearly their names and the capacity in which they appear. Some witnesses will be invited to make a brief opening statement to the committee before the committee commences questions.

We have before us the ADF Legal Service and the Chief Judge Advocate. I invite you to make brief opening statements if you would like, otherwise we can go straight to questions.

Air Cdre Harvey—I do not propose to make an opening statement. I have appeared before the committee previously and I made a statement on that occasion. The only comment I would like to make is that, as the Director-General of the ADF Legal Service, I supervise officers that provide legal and policy advice in relation to matters of military justice. As I made clear in my opening statement on the previous occasion, I do not have actual conduct responsibility for individual cases, and I again want to make that point clear.

Col. Westwood—I have not appeared before the committee previously, so perhaps it might be convenient if I say a few words about my position and background. The position of Chief Judge Advocate was made a statutory appointment under the amendments to the Defence Force Discipline Act enacted by the Defence Legislation Amendment Act 2003. I was formally appointed to the statutory position on 19 May this year. Prior to that, I held the military posting of Judge Advocate Administrator, which was essentially the precursor to the position of Chief Judge Advocate. I have been a member of the Judge Advocates and Defence Force Magistrates panels since 1991. At the moment, in the discharge of my duties as Chief Judge Advocate I come organisationally within the command of the Judge Advocate General, so I am quite distinct from the broader legal office. The JAG, of course, has no power of command over the discharge of the military judicial function that I exercise. I was a member of the Reserve forces, both as a member of the infantry in the university regiment and then as a legal officer, before transferring to the permanent force in 1983.

Air Cdre Harvey—There is just one other matter that I neglected to mention. You will recall that you heard evidence from the Director of Military Prosecutions the other day. He has just asked me to pass on some information which was left outstanding. Essentially, I just wish to pass on the information that, last financial year, the DMP prosecuted 23 trials, of which 12 were led by reservists. It is pointed out that a couple of other trials were, in fact, conducted by Army. That is the statistic he wanted me to pass on.

Senator JOHNSTON—How are you fixed for resources in the Defence Legal Service?

Air Cdre Harvey—In terms of manpower resources or financial resources?

Senator JOHNSTON—Yes.

Air Cdre Harvey—With regard to the resources of the Defence Legal Service, obviously we would want more. We work with the resources that we are given and I believe we are able to effectively provide a service with the resources we have.

Senator JOHNSTON—Are you asking for more?

Air Cdre Harvey—There is a process. We had a review of the Defence Legal Service: the McClelland review, which the committee may be aware of. That review recommended that the issues of establishments and legal numbers be looked at. The service offices have agreed to—I am not quite sure about the triservice terminology—essentially a review of the military establishments. I understand that will take place in November. In terms of asking for it, it was something which came out of a review. We are looking at it and have asked the services to look at it come November.

Senator JOHNSTON—In the meantime, what happens to people who are unhappy with the availability of legal advice through your service?

Air Cdre Harvey—If people are unhappy about the availability of legal advice to the services then obviously there are avenues in which they can raise that and those issues can be put.

Senator JOHNSTON—What are those avenues?

Air Cdre Harvey—If they are unhappy they could raise it directly with me, as the professional head of the legal service. Occasionally, once or twice, that has happened and I have made inquiries.

Senator JOHNSTON—So that has happened once or twice. How long have you been the director?

Air Cdre Harvey—I have been the director for approximately 11 months.

Senator JOHNSTON—So you have had two inquiries saying, ‘I’m unhappy with the level of legal service I’m getting.’

Air Cdre Harvey—No, I would not say that was over the last 11 months. In my former position I was the senior Air Force legal officer and, as such, some requests came through. So those two requests would have come through over quite a number of years.

Senator JOHNSTON—What was the problem about with those two requests?

Air Cdre Harvey—It was just a question of administration. It was a case of somebody wanting some legal advice and making an approach, and we referred them to a Reserve legal officer and they were able to be provided with the advice they required.

Senator JOHNSTON—A lot of people tell us that they are asked to do things, be it as investigating officers, be it as convening authorities—you name it. They want advice. We have had a broad array of people coming through and saying, ‘I needed some advice,’ and, whilst they may have got it, it just took too long to get the advice. How are you benchmarking the performance of your service?

Air Cdre Harvey—It is a bit hard to respond to a bald statement like that without knowing the details. I guess the comment I would like to make is that, in my experience, it is not an issue that has been raised with me as being a significant concern—other than in a couple of cases I have particularly mentioned. I think we have a fairly good reserve which does provide good service to the members of the Australian Defence Force. In most regional areas there are standing legal aid arrangements which provide services to members. That is reinforced by a Defence instruction which details and communicates the entitlement to legal advice and the mechanisms for accessing it.

Senator JOHNSTON—I am sure that you think that, but what are you doing to get out there and check with your clientele that they are happy? Have you gone back to the people who have used your service and said, ‘Give us the benefit of your experience. Did you get good, prompt and timely service? Was the standard of service up to what you expected?’ et cetera. Are you doing that?

Air Cdre Harvey—Absolutely. Obviously in an organisation like the Defence Legal Service the legal service is spread throughout Australia. At the command and the regional levels it will be a responsibility for the command legal officers to ensure that the services are being provided to the clients, and I mean that in the wider sense of being command and also individual members. In respect of the Defence Legal Service headquarters, we have, as a result of the McClelland review, increased our focus upon our clients. As a result of that, we have had some workshops with our clients here in Canberra at the strategic level to make sure that we are aware of what their requirements are for legal services. We have put in train mechanisms to meet those needs. That was a very worthwhile exercise to define exactly what the requirements were and how we would go about meeting them.

Senator JOHNSTON—Are you aware of Lieutenant Colonel Collins and Captain Toohey?

Air Cdre Harvey—I am aware of them, yes.

Senator JOHNSTON—They are involved in quite public legal matters. Are we providing them with legal services?

Air Cdre Harvey—I do not know the detail of those particular cases, but certainly in relation to any issue that arises in the context of a person's employment they have the entitlement to seek legal advice. There are also standing instructions which provide for legal representation at Commonwealth expense which people can avail themselves of. Of course Mr Toohey, who you mentioned, is a lawyer himself.

Senator JOHNSTON—But you know the old adage: he who is his own solicitor has a fool for a client.

Air Cdre Harvey—I have heard that.

Senator JOHNSTON—So he is going to have to get some legal advice to double-check his position, isn't he?

Air Cdre Harvey—Absolutely.

Senator JOHNSTON—But these two fellows are paying their own legal fees—Lance Collins is certainly.

Air Cdre Harvey—I can only speak from a policy perspective. As I said, I do not have individual responsibility for those particular cases. Under the finance directions which apply across the Commonwealth there is a mechanism where people, if they wish to receive reimbursement or representation at Commonwealth expense, may make application. I do not know off the top of my head whether they have made that application, but they are able to. I have just been advised by somebody who knows a bit about the Collins matter that Mr Collins was, in fact, offered legal advice through the system through training command. He used that initially.

Senator JOHNSTON—He has an ongoing requirement for a QC, firstly, with respect to all of the matters that arose in the *Bulletin* article and, more generally, with respect to the sort of allegations that have been made against him. If he wanted to apply for legal advice, where would he get the application form and who would it go to?

Air Cdre Harvey—It is dealt with in Defence instructions, I would imagine, or directives that are issued throughout the Defence organisation.

Senator JOHNSTON—Don't you actually know?

Air Cdre Harvey—It is dealt with by Commonwealth financial directions. I imagine the normal course would be that he would seek some advice from a permanent legal officer and the permanent legal officer could advise him of the various avenues that are available.

Senator JOHNSTON—So who adjudicates his application for legal advice?

Air Cdre Harvey—If he was to make an application under the finance directions, it would be decided by a delegate under the finance directions—which I believe is the director of litigation within the Defence Legal Service.

Senator JOHNSTON—So the director of litigation in the Defence Legal Service would adjudicate whether or not his application was worthy of funding?

Air Cdre Harvey—He would decide that on the basis of the guidelines that are detailed for the provision of legal advice.

Senator JOHNSTON—Do we have a copy of those guidelines?

Air Cdre Harvey—I do not have a copy of the finance directions with me, but we could certainly provide that to you.

Senator JOHNSTON—Do you have any idea what they are?

Air Cdre Harvey—What it is designed to do is provide representation for people who get sued or have a legal proceedings where there is a Commonwealth interest in defending them. Essentially it is a case of looking at the facts and circumstances of the case and deciding whether there is an interest in terms of defending the person.

Senator JOHNSTON—What does it mean: a Commonwealth interest in defending them?

Air Cdre Harvey—The basic principle is that the Commonwealth does not fund people to sue the Commonwealth. That is a matter for private funding of legal representation. But there are situations where a person could, for example, be sued as part of doing their normal duties and, as a result of that, the system provides that in accordance with the guidelines if there is an interest and the person has been seen as acting in his Commonwealth duty, so to speak, it is inappropriate that he should bear the cost of that legal defence. He can make application and, as I said, be provided with legal representation at Commonwealth expense.

Senator JOHNSTON—Do you see a problem with that system?

Air Cdre Harvey—No, I do not see a problem with that system.

Senator JOHNSTON—So if someone who is doing their lawful duty for Army has an issue with another department or another authority for which the Commonwealth is ultimately liable, that person is given no assistance because someone evaluates that that will lead to an action against the Commonwealth. So someone adjudicates whether this person gets advice, gets assistance, based upon his or her perception of whether there is a liability in the hands of Commonwealth. Is that a proper judicial system?

Air Cdre Harvey—I think it needs to be put into context. As I said before, any member of the Defence Force is entitled to legal assistance.

Senator JOHNSTON—But someone is going to determine the merits of their case from a Commonwealth perspective—that is what you have told us.

Air Cdre Harvey—No, I think we need to be a bit clear about what the system is. What we provide to Defence members is legal assistance, not legal representation or legal aid. We provide a free service for Defence members who may come and speak to a service legal officer at no cost

to themselves and get advice in relation to matters that affect their service. That obviously would be available to Collins, Toohey and everyone. The question then arises is, if they require further assistance, then that is not a matter that is provided for under the legal assistance scheme. As I said before, it would be a rather perverse situation to have the Commonwealth funding someone to sue it, if that was the situation.

Senator JOHNSTON—Do we have any Defence instructions and manuals relating to the conduct of disciplinary investigations from a legal perspective within ADF?

Air Cdre Harvey—What do you mean by the conduct?

Senator JOHNSTON—Defence instructions that explain to legal representatives in disciplinary investigations or hearings how to conduct matters.

Air Cdre Harvey—Absolutely.

Senator JOHNSTON—Can we have some copies of those, please? I do not think we have seen them.

Air Cdre Harvey—I am surprised they have not been provided, but absolutely. The main guide or information source is the two-volume discipline law manual: volume 1 contains the legislation and the other one is a detailed layman's guide to the military justice system. It also contains procedure guides and information about rules of evidence, charges, service offences, sentencing principles and the like.

Senator JOHNSTON—We would be very much obliged if you could provide us with copies of those. The McClelland review of the Defence Legal Service was conducted in 2002-03, I think. Do you have a copy of that?

Air Cdre Harvey—I do not have a copy with me at the moment. I am not sure whether the committee has formally requested that before, but my understanding is that there is a submission with the minister to decide that issue.

Senator JOHNSTON—Is it your submission or ours—do you know?

Air Cdre Harvey—I am not quite sure whether the committee has formally outside of this hearing requested it before.

CHAIR—I am not sure if we have either.

Air Cdre Harvey—We will check that with the secretariat.

CHAIR—Take that as a request right now.

Senator JOHNSTON—You will recall the Harvey matter of which you were providing some assistance to the estimates committee in November last year.

Air Cdre Harvey—Sorry, the Harvey matter?

Senator JOHNSTON—I think it was Air Commodore Harvey.

Air Cdre Harvey—You have got me very worried!

Senator JOHNSTON—My apologies. I am reading some notes here—the SAS matter. You sought some advice with respect to the convening authority from the DMP—that was Mr Hevey. Sorry, I am getting my Harveys and Heveys mixed up.

Air Cdre Harvey—I understand that.

Senator JOHNSTON—You said to the estimates committee:

... the convening authority, in this particular case, took advantage of the existence of the Director of Military Prosecutions for advice about whether charges should proceed to a trial.

Firstly, could we have a look at the request for that advice, and what was the advice given? Are you in a position to disclose that to us?

Air Cdre Harvey—As I said in my opening comments, I am not intimately involved in the conduct of individual proceedings. Obviously I would refer the release of a DMP advice to the Director of Military Prosecutions. The request for the advice would have been generated through Army, so I suggest we take those questions on notice and refer them to the responsible areas to make a decision. Colonel Hevey may have some policy concerns which he is not able to represent here about releasing advice on prosecutions.

Senator JOHNSTON—Are you in a position to tell us what the advice was—that is, the ultimate response of the DMP?

Air Cdre Harvey—Off the top of my head, I remember reading it some time ago, but, as I said, I would have to check it up.

Senator JOHNSTON—Could you take that on notice and provide us with a copy if you see fit and if you can. If not, please let us know that you have some concerns about that.

CHAIR—Senator Johnston, can I interrupt you—unless you have some particular issue you would like to finalise. Senator Sandy Macdonald has some questions that we put on notice to you. We need to run through those to assist us in compiling our report.

Senator SANDY MACDONALD—I will start with the way the Defence Force Discipline Act is administered. In your submission you said:

It is designed to be a robust and portable system, to provide swift administration of justice ... For example, courts martial were conducted during operations in East Timor and, more recently, Defence Force Magistrate trials have been conducted in Iraq.

How many of these trials in East Timor and Iraq dealt with criminal offences or military offences which equate to criminal offences such as assault on an inferior or some form of dishonesty?

Air Cdre Harvey—I think these are questions best answered by the Chief Judge Advocate, given his responsibilities for statistical analysis.

Col. Westwood—I have some statistics prepared for the committee, which I will hand up. I wonder if I might make a couple of observations first. The first of these is that, while it is of course possible to prepare statistics on whether offences that have been dealt with by military tribunals have a criminal counterpart under general law or not, I raise for your consideration whether this is a terribly helpful distinction.

The purpose of the military discipline system is the maintenance of discipline. It is possible that a matter that has a counterpart in the civil criminal environment like assault will have a very significant disciplinary impact to it. Say it is a minor assault. It has, on an objective standard, a very limited criminality but it could have a very significant disciplinary component. Theft is another very good example. Theft of even \$30 from a comrade, which is unlikely to be prosecuted in the civil courts because of the amount, in military terms might well be elevated to trial at a Defence Force magistrate level because of the impact on trust between individuals. I simply raise for your consideration whether it is useful to focus on the criminal-discipline distinction as opposed to the impact on discipline, which I think is really the fundamental thrust of the entire scheme.

Continuing on from that, I just observe to you that, even in the maximum punishments provided for in the legislation—for instance, some of the offences against the enemy—some offences have no civil counterpart but the parliament has seen fit to prescribe maximum punishments of up to 15 years imprisonment. I think it gives an idea of the fact that disciplinary matters can themselves be very serious, even though they have no criminality as it would be known in the general community.

Senator SANDY MACDONALD—Thank you for that. I think we appreciate that distinction. Are you able to hand up the statistics?

Col. Westwood—I have another matter that I would raise with you in connection with these statistics. They are only trials conducted before Defence Force magistrates or court martial, so they leave untouched the summary matters. Undoubtedly there would have been summary matters dealt with—minor thefts, perhaps, and minor assaults: offences that do have a criminal counterpart—

Senator IAN MACDONALD—Of the statistics as supplied, how many of the subsequent answers will be covered by those statistics? Can we run through them quite quickly? I have not seen those.

Col. Westwood—Indeed, I can. Let me pass them up to the committee. I have had them broken up into four tables. Because of the interest expressed in the question about offences committed in Iraq and East Timor, the first table is limited simply to those and to the period 2000-04. The matters that have a counterpart under the general criminal law have been bolded to make them easy to identify. The next table is precisely the same sort of information for offences committed overseas other than in Iraq and East Timor. But we have gone on to include Cambodia from 1993, Namibia from 1989 and Somalia from 1993 simply to give you a broader idea. The next table combines the two of them. The final one, which is headed 'Combined

figures', is broken down by theatre of operations. I was going to explain the combined figures in that table as to what they were, but I think it has been taken outside to be copied. Is it convenient for me to go on with the explanation, or would you prefer to have the document?

Senator SANDY MACDONALD—I think we will not be able to be right across the explanation, so perhaps we might take it and have it in the *Hansard*.

Col. Westwood—The combined figures are broken up by theatre of operation. The figures refer to the number of people tried, not the number of charges. You would appreciate that the one accused might have faced three counts, but he appears as one. They have been broken up into matters that were purely disciplinary, matters that were purely with a criminal counterpart and those where the charges were mixed—for instance, disobedience of command plus assault. The final column gives you those trials that were required because the accused's rank was such that it had to be elevated to the upper level.

Senator SANDY MACDONALD—Were any criminal offences that were allegedly committed in these theatres of operation tried in Australia?

Col. Westwood—That appears in the tables. They give you the place of trial. Certainly some of them were.

Senator SANDY MACDONALD—Does it say how long before the trial the offence was allegedly committed?

Col. Westwood—Yes it does. It gives you the date of the offence and the date of trial. I should explain to you, though, that these figures are not part of the normal statistics we maintain. They have been put together from the corporate memory within my office. I am reasonably confident of them but they are not a guaranteed return. It has also not been possible to identify what might have explained a delay between the date of offence and the trial. A possibility, of course, is that the matter simply was not reported to the proper authority until some months after the event. So I am not able to help you with those matters.

Senator SANDY MACDONALD—Are the punishments included in the information handed up?

Col. Westwood—Yes, they are, as well as the rank of the accused. Indeed, if I go across the headings in the table it will give you some idea. The names have been left blank for privacy reasons but it gives the rank of the accused, the place of the offence, the date of the offence, the place of trial, the date of trial, the charges, the finding of guilty or not guilty and the punishment.

Senator SANDY MACDONALD—Have any criminal offences ever been tried by court martial or Defence Force magistrate in theatre on operations under the DFDA?

Col. Westwood—Yes.

Senator SANDY MACDONALD—And that information is provided?

Col. Westwood—Yes, it is in the tables.

Senator SANDY MACDONALD—As to the offence and the matter defended, you have said that they are in the tables. We move now to the second point. Legal advice at Commonwealth expense is available to members being investigated or charged with an offence under the DFDA. That was in your submission. Who appoints these Defence legal advisers to persons being charged or investigated and on what criteria?

Air Cdre Harvey—I would like to address that question. Obviously, the question is framed in terms of proceedings under the Defence Force Discipline Act—the discipline side of the military justice system. As I mentioned before, we have a standing arrangement whereby any member of the Defence Force is able to seek legal advice. That is available, obviously, in cases of people being investigated and charged. You may recall that last night I made reference to specific provisions of the Defence Force Discipline Act—sections 101E and 101F. I do not think I mentioned them specifically yesterday, but they do provide that, where a person is in custody for an offence, before being questioned they will be advised that they may speak with a legal practitioner of their choice. In custody in a prescribed place, members are, as a matter of practice under the act, given a list of service legal officers and they may choose a person from that list to consult. That is part of the investigation of specific offences.

Senator SANDY MACDONALD—Who appoints the list from which they can choose?

Air Cdre Harvey—I think it is actually the Judge Advocate General, from memory, who compiles the list under 101F.

Col. Westwood—I would need to check.

Air Cdre Harvey—We may need to check that, but that is my understanding. I might also just make the observation that, from my experience over 20 years, it is the exception rather than the rule that someone will know a legal officer that they wish to have represent them.

Senator SANDY MACDONALD—That question about who appoints the legal adviser is quite germane, though.

Air Cdre Harvey—Absolutely.

Senator SANDY MACDONALD—You are saying the board is appointed and they can select from that panel.

Air Cdre Harvey—It is not a board we are talking about; it is discipline proceedings. But it is the list of legal officers they would choose in the course of an investigation process.

Senator PAYNE—Can I just clarify that you cannot tell us who appoints the list of legal advisers available to persons being charged or investigated?

Air Cdre Harvey—That is what we are looking at the moment, Senator.

Senator PAYNE—You cannot answer that now.

Air Cdre Harvey—I have given evidence that, in my understanding, it is the Judge Advocate General under the act.

Senator PAYNE—Yes, but it is surprising to me, I must say, that, with both the Chief Judge Advocate and the director of legal services sitting here, you cannot tell us the answer to that question now.

Col. Westwood—I can indeed, Senator. It is section 101F of the legislation. It provides that ‘the Judge Advocate General shall establish and, so far as it is reasonably practicable to do so,’ maintain the list. The list appears as one of the schedules in volume 2 of the law manuals which the air commodore is going to make available to you.

Senator PAYNE—Are there published criteria for the appointment of those legal advisers? On what criteria are they chosen?

Col. Westwood—No, it is simply that they are available. The lists list them geographically. They are legally qualified officers serving in the Defence Force who are available to advise an accused person in custody.

Senator PAYNE—They are full-time, not reservists?

Col. Westwood—No, it would include both. They would predominantly be reserve officers, because ordinarily the permanent officers would be advising the prosecution side of the house.

Senator SANDY MACDONALD—Is there a mechanism in place to ensure the independence, actual or perceived, of the pool of legal advisers?

Air Cdre Harvey—I will just finish answering the previous question first, because I did not get around to the issue of people being charged, which is a bit different. In relation to people being charged, it pretty much depends upon the circumstances. At the lower summary level, the subordinate summary authority representation will not be by legal officer, but the person appointed as the defending officer will be entitled to speak with a permanent or reserve legal officer to get some advice. In relation to higher summary tribunals, rule of procedure 24 is relevant. That indicates that a member may, with the consent of a commanding officer who deems that legal representation is appropriate, ask for a person by name. The person will be made available if they are reasonably available. I just mention that that is a rule of procedure which gives the right to the individual to choose the person at those sorts of summary trials.

In relation to higher tribunals, the practice and procedure has been that the accused will be able to nominate the service legal officer that they wish to have represent them. Again, I make the observation that my experience has been that the vast majority of people who are facing charges under the DFDA do not have a particular legal officer that they want, and some assistance through the command chain would be provided to refer them to people.

Senator SANDY MACDONALD—Going on to my next question, when I said, ‘Is there a mechanism in place to ensure that independence, actual or perceived, is maintained in the pool of legal advisers?’, the question really is: is there a mechanism by which the high professional qualifications and performance of that pool are maintained? How is that reviewed and ensured?

Air Cdre Harvey—I am not quite sure what you mean by the word ‘mechanism’, but the first point I would make is that every person who is an ADF legal officer is admitted to practise as a barrister and solicitor of the Supreme Court. As a requirement of admission, they would undergo ethics training, which would reinforce their obligations to the client, and they would understand the primacy of their obligations.

Senator JOHNSTON—Which Supreme Court?

Air Cdre Harvey—Generally it is the Supreme Court of the state or territory in which they have been admitted to practice.

Senator JOHNSTON—I understand there is a very broad difference in the standard of qualification requirements from state to state.

Air Cdre Harvey—I am not familiar with that.

Senator JOHNSTON—Some courses are three years, in some you can get away with two years, and some are six and seven years. Qualifications can be so broadly diverse in terms of experience and ability that that is almost meaningless. A Western Australian practitioner can probably practise quite well in Queensland and Tasmania, where the criminal law is codified, but he cannot do too well in Victoria and New South Wales, where the common law prevails.

Air Cdre Harvey—The point I want to make is simply that they are admitted to practise as barristers and solicitors, and they have that level of training.

Senator JOHNSTON—Do they hold practising certificates?

Air Cdre Harvey—The reservists do. I think there has been previous evidence to this committee that there is no requirement for permanent legal officers to have practising certificates, by virtue of an act of this parliament—section 123 of the Defence Act. ADF legal officers are also acutely aware of the obligation to avoid conflict of interest. I point out that the ADF has introduced over the last five years or so a most comprehensive training scheme of professional development for legal officers, which I believe is best practice within Australia and maybe some nations overseas. This requires our permanent legal officers to undergo training which leads to the award of a graduate diploma of military law and also master of military law, which are accredited through the University of Melbourne. In that course, they receive specific training on military discipline and the like. So I just want to make the point that there is extensive training.

In terms of mechanisms, all ADF legal officers are subject to the inherent jurisdiction of the Supreme Courts of the states, and those reservists who have practising certificates would also be subject to the law societies as a further check and balance. It is also a fact that every ADF member is subject to a military discipline system, the DFDA and also an administrative system which is available to correct errors and shortcomings in respect of legal officers, including in respect of their professional activities. Finally, I just want to point out that there are existing mechanisms through the Inspector-General of the Australian Defence Force, Mr Earley; the Defence Force Ombudsman; and, of course, the redress of grievance procedures that allow complaints about independence or perceived bias to be raised. I might just give evidence to this

committee that, in my experience of 20 years of intimate involvement with the military justice system, I am not aware of any allegation of actual bias or lack of independence on the part of one of our legal officers. I give you that from a personal perspective.

Senator SANDY MACDONALD—Who reviews—and how do you review—the conduct and performance of the legal officers, and how do you avoid, challenge or respond to a conflict of interest?

Air Cdre Harvey—Conflict of interest is a really important issue that we spend a fair bit of time teaching our legal officers about through our professional development courses. As I said before, legal officers are admitted to practise as solicitors and, through their ethics training, they understand the obligation of the primacy of their responsibility to the client. We are talking about professionals who take their professional responsibilities very seriously.

Senator SANDY MACDONALD—Who reviews the performance?

Air Cdre Harvey—Of individual legal officers?

Senator SANDY MACDONALD—Yes.

Air Cdre Harvey—The review of legal officer performance is done through the normal review chain—the normal appraisal process—that applies across the Defence Force. No-one critiques, per se, legal officers in the performance of their actual duties. I think that would be inappropriate. But certainly there are mechanisms available, if complaints are made, for the legal fraternity to be investigated and looked at.

Senator SANDY MACDONALD—What is their tenure? You mentioned that you have been in the job for 11 months. Do legal officers have the same tenure that might normally be expected in the ADF of 24 months in a particular job before they are moved?

Air Cdre Harvey—In terms of posting cycles?

Senator SANDY MACDONALD—Yes.

Air Cdre Harvey—Legal officers are a little bit different. Under the specialist development scheme, legal officers are on short service commissions, generally of six years, subject to reappointment. But they are normally subject to the normal posting cycles that applies in relation to all officers. Legal officers will do a range of postings, as indeed I have and other legal officers have done throughout their careers.

Senator SANDY MACDONALD—How are defending officers protected from such things as biased performance reporting and negative career influences from the chain of command, which they may have to attack in defending their clients?

Air Cdre Harvey—I think the first point to note is that rarely—I would not say it would never happen but rarely—would a legal officer be involved in prosecuting or defending matters that arise in their chain of command. In fact, almost all defence is done through the Reserve legal officers rather than the permanent legal officers. So the legal officers that are embedded in

the organisation, advising commanders day to day, do not routinely get involved in the defending of members. I think that is a significant difference.

In terms of evaluation reporting, it is a two-step process. It is not just simply an immediate commander that would report on a legal officer; it would be a higher commander. There are quite rigorous appeal processes which legal officers can avail themselves of. In terms of promotion, I think evidence has been given that there is a rigorous promotion process which is outside of the normal chain of command. It is conducted through Canberra based promotion boards of independent people and they consider all the evidence. Legal officers sit on those boards and are able to monitor that process as well to ensure that nothing untoward happens. I might add that, in my experience, legal officers would not be hesitant to complain about any suggestion that they have been marked down or reported on by virtue of their performance of their duties as a prosecutor or a defending officer.

Senator SANDY MACDONALD—There has been a suggestion that an independent office of director of military defenders be instituted. What is the position on that?

Air Cdre Harvey—I do not think it is a matter that is under active policy development at the moment, but it is a matter that was considered at senior command and policy levels at the time that the Director of Military Prosecutions proposals were going through. I was not involved at the time but I understand the thinking was that the priority was to establish and get up and running the Director of Military Prosecutions and that a director of military defenders was not seen as being of the same priority. I think that is borne out by the fact that we have a de facto military defenders system in that the Reserve legal officers primarily perform that particular function. I do not want to give the impression that we would not look at it in the future. I think it is something that down the track we certainly would give consideration to.

There are some quite significant policy considerations involved in that. The number of trials that we have at the court martial level is not great. The geographic spread would mean that we would have to take a significant number of our current Reserve out, which would diminish the availability of those officers potentially for other matters. It would also have a potential effect of limiting the choice of defending officer for accused people, by virtue of the fact that the pool of people to choose from would be reduced. So there are some issues there to be considered. But, as I said, it is a matter that would be under active consideration.

Senator PAYNE—I would like to go back to the comments you made about conflict of interest. You said you spend a fair bit of time teaching conflict in your instruction of ADF lawyers. What does a fair bit of time mean?

Air Cdre Harvey—The main area where this is covered is in one of the particular subjects, the advocacy subject. That subject is still controlled or chaired or organised by Mr Paul Willee QC of the Melbourne bar—he is either a current or past member of the ethics committee of the Melbourne bar. I had a chance to discuss it in anticipation of this question. He has given me an extract of the talking notes or the handout that he gives. I will read out an extract of that to give you a bit of a flavour of the training. He says:

A legal officer with any integrity knows that if he has a solicitor-client type relationship with another member his first duty is to the member's interests, not the CO or the service requirement, unless they are seriously operationally threatened by any action that that legal officer may take that will affect life or limb.

He points out that this is a position which is no different from what applies in the civil arena. He goes on to say:

Time and time again I have heard it from legal officers that their first duty is to the service because they are officers first and lawyers second. The simple fact is that if you get things the wrong way about in that fashion you cannot serve the interests of the member or the service. It is only by fierce, fair and independent representation of the member that the interests of the service are advanced. Anything less is generally destructive to morale and operational effectiveness.

I just read that extract as an indication of the sort of training that we provide to our legal officers.

The issue you are concerned with is obviously that of representing clients with impartiality, which is a critical issue. The whole issue of how the legal officer interfaces with the people accused, the people he represents, is critical, but his relationship with the command is also important. The legal officer is in a unique position in the sense that, notwithstanding having a more junior rank, he will be in situations where he is required to advise the commander of his legal obligations and responsibilities. I think it is pretty obvious that it is incumbent upon us to make sure that he is appropriately trained and aware of those responsibilities. There will be times—they will be difficult, and that is why we focus on it—when the legal officer will have to say to his commanding officer, a superior rank, 'Sir, with respect, I think that you've got problems from a legal perspective if you do that.'

I mention that because the role of the legal officer is unique in terms of the military environment. There is some suggestion that just because you are a military officer you cannot separate out your roles. I know there is that perception—it has come through in some of the questioning—but my experience is that our training and our legal officers are quite adept at identifying those sorts of situations.

Senator PAYNE—You have made reference to evidence that we have received. One of our discussions last night with Chief of Army was about the fact that, in a relatively small organisation, people know each other. People bump up against each other in deployments, various commands or whatever the case may be. What is the position of a legal officer who finds himself or herself asked to take on a particular matter but determines for themselves that there may be a conflict for whatever reason; how do they go about declaring that conflict? How do they manage themselves out of that representation?

Air Cdre Harvey—As I said before, the training is designed to alert the legal officer to that possibility so he can recognise that. I would suggest the appropriate procedure would be for the legal officer to speak to the commanding officer, or he could seek guidance from his immediate superior in the professional chain which may be a command legal officer. In fact I myself have had a situation where that has happened. I was asked to do an evidence-gathering exercise by my command legal officer, and one of the people was a person I knew. I will just use that as an illustration. I raised that with the command legal officer and we found another legal officer to do that.

Senator PAYNE—And you are confident that that works well?

Air Cdre Harvey—I have no evidence, from 20 years experience in the military justice system, that it is causing problems.

Senator PAYNE—On the other side of that coin, what is the position of the Defence member being defended if they perceive a conflict; how do they go about raising that concern and having that addressed?

Air Cdre Harvey—It depends on the circumstances, obviously, but it is incumbent upon that person, or quite open to that person, to make complaints as they see fit—to raise it with the legal officer, to speak to the legal officer or to change the legal officer, which is their right.

Senator PAYNE—How do they change their legal officer?

Air Cdre Harvey—It would just be a case of approaching the command and saying: ‘Look, I have a problem with this legal officer. He knows my uncle’—or whatever—‘I would like another legal officer,’ and that would be arranged, most notably through the permanent legal officer in the region. Of course, now the Inspector-General ADF is available to provide oversight, so if a person were being represented by someone that they had some difficulty with and they were not satisfied with the answer that they were given, they could raise that as a concern and that would be looked at.

Senator PAYNE—Is that turned around quickly?

Air Cdre Harvey—Absolutely, yes.

Senator PAYNE—Thank you very much.

Senator SANDY MACDONALD—Colonel Westwood, in your submission concerning Defence Legal Service and the Chief Judge Advocate, you say: ‘To assist the Judge Advocate General, a statutory position known as the Chief Judge Advocate was created to provide administrative assistance to the Judge Advocate General and to permit him to delegate his administrative powers.’ If this position is administrative as stated, why does it require a judge advocate to fill it rather than a staff officer?

Col. Westwood—The role of, eligibility requirements for and provisions for resignation from the position of Chief Judge Advocate are contained in the Defence Force Discipline Act, part XI, division 2, under ‘Chief Judge Advocate’. It is a requirement of the legislation that the CJA be a member of the judge advocates panel. You need to be aware that the primary responsibility of the Chief Judge Advocate is to sit as a judge advocate and Defence Force magistrate. As an adjunct to this position, the Chief Judge Advocate provides high-level administrative assistance to the Judge Advocate General. The position is analogous to the judge administrator of the Family Court, who assists the Chief Justice of that court with administrative issues. The Judge Advocate General is able to delegate some of his statutory powers to the Chief Judge Advocate. For the proper independence of the military judiciary, it is desirable that these delegations be exercised by a member of the JA/DFM panel who has taken the requisite oaths of office and who, by

virtue of those appointments, enjoys appropriate guarantees of independence from the chain of command.

In addition to the exercise of delegated powers of the Judge Advocate General, the Chief Judge Advocate provides senior staff assistance to the JAG with issues such as the JAG's submission to the current parliamentary inquiry and the JAG's annual report to the parliament. This requires appropriate high-level experience in policy issues affecting the military justice system and in the conduct of trials as a sitting judge advocate and Defence Force magistrate.

While the legislation leaves open whether the Chief Judge Advocate should be a member of the permanent or the reserve forces, the Judge Advocate General has specifically asked me to convey to the committee his view that the Judge Advocate General is best served by having a suitably qualified permanent officer fill the appointment, because of the time required to properly discharge the duties. This is particularly important because to date the Judge Advocate General has always been a serving judge with the responsibilities of high judicial office.

Having a permanent officer in the appointment has also meant that the ADF was able to easily deploy a member of the judge advocates panel to operational areas when required. So far as the permanent officers filling the Chief Judge Advocate and the previous Judge Advocate Administrator positions are concerned, they have sat in all of the trials conducted in active theatres of operations bar one. In that one case I knew the accused personally, and one of the Reserve officers kindly undertook the trial. Having a permanent officer has also meant that there was someone readily deployable with the appropriate judicial skills and perception of independence to command the detainee management unit in East Timor pending the establishment of a civil judiciary in that country. The Reserve officers are of course deployable, but it is often at great cost to their practice if the deployment is to be for some time. Such was the case with the detainee management unit.

Senator SANDY MACDONALD—Who selects the person to be the Chief Judge Advocate and from what field of candidates? What are the selection criteria and what is the selection process?

Col. Westwood—If I may, I will table for the committee the duty statement and the selection criteria. The Chief Judge Advocate is appointed by the Judge Advocate General in accordance with the Defence Force Discipline Act section 188A. The selection process entails the Judge Advocate General requesting the Director of Senior Officer Management to provide the Judge Advocate General with a list of suitably qualified candidates for the JAG's consideration against the selection criteria.

Senator SANDY MACDONALD—How many people were in your selection group?

Col. Westwood—Indeed, mine was the sole name put forward.

Senator SANDY MACDONALD—Your carriage appears to be very good so far! You are doing well. We have figures which say that the Defence Force magistrate in court martial for the five-year period 1998-2002 heard 257 matters—that is, approximately one matter per week. How many of these matters lasted more than one week?

Col. Westwood—Again, I will just qualify this by saying that we do not maintain the statistics on that basis, but my assistant—relying on corporate memory and checking, as those are the proceedings where we had some concerns—has come up with these figures. Our tally of the 1998-2002 period was 256 trials, but I do not think that matters very much. For the ones that went over a week, in 1998 there were three; 1999, three; 2000, four; 2001, four; and 2002, one.

Senator SANDY MACDONALD—Thank you. How many of these matters were dealt with by the Judge Advocate Administrator or the Chief Judge Advocate?

Col. Westwood—In general terms you could expect that I would sit in between one-third to a quarter of the matters. This is now a matter that is reported in the JAG's annual report. Going back to the statistical area of interest, in 1998 I did not sit at all because the position of Judge Advocate Administrator was vacant. I was then the director of the Complaints Resolution Agency, but hopefully all of my matters from that period were so old that they would remain of no interest. In 1994 I resumed the JA/DFM work, but I deployed at the end of that year to East Timor and so only sat in four trials. In 2000 I sat in 12 trials, but also at the end of that year I acted as counsel assisting the board of inquiry into the death of a Corporal Jones. We would not have the Chief Judge Advocate act in that role now, but you will appreciate that this has been a bit of a progression according to what was acceptable. In 2001 I sat in 17 matters; in 2002, 18 matters; and in 2003, 15 matters.

Senator SANDY MACDONALD—Are there to be further appointments of permanent officers as Judge Advocate or to the Defence Force magistracy in addition to the Chief Judge Advocate?

Col. Westwood—Subject to suitable guarantees of independence and there being suitably qualified candidates, the JAG may nominate additional permanent officers.

Senator SANDY MACDONALD—What would be the selection criteria?

Col. Westwood—Before we move from the previous question, could I indicate to you that in the past we did traditionally maintain two to three permanent officers who sat, but we did not have quite the same concerns about the need for strict independence from other functions. You will appreciate from the JAG submission that we are now very alert to the necessity to move the military judiciary to one side and not employ officers in other types of roles. That makes it somewhat more difficult to appoint additional permanent officers. As to the selection criteria, no distinction is drawn between permanent and Reserve officers being considered for the appointments, although it is easier to allocate Reserve officers to do the duties as their sole function. The statutory requirement for appointment to the judge advocates panel, which is a precursor to eligibility for appointment to the Defence Force magistrates panel, is set out at DFDA section 196(3):

An officer is not eligible for appointment ... unless the officer is enrolled as a legal practitioner ... for not less than 5 years.

The appointment to the JA panel is made by the CDF or a service chief, on the nomination of the Judge Advocate General, and the appointment as a magistrate is made from the judge advocates panel by the Judge Advocate General himself.

Senator SANDY MACDONALD—How many people are on the JA panel?

Col. Westwood—The matter is a little difficult to answer because prior to the amendments effected by the Defence Legislation Amendment Act last year the appointments were made without limit to term. Essentially they were held at pleasure. So there were appointments made but nothing was ever really done to remove people who were no longer active. They withered on the vine, so to speak. Perhaps the best answer to your question is to tell you how many officers actively sat in matters in 2003. In that case, six officers actively sat in trials. I think that probably gives you a reasonable indication. There were six officers.

Senator SANDY MACDONALD—If additional permanent judge advocates and Defence Force magistrates were to be appointed, what would be the continuing involvement of the reserve judge advocates and Defence Force magistrates?

Col. Westwood—The JAG strongly envisages that the panel would remain a mixture drawn from the three services and comprising both permanent and Reserve.

Senator SANDY MACDONALD—Are permanent judge advocates and Defence Force magistrates to be considered for further promotion in rank after appointment?

Col. Westwood—Again, the Judge Advocate General does not feel that a distinction should be drawn between permanent and Reserve officers. He has indicated in writing to the CDF that the position of Chief Judge Advocate should be viewed as a terminal posting and that other officers appointed to the judge advocate and Defence Force magistrate panels should not be promoted other than, conceivably, within the office of the Judge Advocate General itself.

Senator JOHNSTON—What do you mean by a ‘terminal posting’?

Col. Westwood—A final posting before retirement so that there could be nothing perceived to be gained from the exercise of the duties.

Senator JOHNSTON—I thought you might have been suggesting that something dreadful happens to him after he has finished his job.

Senator SANDY MACDONALD—There can be no CLMs taken by that.

Senator PAYNE—Just to clarify that point, what is the highest rank that the holder of a judge advocate position could have?

Col. Westwood—It is fixed as a minimum by the legislation at colonel, so the position is somewhat analogous to that of the Director of Military Prosecutions. Colonel Hevey, I think, expressed to you the firm view that he should be a brigadier—one would live in hope—as well as the Chief Judge Advocate. But the legislation thinks as a minimum rank.

Senator PAYNE—A minimum rank but not a maximum rank?

Col. Westwood—Not a maximum, no.

Senator PAYNE—Because the legislation for the DMP fixes a maximum rank.

Col. Westwood—No, I think it fixes, again, a minimum rank.

Senator PAYNE—I misunderstood Colonel Hevey then.

Col. Westwood—Perhaps I could explain the reason for that.

Senator PAYNE—I think the legislation for the DMP fixes the rank at colonel.

Col. Westwood—There is of course no legislation, but the drafting instructions will provide for a minimum rank of colonel. The DMP is created administratively, not by legislation as yet.

Senator PAYNE—We understand that, and we have had that point made to us by Colonel Hevey as well. We will have to clarify that, because we have a different understanding from yours. My understanding is that it is, in fact, a maximum rank for the DMP.

Col. Westwood—All right.

Senator PAYNE—But that is not a problem for you. Yours is a minimum rank, so you can look forward to becoming a brigadier, except that it is a terminal appointment, which might mean that you do not—or that one does not, not you personally.

Col. Westwood—Only if the position were changed. The rank of colonel was selected for the legislation because it is a comparatively senior service rank. It reflected to some degree the demands and responsibilities of the position in terms of the military hierarchy while, again, making sure that an individual was not appointed below that rank, seeking then to try to achieve further promotion.

Senator PAYNE—I understand that.

Senator SANDY MACDONALD—You said that they would not be considered for further promotion in rank after appointment. That was the short answer?

Col. Westwood—That is the short answer.

Senator SANDY MACDONALD—Will two or more permanent judge advocates or Defence Force magistrates be able to deal with all or the substantial majority of the five-year average of one trial per week?

Col. Westwood—That would not be our expectation. I would anticipate that, if there were two permanent officers appointed, we would expect them to cover about half of the trial load. I base that expectation not only on the work that I do at the moment and the other commitments that I have to training and policy but also on the Canadian experience. They have a defence force of roughly the same size. They have roughly the same number of trials—this upper court martial level. They have a chief military judge and three other permanent officers. From my last discussions with them, they were looking to augment that panel, with some reservists to help

with the caseload. I think that if there were two permanent officers we would still look very much at this Reserve-permanent officer mix.

Senator SANDY MACDONALD—So you will still look at the use of reserves. In courts martial, punishments are determined and imposed by members of the court and not by the judge advocate. Defence Force magistrates sit alone and determine punishment, as do summary authorities. What training is given to members of courts martial on the application of sentencing principles?

Col. Westwood—They are given no formal training at all because, in accordance with the scheme established by the Defence Force Discipline Act, they are to be directed formally in open court by the judge advocate on the sentencing principles that apply. This means that it is done openly and is available for review and appeal purposes, although you will be aware that the Judge Advocate General has submitted for your consideration the issue of whether sentencing should pass from the members of the court to the judge advocate. That would be in accord with the practice in the civil courts.

Senator SANDY MACDONALD—What training is given to Defence Force magistrates on sentencing?

Col. Westwood—I will start by saying that we frankly acknowledge that more can be done. It is an issue that the JAG has flagged for further development, in conjunction with a review of the numbers on the JA/DFM panels, following the Defence Legislation Amendment Act bringing in provision for three-year terms of appointments, rather than the appointments being held at pleasure. I indicate to you, though, that we do not think that there is anything to flag a problem with the sentencing process. All trials are subjected to a review process. This is conducted by officers on what is known as the section 154 panel. Essentially, it comprises senior counsel and judges drawn from the Reserve. Those reports will address the sentencing, and a copy is made available to the officer who sat at first instance, so there is ongoing and automatic feedback. If there were some significant matter picked up in the 154 report, it would be disseminated across the entire panel of judge advocates and Defence Force magistrates. You will recall that the JAG has submitted for consideration the issue of whether the rights of appeal to the Discipline Appeals Tribunal should be broadened to include a right of appeal on sentence. Were that done, then of course the entire sentencing process would have the benefit of senior appellate court guidelines, just as occurs in the civil courts.

To return to the narrow issue of training, in the case of permanent officers only, the New South Wales Judicial Commission has very kindly made available a place on their training courses for recently inducted magistrates which do include formal segments on sentencing. It is not possible, however, to send the Reserve officers to that course because it is limited to people who are actually holding appointments as magistrates and are not going to return to the arena.

Senator SANDY MACDONALD—You said that there is more to be done but it is not a problem.

Col. Westwood—Yes. I think that would be a fair summary.

Senator SANDY MACDONALD—What does that mean—that there is more to be done but there is not a problem?

Col. Westwood—There is no indication through the review process that the sentencing is miscarrying, so it has not arisen in that sort of context. But, plainly, more could be done in the way of formal training.

Senator SANDY MACDONALD—I think you have answered my next question, which is: what training is given to summary authorities on the application of sentencing principles? You said that there are opportunities for those to go to the civil magistrates course.

Col. Westwood—No. We were dealing only with this upper level of the court martial and magistrates. I know you have been doing this months, but I will just put this in perspective. If you view Defence Force magistrates and courts martial as being generally the equivalent of a District or County Court, sitting in the case of a magistrate without a jury and in the case of a court martial with a jury, what would be the magistrates arena in civilian life is the commanding officer and summary authorities. In the case of our summary authorities, there is no appeal to the appeals tribunal. They are subject to an automatic review, though at a less elevated level than the 154 officers doing the court martial and magistrates, but they are given formal training in sentencing principles. It is perhaps a matter more for the air commodore, but I know that I assist in the training.

Air Cdre Harvey—I might add to that answer. The Chief of Army last night gave us a pretty good insight into the discipline training that occurs in the Army. My experience is that that is carried through throughout the services. In relation to the summary level, the most important powers of punishment rest with the superior summary authority and the commanding officers. Because of the rank of these positions, and also because of their appointments, these officers will undergo promotion training and also pre-command training. Extensive training is provided in relation to the discipline system. The training is geared towards equipping them with the skills to perform as a summary authority. Obviously, sentencing principles would be a key issue of that.

Also, the committee has requested a copy of the discipline law manuals. I invite you to look at the procedure guides in chapter 7 and also the punishment chapter, which contains detailed policy guidance, which is a bible that people conducting trials rely upon. The procedure guides themselves in chapter 7 actually alert the various authorities to the requirement to consider and to take account of the guidance in relation to sentencing principles.

Senator JOHNSTON—Air Commodore Harvey, correct me if I am wrong, but your legal service personnel go away to deployment and give advice on the rules of engagement, treaty and convention obligations and those sorts of things, don't they?

Air Cdre Harvey—Absolutely.

Senator JOHNSTON—Is that a primary function of a legal practitioner inside the military? Are they a home-grown product that gives advice on what we do—killing and capturing the enemy—and how to do it lawfully?

Air Cdre Harvey—I do not know whether I agree with the word ‘primary’. It certainly is a major focus point for legal officers to provide operational advice, and obviously that is dependent on the operational tempo at the time. I think it is true to say, as we are all aware, that the operational tempo of the ADF has been very high, and I think that at Senate estimates it has been indicated just how legal officers have been involved in that process, but to say that that is their primary responsibility is probably overstating it. The military justice system and providing advice in relation to administrative inquiries are equally core issues which we require uniformed legal officers to be involved in.

Senator JOHNSTON—We took three lawyers to Iraq to constantly oversee and brief our pilots as to the rules of engagement and the delivery of ordnance within the lawful parameters that prevailed with respect to our obligations under international law. Is that correct?

Air Cdre Harvey—It is broadly correct, but those legal officers were not just there as operation of law advisors. They also provided other services.

Senator JOHNSTON—Certainly they have a duality of function. That is the problem that I see in this. When they are performing their military function and providing senior commanders with rules of engagement advice and other military and international law advice, they are in the chain of command. They are interacting with the officers in the chain of command. Then you expect them to cast off all of that commitment to the chain of command and go and defend soldiers who come before those very officers the legal officers have been advising. Do you not see a problem with that?

Air Cdre Harvey—I think what you are getting at is a perception rather than a reality.

Senator JOHNSTON—You tell me. Is it a perception or is it the reality? I think it is the reality.

Air Cdre Harvey—I would not agree it is the reality. The first point I want to make—and I think we have covered this at length—is that we are talking about legal officers who are professionals and who do understand and receive training in relation to their obligations to clients. In relation to the conflict in Iraq, there were a significant number of legal officers deployed, not just in Iraq itself but also in the surrounding area. In situations where that arises, it is possible to use legal officers who are not directly involved in a chain of command to act as defending officers and the like. I do not believe that just because someone is in a chain of command they cannot divorce themselves from that and give effective legal representation.

Senator JOHNSTON—Let us take an example. Let us put on our civil hats for a moment. If I have a group of lawyers who are advising the commissioner of police on how to lawfully conduct police operations on a large scale, where to deploy officers, how to go about search and seizure tasks lawfully and how to make sure they comply with the law surrounding the execution of warrants and arrests, is it then appropriate for those same lawyers to act for the people the police force are prosecuting?

Air Cdre Harvey—You obviously have to deal with the circumstances. Clearly you need to be alert that there is a conflict of interest potential. As I said before, with a number of legal officers in a region, I think you would have the opportunity to use a legal officer who was not

directly involved in advising that commanding officer on those operational matters. But, to be perfectly frank, we have to have a system which can operate in an operational environment. I do not say that in any way suggesting that we do not or that we sell short the rights of individuals, but it has to be cognisant of the operational environment in which we operate.

Senator JOHNSTON—Let us take Iraq. Say we have three lawyers over there and we have a major disciplinary breach. On day one, those lawyers are talking to the commander of the squadron, wing or whatever it might be. The next day they are appearing before him, and one of them is giving advice on the prosecution of a particular member of the ADF for a disciplinary breach while another one of them is defending that person. Do you see that as appropriate, being before the same commanding officer they were both serving the day before?

Air Cdre Harvey—I think what we need to be aware of is that the practice has been and the requirement is under the rule of procedure that the person may have the legal representative of their choice if that person is reasonably available. Certainly at courts martial and defence force magistrates, our practice is to provide those people with the legal officer of their choice. The Chief Judge Advocate may be able to jump in here. I think the practice has been that we have to send the judge advocate over. I think on occasions we have also sent defending officers over to defend people. It is something that I recognise is an issue that has to be very carefully managed and we are alert to it.

Col. Westwood—In the case of all of the trials, the judge advocate or magistrate has been sent over, except in East Timor, because I was there in another role. In the case of serious matters the defending officers have also been sent across and totally removed from the actual local sphere of operations. I could indicate to you that, in connection with the trials that I have done in the Middle East area of operations, one officer sought to be represented by a regimental officer, which is highly unusual under the Defence Force Discipline Act. An entirely competent job was done, but it was very unusual. In another case, an officer was brought in from outside the chain of command. The matter was a negligent discharge and went by way of a plea. It was not quite the scenario that you have outlined. But I will also endeavour to explain something which I think is a difficult concept if viewed through civilian eyes but which is not a difficult concept when viewed through military eyes. Senior commanders, including convening authorities, traditionally under military law had an obligation both to the maintenance of discipline and to the accused. This was not seen as a conflict in military terms. Military discipline and justice were not well served by having someone convicted for something that they had not done.

Senator JOHNSTON—The DPP has the same obligation out there in the real world.

Col. Westwood—It is not quite the same. The discipline act, as it currently is prior to the amendments that are now being shuffled through, reflects this very traditional thinking. The convening authority is the chief prosecuting authority under the legislation, but he is also charged under the act with securing the accused's witnesses and ensuring that the accused is represented before trial. It is not a concept that sits happily when viewed through civilian eyes, but, in military terms, this mutual obligation to accused and command was something that functioned well. In all of my years of serving commanders before moving on to the judicial type function, I have never had a commander who was not interested in the welfare and outcome of the matter so far as the accused was concerned.

Senator JOHNSTON—Unless it involved him.

Col. Westwood—In that case, of course, the commander has no proper say in the prosecution. The matter has to be sent somewhere else, whether it is the commander's order that has been disobeyed or the commander's wallet that has been stolen, but generally that just does not arise.

Senator JOHNSTON—I beg to differ with respect to that because that is one of the subject matters that we are dealing with here. There has been a reluctance by commanders who are not entirely at arm's length to remove themselves from the process. We perceive that going on from time to time. But let us come back to the situation with respect to these cases that you have given us. I note that in one example we have a man in Butterworth and another man in Butterworth—I take it they are men—

Col. Westwood—Which table is this?

Senator JOHNSTON—I am looking at offences committed overseas. It is the top table. There is the table with offences committed overseas in Iraq and East Timor 2000-04 inclusive, but I am looking at the one that does not have quite such an expansive label.

Col. Westwood—You are looking at the combined one—the offences committed overseas?

Senator JOHNSTON—Yes. The first line has a trooper from Butterworth who is charged with assault occasioning actual bodily harm and assault upon a superior.

Col. Westwood—Yes.

Senator JOHNSTON—Then, four down, we have a sergeant at Butterworth who committed offences in 1995, 1994 and 1995.

Col. Westwood—Yes.

Senator JOHNSTON—He had an interesting time between December 1994 and February 1995. He has assaulted an inferior on two occasions, assaulted a superior and had sexual intercourse without consent. What is the basis for and who is the determiner of who is dealt with civilly and who is dealt with militarily?

Air Cdre Harvey—This is an issue that has been the subject of considerable work and High Court decision, in fact.

Senator JOHNSTON—What is the High Court case? Are you talking about Tracey?

Air Cdre Harvey—Yes. Tracey and the line of authority there about substantially serving the interests of discipline in respect of proceedings conducted in Australia. That is the governing policy, and there are some defence instructions which detail the guidelines. I think that might be the worthwhile way of approaching that rather than occupying a fair bit of time here.

Senator JOHNSTON—Yes, but tell me who is the person and give me a snapshot of your understanding of how we do this. My impression is that the various factual backgrounds and

matrices to these charges are extraordinarily diverse and someone has to make a judgment. I want to know who that person is, where he fits into the scheme of military justice, what the precise basis on which he makes that decision is and who reviews his decision. Can you tell me those things?

Col. Westwood—Your question largely relates to the arrangements here in Australia. The tables that you have in front of you are offences overseas. The military jurisdiction overseas is much broader and, generally speaking, there is not an Australian civil court vested with jurisdiction for these matters so there is no need to liaise in connection with these ones that you are looking at.

Senator JOHNSTON—They were both brought back on shore. The trials were conducted in Sydney and Townsville.

Col. Westwood—Indeed, but, because the offence was committed overseas, that does not vest the local authority with a jurisdiction. These ones were determined according to a status of forces agreement with the country in which the accused was posted. The High Court is looking at this again in a matter of a Private Alpert currently before the court, with the decision reserved, as to how far the military jurisdiction extends overseas. I happen to have the details of these if you were interested in them.

Senator JOHNSTON—I appreciate that. It is a very interesting point. What you are saying is that the overseas component makes for a considerable difference in the determination. Let us remove Butterworth and say Townsville and Rockingham.

Col. Westwood—And that, I think, was the way in which the air commodore understood your question to be, but I thought it important to just clarify that—

Senator JOHNSTON—I appreciate that and thank you for that detail. Now let us say we are on shore.

Air Cdre Harvey—The issue there is obviously governed by the High Court case line of authority we have referred to before. The jurisdiction of the Australian Defence Force in peacetime in Australia is limited to situations in which proceeding with a matter substantially serves the interest of maintaining discipline. That is a sort of work of art of the High Court and obviously a question of interpretation and application in any individual case. The obvious point I would like to make is that, if an offence occurs in Australia, civil authorities have their own powers to investigate of their own initiative, but if it is a matter that comes to the notice of service authorities it will be dealt with in accordance with the defence instruction, which we have offered to provide to you, and the decision whether to proceed with a particular case will be governed by the ADF prosecution policy, which is pretty much modelled on the prosecution policies of the Director of Public Prosecutions.

Senator JOHNSTON—Tell us what those policies are. You have read the JAG submission. He says that we are on the cusp of having difficulties in determining who should go civilly and who should be dealt with internally. The law is very unclear and the High Court has not specifically adjudicated on the question of what the threshold is. I want you to tell me what you know, because you are in charge of all these lawyers.

Air Cdre Harvey—With respect, I do not know whether your summation of the JAG submission is entirely accurate. I might leave that to the good colonel to respond to on behalf of the JAG. The point that I want to make is that the threshold jurisdictional issue is the question of whether it substantially serves the interest of maintaining discipline. It really is a case of looking at the facts and circumstances of a case and you need to distinguish between the indicia of the connection with the military, and that is an indication that the legal officers get involved in.

I have just been handed the instruction, which might help us give a bit of detail—and I know you have asked for it and we will provide it. The indicia are: ‘Was the offence committed while the member was on duty? Was the alleged Defence committed on Defence property or in a place under the Defence management and control?’ So there is a difference between if it occurs in a barracks as opposed to if it occurs among people in civilian clothes outside. The indicia continue: ‘Did the alleged offence involve Defence property or equipment or money under Defence control? Did the alleged offence involve an abuse of rank or position of military authority or privilege or trust? Did the alleged offence contravene orders or instructions or Defence policies or procedures? Was the victim a Defence member?’ That is not an exhaustive list, and I do not think it is intended to be.

Senator JOHNSTON—So you would deal with a murder, for instance, by one member of the ADF of another whilst they are both on duty on a base somewhere?

Air Cdre Harvey—Under the DFDA, certain offences, such as murder, require the approval of civilian prosecution authorities and, I think, the Attorney-General to proceed. Those sorts of matters would not be dealt with by the Defence Force.

Senator JOHNSTON—What is the threshold? When do you get to the situation where it has to be dealt with civilly? Where do we draw the line? What are the offences—assault occasioning bodily harm, grievous bodily harm, unlawful wounding?

Col. Westwood—The ones that are specifically excluded are matters such as murder and rape. To have a jurisdiction over them in peacetime, Australia needs the consent of the Director of Public Prosecutions. Anything below that is, theoretically, available to a service tribunal subject to that threshold test of jurisdiction. The committee will find when it looks at the instruction that, on matters that have a counterpart under the general law, there is a requirement to liaise with the civil authority. So I think it is fair to say that, if they were terribly serious assault matters, the Director of Public Prosecutions might well say, ‘While there is a combined jurisdiction with this, we think it would be better for us to deal with it,’ and they would normally then be dealt with in that way.

Senator JOHNSTON—I am obliged to you for that. How does the DPP first become informed? What is the mandate for us to inform the DPP? When do we decide to tell the DPP about this?

Col. Westwood—The Defence instruction gives the detail. There is a requirement under the Defence instruction for that liaison to occur. When the matter comes to trial, I will inquire in appropriate matters as to whether that has been done, and if jurisdiction—

Senator JOHNSTON—At first instance on the return date of the internal prosecution, the judicial officer—if we can call him that; a magistrate, judge advocate or panel—makes a jurisdictional determination as to whether this matter, on the facts, is able to be dealt with internally?

Col. Westwood—Yes, that is exactly right. Let me not overstate it: often the charge makes it abundantly clear that jurisdiction is not an issue. So, if we have a minor assault in the other ranks in the canteen on base, I would not be making formal inquiries about jurisdiction on that. But, with the use of another soldier's credit card to withdraw money from an automatic teller machine, I would want to be satisfied. In an assault on a civilian in a hotel, again, in two matters I found that there was no jurisdiction to proceed. So, yes, the jurisdiction would be plainly determined as part of the proceedings themselves.

Senator JOHNSTON—Do we have any internal precedent for this? I see that the indicia that we have spoken about are unique. Where is the body of practice so that we have some consistency and transparency with respect to these thresholds?

Col. Westwood—The 154 reports to which I referred earlier are circulated to all of the sitting judge advocates and magistrates. Indeed, I happen to be aware that the reasons that I gave for finding no jurisdiction in connection with one leading seaman have been well circulated amongst legal offices. So I think it is fair to say that these decisions on significant matters of jurisdiction are given quite a wide currency around the legal offices.

Air Cdre Harvey—I certainly would repeat that. The actual instruction has a paragraph which gives guidelines in the reverse sense of when a commanding officer is confronted with an allegation about the sort of indicia that he should consider to decide whether to refer it to authorities. The instruction makes it quite clear that the legal officers are to be involved in that process, and they are the ones who, generally, as a matter of practice get involved in the discussions with the directors of military prosecutions. But I think the instruction certainly contains the details, so given the time—

Senator JOHNSTON—That helps me a lot. I am obliged to you both for that because that is something that has always interested me. What are the criteria, Air Commodore, for the subsequent process administratively—and I look at all of these overseas matters—for a failed criminal matter? In other words, double jeopardy is alive and well in the Defence Force. Why is that and how do you relate that to us? We see it as a problem. How do you perceive that that is dealt with as an issue? Is it a problem? Do you agree with double jeopardy?

Air Cdre Harvey—No, I do not. That is a fundamental question. I thought we had got to the stage where we had resolved that issue. No question of double jeopardy arises in a situation where administrative action is taken following a conviction or a criminal proceeding. It is not my understanding of the concept of double jeopardy.

Senator JOHNSTON—All right. I am inclined to accept that. But where your criminal prosecution has failed and where you have not been able to prove beyond a reasonable doubt that someone has committed an offence—and we have talked about the range of offences with the Chief Judge Advocate, and some of these are very serious if they are on base and in jurisdiction—where do you draw the line? I see there are a couple of overseas charges here, with

people found not guilty of dangerous behaviour. The classic is misconduct with corpses. We know what that is all about. You then proceed to take the remnants of failed evidence that has not discharged a standard burden and seek to proceed administratively. What are the checks and balances and protections for that?

Air Cdre Harvey—The comment I would make—and the Timor situation may be what is behind your question—is that my experience has been that the taking of administrative action in a situation where there has not been a conviction is an extremely rare event. Having said that—

Senator JOHNSTON—That makes it all the worse when it happens, doesn't it?

Air Cdre Harvey—I cannot comment upon the individual circumstances, because obviously that is a matter for the command chain. The taking of administrative action is not designed to be a second punishment; it is designed to redress failings in the professional standards of an officer. As I said, this is really a decision made, in accordance with instructions governing adverse administrative action, by the command chain, and they are at liberty to seek legal advice in relation to the circumstances of a particular case.

Senator JOHNSTON—Who makes the decision? The command chain?

Air Cdre Harvey—Administrative action is a decision of the command chain and not a decision of the legal process per se.

Senator JOHNSTON—You see, that worries me. Why wouldn't the Director of Military Prosecutions make the decision?

Air Cdre Harvey—The Director of Military Prosecutions is concerned with the military discipline side of the shop and does not have any relevance in terms of the military administrative inquiry system.

Senator JOHNSTON—But you sought his advice with respect to that East Timor matter.

Air Cdre Harvey—In relation to the disciplinary aspect, not in relation to the taking of administrative action. He was never involved in that. If we refer to the East Timor matter—obviously without naming the person—what happened in that particular case was that the decision was made, and Chief of Army spoke to this yesterday, at Army headquarters or Army training command, perhaps. Our role as legal officers would be to provide advice. We sourced legal advice from the Australian Government Solicitor about the legality of taking that action. But the decision to take the action was a command decision in that particular case, as the Chief of Army mentioned. His position is that in hindsight that was not action that they would have liked to take.

I might also add that that is an issue that the inspector-general has been involved in as a general issue. He has been in correspondence with us and referred it to us as an issue. We have been working with the Defence personnel executive, as the owner of the policy, to develop amendments to standing instructions to provide better guidance. That is an example of learning from the process to prevent the recurrence of things that maybe happened before. We have

provided some advice in working with Army to come up with a form of words to provide better guidance in relation to the circumstance when that sort of action should be taken.

Senator JOHNSTON—That is good. I am happy for you to have responded that way. Let us talk about the famous email that says, ‘Lawyers will be allocated according to the best interests of the service.’ Who wrote the email? I do not want to know the name. I just want to know the rank and position of the person who wrote that.

Air Cdre Harvey—I am not quite sure which email you are referring to, exactly, but it may, I suspect, be the email which was issued by my predecessor, the Director-General of the Defence Legal Service.

Senator JOHNSTON—All right. The Director-General of the Defence Legal Service said, ‘Lawyers will be allocated according to the interests of the services.’ That was with respect to boards of inquiry.

Air Cdre Harvey—I do not have the email in front of me and I do not have—

Senator JOHNSTON—We can give you a copy of it right now.

Air Cdre Harvey—That would be useful. One of the fundamental issues is whether it actually said that. Colonel Hevey mentioned yesterday that that email was inadvisable in the sense that it may have created the impression—

Senator JOHNSTON—We have got it. I think it is paragraph 4.

Air Cdre Harvey—I will just make sure we have got the right email.

Senator JOHNSTON—There are two now. I am told and informed that a month after its issue it was replaced.

Air Cdre Harvey—I understand that was done for the very reason that there was some concern expressed that it may have led to the impression that the interests of an individual would be a subservient consideration. I have got the email now.

Senator JOHNSTON—Is it paragraph 4 that talks about how lawyers will be allocated in boards of inquiry?

Air Cdre Harvey—It says:

5. ‘Counsel representing’. There are several important factors to be taken into account when approving a legal officer to represent an affected person, they are
 - a. the interests of the service,
 - b. the interest of the affected person, and

c. the availability of the legal officer.

This is the first time that I have read this, but the point that springs out to me is that there is no suggestion that (a) is the predominant consideration. However, having said that, I think there is concern, and I think that was behind the decision of the previous director-general—it is for him to speak to it—to replace that instruction. It may have led—and obviously in one submission to this committee that is the case—to a suggestion that the Defence Force would operate in a situation in which less than appropriate regard would be paid to the interests of the individual.

Senator JOHNSTON—I understand what you are saying, but you are still causing me concern. Points (a) and (c), the interests of the service and the availability of a legal officer, should not be there. The only factor to be taken into account when approving a legal officer for an affected person is the interests of that affected person, surely.

Air Cdre Harvey—The interests of an affected person are absolutely critical, and no situation should arise where the interests of an affected person are compromised. But we are talking about administrative inquiries rather than criminal discipline proceedings where there is a body of law in respect of perceptions which is far more stringent.

Senator JOHNSTON—Do you think that someone's lifetime career exposed to tarnish in an administrative inquiry after a serious accident or incident is something that is less than a criminal offence?

Air Cdre Harvey—No, and I do not wish to suggest it is. The point I want to make is that it cannot be looked at in isolation; it needs to be looked at in the circumstance of the case. It is hard to speak for the person who drafted this instruction. Obviously it is not my document.

Senator JOHNSTON—You are still causing me concern. The circumstances of cases are going to differ from time to time. The fact is that an affected person has got to have confidence in his Defence Force Legal Service to provide him with what he needs without fear or favour.

Air Cdre Harvey—And I agree with that.

Senator JOHNSTON—We have distributed something here that causes us considerable concern. Admittedly, you retracted it after one month.

Air Cdre Harvey—The previous director general retracted it.

Senator JOHNSTON—In talking about it with you now I still detect an undercurrent of, 'Well, we've got resource problems, and then there were the circumstances of the case.' I really do not want to hear that. I want to hear that, if a captain in charge of a ship has had an incident where his company has been put at risk and there is a board of inquiry, he has absolute confidence that he is going to be represented 100 per cent at his beck and call. This does not give me that confidence.

Air Cdre Harvey—I agree 100 per cent with what you are saying, and I agree that that is exactly the situation that should apply. I think this is where this instruction is unfortunate, in the sense that it gives the impression that that may be the case. That certainly is not the practice. I

agree fully with you that if someone is facing an administrative inquiry they should be given appropriate, independent and impartial advice, and they should have their interests represented to the full. All I am saying is that we cannot be divorced from the operational environment in which the ADF operates. If I could give you an example that may illustrate it, we have had a lot of operations overseas. If the special forces from Western Australia, for example, were conducting operations in the desert of Iraq and there was an incident involving a weapon malfunction, it might be the case that we would want to investigate that as a matter of priority. The operational imperative may be that those special forces would have to go out and operate the next day.

The question that then arises is: how do we do it? I think we try and conduct the inquiry as soon as possible. That may require us to rely upon resources in theatre that will enable us to conduct that inquiry and provide the safety analysis that will allow the protection of the special forces and their future operating procedures. Do we have the luxury of waiting and giving an absolute perception of the total right of a person to have the person of their choice if it requires a three-week delay while we identify a lawyer of their choice in Australia, force deploy that person and send them over? I do not think so. I think that the service interests of those special forces require us to conduct an administrative inquiry as quickly as possible. Having said that, I do not think that is in any way inconsistent with our obligations as a service to provide that person with representation which is in his interest and which represents his interests, and I think we can.

Senator JOHNSTON—I disagree with you. In the second go that you, the department or your service has had, you have come back with paragraph 5. I am looking at the replacement that the minister has sent us and that you have sent us. You wrote to us with respect to Mr Clark's submission—

Air Cdre Harvey—It was on 11 June.

Senator JOHNSTON—I have a punch hole in my photocopy which obliterates that, but I will take it that it is 11 June. You then say in correction, in paragraph 5:

There are several important factors to be taken into account when approving a legal officer to represent an affected person ...

What you say there is just not right. You have got it wrong still.

Air Cdre Harvey—With respect, Senator, I disagree. I think we have agreed that there is no question that we need to provide appropriate representation to a person. The example that I gave you was to try and illustrate how we have to accommodate an operating environment and also—equally, if not more so—the interests of the individual who is affected. How do we do that? I think this is unfortunate in terms of the terminology that has been used. I have given you an example. I know that we are committed to ensuring that people are represented appropriately and that their interests are represented.

Senator JOHNSTON—Where does a member of the ADF go for a lawyer who is all about him—that is, his best interests and his defence—and about nothing else? Where does he go? You are not going to take his interests solely into account; you are going to take into account a whole lot of other factors.

Air Cdre Harvey—He is going to be represented by a qualified barrister and solicitor or by a solicitor as the case may be.

Senator JOHNSTON—If he is available and the circumstances prevail.

Air Cdre Harvey—Absolutely. There is no right of legal representation before administrative inquiries. It is something that we provide and I think we provide best practice compared to other organisations.

Senator JOHNSTON—So he just takes what he can in the circumstances? If he has some operational and resource difficulties in your service and his career is on the line, that is tough luck?

Air Cdre Harvey—I think that is overstating the case.

Senator JOHNSTON—That is what you are telling me.

Air Cdre Harvey—No. I just want to bring a bit of perspective into the debate and point out that the ADF operates in a unique environment. The systems that we introduce have to be able to accommodate that situation. Are we concerned about ensuring fair results for people? Absolutely. Do we have mechanisms to provide review such as the inspector-general ADF, the Ombudsman et cetera? Absolutely. I think that we are at cross-purposes in that—

Senator JOHNSTON—I think we are.

Air Cdre Harvey—we agree on what the requirement is. As I said before, I think it was unfortunate—and I think Colonel Hevey raised this—that this instruction has gone out in that form and has created that impression. I do not see that there is anything legally wrong with this instruction provided it is interpreted in the way we have discussed today to ensure that the interests of the person are protected and they are provided with the appropriate representation to protect their interests.

Senator JOHNSTON—All I am saying to you is that I do not want to leave it up to interpretation. I do not want to leave it up to someone's best judgment. I want it clear so that everyone knows transparently where they stand. If you are involved in an operation and something goes wrong, you should have a good lawyer. That is all I want to know.

Air Cdre Harvey—I think that happens.

Senator JOHNSTON—I do not think it does. Your document does not give me that confidence.

Air Cdre Harvey—As I said, I think the document could have been better worded. If it was my document I certainly would have taken that on board and maybe drafted it differently. But I do not think there is any difference of opinion about what our obligations are in respect of providing people with appropriate protection for their rights—absolutely none whatsoever.

Senator JOHNSTON—Colonel Westwood, do you have a statutory security?

Col. Westwood—Yes.

Senator JOHNSTON—Let us talk about what that does for you. How long is your tenure?

Col. Westwood—It is an appointment under the current legislation for three years, although the legislation—in the course of amendment through the Defence Legislation Amendment Bill 2004, of which you have heard so much—will bring it to five years.

Senator JOHNSTON—That is better.

Col. Westwood—The Judge Advocate General has indicated to me that he would see the term as being renewable automatically, subject to ‘good behaviour’—to use a judicial term. The Judge Advocate General has, however, also flagged with you I think the limitations that go with term-of-year appointments. They were introduced as a result of the Hon. Mr Justice Abadee’s recommendations back in 1996. Again, as with many of these things, I think events have moved on somewhat. The former Chief Justice of Canada, the Rt Hon. Antonio Lamer—I think the committee has a copy of his report—has questioned the renewable terms. I think the better course for us, ultimately, would be to consider making these appointments to the Judge Advocate and Defence Force magistrate panels terminal appointments in the sense I mentioned before, so that officers would be appointed towards the end of their careers, this would be their final service and they would reach retirement age at the end of it.

Senator JOHNSTON—Have you put that view forward?

Col. Westwood—The Judge Advocate General has put that view forward.

Senator JOHNSTON—So he does your advocacy, in an administrative sense?

Col. Westwood—Yes, in an administrative sense he is my commanding officer.

Senator JOHNSTON—I accept that. With respect to your position, the other tenet of judicial impartiality is security of remuneration. What is the story there?

Col. Westwood—Again, in the Defence Legislation Amendment Bill 2004 my remuneration will be fixed by the independent Commonwealth Remuneration Tribunal. That is not the Defence Force Remuneration Tribunal but the Commonwealth one, so it will be totally divorced from any influence by the Department of Defence.

Senator JOHNSTON—What is the guideline relevant to? Is it relevant to a district court judge?

Col. Westwood—It will be a matter for the tribunal.

Senator JOHNSTON—Do you have any idea what basis they are going to go forward upon?

Col. Westwood—No, I have not had any discussions with them. I am to meet with them later this month to provide them with some idea of the way in which the military disciplinary system functions. It is, I dare to say, a somewhat arcane area.

Senator JOHNSTON—That is right. Are you secure that you are above interference from the chain of command and the surrounding executive that assists you—in terms of staff, transport and access to whatever resource material you want? What is the story there? Are you at the beck and call or at the mercy of some service personnel? How separate are you, for instance, from the lawyers? Are you separate from the lawyers? Are you separate from the administrative back up that you have?

Col. Westwood—We are moving to separate far more formally the office of the Judge Advocate General from the rest of the legal office. What will be accomplished is an independent suite of offices—on a separate floor, with a separate entrance. There are some economies of scale in relation to the administrative support. The office of the Judge Advocate General is very small and it is not an efficient use of resources to staff it with a full team of finance and administrative officers. So we will need to be tacked on to someone. It is probably more desirable that it be part of Defence rather than the Defence Legal Service but at the moment the Defence Legal Service very decently provide the support.

In connection with the trials themselves—which I think is the main aspect of this—the cost of travel and so on is paid out of what is effectively a non-discretionary vote. The court-martial vote funds it. If I adjourn a court-martial from Darwin to Townsville, the court will go—there is no difficulty with it. There are, of course, some financial restrictions. If I want to attend a conference in New York or London, plainly that has to be approved through ordinary departmental procedures. I think that that is quite proper.

Members of the audience interjecting—

Col. Westwood—As the gallery have indicated, I am not a High Court judge.

Senator JOHNSTON—You say you are tacked on to the legal service: how enmeshed are you? What is the extent of the nexus between the judges and the practitioners, the umpires and the players?

Col. Westwood—At the moment the office of the Judge Advocate General has a suite of offices that form part of the office floor of the broader directorate of legal services. So it does not have a separate entrance. We have our funding made available to us as a discrete allocation from that larger amount of money that is allocated to the Defence Legal Service.

Senator JOHNSTON—So you are arguing with them about what slice of the pie you are going to get?

Col. Westwood—There has not been an argument to date.

Senator JOHNSTON—Discussing.

Col. Westwood—But the work in progress is that we will move that so that the office of the JAG will be discretely funded. The JAG is aware of these indicia of independence to which you refer. We just have not got there yet. But the correspondence has been initiated with CDF and the secretary, and I am sure that it will come to fruition.

Senator JOHNSTON—Are you using a panel on a case by case basis, taking reservist barristers and putting them into position in courts martial and what have you?

Col. Westwood—Yes.

Senator JOHNSTON—What is the basis on which you appoint those people? Do they just come along and do a one-off job or whatever? Is it ad hoc?

Col. Westwood—It is ad hoc but in the sense, again, that we are reviewing the panels in light of the three-year terms that have now been made. We will get rid of those people who are inactive and we will confine the panels to people who are actively available for the work. We would look to maintaining those panels so that people could be given meaningful court martial work of about three to four trials per year, on average. The allocation of that work is simply shared around, but under the new arrangements we do not want members of the judge advocates magistrates panels to be doing other work more broadly for the department. I mentioned earlier that in 2002 I did a board of inquiry as counsel assisting. My comrades on the judge advocates panel would also have done that broader work and perhaps have provided high-level advice. We will move to that, and this will be the exclusive military function of these people. But we have not quite got there yet.

Senator JOHNSTON—Who is responsible for the appointment of each panel in each instance of a court martial?

Col. Westwood—The Judge Advocate General personally does it at the moment, but under the legislation it is a task that he could delegate to me.

Senator JOHNSTON—What considerations play upon the appointment of the various personnel? Are there matters of resources or matters of convenience that act upon you or the chief in this?

Col. Westwood—Certainly no matters of resources but possibly some minor considerations of convenience, in that we would endeavour not to send someone from Townsville to Perth. But at the same time we would not want to establish the situation where a particular member of the panel was the tribunal of choice for a narrow geographic area. One of the questions that was presented as expressing an area of interest was: do we have a magistrate currently appointed in Townsville and Darwin? No, we do not. But, if we did appoint someone, we would not allow them to sit only in Townsville or Darwin matters. We want to maintain a broad mix on a tri-service basis, with naval magistrates sitting on Army matters et cetera and a list drawn from across the entire geographic spectrum.

Senator JOHNSTON—What is your background? What brings you to the position? Where have you been in your life? You are obviously quite an astute and accomplished solicitor and barrister. Tell me a bit about your experience. I am interested to know what sort of man becomes the Chief Judge Advocate.

Col. Westwood—I started my military association at university and served in the university regiment as an officer cadet. I was ultimately commissioned into the legal corps after my admission as a solicitor in New South Wales.

Senator JOHNSTON—Full time?

Col. Westwood—No, originally into the Reserve. I practised privately for some seven or eight years—including my articles—with what is now one of the large Sydney firms but was then a much smaller part of that; it has amalgamated. I enjoyed doing the Reserve work. I liked the people and the work appealed to me. We at that time were dealing with the Imperial Army Act 1886—a very sad loss. I did a significant number of what were then called courts of inquiry under the Australian military regulations, and I enjoyed generally the advocacy type work. My military postings were as the legal officer to the 1st Brigade and chief legal officer in Melbourne for four years. I have done a master's through the Army with the United States Judge Advocate General's School in Charlottesville, Virginia.

Senator JOHNSTON—How long was that course?

Col. Westwood—It was a 12-month course. It was particularly good as far as military contacts were concerned. For instance, one of my classmates was the staff judge advocate in Baghdad, Colonel Warren. I have not communicated with him since he gave his evidence to a similar sort of committee. I have advised the commercial support program on the letting of commercial contracts in Melbourne for 12 months. I mentioned earlier that I was the initial director of the complaint resolution agency for some two years. Since that time, my area of specialisation has been court marshal work.

Senator JOHNSTON—Is the head of the military bar position still in existence? What is that, and is it still functioning?

Col. Westwood—It is. It is not part of my arrangements, but, while the air commodore is otherwise engaged, it is Captain Paul Willee, one of Her Majesty's counsel at the Melbourne bar. He is a member of the ethics committee of the Melbourne bar. He is endeavouring to establish this as a focus for military lawyers practising before the military courts.

Senator JOHNSTON—I take it its membership would be across all states?

Col. Westwood—Yes, and they are reserve and permanent.

Senator JOHNSTON—Where does it gain its sustenance in terms of organisational capacity? Is it the good work of that one particular person who thinks it is a good idea to create the military bar, or does it get some assistance from Defence? What we were just talking about, Air Commodore, was the head of the military bar. I believe that there is a very competent barrister in Melbourne who has taken it upon himself to be the head or to organise a group of practitioners.

Air Cdre Harvey—Yes, it is Paul Willee, QC.

Senator JOHNSTON—How is that functioning and what does it do?

Air Cdre Harvey—The head of the military bar was established by my predecessor, essentially to group up a whole range of issues, most notably in relation to the professional oversight of legal officers. As a priority at the moment we are working towards a code of conduct which will apply and a mechanism which will be established via a Defence instruction

to deal with aspects of cases where people have a professional complaint about a legal officer and to provide us with a formalised version of the vehicle which we have as a standing ad hoc arrangement at the moment to be able to investigate complaints. If someone had a concern that they were not represented appropriately at a court marshal, they could obviously raise that through the appeal mechanism. If an issue about how we conducted questioning at a court marshal or a conflict of interest issue arose, that could be dealt with.

As I mentioned, Paul Willee is a current or past member of the ethics committee of the Melbourne bar, so he has been of great benefit to us. The other area the military bar is getting involved in is basically a professional association of the lawyers that are involved in a military arena and developing some expertise in some areas—environmental law and things like that. The main thing I want to pass on is that we see the ethics side of it as being a great development in being able to deal with some complaints.

CHAIR—I have had a private discussion with Air Commodore Harvey. In terms of administrative action issues, Air Commodore Harvey, you have a copy of correspondence from us in relation to allegations against boards of inquiry or investigating officers. Could you explain to the committee what we were discussing in our private conversation?

Air Cdre Harvey—I think the chair is referring to a list of questions relating to the decision-making processes in individual cases—whether a board of inquiry was conducted or an investigating officer conducted the inquiry or the like. From my policy perspective and policy responsibilities, I can certainly tell you what the policy is in terms of the guidance in the manual and so forth, but in terms of the actual decision to use a board of inquiry or an investigating officer in the cases that have been listed, that is not something I would be able to answer. The appointing authority would have been the one who made the decision. There are two ways of finding that out: taking the question on notice and having the services respond or I am more than happy to come back and talk about the policy aspects. I am pretty much in your hands, Chair.

CHAIR—We will probably put the questions on notice but, if you are available for an hour or so next week, that might do us. We will not need to speak to you again, Colonel Westwood. Thank you for your attendance today.

Proceedings suspended from 10.31 a.m. to 10.47 a.m.

COSGROVE, General Peter, AC, MC, Chief of the Defence Force

CHAIR—Welcome. I understand that you would like to make a brief opening statement and that you are prepared to answer questions after that.

Gen. Cosgrove—I will be as brief as I can; I understand that questions are an important part of my final appearance before the committee. Thank you for the opportunity to address the committee again today. Defence made a comprehensive submission to the inquiry, while my opening statement provided my thoughts on some key issues in some detail. I notice that the service chiefs have also responded to a range of issues arising from public submissions and evidence provided in hearings. I stand firmly by my opening remarks and by our submissions to the inquiry. Today, I will summarise the major strategic military justice issues to help draw together and put into a wider operational context some of the themes that have emerged in submissions and evidence to the inquiry.

As I said when the inquiry opened, we are here not just to put a case in support of the military justice system but also to listen to what others have to say and to continue to improve it. Having now heard the testimony of some of the witnesses before you, I remain convinced that we must communicate better with the families of Australian Defence Force members when they are affected by traumatic events. I think the evidence has shown that the ADF's counselling and support services are very good. But I recognise we must better explain what the military justice system is, what it can do for people and, just as importantly, what its limits are. We must make it clear where the military justice system fits into the wider civil process, including the relationship with civilian police, coronial investigations and civil justice systems. We must make sure service people—and in many cases their families—are provided with all the appropriate information and support they need, both in the immediate aftermath of a traumatic event and later.

Before I go any further, please let me again extend through you, Mr Chairman, my heartfelt sympathy to all those bereaved families who are doing their best to cope with the loss of loved ones. In particular, I recognise how difficult this has been for those who have made submissions or appeared before the committee. Their loss is deeply shared by the whole ADF family, upon whose behalf I wish to express our sorrow and sadness. Such tragic loss must not be in vain. We do contend that much has been done in recent years to improve our systems and that they continue to meet the needs of the ADF and its people. This does not mean we believe we are perfect, nor that the implementation of the changes has been flawless, but progress is being made. For example, in the past few years the ADF has significantly improved the mental health care provided to its members. We have a mental health strategy that integrates the efforts of personnel in health, psychology, social work and chaplaincy in the ADF to better meet the needs of our people and commanders. Considerable efforts have been made to address alcohol and other drug issues, to enhance our ability to respond to suicide related behaviour and in how we deal with the potentially traumatising effects of military service. We have put substantial resources into training ADF health and allied health staff to provide care to ADF members. In most areas, the level of care substantially exceeds what is provided in the general community and this is appropriate, as the nature of military service inevitably places great demands on ADF members.

Unfortunately, people will continue to be fallible. When failures by ADF members or of our systems of command and control are identified, we must correct them—and we will. All ADF leaders and members must continue to be on alert to recognise and stamp out inappropriate behaviour and to fix inadequate procedures wherever we may find them. The service chiefs and I will continue to make this crystal clear to commanders at all levels. It is an integral part of their legal and moral responsibilities, just as it is ours. This will continue to require energy and commitment. ADF members are part of a democratic and humane Australian community, which they are pledged to defend—if necessary, at the risk of their lives. Robust discipline and a sound system of military justice are vital when lives are at risk. It is our challenge to maintain discipline whilst preventing intolerance and insensitivity, in situations that might otherwise lead to impaired judgement or desensitisation.

Let me make some observations on what that means to us in the Defence Force, right now. For over a century, the belief has been held that we must never let a mate down. That belief is held and intensely felt throughout the ADF; it goes to the very heart of our traditions and ethos. Sometimes, we need to be reminded that this applies equally in peacetime, where trust is built as we go about our daily work and training as much as it is in combat. When a comrade falls, we must be prepared to reach back and offer a helping hand. This is not a sign of weakness but of moral strength and compassion. Not only is it the right thing to do, but each of us should remember that the next person who needs that help may be themselves. Let me assure you that the leadership of the ADF, starting with the service chiefs and me, are committed to ensuring these fundamental principles continue to be applied throughout the Australian Defence Force. Our values must prevail in peace and in conflict, in our training institutions, in the military justice system and through the entire chain of command.

I think it is important to note at this point that most of the issues I have just spoken to you about relate to the exercise of command responsibilities and the implementation of personnel policies rather than the military justice system itself. I certainly recognise that, while the principal thrust of the inquiry is directed at the effectiveness of the military justice system, the terms of reference do range into other areas. However, many of the submissions, and some of the evidence presented, to the inquiry deal with issues dating back quite some time, preceding changes and reforms designed to overcome the kinds of problems they highlighted.

It is important to keep the wider perspective in mind when judging the overall performance of systems. I note that, despite the wide advertising of this inquiry, very few members of the Defence Force have approached the committee with a complaint. The number of submissions to the inquiry from members and former members of the ADF is in stark contrast with the thousands of respondents who have had cases heard in the military justice system over the last few years. Of course there are failures, but they are certainly not endemic.

Having followed the evidence provided to the inquiry, I need to again emphasise another important point: ADF inquiries into incidents of sudden death do not replace the coroner's role, even though the content of the two may overlap to varying degrees. In recent years, both the processes and findings of boards of inquiry have been found to be appropriate by coroners investigating the same matters. Despite unsubstantiated claims to the contrary, recent boards have been transparent. Where appropriate, they have included non-ADF board members. Similarly, claims that boards and investigations are conducted as cover-ups are not supported by the facts. For example, the ADF inquiry into the death of Private Williams was very critical of

Army, while the Western Australian Coroner rejected accusations of any attempt by Navy to subvert the processes of the board of inquiry into the HMAS *Westralia* tragedy.

I note that there has been criticism of the handling of some redresses of grievance investigations, in particular the time taken to finalise some cases. In that context, I would like to stress the improvements in this area that have been made in recent years. Since the ANAO reviewed our redress processes in 1999, handling times have been reduced for discharge redresses by about 35 per cent, for administrative grievances by 15 per cent and for personal grievances by almost half. This significant improvement has been achieved during, and despite, a period of very high operational tempo.

We will continue to look for ways to improve standards and timeliness. The time taken to deal with some complaints and grievances is still longer than I would like. In line with Defence's commitment to continuous improvement to ensure that we give our people a fair go, I have had discussions with the Defence Force Ombudsman about conducting a joint review of the redress process to identify further improvements. He and I have decided to proceed. I can assure you that I will take the outcomes of the review very seriously and will take steps to further improve our redress of grievance processes. That said, there will always be some cases that require detailed and thorough investigation and a longer than average processing time, as acknowledged by the Defence Force Ombudsman in his evidence.

Furthermore, despite our best efforts, there will inevitably be some cases of poor administration. When this occurs, the Ombudsman is a valuable external point of review for ADF members unsatisfied with the results or conduct of a grievance investigation, and the support of that office continues to be appreciated. I acknowledge the observations of the Ombudsman regarding the additional time taken to seek internal legal advice in some cases. However, contemporary standards demand this extra attention, especially when those submitting grievances frequently, and quite properly, have access to legal advice that is often provided by Defence.

The closing Defence submission, forwarded earlier, provides some additional information about the significant improvements already achieved in our complaint handling processes. I would like to take this opportunity to acknowledge the good work being done by our commanders and the Complaint Resolution Agency in this very difficult area, under the most demanding of circumstances.

I believe that the redress of grievance system is fair and impartial. I note, however, that members of this committee have expressed concern about the independence and impartiality of those who administer the system. The views of committee members expressed at the hearing on 2 August questioned the honesty and integrity of ADF commanders and the impartiality of staff of the Complaint Resolution Agency. I am concerned that such allegations have been made by the committee and placed on the public record. I have been informed that many ADF personnel and members of the Australian Public Service who saw the proceedings on Monday night are also disturbed at the allegations that question their honesty and integrity.

I will now move briefly to the specifics of the military justice system itself. My opening statement and the Defence submission reinforced why we need an effective military justice system that satisfies the unique requirements of military service. We have described how it

works and where it sits in the context of wider Australian society. Let me make just a few general observations concerning the strategic themes that have emerged over the course of the proceedings. Most importantly, the military justice system underpins service discipline and complements the system of command. It does not seek to replace civil justice in peacetime; it complements it. Civilian legal safeguards remain, in addition to those embodied in the military justice system. The Defence Force Discipline Act does not exclude the jurisdiction of Australian courts in dealing with criminal behaviour, where appropriate. We also need a military code of justice during operational deployments outside Australia, in effect taking Australian law—both military and civil—with us when we go.

The administrative system is primarily concerned with decisions and processes associated with the command and control, operations and administration of the ADF. Let us be clear that military inquiries are not designed to answer every question that may be posed about a particular incident or occurrence, nor should they be. As the Judge Advocate General reinforced in his evidence to the committee, an administrative inquiry is an important arm of executive control, not a criminal court: criminal breaches are handled either under the DFDA or through the civil courts. It remains important not to confuse executive with judicial processes by referring to their interaction as a form of ‘double jeopardy’, nor to compromise the separation of powers they represent.

There are complementary civil processes, conducted by the police, coroners and statutory Commonwealth bodies. These apply the same standards to ADF members that apply to the rest of the civilian community, especially where issues of possible criminality or culpable negligence arise. This is why a lack of awareness concerning how the military justice system works can lead to misconceptions regarding its effectiveness: people sometimes expect it do things it is not designed or legally responsible to do. While we believe that the system itself is transparent, I recognise that it is our responsibility to ensure that better communication contributes to greater understanding, especially for non-ADF members who become directly involved with its workings.

The military justice system is all about accountability. All members of the ADF have important responsibilities. With responsibility comes accountability, which means being held to account for one’s actions. It does not mean the automatic apportionment of criminal guilt where an allegation cannot be justified through due legal process. By its very nature, the military justice system is there to deal with circumstances where something has gone wrong. It may be a matter of discipline, an incident requiring investigation, alleged professional misconduct or a perceived administrative failure that results in a grievance. These circumstances are not always clear.

Facts and their interpretation may be either in doubt or even in open dispute. The recollections of witnesses may differ. Mutually contradictory but nonetheless sincerely held beliefs may clash. Emotions can run high. No matter how robust the procedures, it is inevitable that some of those involved will not be satisfied with the results. This characteristic is universal to all justice systems. The acid test is whether there are adequate and independent avenues of review and appeal available.

In that context, I would again refer the committee to our original submission and to the evidence of various expert witnesses who have appeared at the hearings. The weight of this

evidence clearly demonstrates that the military justice system complements the existing civil justice framework. It is not a closed shop. It remains subject to internal, external and judicial review. The Defence Force Ombudsman, the Privacy Commissioner, the Human Rights and Equal Opportunities Commission, the Administrative Appeals Tribunal, the Federal Court and the High Court can all play a role, as can the government and the parliament. The recent appointment of the Inspector-General ADF is an important new avenue by which failures of the military justice system may be exposed internally but independent of the normal chain of command.

We have made significant progress to improve the openness of the military justice system and we will continue to do so. But let me assure you that no-one here has their head in the sand: there is always room for progress, greater efficiency or better timeliness. The military justice system continues to mature as we follow up the implementation of recommendations from a range of recent and comprehensive reviews and inquiries. The fact that we have willingly embraced a policy of continuous improvement for all our personnel practices, including the military justice system, means that we openly acknowledge that the achievement of perfection is impossible.

We should not forget that our current system is derived from sweeping reforms made in the mid-1980s, with regular reviews having occurred through to the current time. The ADF as a whole and our system of military justice in particular have, by and large, received bipartisan support during a succession of governments over that time. While various inquiries may have identified problems—some serious—and definite room for improvement, none have found the system as a whole to be broken; nor have they concluded that the first responsibility for military justice should effectively be removed from the Chief of the Defence Force or the service chiefs. The lines of authority, responsibility and accountability must remain clear and unequivocal. To break this vital nexus would invite grave consequences for the operational effectiveness of the ADF. It is of course right to hold the leaders of the ADF responsible for its command, discipline and operational successes and failures. It cannot work any other way. Clearly, the military justice system must have robust safeguards, external scrutiny and transparency.

Have some unwelcome incidents occurred along the way? Yes, and they must be acknowledged and the circumstances that gave rise to them addressed. Can some of our processes be made more transparent, understandable, effective or timely? Again, my answer is yes. That should be the answer of all my successors, too, because time stands still for no-one. Do we need to search for ways to improve our communication with the public and with families directly affected by serious incidents? Yes, clearly. We were aware of that before the inquiry began, and what we have heard has only reinforced that impression for me. Should we seek to do more to improve the follow-up by commanders of various inquiry findings, or to help avert the tragedy of suicide and the stress caused by severe trauma wherever we can? Yes, of course we must. While some tragedies will inevitably happen despite our best efforts, we should never believe that the last word has been said in any of these areas, no matter how successful we believe various programs are now or may have been in the past.

However, I again emphasise that the military justice system is robust, open and fair, and remains subject to continual improvement. We should not be distracted from the bigger picture. Through the outstanding efforts of tens of thousands of dedicated ADF people, past and present, the proof of the ADF's ongoing success is clear to see. I will repeat my assurance that I have

every confidence that the military justice system is effective and serves the interests of the nation, the Defence Force and its individual members. We will continue to maintain our vigilance and, with your support, strive to ensure that our military justice system and supporting personnel policies are the best they can be. Mr Chairman, you have heard from the service chiefs and other expert witnesses over the past three days. They have provided specific evidence on their own specialist fields in response to your questions. I have attempted to put this into context by stressing the importance of the military justice system to the proper functioning of the Australian Defence Force in its unique role in Australian society. Should you have any questions of a general nature on the military justice system, I will be happy to assist the committee.

CHAIR—Thank you, General Cosgrove. Towards the end of your statement you said the responsibility for military justice should not be removed from the Chief of the Defence Force or the service chiefs. You are aware that we have received a submission and have had evidence from the Judge Advocate General in relation to that particular point. Do you feel you can comment on that?

Gen. Cosgrove—I read that submission with great interest. We received that pretty much at the same time as the committee did, so our time with that important submission is only the same as yours. It is something that I would like to absorb in the light of the committee's report rather than get into a dialogue on its particular conclusions.

CHAIR—But you would recall that in his submission he said as I recall that, except for the United States, almost all the other English-speaking countries now have the system of military justice that he is advocating we should have. Why should we be different from those other English-speaking countries—in your opinion?

Gen. Cosgrove—I am not going to give you an opinion on the report in that it is an important contribution. I think, if the Judge Advocate General were sitting here, he would not be proposing that all aspects of the administration of justice be removed from the Defence Force. He is suggesting that the judicial role in the higher exercise of DFDA matters might go to a standing panel of judges who were appointed in a particular way and had particular responsibilities and tenures. That contribution is an important contribution for us to absorb but I would not want to do some kind of fairly shallow analysis of that. He is certainly not suggesting the whole military justice system and I have been at pains here to point out that it has a number of components including lower levels of discipline, the administrative side. I did not see that in the JAG submission.

CHAIR—Can you understand we are laymen hearing from a respected jurist and also a long time serving reserve army officer that he is advocating this particular system that we might reasonably conclude that there is something wrong with military justice? As I say, we are laymen and the Judge Advocate General says this—it has a lot of weight I would suggest.

Gen. Cosgrove—I do not have the submission here in front of me but I have read it. Do you have it in front of you, Mr Chairman? It seems to be that he is saying that there are overseas trends, which we note.

CHAIR—It is shorter than your opening statement I think.

Gen. Cosgrove—I could probably read the submission to you if you would like, Mr Chairman! I would like, with such an important submission to conduct the analysis on that in the light of all the factors. Obviously, this committee's report is one of those factors.

CHAIR—You said in paragraph 12 that 'very few members of the Defence Force have approached the Committee with a complaint'. I might clear that up. A significant number of officers and enlisted personnel have approached the committee and sought to give their evidence in camera to us. They are still serving personnel and they are concerned about the ramifications of their evidence being made public because they believe that they would not be treated fairly if it came out as a result. They wanted to tell us that the system is not working and they did not want your officers—to put it bluntly—to do anything to them because they said that the system is not working. I want to clear it up that that has not been the case.

Gen. Cosgrove—There seems to be a lack of transparency there.

CHAIR—I would say it would be a lack of trust, General.

Gen. Cosgrove—Transparency as well. It is very hard for us to make an appropriate reply to you.

CHAIR—I understand that but I wanted to clear that up with you. There have been significant in camera contributions for that reason.

Senator HOGG—I made the point last night at the hearing with the three service chiefs and specifically to Air Marshal Houston that I do not like evidence being taken in camera because there is very little that we, as a committee, can do with it. But, nonetheless, we test the credibility of the evidence that is given to us. From my perspective, some of the evidence that I was privy to was cause for concern. I have been involved in another inquiry—it is not military, let me assure you—where people have had concern about giving evidence in public at the committee hearing. What is Defence doing to enable those people who do have concerns to come forward, not only to this inquiry but through other avenues, to express their concerns about the processes within Defence?

Gen. Cosgrove—Weeks of evidence have shown the systems we have put in place to imbue confidence and to give the opportunity to people who feel aggrieved over any issue to bring that to the attention of somebody who can help. It is impossible to deal with the detail of those in camera hearings unless you know about them. So, respecting the system as I do, I appeal to you and ask: how do we deal with those cases? I would accept at face value that the committee viewed the evidence it received with concern, but here you have the Chief of Defence Force telling you he is willing to try to give justice and a hearing to those people. How do we get them to make their approach?

Senator HOGG—I am not doubting your motives at all. Let me just make one other point: under no circumstances does it mean that I believe every word of evidence that is given in camera to us.

CHAIR—The point I would also make about the in camera evidence is that almost all the men—I think they are all men—have been through the system. We have had evidence that

people did not even know there were allegations against them but they had been investigated. They were advised that they had been cleared but they did not even know they were being investigated in some cases. What I am saying is that all these people—every one of those males, as I recall—have been through the system and did not get justice.

Gen. Cosgrove—Accepting that at face value, we have had no reply. Witnesses have sat here and told you these things. I can guarantee that you heard and judged them with your maturity and experience. As Senator Hogg has said, you have applied your own judgment to what you are hearing. But we have not had a chance to tell you one word about it.

Senator HOGG—We accept that. I accept that that is part of the problem of the conduct of any inquiry in taking evidence in camera. In not only this committee but other committees I participate in, I constantly express the lack of trust I have in evidence being given in camera. It leaves the committee very little option of what to do with that evidence. I do not think we are at cross-purposes. It is not a criticism of you or some of your people.

Gen. Cosgrove—My real dilemma is not so much in the broad that you have a number of people; it is that you have particular people whose references and allegations might be absolutely 100 per cent accurate. How do I find out about that and help deal with that with the service chief or whatever is the correct way to resolve that issue? It is a very unappetising dilemma that you have some people on your record that I would like to know about so that we can help them. The ones where there is an argument to have, we could have that in some way. We could say that balancing that person's point is some other information. But what about the ones where they need help?

Senator PAYNE—More importantly, perhaps, for us is that there is clearly a cultural concern within the organisation that you head, which means that in some cases people simply do not have the confidence to come forward publicly to a Senate hearing. That cultural issue is also a matter of concern to us.

Gen. Cosgrove—I am sure the committee knows that much of the culture is really good. We like to fix the parts of the culture that are old-fashioned, outdated and antisocial. We made that very plain during the Rough Justice inquiry et cetera. But you only fix parts of the culture by going to specific incidents. You cannot even tell us the nature of the in camera evidence with references to where that potentially undesirable culture is poking its head up.

CHAIR—What about where you have dealt with an issue after it has occurred, like the suicide of Private Williams? A lot of things have occurred since the incident concerning Private Williams, but an inquiry took place between the death of Private Williams and this inquiry.

Gen. Cosgrove—Yes.

CHAIR—Why wouldn't one come to the conclusion that the only time things move in the armed forces is when they are subject to an inquiry?

Gen. Cosgrove—The issue is that there is a perception—which I know you are not trying to extend—that it is only when the Senate or some external body pays us attention that we change. That is not the case.

CHAIR—It looks like that.

Gen. Cosgrove—Let me give you an example. This is quite pertinent. You will all remember the notorious case of the young soldiers who dealt cruelly with some animals in Townsville. We detected that—‘we’ being the young soldiers of their unit. They were the first people to know that. They referred this terrible event to superiors, who referred it to the police. There was a hue and cry after that. Senator Johnston might ask me later about the double jeopardy side of things there. Every person on talkback radio in Australia was looking to bring the curtain down on those young men. And, of course, a process has been followed there. But, in terms of our own culture, I reiterate that we do our own health checks, and we are changing. I would really dispute that it is only when there is some external hue and cry and a committee or an inquiry that things get noticed and changed.

Senator PAYNE—At point 27 in your opening remarks—which we were reading as you made them—you said:

The Military Justice System continues to mature as we follow up the implementation of recommendations from a range of recent and comprehensive reviews and inquiries.

That goes to the point made in the early part of Defence’s supplementary submission, which says:

The Military Justice System will be further modernised and improved as recommendations from a range of recent reviews, studies and inquiries continue to be implemented.

My question is: how will we know what is done? How will we know which recommendations are implemented? What level of oversight, if you like, is available to you as the Chief of the Defence Force to know that that is happening?

Gen. Cosgrove—The easy one there is to say that we are very obviously a major public institution subject to parliamentary scrutiny. Through the parliamentary process we have more checks and balances on our day-to-day operations—which includes the military justice system—than virtually any other public institution. I would suggest that there are several ways. There is the JAG report to parliament, the statistics available from the Chief Judge Advocate and the Registrar of Military Justice, and the IG ADF. We are evolving this office, but it appears that some of the information that he will be privy to will be available through the estimates process. It comes back to estimates. Senator Payne, I note that you and other senators are on the estimates committee. It seems to me that, if you want to know how we were going in implementing the recommendations and the future directions, that would be the perfect opportunity.

Senator PAYNE—Let me use two examples, then. The ANAO report in 1999 recommended that investigating officers in the ADF should be trained. In 2000 the Defence Force and the Ombudsman also noted the need for that to occur. We received some evidence on Monday night from the Complaints Resolution Agency also in relation to this issue, although that is not their brief as such.

Following the 2000 review, there was a project to develop investigating officer training and that was supposedly under way in 2000. In 2003 it had come to a point where a draft instruction

had been written and training materials were prepared but it was not clear where the actual training was at. I understand it since to have been reinvigorated with a team set up in 2003 to look at getting it happening. The ANAO report says in 1999 that this should happen, the ombudsman agrees in 2000 that this should happen and in 2004 we are still not actually to a point of, as I understand it, complete implementation of that process. It seems to me to be a very long time frame for the observations that you make about the enthusiastic embracing of recommendations of reviews and inquiries.

Gen. Cosgrove—I did not quite use those terms.

Senator PAYNE—I put enthusiastic in inverted commas, then. I would like to think you are enthusiastic!

Gen. Cosgrove—The point is that we will both finish and never finish. We will institute a new regime of training and then no doubt we will need to continue to evolve training. In the huge range of investigations we do—investigations into training incidents, accidents and conduct—whether we have a professional body of investigators who are perhaps even beyond criminal investigators is a moot point. I certainly think we can continue to orient our people who are more likely than not to be put to investigations as to their legal obligations.

Senator PAYNE—The specifics of that I think are a matter on which the committee will come to a view, but I was using the ANAO recommendation on that particular aspect as an example. I said: how will we know which ones you choose to implement and to what extent? Certainly, at estimates we can ask you questions about every single report recommendation and receive an update on its implementation—that is one way, and I guess I should thank you for volunteering for that.

Senator HOGG—That will extend estimates a fair bit, General. That is very good of you!

Gen. Cosgrove—I have never seen a limit to estimates' ability to inquire!

Senator PAYNE—I am keen to have estimates questions asked at estimates, but that makes me unusual! The second example I would use is one which we addressed with Lieutenant General Leahy last night. That is in relation to recommendations that were made at the School of Infantry at Singleton following an incident in the early 2000s. The unfortunate death of Private Williams made it quite clear from that tragedy that those recommendations had not been implemented. Are you able to give us confidence that there have been sufficient changes in the accountability process to ensure that that can never happen again?

Gen. Cosgrove—I cannot say that soldiers will not be brought to a state where they self-harm.

Senator PAYNE—I did not mean that people will not take their lives again; I meant when a report makes recommendations after an inquiry following an event or a concern. In early 2000 there was a report made in Singleton that changes should be made to the way the place was run. They were not implemented, and it was not determined until after Private Williams took his life that they had not been implemented. What I am concerned about is that lack of implementation and the accountability for that. I understand that the people concerned are paying a price.

Gen. Cosgrove—Checks and balances have been put in place following those two incidents, the one that was investigated and after which a raft of different procedures were put in place and they did not stick. They were implemented but did not stick. Following the tragic death of Private Williams and the investigations that have taken place since and the changes, I would be confident that the checks and balances there are good.

Senator PAYNE—Can you say that across the three services, not just, for example, at the School of Infantry?

Gen. Cosgrove—I am pretty comfortable with the sensitivity of commanders at all levels to the fact that cultural issues are really important and that as we step the fine line between realistic and demanding training and a fairly rigorous set of discipline, which is very important for success of operations, nonetheless there is a need to do things fairly in an Australian way. I talk all the time to the chiefs and I get around throughout the entire ADF, and when I go to establishments, particularly the recruit training and initial training establishments, I am pretty alert to the demeanour of the whole place and the attitudes of the staff. I get the very clear view that they understand that you can be a rigorous trainer without losing any sense of humanity or decent dealing.

CHAIR—We need to be aware of the time. General Cosgrove has to catch a plane.

Senator HOGG—I have just two quick questions arising out of your statement. At paragraph 4, in the last line, you refer to the need for support in the immediate aftermath of a traumatic event and later. Are you able to expand on that? If you cannot now, will you take it on notice so that the committee has some concept of what you mean by ‘later’, because that does not seem to be well defined at this stage?

Gen. Cosgrove—It cannot be well defined because it has always got to be a relational thing between the service, the organisation, and the family.

Senator HOGG—I am not trying to get you to tick off 12 months or two years; I am trying to get something a little clearer about what you mean.

Gen. Cosgrove—Do you remember the mother of a soldier who spoke about his death in Townsville who said, ‘Wouldn’t it be good if there were some area within the barracks where my son’s memory might be maintained?’ The same should apply. It was such an obvious idea and it had been done in some other areas but we have mandated that. That is a relational thing. You have got to stay with people. I can recall soldiers in a unit that I commanded a number of years ago who died in traffic accidents. While it is still a tragedy, it happens every day in the community, so there is generally no level of angst between the military and the bereaved. But nonetheless, we were seeing those family members for several years after the event until eventually life moves on. So it is an attitude rather than some kind of a timetable or set of events.

Senator HOGG—But some of these people never have closure because of the circumstances surrounding the death and the processes following the death. That is why I was curious about your definition of ‘later’.

Gen. Cosgrove—‘Later’ just means that there is no cut-off date and that you do try to establish a relationship. It is a very valuable thing to have, not just for the bereaved folk but for the military people who are getting on with life.

Senator HOGG—I am aware of the time and questions from my colleagues. At paragraph 15 you refer to your decision to proceed with the Defence Force Ombudsman to conduct a joint review on the redress process. Are you able to tell us when that is likely to proceed? Who is likely to conduct the process? When will the terms of reference be decided and when will they be released?

Gen. Cosgrove—They are all good questions. They are being worked out now with the ombudsman. I am sure that there will be a member of the ombudsman’s staff who will be an expert, for his part, on that review. For my part I am going to find somebody from outside the presently serving military with full authority and opportunity to look into how we go about it. It will be somebody who may understand the military but with no obvious axe to grind. I will want them to look at every aspect—from when a grievance is perceived by an individual, through to the ultimate disposal of the grievance either to the satisfaction of the individual or to the final point of resolution.

Senator HOGG—So you are looking at a panel of two?

Gen. Cosgrove—Yes, just two.

Senator HOGG—When?

Gen. Cosgrove—I want to get it under way in the third quarter.

Senator HOGG—What will the reporting time line be?

Gen. Cosgrove—I do not know. I would have to let them scope it for me and come back to me on that, I should think.

Senator HOGG—But you are looking at six months?

Gen. Cosgrove—It would be no longer than that.

Senator HOGG—And the report of that investigation would be a public document?

Gen. Cosgrove—I think the ombudsman himself will take that. He is a stakeholder in this. He knows and gets to catch the ones that are not resolved satisfactorily, so it is in our mutual interest for all kinds of reasons to see if we can eliminate any of the delay.

Senator HOGG—But will the report be publicly available?

Gen. Cosgrove—I would not say that. I would have to check with my minister. But, certainly, where the ombudsman is concerned, as a statutory authority he may desire it to be publicly available. I have not had that chat with him yet, though.

Senator HOGG—That is an important issue to us because it is addressing a very important issue that has been before the committee. It seems to me that, if the report is not publicly available, it just adds to some of the mystery that surrounds this area.

Gen. Cosgrove—Yes, I think in the end it will turn out not to be mysterious. I think it will turn out to be—

Senator HOGG—That is what I am hoping and that is why I have asked the question.

Gen. Cosgrove—I am not saying that every redress that has ever been conducted has been good as to its timings, but I am saying that I think that the reasons will turn out to be areas where we can actually make improvement.

Senator JOHNSTON—I think it was before this committee on 1 March that, in talking of the internal justice system, you said:

The military justice system is sound, even if it has sometimes not been applied as well as we would like ... I have every confidence that on the whole the military justice system is effective and serves the interests of the nation and of the Defence Force and its people.

Why have you put the service of military justice, particularly with reference to discipline, in that order—that is, the nation, the Defence Force and then its people?

Gen. Cosgrove—Ultimately there would be no Defence Force unless there was a nation state that required things to be defended. Our *raison d'être* is to serve the nation. The structure is the Defence Force. The people are the lifeblood of the Defence Force. The three things I listed there are not in some clinical way to be separated. They are indivisible. But there are three entities requiring a justice system which works. If we do not have a good justice system, then ultimately Australia suffers. If we do not have a good justice system, then the Defence Force as an organisation is unable to meet its obligation to the country and, finally, our people will not be well treated. So, in that regard, there are three entities or three considerations, but they are indivisible.

Senator JOHNSTON—An effective military justice system serving the interests of Defence Force personnel would in fact, would it not, fulfil the interests of the nation and of the Defence Force?

Gen. Cosgrove—I will put it the other way: if it served the nation but not the people, we would not have a defence force. If it served the people, but ultimately was at the expense of the nation's interests, then people would say, 'Get a better system which still serves your people but also serves the needs of the nation.' So that is where this Holy Trinity of interests intersect and cannot be divided. We have to come up with a system that fundamentally serves our people but never ignores the fact that this is not some exercise in isolation and so the needs of the nation and the corporate health of the organisation that meets the needs of the nation are also considerations.

Senator JOHNSTON—With respect to the use of the words 'and its people,' are you talking about the population at large or are you talking about the Defence Force?

Gen. Cosgrove—The Defence Force.

Senator JOHNSTON—I am interested to note that you draw distinctions in the use of those three expressions. You draw a distinction between the Defence Force and its people as if there are different interests to be served.

Gen. Cosgrove—If I could extend it to you in this way: yes, we are a corporate body. We have an unidentifiable set of rules. We have an ethos. We have a number of ‘ethoses’—if that is the plural form. But we also have individuals with individual needs, so the best justice system does all three. And, if it fails in one area, then it fails as a system.

Senator JOHNSTON—If it fails in one, it fails in all three.

Gen. Cosgrove—Yes.

Senator JOHNSTON—Okay—that is good. As I put to your chiefs last night, in 1995 we saw the commencement of Abadee’s study into the judicial system under the Defence Force Discipline Act. In 1998 we saw the Commonwealth ombudsman’s report, *Own motion investigation into how the ADF responds to allegations of serious incidents and offences*. In 1999 we saw the inquiry of the Joint Standing Committee on Defence and Trade into military justice procedures in the ADF. In 2001 we saw the report of the Joint Standing Committee on Defence and Trade, *Rough justice? An investigation into allegations of brutality in the Army’s Parachute Battalion*. Also in 2001, we saw Burchett’s inquiry into military justice in the Australian Defence Force. In 2002 there was the coroner’s investigation into HMAS *Westralia*. In 2003-04 there was the inquiry of the Senate Standing Committee on Foreign Affairs, Defence and Trade—this committee. Do you consider the motivations behind the 10 years of virtually constant review of this subject matter to be legitimate?

Gen. Cosgrove—The interest is legitimate, and I think it is understandable. I have noticed it internationally as well. I think the Judge Advocate General pointed to the fact that there has been very significant social interest and, therefore, understandably the parliament is interested in a rapid evolution of the rules within military forces. We have seen it in the UK and we have seen it in Canada. There has been a clear focus on the way military justice is administered. I see it as a natural interest and outcome. Over the last few years it has created a huge bow wave of recommendations which people are beavering away working on. The real trick, and a trick for this committee, is to try to gather it all in to a comprehensible whole. You obviously will try to take into account all the stuff we have got on foot. You might be perturbed at the stuff that we are still looking to do. We try to prioritise it by forming a vast master list and linking recommendations where possible. Sometimes we have gone different ways to what was perceived by the various other worthy inquiries but, from our point of view, that has been because that seemed the best way to develop. I think we are evolving, and pretty rapidly.

Senator JOHNSTON—So you are saying that these 10 years of inquiries and close scrutiny are just a product of the evolutionary process?

Gen. Cosgrove—Probably more. I do look overseas on these issues and I see that with greater transparency and accountability across the whole of the defence function, not just in military justice, there are issues known and of interest to the public and therefore of interest to the

parliament which 20 years ago would have been unknown; there was a sort of monastic order cachet about the military. I think what is happening now—and not just in Australia—is a natural outcome of that heightened interest. No doubt some fairly lurid events have led to this—the rough justice issue was not one that we enjoyed, I can assure the committee—but it is more typified I think with higher public scrutiny.

Senator JOHNSTON—Do you think we will go the way of New Zealand, Canada and the United Kingdom in terms of the way we administer justice inside the military?

Gen. Cosgrove—I do not know. I am fascinated to wait for the committee's report. You pointed to the strong contribution made by the Judge Advocate General. We have deliberately withheld consideration of that; we think we should see that in the light of the committee's report.

Senator JOHNSTON—You have said in your opening remarks that this committee attacked the integrity and honesty of ADF commanders. Paragraph 18 states:

The views of Committee members expressed at the Hearing on the second of August questioned the honesty and integrity of ADF commanders and the impartiality of staff of the Complaint Resolution Agency.

I take it that you are referring to something I have said—you have said 'committee members'; I will take the responsibility for it because I usually seem to do more talking than anyone else—and perhaps it is this:

If you have not read all of our transcripts, I recommend that you do. It is a very laborious and time-consuming process but it does open a very big window into the way things are perceived by the consumers of the various products that the chiefs have put together to accommodate justice within the ADF. When someone is to be railroaded, the process as you have identified it will be pristine. There will be nothing wrong with it that you can point to, because this is the way we train our defence personnel—they are set a task and they perform it magnificently. So an inquiry designed to end a career—an inquiry designed to remove a problem, be it operational or political—will not have a hole in it. It will not be something that you can deal with.

I take it that is the clause that offended you.

Gen. Cosgrove—Yes, that is correct.

Senator JOHNSTON—Can you say that does not happen inside the Defence Force?

Gen. Cosgrove—You are talking to the Chief of the Defence Force and asking whether there are commanding officers in that force who set out to subvert just processes. If I knew of any of those people, they would not be commanding officers.

Senator JOHNSTON—I know that, but can you tell me that it does not happen?

Gen. Cosgrove—I am vigilant to whatever I see going on around me. I was just astounded that you would take that line. I can only presume that you formed a view from stuff you heard in camera that we have had no access to; that is part of our dilemma. It is outrageous. We have hundreds of officers who have watched this with interest and who are watching us now and they are just jumping from foot to foot. You have impugned that this is sort of common practice.

Senator JOHNSTON—I have not suggested it is common practice.

Gen. Cosgrove—You have, Senator.

Senator JOHNSTON—I have said, when it is proposed or when it happens—

Gen. Cosgrove—You did not qualify it.

Senator JOHNSTON—You have not answered my question. Do you say that it does not happen?

Gen. Cosgrove—I am saying that, if it ever did happen, I would be right on to it and so would every other right-minded person.

Senator JOHNSTON—So you are saying that you are unaware of it ever happening.

Gen. Cosgrove—I could not say that occasional drunkenness, occasional misconduct does not occur; you name something awful and it will happen at some stage in the Defence Force as it happens anywhere else. But to imply, as you did, that it is commonplace and this is just the way it is done was a deep slur. I know you did not mean it, but that is the way it was taken over the road and throughout the ADF.

Senator JOHNSTON—Let us deal with this deep slur. We have sat here for eight or nine months now, and you are saying, ‘Okay, it’s all in camera.’ We will footnote all of the matters and all of the complaints and give ADF the chance to come back and respond to this. But to simply say, ‘It is a deep slur and we reject it’—what have we been doing for the last nine months? Seriously, what I want you to do is to say—as you have said—‘Look, there are problems. We have very professional, well-trained people who, when they go about the business of fixing someone up, as human nature would have it, do a good job.’

Gen. Cosgrove—It is that point—where you say that we seek to work in an opaque, hidden and very effective way, essentially an unjust way—that I reject. Every right-minded person would reject it. You do not want a Defence Force that operates that way. Let me be very clear about what I am saying to you. You mentioned the stuff you have heard in camera which may go to anything that happens of that nature. How do I get hold of that and how can I do something about that? I do not know that your footnoting is going to help. I welcome it, but unless you can tell me, ‘Here is Private Bloggs, or LAC Smith, or Able Seaman Brown, who has had one of these sorts of things happen,’ I cannot deal with it.

Senator JOHNSTON—The point I want to make to you is that from we have seen—be it from parents and the way they have been massaged and handled, be it from the disciplinary side of things, DFDA, or any of these other matters—there are examples. It could not possibly be the norm—and, for the sake of the record, I am not suggesting for one moment it is the norm. But there are matters—and, indeed, we have 10 years worth of inquiries into these sorts of things—where people have been dealt with in such a way that it is opaque; their rights are abused, and no-one knows about it except them and no-one believes them. Are you telling me that that does not happen?

Gen. Cosgrove—We have an impasse. I cannot tell you it does not happen; I can only reject it as a practice—

Senator JOHNSTON—I hope you do.

Gen. Cosgrove—or as something that we think is acceptable. If I could get access to some of these events or reports we could do something about it.

Senator JOHNSTON—Let me give you one example off the top of my head. The SAS soldier's case is a classic example of it. That was a railroad, such that you gave him an apology. That is just one example off the top of my head. If I sat down here long enough I could probably give you 10, but that is one that I think stands out at the very top of the tree. He did nothing wrong, everything right, and went through the most tortuous, obscene process that anybody with any sense of justice could ever wish to imagine.

Gen. Cosgrove—Without enlivening that particular case—and you would understand that I am sensitive to his peace of mind in the future—I have spoken to the officer and to his family, and I think I and the Chief of Army have fixed up what was something going off the rails.

Senator JOHNSTON—If it had not been for him constantly putting his hand up in the most adverse circumstances—coming to see us, coming to members of parliament, going to estimates and doing all the things he had to do—I wonder whether he would have seen the light of day.

Gen. Cosgrove—On that case I remind you of the timings. I remind you that that was resolved before this committee started its consideration.

Senator JOHNSTON—He certainly did not have his apology before we started.

Gen. Cosgrove—He had his outcomes. I would put it this way: the process of finalising the issue was well and truly in hand.

Senator JOHNSTON—You are right: it was finalised. But it was not repaired such that he had his career back on track.

Gen. Cosgrove—I do not think talking further about that particular case in this open way is going to help very much. At no stage did I say that we got it right all the time.

Senator JOHNSTON—It is those ones I am worried about—the ones where you get it wrong. They are the ones the committee is concerned with.

Gen. Cosgrove—Yes, but you will not tell me about 90 per cent of them.

Senator JOHNSTON—I have just told you about one.

Gen. Cosgrove—We have dealt with it.

Senator JOHNSTON—You seem to be saying that you had it in hand and that it worked out well in the end. But I have to you that it was not in hand.

CHAIR—There are ones that were public.

Gen. Cosgrove—I really do believe it is a dilemma in something like this—we are not talking about inanimate objects; we are talking about people. There are people who need help, and the ADF seeks to help them. I wonder if there is some clever way the committee can figure out to allow us to help these people. If I left on that note, I think that would be the right thing to say at the end.

CHAIR—Thank you, General. I thank all the witnesses for their attendance and the recording staff for their assistance.

Committee adjourned at 11.55 a.m.