



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES  
COMMITTEE

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

TUESDAY, 10 AUGUST 2004

CANBERRA

BY AUTHORITY OF THE SENATE



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**SENATE**  
**FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE**

**Tuesday, 10 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, Colbeck, 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 Chris Evans, 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**

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

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



**Committee met at 3.57 p.m.**

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

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

**CHAIR**—I declare open this meeting of the Senate Foreign Affairs, Defence and Trade References Committee. Today the committee is conducting a short follow-up public hearing in order to cover questions which we were unable to cover last week in relation to the committee's inquiry 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 evidence given to the committee is protected by parliamentary privilege. It is important for witnesses to be aware that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. An officer of a department of the Commonwealth may 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. The committee is continuing from last week and would like to pursue administrative inquiries in terms of military justice.

At paragraph 2.18 of Defence's submission, you reject Mr James's suggestion that witness statements upon which disciplinary actions are based should be sworn and subject to testing by cross-examination. Defence's view on that is that 'there is no genuine or practical requirement to deal with all witness statements in the manner proposed'. When sworn statements are of a higher evidentiary value than unsworn statements, when they discourage the witness from lying and when they encourage witnesses to seriously consider the veracity and reliability of their evidence, why doesn't Defence support this view?

**Air Cdre Harvey**—We are talking in the context, I think, of administrative inquiries rather than disciplinary proceedings. That is the first point. Under administrative inquiries, it is an offence to give false evidence. I think that is a significant point in terms of whether they need to be given on oath or be subjected to cross-examination. I think the feeling is that we need to distinguish between what is a fact-finding administrative inquiry, in which a lower standard of proof applies, and judicial proceedings, in which cross-examination would be appropriate in accordance with the norms of criminal justice. I do not have a lot more to add than what is in the submission other than that we just do not see, as a matter of course, that that would be required. Our experience—and I think this is in the submission—is that we do not have any evidence that people have been lying in submissions and the like. I guess it is a case of whether there is really an issue there that we need to address. I think our feeling is that there is not.

**CHAIR**—Do you rely on unsworn evidence for disciplinary matters?

**Air Cdre Harvey**—Not per se. Evidence is given on oath or affirmation before military proceedings.

**Senator JOHNSTON**—That is proceedings. What about matters that require the magistrate to find a prima facie case?

**Col. Westwood**—Perhaps it would be convenient if I were to address that. The finding of a prima facie case is not really an appropriate analogy. You will remember that I mentioned last time that our hierarchy, our equivalent of a civil magistrate's court, is the commanding officer's summary dealing. So all matters proceeding to trial at the higher levels of magistrate and court martial pass through the commanding officer and he conducts what is known under the act as a dealing. The dealing may extend so far as to hear the prosecution evidence. If so, the evidence would be called on oath. But the dealing need not be as elaborate as that. The dealing could consist of no more than considering the charges on the charge sheet at face value and determining that those charges were appropriate to be referred up. It is a course of conduct which has been considered by the Defence Force Discipline Appeals Tribunal in the appeal of Hogan, and the tribunal were quite happy that that arrangement satisfied the legislative scheme under the DFDA.

**CHAIR**—So the accused person is never, prior to trial, fully informed of precisely what he stands accused of and by whom.

**Col. Westwood**—No, that is not a correct statement. There is a requirement under the rules for the accused to be served with copies of all of the prosecution evidence. There is an obligation cast at the moment on the convening authority, if the matter goes forward to higher trial, to ensure that that is done.

**Senator JOHNSTON**—Is that evidence sworn?

**Col. Westwood**—No, it is not sworn. These are the statements forming the prosecution brief. They do have a jurat clause attached to them consistent with the statements and the jurat clauses affixed to investigations by most of the state police forces—essentially, that it is evidence that the witness is prepared to give on oath, if required, and the witness realises there are penalties for making false statements.

**Senator JOHNSTON**—But the false statements referred to in that jurat are on oath.

**Col. Westwood**—No, they are not on oath. It is simply a form of jurat but falling short of the evidence being given on oath.

**Senator JOHNSTON**—Yes. But the statement that 'the witness is aware that were he to give any false statement' talks about a false statement that is sworn before a magistrate.

**Col. Westwood**—No, it is not. It includes giving a false statement in an unsworn form to the service police, and that would be a chargeable offence. Plainly, laying malicious allegations against someone is seriously adverse to discipline and would be dealt with.

**CHAIR**—We might move on to the administrative inquiries. I understand you have a copy of the questions we have.

**Air Cdre Harvey**—Yes, we do.



**CHAIR**—What mechanisms are in place or proposed to ensure appropriate training of administrative investigating officers?

**Air Cdre Harvey**—I think this was a question that was allocated to and addressed by Mr Geoff Earley when he gave his evidence in relation to administrative inquiries. I might add to that a little. He gave evidence before this committee about the training course which is under development and is intended to provide formalised training. There is also training that is provided to the legal officers who are involved in the process. We have an extensive training scheme. I gave evidence last time about the professional development scheme, and this includes the graduate diploma and the master's program. In the course of that, the members that would appear as a counsel assisting—or, potentially, as an investigating officer, in the case of a legal officer—receive extensive training in relation to administrative inquiries.

The training that is provided to people who are non-legal officers is probably better addressed by other people, but I do know from experience and can tell the committee that there is extensive training provided as part of the promotion courses and initial training courses and, more importantly, in relation to pre-command courses. We have invested a fair bit of time in recent years and months in developing and improving the training that is provided to commanding officers—and, in the case of Navy, executive officers—before they take over their command. These courses have components which consist of presentations by members of my administrative law staff, who go through and provide them with details about how to conduct inquiries and about administrative action in general. Although it is not formalised, there is a standing practice that anyone who is appointed to a board or as an investigating officer is able to, and regularly does, seek advice from legal officers. I think one of the recommendations from the Acumen Alliance review is that this process be formalised. We have accepted that recommendation and we are working towards implementing it.

**Senator PAYNE**—You said 'extensive training'. What does 'extensive' mean in your book?

**Air Cdre Harvey**—It is really hard for me to answer that because, obviously, the training is organised primarily by the service officers. But when I say 'extensive training' I certainly refer to the detailed training that is provided to defence legal officers. As I said, basically they are required to do courses of up to a week in length in relation to administrative law. Quite detailed training is provided on those courses, as you would imagine, in relation to the defence inquiry regulations, what the role of the legal officers is, what the issues are that come up in the course of investigations and the like.

For the pre-command course, which as I said is something we have been working on extensively of late, the training varies from service to service. In the case of the Air Force—I might use that as an example, as that is one I am more familiar with—there is a week dedicated to legal training for pre-command Air Force commanding officers. Of that, I think there would be at least a day of training on administrative law matters, including advice in relation to administrative inquiries. Having attended a number of those courses and having been involved in providing training on them, I know there is certainly great interest among our members in administrative law matters. In fact, if there is an observation I would make from being involved in these courses over a period of about 15 years, it is that initially they were very much concerned about responsibilities at a summary trial, how to conduct trials and what the procedures are. That still remains a very important emphasis, but we have found that there has

been a much greater interest among our COs in finding out information about how administrative inquiries can impact upon them and, more importantly, how administrative action generally impacts upon them. They have witnessed, seen and heard about the various inquiries that have been going on, and they take very seriously their obligations. I think it is very pleasing that that is the case and that they do show that interest. I hope that gives you a bit of a feel for it.

**Senator PAYNE**—I have some conflict, perhaps confusion—I am certain it is on my part, not on anyone else's—about some of the observations that have been made in this area in the past couple of hearings. You would be aware that I had raised with a number of witnesses the evidence and the submission of the Defence Force Ombudsman, which made some very specific observations in relation to the training of officers undertaking investigations. I wonder whether you accept those observations. If not, why not, and how does that marry with what you have just told us?

**Air Cdre Harvey**—I have recently re-read the Ombudsman's submission to this committee and his oral evidence. I will refer to the evidence that he gave. In his written submission to the committee, which is obviously a public submission, he said:

Over the past several years the following issues have arisen in some complaints by individuals. While we do not have information to suggest these issues are widespread, and I certainly do not suggest they are, they are indicative of the types of problems which can arise.

I raise that because I do not think the Ombudsman was suggesting that this is a widespread problem. It has certainly come up in matters that have been raised with him and it is quite appropriate that he should raise it at a committee hearing like this. However, although we are very interested in those sorts of comments, I want to flag, first of all, that the Ombudsman is not suggesting, if that is the suggestion in your question, that it is a widespread practice. I think the comments that I just read suggest quite the opposite.

**Senator PAYNE**—Although, Air Commodore Harvey, if you were to read on through that same submission, you would read in excess of half a page of observations about training and investigation inadequacies, which we take very seriously.

**Air Cdre Harvey**—I would expect you to, and I am not denying that at all. However, knowing the system, I can identify from the observations that he made the particular cases they came out of, but I think it needs to be read in the context that there are issues that he has raised and important issues we should look at. I think the common thread is his point down at the bottom of his submission that a consistent theme is the need for better training of investigations staff. I do agree with that. I think there is a lot more we can do. The Acumen Alliance report indicated a mechanism that we can adopt to do that, and I was very pleased to see the Inspector General of the ADF taking the lead in relation to developing a course. I know he spoke to you at length about his proposals to run that particular course.

There is obviously more we can do, and I think we should continue to invest resources in that. Have we done enough in the past? Arguably we may not have. Are we on the right track? Are we recognising this as an issue? Yes, we are and I think we are taking some positive steps. I think the comments I made about the COs course and the pre-command training that is provided across the three services indicate to you that we have a recognition, from the feedback we get

from COs, that they are very interested in this. This can really impact upon them as commanding officers and, more importantly, can get them into real trouble and affect the rights of people in their command. I think it is very pleasing that they are making those observations. It is pleasing to see that it is coming from the commanding officers themselves and that the system, through the Inspector-General, also recognises that and is investing the resources. We need to be vigilant about it in the future. I do not think you can ever have too much training, particularly given the importance of the issues involved.

**Senator PAYNE**—Given that the evidence we have received on this issue extends back to the ANAO report of 1999, which recommended training of investigation officers followed up by a review within the ADF and by the Ombudsman in 2000 and it has meandered along until somewhat more recently, what confidence can you give us that this will work now, that this will be implemented, that this will happen and that the committee can rely on that?

**Air Cdre Harvey**—I noted your comments at the last hearing and the comments you have just made about this being a long-term recommendation from a number of inquiries. I guess it is a bit hard for me to comment, because I was not around at the time, but I understand the reasons why it has taken so long to get to this stage. The first point I would make is that it is probably not for the legal officers to have carriage of that; it is for the Defence Personnel Executive. So, again, it makes it difficult for me to respond, but certainly the legal officer could.

**Senator PAYNE**—I do not think the minister would let us talk to them about it!

**Air Cdre Harvey**—That is a matter for the minister, I am afraid.

**Senator PAYNE**—I was being slightly facetious, Air Commodore. Don't worry too much.

**Senator CHRIS EVANS**—You cannot have a go at us for continuing to have inquiries when we do not see the results of the first ones implemented.

**Air Cdre Harvey**—All I am saying is that it is difficult for me, having only been in my job for a year and not having the functional responsibility in my area for the implementation of those recommendations. But I think it is true to say that there is movement at the station. Whether it has been as speedy as it should be and whether there are enough resources is for other people to say, but I can certainly indicate from my knowledge of the legal section that we have been very supportive of all these initiatives. We have a legal officer on the working party, and I imagine we will be intimately involved in the provision of the training that follows through.

**Senator PAYNE**—Who is that working party convened by?

**Air Cdre Harvey**—I think that is the administrative inquiries working group that the Inspector-General of ADF referred to.

**Senator PAYNE**—I am just wondering who convenes the working party. It is not the IG ADF, is it?

**Air Cdre Harvey**—I think the chair is the catalyst for it. I stand to be corrected on that.

**Senator PAYNE**—I will check that with the evidence, thank you.

**Air Cdre Harvey**—I am afraid it is not my area.

**Senator HOGG**—I foreshadowed a couple of questions with Air Commodore Harvey the other day. Firstly, are any military personnel exempt from the DFDA and the operation or application of that act? That issue has been raised with us.

**Air Cdre Harvey**—As a legal officer, I can talk about the legislation. There is certainly nothing in the black ink of the Defence Force Discipline Act that provides for an exemption for any member. In fact, it is quite the opposite: it has full application in relation to all members of the Defence Force. That is not to say that there are not issues involved relating to rank and which tribunal would be appropriate. Some of the minor discipline matters may be restricted to minor ranks. I guess the global answer to your question is that all members are subject to the DFDA and admin procedures. The question of how it would operate in any individual case would require a fairly detailed answer. I am not quite sure what level of detail you want.

**Senator HOGG**—The point is, though, that it operates from CDF down.

**Air Cdre Harvey**—That is right.

**Senator HOGG**—The CDF is as much under the act as a private.

**Air Cdre Harvey**—Absolutely; there is no discriminator in the act, as I said. Obviously, in the case of CDF there would be some practical issues involved that we would have to address. I am not for one minute suggesting that CDF would commit an offence or be subject to it.

**Senator HOGG**—No, neither am I. I am just looking at the general application.

**Air Cdre Harvey**—Theoretically, there would be some interesting issues that we would have to address in terms of how the tribunals would be made up. Obviously, an independent director of military prosecutions as a statutory appointment would be an advantage down the track in terms of making independent decisions. At the moment, as we discussed last time, the DMP is nominally under interim arrangements under the CDF, so that would cause a practical problem. So there are practical issues that we would have to address, but no exemption.

**Senator HOGG**—The second question that I foreshadowed was: what happens in the case where the person in the matter concerned—whether the complainant or the person being complained about—retires from the Defence Force?

**Air Cdre Harvey**—That is difficult to answer, because obviously it depends upon the nature of the offence that has been committed. You will appreciate that the range of offences under the DFDA range from very minor disciplinary infractions, such as failing to have a room in inspection order at a recruit training facility, to potentially important matters, such as very serious criminal matters, particularly overseas. So it really depends upon the circumstances. The broad answer to your question is that each case would need to be looked at according to its circumstances.

In the case of a person who has committed a serious offence, it could well be a matter that would be dealt with. If it is a dual offence, one that has a civilian equivalent, it would be dealt with by civilian authorities. There is also a practice that consideration would be given not to discharge that person. Where we have had notification that a person had committed an offence, and they have put in their application to leave the services, we have on many occasions not accepted that resignation on the basis that those charges should be resolved first of all. Again, it is a bit hard to answer that without knowing what the offence is. If it were a very minor matter—say a recruit had failed a room inspection—we may not see a disciplinary need to retain that person; the fact that he was leaving may be an adequate resolution of the matter.

**Senator HOGG**—What would happen in the instance where someone was in a middle rank and they had a complaint against them, or a complaint was pending but not necessarily in the pipeline at that stage—and people may not have been aware of it—and they decided to leave the force? How does the complainant under those circumstances get justice for themselves?

**Air Cdre Harvey**—Again, it depends on the circumstances and whether the member has actually been charged. As I said, if the member has been charged we will have visibility of the matter and a conscious decision will be made about whether to allow the discharge to be accepted or not. If it is the case that the person has committed an offence that has not come to notice—which may relate more to your question—and they know it will come out, so they apply for a discharge, there are provisions in the act that allow for us to deal with people after they leave the services for offences that have occurred during their service. It is really, again, factual. The general position is that, if a member has been discharged before being formally charged and then we get notification or some information comes about, the investigation would be conducted. As to jurisdiction, section 96(6) of the DFDA does limit our ability. There is a limit in terms of time.

**Senator HOGG**—What is the limit in terms of time?

**Air Cdre Harvey**—There is an overall limit in that this is a discipline scheme. The act provides that we need to charge an ex-member within six months of the time that they leave. There is a provision that requires a person to be charged within five years of committing the offence. That was changed a couple of years ago from three years. One question is: how long ago did he commit the offence? If it is more than five years then there may be jurisdiction issues—we will not have jurisdiction. If it is the case that the person has left the services and it is within five years of the time he is alleged to have committed the offence then we have six months from the date of discharge, as has been mentioned, to proceed against him. But the offence is limited in that it has to be an offence with a punishment of two years or greater. Basically, the intent is that if it is a serious matter we will deal with it. The intent is that if it is only a discipline matter then, arguably, that would fall within the less than two years period and we would not have jurisdiction under the DFDA.

**Senator HOGG**—Who would make that decision not to proceed?

**Air Cdre Harvey**—Whether to proceed, assuming we have jurisdiction?

**Senator HOGG**—Yes.

**Air Cdre Harvey**—It depends again on the circumstances. It could be made in the mature system by the Director of Military Prosecutions. There would be an issue there involved in deciding whether the interests of discipline are substantially served by proceeding under the constitutional High Court limit that we have. Obviously, if a person has left and it is a minor discipline issue there may be an argument there to say that discipline is not affected, that there is not a discipline interest. The DMP could be involved in those discussions if it was a serious offence. I am sorry to be a bit vague, but there is a range of issues and it really is quite specific to the facts of the case that you would have to consider. I hope that gives you a bit of an idea about the considerations.

**Senator JOHNSTON**—Air Commodore, you will remember that I requested the documentation with respect to the manual. I think we have copies of the discipline law manual, but what I am interested in is: are there any manual, guidelines or policy documents with respect to the conduct of disciplinary investigations?

**Air Cdre Harvey**—I must admit that I understood your question to be about the manual about the system. If you are talking about the actual investigations, I imagine there would be single service instructions issued through the service police. But, as they are not part of my organisation, I cannot answer that definitively.

**Senator JOHNSTON**—So we need to get those from somewhere else?

**Air Cdre Harvey**—Exactly. That is an issue we may need to take on notice and refer to the responsible area.

**Senator JOHNSTON**—Very good.

**Air Cdre Harvey**—I am sure there are investigation manuals—

**Senator JOHNSTON**—If you could do that, we would be very much obliged.

**Air Cdre Harvey**—We will take that on board and pass that to the relevant areas. I have just been advised—and it is a valid point to raise—that when you do get the discipline law manual you should look at chapter 3, as it does deal generally with investigations. That might be a good starting point, but I am sure it is supplemented by more detailed instructions that the service police themselves have.

**CHAIR**—How many ROGs have been lodged by members while on operations in the last five years?

**Air Cdre Harvey**—That is a question that I am afraid I cannot answer, because the redress of grievances does not come within the legal area. I imagine that is a question that probably Colonel Di Harris (Rtd) from the defence Complaint Resolution Agency would have been best able to answer.

**CHAIR**—Could you take that on notice on behalf of defence and come back to us?

**Air Cdre Harvey**—Absolutely. I might just add that one of the difficulties was that we had a range of questions, and they were divvied up among the defence organisation, about the responsible area, and if there has been a failing it has been to highlight to the committee which area is best placed to answer that.

**CHAIR**—Fair enough. The special adviser to DGTDLs has stated:

... I believe that the tax free nature of the sessional fee of \$1,200 per day paid to reserve legal officers representing persons affected by a board of inquiry is no incentive to conclude the proceedings quickly ...

Is the DGTDLs of the opinion that Reserve legal officers are deliberately prolonging administrative inquiries for financial gain?

**Air Cdre Harvey**—The first comment I might make by way of clarification is that the submission from Colonel Harvey only fairly recently appeared on the web site. In fact, it was not available to us when we appeared last time. I had a chance to quickly read it this morning but I must admit I have not had a chance to read it in detail.

I want to make a couple of other points. It is, as is obvious from the submission, a private submission, rather than a TDLS submission or Defence legal service submission or a Department of Defence submission. The other point I want to make by way of background is that the special adviser is a special adviser to me in relation to establishment matters and also legal officer professional development. I want to make those points clear: it did not have the character of an official submission and was not from someone who was a special adviser to me in relation to those sorts of matters. I think it is important to put it into context.

The issue that was raised is whether Reserve legal officers are deliberately prolonging inquiries for financial gain. That was not an issue that was raised by Colonel Harvey in his submission. I think that is an extrapolation. Colonel Harvey simply says that the determination does not contain any incentive for reservists to constrain inquiries. Certainly that is true as a matter of factual interpretation of the determination. But as I said, Colonel Harvey did not actually make the assertion that Reserve legal officers were prolonging them for financial gain.

You have asked me the question and I will answer it. I have not been provided with any evidence that Reserve legal officers are in fact doing that. I expect, as the professional head of the Australian Defence Force Legal Service, that all legal officers will act professionally and ethically. Obviously, such behaviour would be totally inappropriate and unethical and would be dealt with appropriately—if evidence was available to be provided to me—by others if need be, such as the inspector-general if it was a fraud matter or the Inspector-General of the Australian Defence Force if it was a matter related to military justice.

I might add that my predecessor, however, was concerned—as I am—about the length of some of the boards of inquiry, particularly some recent ones that have been conducted by Army. This was one of the catalysts—I do not think it was the major one but it certainly was a factor—behind the commissioning of the Acumen Alliance review. Reading the terms of reference, the concern that they expressed—and I have not spoken to them in detail about that—was basically about trying to improve the process of the boards of inquiry, rather than investigate whether reservists have been extending them. I guess an answer to your question is that I do not have any

evidence to suggest that from the perspective of the DGTDLs or the DG of the ADF Legal Service.

**CHAIR**—Do you think the same lack of incentive may apply in disciplinary matters where the judge advocate and the DFM prosecutors and defending officers and section 154 reviewing officers receive the sessional fee?

**Air Cdre Harvey**—Yes. The determination itself does not contain any express provision in there which would curtail an investigation or promote efficiency. It pretty much basically provides that once someone is appointed they get paid a set statutory rate. It is the same determination that applies to both, in answer to your question. The point I would make is that both the McClelland review of the Australian Defence Force Legal Service and also the Acumen Alliance review—particularly the Acumen Alliance review—identified this as a deficiency. I have accepted that recommendation and we are working towards reviewing that determination to deal with that particular issue. Even though I do not have evidence and do not have reasons to suspect reservists or JAs or DFMs are extending proceedings it is a transparency issue and an accountability issue we need to address.

**Senator CHRIS EVANS**—What does ‘reviewing that’ mean?

**Air Cdre Harvey**—It was a recommendation, as I said, in a couple of reviews. One recommendation suggested we do away with it and replace it with the Reserve Employer Support Payment Scheme. We have looked at that at some length and discussed that with the policy area. Unfortunately, it looks like that is not going to be an appropriate solution because the Reserve Employer Support Payment Scheme, as you would appreciate, applies to all reservists and the needs of legal officers are usually quite unique, particularly in terms of discipline proceedings. They generally come in for one or two days and that employer scheme only kicks in after a qualifying period. To try and get a Queen’s Counsel—as I am sure this committee understands how expensive legal advice can be—to forgo \$5,000 a day and accept a training day rate for a period that would cover the whole court martial is problematic.

I have instructed my director of administrative law to follow on and look particularly at the recommendation that has come out of Acumen Alliance. We are doing a bit of research to try and see whether we can come up with a determination which better meets our needs and provides better transparency and accountability. I am keen to look at paying more attention to the competency of legal officers, now we have a competency scheme, and to making sure there is better equity and accountability for the determination. It is something that is under examination, but I am afraid I do not have any firm ideas other than that we will end up with a different determination.

**CHAIR**—Is anybody responsible for ensuring that what might be perceived as delaying activities cannot happen in proceedings?

**Air Cdre Harvey**—Yes, there is. The question is primarily in terms of the DFDA, which was what was asked in the advance questions that we got. As I said, I have no evidence of that in the DFDA side of it—and the Chief Judge Advocate can probably talk from the experience of observing a number of trials—but legal officers are not using the determination to extend it. There are mechanisms that apply in the discipline arena such as the 154 reporting and reviewing



process. Again the Chief Judge Advocate is at liberty to comment if he would like, but that is a mechanism whereby an independent review of DFDA proceedings is conducted. I imagine that, if there was evidence that a trial had been extended unreasonably, then that would be an issue that would come up or could be commented upon in a 154 reporting process.

I will also point out that in the discipline arena that the JA—judge advocate—and evidentiary considerations, mainly relevance, would limit severely the ability of a reservist to extend discipline proceedings. Obviously, they are subject to fairly tight control in terms of the admissibility of evidence and that acts as a particular control. I do not know whether Colonel Westwood would want to say anything specifically about that.

**Col. Westwood**—I would simply make the observation that, in the case of the discipline matters, the form of the charges and the rules of evidence necessarily focus on the inquiry. The issue is not why particular events happened; the issue is: are the elements of the offence proved to a standard beyond reasonable doubt? The judgment as to how far an inquiry should legitimately go is very much harder when you are dealing with administrative matters and looking at not just whether an event occurred, to a requisite standard of proof, but why it occurred. You will appreciate that that inquiry is rather like throwing a stone into a pond. The ripples will go out to the edge of the pond and they will then proceed up the various tributaries that feed it. At some point a judgment has to be exercised as to where you stop, but it is a very difficult judgment to exercise.

**Air Cdre Harvey**—I might add something to that answer in relation to administrative inquiries. Obviously, the appointing authority has a role to play in the overall management of a board of inquiry that he has appointed, subject to the requirement that he does not intervene and influence the conduct of that inquiry unnecessarily. But in terms of monitoring—and this is one of the Acumen Alliance recommendations about providing better guidance to all parties to ensure the scoping of boards of inquiry and the monitoring process is more effectively conducted—we will have a mechanism to allow that to happen. The other mechanism is that, if that was the case, it would be open to complaints to be made to me on a professional basis to say that: ‘Reservist Joe Bloggs is unreasonably delaying an inquiry.’ Also, if it was a reservist, the law society and the Inspector-General of ADF could also receive a complaint.

**CHAIR**—The special adviser also stated:

...board of inquiry hearings have been taking so long in recent times because ... those legal officers are endeavouring to ensure that their client is not being held responsible for the incident...

Does Defence consider that persons who may be shown to have failed in their duty should not be allowed representation by a legal officer before a board of inquiry?

**Air Cdre Harvey**—Again, I just make the qualifying statement that having read Colonel Harvey’s submission this morning, I do not think he drew that link—that people should not be legally represented. He certainly did make the statement that you have read out as a general concern about his concern. The view of Defence generally is that we do support the right of people to have representation. In fact, we have accepted regulation 33 of the Defence inquiry regulations and we are in the process of amending that to enshrine the right of representation, which is already our practice and our policy.

So ADF practice and policy is to allow representation for people who are potentially adversely affected. I think I made the comment last time that I think defence is probably best practice in that regard. It would be very interesting to compare that with other administrative inquiries such as in relation to National Australia Bank with their so-called rogue share traders. Obviously National Australia Bank did an inquiry there, and I just wonder whether they were provided with legal representation at the cost of National Australia Bank or its shareholders. Another example of more relevance is the recent administrative inquiry in relation to the cyclists and their drugs. I think it would be an interesting question to ask whether they were provided with legal representation.

In short answer to the question, I think we would need to be careful about misquoting what Colonel Harvey is actually saying, but the defence position is that we are fully supportive of affected people having effective legal representation to represent their interests. I might add that the role of the legal adviser before an administrative inquiry is to represent their client, as we discussed last time about the obligations of legal officers to effectively and impartially do that, and ensure that the interests of that person are protected, that any evidence they want to present is presented and that interpretation of that evidence is appropriate, particularly in light of their client's interest.

**CHAIR**—The special adviser also states that ‘adverse administrative action such as censure following an inquiry should be prohibited’. Does it follow from this view that no ADF member would have adverse action taken against them following inquiries into matters such as the Williams suicide because a coroner has determined the cause of death?

**Air Cdre Harvey**—I cannot comment on individual cases because obviously it is a case of looking at the facts of each case and making a particular decision. I had a quick read of Colonel Harvey's submission this morning and I am not quite sure whether he is actually saying that no admin action should ever flow from an administrative inquiry. I think his point is the concern that has risen from the focus upon inquiries, and that tends to result in an adversarial process. He raises some interesting aspects about whether we can approach that better.

But, in answer to the question you raise, I think it is important from the point of view of accountability that administrative action is taken in result of any situation in which the professional failing of a person falls short of the standard that the ADF requires. As I said, that is a case-by-case consideration and it is, in my view, a separate consideration. Once the board of inquiry or whatever concludes its inquiry, it is a case of the relevant authority considering that evidence and making a decision. If Colonel Harvey is saying—I do not know whether he is actually saying this—that we should never have administrative inquiries that can result in evidence that can lead to administrative action, I think it needs to be tempered by the fact that an administrative inquiry is a fact-finding exercise, not a self-executing exercise, and any action that is taken from an administrative perspective obviously comports with procedural fairness requirements such as notice to show cause and an opportunity for the person to have procedural fairness and provide rebuttal evidence.

**CHAIR**—Have you seen his recommendation on this point?

**Air Cdre Harvey**—I have read it, but I think you really need to consider his recommendation in light of the comments he makes in earlier parts of the paragraph. If I had had time, it probably

would have been beneficial to sit down and have a bit of a chat to him, but this morning was the first opportunity I had.

**CHAIR**—Is there any structural separation in the legal service between the adviser to the initiating authority for adverse administrative action and the adviser to the determining authority before the adverse action?

**Air Cdre Harvey**—I can only really answer that from a legal perspective. I guess the answer I would give you is that we provide legal officers to commands, so to the extent that the structural separation occurs among those people who are exercising the powers of administrative action—I understand that is generally the case—factually it would be a different legal officer. That is not to say that in every case it would be the case, but in a sense if an incident arose at a command level, for example, to give you an illustration, the command legal officer would provide legal assistance to the initiating person for that admin action. If it was to go to the Army area that would decide it, or to Air Force headquarters if that was the responsible area, then obviously it would be the case that there would be separate legal advice that would be provided.

**CHAIR**—Does it happen that the same legal officer is involved in advising the pro and con case?

**Air Cdre Harvey**—It can happen, but I understand that in most cases it probably would not happen. In those cases where it does happen, I think we need to bear in mind that the legal officer's role is to provide legal advice, not to make the factual determination, which obviously rests upon the delegate, who has the power to make that decision under the relevant DI(G) that applies. I also do not see that there is any inherent conflict of interest in a legal officer providing advice to separate authorities, or the same authority, in relation to that. As has been mentioned before, we do invest—and I explained this last time—quite considerably in ensuring that our legal officers are aware of the potential for conflict of interest. I would expect, and I am sure it is the practice, that legal officers, if they did encounter a conflict in that situation, would refer it to another legal officer to provide advice on.

**CHAIR**—Mr Benson, of the administrative law section, stated that he recommended a personal friend to the office of the Chief of Army as a potential member of the Big Wall board of inquiry. Is it accepted practice for legal staff, or other staff, to recommend potential members of boards of inquiry?

**Air Cdre Harvey**—I have read Mr Benson's response to the submission that was made by Mr Clark. Obviously the committee has the benefit of that so it is probably best that I leave it to the committee to read that. On my reading of his submission, I think Mr Benson does take issue with the personal friend aspect—that that is not the characterisation and that, in fact, his role in that particular case was merely to assist the appointing authority. He was not the appointing authority; he assisted the appointing authority with a range of names. One of those names was that of a commodore who was a person known to him. You have asked a policy question—is it accepted practice for TDLS staff to recommend members of boards of inquiry? I do not have any knowledge that this is a standard practice, although it has been the case—and I have been involved in this myself at various levels—that defence legal staff may be asked for assistance by appointing authorities in terms of identifying personnel for particular boards or investigations.

The key point to make is that the actual instrument of appointment is signed by the authority under the defence inquiry recommendation. So a recommendation is just that: a recommendation. I would expect my staff to assist—and I would see nothing wrong with Mr Benson in this case or legal officers in general assisting—appointing authorities with suggestions of names. Again, I emphasise the word ‘suggestions’. I bear in mind that obviously it would be inappropriate to recommend someone who was a close personal friend or who had prior knowledge. The reason why appointing authorities may do this, and I guess it is more for them to comment on, is that legal officers often—and particularly in the directorate of administrative law—will be involved in the process of providing advice in relation to wide range of boards of inquiry and so they are in a particularly unique position in terms of being able to provide advice on people who may have already done an inquiry, who have experience and who, more importantly, may have potential conflicts of interest. There was a case where two Army boards of inquiry involved issues where it was important that certain appointments were not made.

I guess my answer to your question is that it is not a standard procedure, but it is appropriate that, if we are asked for advice, advice is given subject to the caveats I have given. From a legal perspective, I do not see any conflict of interest necessarily arising. In fact, bearing in mind that we are talking about appointments to boards of inquiry being people with specialist skills, it will sometimes be the case that defence legal staff will have particular knowledge. The most obvious example would be where they want to appoint a counsel assisting. I would expect them to come to the Defence Legal Service and ask for advice about who was a suitable person for appointment to that position.

**CHAIR**—Is there any mechanism in place to make sure that you can identify and select suitably qualified personnel for administrative inquiries? Is there a manual, an instruction 303 or something like that?

**Air Cdre Harvey**—There is the administrative inquiries manual, which does provide some guidance to appointing authorities. I do take on board—and I am sure the committee would be aware—that the Acumen Alliance report recommends that we improve the guidance given to people in relation to that. The suggestion put to us was that the RMJ may have a role to play in that. The point I would make is that the RMJ is exclusively concerned with the military discipline system so his role in that would be questionable. There is no formal, independent mechanism that exists at present. However a list is being prepared, in accordance with one of the Acumen recommendations, of suitable people for appointment to these boards. We have already entered into correspondence with the service chiefs and asked them to make nominations. I think the proposal is that we will have a list of names—which comes close, I guess, to addressing the question—available to service officers to choose from. Some of the services have already indicated that they may wish to choose an Army representative from that list to deal with an Air Force board of inquiry, and I think that is a move to be encouraged.

You would also be aware from the evidence of Mr Earley, the Inspector-General of the ADF, that he has initiated a process to identify a list of people for potential appointment to investigating officers. It is not beyond reason that they could also be suitable people for appointments. I welcome that, and I am sure the committee does, as a further potential transparency process. As I said, the guidance needs to be improved and Acumen Alliance has highlighted that and I have instructed my director of administrative law to work on that as an issue.

**Senator CHRIS EVANS**—Why did you not allow a wider input into the Acumen Alliance report?

**Air Cdre Harvey**—I just want to confirm that the committee has seen the Acumen Alliance report. That was an issue that came up. I believe it has been made available to the committee.

**Senator CHRIS EVANS**—It was made available last week.

**Air Cdre Harvey**—The first point I would make in relation to the Acumen Alliance report is that it was appointed by my predecessor, so I only got the terms of reference and I looked at the files.

**Senator CHRIS EVANS**—That is the beauty of the Army and the forces generally—there is a continuity of command and responsibility, Air Commodore Harvey. That is why we got you here. You can explain to us why—

**Air Cdre Harvey**—Absolutely. I am happy to address that question. The object of the audit was fairly limited. It was a strategic level audit that was designed to look at lessons learned from some recent boards of inquiry. Particular focus was on governance issues, performance risks, review of governance structure and identification of performance risk. Obviously, the terms of reference were limited because of the time available and we wanted to maximise the benefit from getting and implementing recommendations. There was an extensive opportunity for service legal officers to provide comment in relation to the review. Is there a particular person you are concerned about?

**Senator CHRIS EVANS**—I would have thought the clients, for one—the next of kin, the relatives. A lot of these involved tragic deaths. It seems a glaringly obvious omission that you did not talk to the people most directly impacted by the death of their relative. It seemed to be a very in-house, in-club list of people you consulted with. It seemed to be the stakeholders—IG of ADF and the Chief Judge Advocate. I am not saying they should not have been consulted, but there did not seem to be the customer base as well.

**Air Cdre Harvey**—The answer to that question gets back to the focus of the inquiry. Certainly, there were discussions held by Acumen Alliance with the service chiefs and various other people. I think you will be aware—Chief of Air Force made mention of this—of a Churchill Fellowship which is being done in the area that you refer to. The thinking was that basically that was under investigation in a separate forum. In terms of the Acumen Alliance investigation, it was a case that we had to draw the line somewhere. If we delved into individual boards of inquiry in detail the review would still be going on.

**Senator CHRIS EVANS**—I understand that the Chief of Army was not happy—so it is not as if it is just an outsider's view of the world—with the fact that you did not interview in that inquiry the people most directly affected.

**Air Cdre Harvey**—I refer you to the defence supplementary submission, which addresses those sorts of issues.

**Senator CHRIS EVANS**—I have it right here.

**Air Cdre Harvey**—The Chief of Army did raise with the director of administrative law a request that those sorts of people be considered. That was raised with me. We looked at that and discussed it with Acumen Alliance and we decided that given the terms of reference it was not appropriate to go into the detail of those particular areas because they did not fall within the strategic limit of the Acumen Alliance review.

**Senator CHRIS EVANS**—What does that mean? I thought the Acumen Alliance review was to provide assistance to you.

**Air Cdre Harvey**—It certainly was but it was in the areas of governance structure, performance risk and reviewing the structure and selection process of boards of inquiry. The area that you refer to is something that was being dealt with outside through the Churchill Fellowship mechanism and it was not something that was identified to us as being a particular problem.

**Senator CHRIS EVANS**—How was it being dealt with by the Churchill Fellowship mechanism?

**Senator PAYNE**—It was fortuitous more than anything else.

**Air Cdre Harvey**—The fact of the matter is that it was being investigated.

**Senator PAYNE**—But it was fortuitous. It is not a formal part of the defence procedures for dealing with these issues.

**Air Cdre Harvey**—Can I just answer that question by saying that when the Acumen Alliance review was conducted the concern was the issues that I have raised—the governments, the structure. I do not think that it was raised at that stage—and we are going back some time now—that the representation of individual people was an issue. In fact, it was quite the opposite. Our understanding was that this was quite adequately provided. Our experience of recent boards of inquiry at that stage was that there was an extensive process to allow for people to be represented before boards of inquiry if they were affected people. Can I just qualify this by saying that I am not for one minute suggesting that is not an important issue; it is just that at the time that my predecessor set this up I think it was seen as, ‘This is the area that we wanted to focus upon, and these are important areas.’ Obviously, Acumen Alliance is an external consultant, so there are cost considerations. It was not a case of looking at individual boards of inquiry and seeing whether persons had appropriately had their interests looked after and all those sorts of issues.

From the discussions I had with the staff officer and the Chief of Army, they were quite happy with the process that we were adopting in terms of going ahead and limiting the inquiry to that; and in the discussions with the Chief of Army staff we indicated that we would be more than happy to receive submissions, as a separate issue, as part of our ongoing review of the administrative inquiries manual. My understanding—I need to refresh my memory—was that at the time we wrote to various people, I think particularly in the case of the inquiry that the Chief of Army raised, and provided them with an opportunity to speak, saying, ‘There are issues that you have got here. We will be conducting and are conducting a review of the administrative inquiries manual. Please raise them with us.’ I think one of the people did in fact come back and provide a submission, and we took that on board. So, I just qualify my comments by saying I am

not suggesting for a minute it was not an important issue, but it was not an issue that we had visibility on, and when the terms of reference were set they were the strategic focus of the inquiry and the mechanisms that were put in place were designed to allow that other aspect which came up subsequently to build on it.

**Senator CHRIS EVANS**—I guess I am questioning why, when you say you are going to ‘identify, assess and validate practices and processes which facilitate efficient and effective boards’, you do not see part of the strategic focus as being those people most intimately affected by the issue you are inquiring into.

**Air Cdre Harvey**—Certainly, Acumen Alliance had the ability to look at the proceedings of boards of inquiry—they were given access—so they had that mechanism to look into boards of inquiry and look at issues related to representation on the papers. And I want to emphasise that this was essentially an audit rather than an investigation, so it is basically a review of the documentation, with a view to drawing lessons learned, rather than conducting an investigation and speaking ad nauseam to people. From the examination of the—

**Senator CHRIS EVANS**—I do not think I was saying ad nauseam; maybe just a bit of a chat might have helped. But you specifically ruled out the problem—and I understand that after Chief of Army asked for input you still resisted providing any input.

**Air Cdre Harvey**—With respect, I do not think that is a correct characterisation of what—

**Senator CHRIS EVANS**—That is what your submission says to me.

**Air Cdre Harvey**—I do not agree with the characterisation that we ignored the Chief of Army. We took on board the Chief of Army’s concern and we raised it with the Chief of Army and we explained to him—he was not aware of it at that stage—what the intent, focus and time line were and what we wanted to achieve out of the Acumen Alliance review, and he was agreeable to the mechanism we adopted to deal with his concerns.

**Senator CHRIS EVANS**—I will quote what you have said to me; this is from the formal submission from Defence. You said:

The proposed interviews were outside the scope of the terms of reference for the management audit and Acumen Alliance advised that such interviews were not necessary.

**Air Cdre Harvey**—Absolutely.

**Senator CHRIS EVANS**—That seems to me to say you are not interested in the input from these groups. It is pretty clear—

**Air Cdre Harvey**—No—

**Senator CHRIS EVANS**—they were not to be included—their views were not to be taken into account.

**Air Cdre Harvey**—It is a question of the advice of Acumen Alliance—the people conducting the review—to us and it was quite clear. We expressly asked them about this because the issue was a live one. They said to us ‘Look, we do not believe that we need to go into interviewing individual people to be able to do our review with our terms of reference.’ That is Acumen Alliance’s independent assessment and the advice that we acted upon. As I said, they had access to the review, to the boards of inquiry and to the documentation to be able to conduct their review. I remember the point being made that, if we opened it up to individual people for one particular board of inquiry, we would have to do it with the other 10 or 13 boards of inquiry and—

**Senator PAYNE**—Do you think it crossed their minds that they could have talked to say, the DCO, about the people with whom they work in relation to boards of inquiry? That would have been one interview, maybe, and not too time consuming or too outside the terms of reference.

**Air Cdre Harvey**—Sure. I do not remember them raising it. Certainly it was not an issue that was raised with me but I agree with you that—

**Senator CHRIS EVANS**—But there seems to be the wrong emphasis here; Acumen Alliance is a company employed by the Director General Defence Legal Service—

**Air Cdre Harvey**—Sure.

**Senator CHRIS EVANS**—to provide a function for you.

**Air Cdre Harvey**—Yes.

**Senator CHRIS EVANS**—So surely you are telling them what you want, not having them tell you what they want.

**Air Cdre Harvey**—We tell them, through the terms of reference, what we want them to inquire into. We rely upon their expertise. We said, ‘Do we need to speak to these people?’ and their advice was no.

**Senator CHRIS EVANS**—But I am asking you why you thought it was not necessary for Defence to hear from these people. It seems to me you cannot hide behind Acumen Alliance. You employed them to do a job for you.

**Air Cdre Harvey**—No, it is not a case of hiding behind them. I do not know whether I can add to what I have answered before, other than that we set up a board of inquiry which was designed to look at particular issues which we saw as being in issue at that stage in relation to governance, structure and monitoring of boards of inquiry. One of the issues that popped up out of recent boards of inquiry at that stage was not an issue related to representation of people. As I said before, our experience was that, if anything, we had really comprehensive procedures available for the representation of people. That was not a live issue that we saw at that stage as needing review. As I said, the Acumen Alliance review had the ability to look at the boards of inquiry proceedings and to make those sorts of findings.



We can argue ad nauseam, but it is the case that the issue was raised by Chief of Army. We looked at that, we discussed it with Acumen Alliance and we made a decision, which I think was the right decision, to ‘focus’ the inquiry—I think is the best word—on the matters that were raised by the terms of reference and to deal with those matters through other mechanisms, which in fact they were and are being dealt with. As I mentioned, the Churchill Fellowship is another area where that is being and has been looked at in quite some detail.

**Senator CHRIS EVANS**—So it ‘is being dealt with by other areas’. One is that one of your officers has got a Churchill Fellowship—I presume, on their own merits—and the other is that you had one submission from somebody in reviewing the administrative inquiries manual. Is that the extent of it?

**Air Cdre Harvey**—I am not quite sure what the question is.

**Senator CHRIS EVANS**—You said that, rather than allowing input into the Acumen Alliance process, you suggested to Chief of Army there was an alternative. You now tell me that someone has a Churchill Fellowship—which I presume defence played no role in and the officer won on their own merits; that, as I understand, is how it usually works—and that may well prove helpful. Your second input into these issues is that you have had one submission into the review of the administrative inquiries manual. Is that fair?

**Air Cdre Harvey**—I think we need to be careful about the timing. I only mentioned the Churchill Fellowship to say—for the benefit of this committee in case they were not aware—that this is an issue which defence obviously takes seriously and has been the subject of a Churchill Fellowship. That has not been done through the legal section, but I understand that—

**Senator CHRIS EVANS**—So why would someone getting a Churchill Fellowship be a sign that defence takes it seriously? I do not understand that linkage.

**Air Cdre Harvey**—It is for others to comment upon, but I think defence made this person available through defence time, letting them have time off work and so forth. So defence was interested—I think maybe, Senator, you can help me here—and I think it was a case of defence having this proposal put to it and being asked, ‘Do you sponsor it?’ Again it is outside my area and I was not the sponsor, but I think the understanding was that we saw great benefit in this and it was a case of this being an area we really wanted to drill into and build upon some other work we have done to try and improve it.

**Senator JOHNSTON**—What was the term of the study?

**Air Cdre Harvey**—I am afraid that, other than I know it is a Churchill—

**Senator JOHNSTON**—It is usually 12 months, isn’t it?

**Air Cdre Harvey**—I think so; something of that order. The lady—a squadron leader, I think it was—came and spoke to me some time ago. Chief of Air Force I think may have spoken to this in his evidence. But it impressed upon me that she was very interested in dealing with those issues and—in answer to Senator Payne’s question—she went off and spoke to the DCO at length and dealt with that issue. So I think it is more a case of it clearly being an important issue.

I think the defence sponsorship or support of that inquiry highlights the fact that this is an important area that requires detailed analysis.

I might add that, if it had been tacked on to the Acumen Alliance review, I wonder how much detail, quite frankly—bearing in mind that it was an audit rather than an investigation—would have been obtained from that process. I think we will get a far more robust outcome from the Churchill Fellowship, which has been able to speak at length to those people and has come up with a range of recommendations, which I understand have been accepted. In fact, I think CDF actually spoke to it, now I think about it a bit more.

**Senator CHRIS EVANS**—Maybe the Senate inquiry process might help as well; we will see.

**CHAIR**—The committee has received evidence that an ADF member has been advised that the decisions of former service chiefs cannot be reviewed. That would mean that the decisions of service chiefs attract an incredible immunity once they leave office. Can defence legal explain what attracts to the decisions of service chiefs and where is authority for what is essentially immunity provided for in the Defence Act or regulations?

**Air Cdre Harvey**—My first obvious point is that it is very hard to respond to that without knowing the context and seeing the submission.

**CHAIR**—But you just nodded and said that they are immune once they leave office.

**Air Cdre Harvey**—No, I was not agreeing with that at all—in fact, quite the opposite.

**CHAIR**—Okay. Was that a different nod?

**Air Cdre Harvey**—I was just trying to understand what was meant by ‘immune’. I am not aware of the submission but occasionally this comment is made.

**CHAIR**—Is it the case that a former service chief’s decisions cannot be reviewed? Yes or no?

**Air Cdre Harvey**—I cannot answer that without knowing what decision we are talking about. Are we talking about a disciplinary decision or are we talking about an administrative inquiry decision? What are we talking about? It is really a case of how long is a piece of string and what you mean by ‘immune’. I am not aware of any immunity that applies under the DFDA or any other—

**CHAIR**—It sounds like you are struggling to try to answer this question. You know clearly what I am asking you. Don’t struggle; just give us the answer.

**Air Cdre Harvey**—With respect, no, I do not. With the limited information that I have been provided with, no, I do not. That is the problem.

**CHAIR**—As Senator Evans said, take us through all the potential decisions that may or may not be able to be—

**Air Cdre Harvey**—Are you able to refer to the submission or is it a confidential submission?

**CHAIR**—It is confidential at this stage.

**Air Cdre Harvey**—That makes it very difficult to respond to a hypothetical question. The question is: are service chiefs immune? That could mean anything under the sun, with great respect. If you want to provide that on notice we will certainly take it on notice and answer it.

**Senator CHRIS EVANS**—But it is a question of your law of processes. It is not a question about a particular incident. It is a question of what immunity or what review mechanisms apply to decisions of former chiefs. In a general sense, is there a problem with a subsequent chief reviewing a decision of an earlier chief?

**Col. Westwood**—Would it be helpful if I were to address the disciplinary arrangements perhaps at least in part in connection with this? Senator, as you observed in connection with the air commodore earlier, the personnel may change but the position goes on. If there is a review conducted of service tribunals by a reviewing authority and there is a requirement to review the thing subsequently, of course it is reviewed by a successor in the appointment. The scheme of the DFDA arrangements are that there only be a limited number of internal reviews and that these will culminate in a review by a service chief. But it does not preclude a subsequent service chief having another look at it. The sort of example I give you is if, say, it had gone through the review process but new evidence was then discovered, there is nothing to prevent the matter being looked at again. In terms of strict immunity, which I am not quite sure was really the term of the question, the DFDA itself contains protections and immunities for members of courts martial, prosecutors, defending officers, the judge advocate and so on from civil suit, and the defence inquiry regulations do likewise for investigating officers and participants before boards of inquiry.

**Air Cdre Harvey**—Thanks for that, Colonel. Obviously that is on the DFDA side. On the admin inquiry side it is difficult to answer without knowing what you are referring to.

**CHAIR**—I was referring to administrative decisions not disciplinary ones.

**Air Cdre Harvey**—Maybe I can help to try to make—

**CHAIR**—Say a former chief orders the discharge of someone and then leaves office. Can that be reviewed?

**Air Cdre Harvey**—It depends, again, upon the circumstances. If you are talking about a chief exercising a delegation that he is granted—

**CHAIR**—So it can be reviewed?

**Air Cdre Harvey**—If you will let me finish, I will go through it. If he is exercising a statutory authority then the decision is made under the legislation or the delegation and that decision generally would stand. It would not be up to another service chief to come along and subsequently change it. Obviously if a decision is made by a service chief under legislation or a delegation there would be review mechanisms that apply in accordance with any decision, such as under the AD(JR) Act in the Federal Court and the like. But if there is a more general issue of a service chief making a decision of an administrative character, such as a decision on a redress

of a grievance, for example, it would be open for the matter to be revisited if there were a reason to do so. I do not want to seem unhelpful, but it really depends upon whether it is exercising a legislative authority which may have review mechanisms or whether it is simply a decision of a service chief.

A decision of a service chief is reviewable, not just if it is a statutory provision but also through normal mechanisms. We have had occasions when a service chief's decision on a particular case is the subject of a Federal Court proceeding under the AD(JR) Act, in the same way that any other decision of a government entity or organisation would be. I am sorry if that sounds evasive; I am just trying to help.

**CHAIR**—It sounds like it can be reviewed, depending on the circumstances.

**Air Cdre Harvey**—Unless there is a statutory prohibition and the decision has been made. There are separate statutory mechanisms for review.

**Senator JOHNSTON**—I have one request. Air Commodore, I am sorry I have to keep asking you for these documents. There is a DI(G) with respect to public duty and private interest, *Guidelines for members of the Defence Force*. Could we have a copy of that, if you could be so kind.

**Air Cdre Harvey**—Certainly. That is not one of my areas of responsibility but we will take that on notice along with the other documents you have requested.

**Senator JOHNSTON**—I am much obliged to your endeavours in this regard.

**Air Cdre Harvey**—Thank you. As you appreciate, there may be a ministerial requirement for approval, so I will have to process that.

**CHAIR**—We did not have an opportunity to ask a series of questions the other night that we would have liked the service chiefs to answer. I would like to put them on notice and I seek the cooperation of the chiefs to reply. I think we can write to the chiefs.

**Air Cdre Harvey**—Are they the ones about the boards of inquiry and things?

**CHAIR**—Yes.

**Air Cdre Harvey**—I think that would be the appropriate way to do it because individual services will need to answer those questions.

**CHAIR**—Could you alert the chiefs to the fact that we will send them off. The sooner we get the answers, the sooner we can compile our report and put it before the parliament. There being no further questions, I declare this hearing closed.

**Committee adjourned at 5.06 p.m.**