



Military Discipline

The Requirement for Military Discipline

- 4.1 The nature of military service demands compliance with orders and authority, sometimes in situations in which life or death rests upon that compliance.¹ In this regard, military service is like no other employment. Military personnel operate in a high-risk working environment that demands teamwork, mutual support and personal reliability. Discipline, both individual and collective, provides the basis for these characteristics and underpins the effectiveness of the ADF.
- 4.2 Discipline is a product of command and leadership, providing for the maintenance of good order and morale and compliance with lawful directions. The ADF asserts that military discipline exists for the protection, not the persecution, of personnel. However, to enforce compliance or to punish unacceptable behaviour, commanders must have access to a strict disciplinary system. Moreover, that system of discipline must impose an additional level of regulations on military personnel greatly exceeding those that apply to civilian employment. That is, a military disciplinary system which coexists with the civil system and provides for military personnel to be subject to a code of military disciplinary in addition to civil and criminal laws.² The ADF asserts that without such a system of military discipline it cannot effectively perform its role: to fight and win wars.³

1 Department of Defence, Private Briefing, Transcript, p. 5.

2 Department of Defence, Submission, p. 549.

3 Department of Defence, Private Briefing, Transcript, p. 5.

- 4.3 The existence of a code of military discipline that coexists with the civilian justice system suggests that military personnel do not enjoy the same rights as other members of our society. This is certainly the case. Indeed when the DFDA was drafted during the late 1970s and early 1980s, the important elements of today's justice system (human rights, equal opportunity, freedom of information and privacy protection) did not exist.⁴ Moreover, the ideological principles that underpin the Act emphasise the needs of the group over the needs of the individual.⁵ In contrast, the civil justice system is based on the concept of individual rights within the context of wider social responsibilities. While the ADF is experiencing changes that reflect those occurring in society, there is still a perception that members of the military do not enjoy the same rights as other members of society.

Those who join the services make a professional commitment quite unlike any other. They undertake to maintain the security, values and standards of the nation against external threat. They train for the application of extreme violence in a controlled and humane fashion whilst accepting the risk of death or serious injury in the achievement of the mission. They agree to accept a lawful direction of authority without equivocation, and to forgo the right to withdraw labour or refuse to undertake a (lawful) task, in short they undertake to train for and, if required undertake duty beyond the normal bounds of human behaviour.⁶

- 4.4 Michael Evans suggested that 'to be an effective servant of democratic life, the military profession cannot become a mirror image of a free society; it must instead consciously and deliberately become the guardian of freedom. If there is to be a reflection of society, it must be through the lens of a shield.'⁷ Any move to bring the rights of ADF personnel in line with society must not occur at the expense of the overall effectiveness of the military. Indeed, 'the military can only absorb those societal changes that will not reduce its prime mission – namely, the ability to fight.'⁸
- 4.5 The Committee acknowledged the need for the ADF to have a separate system of military discipline in addition to Australia's civil justice system. A military discipline system allows for the maintenance of Service discipline, supports command authority and, within the limitations of its

4 Group Captain B Biddington, Submission, p. 324.

5 Colonel K Northwood, Submission, p. 864.

6 *Serving Australia: The ADF in the Twenty First Century*, 1995, p. 61.

7 Evans, Michael, 'Mind of the Warrior', *The Australian*, 30 July 1997.

8 *ibid.*

prime mission, can also be seen to protect the rights of individual members of the ADF.

International Covenant on Civil and Political Rights

4.6 A considerable amount of evidence presented to the Committee supported the transfer of responsibility for the system of military discipline to an authority separate to the ADF.⁹ The principal reason underlying suggestions that the responsibility for the system of military discipline be transferred to a separate authority was the lack of impartiality of service tribunals and the independence of the ADF judiciary. Central to this issue of impartiality and independence is the ICCPR to which Australia became a signatory in 1980. In accordance with the ICCPR, Australia has agreed, in principle, to uphold certain internationally recognised standards of conduct in relation to the rights of the individual.

4.7 Article 14(1) of the ICCPR states, *inter alia*, that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹⁰

4.8 This was the fundamental issue in Findlay v. United Kingdom where the European Convention on Human Rights and Fundamental Freedoms (European Convention) found that Sergeant Findlay had not received a fair hearing by an independent and impartial tribunal. 'There were a number of factors that went into making [the tribunal] not an independent, impartial tribunal, and the fact that service members were trying other service members was just one part of that.'¹¹

4.9 One of the primary issues was the pivotal role of the Convening Authority.¹² Indeed, it was suggested to the Committee that Findlay v. United Kingdom was really about the position of the convening officer in that case and the power of the Convening Authority in relation to setting up the court martial.¹³ However, it was not necessarily that the trial was

9 Professor Barker suggested that a separate military court should be established to deal with services offences that extend beyond merely disciplinary offences (Professor D Barker, Submission, p. 295).

10 *International Covenant on Civil and Political Rights*, Article 14(1).

11 Ms D Manion, Transcript, p. 256.

12 Ms P. Crofts, Transcript, p. 260.

13 Ms D Manion, Transcript, p. 256.

not impartial, but that the way in which it had been constituted could **potentially** have led to a lack of impartiality in its findings.¹⁴ The European Convention found that the Court Martial did not constitute an independent or impartial tribunal within the meaning of Article 6(1) of the European Convention, and as such, did not guarantee a fair trial.¹⁵

- 4.10 The significance of Findlay v. United Kingdom to Australia is in the close similarity between Article 6(1) of the European Convention and Article 14 of the ICCPR. The United Nations Commission on Human Rights, in its General Comment on Article 14 has expressed the view that the provisions of Article 14 of the ICCPR apply equally to military courts.¹⁶ There are parallels between Findlay v. United Kingdom and the current system under which members of the ADF are tried before a military tribunal under the DFDA. The Committee acknowledged these parallels but noted that the legislation governing military disciplinary procedures in the ADF¹⁷ is entirely different from that of the United Kingdom.
- 4.11 In November 1995, the Chief of Defence Force commissioned one of the Deputy Judge Advocates General, Brigadier the Honourable A R Abadee to conduct a study into arrangements for the conduct of military trials. The study was prompted by recent judicial decisions both in the United Kingdom and Canada which have held that certain aspects of the conduct of those countries' military discipline systems failed to satisfy current tests of judicial independence and impartiality.¹⁸ His Honour, Mr Justice Abadee points out that the ICCPR 'applies to the determination of criminal charges',¹⁹ not disciplinary ones. Noting that the ECHR left open the question as to whether the full requirements of the ICCPR were required to be met had the offence(s) been merely of a "disciplinary" nature',²⁰ Justice Abadee challenged the applicability of Findlay v. United Kingdom, specifically in relation to matters of discipline.²¹

14 *ibid*, p. 259.

15 Professor D Barker, Submission, p. 293.

16 Professor D Barker, Transcript, p. 259.

17 DFDA.

18 The study also considered the implications for the DFDA of recent rulings by the High Court in respect of the jurisdiction of military tribunals.

19 Abadee, Brigadier Hon A.R., *A Study into Judicial System under the DFDA*, 1997, p. 46.

20 *ibid*, p. 40.

21 In his submission, Professor Barker suggested that that the findings of Findlay v. United Kingdom are relevant to Australia, and that the DFDA should be amended to ensure that an accused person before a court martial is guaranteed a fair trial by an independent tribunal in accordance with Article 14 (1) of the International Covenant on Civil and Political Rights (Professor D Barker, Transcript, p. 259).

- 4.12 Justice Abadee suggested that, while Australia is a signatory to the ICCPR, that in itself does not mean that the ICCPR supersedes existing laws in Australia.²² Although the Executive ratified the ICCPR in 1980, Article 14 (1) does not form part of Australian law.²³ Justice Abadee stated that ‘as a general proposition under the common law, entry by the Executive into a treaty is insufficient, without legislation to implement it, to modify the domestic or municipal law, by creating or changing public rights and legal obligations. If the Executive wishes to translate international agreements into domestic law it must procure the passage of legislation to implement those agreements.’²⁴ Therefore ‘an explicit municipal law which is inconsistent with international law will override the latter.’²⁵ In contrast to the current situation in Australia, some countries including Canada,²⁶ have introduced provisions under their constitutions to fulfil international obligations under Article 14 of the ICCPR.²⁷
- 4.13 Justice Abadee concluded that ‘rights under the ICCPR cannot be directly enforced in Australia,’²⁸ and that ‘as the law now stands in Australia, the military justice system is not required to be consistent with Article 14 of the ICCPR.’²⁹ Despite Justice Abadee’s conclusions the Committee noted that ‘with regard to the first protocol, there is an obligation within public international law which is placed upon Australia to comply as an original signatory to the covenant.’³⁰ Moreover, it was argued to the Committee that although Australia has not specifically enacted the ICCPR under municipal law it is a direct legislation, being a schedule to another act.³¹

22 Justice Abadee suggested that ‘whilst one should approach overseas decisions with caution, nevertheless Australia is a signatory to the ICCPR and the future potential for influence of decisions based on provisions similar to those found in the ICCPR cannot be overlooked. To date, as Tyler shows, the approach in Genereux had been presently rejected. Indeed, if the views of Brennan and Toohey JJ in Nolan (at 481) correctly reflect the law that the DFDA does not create criminal offences, then a question could arise as to whether Article 14(1) of the ICCPR could ever apply to service offences because that Article in terms refers to the determination of any “criminal charge”.’ (See Abadee, op cit, p. 41).

23 Abadee, op cit, p. 45.

24 *ibid.*

25 Although Australia is a party to the ICCPR, such obligations are not binding on the Court as part of the law of Australia, as the convention has not been incorporated into domestic law (Abadee, op cit, p. 45).

26 The US has a “due process” clause not found in the Australian Constitution which is the counter part of s (11) d of the Canadian Constitution (Abadee, op cit, p. 43).

27 The terms of these provisions are slightly different from Article 14 of the International Covenant on Civil and Political Rights (Abadee, op cit, p. 39).

28 Abadee, op cit, p. 46.

29 *ibid.*, p. 47.

30 Professor D Barker, Transcript, p. 256.

31 Ms D Manion, Transcript, p. 257.

Although the ICCPR is not legally binding on its signatories, the Australian government is clearly of the opinion that existing laws provide for all the rights that are provided for in the ICCPR. In essence, Australia has complied with the ICCPR and it is now part of Australian law.³² Justice Abadee agrees, suggesting that the 'requirement that the trial of a person should be fair and impartial is deeply rooted in the Australian system of law.'³³

- 4.14 The Committee acknowledged the ADF assertion that 'the remote theoretical possibility of an international tribunal finding that the present, tested, legislative arrangements may be in breach of our treaty commitments is not sufficient to overturn a system which is practical, efficient and effective.'³⁴ Although the applicability of Article 14 of the ICCPR to the military justice system remains to be tested the Committee agreed that a principal tenet of Australia's military discipline system must be an entitlement to an independent and impartial trial.

Independence of Service Tribunals

- 4.15 The Committee noted that a number of submissions suggested that a separate military court, within the existing Australian judicial system could best facilitate an independent and impartial trial.³⁵ The majority of these submissions addressed the multiple roles of the Convening Authority in the Court Martial and Defence Force Magistrate process as a fundamental barrier to an independent and impartial trial.
- 4.16 Notwithstanding Justice Abadee's conclusion that the European Convention's judgment does not directly affect Australia, the role of the Convening Authority under current arrangements in Australia is similar to that criticised by the European Convention on Human Rights and Fundamental Freedoms in *Findlay v. United Kingdom*. Under current arrangements, the Convening Authority in ADF disciplinary proceedings has the power to:
- determine whether there should be a trial;
 - determine the nature of the tribunal and the charges;

32 *ibid.*

33 Abadee, *op cit*, p. 37.

34 Department of Defence, Submission, p. 1043.

35 Professor D Barker, Submission, p. 295.

- select the trial judge and jury;
- select the prosecutor; and
- review the proceedings.

4.17 Justice Abadee noted concerns that these arrangements may engender a *perception* of unfairness regardless of the *actual* fairness of the particular proceedings. Having initiated the prosecution, the Convening Authority could be seen to have an interest in the outcome of the case³⁶ justifying the decision to prosecute. Further, where the officer prosecuting the trial is under the command of the Convening Authority, allegations may be levelled regarding the undue influence of the Convening Authority, to the possible detriment of the accused individual. As one of a number of measures to address this shortfall in the current system, Justice Abadee recommended that the multiple roles of the Convening Authority be removed.³⁷ This recommendation has been accepted by the ADF.

4.18 In addition, and as a direct result of the Abadee study, the ADF has agreed that:

- Convening Authorities will continue to decide whether to prosecute but will no longer issue convening orders for Courts Martial or Defence Force Magistrate trials;³⁸
- the duty of selecting members of a Court Martial or Defence Force Magistrate will be transferred to the JAG's office in consultation with the Service authorities;³⁹
- prosecution policy will be introduced to guide Convening Authorities;⁴⁰ and
- reviews of court martial proceedings and DFM trials will be conducted by an authority other than the Convening Authority.⁴¹

4.19 These changes are outlined in Table 4.1.

36 Abadee, op cit, p. 152.

37 *ibid*, Recommendation 2.

38 *ibid*, Recommendation 13.

39 *ibid*, Recommendation 16.

40 *ibid*, Recommendation 3.

41 *ibid*, Recommendation 18.

Table 4.1 Proposed Changes to the Role of the Convening Authority

Function	Current System	Proposed System
Determine whether there should be a trial	Convening Authority	Convening Authority
Determine the nature of the tribunal and the charges	Convening Authority	Convening Authority
Select the trial judge and jury	Convening Authority	JAG's office in consultation with the Service authorities
Select the prosecutor	Convening Authority	Convening Authority
Review the proceeding	Convening Authority	Authority other than the Convening Authority

4.20 The Committee noted that the issue of independence of military tribunals was a major theme of the study conducted by Justice Abadee but accepted that these changes will address concerns regarding the multiple roles of the Convening Authority. The ADF has accepted the majority of the recommendations flowing from the findings of the Abadee report. Other than the multiple roles of the Convening Authority, the significant changes to the military discipline system which stem from the report by Justice Abadee include changes to the functions and management of the Judge Advocate Administrator to provide independence from command influence and changes to the management of JAs,⁴² DFMs and s.154(1)(a) reporting officers.⁴³ The Committee accepted that these changes will enhance the perceptions of independence and impartiality of courts martial and Defence Force Magistrate trials.⁴⁴

4.21 The Committee noted that no submissions to this inquiry presented evidence regarding breach of process in a Court Martial or Defence Force Magistrate trial. This is not surprising since very few ADF disciplinary cases are dealt with by Court Martial or Defence Force Magistrate; the overwhelming majority are dealt with by summary authorities or discipline officers. In his report Justice Abadee noted that as yet 'no court challenge has ever been made in respect of the exercise of summary disciplinary authority.'⁴⁵ But he acknowledged that any 'question of independence and impartiality must, of necessity, deal with the summary authority position'.⁴⁶ The ADF has accepted most of the significant

42 A Judge Advocate is a lawyer who is appointed effectively as a legal adviser to a court martial (See Lieutenant Colonel P Boyd, Transcript p. 160).

43 Abadee, op cit, Recommendations 7, 8, 9, 10, 11, 12, 14.

44 ibid, p. 14.

45 Abadee, op cit, p. 11.

46 ibid, p. 11.

recommendations of Justice Abadee regarding the function of summary authorities. These include:

- In respect of elective punishments, provision will be made for the election to be in writing and for the summary authority to furnish the accused certain explanations about the election when giving him or her the opportunity to elect trial by DFM or court martial.⁴⁷
- A commanding officer's performance of duties as a service tribunal in a particular case will not be reported.⁴⁸
- The discipline officer scheme will be extended to apply to officers up to the rank of Captain (Army) equivalent undergoing initial training.⁴⁹
- Amendments to the relevant legislation are to be developed to provide for the recording of 'no conviction' under the DFDA.⁵⁰

4.22 In addition, Justice Abadee's recommendations regarding the provision of training and guidance to personnel required to conduct service tribunals are identified for consideration in a training needs analysis by the ADF.⁵¹ The Committee accepted that these changes will enhance the perceptions of independence and impartiality of trials conducted by summary authorities.⁵²

Who Should Enforce Military Discipline?

4.23 The system of discipline that applies to the Australian military is currently operated by the ADF under the legislative provisions of the DFDA.⁵³ Throughout the inquiry, the ADF maintained that a paramount requirement for an effective military discipline system is that it must be implemented and managed from within the organisation itself.⁵⁴ Indeed, that control of a timely and effective system of military discipline is essential to support the command structure and operational requirements of the ADF.

47 *ibid*, Recommendation 34, 37.

48 *ibid*, Recommendation 47.

49 *ibid*, Recommendation 48.

50 *ibid*, Recommendation 24.

51 *ibid*, Recommendations 3, 33, 38, 39, 40, 41, 42, 43, 44, 45.

52 *ibid*, p. 14.

53 See Chapter 2 of this report.

54 Department of Defence, Private Briefing, Transcript, p. 6.

- 4.24 Evidence from senior ADF commanders suggested that the DFDA has, to date, served the ADF well.⁵⁵ It has been under a constant process of review since its implementation and has been improved with experience and practice.⁵⁶ However a strong focus of evidence taken by the Committee regarding military discipline addressed who should be responsible for the system of military discipline employed within the ADF.
- 4.25 The ADF suggested that the creation of a separate military judiciary would be both impractical and unnecessary.⁵⁷ Unnecessary in that the existing system, enhanced by the acceptance of most of the Abadee recommendations, will provide an 'independent and impartial disciplinary system, consistent with the needs of the ADF and the interests of justice.'⁵⁸ Impractical in terms of the 'command structure and operational requirements of the ADF.'⁵⁹
- 4.26 The Committee agreed that during 'deployments and on operations, the ADF needs to have access to a discipline system that can be applied expeditiously and in such a way that service discipline is maintained, operations are not impeded and command authority is supported.'⁶⁰ An important aspect of military discipline during conflict is that it must be swift. A commander must be able to deal quickly with breaches of discipline in order to maintain group cohesion, teamwork and mutual support. In addition, the military discipline system must preserve the rights of individual members.
- 4.27 Advocates of the transfer of responsibility for the system of military discipline to an authority separate from the ADF suggested that two systems of military discipline should apply: one which operates during peacetime and another which operates when the ADF is deployed on operations.
- 4.28 For peacetime, the most popular suggestion was the establishment of a military court within the Australian judicial system to deal with all Courts Martial and Defence Force Magistrate trials. There was widespread agreement that such a military court, whilst within the civilian judicial system, should be presided over by members of the civilian judiciary with a military background. These individuals would have the background to put the military issues in perspective but would allow for the
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55 General J Baker, Transcript, p. 3; Air Marshall E McCormack, Transcript, p. 36.

56 General J Baker, Transcript, p. 3.

57 Department of Defence, Submission, p. 1045.

58 *ibid*, p. 1041.

59 *ibid*.

60 Department of Defence, Private Briefing, Transcript, p. 5.

interpretation of the DFDA within the independent and impartial framework of the civilian judicial system.

- 4.29 Under current arrangements JAs and Defence Force Magistrates are ‘invariably reserve officers [appointed by the JAG] who are senior practitioners in the civilian criminal courts.’⁶¹ The JAG and the DJAGs are ‘very senior reserve officers and invariably Judges of a Federal or Supreme Court.’⁶² Justice Abadee suggested that for this reason the influence of the civilian judicial system is extremely strong on the Australian military system of Courts Martial and Defence Force Magistrate trials. The Committee was of the opinion that this factor coupled with the ADF’s acceptance of most of the Abadee recommendations already provides for the interpretation of the DFDA within an independent and impartial framework. Moreover, the Committee accepted that ‘Australia does not have the volume of Military trials to warrant a permanent court.’⁶³
- 4.30 While there were several variations on the theme of separate systems of military discipline for peace and war, the need for the ADF to enforce discipline whilst on operations was widely accepted.⁶⁴ However the introduction of two separate systems, one for peace and another for war, adds a marked degree of complexity to what is currently a simple matter of civilian vs military jurisdiction. Moreover, separate systems for the application of military discipline in peace and war suggests two different standards of justice.
- 4.31 The ADF strongly supported Justice Abadee’s recommendation that the ‘standard of military justice should not vary according to whether it is a time of peace or war.’⁶⁵ However, in times of conflict ‘the ends of military justice are best served by more speedy and more certain action on the part of the court than is possible under the usual safeguards of individual rights that the civil law provides.’⁶⁶ For this reason the ADF, regardless of external circumstances,⁶⁷ adopts a standard system which allows the maintenance of the highest standards of discipline and order. The ADF unequivocally supported the continuation of the present system, in which uniform measures are adopted, and saw no compelling argument to amend the present arrangement.

61 Abadee, *op cit*, p. 8.

62 *ibid*.

63 Colonel K Northwood, Submission, p. 867.

64 Ms P. Crofts, Transcript, p. 262; and Ms D Manion, Transcript, p. 263.

65 Abadee, *op cit*, Recommendation 1.

66 Colonel K Northwood, Submission, p. 866.

67 ie it is irrelevant whether the person was on duty during peacetime or conflict at the time of the offence.

- 4.32 The Committee concluded that the current system of military discipline, coupled with the ADF's acceptance of most of the Abadee recommendations, provides for an independent and impartial framework. Furthermore, the Committee agreed that, regardless of whether it operates in peace or in war, the standard of justice within the ADF should not vary. The Committee also noted that 'Australia does not have the volume of Military trials to warrant a permanent court.'⁶⁸ While the Committee acknowledged considerable support for the transfer of responsibility for the military discipline to an authority separate to the ADF it did not support the creation of a separate military judiciary.

Director of Military Prosecutions

Introduction

- 4.33 The only significant matter arising from the Abadee Report that has not been accepted by the ADF is the creation of an independent Director of Military Prosecutions (DMP). Justice Abadee recommended that 'careful consideration should be given to examining the question of the appointment of an "independent" Director of Military Prosecutions upon a tri-service basis'⁶⁹ as **one of a number** of measures to rectify any perception of lack of independence in the system of military discipline employed by the ADF.
- 4.34 The ADF have acknowledged the need to improve perceptions of independence and impartiality of the trial process. Accordingly, the ADF has accepted a number of recommendations of the Abadee report, which change the role of convening authorities in service tribunals; specifically, the multiple roles of convening authorities have been removed.⁷⁰
- 4.35 Under the new arrangements proposed by the ADF, the Convening Authority will continue to decide whether to prosecute but will no longer issue convening orders for Courts Martial or Defence Force Magistrate (DFM) trials.⁷¹ Rather the duty of selecting members of a Court Martial or DFM will be transferred to the JAG's office in consultation with the service authorities.⁷²

68 Colonel K Northwood, Submission, p. 867.

69 Abadee, op cit, Recommendation 4.

70 See Para 4.15 to 4.20 of this report.

71 Abadee, op cit, Recommendation 13.

72 *ibid*, Recommendation 16.

- 4.36 To facilitate this function, the ADF has agreed to the reintroduction of a Judge Advocate Administrator (JAA) to provide independence from command influence in the management of duties of a judicial nature for JAs⁷³, DFMs and s.154(1)(a) reporting officers. The JAA will be a tri-service appointment, independent of the chain of command and placed under the JAG. The JAA will be responsible for selecting JAs and members for Court Martial, selecting magistrates for DFM trials and the management of duties of a judicial nature for JAs, DFMs and Section 154(1)(a) reporting officers.
- 4.37 Furthermore, the ADF have agreed to introduce prosecution policy to guide convening authorities⁷⁴ and to ensure that reviews of court martial proceedings and DFM trials will be conducted by an authority other than the Convening Authority.⁷⁵ The proposed changes to the roles of the Convening Authority are summarised in Table 4.1.
- 4.38 While these reforms address the multiple roles of the Convening Authority, the power to prosecute remains vested in the commander. Indeed the current system is to be retained, whereby, without being bound by legal advice, it is up to the Convening Authority to determine whether a prosecution should be instituted, and the nature of the tribunal.
- 4.39 A number of submissions advocated the creation of an independent DMP as a necessary step to insulate the independence of courts martial and DFM trials from influence by a commander with a vested interest in the outcome. In broad outline a DMP would provide a means to handle all courts martial and DFM trials outside the chain of command⁷⁶ with the primary aim in the creation of a DMP being to facilitate an independent and impartial trial. Given the post-Abadee changes proposed by the ADF, the key issue which would be addressed by the creation of a DMP would be institutional independence in relation to prosecution.⁷⁷

73 A Judge Advocate is a lawyer who is appointed effectively as a legal adviser to a court martial.

74 Abadee, *op cit*, Recommendation 3.

75 *ibid*, Recommendation 18.

76 Ms J Kelly, Transcript, p. 55.

77 Abadee, *op cit*, p. 160.

Operation of a DMP

Model 1

- 4.40 In one model (Model One) proposed to the Committee, principally an adaptation of the British model for a DMP,⁷⁸ a Convening Authority would consider whether an individual referred to him/her had a case to answer. The Convening Authority would then refer the matter to the DMP or alternatively refer the matter back to the commanding officer for hearing if he/she considered this to be appropriate.⁷⁹
- 4.41 The decision of whether to prosecute or not at court martial or at a DFM trial and the appropriate charges to be laid would be taken only by the DMP. Once the decision to put a member to trial has been taken by the DMP the matter would be remitted to the Convening Authority to convene the appropriate court and run the trial (albeit that the Convening Order will be issued by the JAA and the prosecutor would be appointed by the DMP).
- 4.42 The DMP would be of the rank of navy captain, colonel or group captain and independent from the chain of command. The DMP would use uniformed legal officers to prosecute. In this model the DMP would be similar to the Army Prosecutions Authority in the British model and analogous to the Director of Public Prosecutions in Australia.

Model 2

- 4.43 An alternate model⁸⁰ (Model Two) would see the DMP simply undertake the prosecution function after a Convening Authority has decided that charges should be laid and convenes a court martial or defence force magistrate trial. While this model addresses the independence of the prosecutor it would still suffer from the same difficulties identified in the Canadian inquiry;⁸¹ inter alia, the prosecutor would remain the direct agent of the Convening Authority and would have no authority, independent of the Convening Authority, to amend or withdraw charges.
- 4.44 These models and the proposed post-Abadee system to be employed by the ADF are summarised in Table 4.2.

78 Lieutenant Colonel P. Boyd, Transcript, p. 157.

79 The prerogative to refer the matter back to the Commanding Officer for hearing currently exists under the DFDA.

80 Lieutenant Colonel P. Boyd, Transcript, p. 158.

81 See Para 4.49 of this report.

The Case For a DMP

Findlay v. United Kingdom

- 4.45 The impetus for the creation of a DMP comes, in part, from the ruling of the European Convention on Human Rights and Fundamental Freedoms in Findlay v. United Kingdom that Sergeant Findlay had not received a fair hearing by an independent and impartial tribunal. It has been argued that the fundamental issue in Findlay v. United Kingdom was the position of the Convening Authority in that case and the power of the Convening Authority in relation to setting up the court martial.⁸²
- 4.46 The European Court of Human Rights (EHCR) found that the officer convening the court martial was central to the prosecution, and that all officers appointed to the tribunal were subordinate to the Convening Authority, and subject to his influence. It was not necessarily that the trial was not impartial, but that the way in which it had been constituted could potentially have led to a lack of impartiality in its findings.⁸³ The EHCR ruled that the court-martial could not be seen as impartial and independent under this circumstance.
- 4.47 One of the corrective measures taken by the British Government to rectify the cause of the EHCR criticism was to create a statutory prosecuting authority for military trials, to improve the perception of independence in the Court Martial process.

82 Ms D Manion, Transcript, p. 256.

83 *ibid*, p. 259.

Table 4.2 Alternate Models

Function	Current System	Model One	Model Two	ADF System Post Abadee Reforms	Australian Criminal System
Determine whether there should be a trial	Convening Authority	DMP	Convening Authority	Convening Authority	DPP
Determine the nature of the tribunal and the charges	Convening Authority	DMP	Convening Authority	Convening Authority	DPP
Select the trial judge and jury	Convening Authority	JAA (JAG's office)	JAA (JAG's office)	JAA (JAG's office)	Administrative function of the Court and legislation
Select the prosecutor	Convening Authority	DMP	DMP	Convening Authority	DPP
Automatic review of proceedings	Convening Authority	Authority other than the Convening Authority	Authority other than the Convening Authority	Authority other than the Convening Authority	None
Review on Petition	Reviewing Authority ⁸⁴ Service Chief	Reviewing Authority Service Chief	Reviewing Authority Service Chief	Reviewing Authority Service Chief	None
Appeal	DFD Appeals Tribunal ⁸⁵ Federal Court	DFD Appeals Tribunal Federal Court	DFD Appeals Tribunal Federal Court	DFD Appeals Tribunal Federal Court	Higher court within the Australian judicial system

84 A member convicted of a service offence has access to two levels of review on petition. In the first instance there is access to a reviewing authority appointed by the Service Chief and then there may be a further review by the Service Chief (See Department of Defence, Submission, p. 563). When conducting a review by petition, a reviewing officer is required to obtain a legal report which is binding on them on questions of law.

85 A person convicted by a court martial or by a DFM may be able to pursue an appeal against the conviction, but not the punishment, to the Defence Force Discipline Appeals Tribunal convened under the *Defence Force Discipline Appeals Act 1955*. Appeals are heard by a tribunal comprising, usually, of not less than three judges (Justice or Judge of a federal court or of the Supreme Court of a State or Territory) who are appointed by the Governor General (*Defence Force Discipline Appeals Act, 1955, Section 7*).

Canadian Review

- 4.48 In the recent Canadian review of their military justice system⁸⁶ the inquiry found that the prosecutor for a Court Martial is appointed by the convening authority with the concurrence of the JAG and is the direct agent of the convening authority. The prosecutor ‘has no authority, independent of the convening authority, to amend charges or to proceed or not proceed to trial having regard to the usual criteria of a reasonable prospect of conviction and the public interest. Where charges are amended or withdrawn, or a plea bargain is entered into, the convening authority makes the decision, albeit on advice of the legal officer assigned to prosecute the case.’⁸⁷
- 4.49 The Canadian JAG advised the inquiry that for courts martial the prosecution function must be performed separately from the chain of command, and must ensure the independence of the prosecution function by reducing potential conflicts of interest. The Canadian inquiry concluded that a separate JAG office should be established with operational responsibility for all prosecutions before Court Martial. Accordingly, the inquiry recommended that an independent DMP, responsible to the JAG, be established.

Impartiality

- 4.50 Justice Abadee noted that ‘it is important to ensure a high degree of manifest independence in the vital task of making decisions to prosecute and in the exercise of prosecution discretions. The decision to prosecute should be made on entirely neutral grounds to avoid the suspicion that it might otherwise be biased.’⁸⁸ His Honour further suggested that, assuming such is desirable and appropriate, a tri-service prosecuting authority would seem to be a suitable way of achieving institutional independence in relation to prosecution and divesting the Convening Authority of the prosecuting role.⁸⁹
- 4.51 The Committee agreed that the establishment of a tri-service prosecuting authority would:
- a) add to the independence of the process by providing an officer outside the chain of command who decides whether it is necessary and

86 Dickson et al, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, 25 March 1997.

87 *ibid*, Section 3-3-b.

88 Abadee, *op cit*, p. 160.

89 *ibid*.

appropriate that a member be prosecuted and the nature of the charges which should be applied;

b) provide consistency of approach, on a tri-service basis, in prosecutions of a serious nature; and

c) assist to ensure that, as far as possible, the trial process is impartial.⁹⁰

Level of Operation

- 4.52 While one view is that a DMP should only operate at the level of court martial and DFM trial the main focus of evidence on this issue was for a DMP to also operate at the summary level. This would involve significant change to the current arrangements for the conduct of summary trials under the DFDA.
- 4.53 Currently, an accused person awaiting trial by Court Martial or DFM trial shall, subject to the exigencies of the service, 'be afforded the opportunity to be represented at the trial, and to be advised before the trial, by a legal officer.'⁹¹ However, for summary proceedings, an accused may conduct his or her own defence or nominate another ADF member to defend them.⁹²
- 4.54 There is nothing in the DFDA to provide for an accused person to be represented by a legal officer, however the Act does not prohibit the summary authority from authorising legal representation.⁹³ In practice an accused person is normally represented by another ADF member, nominated by the accused. It is not general practice for an accused member to be represented by a legal officer, however in complex matters a summary authority may authorise the accused to be represented by a legal officer at no cost to the accused.⁹⁴
- 4.55 In a similar vein, the prosecution in a summary trial is not normally conducted by a legal officer. However, it is not normal for only one of the prosecution or the defence to be conducted by a legal officer. Rather either both the prosecution and the defence are conducted by a legal officer or both are conducted by a non-legal ADF member.

90 Colonel K Northwood, Submission, p. 871.

91 DFDA, Section 137 (1).

92 ADFP 201, Volume 1, Chapter 7, pp. 7-10.

93 Department of Defence, Submission, p. 1216.

94 *ibid.*

4.56 The Committee noted that the establishment of a DMP to operate at the summary level would, to ensure fairness, introduce a requirement for all accused persons in a summary trial to be represented by a legal officer. Given that the average number of summary trials per annum is of the order of 4900,⁹⁵ the operation of a DMP at the summary level would complicate the process and impose a massive cost, in time and resources, on the summary trial process. It is possible that a DMP could be selectively involved in the summary trial process however the Committee noted that even ‘overseas it has not been suggested that an independent Director of Prosecutions would be involved in the prosecuting of summary trials.’⁹⁶

The Case Against a DMP

Decision to Prosecute

- 4.57 The ADF asserts that the discretion to prosecute is a command decision which must consider both discipline and command issues and ‘is a paramount tenet of military discipline’.⁹⁷ This allows the commander discretion not to proceed with disciplinary action where the ensuing trial would adversely affect unit morale or cohesion, or where formal disciplinary proceedings would otherwise not be in the best interests of the Service.⁹⁸ Such circumstances may arise in cases of professional failure⁹⁹ or where the Service interest does not require that the matter be prosecuted.¹⁰⁰
- 4.58 The sensitivity of such a decision suggests that this power of discretion requires the judgement of an experienced commander who is able to balance the impact of the decision to prosecute on his or her command¹⁰¹ with the technical merits of the prosecution case. While it is not

95 *ibid*, p. 620.

96 Abadee, *op cit*, p. 155.

97 Department of Defence, Submission, p. 1042.

98 The Committee noted that Justice Abadee accepted that ‘the Convening Authority should not be bound by legal advice as to whether to prosecute or not (See Abadee, *op cit*, p. 160).

99 See Para 5.3 to 5.8 of this report.

100 In NSW the primary question is whether or not the public interest requires that a matter be prosecuted. That question is resolved by determining:
(1) whether or not the evidence available is capable of establishing each element of the offence;
(2) whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury properly instructed; and
(3) if not, whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest (See Abadee, *op cit*, p. 158).

101 Unit, formation, ship, etc.

inconceivable that legal officers may possess substantial command experience, it is the commander who is best placed to make an assessment on the broader impact of proceeding with disciplinary action.

DMP Impact on Command

4.59 Of greater concern to the ADF is the ability of a DMP to ensure the swift application of discipline to allow the commander to deal quickly with breaches of discipline in order to maintain group cohesion, teamwork and mutual support. A centralised, tri-service DMP commissioned with the authority to determine whether to prosecute could introduce unacceptable delays into the military discipline process. Moreover, the ADF raised concerns regarding practical problems with the operation of a DMP during conflict.¹⁰² Both in terms of the decision to prosecute and the ability to provide a swift application of discipline ‘a DMP outside the chain of command removes from the commander some degree of ability to command.’¹⁰³

Impartiality

4.60 Justice Abadee observed that an alternative to the creation of a DMP would be to introduce prosecution policy to guide convening authorities.¹⁰⁴ His Honour suggested that this would not remove or circumscribe the powers of the Convening Authority in regard to making decisions to prosecute and in the exercise of prosecution discretions but would enhance perceptions of impartiality and independence. Such guidelines would provide protection for the Convening Authority from any possible claims of unfounded prosecution, save for neutral reasons relating to the evidence.¹⁰⁵ The ADF have agreed to introduce such prosecution policy.

Independent Review

4.61 While not specifically related to the prosecution function of the Convening Authority, the Committee accepted that the post-Abadee arrangements for the conduct of Courts Martial and DFM trials, include three separate levels of independent review, one of which is automatic, before a defendant has cause to resort to the appeal process. Moreover, the Committee noted that, at each level of review the reviewing officer is required to obtain a legal

102 Department of Defence, Submission, p. 1043.

103 Vice Admiral D Chalmers, Transcript, p. 45.

104 Abadee, *op cit*, Recommendation 3.

105 *ibid*, p. 158.

report which is binding on questions of law. With regard to appeal, the Committee noted that the first level of appeal for a defendant is heard by a tribunal comprising, usually, not less than three judges¹⁰⁶ who are appointed by the Governor General. The Committee accepted that such extensive review options would not prevent a decision not to proceed with a case but noted that it would, inter alia, compliment prosecution policy by serving to prevent unfounded prosecution.

ADF Conclusions

4.62 In determining its response to the Abadee recommendations the ADF noted that there existed no Australian legal imperative requiring such an appointment.¹⁰⁷ The ADF concluded that a DMP would not be created in response to the Abadee recommendations as ‘the marginal advantage to be gained from the enhanced perception of independence and impartiality on an independent DMP, would not compensate for the disadvantage that would result from commanders losing the prerogative to decide whether to prosecute.’¹⁰⁸ Moreover, the ADF claim that, with the proposed post-Abadee reforms to the military discipline system in place, the right balance has been found between ‘the needs of the ADF, the interests of justice per se and its practical administration in the ADF.’¹⁰⁹

Conclusion

4.63 The Committee accepted that the establishment of a DMP, based upon an adaptation of the British model, would serve to **add** to the perception of independence of the post-Abadee process, provide consistency of approach and assist to ensure that, as far as possible, the prosecution component of the trial process is impartial. However, the Committee acknowledged that the introduction of a DMP to operate at the summary level would be impractical and would complicate the process and impose a massive cost, in time and resources, on the summary trial process.

4.64 For Courts Martial and DFM Trials, the Committee acknowledged that the ADF have removed the multiple roles of the Convening Authority and addressed the independence of the court by the reintroduction of a JAA. In

106 Justice or Judge of a federal court or of the Supreme Court of a State or Territory (See Para 2.108 of this report and *Defence Force Discipline Appeals Act 1955*, Section 7).

107 In Abadee, op cit, p.159, His Honour suggested that ‘while no legal requirement existed for the creation of an independent DMP there are non-US trends strongly supporting consideration of such.’

108 Department of Defence, Submission, p. 1042.

109 *ibid.*

addition, the ADF have agreed to have proceedings automatically reviewed by an authority other than the Convening Authority. Moreover the Committee noted that the ADF have moved to address the issue of institutional independence in relation to prosecution by proposing to introduce prosecution policy to guide convening authorities and to assist in providing consistency of approach.

- 4.65 The Committee further noted that there exists no Australian legal imperative requiring the creation of a DMP and that the number of Courts Martial and DFM trials conducted each year could not, by itself, justify an argument for the establishment of a DMP. The Committee acknowledged that in initiating the Abadee study and adopting reforms stemming from the Abadee Report the ADF have moved constructively to address shortfalls in the independence and impartiality of the current system of military discipline.
- 4.66 The Committee accepted that the proposed post-Abadee reforms to the ADF discipline system **appear** to establish a balance between ‘the needs of the ADF, the interests of justice per se and its practical administration in the ADF.’¹¹⁰ However, the Committee concluded that the issue of institutional independence in relation to prosecution should be reviewed after the proposed post-Abadee arrangements have been in operation for sufficient time to allow the impact to be assessed. The Committee suggested that a review after three years would be appropriate.

Recommendation 46

The Committee recommends that, after the proposed post-Abadee arrangements have been in operation for three years, the issue of institutional independence in relation to prosecution in Courts Martial and DFM trials be reviewed.

Jurisdiction

- 4.67 The offences created by the DFDA are directed to maintaining and enforcing service discipline, however, some of these duplicate or overlap with offences created under Australian civil or criminal law. The policy for jurisdiction in such cases is detailed in Defence Instruction (General) PERS

110 *ibid.*

45-1 titled *Jurisdiction Under the DFDA Guidance for Military Commanders*.¹¹¹ The exercise of military jurisdiction within Australia¹¹² is also expressly limited by section 63 of the DFDA.¹¹³ The ADF requires the consent of the Commonwealth Director of Public Prosecutions before a service tribunal can deal with more serious offences such as murder, manslaughter and certain sexual offences.¹¹⁴

- 4.68 Reports of incidents of sexual assault and sexual harassment aboard the Destroyer escort HMAS *Swan* in 1992 resulted in an inquiry by the Senate Standing Committee on Foreign Affairs, Defence and Trade, which reported to the Parliament in August 1994. One of the important outcomes of this inquiry was that the jurisdiction to deal with sexual offences was removed from the ADF.¹¹⁵ While this is a workable jurisdictional arrangement in cases of serious sexual assault, problems arise, particularly for straightforward acts of indecency, where a victim decides not to pursue the issue through the civilian legal system. This was an important issue raised by the 1998 report into sexual harassment at ADFA.¹¹⁶
- 4.69 Under current arrangements, the ADF has agreed that all allegations of sexual assault will be immediately referred to civilian authorities for investigation and prosecution. Several submissions to the Committee suggested that current jurisdictional arrangements should be readjusted to allow straightforward acts of indecency¹¹⁷ to be dealt with under the DFDA¹¹⁸ but retaining the requirement for serious sexual assault to be referred to the relevant civilian jurisdiction.¹¹⁹ It was argued that this would address some of the shortcomings of the current arrangement including the reluctance of state and federal police forces to investigate

111 This policy seeks to resolve civilian / military jurisdictional issues and is accepted by both the ADF and the Director of Public Prosecutions.

112 See Chapter 2 of this report.

113 The limitations imposed by section 63 of the DFDA do not apply in respect of offences committed overseas. Nevertheless, the exercise of DFDA jurisdiction overseas may be regulated by international agreements, such as Status of Forces Agreements and approval from the host government will usually be required before a DFDA trial is conducted overseas.

114 DFDA, Section 63.

115 Although provision was made for the ADF to deal with sexual offences with the consent of the Commonwealth Director of Public Prosecutions. An exception exists where the offence occurs outside Australia, where the Services retain their jurisdiction to deal with such offences (Defence Instructions (General) Personnel 45-1, dated 19 January 1998, p. 2).

116 *Report of the review into Policies and Practices to deal with Sexual Harassment and Sexual Offences*, ADFA, June 1998.

117 Acts of indecency within the meaning of Section 92 of the *Commonwealth Crimes Act*.

118 Colonel K Northwood, Submission, p. 871.

119 Under current arrangements the ADF is prevented from dealing with such cases without first obtaining the consent of the Director of Public Prosecutions.

comparatively minor acts of indecency and the reluctance of complainants to subject themselves to the civil process.¹²⁰

- 4.70 The implications of these shortcomings of the current arrangements are that matters of sexual assault are not properly investigated and penalties are invariably minor.¹²¹ Indeed, one submission questioned how in good conscience anyone could 'recommend to young females that they subject themselves to the trauma of the civil court system when there is little chance of a conviction.'¹²² If current jurisdictional arrangements are adjusted to allow straightforward acts of indecency to be dealt with under the DFDA such issues could be quickly investigated and, where appropriate, prosecuted. Importantly this would provide a framework to ensure that all matters of sexual assault, straightforward acts of indecency and serious sexual assault, are investigated and, where necessary, dealt with.
- 4.71 While the preferred arrangement would be for the ADF to be empowered to deal with straight forward acts of indecency without requiring the consent of the Director of Public Prosecutions, the current arrangement of requiring consent could be retained. However, retention of the current requirement for consent would necessitate the Director of Public Prosecutions introducing procedures to allow the decision on consent to be taken much more quickly than has been the case in the past.¹²³ Timely action by the Director of Public Prosecutions is essential if consent is still required and the ADF is to effectively deal with straight forward acts of indecency.
- 4.72 Hitherto the ADF has acted under the presumption that it was unable to initiate disciplinary action in relation to any alleged criminal offences which were referred to civil authorities. Where no complaint is made to civil authorities, the ADF has operated under the belief that it can neither investigate nor prosecute a sexual assault.¹²⁴ The complainant may not wish to subject herself or himself to the civil process or indeed may not wish to have the alleged offender prosecuted in civil court, perhaps fearing ostracism or victimisation.¹²⁵ Under current arrangements this would give rise to a situation where a commander has identified a serious disciplinary issue but is unable to take action to address the problem.

120 Colonel K Northwood, Submission, p. 870.

121 *ibid.*, p. 869.

122 *ibid.*

123 *ibid.*, p. 871.

124 Department of Defence, Submission, p. 1044.

125 Colonel K Northwood, Submission, p. 870.

- 4.73 However, more recent advice suggests that ‘it may well be appropriate for the ADF to exercise some form of disciplinary jurisdiction to deal with ancillary aspects of conduct of breaches of service discipline where criminal charges have not been preferred.’¹²⁶ This matter is under investigation by the ADF, seeking to clarify the scope to take follow-up disciplinary action where criminal charges have not been preferred.¹²⁷
- 4.74 The Committee accepted that an offence should only be dealt with under the DFDA where such proceedings substantially serve the purpose of maintaining and enforcing service discipline.¹²⁸ However it acknowledged that current jurisdictional arrangements for the handling of cases involving straightforward acts of indecency have the potential to inflict on a commander, a serious disciplinary situation which he or she is powerless to resolve. The Committee agreed that consideration should be given to reviewing current arrangements to allow the ADF to deal with all cases involving straightforward acts of indecency without requiring the consent of the Director of Public Prosecutions.

Recommendation 47

The Committee recommends that consideration should be given to reviewing current arrangements to allow the ADF to deal with all cases involving straightforward acts of indecency without requiring the consent of the Director of Public Prosecutions.

- 4.75 A significant amount of evidence presented to the Committee suggested that there needs to be a clear distinction between defence and civilian crimes committed by ADF personnel.¹²⁹ Furthermore, it was suggested that any serious offence should be dealt with by the civil courts and not by the military.¹³⁰ One submission suggested that justice may not be done when a military matter is tried in civil court as the jury may not understand the military procedures.¹³¹ The Committee acknowledged that in some situations military nuances might have some bearing on the outcome of the trial. However, the ADF has an agreement with the civil

126 Department of Defence, Submission, p. 1044.

127 *ibid.*, p. 1045.

128 Professor D Barker, Submission, p. 295.

129 Mr M Prowse, Submission, p. 859.

130 Mr G Melik, Transcript, p. 352.

131 Mrs G Otuszewski, Transcript, p. 188.

legal authorities that where cases have criminality of substance, which are dealt with by the civilian law, they will be dealt with by the civil authorities in peacetime in Australia.¹³² Where there is doubt regarding jurisdiction the ADF is required to consult with civil prosecution authorities.

- 4.76 The Committee noted the Ombudsman's comment in her 1998 report that the issues surrounding the appropriateness of the ADF using its jurisdiction to deal with matters other than the serious offences referred to under section 63 of the DFDA are very complex.¹³³ Given the complexity of the issues, the Committee accepted that current policy¹³⁴ provides adequate guidance to ADF personnel on dealing with issues of jurisdiction and that liaison between the ADF and the Director of Public Prosecution provides a suitable procedure for resolving jurisdictional issues.

Procedure

- 4.77 Issues of procedure in regard to the conduct of military discipline under the DFDA received little attention in the evidence presented to the Committee. One witness suggested that this is not surprising as the DFDA 'has a very detailed elaboration of the procedures for a court martial which are very fair and very appropriate.'¹³⁵ The Committee noted that the Defence Force Discipline Legislation Board of Review in 1989 concluded that 'there was general satisfaction about the manner in which hearings before courts martial and Defence Force Magistrates were conducted.'¹³⁶
- 4.78 In regard to dealings by summary authorities under the DFDA, one submission suggested that 'the disciplinary authority is required to bring to bear considerable legal expertise in which he or she has no training and is further required to rule on points of evidence and law.'¹³⁷ This was addressed by the Defence Force Discipline Legislation Board of Review 1989 that recommended a relaxation of, what it considered to be, the overly legalised procedures which the Act, Rules and Discipline Law Manual impose on summary authorities.¹³⁸ The Defence Force Discipline
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132 General J Baker, Transcript, p. 21.

133 Ms P Smith, op cit, p. 7.

134 Defence Instruction (General) PERS 45-1 titled *Jurisdiction Under the DFDA Guidance for Military Commanders*.

135 Mr M Slattery, Transcript, p. 287.

136 Department of Defence, Submission, p. 567.

137 Mr G Melik, Transcript, p. 349.

138 Department of Defence, Submission, p. 567.

Legislation Board of Review 1989 proposed that 'summary authorities should observe the principles of natural justice and require the best evidence reasonably available to be led in proceedings before them.'¹³⁹ This recommendation was not accepted by the ADF on the basis that the 'powers of punishment available to summary authorities under the DFDA are quite extensive. Consequently, it was considered important by the Services from the viewpoint of justice and fairness to accused members that the rules of evidence, though complex, should apply to ensure this protection.'¹⁴⁰ The safeguard in the system is provided for by the automatic review of every conviction and punishment.¹⁴¹

- 4.79 A further recommendation by the Defence Force Discipline Legislation Board of Review 1989 was for the introduction of Discipline Officers.¹⁴² The creation of Discipline Officers would introduce a streamlined system for dealing with minor discipline breaches and reduce the number of breaches required to be dealt with by summary authorities. While no submissions to the Committee addressed the matter of Discipline Officers it was addressed by Justice Abadee in his 1997 report.¹⁴³ His Honour recommended that the ADF consider extending the jurisdiction of discipline officers to allow officers holding the rank of Major (and other Service equivalents) and below to be dealt with under this system.¹⁴⁴ Under current arrangements Discipline Officers may only deal with service personnel below non-commissioned rank, however Justice Abadee suggests that a widening of the Discipline Officer provisions of the DFDA would further reduce the number of minor breaches of discipline dealt with by summary authorities.¹⁴⁵ The ADF have partially accepted the recommendation and propose to extend the Discipline Officer scheme to apply to officers holding the rank of Army Captain (and other Service equivalents) undergoing initial training.¹⁴⁶
- 4.80 Justice Abadee also recommended that the DFDA be amended to make warrant officers eligible for membership of courts martial, provided that the warrant officer is equal or senior in rank to the accused.¹⁴⁷ Considering it important that the boundaries between commissioned and non-

139 *ibid*, p. 568.

140 *ibid*.

141 See paragraph 2.113 of this report.

142 See paragraphs 2.100-2.102 of this report.

143 Abadee, *op cit*.

144 *ibid*, Recommendation 48.

145 Summary authorities are currently the only avenue available to deal with minor breaches of discipline by personnel of non-commissioned rank and above.

146 Department of Defence, Submission, p. 1193.

147 Abadee, *op cit*, Recommendations 25 and 26.

commissioned officers be retained with the role of warrant officers being to administer and decide discipline,¹⁴⁸ the ADF rejected this proposal. The ADF also rejected recommendations by Justice Abadee that the range of elective punishments presently available under the DFDA be reviewed, particularly the punishment of reduction in rank.¹⁴⁹ The ADF asserts that 'the full range of elective punishments is important in maintaining discipline especially at the lower rank levels and during operations'¹⁵⁰ and therefore declined to review the range of elective punishments available under the DFDA.

- 4.81 However, the ADF has agreed that in 'respect of elective punishments, provision should be made for the election to be in writing and for the summary authority to furnish the accused certain explanations about the election when giving him the opportunity to elect trial by DFM or court martial.'¹⁵¹ The ADF has also agreed that amendments to the DFDA should be made to allow for a finding of 'no conviction' thus recognising that there may be good reasons for no conviction being recorded.¹⁵²
- 4.82 The Committee acknowledged that the DFDA has been under an almost constant process of review since its implementation.¹⁵³ Of most significance in this process of review have been the Defence Force Discipline Legislation Board of Review of 1989, the annual reports to the Minister by the JAG and most recently the exhaustive study conducted by Justice Abadee regarding the judicial independence of military trials. The Committee noted that no significant issues of procedure in regard to the conduct of military discipline under the DFDA had had been identified during the course of its inquiry.

Appeal

- 4.83 The ADF asserts that the lack of appeals under the DFDA¹⁵⁴ is testament to the value of the military discipline system.¹⁵⁵ Evidence presented to the Committee suggested that the appeal process under the DFDA is prohibitive to the majority of ADF members as an individual must
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148 Department of Defence, Submission, pp. 1186–1187.

149 Abadee, *op cit*, Recommendations 35 and 36.

150 Department of Defence, Submission, pp. 1189–1190.

151 Abadee, *op cit*, Recommendations 34 and 37.

152 *ibid*, Recommendation 24.

153 General J Baker, Transcript, p. 3.

154 Five appeals against courts martial and Defence Force Magistrates in three years and 176 trials.

155 General J Baker, Transcript, p. 3.

challenge the Commonwealth in the Federal Court and the prospect of taking this approach and being forced to bear costs if unsuccessful is daunting.

- 4.84 However, the Committee noted that for courts martial and Defence Force Magistrate trials, a member convicted of a service offence has access to two levels of review on petition: firstly to a reviewing authority appointed by the Service Chief and then the Service Chief.¹⁵⁶ The system is then directly linked into the judicial hierarchy of Australia through the Defence Force Discipline Appeal Tribunal to the Federal Court and ultimately the High Court.¹⁵⁷ No right of appeal exists against sentence for courts martial and Defence Force Magistrate trials. For the decisions of a summary authority, no right of appeal exists, however, all convictions and punishments awarded by service tribunals are subject to automatic review including legal examination of the proceedings by a Service lawyer.
- 4.85 The issues of appeal were considered by Justice Abadee in his recent study regarding the judicial independence of military trials. His Honour recommended that there should be no change to the current system of review of DFDA decisions by summary authorities as the system provides protections for Defence members and benefits to the Service in streamlining the administration of justice.¹⁵⁸ He further recommended that although arguments exist for a limited right of appeal in some cases from decisions of a commanding officer or other summary authorities, no action should be taken, at this stage, to introduce any such appeal rights.¹⁵⁹ With regard to a prosecution appeal, as of right or by appeal against sentence, Justice Abadee noted that whether there should be a right of appeal in respect of sentence would be a highly controversial issue. However he made no case for a change to the present procedure.¹⁶⁰
- 4.86 The Committee noted that the effective running of the organisation as a whole is of paramount importance and while individual grievances and appeals processes are essential they should not should inhibit the ADF from realising this objective. In addition the Committee accepted the ADF position that the 'present system of reviews, appeals and petitions is comprehensive and far exceeds what is available through the civil court system. Consequently, the introduction of further appeals (on sentence) is

156 See paragraph 2.113-115 of this report

157 Mr M Slattery, Transcript, p. 287.

158 Abadee, op cit, Recommendation 29.

159 *ibid*, Recommendation 27.

160 *ibid*, op cit, Recommendation 23.

unnecessary and would cause administrative delays to the finalisation of disciplinary matters.’¹⁶¹

Procedural Fairness

4.87 The ADF needs to have ‘access to a discipline system that can be applied expeditiously and in such a way that service discipline is maintained, operations are not impeded and command authority is supported.’¹⁶² Nonetheless, issues of procedural fairness must be observed and the rights of individuals must be adequately protected during the application of military discipline. In any circumstances where an action under the DFDA may adversely affect an individual, he or she has a right to expect that the principles of procedural fairness will apply. Specifically:

- Members have the right to be informed of allegations against them which are to be investigated under the DFDA. The exception to this right to be informed should be where an individual is ‘suspected of an offence and where forewarning may result in the destruction of evidence.’¹⁶³
- The subject of a complaint or allegation, against whom action is to be taken as a result, should, after the right to be informed has been satisfied, be afforded adequate opportunity to respond to the allegations or complaint.
- A member against whom action is to be taken should have access to any evidence relied upon in making a decision or taking any action that affects them.¹⁶⁴
- A member who is subject to an action under the DFDA which may adversely affect that individual has a right to expect that he or she is adequately informed, in a timely manner, regarding his or her status and the outcome of the inquiry in relation to matters relevant to him or her.
- Members have the right to expect that ‘actions or decisions taken as a result of an investigation will be based on logically probative evidence and to be provided with reasons for any decisions made or actions

161 Department of Defence, Submission, p. 1185.

162 Department of Defence, Private Briefing, Transcript, p. 5.

163 Ms P Smith, *op cit*, p. 73.

164 *ibid*.

taken (including the factors considered in reaching a decision and any further action proposed).¹⁶⁵

- Members affected by the outcome of a DFDA action should be provided an opportunity to respond to that decision or action and have the right to have any information submitted by them considered.¹⁶⁶
- Members affected by the outcome of a DFDA action should be advised of any right of review that may exist.¹⁶⁷
- Members are entitled to expect that any information relating to them will be treated discreetly and their privacy respected.¹⁶⁸

4.88 In her 1998 report, the Ombudsman concluded that ‘under the DFDA these principles are built into the processes for charging a member with an offence, hearing of charges and the orders of the hearing authority.’¹⁶⁹ In addition, she suggested that investigations conducted under the DFDA are generally satisfactory¹⁷⁰ and that she was satisfied that ‘every effort is being made to ensure that Service police will be adequately trained in the future.’¹⁷¹ With regard to confidentiality and privacy, the Ombudsman suggested that existing guidance is clear but not always adhered to. The Committee was satisfied that the principles of procedural fairness are inherent in the military discipline process but was unequivocal in its agreement that the ADF must adhere to existing guidelines on the right to privacy.

Recommendation 48

The Committee recommends that the ADF ensure that existing guidelines on the right to privacy are adhered to in the conduct of DFDA action.

165 *ibid.*, p. 73.

166 *ibid.*

167 *ibid.*

168 *ibid.*

169 *ibid.*, p. 74.

170 *ibid.*, p. iv.

171 *ibid.*, p. vi

Delay of Discharge

- 4.89 The Committee was provided with evidence that the ADF has retained personnel in the Service past their requested discharge date in order to finalise disciplinary action being taken against them.¹⁷² In one example offered in anecdotal evidence to the Committee, an officer was accused of theft and fraud involving \$30 000 to \$40 000. In an attempt to avoid action under the DFDA he applied for discharge but this was refused and the matter was referred to the Australian Federal Police. The officer was released from the service after the Australian Federal Police had formally laid charges some months after the officer's original resignation. Had the Australian Federal Police declined to proceed with charges the ADF would have proceeded with a series of offences under the DFDA.¹⁷³ Similar anecdotal evidence regarding two separate incidents was provided to the Committee by another submission.¹⁷⁴
- 4.90 In the cases considered by the Committee where discharge or resignation had been delayed and individuals had been retained in the ADF it was due to pending disciplinary action. Where the ADF refers an alleged offence to civilian authorities, there may be considerable delay in resolving the issue to a point where the member's discharge or resignation is allowed to proceed.¹⁷⁵ However, when the ADF deals directly with a matter under the DFDA the time taken to reach a point where the member's discharge or resignation is allowed to proceed is likely to be quite short. The Committee accepted that where action under the DFDA results in a custodial sentence, a member must complete that sentence before discharge or resignation is allowed to proceed.
- 4.91 One submission to the Committee suggested that members should be allowed to claim for discharge or resign regardless of pending disciplinary action claiming that the current system is unfair and that the ADF can use Section 96(6) of the DFDA. The Committee noted that the DFDA only applies to defence members¹⁷⁶ and defence civilians.¹⁷⁷ However, under the provisions of Section 96(6) of the DFDA, that:

172 Group Captain B Biddington, Submission, p. 326; Warrant Officer Class Two P Harris, Submission, p. 440; and Ms J Kelly, Transcript, p. 57.

173 Group Captain B Biddington, Submission, p. 326.

174 Warrant Officer Class Two P Harris, Submission, p. 440

175 During this period the member affected will continue to be employed by the ADF although the nature of that employment will be determined by the nature of the alleged offence (eg it may be inappropriate for a member against whom fraud is alleged to continue to be employed in the appointment in which the alleged offence occurred).

176 'defence member' means: (a) a member of the Permanent Naval Forces, the Australian Regular Army, the Regular Army Supplement or the Permanent Air Force; or (b) a member of the

A person who has ceased to be a member of the Defence Force or a defence civilian shall not be charged with a service offence unless: (a) the period that has elapsed since the person so ceased does not exceed 6 months; and (b) the maximum punishment for the service offence is imprisonment for a period of 2 years or a punishment that is more severe than that punishment.

- 4.92 The Committee noted that action under Section 96(6) of the DFDA would be limited to a small number of serious offences. Moreover, action under Section 96(6) would be prohibited if the period since the individual ceased to be a member of the ADF exceeds six months. Given that when a matter is referred to civilian authorities, the ADF case is in competition with other pressing cases¹⁷⁸ it is quite possible that a period greater than six months could elapse before the decision to pursue civil or criminal charges is made.
- 4.93 The Committee accepted that it is appropriate for a member's discharge or resignation to be delayed and that individual to be retained in the ADF where disciplinary action under the DFDA against that individual is underway. However, there should be no delay in the progressing of such disciplinary action and the member's discharge or resignation should be accepted, subject to the standard provisions of relevant Act,¹⁷⁹ on the finalisation of disciplinary action.¹⁸⁰ The Committee acknowledged the problems associated with delays when alleged offences are referred to civilian authorities. Nonetheless, the Committee accepted that the ADF is empowered under the relevant Act, and should be able to, delay the resignation or discharge of a member until disciplinary action has been finalised.¹⁸¹

Emergency Forces or the Reserve Forces who: (i) is rendering continuous full-time service; or (ii) is on duty or in uniform;

177 'defence civilian' means a person (other than a defence member) who: (a) with the authority of an authorised officer, accompanies a part of the Defence Force that is: (i) outside Australia; or (ii) on operations against the enemy; and (b) has consented, in writing, to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force.

178 Group Captain B Biddington, Submission, p. 326.

179 *The Defence Act 1903, The Naval Defence Act 1910 or Air Force Act 1923.*

180 Such finalisation may include the completion of a custodial sentence.

181 *The Defence Act 1903, The Naval Defence Act 1910 or Air Force Act 1923.*

Legal Representation

- 4.94 The Committee noted that under the provisions of the DFDA, an accused person awaiting trial by Court Martial or DFM trial shall, subject to the exigencies of the service, 'be afforded the opportunity to be represented at the trial, and to be advised before the trial, by a legal officer'¹⁸² at no expense to the accused person.¹⁸³ For summary proceedings, an accused may conduct his or her own defence or nominate another ADF member to defend them.¹⁸⁴ There is nothing in the DFDA to provide for an accused person to be represented by a legal officer, however the Act does not prohibit the summary authority from authorising legal representation.¹⁸⁵ In practice an accused person is normally represented by another ADF member, nominated by the accused. It is not general practice for an accused member to be represented by a legal officer, however in complex matters a summary authority may authorise the accused to be represented by a legal officer at no cost to the accused. Notwithstanding, the accused person is entitled to seek legal advice from a Service legal officer at no cost to the accused. In addition, any member of the ADF who represents the accused may, at no cost to themselves or the accused, seek legal advice from a Service legal officer in order to fulfil their duty as the Defending Officer.¹⁸⁶
- 4.95 When an ADF member seeks legal advice from a Service legal officer on a matter relating to DFDA action, that advice is provided at no cost to the member. Similarly, when an accused is represented by a Service legal officer in a DFDA action, that representation is provided at no cost to the accused. Where an accused chooses, in a DFDA action, to be represented by a civilian legal practitioner, that representation will be at the member's expense. In civil or criminal cases, a Service legal officer may not act for or formally represent the accused but may, if a Reserve officer, be retained by the accused as a private legal practitioner.¹⁸⁷ Service legal assistance is also available to assist members in preparing petitions and appeals, if convicted.
- 4.96 In the evidence presented to the Committee, the principal issue in respect of legal representation was the standard of legal representation provided to members subject to disciplinary action under the DFDA. One
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182 DFDA, Section 137 (1).

183 DFDA, Section 137 (2).

184 ADFP 201, Volume 1, Chapter 7, pp. 7-10.

185 Department of Defence, Submission, p. 1216.

186 *ibid.*

187 Ms P Smith, *op cit*, p. 63.

submission suggested that there is potential within the ADF discipline system for disparity in the level of experience of defence and prosecution counsel.¹⁸⁸ Indeed, several submissions to the Committee suggested that the quality of legal representation provided for the defence of an ADF member has, on occasions, been far lower than the quality of the legal resources used by the ADF to prosecute the case against the member.¹⁸⁹ In practice, the only limiting factor in the selection of legal representation for an accused person is the availability of Permanent Force legal officers and for this reason accused persons are often provided with Reserve legal officers.¹⁹⁰ Nonetheless, the Committee agreed that the level of forensic experience of appointed defence counsel should be comparable with that of the prosecuting officer.

- 4.97 Another issue raised in regard to legal representation was the impartiality of Service legal officers.¹⁹¹ One submission suggested that ADF lawyers are employed within the chain of command and consequently they can be commanded to do things against their legal training.¹⁹² However the Committee accepted that one reason a Permanent Force legal officer may be unavailable may be because he or she has the responsibility to provide advice to the command structure, and representation of the accused would bring into question issues of conflict of interest.¹⁹³ In addition, the Committee accepted that the use of Reserve officers in the provision of legal representation addressed many of the concerns regarding conflict of interest caused by the influence of the command chain.
- 4.98 There seems to be no limit placed on the financial and human resources used by the ADF in prosecuting potential offences, yet there are strict limits placed on the level to which the ADF will fund the legal representation of accused ADF members. In one case presented to the Committee, an officer believed he was unable to obtain, from an Army Reservist, impartial legal council to defend him at court martial, selected a civilian lawyer, however, Army declined to fund that lawyer's preparation.¹⁹⁴

188 Ms J Kelly, Transcript, p. 60.

189 Hilton Review into the Board of Inquiry into the command of Squadron Leader R P Vance, Officer Commanding, No 92. Wing Detachment A, Butterworth, Malaysia, p. 5; and Ms J Kelly, Transcript, p. 60.

190 Department of Defence, Submission, p. 1216.

191 Mr D Hartshorn, Submission, p. 3.

192 Ms J Kelly, Transcript, p. 63.

193 Ms P Smith, *op cit*, p. 63.

194 Colonel M Sampson, Submission, p. 949.

Cost

4.99 The Committee acknowledged that there ‘is no historical cost for the conduct of trials by Service tribunals under the DFDA. The cost of trials varies widely according to whether the accused member pleads guilty or contests the charges, whether the accused member is legally represented and how many witnesses need to be called.’¹⁹⁵ The Committee noted that military discipline system is operated primarily by members of the ADF who perform disciplinary functions as a secondary duty that is incidental and additional to their normal duties.¹⁹⁶ While many of the functions performed in the military discipline system involve no direct cash expenditure there is a cost in accrual terms. However, the Committee accepted that the ADF does not currently capture accrual costings of such functions. Earlier in this report¹⁹⁷ the Committee has recommended that the ADF examine the feasibility of capturing the cost of the military justice system.

Training

- 4.100 The Committee noted that the issue of education and training in regard to the operation of the military discipline system was addressed by the Defence Force Discipline Legislation Board of Review 1989, reports to the Minister by the JAG and the recent report by Justice Abadee. These reports suggested that ‘members of the ADF who have no legal training are required to act according to, or to make decisions based on a complex set of legislation.’¹⁹⁸ In its submission, the ADF acknowledged that ‘an effective education and training program is an essential ingredient of the entire system of discipline in the ADF.’¹⁹⁹
- 4.101 Justice Abadee recommended that increased formalised training and education should be provided to commanding officers before they assume their appointment and exercise service tribunal jurisdiction as a summary authority and that this should be complemented by ongoing education and instruction for officers who act in the capacity of a summary authority.²⁰⁰ In addition, His Honour recommended that basic legal
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195 *ibid.*

196 Department of Defence, Submission, p. 1290.

197 See Recommendation 44 of this report.

198 Department of Defence, Submission, p. 577.

199 *ibid.*, p. 554.

200 Abadee, *op cit*, Recommendations 33, 38, 39 and 43.

training and work materials should be provided to personnel who may be required to act as a prosecuting or defending officer at a summary trial.²⁰¹ Justice Abadee also suggested that sentencing statistics and guidelines in relation to summary punishments should be published from time to time.²⁰² Further, he suggested that instructions be given that any summary authority²⁰³ who has been involved in the investigation or the preferring of a charge against an accused should not hear or deal with any such charge against that accused.²⁰⁴

- 4.102 The ADF has accepted these recommendations and undertaken to conduct a 'formal training needs analysis with respect to the use and implementation of the DFDA.'²⁰⁵ Further the ADF have agreed that this analysis will form the basis for the development and introduction of appropriate education and training courses.²⁰⁶

Recommendation 49

The Committee recommends that the ADF undertake a formal training needs analysis with respect to the use and implementation of the DFDA as a basis for the development and introduction of appropriate education and training courses.

- 4.103 Evidence presented to the Committee also suggested that the training and education of Service legal professionals who operate under the DFDA needs to be addressed. Indeed Justice Abadee recommended that the training and certification of s.154(1)(a) and s.154(1)(b)²⁰⁷ officers should be

201 *ibid*, Recommendation 44.

202 *ibid*, Recommendation 40.

203 including Commanding Officer, Superior Summary Authority and Subordinate Summary Authority.

204 Abadee, *op cit*, Recommendation 45.

205 Department of Defence, Submission, p. 577

206 *ibid*.

207 Report to be obtained before commencement of review (DFDA, Section 154)

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

(a) in the case of a conviction, or a direction given under subsection 145 (2) or (5), by a court martial or Defence Force Magistrate - a legal officer appointed, by instrument in writing, for the purposes of this section by the Chief of the Defence Force or a service chief on the recommendation of the Judge Advocate General; or

(b) in any other case-a legal officer.

(2) Subject to subsection (4), a reviewing authority, in making a review, is bound by any opinion on a question of law set out in a report obtained under subsection (1).

examined.²⁰⁸ This recommendation has also been accepted by the ADF and will be incorporated in the planned training needs analysis.²⁰⁹ One submission to the Committee suggested that while Defence Force Magistrates and Judge Advocates must have some worthwhile military experience they also need to be given continuation training on the DFDA.²¹⁰ That submission went on to suggest that there is a need to move from the triennial day and a half seminar to proper structured training for Defence Force Magistrates and Judge Advocates.

- 4.104 The Committee agreed that on the basis of the evidence presented in the inquiry, a higher standard of legal training is necessary for ADF personnel required to implement the DFDA. The Committee acknowledged that the ADF training needs analysis and the subsequent introduction of appropriate education and training courses is a positive step towards addressing the current shortfall. In addition, the Committee agreed that the ADF should consider the introduction of structured continuation training for Defence Force Magistrates and Judge Advocates on the DFDA.

Recommendation 50

The Committee recommends that the ADF consider the introduction of structured continuation training for Defence Force Magistrates and Judge Advocates on the DFDA.

Detention Centres

- 4.105 The Committee acknowledged the important role in the military discipline system played by Detention Centres, particularly the DFCE and noted that in recent history, four inquiries have centred on the DFCE. Two of the inquiries addressed 'Attitude Adjustment Training'²¹¹ (AAT) at the DFCE

(3) A reviewing authority may refer a report obtained under subsection (1) to the Judge Advocate General or, if the Judge Advocate General so directs, to a Deputy Judge Advocate General.

(4) On a reference under subsection (3) of a report, the Judge Advocate General or the Deputy Judge Advocate General may dissent from any opinion on a question of law set out in the report and, if he or she does so, he or she shall furnish to the reviewing authority, in writing, his or her own opinion on that question, which opinion is binding on the reviewing authority.

208 Abadee, *op cit*, Recommendation 31.

209 Department of Defence, Submission, p. 1188.

210 Colonel K Northwood, Submission, p. 872.

211 Also known as 'Discipline Tours', 'Compound Tours' and 'Correctional Tours'.

and were conducted by Captain R.G. Long, RANR. Consequently, a 'separate investigation into allegations of unlawful activities in connection with AAT at the DFCE was undertaken by Group Captain C.M. Stunden, RAAF.'²¹² A subsequent, broader review, by Brigadier M.W. Meecham, was conducted 'to review DFCE, its concepts, processes, documentation, management and supervision to determine whether it was meeting the objectives of military rehabilitation and whether its operations were in line with contemporary standards.'²¹³

- 4.106 The inquiries by Captain Long sought to investigate allegations of abuse during AAT at the DFCE. AAT was initiated circa 1991 as a familiarisation tour of the DFCE intended to deter potential detainees from committing offences liable to prosecution under the DFDA. The concept for AAT was a tour of the DFCE compound and the detention cells coupled with an explanation of the daily routine that a detainee could expect. Over time, AAT developed into 'a short, structured form of punishment ...[and]...personnel were being treated more as inmates.'²¹⁴ Some military personnel who participated in such tours 'claimed they had been physically assaulted and forcibly imprisoned.'²¹⁵
- 4.107 The ADF initiated the first of the inquiries by Captain Long on 18 March 1998. After submitting his inquiry report on 31 March 1998, Captain Long was commissioned to conduct a second inquiry on 8 April 1998. The second inquiry was convoked to investigate matters that were outside the scope of the initial inquiry. Concurrent with the second inquiry by Captain Long a separate, independent investigation into allegations of physical assault and forcible imprisonment was initiated by the Chief of Defence Force and conducted by Group Captain C.M. Stunden, RAAF. Group Captain Stunden, assisted by advice from the Australian Federal Police,²¹⁶ sought to determine whether any charges should be laid under the DFDA.
- 4.108 The recommendations contained in the report by Brigadier Meecham are currently being addressed by the ADF. 'Those recommendations which are procedural in nature are currently being implemented.'²¹⁷ In addition, direction 'has been given to develop proposals to implement other recommendations that have wider application, such as tri-service policy on detention centre committal procedures, a formal inspection and

212 Minister Assisting the Minister for Defence, response to Question on Notice Number 556.

213 Department of Defence, Submission, p. 1268.

214 Minister Assisting the Minister for Defence, Hansard, 23 March 1999, p. 3426.

215 *ibid.*

216 The Australian Federal Police provided advice on the framing of the investigation process and were engaged to review possible offences.

217 Department of Defence, Submission, p. 1268.

licensing system for detention facilities and a code of conduct.’²¹⁸ The Committee accepted that these issues will take several months to finalise.²¹⁹

- 4.109 AAT was suspended from 31 July 1997 on the initiative of the Officer Commanding DFCE and has not been recommenced. The Committee noted that no ‘individual person or authority has been identified as being responsible for the transition from familiarisation tours to AAT’²²⁰ and that no action, either under the DFDA or of an administrative nature, has been taken against any individual as a result of AAT. The Committee further noted the ADF conclusion that although it was ‘clear that there had been a departure from proper procedures’,²²¹ AAT was provided for in DFCE Standing Orders,²²² and ‘there was no evidence of professional failure that would warrant disciplinary or administrative action on the part of any individual.’²²³
- 4.110 The Committee was concerned that a disciplinary measure could be developed in the absence of any ADF policy or guidance. Further, that AAT was able to degenerate from the initial concept of familiarisation tour of the DFCE intended to deter potential detainees into a structured form of punishment without any command intervention. The fact that AAT endured unchecked for six years and that the ADF has clearly failed to meet ‘duty of care’ requirements is deeply disturbing. However, the Committee acknowledged and strongly supported the significant changes to the DFCE stemming from the Meecham report.
- 4.111 Given the public interest in the matter of AAT and the operation of the DFCE in general the Committee was of the view that that the Meecham report and the action taken to implement the findings and recommendations of that report should be made public. Moreover, as part of a comprehensive public disclosure of the matter of AAT, the Meecham report, a comprehensive report on the matter of AAT and any relevant documents relating to AAT should be tabled in the Parliament.²²⁴

218 *ibid.*

219 *ibid.*

220 Minister Assisting the Minister for Defence, response to Question on Notice Number 551(3).

221 Department of Defence, Submission, p. 1268.

222 Minister Assisting the Minister for Defence, response to Question on Notice Number 551(2).

223 Department of Defence, Submission, p. 1268.

224 Under D(I)R 63, all or part of an inquiry report may only be released on the authority of the Minister.

Recommendation 51

The Committee recommends that, as part of a comprehensive public disclosure of the matter of AAT, the Meecham report, a comprehensive report on the matter of AAT and any relevant documents relating to AAT should be tabled in the Parliament.

Reporting

- 4.112 The Committee noted that the JAG reports annually to the Minister of Defence as a statutory requirement established by Section 196A of the DFDA. The report covers the operation of the DFDA, the regulations and rules of procedure and the operation of any other law of the Commonwealth or of the Australian Capital Territory in so far as that law relates to the discipline of the ADF. The Committee further noted that the Act requires that the Report include such statistical information as the JAG considers appropriate and that in practice the Report includes statistical summaries of Courts Martial, DFM and summary trials. Once the JAG Report is laid before each House of the Parliament by the Minister of Defence the Report becomes public information.
- 4.113 The Committee accepted that the JAG Report satisfied the requirements to publicly report on the operation of the DFDA. However, the Committee did note that as at 24 May 1999, the JAG Report for 1998 had not yet been tabled in the Parliament by the Minister of Defence. The Committee was of the view that the report on the operation of the DFDA should be tabled in a more timely manner.

Recommendation 52

The Committee recommends that the report on the operation of the DFDA should be tabled in a more timely manner.

- 4.114 The Committee also concluded that the ADF should publicly account for the operation of the military inquiry system and the administrative action system by the provision of an annual report to the Minister of Defence. These conclusions are covered in detail at paragraphs 3.163 and 5.65

respectively of this report. As outlined earlier in this report,²²⁵ the Committee was of the view that it would be sensible to combine the reporting requirements for military inquiries, the DFDA and administrative action in a single report to the Minister of Defence.

225 See Recommendation 45 of this report.