



COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE

ON

FOREIGN AFFAIRS, DEFENCE AND TRADE

(Defence Subcommittee)

Reference: Military justice procedures

CANBERRA

Monday, 11 May 1998

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

(Defence Subcommittee)

Members:

Senator MacGibbon (Chairman)

Mr Ted Grace (Deputy Chair)

Senator Bourne	Mr Bob Baldwin
Senator Ferguson	Mr Bevis
Senator Sandy Macdonald	Mr Bradford
Senator Margetts	Mr Brereton
	Mr Brough
	Mr Dondas
	Mr Georgiou
	Mr Hicks
	Mr Lieberman
	Mr McLeay
	Mr Price
	Dr Southcott
	Mr Taylor

Matters referred:

- (1) the adequacy and appropriateness of the existing legislative framework and procedures for the conduct of:
 - (a) military boards of inquiry;
 - (b) military courts of inquiry; and
 - (c) Defence Force discipline.
- (2) Without limiting the scope of the inquiry, the committee shall give consideration to:
 - (a) the needs of Australian Defence Force in peace and in the conduct of operations within Australia and overseas;
 - (b) the constitutional and legislative framework within Australia, and particularly precedents established by the decisions of the High Court of Australia;
 - (c) the Judge Advocate General's annual reports; and

- (d) other reports, including but not limited to, reports of the Parliament, the Commonwealth and Defence Force Ombudsman's annual report for the 1996-97 financial year and reports from relevant overseas jurisdictions.

WITNESSES

BAKER, General John Stuart, Chief of the Defence Force, F-3-CDF Suite, Department of Defence, Canberra, Australian Capital Territory 2600	2
BIDDINGTON, Group Captain, Brett, PO Box 165, Mawson, Australian Capital Territory 2607	70
CHALMERS, Vice Admiral, Donald Bruce, Chief, Royal Australian Navy, Building A-4-19, Russell Offices, Canberra, Australian Capital Territory 2600	30
KELLY, Miss Jacqueline Marie, MP, Parliament House, Canberra, Australian Capital Territory 2600	52
McCORMACK, Air Marshal Errol John, Chief, Royal Australian Air Force, Air Force Headquarters, Department of Defence, Canberra, Australian Capital Territory 2600	30
SANDERSON, Lieutenant General John Murray, Chief, Royal Australian Army, Army Headquarters, G-2-11, Russell Offices, Canberra, Australian Capital Territory 2600	30

JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE
(Defence Subcommittee)

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Present

Senator MacGibbon (Chairman)

Senator Bourne

Mr Bevis

Mr Brough

Mr Dondas

Mr Price

Subcommittee met at 1.03 p.m.

Senator MacGibbon took the chair.

**BAKER, General John Stuart, Chief of the Defence Force, F-3-CDF Suite,
Department of Defence, Canberra, Australian Capital Territory 2600**

CHAIRMAN—I welcome General Baker, the Chief of the Defence Force, who is the first witness in the public hearing this afternoon. This morning we had a private briefing from the legal division within the ADF which was directed primarily at laying the foundations on which military justice is administered. There were some questions there, but they were really quite restricted to the information that was passed out at the time.

Gen. Baker—Thank you for accepting my request to appear before this committee early in its hearings. I say that also for the service chiefs who will follow as the next witnesses. In particular, they will talk to you about military justice procedures in the context of command.

We do not believe this will be the one time that the service chiefs, myself or anyone else in uniform appears before this committee. We will provide whatever support is necessary to inform you and to contribute to your deliberations. In particular, should you so wish, as you begin to form your report, the Chiefs of Staff Committee will be available should you wish a professional sounding board to test any of your deliberations.

I would also like to say from the outset how much I, in particular, welcome these hearings. I expect the outcomes will be valuable in shaping future arrangements in the important areas of military justice and discipline, and inquiries. When I say ‘inquiries’, of course, I include investigations, which are by far the bulk of what we do in terms of inquiries.

All of you will have seen the CDF submission, and it was further explained by the legal staff this morning. I think that sets out some useful parameters and factors for you. I do not intend to cover in detail the same ground, but I think there are a number of very general aspects that I would like to cover before any discussion or questioning that you might like to have.

I think it is very important to distinguish clearly between military justice and military inquiries. They are distinctly different processes, governed by separate legislation, regulations and rules. I believe the blurring of this has resulted in much confusion and misunderstanding in public eyes generally. In particular, investigations, inquiries, are not bound by the rules of evidence that apply in discipline and in judicial processes. They are designed to establish facts and not to apportion blame. It is important to accept that evidence gathered in those inquiries is not admissible in trials. Clearly, this has been the cause of much media speculation which, I believe, has been very much premature and, in many cases, unjustified. The Black Hawk case is a classic example.

It is one of the areas that causes problems for us in holding open inquiries, because people can be compelled to incriminate themselves, and it is not fair to them to do it in an

open manner. That is not to say we will not have open inquiries, such as in the *Westralia* case. Indeed, in the Black Hawk case there was an open inquiry, and there will be more in future, I believe. But you have to accept the limitations in doing it.

In peacetime, within Australia, the military justice system is essentially a discipline system, not a judicial system. Under the arrangements in place at Commonwealth and state levels, serious transgressions having a civilian equivalent will normally be dealt with by the civilian courts, not by the military, or at least they will be dealt with at the discretion of the relevant DPP. Where, for their own reasons, and after coronial inquiries, DPPs decide that no civil action will be undertaken, military authorities are left with few options. Normally, it is to take action under the Defence Force Discipline Act, but because it has been rejected by civil authorities, it has to be primarily on issues of discipline, not criminality.

I see this as another important area of understanding. It is an area in which the ADF is sometimes criticised, when the primary decisions on action are in fact taken by civil authorities, not by the military.

Certainly, in my view, the Defence Force Discipline Act, since its introduction in 1985, has served us reasonably well. Our statistics are limited but we estimate in that time there have been about 75,000 matters dealt with by summary authorities and about 700 or more court martials or matters dealt with by defence force magistrates. As no doubt was covered this morning, every conviction and punishment is subject to automatic review.

I think the fact that there have been very few appeals under the Defence Force Discipline Appeals Act—five appeals against court martials and Defence Force magistrates in three years and 176 trials—testifies to the value of the process. Many would claim that that is a far better process than is arrived at in civil proceedings. I think the statistics speak for that. Of course, the High Court has ruled several times now, albeit by split decision, in favour of the Defence Force Discipline Act and its jurisdiction.

You should also remember that there have been almost constant processes of review of the Defence Force Discipline Act since its implementation. There was one major review of the Defence Force Discipline Act after three years of its operation—that took a little time to finalise. There is an annual report to the minister by the Judge Advocate General and through him to the parliament. There have, of course, been challenges which have been adjudicated on by the High Court. I think it is fair to say that the act and the processes have continued to develop with the experience and practice over the 12 years in which it has been in operation.

We accept that practice of the law is not static. It changes over time and we need to change with it. This is why, although the High Court ruled in support of the Defence Force Discipline Act, I commissioned the examination by Judge Abadee into military justice, including emphasis on independence and impartiality.

The Abadee report has been made available to this committee. It is a report that puts the issues squarely on the table, without recommendations as to particular courses of action, but it does, I think, canvass the key issues. These have all been considered by the Chiefs of Staff Committee. Their conclusions are also available to the committee. These do recommend some changes, primarily directed at the perception of independence and impartiality of service tribunals, and they do distribute the present duties as a convening authority. I commend Abadee and its consideration to your committee. I think it covers a host of issues that you are likely to be most interested in in terms of military justice.

I wish to stress the importance of military justice to the command and discipline of the ADF. We must never lose sight of the primary purpose of the ADF: to fight and to win. Similarly, we should never underestimate the importance of discipline to us meeting our combat responsibilities. The ADF is fundamentally a command driven organisation, integrating authority, responsibility and leadership at all levels. Discipline is not something imposed simply by rules and regulations. It is a state of mind brought about by good leadership exercising legal authority. Poor discipline leads to poor performance on the battlefield. We should all be very careful to preserve all of those elements which contribute to the standing and the battle reputation of the ADF.

I would like to make a few points about inquiries, in particular, boards of inquiry, which seem to be the focus of most challenge and debate. Again, I would like to stress a few points. Boards of inquiry are not courts, nor are they of themselves executive bodies directing action. They are simply fact finding arrangements to provide a basis for decisions and necessary action by a responsible authority. The only people who can take authority and take action within the Defence Force are the commanders empowered by the law of the land. I wish this were more clearly understood.

There are many forms of inquiries within the ADF. Boards of inquiry provide a more formal process for matters of complexity or moment. But given the costs and overheads associated with boards of inquiry, they should be used selectively where lesser or alternative methods are inadequate.

I think we should accept from the outset that most boards of inquiry will fail to satisfy everyone concerned. After all, they should be dealing with complex issues of substance, often involving highly emotional issues. Individual dissatisfaction with outcomes should not lead to assumptions that the process is flawed. They are almost inevitable. Further, boards of inquiry are supported by legal counsel—these days, normally of very high quality, making full use of reserve legal officers.

Having said that, we accept that there is always room for improvement in what we do. In the case of boards of inquiry, my view is that the defence inquiry regulations are basically adequate. But experience with about 300 boards of inquiry suggests we need a number of improvements in practice. This led to my asking the Defence Force Ombudsman to undertake an own motion review of a particular case to see what lessons

we could learn.

I commend to you the submission by the ombudsman and the actions already well in hand within the ADF to improve our practice. I think the ombudsman's submission and the actions flowing from it will address many of the issues of concern to your committee.

In conclusion, the work done by Abadee and the ombudsman indicates that the ADF is already working on these issues and adjustments are already being made. I am very concerned about a perception of public lack of confidence in ADF inquiries and judicial processes. I look forward to your report generating additional confidence publicly in what we do.

In making your recommendations, it is important that a number of key parameters be observed. I suggest that these include the following matters. They must add to our capacity to win on the battlefield. They must recognise the special characteristics of a disciplined defence force and that those characteristics do not originate simply from a set of rules but do involve leadership, authority, responsibility and morale. They must not cut across the requirements of clarity and unambiguity of command. They must apply both in war and in peace. The culture of command and discipline is not developed easily or quickly. ADF standards will be beyond the community norm. They must be drawn not only from sound legislation but also from sound practice based on guidance, education and training. Finally, they must provide adequate, appropriate and timely standards of justice.

Those are the points that I wanted to make. I am only too happy now to entertain any questions or discussion.

CHAIRMAN—Thank you very much, General. I think that was very appropriate. In your time as CDF, how much of your time do disciplinary matters and the broad gamut of legislation take? I am not diminishing the importance of it and I am not asking you to rank or prioritise the importance of disciplinary matters. Has it been a major concern, with respect to administrative time, for you as CDF?

Gen. Baker—With regard to discipline, probably no, except in the case of trying to look to the future; the Abadee report and those issues have been a significant factor. But the exercise of discipline is mainly carried out through service chains of command. I think we are in deep trouble if disciplinary issues come to the level of CDF. I am more interested in the administration of discipline than discipline itself.

In terms of inquiries, administrative problems and issues to be resolved, a large percentage of my time is devoted to that—far more than I would like. Some of that process helped contribute to my request to the ombudsman to look at the way we were handling some boards of inquiry. I was not dissatisfied necessarily with their findings, but I was concerned and worried about some of the processes involved and about some of the difficulties in reaching proper judgments about them. I think the ombudsman's submission

to this committee is a first-class piece of work.

CHAIRMAN—In relation to that topic you have raised, is there anything you would like to say about the processes of the largest inquiry in your time as CDF—that is, the Black Hawk inquiry? Do you have any reservations about that in any way at all?

Gen. Baker—The Black Hawk inquiry was an open inquiry—the first that I can recall being open—in which everybody had availability of counsel, and there was pretty solid legal advice right through. I am satisfied with the board of inquiry, given that it is merely a fact-finding organisation. It is not there to make judgments or to take action; it merely elicits the facts. I believe it did elicit the facts associated with the accident itself.

CHAIRMAN—With respect to the processes followed by the Black Hawk inquiry, is there any procedural change that you would recommend? Forget about the outcomes.

Gen. Baker—I am not conscious that I would like to make any. Like all of these things, time and time pressures become an issue. I would like to find ways of doing these things more quickly. I think there are aspects related to the accident investigation and the board of inquiry and how they should be merged together, because they are presently two separate activities.

The thing that concerned me most about Black Hawk was the publicity and the distortion of what was going on—as it was occurring in public—because of the false assumptions about the evidence and what was being done at the inquiry.

CHAIRMAN—Would you like to expand on that for the benefit of the committee?

Gen. Baker—The basic thing is that, at a board of inquiry, witnesses are compelled to answer. They have no choice if the board puts it to them. In that situation, they can incriminate themselves. That is a very strong limitation on having an inquiry open to the public, because it immediately produces a media feast, and I think that is unfair to the individuals involved. That is one of the real problems associated with it. Because it is simply a fact-finding thing and because there might be a need to take appropriate action to avoid the further risk of loss of life or critical issues, it needs to be done speedily.

The Black Hawk inquiry was under great pressure to finish quickly, but it still took a very long time to do. Had there been much more serious safety issues involved that were of immediate application elsewhere in the ADF, we would have to have done something else. So there are those sorts of concerns. I am not sure how you overcome them.

CHAIRMAN—I do not want to get into the details of any of the major cases that have resulted in inquiries, but one point that is not related to justice and outcomes but to costs—you would be aware of the inquiry into the Butterworth incident in Penang where,

apparently, no control was exercised on the cost of the inquiry. What is the mechanism to prevent a re-run of the multimillion dollar trial over something which, in one way, did not justify any of that cost?

Gen. Baker—I think there are several things. First of all, I think there has been a tendency to use boards of inquiry where other methods would have been equally satisfactory. We should restrict boards of inquiry to matters of moment. I am not pretending that the Butterworth issue was not a matter of moment, but it was not a matter of great moment in terms of the administration of the Defence Force; it was a matter of moment to the individuals concerned. I think we might have been able to deal with that by a separate process.

CHAIRMAN—What would that process be?

Gen. Baker—We tend to use boards of inquiry to deal with interpersonal relationships, where counselling and different forms of arbitration action might be a better process. We tend to use boards of inquiry where there has been a failure to take appropriate administrative action at an early stage. I think we tend to overuse boards of inquiry and we must be careful.

Secondly, in my view, and one of the things that caused me to go to the ombudsman, was the fact that we tended to fire and forget. We convened a board of inquiry and left it to get on with its business whereas the appointing authority should be continually monitoring, guiding and assisting the board of inquiry to keep its relevance, timeliness and appropriateness on track. After all, the board of inquiry is there to help the appointing authority make some decisions on what he or she is going to do about it. That is what it is all about. It is not a court; it is to help the responsible authority to make decisions. You should not just step back from it.

CHAIRMAN—What other vehicles were available in the case of that Butterworth inquiry?

Gen. Baker—I think it was a case which could have been handled by strong command influence, without the formality of a board of inquiry. The decisions by commanders might have avoided the need for it. I would not like that to be taken literally in terms of the Butterworth incident but, in terms of those sorts of issues, strong command action can often resolve the need for an inquiry.

CHAIRMAN—Thank you.

Senator BOURNE—General Baker, this morning we were given a really good general outline of the general court of inquiry; we have not had any of them. Do you have any idea as to what sorts of circumstances would lead to something of that level being convened?

Gen. Baker—Ask the minister.

Senator BOURNE—So it would just be something the minister would decide.

Mr PRICE—Were you surprised that there was not a general court of inquiry with the Black Hawk, given that that is the highest—

Gen. Baker—That was not necessary, in my view. Remembering what it is, it is not a court. It is merely establishing the facts. A court of inquiry needs a very serious incident: it is the nearest equivalent to a royal commission.

Senator BOURNE—It would be like the *Voyager*, or something like that?

Gen. Baker—Even that. How many royal commissions produce total satisfaction?

Mr BROUGH—Would it be more likely that a general court of inquiry would be deemed necessary by the minister if he thought that the CDF was perhaps somehow involved—perhaps not involved, but implicated—in part of the inquiry and that some fault may lay there?

Gen. Baker—If there was a view that the CDF or one of the service chiefs was mismanaging or not carrying out their responsibilities effectively, that is the provision available to the minister; if he feels he has to do it in that way. It would need to be very serious, because the powers available to the minister in terms of appointing and not reappointing people are also pretty effective.

Mr BROUGH—Yes.

Gen. Baker—I think it has to be something of a very serious nature which is going to go beyond disciplinary processes to resolve. But that is a matter for ministers, and it is a provision which I believe should be retained because, after all, we do all work for the government and the people, and through the parliament.

Mr PRICE—So you can take action of your own in terms of a board of inquiry?

Gen. Baker—The only people who can establish boards of inquiry are authorised people within the Defence Force itself. But, as to ongoing activities, clearly we work under the general control and direction of the minister, and we keep him informed as to what is going on.

Mr PRICE—How would he take a decision for a court of inquiry if you have got the power to gazump him, in a sense, by instituting a court inquiry?

Gen. Baker—It is not gazumping him. My responsibility, through him, to the

parliament and the people of Australia is for the effective administration of the Defence Force. If I fail to take those actions, he ought to thump me—not literally but authority wise.

Mr PRICE—I should have said that I was trying to develop a hypothetical situation; I am sure it has never occurred.

Gen. Baker—That does not occur. The relationship between the Chief of the Defence Force and the minister is not something that just deals with the here and now; it deals with the ongoing business of government and the Defence Force. It is a sound working relationship so that the parliament can be assured that the Defence Force is working under the general control of the minister. You do not just go running to him when something goes wrong; you are with him every day, almost.

Mr PRICE—Would you agree that, with the way a board of inquiry is convened, it is almost impossible to implicate a service chief—hypothetically—if that service chief somehow shares some burden of responsibility or measure of responsibility?

Gen. Baker—I would like to say to you that I, as the Chief of the Defence Force, bear some responsibility for everything that happens within the Defence Force. I believe it is the same for the service chiefs, but within their own service. It is not an issue, in my view. It is a question of whether the adequacy of my actions and those of the service chiefs meets the needs of the minister and government of the day. A board of inquiry will not answer that question for you. It is not intended to lay blame; it is intended to elucidate the facts. It is up to the authority to then decide what he is going to do about it.

Mr BEVIS—Can I pick up on that, General. I understand the distinction you are drawing, but, for the people in uniform who are subject to these, and for the general public, the fact that the board of inquiry may well come to some form of conclusion and recommendation as to subsequent disciplinary action rather flies in the face of what is that technical role. It is difficult to divorce the fact finding from the disciplinary when the same body in the same process makes recommendations about both.

Gen. Baker—It may be, but not necessarily.

Mr BEVIS—But very often the board will make recommendations about both—that is, the fact finding of what transpired in the incident together with some comment about what disciplinary action it sees as appropriate.

Gen. Baker—It is appropriate for the board of inquiry to suggest that disciplinary action is appropriate. Should the appointing authority or any other authority reading that decide that there is a case to be answered, he or she then has the requirement to establish a separate process of evidence gathering. It is on that basis that charges are laid, by either civil or military authorities, according to the nature of the event, and it is a separate

process.

Mr BEVIS—Yes, I understand the distinction, but I am not at all surprised by the perceptions of people in uniform and the public—which are in some cases a misunderstanding of the roles, but in other cases not—when you give a fact-finding authority to a group of people who also have the power to recommend disciplinary action as part of that activity. Even though another group of people will consider the disciplinary action and the evidence separately, the fact that those two roles are put together is inevitably seen in the minds of people as the two coming as one. It is a pedantic piece of law to them.

Gen. Baker—I can understand how people see that, and this is one of the points that needs very clear clarification. But put yourself in the position of the commander of an activity in which something goes wrong. How on earth are you going to decide what to do about a complex issue unless you let people go out and elucidate the facts for you? If you had time you would do it yourself, but what if you are frantic and you do not have the time? You are still the commander, you are still responsible for things that happen under your command and you are charged with doing something about it, so you need to gather the facts. There cannot be a problem; you do not just decide to do something.

CHAIRMAN—I think the committee can see that point.

Gen. Baker—I do accept there is a public perception, which is worrying me—

Mr BEVIS—I do not think it is just the public, John. I think there are people in uniform who sit there and say, ‘Hold on. I know this is a board of inquiry and I know it is only looking at facts but, at the end of the day, I might find myself on a disciplinary charge arising out of it.’

Gen. Baker—Yes, you are right.

Mr BEVIS—It is not just a public perception.

Gen. Baker—What is important then is that the disciplinary processes be fair and sound. I do believe that they largely are. The number of appeals tends to prove that.

Mr BROUGH—What about the relationship of open inquiries? You made a couple of points earlier. Do you think that this also corrupts the whole process where they are then tried by the media before you have got to the disciplinary side of it?

Gen. Baker—Yes.

Mr BROUGH—What is your view? Should we, with the hindsight now of the Black Hawk incident, have open inquiries in the future?

Gen. Baker—We are about to have another one on *Westralia*.

Mr BROUGH—Do you believe that that is the way to go?

Gen. Baker—There are issues in many cases like *Westralia* where I believe it is appropriate to be open. There are issues where there might be aspects of personal liability and criminality involved and we are bound to keep at least that part of it closed. It is important to understand that, if you have these open and people are reluctant to come forward with ideas and evidence and suggestions, the end result will be inferior. After all, what we are trying to do in most instances of investigation is prevent recurrences. My concern with Black Hawk was—and indeed still is—to prevent a recurrence of that accident. I believe that is my responsibility as the commander.

CHAIRMAN—I would like to go back to the point Mr Price raised this morning about the de facto immunity of the chiefs from any censure. That is really what he is driving at behind the obliquity of his comment. How do you overcome that?

Gen. Baker—There are several ways that can be overcome. First of all, if it is a service chief, you have CDF, who has command.

CHAIRMAN—Has a CDF ever intervened to censure a chief of staff?

Gen. Baker—The CDF has, at times, issued some directions and done things which the service chiefs have not been happy about and caused things to happen that the service chief does not want to happen. Any Chiefs of Staff Committee has elements of that involved in it. That is part of the responsibility. Secondly, they are statutory authorities responsible through CDF to the minister. The minister has powers to deal with issues if he is not satisfied with the performance of a chief.

CHAIRMAN—Yes, but if the BOI does not reflect on the conduct of the chief of staff, then the minister can take no action, nor can the CDF. What we are talking about here is not personal negligence. A chief of staff may have approved an administrative process which was fundamentally flawed and resulted in an accident with loss of life. The board of inquiry comes in at a low level and somebody—maybe a wing commander or someone at that rank structure—takes the rap for it and no-one above that is involved at all. Yet they had oversight and legal responsibility for it. I think that is the point Mr Price is trying to make.

Mr PRICE—Yes, but not quite as delicately as you.

Gen. Baker—I think any board of inquiry which is doing its job will elucidate facts. There are occasions when senior officers might want to have issues raised that reflect upon more senior people. The board of inquiry can do that. There is nothing to stop it. It would normally refer back to the appointing authority saying it had a potential

problem to do it. You will find most boards of inquiry would have direct interest and it would be read at the highest levels in the organisation. I think appropriate action would flow.

I think you should accept that we are dealing with people of integrity at the head of the Defence Force—the chiefs. Where action is required, I think you will find that action is taken. But you do need to distinguish quite clearly between legal liability and the authority and responsibility of a person in office. Ultimately, it is the general control of the minister that will impact upon that.

I think you should also accept that in the Defence Force, like in no other section of the community, there is a constant annual regular appraisal of performance. All of those issues come to the fore in that appraisal. People's careers and futures are directly affected by their performance. That is something which is not in the public forum, but I can assure you that it directly affects the prospects for people being promoted and extended.

Mr DONDAS—General Baker, how do you select your witnesses for the board of inquiry? Is there a process?

Gen. Baker—They can be just summonsed to appear and they are compelled to.

Mr DONDAS—That is the mechanism. Is there a selection process for trying to work out who you would want evidence from?

Gen. Baker—Yes, there is the normal process of going through what facts we need. For example, in an aircraft accident, there is normally on day one an accident investigation team which looks at the technical issues involved. That elicits a number of factors which gives you your first lead. Then, before a board of inquiry, people who are directly affected are entitled to ask to appear. In structuring the board of inquiry, the appointing authority normally works out what he wants to determine out of it and so has the terms of reference flow logically into who must appear before it. I do not see that as a difficult problem.

Mr DONDAS—If it was not for the media circus, as I would call it, going into the Black Hawk inquiry, would you have done it any differently?

Gen. Baker—I would have liked, as I said before, to have seen it done quicker, but speed has its own elements that come with it. I am fairly satisfied with what they did within the time they had available.

CHAIRMAN—Going back to boards of inquiry, in general, you would be aware that there is criticism within the ADF and in the general community.

Gen. Baker—And by me.

CHAIRMAN—I hope so on this specific point. There is a perception that the setting of terms of reference, like the setting up of royal commissions by governments, is designed to predict what the outcome will be, although it might come as a surprise to the general public that there is a view that there may be some lack of objectivity or comprehensiveness in setting those terms of reference. What is your response to that?

Gen. Baker—I think that is true. I think the ombudsman, through submission to this inquiry, will point out that one of the problems associated with boards of inquiry in the past has been inadequate terms of reference. That is one area where we need to improve.

We have mechanisms that we have put in place that will help in that process. It is a matter of being selective where you use a board of inquiry and have much more specific things for it to do. It is not a case of sweeping everything into inquiries instead of administrative action which ought to be taken separately.

CHAIRMAN—One of the other problems that has been discussed in this parliament over the last more than five years in relation to discipline is the statute of limitations of the Defence Force Discipline Act. While no proof can be adduced to this, there is clear evidence that the ADF have on occasions extended the deliberations on holding inquiries and the rest of it, so that the statute of limitations has been exceeded and, thereby, no disciplinary action could be taken. Do you support the recommendation of the government that that period of limitations be extended from three to five years?

Gen. Baker—It does not matter. The government has decided to do it and it will do it. Let me say to you, I do not care. You can have a 20-year statute of limitations as far as I am concerned. That obviously raises some administrative issues if people keep going back 20 years. There has to be some limit.

The important aspect of military discipline in a war situation is that it must be swift. You cannot afford to keep a commander in the field who has failed and, if he loses the confidence of his men, you want a system which allows you to remove him quickly.

CHAIRMAN—More than that, it means discipline as proof.

Gen. Baker—But it also has to be swift. You cannot afford to have someone who is treated as though he is innocent until he is proven guilty. At times we need to be able to move people for the good of the force, and there is no assumption of guilt. There must be elements of speed. But, in terms of the statute of limitations, I do not have a concern. I do not accept your premise, by the way, that there is clear evidence of that ever happening. I am not aware of it.

CHAIRMAN—I said there was no proof, General.

Gen. Baker—I do not even accept there is evidence of it. If there was I would be very interested in dealing with it.

Mr BEVIS—I have a question concerning the board of inquiry matter. When terrible tragedies occur they very often relate to a sequence going over some period of time—

Gen. Baker—In most instances they would.

Mr BEVIS—rather than something happening on the day of the incident. Given the rotation of postings within the Defence Force and given the fact that boards of inquiries are—until the *Westralia* inquiry—comprised solely of people within the services, how do you ensure that people are not appointed to a board of inquiry who did not either in their current posting or in some earlier posting have some role in the sequence of events that led to the incident under investigation? I hope I have explained that question.

Gen. Baker—I understand your point. In a small defence force that is increasingly difficult. It is difficult to select officers who have no immediate or close past involvement.

Mr BEVIS—It is a catch-22 situation, you want to have people on the board who have some knowledge and background in the field, you do not want to get people with no knowledge, but they cannot be too close. So once you narrow the field down, and you have a smaller permanent force to draw from, how do you make sure you are not actually putting someone there who is on the wrong side of the witness box?

Gen. Baker—You try to avoid that as best you can, but it is almost impossible in this Defence Force. Concerning any senior officer who was subject to a board of inquiry, for example, I would be very familiar with him or her and have preconceived views. It makes life very difficult. But it is a choice between having people who understand the culture, who understand the systems and who understand the issues, and someone who does not. Again, remember they are not in a position to take executive action. They are there only to report on facts. A good appointing authority will be keeping very close watch on progress. These days we are very keen on very effective legal counsel watching closely for those sorts of issues. It is in our interest to make sure that the board of inquiry is as effective as we can possibly make it.

Mr BEVIS—I do not think it was ever anticipated at the outset—and with the best of effort I do not think it would have changed, I think it was the best of effort—in relation to the Black Hawk inquiry. However, there were questions raised in the media after the Black Hawk inquiry about the potential for a conflict of interest. That seemed to me to highlight the fact that with the best of effort you can still end up with a situation like that.

Gen. Baker—Yes, but the media in that case was apportioning blame. It was accusing people of doing things that the board of inquiry was never intended to do and

was using evidence that was tendered to the board of inquiry in public and dealt with by all the counsels to make some very scurrilous accusations. I am surprised the matter has not finished up in court. I am concerned about public perceptions and I have made that point. One of the things I want this committee to do, if it possibly can, is re-establish public confidence in what we do in accordance with the rules and regulations under which we have to work.

Mr BEVIS—Still on the board of inquiry matter, one of the difficulties with this is that you must strike that balance between public interest and a right to know—certainly in some cases a right to know—with ensuring that any subsequent court proceedings are not prejudiced, that people's rights are not prejudiced. I am not sure how you balance that. I would be interested in any thoughts you have on that.

However, it is made more difficult in the case of the closed inquiries, for example, Butterworth, as was mentioned before. From some of the things that have now been reported from the transcript of that earlier inquiry it would appear as though totally inappropriate procedures and certainly inappropriate questions were being pursued. When that sort of information does become public people say there is a danger of that occurring if you have closed inquiries. If you lock the door and lock the public out then people in a strict disciplinary environment might take liberties that would not be acceptable elsewhere.

Gen. Baker—People are all too ready to denigrate the integrity of members of the Defence Force.

CHAIRMAN—Not as ready as they do for members of the parliament!

Gen. Baker—I will not comment on members of parliament. If you take that Butterworth inquiry, for example, because there were concerns with it we have had that reviewed, and it is my intention that that review will be given to this committee. Once again, you will find that most of the public comment and criticisms of it were scurrilous. The board of inquiry was a well conducted board of inquiry, albeit too long and too expensive, but there is nothing legally or technically or judicially wrong with what they did. You will get an outcome of that delivered to this committee.

I can assure you that if there is any concern about these boards of inquiry that the ADF will automatically review them, and they will be reviewed, as in the case of Butterworth, with a fair degree of independence.

Mr BEVIS—But the catch-22 is that if it is not publicly known then you do not generate the concern to generate the review.

Gen. Baker—It will become publicly known. I do not have to wait for someone to write it up in the media for me to have a concern and do something about it, nor do any of the service chiefs. We are serious about the Defence Force and about our responsibility.

Mr BEVIS—But if the system was working that smoothly, and we are talking about the Butterworth example, why would not the initiative to review the Butterworth inquiry have come before the public disclosure? The same applies with the Holsworthy stuff, the attitude adjustment training.

Gen. Baker—You will find that it did come before the publicity. We had taken the decision to do it before it was highlighted in the media.

Mr BEVIS—I would be interested to know if that was the case because—

Gen. Baker—I certainly discussed with the VCDF the need to do it because of internal rumblings. It first came to light in our case because one of the people involved in the board of inquiry was unhappy with the outcome.

Mr BEVIS—Right.

Gen. Baker—That was long before it became public. In fact, it was the process of review that probably got it into the public arena. So, it was actually in reverse.

Mr BEVIS—Okay. There is another recent example that I am interested in. What are your comments on the attitude adjustment training, so-called, which is the subject of an inquiry as well?

Gen. Baker—Again, it is one initiated by us.

Mr BEVIS—Yes, I am aware that inquiry was initiated before the media coverage of it.

Gen. Baker—And most are.

Mr BEVIS—I guess we are pre-empting what the report might find but the fact that something like that could exist over a period of years and apparently involving all three services and was outside the parameters of normal discipline and military justice procedures—

Gen. Baker—Are you making assumptions?

Mr BEVIS—I am.

Gen. Baker—Be careful.

Mr BEVIS—Okay. I will be interested to see the report. But it is assumptions based on—

CHAIRMAN—What report are we talking about now?

Gen. Baker—We are getting into delicate matters when we are dealing with individual cases because I do not think we have the process to do it. I am happy to deal with the processes but not with the outcomes of particular cases.

Mr BEVIS—That's fair enough.

CHAIRMAN—Which ones are they?

Gen. Baker—This is the Defence Force corrective establishment, the attitude adjustment training, how that came about.

Mr BROUGH—Is that covering the corps of officer cadets and that type of thing?

Gen. Baker—No, that is a different one.

Mr BROUGH—That is what I thought.

Gen. Baker—This is the military detention establishment inquiry.

Mr PRICE—General Baker, are you contesting that it was over a number of years?

Gen. Baker—No, I am not, but I am contesting the assumption that it was outside proper military process. It may be; I do not know. I am waiting for the inquiry. The mere fact that people think it was is enough for us to generate some action to find out. But do not jump to conclusions just because some newspaper runs a scurrilous article. That is the problem.

Mr BEVIS—And there are individuals who went through there, who give accounts of circumstances—

Gen. Baker—Of course they do, because they feel aggrieved and we will find out. I will not judge one way or the other until I see the hard evidence.

Mr BEVIS—When do you think that might be?

Gen. Baker—I do not think that will be too long. Like all of these things, I hesitate to put a time frame on it because accuracy and completeness, where there is not safety—

Mr BEVIS—Are we talking in terms of weeks or a couple of months rather than—

Gen. Baker—I would think months at the most. I have my own opinions right now, but I need more than that.

Mr DONDAS—You said that the general courts of inquiry were as rare as hen teeth. How many general courts of inquiry have we had in the last decade?

Gen. Baker—None.

Mr DONDAS—Are they pretty rare?

Gen. Baker—They can only be originated by ministers.

Mr DONDAS—Fair enough. Secondly, the board of the inquiry—

Mr PRICE—They change it before they want one.

Mr DONDAS—With the announcement, the board of inquiry is obviously going to have some expertise other than military associated with the *Westralia* inquiry. Do you think that is likely to benefit the Australian Defence Force in its final outcomes or do you think it is likely to be less positive?

Gen. Baker—I am not sure. What I am sure of is that we need to improve not the legislation but the processes within it. The processes do make provision for civilian experts to be involved. In aircraft accidents, for example, the Bureau of Air Safety Investigation will often be at least partly involved. What we are trying to do is learn from our experience of Black Hawk and others.

In *Westralia* it seems to me to be, although a great tragedy, a fairly straightforward event. It is a good opportunity for us to explore the value of having civilian experts as well as military experts to see if this can help, not because I think it will make any difference to the findings but it might help in public perception terms and I think it is worth trying for that effect. I do not see this as a precedent. I see this as a way for us to try and learn whether it is worth doing and in what circumstances. It is part of our self-improvement program, if you like. Let me assure you that no-one more than me and the service chiefs want these things to be smooth, clean and effective.

Mr BROUGH—General Baker, on a disciplinary matter, do you see any room for informal discipline in training environments?

Gen. Baker—No.

Mr BROUGH—I am not talking about bastardisation or anything else. The corps of officer cadets have always had their punishment books et cetera, where it is just arbitrarily handed out. Are you saying that should all be gone?

Gen. Baker—Yes.

Mr BROUGH—Thank you.

Gen. Baker—It is not the style of the way ADF works and it should not be inculcated at any stage at any place within the ADF. We will not stand for it.

Mr BROUGH—If I am to understand, the disciplinary officers include the warrant officer or senior NCO. I believe the report that has recently been completed was also canvassing the idea that you could perhaps do that up to the rank of major or equivalent, but that has been rejected. What are your views on that, given that you then have one system for the private soldier and another for junior NCOs, senior NCOs and junior officers, whereas in the past, there have been those informal types of punishments by duty officers et cetera.

Gen. Baker—There is a discipline officer who deals with a case when it is a simple matter in which the individual concerned agrees and, in effect, pleads guilty. Rather than go through all the administrative processes associated with some of the authorities, it can be dealt with expeditiously and effectively and with a very limited range of punishments so that it is not, in essence, a major issue. It is the dirty boots, long hair syndrome which would gum up formal disciplinary processes albeit summary authorities if they were not actioned.

I have great problems in that process being applied to anyone who wears rank and who is therefore a leader and a commander in his own right. I believe, if someone needs to be dealt with constantly at that level when he wears rank, he ought be dealt with by a proper disciplinary process. It is unsatisfactory to deal with leaders in that sort of way. That is the distinction that I draw because of the authority given to someone, albeit if it is only one or two stripes on his shoulder, wearing rank. If his performance is such that you have got to deal with it that way, he should not be an NCO or a junior officer. The one exception to that might be with very junior commissioned officers who are essentially still learning the trade.

Mr BROUGH—Those sorts of matters that were handled by adjutants and things like that.

Gen. Baker—I think we will still have duty officers doing extra days of duty because they were not very effective. I see that as training not as punishment and that is just part of normal military life.

Mr BROUGH—So extra training for junior NCOs would not be a problem either, obviously.

Gen. Baker—Within realms. It is training, not discipline in the sense of—

CHAIRMAN—The Australian Defence Force is now a volunteer organisation and you are training volunteers to do what could best be described as an unnatural or perverse activity in taking part in war. That does require different training programs, different discipline, from any civilian occupation, and you cannot learn it by watching video clips or something like that. I do not think this committee has any ambiguity about the importance of military discipline being inculcated in the ADF but, if it is a volunteer force, it does follow that administratively incompetence can not be tolerated, particularly where loss of life is involved.

Gen. Baker—Yes.

CHAIRMAN—If a soldier sees an exercise performed where one of his mates is killed or several of them are killed or badly injured, where it is a consequence of bad planning, incompetence, negligence or something like and no censure is applied to those who legally bear the responsibility for that, you are going to get a breakdown in discipline. In a number of boards of inquiry in my knowledge—none while you have been CDF, but not far removed from that appointment—we have seen a diffusion of responsibility in those boards of inquiry so that no-one actually takes the blame, irrespective of their position within the hierarchical structure of the Defence Force.

There have been at least two accidents leading to loss of life in the RAAF where blame should have clearly been attached to certain people who had responsibility by virtue of their appointment, yet you have this diffusion in the inquiry and you end up with the buzz word ‘systemic failures’ applied as the reason for it. That is not conducive to the maintenance of good order and discipline where people who have authority do not have to accept the responsibility for their actions. What is your defence? How are you going to cope with this in the future?

Gen. Baker—I think there are several things that need to be quite clear. I am not about to rule on any specific case. I think it is quite wrong outside of the processes, the legal advice and the cross-examination and all the rest of it that comes with it to a conclusion. It does concern me that there are these perceptions. I think you need, in making your own judgments, to be very clear in your own mind between legal liability which can give rise to criminal actions and other administrative measures which might be taken in due course.

I also suggest to you that, in present processes where there is an accident involving a loss of life, there is invariably a coroner’s inquiry and, if there is any question, there is a DPP examination of the issues to see whether civilian charges will be laid because, if it is a question of criminality, that is a matter, essentially under our present agreements, for the civil authorities not the military authorities. So there is one safety.

CHAIRMAN—With the greatest respect that is fine in theory, in practice, it does not work.

Gen. Baker—It does not work in the civil community, either: does it?

CHAIRMAN—Two wrongs do not make a right.

Gen. Baker—But you cannot expect the Defence Force to deal with people using standards of justice that are different from those of the civilian community. We cannot throw the rule book out the window if there is no direct evidence and the DPPs do not want to do it. We cannot say, ‘To hell with you; we are still going to charge you with things for which there is insufficient evidence for the civil authority.’ That is our problem and I mentioned that. That is one of the issues.

The agreement we have with the civil legal authorities is that where there are cases of criminality of substance, which are dealt with by the civil law, they will be dealt with by the civil authorities in peace time in Australia and not by us. That is the agreement. We cannot ignore that. If the civil authority says, ‘There is no case to answer,’ that is it. I know of one case that has been to the courts and dismissed, and people are still asking us to take action. We cannot.

That said, we still have, within the Defence Force performance parameters, annual appraisals of everyone’s performance, and people are dealt with informally or formally but not publicly in that process. People’s careers, their appointments and their futures are decided according to their performance. So it is not correct to say, necessarily, that nothing happens.

Mr BROUGH—It is an indirect consequence.

Gen. Baker—It is a direct consequence but it is not in the sense that it can be handled openly because of justice for individuals, and privacy rules and all the other things.

CHAIRMAN—With the greatest of respect, General, I come back to the point that you have a volunteer organisation and the need for justice to be seen to be applied—

Gen. Baker—To be applied, yes. Not just to be seen but to be applied.

CHAIRMAN—Yes. You are telling me that these officers who have fallen down on the job find, in private, that they have a black mark on their annual report. That does not help the digger in the ranks one bit because they never see those annual reports.

Gen. Baker—I think your digger in the ranks sees what happens to people who consistently fail to meet their responsibilities. Do not suggest to me that the diggers in the ranks do not watch closely what happens to their officers and senior NCOs; I am sure they do. I do not claim that our system is perfect, far from it. After all, we are all human. But I do insist that we cannot have standards of justice which are not the standards of justice

applied by the community at large. You cannot hang someone simply because he wears a uniform. We actually demand much more. When they are not dealt with by civil authorities, we can and, at times, do deal with them on a disciplinary matter, but it will not be a serious criminal charge.

CHAIRMAN—It is a matter of historical record that an officer—putting a simple hypothetical case—who is responsible—

Gen. Baker—I know the cases you are talking about.

CHAIRMAN—for saying that a certain piece of equipment is functional, and a person goes and uses that equipment and is killed, that that officer is not disciplined. You cannot show me any case where disciplinary action has been taken against an officer in recent years.

Gen. Baker—I know the case you are referring to.

CHAIRMAN—There are several cases that I have in mind.

Gen. Baker—I am not going to sit here and argue about particular instances without the full value of the inquiries that went on, and the legal counsel, and all the other advice that went on about it.

CHAIRMAN—We are raising these matters with you because they are matters of perception with the public, and I think it is important that they are dealt with.

Gen. Baker—I agree, and I am concerned that there are these matters of perception. But I also think it is important that people understand that those issues are dealt with, essentially, by the civil authorities in peace time in Australia and not by us. That is the agreement we have.

Mr PRICE—Are all criminal matters investigated and tried by civilian authorities or is that only in recent times?

Gen. Baker—It has been a development since the Defence Force Discipline Act 1985. I am not sure of this but certainly in the last 10 or 12 years there have been discussions with civil authorities. There have been test cases in the High Court about jurisdiction of military tribunals, et cetera. The substance of that—and Abadee covers this point—is that we are dealing, essentially, with disciplinary issues in peace time.

Mr PRICE—Are you satisfied that the system is adequate in exposing systemic problems. Issues of sexual harassment, for example, seem to need to have outside pressure before they bubble up to the attention of the highest level.

Gen. Baker—I do not think that is so. In most of the instances I have been aware of the action is taken internally and then actually bubbles up outside. Certainly, in recent cases, there has been action occurring inside before it has become public. Often you cannot exclude a whistleblower or an aggrieved person going public rather than coming in. What does worry me is that we are increasingly giving people avenues of complaint outside the chain of command. That allows people and commanders the ability to sideslip their responsibilities.

It worries me that someone in the Defence Force feels that they have to go public rather than come and talk to people within the Defence Force. That really worries me. I am concerned that in many of the things we are doing we are providing alternative means of complaint which, in effect, prostitutes the system of command. We need to be careful.

Mr PRICE—There can also be a signal that the chain of command was not able to pick up the issue in the first instance.

Gen. Baker—There are some things the chain of command cannot deal with but what worries me is that they are not made aware of the problem. That is the issue. Personal relationship problems are inevitably going to occur between fit young men and women in conditions of stress. The ability of people who have a problem, and an issue in that, to go outside the organisation to get some remedial action worries me in that I would prefer they could do it straight up their chain of command.

CHAIRMAN—The fundamental point there is you cannot have a plurality of command. It must be a unitary process. I think that is a very real process.

Gen. Baker—Yes. The danger is that if troops see you going outside the chain of command to get something fixed they immediately wipe off the commander. Similarly, if a commander sees people going outside he forgets he has a responsibility for looking after those people who are getting their problems solved elsewhere. That is breaking down the very thing that we need so that in battle people have a disciplined approach to doing things that no sensible human being would ever do.

Mr PRICE—I have not read the ombudsman's report but it was mentioned to us this morning. You asked us to have respect for those wearing the uniform, and that is fair enough, but, given that the ombudsman's report highlighted, if you like, inadequate—if not, grossly inadequate—training of officers charged with responsibilities under the discipline and justice system, are you not concerned about that and why should we not be more than critical of it?

Gen. Baker—You have to remember the ombudsman did that report because she was requested by me to do it because we had these concerns. The actions that will flow from her report will, I think, help us to overcome those problems. I do not think that will be the end of it. I think, as the law changes, as administrative rules change, we will need

to continue to evolve and develop our processes. Let me say to you here and now, I believe, and I gave the committee another piece of paper on the weekend, that command in the ADF, at quite low levels, is much more difficult now than it was when I was a junior officer. We need to do a lot more to prepare people for command.

We need to provide better guidance and direction for them in the exercise of command, and we need to give them far better education and training in all of these issues. That is recognised and we are doing it. Similarly, in these things raised by the ombudsman, in terms of training and boards of inquiry and investigations, the law is now much more complex and much more difficult than it ever was, and we have to train people to deal with it.

Mr BROUGH—A little earlier you said that, if you have an inquiry or investigation and an individual officer is found not to have a case to answer, through the PR19 or whatever the position of responsibility may not necessarily be forthcoming again. Is that right?

Gen. Baker—Yes. If you take an officer who is not performing out of a board of inquiry and there is not sufficient evidence to take disciplinary or judicial proceedings against him, that is not the end of the matter. You continue as a commander to watch that officer to see how he performs to make judgements about his capability as a commander and as a leader. That affects your judgment on his future. Everyone in the Defence Force gets a personal appraisal on performance every year. They can go back and tell me which tooth I had filled in 1954 on 3 February when I first joined the Royal Military College.

Mr BROUGH—I accept that, but when you have incidents where there is a perception that someone of a lower rank has worn the bucket for someone of a higher rank what can potentially happen is that the person who has been exonerated—

Gen. Baker—Not exonerated, just not charged.

Mr BROUGH—I know what you are saying. You do not have sufficient evidence. Then someone else takes it into their own hands to say, ‘My judgment of what actually occurred, even though there was insufficient evidence, is that this person is not fit to hold a command position or be in that level of responsibility.’ I am not arguing with that case, but from a human rights perception or a civil rights perception these days can people not turn around and say, ‘Hang on a minute, there was not sufficient evidence to charge me. I have performed my duties adequately ever since but my career has come to a halt.’

Gen. Baker—It is not as simple as that and nor is it based on a single incident. If, as a commander, you have a junior officer who you think has made some mistakes, although you cannot hold him legally responsible for those mistakes and their outcomes, you, as responsible commander, immediately give some attention to observing that officer in the performance of his functions, and it is based on that performance.

If you are a good commander, it does not come as a surprise to the young officer because he is counselled, advised, and he is given trial reports and you work on him. So it comes as no shock when, at the end of the year for the third year in a row you say, he is not suitable for promotion. He is not suitable for command. I would not feed this man. The board of inquiry and those things are not the end of these matters. A good commander continues with it. It is an ongoing process of managing that affects people's careers in quite serious ways—not as one isolated incident. We can all make mistakes, but it is a progression of observations, training, education, et cetera.

Mr BEVIS—Is it appropriate in a circumstance like that for the commanding officer to require the person to show cause why they should not be censured? What is the import of a censure of that kind from a commanding officer?

Gen. Baker—There is a process of asking an officer to show cause. You can award an administrative censure rather than a disciplinary outcome. That immediately puts that on the officer's or the NCO's record, which is there for ever more for people to judge against what happens.

Mr BEVIS—Should that type of censure be used in circumstances where a board has looked at a matter and there has been a determination that no charges would be laid? Is it an appropriate circumstance in an occasion like that for censures to be used?

Gen. Baker—You cannot generalise but there is an appropriate mechanism available to commanders. How formal you can be depends upon all the processes and the evidence that is put before you, but there is that mechanism for administrative censure.

Mr DONDAS—Air Commodore Skillen covered this morning the Abadee report and some of the recommendations that I hope you are not accepting. I must advise you that at this stage the committee has not seen the report but it is being provided to us in the next couple of days with a summary of the recommendations.

Gen. Baker—Good luck.

Mr DONDAS—How quickly will you put in place the recommendations of the Abadee review that you accept?

Gen. Baker—The chief's recommendations have all been through and agreed. We will now start the process of implementing them. Some of them will require legislative change; some will take some time. The simple ones we will do much more quickly.

Mr DONDAS—Do you see the legislative program as trying to get some priority through the ministers on it?

Gen. Baker—I am hoping that the result of this committee will enable us to get

some priority on the legislative changes.

Mr DONDAS—Have you identified those areas for legislation to the committee?

Gen. Baker—Some of that work has been done. For example, if we want to change the responsibilities of the convening authorities, which are presently laid down in legislation, we would probably need to make some amendments. One of the key issues is that we want to spread the responsibilities of the convening authority. To do it we need some change of legislation because the act at the moment, or the rules, say that the convening authority will do this, this and this. We want to do it differently, in the interests of impartiality.

Mr DONDAS—That is a high priority?

Gen. Baker—In my view it is because we have identified a weakness in a disciplinary process.

Mr BEVIS—Obviously, from time to time, you and also the chiefs need to get legal advice on a whole range of matters. In what circumstances do you regard it as necessary or desirable to take advice from the Defence Legal Office or, as distinct from the Defence Legal Office, the Australian Government Solicitor, or, as distinct from either of those two, to get a private solicitor or company to give advice?

Gen. Baker—It is a difficult choice. I often require legal advice depending on the nature of a matter. If it is a procedural matter the Defence Legal Office does a lot of work for me on those sorts of issues. If it is something that is already being handled, such as a board of inquiry report on which I want some extra advice, I will normally go outside that community to make sure that I get a degree of independent advice. I must say that I am not impressed with some of the stuff that I get from within government.

CHAIRMAN—Oh, really.

Gen. Baker—I tend to use reservists who have eminent standing in the community. Although recently the advice of government solicitors has been that I should not use judges, that is exactly the skill and level of advice that I would like to have. That is a complex issue that I have not addressed but that I will take up soon. It is a combination. I do not believe that there is anyone else in Australia who has access, free of significant cost largely, to first-rate legal advice for the service chiefs and CDF, because they can call upon the reserve legal panel and they are very eminent.

Mr BEVIS—Cheap QCs?

Gen. Baker—At the rates we pay them—very cheap. But we do use them and we are using them increasingly. I hope we do not wear out their patience with us because we

do use them. Most of them enjoy what they do and enjoy their service association. We sponge on them as a result of that.

CHAIRMAN—You were talking before about alternate pathways for appeal outside the normal chain of command and I share your great concern about that. One area that is having quite an impact now on Defence is occupational health and safety regulations. I have a view that it is not an appropriate application of the act to the armed services when you have limitations on how far they can reach up or jump from an elevated position, whether it is 36 inches or 40 inches or something. That is a load of nonsense. You are not going to train war fighters on that basis. In so far as this is impacting on the legislative base of the Defence Force, is there any disciplinary downside to that?

Gen. Baker—There is a major administrative downside to it. We need, in all of these instances of human rights, equal opportunity to apply the spirit of the law to the Defence Force as far as it is practically possible without impinging upon the effectiveness of the Defence Force. We do need some special provisions and, where we come across these from time to time, we seek them in legislation. Unfortunately, the difficulty we face is the legislative program is often at least three or four years behind the fact and in that period you go through the difficult time of going to court time and time again. It is a major worry for us, but in an administrative sense, because in most cases people within the defence force see the logic of what we are trying to do. It is the disaffected that cause human rifts.

CHAIRMAN—But then they have a legal avenue to seek redress.

Gen. Baker—They have a legal avenue for appeal, and they can go to three or four different sources, one after the other. That is very time and effort consuming.

Mr PRICE—General, there has been a change in the type of recruitment expectations and what you are attracting in all three services. Is the discipline system something that is constant and, irrespective of the changing attitudes and approaches by recruits, does it remain rigid? Can it change, and if so, how has it changed?

Gen. Baker—I do not think we regard it as constant any more than I regard the application of the law in this country as constant. It continues to evolve and vary, and we need to move with it. One of the problems we face as commanders these days in the Defence Force, and it is more a problem with the junior level than it is at my level, is that the expectations of youth today for privacy and individuality are much stronger than they ever were when I was a young officer. I can remember going to my OC and asking him for permission to get married. You try that on these days and see how far you would get.

Attitudes have changed tremendously in the sorts of things we are trying to look at through Abadee, in terms of court martials and judicial processes in the Defence Force.

We recognise the inevitable need for us to change and we are seeking assistance in making changes which look after both our interests and the interests of justice for the individual. That is the balance that we have got to strike. That is a balance which is different from the balance you will find between a private citizen and the law of the land in criminal terms. It has to be, because of the things we require people to do.

Mr BROUGH—Would you say there is a consistent standard of discipline across the three services, and application?

Gen. Baker—It is very difficult to compare because of the cultural differences between the three services, the stresses they work under and the conditions under which they work. I am generally very satisfied with the standard of discipline in the whole ADF, even though it is different between the three services. It is interesting also that, as we go more and more joint, one issue is how that is going to affect some of these things.

Mr BROUGH—Sorry?

Gen. Baker—As we go into more joint operations where the interaction between elements of the services is now much stronger than it was in the past, where discipline can be enforced by an officer of one service on members of another, there are things there. Again, education, training understanding are all very important parts of that process.

Mr BROUGH—Whilst you are happy with the level of discipline now, and your answer to Mr Price's question was that it is evolving, how would you compare it to a decade ago? Is the discipline level as good?

Gen. Baker—In terms of the professionalism and discipline of the Defence Force today, it bears no comparison with the Defence Force I first joined. Fortunately, it is very much in the positive.

Mr BROUGH—So there is a greater level imposed on personnel than there was.

Gen. Baker—The standard of officer and soldier in today's Defence Force—his integrity, his commitment, his dedication—far exceeds that of the Defence Force I first joined. That is not a criticism of the Defence Force I first joined. It is a question of the quality of the people we presently have.

Mr BROUGH—You talked about perceptions earlier. The perception out in the wider ex-military community is that that is not the case.

Gen. Baker—They would not be biased, would they?

Mr BROUGH—I am wondering what you do about that, because it is a very real concern that discipline in days gone by was different. I am encouraged by your comment,

but I wonder how we improve it in the wider community.

Gen. Baker—I am hoping that the findings of this committee will be one of the steps in re-establishing public confidence in the Defence Force and in what we do. Let us look at it. The measure of the performance of the Defence Force is not in administrative processes and things, it is in what we do. Over the last 12 months in particular, the performance of the Defence Force in doing the things that this government has asked of it has been exemplary. I think that holds for the previous government as well. That is what it is all about. That is how you judge.

Mr BEVIS—One of the more serious allegations or issues that has been raised that I have seen arising out of the establishment of this inquiry is the suggestion, at least in one case—and I hope it is only one case—that there was pressure placed upon people conducting a board of inquiry to conclude the matter in a particular way. Are you aware of those types of problems or concerns?

Gen. Baker—If I was aware of that problem I would deal with it forthwith, let me assure you. I am aware that there are pressures of time and I share—

Mr BEVIS—No, this went beyond pressures of time to the nature of the finding they might make. I suspect, during the course of our deliberations, you may see or hear more fully what that is about, and I will be interested if that occurs, as I expect it will.

Gen. Baker—If there is any justification for that point of view, we will deal with it, I promise you.

Mr PRICE—In other overseas defence forces, are there systems different from what we have, but which have some strengths? If so, what are they?

Gen. Baker—I think there are some things that are different in overseas defence forces. I think they come about by different cultures, different legislative requirements of their parliaments or equivalents. I think there are some things that we can learn. Certainly we keep watch on what is happening, and some of these are elaborated by Abadee. I also feel that there is no better defence force than ours.

Mr PRICE—We are talking about one aspect of it.

Gen. Baker—No, no. But it is an important part of it.

Mr PRICE—I accept that.

CHAIRMAN—Thank you very much for your evidence this afternoon, General. You will be sent a copy of the transcript of your evidence to which you can make corrections. I do not think there is anything that *Hansard* requires of you with respect to terminology. Thank you for coming along.

[2.34 p.m.]

CHALMERS, Vice Admiral, Donald Bruce, Chief, Royal Australian Navy, Building A-4-19, Russell Offices, Canberra, Australian Capital Territory 2600

McCORMACK, Air Marshal Errol John, Chief, Royal Australian Air Force, Air Force Headquarters, Department of Defence, Canberra, Australian Capital Territory 2600

SANDERSON, Lieutenant General John Murray, Chief, Royal Australian Army, Army Headquarters, G-2-11, Russell Offices, Canberra, Australian Capital Territory 2600

CHAIRMAN—Thank you, gentlemen. I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in respect of the houses of parliament demand. Although the subcommittee today will not require you to take an oath for the giving of your evidence, you should be aware that that does not alter the importance or the legal significance of it.

We would prefer this inquiry to be held in public for the taking of evidence, but there may be occasions where we do have to move in camera or in private. That facility, of course, is available to you and, if you do have a matter that you wish that we discuss in private, raise it with the committee and we will give full consideration to your request.

I believe that each of you individually wishes to make a submission. We will start with Vice Admiral Chalmers.

Vice Adm. Chalmers—Thank you. As Chief of Navy, I greatly appreciate this opportunity to appear before you on this very important occasion. This inquiry is fundamentally important to the Navy and to the Australian Defence Force. Acknowledging that many points have already been raised by the Chief of the Defence Force, I would like to reiterate some aspects that are particularly important to me in my command.

Navy faces special challenges in the manner in which it operates, frequently away from bases and homes for long periods. We have major commitments in home waters, regionally and further afield as well. We strive to ensure that the practices designed for the discipline and administration of the Navy and its activities, both in peace and war, are both fair and just, and, in order for me to command as opposed to manage the Navy, that they remain within the command chain.

I have to keep at the forefront of my thinking, my responsibility and my accountability for delivering a navy that can fight and win. To do that I need a robust disciplinary system, and a responsive internal inquiry system. The Defence Force Discipline Act has, for more than a decade, served the Navy quite well. It continues to be

subject to evolutionary change and constant review but, having regard to the great demands on our Navy, the discipline act has proven to be sufficiently adaptable to cater for our needs.

However, occasionally, despite some of our best efforts, there are accidents. In such circumstances ministers, CDF and I need the earliest assurance that our people are safe, that the cause of the accident has been discovered, and that requisite steps can be taken to avoid a recurrence. As such, I require prompt, focused and responsive internal inquiry mechanisms, such as a board of inquiry under the defence inquiry regulations.

I note that many of the submissions to this inquiry have been critical of past BOIs. However, as Chief of Navy, they are extremely important to me because they allow the facts to be established quickly. They identify lessons learned and recommend actions to be taken to overcome weaknesses in practice or process. A board of inquiry enables the command to make sound and fair decisions based on the facts of a given situation.

The board of inquiry arising out of the recent tragic events on *Westralia* is a living case to follow. The board has wide ranging terms of reference to allow it to examine all relevant circumstances surrounding the accident. Comprising civilian and military experts in all areas to be examined, the board will be conducted in an open public forum which started today. I am confident it will provide the appointing authority, who is the Maritime Commander Australia, all the facts that he needs to make the necessary recommendations for my review. I intend that the board of inquiry recommendations and my review of the outcomes will also be open. As long as we remember that the ultimate responsibility for decision making rests within the command structure, we can place the vital role of the inquiry process in its proper context. Thank you.

Lt Gen. Sanderson—Let me begin by saying how much I welcome this inquiry into these issues of military inquiry and the discipline system. The subjects are of fundamental importance to the effectiveness of the Defence Force in its core role of defending our nation and its interests.

It has become very clear to me in my time as Chief of Army that there is much confusion abroad in the Australian public about the purposes of the existing legislative framework and the relationships between administrative inquiry and the discipline system. Both the Black Hawk board of inquiry and the follow-up action were done in the full glare of public scrutiny. Yet the media and other commentators have shown a tendency to brand this, the most open of Defence inquiries, as a conspiracy of some form.

The lack of understanding of the intent and relationships in this process would be justification enough for your inquiry. But I also appreciate that there is a need to examine the Defence Force discipline system in the light of contemporary values and social change. In my view the Defence Force must be a true reflection of the values and ethos of our society.

Inherent in the military discipline system is the concept of command responsibility. In saying this, I am conscious of the fact that the Defence Force Discipline Act is fundamentally based on the original Army Act and then the Defence Act, which recognises fully the responsibilities of command, empowering commanders to make regulations and give orders in the context of the act. Why has it been based essentially on the Army system? I believe it is because discipline and the associated issue of morale are fundamental to the effectiveness of units and formations as a fighting force.

Because soldiers are trained to kill at close quarters, and because they are often armed and walk among the people for that purpose, their command relationships are necessarily different from those of Navy and Air Force. Often, they are required to operate among the peoples of other countries for that purpose. Sometimes they commit ghastly crimes—as was the case with the US Army troops at My Lai—or lesser crimes, as with the Canadian soldiers more recently in Somalia. Always, the commander on the spot is responsible, even though the causes of these crimes may reflect deep-seated systemic failures in their military ethos, or an even more fundamental national malaise.

The commander must be able to deal expeditiously with the things that go wrong. The word ‘expeditiously’ is the key word here. Nothing is more corrosive of morale and fighting spirit than technical problems that are not addressed quickly or failures of discipline and command responsibility that are not solved on the spot. It cannot be any other way. Because it is about life and death, the commanding officer must be entrusted with the administrative tools to fulfil that responsibility. Laws and regulations only fulfil part of this requirement. There has to be a structure with clear-cut divisions of responsibility and accountability. The commander is responsible, but he or she cannot be everywhere. The essential thing is that the relationships have to be established deep in the training system.

I have commanded Australian soldiers on operations on many occasions. I have also commanded the troops of many other nations on a specific operation. I am proud to say that Australian soldiers have always presented the best combination of discipline and initiative. Other nations have more extreme forms of discipline, often a reflection of their national character. But they sacrifice much in these more coercive relationships in the way of initiative and compassion among their troops.

The key lies in everyone understanding their responsibility and exercising their authority with fairness and firmness. Without doubt, the main advantage the Australian Army has over other armies—with the exception perhaps of the British Army—is a strong professional core of non-commissioned officers and warrant officers who fulfil the technical administrative and lower level training roles with a strong sense of commitment to regimental traditions and standards. This is their job and, despite technological and social change, they cherish that role.

One of the problems I see facing us in the joint environment we are creating is the

clash of cultural needs because of the different operating environments and operating relationships of each of the services. What might meet the needs of Navy and Air Force will not necessarily reflect the sorts of realities of Army's operating environment.

I hope that no-one will conclude from what I have said that I am seeking a more coercive set of military relationships. Everyone will know that I am encouraging the development of a 21st century army structure, where enhanced independence of mind and spirit and heightened responsibility at junior rank levels will be the hallmark. At the same time, this autonomy will demand even higher levels of accountability on the part of commanders. Most of their actions are going to appear on television screens. As we have seen lately with respect to Bosnia and Rwanda, there is an increasing tendency for the international community to call them to account. Whatever this committee recommends must not, in my view, detract from their ability to command in the 21st century. Thank you, Mr Chairman.

Air Marshal McCormack—Mr Chairman and members of the Defence Subcommittee, I also welcome the opportunity to follow on from CDF and the fellow service chiefs to speak to the subcommittee. As you know, the Air Force is a highly technical force, whose men and women are involved with weapons systems of great potency. As with Navy and Army, Air Force men and women work within a disciplined environment that fosters controlled application of force associated with the modern weapon systems they operate. The controls imposed by the defence discipline framework are absolutely essential to the way the air force must operate as it goes about meeting the requirements of government.

In addition to the complexity of the equipment it employs, Air Force operations are further complicated by activities that on any day may span the globe. Our people can be, and are right now, operating in distant locations, remote from their supervisors and support agencies. This diffusion of the command function places high demands on individual professionalism and it places a premium on well-established leadership command and clearly understood discipline chains. Notwithstanding the high level of personal and professional discipline exercised by service members, occasionally things do go wrong.

As commander of the Air Force, I require a mechanism to identify what has gone wrong and what we can do to ensure that it does not happen again. It is my firm view that the existing defence inquiry arrangements provide a basic command and management function that is absolutely fundamental to enable the defence force—and, in this case, the Air Force—to perform the role expected of it. Having mentioned that things do go wrong, I would have to say that Air Force has had its share of bad, and sometimes tragic, experiences. For example, 1991 was a particularly bad year for aircraft accidents. However, the excellent flying safety record enjoyed by Air Force over the past four years can largely be attributed by the lessons learnt from a thorough investigation of the tragedies in 1991.

The formation in March of last year of the ADF Flying Safety Agency now means that the processes associated with investigating flying accidents, and the hard lessons learnt from those comprehensive investigations, are now more readily accessible across the defence force. Importantly, since last year, there has been provision for flying safety investigations conducted by the ADF to include investigators from the civil Bureau of Air Safety Investigation, as well as members of the public with aviation experience who are appointed to the RAAF Accident Safety Panel. The system ensures a broad range of experience is brought to bear on any aircraft investigation.

While we in the ADF work closely together, each service has its own proud traditions, ethos and values that distinguish it from the other two services. In the context of military justice and procedures, Air Force also faces different challenges to those facing Army and Navy, and that again adds to defining the unique nature of each of the three services. While until recently the majority of our men and women worked in our southern bases and resided with the general community, today's smaller and more combat-oriented and deployable force is more often facing the challenges associated with operations from remote bases and extended command links.

I turn now to a consideration of the Defence Force Discipline Act. I would have to say that the legislation has bedded down well in Air Force and has proved sufficiently flexible to accommodate the changing needs of the service. That is not to say that we are not open to continuous improvement of the system. We are, and the Defence submission shows this. Through my predecessor, Air Force participated in the process of the Abadee report and, as deputy chief at the time, I had clear visibility of that process. The majority of the changes recommended by Abadee have been accepted as clear improvements, and the process of reviewing the report has provided confidence that the ADF standards of justice are consistent with the needs of commanders in the Air Force.

Let me conclude by acknowledging that criticism of a small number of inquiries conducted by Air Force recently served as the catalyst for the Defence Ombudsman's own motion investigation. Air Force is committed to ensuring that the public has confidence in the way it conducts its operations and, in the context of these hearings, the way in which it conducts its inquiries. I am determined that Air Force will take on board the necessary reforms to its inquiry processes to ensure that we meet the expectations of government and the public and enjoy their confidence in the way we do business. Thank you.

CHAIRMAN—The Defence Force Discipline Act has been mentioned, and one of the frequent criticisms of that which one gets is that commanders now, from a corporal upwards, are frightened to act, because of the alternate pathways it provides and the appeal mechanisms and the rest of it and that, whereas once you would march a soldier up and put him on a charge and a couple of nights of extra duty in the guardroom or cookhouse or something like that, that has now all gone. How true is that? Has it had a debilitating effect on the confidence of officers and non-commissioned officers?

Lt Gen. Sanderson—It is difficult to speak for specific officers. The way I see it is that the Defence Force Discipline Act has not really detracted from the way in which disciplines apply within the organisation. What has changed is the nature of the people in the organisation. What is happening today is that people are treated as individuals and that is the basis on which our society functions more and more, but it is also the way in which the organisation of our units function. When I first came into the army soldiers lived in open wooden huts—right across the whole army. There were two power points in the hut; one for the section commander and one for the rest of the hut. When we asked our soldiers the other day what they most desired in their individual rooms, it was a telephone line to connect their computer systems to the world wide net.

It is a vastly different soldiering that we are talking about here and, indeed, the corporals and sergeants are starting to emerge from that soldiery. The Defence Force Discipline Act enables commanding officers and, indeed, lower level commanders to exercise responsibilities in much the same way as they did in the past. It is just that it is a different environment in which they operate.

CHAIRMAN—So you endorse the DFDA and do not want to see changes in it?

Lt Gen. Sanderson—I do not see any reason to change the fundamental essence of the Defence Force Discipline Act.

CHAIRMAN—Is that the view of your colleagues?

Vice Adm. Chalmers—Yes, I think the essence of the DFDA is fine and should continue. I think where we have problems is that commanders need to carry out action within the command chain. It is the ability of those who are in the command chain to go outside of that chain to question what has gone on that has the stultifying effect, I believe, on the way our officers and NCOs feel that they are being restricted.

CHAIRMAN—We come to the point of the questioning—that is, the fact that alternate pathways exist tends to diminish the authority of the senior officer whether it is one rank above or five or more.

Vice Adm. Chalmers—It can but that is not part of the Defence Force Discipline Act's problem.

CHAIRMAN—I see. What about the plethora of lawyers and legal representation for people on minor charges? Is that not a real problem, in practice?

Vice Adm. Chalmers—In Navy and ships deployed that is not a problem.

Mr BROUGH—How do you deal with that?

Vice Adm. Chalmers—Any sailor who comes up before a summary authority has the right to be represented, if time permits. A sailor will be represented by his divisional officer. But, if time permits, and it is a more serious charge, certainly there is the opportunity to be represented by a legal representative. But it is time permitting. If it is thought by the accused that there is a conflict of interest by the summary authority—within a task group, of course, there are a number of summary authorities—we can move the case to another unit.

Mr BROUGH—Could you just expand on that for me; I have very little knowledge of Navy. In times gone by, when you had a disciplinary problem with an officer, a junior officer or a ranking, you could deal with it—bang, it was done, I presume. But, today, there are these steps in place. All three of you have made the point that you need to be able to act expeditiously so that discipline is done, and the whole matter is dealt with so that you have the confidence of your crew as well. We do not run task force very often—

Vice Adm. Chalmers—No, we run task groups all the time. We very rarely single ship steam.

Mr BROUGH—So this does not create any problems for you whatsoever in dealing with it in the speed that it needs to be dealt with. I am not talking now in peacetime, I am talking about in time of conflict.

Vice Adm. Chalmers—If you can deal with it under summary proceedings, it can be dealt with most expeditiously. If necessary, in time of conflict or in time of operations, you can very quickly put in place a court martial.

Mr BROUGH—So you are happy with it all?

Vice Adm. Chalmers—Providing we continue to evolve and that the system remains within the chain of command, I am happy that it will provide us with the necessary answers.

Mr BROUGH—Where do you want it to evolve to? If it is right now, where does it need to go to? You must still deem there to be improvements that need to be made.

Vice Adm. Chalmers—I think they are improvements to keep it in line with community expectations. I think the Defence Force Disciplinary Act serves us well at the moment.

Air Marshal McCormack—I think the DFDA serves us well. The other avenues of complaint are the redress of grievance and ministerials. They tend to bog us down a fair bit and I see that as outside the normal chain that people take. It is often used as an obfuscation of the real events.

Lt Gen. Sanderson—It is going to be quite an expensive operation to make sure that we have got the legal structures in place, even though there is the option to exercise some of your authority. It is just that we will cart more lawyers along with us on operations than perhaps we have in the past.

CHAIRMAN—Are you talking about internal disciplinary matters, or the relationship between your force, other forces and the country you are in?

Lt Gen. Sanderson—We are going to have to deal with issues of discipline, in theatre, in accordance with the Defence Force Discipline Act. We are going to have to provide representation in a more comprehensive way than we have done in past major conflicts. It just means that there will be more lawyers.

CHAIRMAN—Some of them might get killed on the front line and help us!

Lt Gen. Sanderson—I could not offer comment on that.

Mr BEVIS—I have a question relating to boards of inquiry. Do you see any conflict or potential conflict between the role of a board in identifying the facts and the supportable conclusions, as distinct from the role it might play in recommending disciplinary action?

Lt Gen. Sanderson—In support of what the CDF has already said, the primary purpose of the board of action is to provide a way of quickly assessing what went wrong and correcting it. Included in that process are any recommendations that might pertain to individual failures in the process. They are not necessarily suggestions of the need for criminal charges, they are suggestions of the need for further investigation into whether there is a requirement for discipline. That is essentially the process. I see no other way of a commander exercising his responsibility, to make sure that these things are dealt with expeditiously, other than through the board of inquiry process.

Mr BEVIS—Can I try to flesh that out and distinguish a bit more? The commander needs to find out what went wrong and make sure that everything is put in place so that it does not happen again—principally that is the facts and the supportable conclusions. As to the other part, which I am distinguishing here, where the board then says, ‘And we think an investigation should be held into whether X, Y or Z should be charged with some disciplinary offence or whatever,’ in the end, that is nothing more than a recommendation. If properly acted upon, it requires a more senior authority to then make their own independent judgment. In other words, the board’s decision should not be rubber stamped. If it were rubber stamped, I suspect that that would then leave open a whole series of other legal questions about process. There has to be a determination by another body.

Given then that the body that does make the determination—yes, there will or there

will not be a charge laid—has to go over the facts anyway, what is the value of the board's recommendation? Why does having a board recommendation of potential disciplinary action add to that process? I have got to say, it seems to me from the feedback I get that it muddies the water about what I think the primary function of the board's task is; that is, finding out what went wrong quickly, getting the facts, and letting us set in train fixing the problem.

Lt Gen. Sanderson—Except that in the assessment of what went wrong surely one of the primary issues that could go wrong would be a failure of individuals to fulfil their responsibilities.

Mr BEVIS—But they may well, as a matter of fact, report that Mr Bloggs made a mistake or that Mr Bloggs failed to follow the procedure.

Lt Gen. Sanderson—Yes.

Mr BEVIS—There is then a secondary consideration, separate to that, which says, 'We recommend Mr Bloggs be charged or investigated for a possible charge.' There is a difference between a finding of fact and supportable conclusion as distinct from a recommendation on disciplinary action. What I am really trying to get is some feel of what we gain by putting these two together and what do we gain by separating the two out or having a board looking at only one of those things.

Lt Gen. Sanderson—The inquiry cannot be complete unless all the factors which contributed to the particular circumstances are taken into account.

Mr BEVIS—I agree.

Lt Gen. Sanderson—And in that process the issue is not one of guilt or non-guilt; the issue is one of what further investigations need to be taken against individuals.

Mr BEVIS—They are at the moment. What I am saying is I do not understand, from the answer or from my other knowledge of the circumstances, what the process gains by a board's recommending. One of the reasons we have had the controversies about boards, of late, is not that they were quick, or a whole host of other reasons, but that second aspect of it; the aspect dealing with a comment on potential disciplinary action. That is where the bulk of criticism has come from. Whether it is the submissions to this inquiry, which have had some notoriety in the media, or whether it is the Black Hawk, the public interest and the reaction in the military as well, that is the second aspect.

Vice Adm. Chalmers—I might add something to this. It is up to the appointing authority when he appoints the board of inquiry whether he wishes that inquiry to actually make recommendations. In the past that has been the norm. I accept that it would appear that it muddies the water. I think that as we move toward more open inquiries, as we did

with the Black Hawk inquiry and as we are doing with the *Westralia* inquiry, it will also be necessary when the recommendations go forward. In the case of *Westralia* they will be reviewed by the maritime commander who was the appointing authority. He will make recommendations to me and I will also review that. What has muddied the water possibly in the past is that not always have those recommendations been agreed by the reviewing authority.

Mr BEVIS—Yes. I was going to say that.

Vice Adm. Chalmers—So, if you like, it is not a case of whether you separate the two. I would suggest it is a case of how do we make it more open and, if it is possible for the reviewing authorities to have that review process—and at least if the conclusions of that review were more open to public scrutiny—it might remove the problem we have had.

Mr BEVIS—I think if the reviewing process was more open that would address some of it. It might open up a whole bag of other headaches that you might not want to get into but it would address part of that. Is it possible to get a statistical breakdown—I do not believe we have one; if we do, someone will correct me, no doubt—on occasions in which boards have made recommendations for disciplinary action and, of those occasions where recommendations have been made for each of the three services, whether or not a subsequent authority has acted on them, in other words, implemented them? Is it possible for that information to be available or not?

Lt Gen. Sanderson—You want us to go back over specific incidents and determine in which ones we acted on the recommendations of the board, and which ones we did not.

Mr BEVIS—In essence, I am trying to get some idea on how many occasions a board has recommended disciplinary action and on how many of them was disciplinary action taken as per the board's recommendations.

Vice Adm. Chalmers—We go to the next stage which is to investigate whether we can move to disciplinary action.

Mr BEVIS—I am actually talking about disciplinary action having been taken. If you want to add the intermediary step in there, I am quite happy to get that as well.

Lt Gen. Sanderson—I am sure that the records of all of those boards are available and we will get our legal authorities to work on doing that.

Mr BROUGH—How far back?

Mr BEVIS—It is a question of what is easy and doable. I am not trying to place an onerous task on people.

Lt Gen. Sanderson—If I could just add by way of explanation of this process: in the boards of inquiry that I am personally familiar with, those recommendations that were made by the board were made with deep legal opinion on the part of the board, not the individuals. Then the response was passed to further legal opinion and then that legal opinion was passed to other authorities who took further legal opinion and there is layer upon layer of legal opinion before action is initiated to commence the investigation that is associated with those recommendations. It is a very prolonged process.

Mr BEVIS—It makes you wonder what the value of the original report recommendation is.

CHAIRMAN—The purpose of the board of inquiry is, as you say, to find out what went wrong and to correct it rapidly. It is a universal view of senior officers that boards of inquiries are always accurate in finding that. I think this committee would have a different view of that and one of those problems with BOIs stems from the terms of reference—and they may or may not be designed to really get to the heart of the problem.

What obligations are on the establishing authority, and in this case you are talking about the maritime commander—and I do not want to talk about *Westralia* in any way at all—and what guidelines as chiefs of staff do you give the authority that sets up a BOI to really get to the heart of the problem, not protect someone's career?

Air Marshal McCormack—We use a lot of legal advice in the preliminary investigation. In the case of aircraft accidents you have the aircraft investigation team's initial report to give you guidance on the facts and what went wrong. From that you then develop the terms of reference with guidance from the legal advice on what should be covered. It is not done as a single person sitting down and writing terms of reference.

Mr PRICE—Where do you get your legal advice?

Air Marshal McCormack—In the case of Defence, it used to be Air Force but now it is Defence central, various people from the defence department.

Vice Adm. Chalmers—In looking at boards of inquiry, if there is not an initial investigation in the preparatory period prior to the setting the boards of inquiry one can start off with fairly broad parameters within which the board can work, but with management by the appointing authority to ensure that they do not go too far and have something that is going to go for many months beyond that board. I think that is a useful way of doing that. You do take legal advice. In our case we use eminent lawyers who are members of the naval reserve who are practising legal practitioners in the various states so the state legal panel will assist with putting together those terms of reference.

CHAIRMAN—But you would agree that the terms of reference are really crucial to the outcome?

Vice Adm. Chalmers—Providing they do not stultify the inquiry. Yes, they are crucial to the outcome.

CHAIRMAN—My next point is, how do you overcome the inherent problem in the ADF of inferior and superior officers in a hierarchal structure? Every board of inquiry you set up must be done by a junior officer or done by an officer over whom there is a superior officer who in some way has an influence on his career. Unless the BOI is conducted by the CDF, that case must apply. Where there is what is euphemistically called systemic failure, where people in a higher position fail to be accountable, or held to account, how do you overcome that deficiency?

Lt. Gen. Sanderson—Firstly, it is a board of inquiry. It is not just an individual making an inquiry. It is a board of inquiry which, in most recent cases, has been conducted in full public scrutiny. Associated with the board of inquiry is a very strongly defined legal relationship and assistance providing guidance to the board.

The idea of an individual being able to come up with conclusions from a board which reflect his particular career perspective would be quite unusual. It would require an individual to have such powers of persuasion over the board themselves, to be capable of ignoring legal advice and to run the risk that ignorance of legal advice would not come to light eventually. It would be quite extraordinary for that to happen, in my view. That is overcome by putting together people across a broad cross-section of the organisation with expertise in this area, giving them legal advice and taking legal advice on the terms of reference for the board of inquiry. The terms of reference for the Black Hawk board of inquiry were not drafted by me. They were drafted by a whole panel of people who assisted our chief legal officer in putting that together.

CHAIRMAN—On a board of inquiry the chairman is the senior officer and he is sitting on the board with officers who are junior to him. I can recall cases on boards of inquiry where leading questions simply were not asked. It is impossible to avoid the conclusion that that was done to protect the careers of more senior people. I am not talking about events in the last 12 or 24 months; I am heading back beyond that. If you are going to have a justice system that is fair, it has to be seen to be fair and has to work in a fair way. That is one of the problems with the present situation.

Vice Adm. Chalmers—I think it is fair to say that those who review boards of inquiry at the level above the appointing authority do look quite carefully at the questions asked. I know of occasions when boards of inquiry have been required to re-sit to cover particular matters that were not covered to the reviewing officer's satisfaction.

Mr BROUGH—Are the abilities, experience and training of anybody who sits on a board of inquiry, or an investigating officer in less notable cases, adequate in the three services in your opinion? We were told earlier that you were looking towards some system of course training so you had specific people within each of the three services. Which

direction do you feel would be the best way to go so that you get the best outcomes? I am not just talking about these top issues but also the lesser inquiries that are investigated.

Lt Gen. Sanderson—One of the requirements of a board of inquiry, which is about finding out what went wrong, is to have people on the board who have the expertise to make judgments about that. These are not necessarily people who are sitting on boards of inquiry as a constant part of their existence. Mostly they are people who have other jobs which are to do with their expertise and they deal with that in depth.

From what I have seen of boards of inquiry over the years, normally the board of inquiry takes a long period of instruction prior to commencing its proceedings. It takes instruction from legal officers. It sits around for quite a long time discussing exactly what the board of inquiry is about and what they are seeking to achieve. Then they decide who they need to talk to to achieve that. They do open up for submissions as well. It is experts who take advice on proceedings in order to do their jobs.

Mr BROUGH—From a board of inquiry's point of view, you think that is the best way of going. Is that correct?

Lt Gen. Sanderson—Unless we want to have a panel of experts sitting and waiting to do that.

Mr BROUGH—No, I am asking what you want to do.

Lt Gen. Sanderson—That seems to me to be the best way to do it.

Mr BROUGH—What about agreements from the other two services? What about the investigating officers? That is a different kettle of fish. How would you see that best operating to get the best outcomes?

Lt Gen. Sanderson—As you may know, investigations are going on all the time. That is the normal low level of activity that goes on to meet a commander's responsibility to correct things that occur. That goes on to cover everything from loss of a particular piece of equipment to vehicle accidents. Mostly it is associated with vehicle accidents. Incidentally, it is a huge burden on units to have officers tied up with investigations continuously. Normally the commanding officer has to make a judgment about the seniority and the expertise of the individual investigating officers who do the job.

Mr BROUGH—Do you think there is sufficient training for people given these tasks to undertake them and to come up with the right sorts of accurate outcomes in your three services at the moment? Should there be some formal training instigated during their basic officer training, or throughout some other part, compared to what you have now, which is basically very little?

Vice Adm. Chalmers—In terms of investigating officers, our junior officers do get that instruction as they go through their courses and, as they move through ships and get more and more experience and instruction as well, they learn a lot more of that on the job. I think that we need to ensure that there is a continuity of education so that matters are investigated properly. In terms of boards of inquiry, we are going to a different level.

Mr BROUGH—I understand that and that is why I am dealing with this inquiry. For the investigating officer, you said you think there should be something formalised. I am just trying to get a handle on what you three believe it should take. My belief is that there is not sufficient training at the lowest level when they first undertake it and, therefore, inherent problems start then and can be built in throughout the system. Do you believe the current system is satisfactory or needs to be improved and, if it does, how does it need to be improved? That is all. As far as the actual abilities of the investigating officers, as you said, it is a big burden on officers in each unit and with each ship. If they have the ability and the training to do it, you are going to have better outcomes and it is going to be done more speedily. How do we attain that?

Lt Gen. Sanderson—They are trying to do it, but it is like every other aspect of investigative work: you do not develop real expertise in those areas unless you actually do them. One of the most debilitating things for commanding officers, from my experience, is to have to send investigating officers back again to get the thing done properly, but it is part of the education of the officer and it is difficult to see how you can do it any other way. There is training in the training establishments, but it has to be hand-on investigative work in order to develop.

Mr PRICE—I am confused. I thought the ombudsman said training was inadequate.

Lt Gen. Sanderson—That is a judgment.

Mr BROUGH—You are obviously of the belief, collectively, that the best thing is to do the work on the ground and be corrected by a superior until they gain practical experience rather than do some form of formalised course.

Vice Adm. Chalmers—I think that it would be fair to say that there should be elements in initial training and then throughout the continuum of education and training.

Mr BROUGH—Through existing courses.

Vice Adm. Chalmers—Yes, through existing courses.

Mr PRICE—What if it is initial training of a junior staff? Lots of your officers will not make commanding staff, will they?

Vice Adm. Chalmers—No.

Mr PRICE—That means it would stop at that level.

Vice Adm. Chalmers—Not necessarily. It takes us nearly 20 years to produce a commanding officer of a destroyer. There is a tremendous amount of experience in that. Every time an officer goes to become an executive officer or a commanding officer of a smaller ship—say, a patrol boat—he goes through a whole series of courses, which do include updates on Defence Force Discipline Act matters and any of the major issues of the day. If investigations is one of them, that is something covered in that specific course for updating people before they take up those appointments.

CHAIRMAN—Presumably we live in an ideal world, have an accurate BOI and find out what went wrong and move to correct it. The next point is: if there has been negligence or incompetence involved, how is that disciplinary step taken? In so many cases in the last ten years, we have seen examples where BOIs have found a failure in the administration, yet no person is ever brought to account. The generic description is that it is a systemic failure and the guilty go free and the families mourn. That is not a good enough situation.

Vice Adm. Chalmers—There are really two routes that can be taken after the BOI has completed its work. One is that we start off a disciplinary investigation which attempts to illicit evidence under different rules of evidence. As a result of that, I would suggest, the reviewing officer has a legal opinion as to whether a disciplinary case would be successful in a court martial or other forum.

If it is a matter of professional negligence, the alternative is to follow the route of administrative action. If you follow the route of administrative action for professional negligence matters then, generally, people are held to account. They are asked to show cause why they should not be administratively censured. Censures may or may not then be used depending on their response to that 'show cause', which is quite a detailed document. If they are censured, those censures are placed on their promotion files where, in the Navy's case, they remain and the whole file is reviewed before promotion. So indeed they are censured.

CHAIRMAN—Admiral, this applies to all three services—no service is immune from it: you cannot give me an example where lives have been lost in the last 15 years as a result of an accident in the ADF and somebody has been reduced in rank or court-martialled or discharged from the service where negligence has clearly been involved.

Vice Adm. Chalmers—I would suggest that it is a matter of legal opinion as to whether that case could be taken to court martial, given different rules of evidence, the case proven and, indeed, the court martial be successful. The process is rather like being in a civilian organisation and going to the DPP and the DPP deciding whether he is going

to prosecute based on whether he thinks he can win the case. In our case, we have two ways of doing it. We can review it and either go to court martial if we have legal opinion that the case is likely to be won or look at administrative censure if it cannot.

CHAIRMAN—I accept that, Admiral. Civilian courts do convict for manslaughter. There has been no case of manslaughter prosecuted against any member of the ADF that I am aware of in the last 15 years. Has there been?

Lt. Gen. Sanderson—Yes.

CHAIRMAN—Successfully?

Lt. Gen. Sanderson—No. Civilian courts found the individual not guilty. There are certain things that we have to refer to the Director of Public Prosecutions which obviously cannot be tried within the organisation itself. One particular incident—quite a recent one—was referred to the Director of Public Prosecutions who took criminal charges against the individual and the individual was found not guilty.

CHAIRMAN—But, by and large, there has been no overt disciplinary action taken against any officer of the ADF for about 15 years that has led to a public censure of that officer with respect to either discharge from the service or reduction from the rank they held.

Vice Adm. Chalmers—But each one of those cases would have gone through the process.

CHAIRMAN—The importance of this is that it is very difficult in a voluntary service for the volunteers to see incompetence or negligence and people getting away scot-free with that. It is very hard to maintain discipline in those circumstances.

Vice Adm. Chalmers—People do not get away scot-free. The administrative process allows people to be censured and the fact that they have been censured is well-known in a small service like ours.

Mr PRICE—I am trying to make the point that the ADF had rejected the opportunity to set up its own DPP organisation. Are you making the decision as to whether or not to proceed to the next stage?

Vice Adm. Chalmers—As I said in my opening statement, I think it is important that the discipline system remains within the command chain. A DPP outside the command chain is taking something that is integral to command away from the commander. It is up to the commander to decide. That is what command is all about. It is not about management; it is about life and death; it is about making those decisions. I would think that the integrity of our commanders is such that we can make those

decisions.

Mr PRICE—I suppose the difficulty I have is that it is very early in the inquiry and much earlier in my understanding, but isn't there a way that you can separate out the different types of disciplinary actions and have more appropriate measures for them? I guess you would argue that that is already the case, but I am having difficulty coming to grips with it.

Lt Gen. Sanderson—It is already the case, and quite clearly there are matters which we have to refer to the Director of Public Prosecutions. In the case of the Black Hawk board of inquiry, for example, we did refer the findings of the Black Hawk board of inquiry to the Director of Public Prosecutions for their judgment as to whether there was a case for action to be taken by the Director of Public Prosecutions. The answer was no; therefore we then had to deal with it internally.

Mr PRICE—In the recent deployments in Cambodia, Rwanda and Somalia, what were the disciplinary matters that came forward with those deployments?

Lt Gen. Sanderson—You are talking about the Australian disciplinary matters?

Mr PRICE—Yes.

Lt Gen. Sanderson—I do not have all of those at my fingertips. I can speak about the Cambodian situation; there was a case of people leaving their weapons insecure and losing them. There was an investigation into an Australian soldier killing a Cambodian policeman which did not result in a disciplinary action against the Australian. But I cannot tell you all of them. Our legal representatives could get that detail for you.

I am sure there were cases of vehicle accidents which impacted on the operation of the force. That is pretty normal in those sorts of operations. There were some very serious consequences of actions in other foreign contingents, of course. We had cases of people raping, stealing, and very serious vehicle accidents killing large numbers of people. It was a difficulty for the commander to solve those problems because he did not have national command over those contingents but had to accept responsibility for them.

Senator BOURNE—There must be real problems with being in command, as you were, of a group of defence forces which are not of the same level of training as your own that you are used to. What specific problems does that cause in discipline and that sort of thing?

Lt Gen. Sanderson—You are totally dependent upon the disciplinary processes of that country producing a disciplined force. If you do not have a disciplined force acting with truly disciplined effectiveness in the countryside, you run into great difficulties. You are held accountable for that responsibility, and all you can do is insist that that particular

country acts comprehensively with respect to those infringements. Sometimes it takes them a long time to do that. Therefore, you have a real problem in the countryside which seriously detracts from your achieving your operational objectives, which probably highlights the point I have been making about the ability of commanding officers to be able to deal expeditiously with these issues.

Mr BROUGH—Can I go back to the chairman's point about the fact that one person has been referred, et cetera. Are you happy with the way the system allows that to occur? We currently have a system, a board of inquiry, et cetera, and you go through the process. Given the outcomes, which are history, does that create any problems or anxieties for you as the chiefs of staff?

Lt Gen. Sanderson—Like the chairman, I have deep concerns about some of these issues, and my own exploration of the sorts of things that he is talking about reveals that when the whole thing is subjected to the full legal processes, there has not been a case to answer. That has been the legal recommendation in those processes. Therefore, it has not been proceeded—

Mr BROUGH—With respect, that is not my question; I understand that and I accept that. I am saying: does that create a problem for you internally where, for all intents and purposes, the widely held belief within the unit and the formation may be that X,Y and Z were very culpable and, at the end of the day, guilty, and have got away with it? I am just asking whether that creates a problem for you in dealing with that on the ground, when you have gone through all due process and this is the outcome that the system throws up for you.

Lt Gen. Sanderson—If there is a widespread belief that somebody is guilty of a command or a technical failure and they are found not guilty by the system, then it does present difficulties. But the fact is that that has to be explained, and life has to be got on with.

CHAIRMAN—You would be aware that the government has appointed two civilians to this inquiry into the *Westralia*.

Vice Adm. Chalmers—The government did not appoint them. The appointing officer appointed them.

CHAIRMAN—Thank you; I stand corrected on that. Without having discussed the matter with the appointing authority, that can only be interpreted as a wish for a perception of independence to be created in the services and in the public's mind. How would you feel if the whole matter of boards of inquiry, where we are dealing with major issues, where loss of life occurs or major materiel damage beyond \$10 million or something like that occurs, was handled by an independent authority? Would that relieve you of the worries that you have at the present time about objectivity?

Vice Adm. Chalmers—No. We have appointed civilians in this case, to the board of inquiry you are referring to, in order to ensure that there is openness, by appointing them and having the board open. They also bring particular skills to that board which are matched by others on the board of inquiry.

CHAIRMAN—I am not proposing that you have an independent body that is composed of civilians; I am presuming that you have people with correct professional experience in the area that is under consideration, but that those people are no longer dependent for their weekly salary cheque on the Department of Defence. In other words, they are ex-defence personnel of a senior rank.

Vice Adm. Chalmers—I would say ex-defence people of a senior rank have a very short half-life in terms of experience. I also think that it is incredibly important to a commander to be able to command and lead that boards of inquiry take place within the chain of command so that he can act on them extremely quickly. Then, the real trick, I suggest, is for the review process to also be open and explainable.

CHAIRMAN—We have a practice in this society of separating the legislature from the judiciary. It seems to me that the services, like the police forces, are so small that internal investigations are very difficult to achieve objectively.

Vice Adm. Chalmers—Again, if you have a board of inquiry which does have members who are not members of the Defence Force on it, then the president of that board cannot hold sway.

CHAIRMAN—But if you give him the legal right to send for documents and people, to make recommendations and to see that those recommendations are implemented by the CDF, you overcome that problem.

Vice Adm. Chalmers—I would say to you that a board of inquiry might make recommendations; it might not. The appointing authority may not want recommendations made and, if so, he can leave that out of the document which sets up the board of inquiry. We have to remember that that board of inquiry is only there to gather facts. It is really not there to make judgments or to apportion any sort of blame. I think that is a process which is carried out quite separately.

CHAIRMAN—I accept that. That is no problem. But we really do have two problems here. Firstly, we have the determination of what actually occurred and, secondly, the disciplinary action, if any, that is required to flow on from that. Some things are acts of God and nothing will change that. But others do come from people falling down in their responsibility and, as a committee, we attach quite a bit of importance to the accuracy of both processes—not to one, but to both.

Vice Adm. Chalmers—I agree with that, Mr Chairman; we must look at both the

processes. I think what we must also do is separate the processes and understand that they are two quite different processes. I do believe that, in reviewing the inquiry, the review of the inquiry process is one that is particularly important and one which most people do not understand.

Mr BROUGH—On the *Westralia*, do the terms of reference include making recommendations?

Vice Adm. Chalmers—They have, in fact.

Mr BEVIS—I have just one request. I imagine you gentlemen are aware of the range of submissions and that, amongst the submissions the committee has received, there are some allegations or concerns or questions raised about past boards of inquiry. I would simply make the request that obviously we will—certainly I will—want to get a view from the services about those matters that are raised there so, if someone is not already looking at that, I request that they dig it up and have a read. I am sure there will be a number of questions for you out of them.

Air Marshal McCormack—Individual boards of inquiry?

Mr BEVIS—If you have a look at the submissions, there are a couple, I think, that stand out where you can identify that at least some members of the committee will have an interest in knowing what the services' view of the submission is. By that, I mean the submissions dealing specifically with what would appear to be wrong processes or things that have gone off the rails with former boards.

Mr PRICE—When we talk about systemic problems, often if there is a systemic problem it did not develop overnight; it has been there for a while. To what extent do you consider the rotation of commanding officers inhibits or assists in the protection or non-protection of systemic problems? I guess what I am trying to say is that you get appointed to a commanding position, and you are there for a couple of years and you are shuffled off to another place.

Lt. Gen. Sanderson—That is the natural flow-through within the organisation, and in fact it is part, particularly in the army, of the army ethos of keeping our command structure young. In fact, I have a deep concern at the moment that the command structure is getting old. We really need youthful people in these places, and normally we rotate to do that, and also to spread that expertise. That is not to say it is on-the-job training; we are very careful in the selection of our commanding officers and we make sure they are trained for the jobs. In fact, I would like to re-emphasise that point. We are very careful. It is the thing that is most demanding of me in my position as Chief of Army, the selection of commanding officers and making sure that they are properly equipped for the job.

Mr PRICE—Let me put it another way. The structure underneath the commanding officers is likely to have been there longer than he has and remain there after he has gone, whether we are talking Air Force, Navy or Army. Does that facilitate the development of systemic problems or does it inhibit it, or is it mutual or indifferent?

Air Marshal McCormack—Mr Chairman, if I may, often the new CO in fact finds out some problems in his handover and sees problems that other people may have missed. So a new vision on it is often the best thing that could happen.

CHAIRMAN—He might also bury them for two years' time.

Lt. Gen. Sanderson—He could. But these are people of high integrity, Mr Chairman. The suggestion that that would be a broad practice, I think, is totally wrong about the Australian Defence Force.

Mr PRICE—But he may be unaware of it, I guess.

Lt. General. Sanderson—This is a remarkable—

CHAIRMAN—On a more serious note—and that was in jest—I think there are real criticisms about the frequency of rotation in so far as people do not develop the expertise and the experience to make—

Lt. Gen. Sanderson—Mr Chairman, if I may, people do not come to command positions without having experience in all of these steps towards that command.

CHAIRMAN—I know that. Jack of all trades and master of none.

Lt Gen. Sanderson—I think that is probably an incorrect assessment of what the ADF is all about. Normally, for somebody to be a commander of a battalion, for example, they will have been a company commander, an operations officer, a platoon commander, and probably a specialist commander of mortar or assault parties in that platoon. By the time they arrive at the command position they have been through one of the most expensive training processes in the country.

CHAIRMAN—Quite, but there is a difference between being No. 2 and No. 1, and the battalion CO is really a very different position to the 2IC.

Mr PRICE—If I could just ask this question, if you had a ship at sea, what is the cut-off point in terms of disciplinary action or administrative action that may be handled by that ships' company?

Vice Adm. Chalmers—By the commanding officer?

Mr PRICE—By the commanding officer, yes.

Vice Adm. Chalmers—The commanding officer can conduct trials, if you like, under summary proceedings. He can also recommend to a convening authority that a court martial be put in place. If something goes wrong in the ship, he can conduct an initial investigation and, again, his appointing authority—and we only have three appointing authorities and three convening authorities in Navy, that is, myself, the training commander, and the maritime commander—will deal with that as well. There is a very close relationship between all to ensure that these investigations take place.

CHAIR—Gentlemen, thank you very much for your attendance here this afternoon. This is going to be a very long and complex inquiry, and we may well wish to call you back again to amplify some of the points that turn up in evidence. You will have due notice of that.

You will be sent a transcript of evidence from *Hansard* to which you may make grammatical corrections. I do not think there is any information that *Hansard* wish to speak to you privately about, so thank you once more for your attendance, and we look forward to seeing you next time.

[3.52 p.m.]

KELLY, Miss Jacqueline Marie, MP, Parliament House, Canberra, Australian Capital Territory 2600

CHAIRMAN—I welcome Miss Jackie Kelly to the subcommittee. I must advise you that the proceedings here today are legal proceedings of the parliament and although the subcommittee does not require you to give evidence under oath you should be aware that this does not alter the significance of the occasion. The subcommittee prefers that all your evidence be given in public but, if there are matters that you wish to raise in private, you can request to do so and the committee will give full consideration to that. Do you wish to make an opening statement?

Miss Jackie Kelly—Thank you, Mr Chairman. I will start by giving some background information. I served in the military for six years prior to my election in March 1996. While in the military I had a lot to do with military justice. In discussions with Paul it became apparent that I should make some sort of submission. Given the priorities in my electorate I have not actually had time to put in a written submission so I am here this afternoon just to give an oral point form briefing on my experiences in the military.

I served from 1989 to 1996 in the legal category and I reached the rank of Squadron Leader. During that time I served in Support Command where I was involved in convening courts martial and training in military law. I also served for three years in Butterworth. I was then posted to Air Command where again I was involved in convening courts martial, boards of inquiry, and administering the DFDA, as well as laws of armed conflict training and general base administration.

The six years in the RAAF were the best years of my life. I do not regret a day. A reason for becoming politically active was to seek a better direction for our ADF. I felt that I had something to offer in that direction.

I would like to state on the record that everyone that I have ever had dealings with in the RAAF is fully committed. We all go through a very stringent recruiting process which, basically, sifts out those without talent and selects those who are very talented, committed and dedicated. They then have a very stiff training regime to get through and most of them that I have worked with—we have a saying in the RAAF that ‘they bleed blue’—really would do anything in the interests of the RAAF. And I imagine that the culture is the same in the other services.

We did a lot of our training as officers in man management and in the policies and regulations of the ADF. We were informed in training that there are no personality clashes, that the system will work. It is a very different culture from that of civilian life and a very good example is the attitude to marijuana. In the civilian life using marijuana

is treated these days as a minor offence and, in some jurisdictions, as a summary matter. In the RAAF it is a heinous crime and any sort of drug abuse is looked on in a far more conservative fashion than in civilian life.

CHAIRMAN—It would also be a pharmacologically correct approach, too.

Miss Jackie Kelly—It just shows you the difference between trying to implement military justice and what civilian standards would be. It is a very litigious society in civilian life—I think that most of our members are aware of that. As we recruit fewer ADF personnel and demand higher standards of entry, recruits are of an increasingly high calibre and they are aware of their rights. I do not think there is any statement that clearly sets out their employment contract with their commission or with their employer. Frequently it seems to be a one-way contract but, given the attitude of the members, they are quite happy for that.

I think that mention has been made of the incidents where civilians have rights to sue for negligence, but service people have a different obligation. The basis for justice is that every person is entitled to a fair hearing by a competent, independent and impartial tribunal within a reasonable time.

I also believe that the punishment should be consistent. One thing I experienced quite frequently in the RAAF was that you never knew what the punishment was going to be when you walked into a tribunal. You often really had no idea what the outcome would be. There came to be a culture of pleading not guilty in the RAAF because you got off on a technicality. An example of that was a matter involving one base where there was a speed limit of 40 kilometres on the base. A driver managed to roll a service vehicle at 40 kilometres an hour and was charged. After the CO had been bombarded by two expert lawyers—who were reservists—for three days he eventually threw the matter out and said that he did not have time to go on. He said that he was not legally qualified and threw the matter out rather than pursuing it.

At that time we had a driver category, or a driver mustering, and in those days—this is just an example—some bases would not charge drivers, while other bases would bring charges after every single accident. Some bases would only charge people if they were problem people with a history of difficulties and we thought to administratively deal with them and a charge on their record would assist. There are several instances I can show of persons having exemplary records prior posting to a unit and running into a personality problems—I call them personality problems or clashes—and their careers have taken a downwards dive. These are people that we have recruited and trained to the highest standards and who have performed above average. Suddenly their careers are toast—and there are several examples of that.

Major Davis in his submission has made a good point about the person charging someone and hearing the charges was the person responsible for the lead-in circumstances.

For example, this was a case of forcing someone to drive for 14 hours, then making that person have broken sleep on picket duty and forcing him to drive again and when the individual fell asleep at picket, bringing a charge against him. The person who gave those orders was also responsible and in charge.

CHAIRMAN—It might interest you to know that I have been charged for going to sleep as a picket after a hard day's training starting at six in the morning.

Miss Jackie Kelly—Often the charges get complex. The COs are deterred from going forward with the charges, or they become Rumpoles and seek to run from a legal basis and feel that they are carrying on an injustice. The inquiry in Butterworth was a clear example of that: people ran away with the concept of law and the pursuit of justice and failed to see the actual objective of that board of inquiry. In that instance it paralysed leadership. It is strange that that inquiry in Butterworth which cost taxpayers \$6 million has not really been looked at by this committee to date.

CHAIRMAN—It has been referred to.

Miss Jackie Kelly—It has been referred to. For the record, that was an instance where a squadron leader was posted into a 10-man unit which was based permanently in Butterworth. It was the administration unit for the rotating P3s through that area. The airplane and crew and maintenance personnel were posted up on a rotational basis, and that small unit of 10 people or so were responsible for the administration of that operational force. Our P3s are doing active service. The sorties that they do are very sensitive and of great benefit to us and our allies.

You had a situation where a new CO was posted in and he clearly had personnel problems. He was in a position where he could not deal with his subordinates. Basically, they then got together and dealt with him. The group captain in his chain of command came up as an investigating officer to try to deal with the situation. He had no power to send people home, or he felt legally bound, or he was unsure of legal consequences, so that he could not exercise leadership. That was subsequently referred, and terms of reference were drafted by an administrative officer who had the ear of the air commander. It then went to a board of inquiry and the situation really snowballed out of hand. You had lawyers on \$1,200 a day, some of whom were very eminent legal practitioners in the same circumstances as junior service officers with little or legal experience. They were trying to defend their clients on an equal footing. It did get rather out of hand.

I made some enquiries as to cost with a view to changing the terms of reference to scale it down and have it more speedily dealt with. I was promptly told not to intervene, and therefore the whole matter went on with no legal advice. Six million dollars later—

CHAIRMAN—You had a legitimate administrative role?

Miss Jackie Kelly—I was the legal adviser at air command. Air command legal should have had some role in convening—

CHAIRMAN—Who overrode, or neglected your advice?

Miss Jackie Kelly—The senior administrative officer who was in our chain of command. He was writing my reports. So when he told me to do something, I did it because he was writing my annual report.

Mr BROUGH—He was also your direct commander and so he commanded you not to do something. Is that what he did?

Miss Jackie Kelly—That is absolutely what he did. So that went the way that it went. I think another problem with the current system is that the lawyers are general service officers. That is important because they are then in a general service chain of command where they can be commanded to do things. That may be against their legal training in a civilian outfit but it is perfectly acceptable, culturally, within the RAAF. They are also within a chain of command within the service lawyers. So you have two chains of command running the junior legal officers. That is a contradiction in itself. You are answerable to both commands because both of them have an input on your annual report.

There is also the RAAF culture: do what is in the interests of the RAAF—be that keeping something out of the media or keeping our image very shiny and bright, which is always important to an organisation as proud as the RAAF. It is a systemic problem. It is not something that any one person could have avoided. There was never any one person with a conspiracy running on. Because of that culture, I can see how people, at the end of legal proceedings, could feel that there is some conspiracy out there to get them—that there is this somebody in the RAAF who is after them. It is a systemic problem of no one person having a clear idea, nor experience, of all of the things that are going on.

I think the statistics show that between six and 12 court marshals or DFM hearings are convened within the RAAF every year. In my time in air command, I would have done between six and 12 a year. In training command, I probably did a few more and, in log command, I did not do too many. Generally, they were from units all over Australia. So hearings could be held in Townsville, Darwin, Brisbane, Sale—anywhere. In every instance you had a different DFM or judge so there was no consistency, and they did not have any knowledge of the accepted punishment. Punishments were pretty well all over the place in terms of consistency. There did not seem to be any reference against any matters for a particular offence because people did not have experience.

Mr BROUGH—What is restricting him from looking at prior judgments?

Miss Jackie Kelly—They are not very well recorded. The manuals for prior

judgments generally consist of the review process, the 105 review report. That is written by a legal officer after the trial and does not necessarily refer to the specific problems within that trial, the mitigating circumstances et cetera. Unless there was something wrong with the punishment, and that would be why it was changed, the reviews do not necessarily go into all the circumstances of a trial and how or why that decision was arrived at.

Another thing is that you know all of the people. It is a very small organisation. During your time in the RAAF—in any of the services—you will get to know everybody. Unquestionably, when something goes on, you know the pilots, the spouses, or whoever is involved. You have at least had dinner in the mess with them. These are all people that you know so it is very hard to get independence.

In Burnett's submission he mentions a case that was inordinately delayed. This was the case where someone had done some pretty severe theft from the military and was given a suspended sentence. It really was an instance where we thought he would get a detention and he did not. He was advertising military supplies in the *Trading Post* and then selling them out of the Amberley warehouse.

The Amberley stocktake revealed that. A lot of paper shuffling was then done to show that the stocktake was not really that bad. However, a lot of evidence pointed to very poor control of the stock out of that warehouse. That case, initially, because it was a warehousing one, went to Log Command. About 12 months later it ended up at Air Command because the person involved was Air Command. From there, they had to find an available convening authority and a defending officer, at a time that suited the defending officer—do not forget he had already chosen a defending office—and then they had to find a day that suited both the defending officer and the judge. On top of that, they had to find a date when they could get a prosecuting officer. So further delays occurred and it was coming onto Christmas.

Some two years after the initial search of this person's premises, and the confiscation of all the goods, charges were laid. The judge basically said that there was a conviction but the punishment was not particularly severe. I think it was a suspended detention. The RAAF then tried, administratively, to get rid of this fellow because they felt that, as a service policeman, he was no longer suitable.

Clearly, the court, in that instance, had the option of dismissing of him, and did not do so. I think that is what you have to look at—getting tribunals who are prepared to dismiss someone. The number of man-hours that are lost in the military administering administrative problems—in the instance above, they spent two years trying to get rid of a person who had breached his security duties—is enormous. So those are the sorts of things need to be looked at.

Boards of inquiry used to be used to find out what happened. They were closed

hearings and no-one ever heard about them. In the end, through coroners inquiries or what have you, reports were eventually made public. It then became policy that they would become public. Witnesses at those inquiries had no confidence that what they told the inquiry would be made public. Therefore, they started requesting legal representation at the proceedings.

The Black Hawk inquiry was open to the public from the word go as and it is the same for the *Westralia* inquiry. That is probably appropriate, given today's civilian expectations, but it does mean that the role of the board of inquiry to get to the basis of what happened, so that people feel quite free to say what went on, so that it does not happen again, is probably no longer able to occur. You would have to look at rewriting those BOIs to try to achieve that. I think a lot of work needs to be done on BOIs.

There is no separate body for service employment issues. Peter Harris makes a case where people were kept in for no reason, after their service was terminated or their contracts with the RAAF had expired, and they are not given any of the financial benefits that discharge would give them. I think you have to look at people's service conditions and why they are being kept in.

Mr BROUGH—Can you expand on that a bit. Are you saying that they have signed up for X amount of years, that that date has expired and they are not allowed to leave? What is the reason for that?

CHAIRMAN—Yet if they were dismissed by a court, they could go out with a truck load of money; is that what you are saying?

Miss Jackie Kelly—No. But we probably should look at the court's ability to dismiss people, and for a prosecuting officer to seek dismissal, because of a number of administrative reasons, and be able to bring in the administrative history of a particular service person to show why they should be discharged.

CHAIRMAN—You are not suggesting that, if someone is discharged for unsatisfactory service, they should go out with financial reward?

Miss Jackie Kelly—No, I am saying that, if you are charged, and your service expires, they keep you in. Given that they have up to six months—

Mr BROUGH—To serve the end of your sentence. Is that what you are saying?

Miss Jackie Kelly—On at least two occasions, the army has halted the discharge of soldiers to take action against them under the DFDA. In both cases, the army halted the discharge using the provisions of the Defence Act, which states:

A soldier who becomes entitled to a discharge shall be released from service in the Army as soon as

is reasonably practicable, but remains bound to serve until discharge.

Their cases should have been dealt with under the DFDA96, which states:

A person who has ceased to be a member of the Defence Force . . . 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.

So you do have the capacity in serious incidences to charge them even after they are discharged, but people keep them in.

Mr BROUGH—Time that you spent in the cells is not considered as service time, therefore that is added to your discharge date, isn't that correct?

Miss Jackie Kelly—This person has not been found guilty.

Mr BROUGH—No, but they are going through the processes. Isn't that what you are suggesting?

Miss Jackie Kelly—I am suggesting that they have not been found guilty and the right to be treated as innocent until proven guilty does not exist. They are keeping someone in and no tribunal has found them guilty. So you probably should look at that section and say that if you want to keep someone in, then either the proceedings are already under way and can continue or there is a deadline of six months for any offence.

Mr PRICE—Is this a problem in the RAAF?

Miss Jackie Kelly—Yes, it happens in the RAAF, I know of cases in the RAAF. I am pretty sure it happens in the navy, too.

Mr BROUGH—You say they did not get their entitlements?

Miss Jackie Kelly—That is right. In one case the period of time was up to two years, in another a pension and over \$60,000 in commutation was held up, necessitating hardship on the family involved and applying a financial pressure on the member to make the minimum amount of fuss.

Mr BROUGH—So they were still being paid as a member of the Defence Force while they were there?

Miss Jackie Kelly—No, they were not paid.

Mr BROUGH—So they were kept in the defence forces—

Miss Jackie Kelly—Kept in the defence forces, not paid and not given any of their commutation benefits which would have helped them in paying legal fees.

Mr BROUGH—And this person was not in prison at the time?

Miss Jackie Kelly—No, not in prison and not found guilty at the time—and subsequently not found guilty.

Mr BEVIS—Not on detention and not being paid. How can you do that?

Miss Jackie Kelly—I think you need to rewrite the contract that service personnel have with the government. You obviously cannot do that. Unless people have put submissions in, it is very hard to—

Mr BROUGH—I would like to be able to substantiate it, that is all. I am not calling you into question at all, but I think that we need to be able to substantiate all of those details because it is a very serious issue if it is true.

Miss Jackie Kelly—Check with Peter Harris, I am sure he would give you the names on that submission. But I am aware of it as well in the RAAF.

CHAIRMAN—Have you finished your opening statement?

Miss Jackie Kelly—Delays are a problem. Also the culture of it. There was another instance where a trailer was made as what is called a foreigner in a shop. The member was subsequently charged. However, it was a culture that had been going on forever. They generally keep their skills up by making foreigners and in fact that was the service name for it, a foreigner. He was charged.

I think there is not enough independence in the selection of the administration of the DFDA. The Abadee report makes a number of very good recommendations, it goes some way to looking at it. I prefer a system similar to that in the United States where you actually have a separate legal category for prosecutions and a separate one for defence and a separate one for judges. Then you still have your service lawyers. Do not forget that during the Gulf crisis, America had 320 lawyers in the Gulf. They do play a vital role.

CHAIRMAN—They also had well over 100,000 troops, though, didn't they?

Miss Jackie Kelly—Yes.

Mr PRICE—Send the lawyers out first.

Miss Jackie Kelly—Someone told me it should be full of EDOs and lawyers. Parachute them in behind enemy lines and get them to teach the enemy all about the laws

of armed conflict, and you won't have any problems.

CHAIRMAN—That is a very different view from the one we have had from the chiefs of staff and the CDF.

Mr BROUGH—Is that why you sought another career?

Miss Jackie Kelly—No, I loved my career; it was really great. Often I would find myself advising the defending officer, who would be a flight lieutenant; I would advise the prosecuting officer and I would advise the CO. Basically, they would all walk out of there and they would be pretty happy because the defending officer probably got what he thought he was going to get, but whether that is really independence of the judiciary is another thing.

CHAIRMAN—Do you think there is a capacity in the ADF as it stands at present to provide fair and impartial hearings on disciplinary matters?

Miss Jackie Kelly—I think you need to make some changes. I definitely think some strong changes are required. I think Abadee goes a certain way towards doing it. I think that the structure, as it is currently set, has got too much room for systemic error. There is the lack of experience in a particular area, and the quality of the representation as well is not as fair as you would get in civilian courts. I mean no disrespect to our reservists; they are excellent and provide an excellent service, but they run country practice GP services. Suddenly, they are in a trial against someone who makes a living as a barrister. I would hope that that person is the prosecuting officer rather than the defending officer but that is not always the case.

You have got to have some parity between the experience levels. It should be as good as you could get in civilian life. I do not see why, as service personnel, our representation should be any less, because we are fighting for our careers. This is someone's job that is on the line. This is their life. They have chosen something which they are passionate about and they take it very seriously. When the RAAF, to which they have given everything, for which they bled blue, dumps on them, then they start believing in conspiracy theories rather than believing that the system is probably inappropriate for the litigious society that we are in today.

CHAIRMAN—Do you think there is enough independence for the legal service within the services? You might have heard what I put to the three chiefs of staff. Is the ADF any more able to investigate itself objectively than the police force? I am not saying for one moment that the ADF is corrupt like some elements of the police force or anything like that.

Miss Jackie Kelly—It is not corruption, it is not incompetence, it is just a system. If one person gets a set of evidence and decides someone is guilty, they can direct

someone to prosecute it; they can then appoint who they want. We have done it; if you think the guy is guilty, 'Let's appoint an Army JAG because they give a heavier punishment than a RAAF one.' So we get to appoint the JAG, we get to appoint the defending officer, when it comes back for review we get to advise the reviewing officer. You try very hard to be impartial, but when you are in a chain of command with the group captain who is doing you AER or OER, it is a systemic problem and you are motivated to do what is best—

CHAIRMAN—You are basically suggesting that all these inquiries ought to be handled by somebody who is independent, in the way that we have the legal system separate from the legislature.

Miss Jackie Kelly—Absolutely. It needs to be independent. I think RAAF pol also need to be part of it. Often, you would be getting evidence collected by RAAF police which was unusable. They have wasted all of their time for stuff that could not be used. Probably, you should see a separation of RAAF pol between those who want to seek duties in a totally legal and investigative field and those who stay in security. That arm of the military—and you can be tri-service—runs defending separately, prosecuting separately, and they all have direct chains of command up to the chief prosecuting officer and the chief defending officer. So you are judged on the quality of your defence or the quality of your prosecution rather than having the mishmash that we currently have. Then the justices would not be doing a DFDA hearing maybe once a year; they would be doing it consistently. They gain experience and an attitude of, 'Look, I've heard that story before, I'm aware of the military culture and that is not acceptable; I'm aware of the administrative matters to get rid of this person which would most likely be taken in any case, so let's discharge him here,' with all the external appeals mechanisms that justice requires.

Mr BROUGH—What do you think the ramifications would be if you gave this evidence and you were still in the RAAF?

Miss Jackie Kelly—I would not be here.

Mr BROUGH—I am saying if you elected to come here and do this.

Miss Jackie Kelly—I would not have elected to come here and do this.

Mr BROUGH—Why not?

Miss Jackie Kelly—I just would not have done that because the RAAF is very important, and how we are perceived is very important.

Mr BROUGH—You obviously think it is important enough to come here today to break this open, so why wouldn't you have done it while you were a serving officer?

Miss Jackie Kelly—Experience. You have come out of law school; you think that is the way things are done.

Mr BROUGH—So your perception of military justice in the RAAF has changed considerably since you have left?

Miss Jackie Kelly—No, I suppose not so much my perception of it but the ability to change it. I now know that I can have a say in trying to change it and get it more adjusted and more aligned with the civilian system. Before, it was a matter of, ‘Well that’s the system; I’m not going to be able to change it, so that’s the system.’ Whereas now I think I can have an influence, through this committee, in saying it does need review. It is not any one person who is this ogre who is out to get these people, mislead the public or cover up. It is simply a systemic problem where one person is responsible for a lot of things that perhaps they should not be responsible for.

Mr BROUGH—With your dealings with boards of inquiry, did you find that the evidence was collected rather accurately and well in most cases, albeit laboriously perhaps in some ways, but at the end of the day the recommendations did not necessarily flow from the evidence? If not, what were the limitations of the inquiry?

Miss Jackie Kelly—You really should have a look at the Butterworth inquiry. That was a shemozzle. I do not imagine that the evidence was taken at all well.

Mr BROUGH—I guess I am generalising, not talking about a specific inquiry.

Miss Jackie Kelly—With us, we had the accident investigation team on the scene first. Their evidence was always exceptional. We generally had experienced people running that initial investigation. The board of inquiry subsequently was written and then it went through many channels of command. It was the delays in that that led to the belief that there was some cover-up going on. I think that is how come we are now in the situation where we just have an open board right from the start.

CHAIRMAN—Are you rejecting the fact that there were never cover-ups?

Miss Jackie Kelly—I think there clearly were.

CHAIRMAN—Did you read the 707 board of inquiry?

Miss Jackie Kelly—Yes.

CHAIRMAN—Do you think that was clean and objective?

Miss Jackie Kelly—Again, you are looking at a systemic problem. Again, you are looking at a culture—that was the way that we did things and that was accepted. There are

a number—*Voyager*, for a start. There have been a number of boards about which, as they went through the commands, things have been altered to suit. I would not say there was any deliberate personal motive; they were just changed in the interests of the RAAF or the ADF. It was not malicious or corrupt; it was well-meaning, but probably not in the interests of an open, transparent system.

Mr BROUGH—So with regard to the system that today you have put a light on, to a degree, in highlighting the difficulties, would you have defended this same system as being adequate two years ago?

Miss Jackie Kelly—I have done it. When you are asked to write a report, I remember the first time I came into this parliament there was an investigation into environmental damage to defence land. I remember writing some stuff to go up on what we had done—certain paint shops, what the neighbours had complained of and the action that had been taken. By the time I had put my piece in, then my superior, and by the time I actually saw the final report at this end, you kind of had a chuckle—

Mr BROUGH—It was far from what was started.

Miss Jackie Kelly—It did not look exactly like it did when it originally started. You cannot operate the military without a chain of command. You do need to have a chain of command. But when your career is on the line, and there are big bucks involved, you need to have some independent body that you can go to and say, ‘I have been harshly done by. There is a personality problem, there are terms of reference which have been badly drafted, this is going to inordinate cost, there has got to be a cost-benefit ratio in this action.’

Mr BEVIS—In terms of structural changes, how would you balance that chain of command requirement that everyone accepts must exist in the military with an independent judiciary that is separate from that chain of command?

Miss Jackie Kelly—That would give commanders a lot more confidence. They go into a role as a leader. It is a leadership role; they do not have to worry about the law. If I have a problem, he can say, ‘Boom, you are posted,’ and you are out of there. He walks into Butterworth and says, ‘I have a problem in an operational unit,’ and you are gone. He sends you back to Australia and it is not his problem. It is then dealt with through the legal processes, and he is quite happy that the person is getting justice. At the moment, things are convoluted in terms of what his rights are, what my rights are, whether he can ever come back at me, whether it is legal, whether he should get legal opinion, whether he should ask the lawyers what they think and, suddenly, we have lawyers making command decisions.

It is entirely inappropriate to have a lawyer sitting behind every infantryman on a front line saying, ‘That’s a legal target; no that ain’t. That’s a legal target.’ You cannot

have a lawyer at your shoulder, which most commanders seem to want today before they make a command decision. You really have to give them the confidence that they do have command, that decisions are not going to bounce back on them in some legal arena, that they can take action and that, boom, it goes off to an independent body. The person will be discharged, dealt with or sent back into the service with no blemish on their record.

Mr BROUGH—Once you remove someone from their unit, though, they are going to be damned.

Miss Jackie Kelly—At the moment.

Mr BROUGH—You said earlier how small the service is. I would think that, with what you are advocating with your ‘commander sends you away’ scenario, once you have left the unit, you are damned by your other ranks, or whatever else, from the start, because you have been judged at that point.

Miss Jackie Kelly—No. I think that is the case at the moment. In order to do that, you have to manufacture a whole bunch of evidence.

Mr BROUGH—Manufacture a whole bunch of evidence?

Miss Jackie Kelly—Absolutely. You will start with counselling and a whole bunch of other things. If you can find a summary offence to get him on, then you do that as well; let us start really riding someone. I have an example of an 18-year corporal. Being a corporal in the service for 18 years is not really being a high flier. Basically, two years from DFRDB—I think he was on sick parade, and I think a flight lieutenant told him to stand up a bit straighter. He said, ‘I’m on sick parade.’ In the end, the flight lieutenant had to apologise to him. From that instant on the guy was a marked man. Every effort was made administratively to get rid of him from the air force—18 years. For 18 years people had signed his AR saying that this guy was suitable for further service. But he had never been promoted beyond corporal in the same mustering. This has been his life and he is now struggling just to make pension.

You do not have to do that. You simply say, ‘We have a personality problem. I do not like your attitude,’ or, ‘I don’t like the way that you bark at me in front of everyone.’ You are then out of the squadron. You are posted somewhere else and no-one needs to know the circumstances.

Mr BEVIS—What does that do to the chain of command and the process of discipline in that unit?

Miss Jackie Kelly—I think it gives the commander a lot more confidence in his decision. It is not going to be double-checked by lawyers.

Mr PRICE—You are relating an incident where there was a clash. How did the RAAF handle what you described earlier as your personality problem, where someone has arrived at a unit with a good record and suddenly the performance deteriorates dramatically?

Miss Jackie Kelly—Basically they will go along to whoever is running that particular person's AR. They will probably be posted out of the unit and put into some 'hanging' job where they just float until it can be dealt with.

Mr PRICE—You gave the incidence of the extreme variability of sentences, if I could say, in relation to truck drivers or driving accidents. Were there other instances where you detected this gross variability?

Miss Jackie Kelly—Yes, I think it happens across the services. Certainly something in the army would get a much more severe sentence than would a similar offence in the RAAF, and similarly with the navy. There was not any uniformity across the services. Indecent exposure, for example: I have seen someone's career cruelled because he exposed himself. In another instance the person was summary trialled and convicted with no punishment.

Mr PRICE—Would you be able to give us the details of that RAAF case that you mentioned earlier—where it was held?

Miss Jackie Kelly—I would have to check.

Mr PRICE—I understand that.

Mr BROUGH—Warrant Officer Harris does not—to the best of my quick glance, anyway—refer to them not being paid or whatever else, which really seems to me to be in total contrast to anything that the Commonwealth could do. It would be good to have that it you could come up with something. It refers to them not getting their \$60,000 computation or it being held up, but I do not think it refers to them not being paid whilst they were being retained in the defence forces. It would be useful if you could come up with something.

CHAIRMAN—You raised a new concept for us here that the air force, in your experience, used administrative devices or stratagems rather than disciplinary action against someone. Was that a once only event?

Miss Jackie Kelly—No, by and large, the justice tribunals do not dismiss people. I do not think I have seen it occur. Generally if they are not dismissed at the tribunal, and the person is a service policeman responsible for security and has been ripping off a warehouse, people want him out of the services. So you have to go about it administratively.

CHAIRMAN—But that is clearly an abuse of the process if you are using an administrative device or procedure like that rather than using the correct disciplinary—

Miss Jackie Kelly—To me it is a systemic problem. The result is in the interests of the RAAF, but we need the power to make sure that it occurs.

CHAIRMAN—You talk about the esprit de corp and the desire to maintain the public prestige and standing of the organisation rather than face the facts on some issues. Do you think that explains the fact that very few major accidents ever lead to anyone's career suffering?

Miss Jackie Kelly—Excuse me?

CHAIRMAN—We have a number of accidents—not too many, but over a year or so we get one or two people killed in an exercise or an operation somewhere along the way—and we go through the AIT and the BOI. In some cases it just happens that it was an unavoidable and unforeseen accident. In others there is clearly negligence or incompetence. No-one is ever convicted. No-one's career ever suffers. Do you think it is part of the protection of the ethos of the service that leads people to do that or do you think it is just people looking after their own individual careers in so far as there is always a superior writing their AR for them?

Miss Jackie Kelly—I think it is a systemic problem. I am thinking of the submarine where they lost the two men overboard. By the time that you are getting to those conclusions, you are a long time after the event. People have moved on, people have been posted, evidence is no longer available.

CHAIRMAN—I do not want to go to that submarine thing, but clearly in that case there was an officer on watch and there was an officer who detailed those two ratings to go and do that task. There was a captain who should have known that the weather decks were cleared and that everyone was back on board. Exactly the same applies in a number of aircraft accidents in the air force: things that were supposed to be done were not done. That led to the loss of life, and the person in whom the authority was vested to make sure that something was done escapes absolutely without any censure on them.

We were told today, 'Oh, there's a black mark against them, held against them. They really don't go much further.' But I can recall a case of somebody becoming a chief of staff, who went through a very bad accident many years ago, so I am very cynical of that view.

Miss Jackie Kelly—I think a good instance of that is the Black Hawk tragedy where three people were selected for charge—I do not think you could have got lower down the pecking order than the three who were chosen—for a systemic problem. If you were going to charge anyone out of that you had to go so far up it started to get

embarrassing.

CHAIRMAN—Embarrassing to whom?

Miss Jackie Kelly—I suppose to the Defence Force, that these things were not picked up earlier. When you are trying to deal with a systemic error you have to change regulations, training cultures and the informal disciplinary cultures. I am aware of an Army officer who pulled 30 orderly officers in a row for 30 days—he was out for 30 nights. He never said anything because that way no charges were preferred. That was the choice. When you are dealing with all of those things that need to be changed then, yes, it is this Group Captain here and it is that Air Commodore there. There are so many people who had responsibility for the administration of the publications, for the training of the crew, for setting down the flight procedures. So many people had responsibility.

CHAIRMAN—We can accept that. But at the end of the day there are black and white issues where somebody says, ‘That piece of equipment is serviceable, go and fly it’ or ‘Go and drive it’ or ‘Go and sail it’ and it fails. They clearly had the authority to withdraw that as being unserviceable and they go ahead. Nothing happens to them.

Mr BROUGH—Whereas we were given evidence earlier that things did happen to them after, in the lines of administration. Perhaps it was marked on their reports that they were never to have a command or whatever. Is that what you have seen as their way of dealing with it?

Miss Jackie Kelly—It is supposed to happen and it certainly happens.

Mr BROUGH—Sorry. What is supposed to happen?

Miss Jackie Kelly—I know in one case a fellow was in a digital position and stole cash. He was found guilty—I am not sure what his punishment was—and he was then posted to a non-digital position, clearly marked, ‘Not to be in charge of cash.’ About three postings later he was in a digital position in charge of cash again and guess what?

Mr PRICE—I presume digital means it has something to do with money.

Miss Jackie Kelly—You are on your own. You are a ‘fin accounto’ on a small unit and you are the only person double checking your books. Normally, with money you are with a lot of people.

CHAIRMAN—There are occasions where people have been negligent in the discharge of their duties and had they been in civilian life they would have been charged, been before the courts, and convicted of anything from manslaughter down to theft. That does not happen in the services. The excuse that we have been given today is, ‘Oh, we always refer it to the civilian authorities and the DPP, and if they think we don’t have a

case we don't go ahead.' Clearly, there is a dichotomy there between standards within the services with respect to justice and in the civilian community today.

Miss Jackie Kelly—That comes back to the non-independence of the person making the decision to refer it trial. If it is a negligence that is so criminal, it is obvious. But if it is the sort of negligence, 'There, but for the grace of God, go I,' there may be major reluctance in the person in the position who is responsible for referring that matter to trial to say, 'Yes, it should proceed' or 'It should not proceed; that could have been any one of us.' Clear cut cases of negligence are prosecuted—driving accidents and things.

Mr BROUGH—Is this because they believe they are going to be dealt with outside of that system anyway? You, as a prosecuting officer or whatever else, are not going to feel too aggrieved that you know this bloke is as guilty as sin—he has got away with it—because you know that the system is going to deal with him anyway, albeit in a roundabout way. Is that part of the problem?

Miss Jackie Kelly—No. At the end of the DFDA proceedings that is it. You can really only use that DFDA conviction as part of your administrative procedure. 'Yes, he has been late three days this week. He turned up drunk on this day and he was charged on this day. He has been reported on three times and has not improved his performance in the intervening period. Altogether it looks pretty bad and, administratively, service is no longer required.' It can only be a cog. It cannot be: take all of that evidence and go out and—

Mr PRICE—You mentioned in your opening statement that there was a lot of work to be done on the boards of inquiry and you welcomed them going public but, with the difficulties that you ascribe to that, were there other suggestions you had for change as far as boards of inquiry were concerned?

Miss Jackie Kelly—I would like to see a professional. We actually starting doing that in the RAAF at Russell Offices here—having a response team of experienced people who have read over previous transcripts. If there is an accident they are the first ones there on site and we have very experienced people on the boards. I really think that should be more formalised. I do not know where it has gone to yet. But that really is something; rather than scraping a board together of whoever is available and who is between postings. Generally, if a board goes up you are scratching around for who has knowledge in that aircraft type, who is available and not currently in a command position, et cetera, to get the personnel to actually do the job. Having done one you should be used to do another.

The dreadful thing that the RAAF does—I noticed it when we contracted out the services at Fairbairn—is that we have a lot of experienced personnel, who are familiar with contracting, and when the next one came up for tender—they made a number of mistakes but they learned from it; that is an expensive learning exercise—we used a whole set of different people, instead of using the same people with the experience and had

learned a lot from their mistakes.

CHAIRMAN—I would say that was life.

Miss Jackie Kelly—But that is boards of inquiry too.

CHAIRMAN—That is why we are recommending increased expenditure too.

Miss Jackie Kelly—Yes. We are always using new people. On the Butterworth one, the advising lawyer was fairly inexperienced and had only service experience. When you are up against QCs and very experienced lawyers that is a bit of a disadvantage; plus you are in the chain command as well. Summary offences work well. After the CO has disciplined the person they still then have to work in that unit. If you were late for work on this day—boom. It goes to an independent line of professional prosecutors and defenders and lawyers. It is triservice, transparent and the CO simply flicks it sideways. He is not responsible for something that happened during his time. Rather, he was actually the person who made the decision on that person. That goes right through to courts martial and boards of inquiry. That sort of independence is required.

CHAIRMAN—Thank you very much for coming along today. You will be sent a copy of the transcript of your evidence, to which the same *Hansard* rules apply.

[4.47 p.m.]

BIDDINGTON, Group Captain, Brett, PO Box 165, Mawson, Australian Capital Territory 2607

CHAIRMAN—Welcome, Group Captain. It is late in the day and there is a bit of combat fatigue around here. I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect as proceedings of the respective houses of parliament demand. We do not require you to swear on oath, but you should be aware that that does not diminish the importance of the occasion. In other words, you have to tell the truth, and the whole truth. The subcommittee prefers that all the evidence be given in public but, if, at any stage, you have a matter that you wish to raise in private, we will give consideration to that and cooperate if possible. Would you like to make an additional statement to the submission you have already made and which has been published?

Group Capt. Biddington—Yes, I would like to talk for a couple of minutes and then be open to questions, if that is all right. I am appearing as a person who has provided a private submission, but based in particular on my experience as Provost Marshal Air Force, as a Wing Commander, from 1995-1996. I feel particularly passionate about the importance of this inquiry and I felt it was important to write about it.

Potentially, this is one of the most important inquiries that Defence has conducted in the past 20 years, because it comes to the heart of the relationship and the distinction between service personnel and the infinitely larger number of civilian members in our society. The succession of reviews that have led to the enormous changes in the structure and organisation of the Defence Force since the late 1980s, combined with the changing nature of warfare, have coerced us to reconsider the relationship between the soldier and the state in philosophical, practical and legal terms.

In effect, the defence of Australia is now explicitly recognised in Defence, but perhaps not so well understood elsewhere as a national enterprise. In fact, this has always been the case but because the Australian Defence Force was so self-sufficient until quite recently it was largely a closed society, away from the public gaze as it went about its daily business. In strategic terms it is our task to convince the rest of Australia that national defence is the responsibility of all Australians and not just the small group of permanent and reserve personnel in uniform. This is by no means a call to arms, but rather a comment about attitude, support, commitment and expectation.

For the foreseeable future the critical resource in the Australian defence organisation, both the civilian element and the ADF, will be the intellect of our people. We have to become much more astute in the political and diplomatic sense and far more comfortable with ambiguity, imprecision and compromise, notably at the higher levels of security policy. We need to value intellect inside the organisation perhaps more highly

than we have in the past and we need to draw on the intellect in the wider community to assist in the enterprise.

To me, all of this implies a redefined relationship between the military and our wider society. The boundary in a formal sense is defined by the military justice system. This is not just an inquiry into why a series of investigations, conducted over the past five or six years, have failed in the sense that complainants have not been satisfied, there have been great delays and processes have drawn adverse comment in the press and in parliament; rather, it points to systemic failures and to deeper questions. We will not overcome the problems that have arisen by simply tweaking the DFDA or by employing trained investigators, be they civilian or service people, although that might be a start.

Rather, we need to ask ourselves as a society where the military fits in the context of the activities we presently undertake on behalf of the nation, the activities we may be asked to undertake and how we prepare for future wars when the half life of increasingly important technologies is somewhere in the order of six to 18 months. I think there are some big systemic issues underneath. We must address those before we can really address the issues that came to the fore in the terms of reference of the inquiry. I might just say that I had some other comments about the four or five separate sections of my submission, but rather than read those I will take questions.

CHAIRMAN—I must say I enjoyed your submission, particularly that paragraph 24 on the definition of the Department of Defence as an ISTJ organisation—I thought that was brilliant. One of the cases you give basically relates to a failure to act. How much of that do you attribute to the social climate that we are living in at the present time, plus legislative moves like the human rights act, the occupational health and safety act and, above all, the DFDA? Are they erosive of command authority in an organisation which must have unambiguous command and unquestioned discipline?

Group Capt. Biddington—I think the difficulty is that in conflict or war or those most extreme situations the answer is that yes they probably are, for the sorts of reasons that Jackie Kelly mentioned previously in her submission, because commanders need to understand fundamentally how to manage risk, how to accept risk, how to deny risk and how to mitigate risk. The last thing we want commanders to do in a military operational setting is to become so risk averse, because they are concerned about what might be a follow-on or a later effect of their decisions, that they do not act at all. That is the concern that I have.

I think we have some very difficult questions as a society. On the one hand, there is no question that people who are in uniform should be seen and treated before the law equally with other Australians. I think that is a basic principle. However, when we put on the uniform perhaps we give up certain rights in order to gain certain other rights, responsibilities and obligations.

However, when we put on the uniform, there are certain rights that we give up in order to gain certain other rights, responsibilities and obligations. Somewhere in there is the dilemma. In the past, it was a more or less closed society. There was not quite the litigiousness or the same degree of scrutiny and openness. Perhaps there was a little more trust, awareness, sympathy and value placed on things like team work within the military and even beyond.

Those sorts of issues are now not with us. We are far more individualistic. Individual rights are terribly important to us all and we now have some very difficult tasks in balancing the rights of the individual versus the rights of teams. As you are well aware, the military is about teamwork and the key to that team is the leader, the commander. In the submission, I tried to give some examples of my experiences as a commander in a tri-service unit, which led to all sorts of difficulties and challenges that a commander of just an army unit or a navy ship or an RAAF command would not experience.

This is something of great importance to us because, as we move our joint training into tri-service units, this is where we have young people. We are trying to imbue them with the culture of a single service, with the culture of the ADF in a more general sense, and we are going to come up against some important conflicts. For example, I saw that when I was the provost marshal responsible for policing at Wagga. We had Army, Navy and RAAF people on the unit and there were quite different expectations from Army, Navy and RAAF trainees when there were misdemeanours about how they would be treated and I do not think that is right either.

CHAIRMAN—Accepting all that, we have still got to have a need to have fair and just treatment within the ADF and, in your view, just in a general sense, what is wrong with the system at the present time or do you think it is as good we can attain?

Group Capt. Biddington—I think what is wrong with this system right now is, firstly, we do not have a clear view as a country about what we want our defence force to do. Therefore, there is no social or political will to say that this is what 50,000 men and women in uniform are expected to do by this country and these are the legislative protections and provisions that we are going to put in place to allow that to happen. That is the first point.

Secondly, noting the sorts of comments that Jackie Kelly made today, we are a very small organisation. I am sympathetic to the sort of structure that she was advocating. With the reality of 50,000 people, I do not know whether the numbers exist to set the structure in place that she advocated. We need to ask ourselves: is this investigative apparatus the core business of the Defence Force? How much of it is core business? How much of it is enabling business? If it is not core business, maybe it needs to be done by an external agency.

One of my thoughts is that maybe we need to consider broadening the

responsibilities perhaps of the Federal Court and the AFP. They might not like that but, again, it is about culture change and culture shift and change in resources that achieves the independence issue absolutely. But it does not address the question of swiftness. Within the chain of command, in order for a commander to proceed with certainty after disciplining one of his subordinates, he needs to be able to do that very quickly.

Essentially, that is about example and improvement not only for the individual but also for the team, so that the team is strengthened by that and can go forward. If we are stuck as we have been for many months waiting for someone to come to trial in a civil court, the disciplinary effect is lost. On the other hand, we should not be especially pleading as uniformed people to be given more rapid access to the court than a civilian who might have committed a similar offence.

So there is conundrum there. I think it is about independence that I do not think we have and it is about professionalism, particularly with our investigative groups. I would like to see that strengthened. When I was Provost Marshal Air Force we started to do that, and with some measure of success, but I do not think we have gone anything like far enough.

CHAIRMAN—You said in your submission that you were appointed as investigating officer on a case involving allegations of sexual harassment.

Group Capt. Biddington—Yes.

CHAIRMAN—Victimisation and maladministration in which ‘systemic dysfunctions were revealed that also related to the prerogatives and responsibilities of command and the nature of the military discipline’. What were those dysfunctions and how did your findings address them?

Group Capt. Biddington—I will briefly set the scene here. This was a very difficult case. It involved an LACW who made claims that were publicised last year. Mine was the third investigation into the case. The first was a preliminary investigation that had basically failed. The second was a desktop review that suggested there were some avenues of inquiry that needed to be taken further and then I was given the task. Essentially, in six weeks, acting independently over Christmas, 500 hours of work, there was a 33,000-word report produced. So it was a very intense intellectual effort. I make that point only to say that, certainly, from my perspective, I gave this my best shot. Whether or not that succeeds depends on whether the complainant—

CHAIRMAN—Would any one person bother to read the 33,000-word report?

Group Capt. Biddington—The Deputy Chief of the Air Force read it, because he picked up a year mistake on the third last page. That might have been good luck, but he certainly read the report. It had to be because I had 30 terms of reference. Why did I have

30 terms of reference? Because coming out of the ombudsman's own motion and inquiry, and her recommendations, she was very insistent that there had to be very specific heads to be investigated. So we have now got some other conflicts running here. Once upon a time, and in this particular case, four or five questions, properly cast, sensibly asked, the investigator would have cut to the chase. But I was legally obliged, because of other changes that have occurred, to address 30 separate questions. It took a long time.

However, what were the issues that I found? Basically, all of the matters that the complainant raised occurred in Canberra some years ago. Critical to this was the role of the commanding officer of support unit, Canberra, and, for a critical period, the commanding officer was a temporary commanding officer at flight lieutenant level. The commanding officer of support unit, Canberra, administers about 4,000 RAAF personnel, very senior officers, of course. It is a very complex task.

From my perspective—and one of my findings in the systemic sense—in the air force, we failed ourselves by allowing a flight lieutenant—a very competent flight lieutenant, I might add—to be in that position. She did not have the authority, ultimately, to bring the medical, the psychological, and the workplace experience about the complainant together to understand the case. So the case ran wild. Basically, that is because she did not have enough rank on her shoulder to bell those cats and to bring the information together that she needed. So there was a disconnect, and basically that is where this case started and ended.

CHAIRMAN—How well do you think the ADF handles harassment cases?

Group Capt. Biddington—I think that we handle them better than we did, say, two or three or five years ago.

CHAIRMAN—That is coming off a very low base, isn't it?

Group Capt. Biddington—It is coming off an extremely low base. What I would say is that, as an organisation with the exception of some pockets which are usually relating to some particularly gifted individual commanders or leaders, we still have a very heavy male emphasis in the service. Whilst we are aware about rude jokes and rude pictures, and so on, there is a gloss or a veneer of equity. I do not think the culture has yet changed fundamentally. But I think there is recognition, firstly, that it is and, secondly, that it must. So I say that things are improving.

CHAIRMAN—How are you going to improve the handling of sexual harassment cases across the three services? I say that having been in Kuwait recently. A couple of army guys raised with me the inequity as they saw it in relation to the conditions of service between the RAAF contingent there and the SAS unit—allegedly under the same conditions of service, and I am not referring to the fact that Air Force ran a four-star hotel literally within about 50 yards of the aircraft at airport and that the SAS were out in tents

in the desert. But it seems to me that there is a great deal of interservice variation on what ought to be standard terms and conditions.

Group Capt. Biddington—This is a personal view and is really beyond what I wrote about. My view is that we are uneven in our application. I think that Navy systemically coming from *Swan* has made the greatest advances within its culture, the Navy tribal culture. Navy has gone further to address equity issues than RAAF or Army have. But that is very much a subjective view and a personal view. Of the other two services, I am really in no position to judge. I do not have enough experience of the army culture to make a judgement about that vis-a-vis the RAAF culture.

Senator BOURNE—You mention the Office of Military Investigation and relate that back to the USAF.

Group Capt. Biddington—Yes, the office of the OSI.

Senator BOURNE—That sounded really interesting.

Group Capt. Biddington—The OSI, in my experience, is an extremely professional organisation. Firstly, the US military can investigate a lot more than our military can investigate. That is an issue we have to address. If we have lots and lots of contractors on our bases spending our money, should a service investigator—either civilian or uniform—be allowed to investigate those people? In particular, should a uniformed service investigator be allowed to investigate civilians spending public money within the RAAF program or the defence program? I do not think there is a straight answer to that. It is a political question fundamentally.

The OSI looks at frauds, thefts, offences against the person and counterintelligence. Going beyond that, they have moved into the very high tech areas of information warfare. There is a core of professionalism through that that is terrific. I think that would be my model. That was certainly the model I came back with in 1995, as Provost Marshal Air Force, to say they were the sorts of people we needed. They were graduates. They had a fundamentally different culture to the RAAF police culture, as I understood it at the time. It means recruiting more expensive people, more training and a lot more commitment of resources. Against that, we have to ask ourselves, being still in a small organisation of 50,000, how much of that is core, uniformed or fighting business? How much of that do you need vis-a-vis ships and aeroplanes and tanks and weapons to do your job? I do not think we have measures yet in metrics to understand that.

Senator BOURNE—After what Jackie Kelly said, would it make sense to set up a legal structure within the forces that would be tri-service? You would have something similar to what Jackie said about the independence of defence, the independence of prosecution, the independence of command inside the legal service and the independence of the investigation, but, necessarily, a little smaller if it were tri-service.

Group Capt. Biddington—I think there is a great opportunity here to set up a tri-service organisation. Toward the end of my time as a provost marshal, the three service provost marshals thought about how we would move towards a provost marshal for the Defence Force. We all recognised that collectively we had lost the plot vis-a-vis the professional standards of policing in the community. The DFDA is a separate jurisdiction effectively. In principle, I think that the ADF, therefore, and the police commissioner for the ADF—if I can use that term—should be part of the councils of police commissioners because that is where you learn and maintain and understand professional policing standards, including investigative standards and process standards.

I might add that one of my staff was killed on his pushbike coming to work last year. I went to the coronial inquest, which was held in Canberra on a Monday. The poor fellow who ran my staff member down was only given the information that he had to turn up on the Friday before. I tended to see civilian process as being a cut above military process. We would never have tolerated that in the military. In fact, I think we are actually a bit critical of ourselves. I think that our processes are perhaps not quite so bad vis-a-vis the civilian standard as perhaps we tend to make out. Mind you, I only have this tiny microcosm to go by. I think that is another point we need to bear in mind.

Senator BOURNE—You do mention systemic problems and systemic dysfunction. Do you think those are currently being addressed and are there any areas at the moment that you think are not being addressed well enough?

Group Capt. Biddington—Yes, we are addressing the systemic problems, and I look forward in particular to Bronwyn Grey's report from ADFA because I think that that will really begin to show us a way forward because it is a systematic look at, in a sense, our highest profile institution. If we get that training institution right in terms of the behaviours and the conducts that we expect of both students towards each other and students towards staff, and we have the right regime in there for command and discipline, then that should permeate through the rest of the force in being, and also that should permeate the culture of those leaders forever in their service careers. Maybe I am being optimistic, but I am really hoping to see a lot of positive come out of that.

I think also that we have already learned from the ombudsman's inquiry and so on. My own investigation over the summer was done very mindful of a whole lot of things that perhaps two years ago, had I been asked to do it, I would not have bothered with. We are certainly more conscious and more aware and more astute and more caring. But, again, I suspect there are individuals who are like that, and there are others who are still shaking their heads and are lost and do not really understand and are in denial a bit.

CHAIRMAN—You state that offenders punished under a disciplinary code are subject to a lesser standard of trial and punishment than are members of the community when their offences have a civilian equivalent in the criminal code. What examples can you provide?

Group Capt. Biddington—Mr Chairman, I put that in. It is not so much an example issue as a philosophical issue and, indeed, it is not my line. It is an argument coming out of the Attorney-General's Department. There are some people in that department who believe that—for example, a theft that is prosecuted under a disciplinary code as opposed to a criminal code—under a disciplinary code, that is not something that gets wide recognition in the community and, if you like, the taint is not there as it would be if you had a criminal offence for having committed the same crime. That is the only point I am trying to make there. But I think it is an important in-principle point in terms of this equity issue across the community.

CHAIRMAN—What are you saying there? That somebody convicted of a military crime of theft is in a disadvantageous position compared with a civilian?

Group Capt. Biddington—No; the reverse. In a broad social sense, if you are disciplined for having committed, say, a theft in the service, that taint in the broader society means less than if you go to a Magistrates Court and are committed for the same offence because you stole from your neighbour or stole from a shop or something like that, because it is a criminal offence that goes with you as opposed to a disciplinary offence which is dealt with internally within the structure of the ADF.

CHAIRMAN—I have had a civilian complaint through my office in the last few months where the allegation was that \$200,000 was stolen from a private company. I could not get the ASC or the police to take an interest—the sum was too small. There are not too many people who knock off \$200,000 in the ADF, are there?

Group Capt. Biddington—No.

CHAIRMAN—They would go for a few hundred or the odd thousand and they would get convicted.

Group Capt. Biddington—Indeed. Again, where is justice in this? Mind you, we have trouble—and I think I raised this too somewhere—even with amounts less than \$200,000. I mentioned an example of \$30,000 or \$40,000 where the Federal Police were very reluctant to commit resources to investigate that particular potential crime because they were more interested in—I guess not necessarily \$200,000 by the sound of things—crimes that they considered to be of more importance. They are big challenges.

CHAIRMAN—Your submission examines the relationship between the nature of developments in third wave warfare and the need for restructuring the ADF to address these developments. Do you think this link is vital to the issues which surround the implementation of effective practices of military justice?

Group Capt. Biddington—Yes, I do. Basically, the military justice system that we have now supports cultures that are to do with essentially people killing other people or

putting themselves at risk in what you might call kinetic warfare—bullets, missiles and bombs.

As we move to other forms of warfare where information is more important and where you can conduct at least parts of a campaign—not all of the campaign, but parts of a campaign—from a computer desktop, the person who might be the best at doing that might be somebody who smokes marijuana, is 16 years old and has a ring in his or her ear. We want that person to be on our side, not against us.

CHAIRMAN—I do not want him running the game for me, though.

Group Capt. Biddington—No, indeed not. But how do we tap that resource? Perhaps not by putting that resource into uniform. But again I come back to my point about defending this country being strategically a whole of country approach. We have to build a debate and then build an understanding that it is okay for that to happen.

I mentioned in here that you can have people with Steyr rifles on one hand who are facing people perhaps with machetes on another. That is a very realistic peacekeeping scenario. We have got there to have very clear lines of discipline, military prerogative and all those sorts of things. I felt that the royal commission that the Canadians conducted into Somalia really brought out those points very well, which is why I put three or four pages of recommendations at the end. I am sure you have seen it anyway.

CHAIRMAN—I have not read that. I have a complete print-out of it.

Group Capt. Biddington—I know it is huge.

CHAIRMAN—It is just beyond me to read it. I am horrified at the breakdown in discipline in what was really a good military force.

Group Capt. Biddington—You asked Jackie Kelly the question about how far responsibility goes in the organisation. The Canadians found precisely the same issue. Indeed, the royal commission report commends one two-star general, as I recall, for his frankness, and basically damns explicitly, not even through faint praise, the rest of them. That is very embarrassing, not just for the individuals concerned in the service but for the whole country because it really means that that country lost the plot with regard to what it wanted its military to do. I believe we are in a similar situation.

CHAIRMAN—The fundamental point there was that any defence force is trained to use maximum power to achieve its goal and, if it is not tightly disciplined, it is uncontrollable and dangerous. That is what happened with the Canadians.

Group Capt. Biddington—Yes.

CHAIRMAN—Our defence forces have met that test in Somalia, Cambodia and Rwanda. I have been to most of the deployments that we have been involved in in the last 10 years. They have come through that with an absolutely unblemished record. I think Somalia was by far the toughest thing we have been involved in. That was a very nasty situation where very great responsibility was put on very young corporals.

Group Capt. Biddington—Indeed.

CHAIRMAN—In that sense our disciplinary system does work; there is no debate about that. You were not here through the earlier part of the day but, by accident, not by design, most of the day has been spent discussing boards of inquiries and whether they are any good or not, to be crude about it. The defence from senior members of the ADF is that they are pretty close to perfection. I was just wondering what your view is. Do you think the boards of inquiries—do not look at any particular one—going back over the last 15 or 20 years, do get to the truth of how the accident occurred? Do you think that justice was meted out, if justice needed to be meted out, as a consequence of going through a BOI?

Group Capt. Biddington—Again, I would have to preface this very clearly and say this is a private comment because I am really not in a position to have seen these, other than as a person in the military and having grown up in the military in the last 18 years who now happens to be in front of the committee. In my view—and I reinforce what Jackie Kelly said—the accident investigation teams who are on the scene quickly, in my experience, are very proficient and gather the evidence.

I was involved in a helicopter crash in the Kimberleys in the early 1980s. I was one of those who was on board and we were lucky to survive, but we did. I remember sitting back, as a flight lieutenant in those days, watching the investigation process, as well as being a witness to it, and being very impressed with the way in which the initial gathering of information took place. There were some parts of our conduct, particularly the dress that we had on, which were really inappropriate. I was the best dressed person on the helicopter because I had boots, a T-shirt and shorts. We should have all been better dressed than that, but that was the culture of the day—although the air crew were properly dressed. I felt that that part was right.

What I am not sure about, because I do not really have much knowledge of this, is how that then translates into determining who is and who is not responsible, to what degree, and then what we do about that. I have a feeling—from the press more than anything else because I have not seen the actual documentation that the services have produced—that we tend naturally, like anybody else, to try to put a spin on it that makes our organisation look good. Whether that is honest or dishonest, ethical or non-ethical, is a matter for judgement. We are all entitled—and we all do it all the time—to put the best face on what is often a pretty bad situation.

CHAIRMAN—If we accept that, is that in the interests of the ADF or of the nation?

Group Capt. Biddington—It is not in their interests if in the putting the best spin on it we lose sight of the truth. If there are disincentives for people to come forward not to be truthful then that is no good because we cannot get to the systemic errors to make sure it does not happen again—point one. Point two, if we must assign blame—and after all, leadership is about acceptance of responsibility and sometimes that means acceptance of blame or error—then we have to create a culture in which it is okay to do that and to take the consequences. I am not sure we do that as well as we might.

CHAIRMAN—There is one final topic that I want to raise. Does the military have a guilty until proven innocent approach?

Group Capt. Biddington—We used to. Many years ago there was that famous phrase, if I may use it, of ‘March in the guilty bastard,’ used before summary courts. I do not believe that applies today. Certainly, I have not been in a position where I have had to charge any of my subordinates. I have been in a position where I have had to administratively take very severe action, a formal warning, leading to adverse reporting in one or two cases. In my experience, providing the entire process is absolutely open and adequately documented and your subordinate knows why he or she is in strife, and they have time to think about what is occurring, effectively you come to some type of consensus.

CHAIRMAN—Are you telling me that it is impossible in today’s ADF to have a charge laid against a person, that person not knowing the charge is there, and that the investigation takes place and that the accuser maintains his privacy? Are you saying that cannot happen in today’s Air Force?

Group Capt. Biddington—The accuser should not maintain his or her anonymity, in my view.

CHAIRMAN—But does it happen?

Group Capt. Biddington—That they do maintain their anonymity?

CHAIRMAN—Yes. For example, can someone in the services lay a charge against you that you have been sexually abusing a junior officer or rating or you have been stealing mess account funds or—

Group Capt. Biddington—The answer is that it is possible at the moment in the first instance for somebody to make a complaint, if you will, in camera or in private. That can then lead to an investigation that is—

CHAIRMAN—Would you automatically be advised of that at the outset?

Group Capt. Biddington—No, you may not be, and perhaps neither should you be, because if you know that you are under investigation you have the opportunity to destroy the evidence. But there comes a point where if an accusation is made then ultimately the accuser should be in court, or in a tribunal, in a formal setting, to make his or her claim in front of the person he or she has complained against.

I know that is contrary to whistleblower type issues but, again, particularly in the services, there is an issue here about team work, accountability and trust. You cannot have trust when you have some person really putting anonymous claims about another into the organisation. At some time it has to be brought out into the open and dealt with in the open. That is one of the greatest challenges that commanders face. In the first instance you might deal with it discreetly, if you will, but there comes a point when you have to move beyond that.

CHAIRMAN—Thank you. As there are no further questions, thank you very much for your attendance here this afternoon. It is a bit like that Mozart symphony where all the players get up and depart the stage one after the other. This has been a bad half hour for us in that sense. Thank you very much for coming along. You will be sent a copy of the transcript of your evidence to which you can make grammatical corrections. I do not think *Hansard* have any questions beyond obscure terminologies.

Group Capt. Biddington—I tried not to use any.

CHAIRMAN—Thank you very much for coming along and I formally close this public hearing.

Resolved (on motion by **Senator Bourne**):

That this committee authorises publication of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 5.26 p.m.