COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE

ON

FOREIGN AFFAIRS, DEFENCE AND TRADE

(Defence Subcommittee)

Reference: Military justice procedures

CANBERRA

Monday, 18 May 1998

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

(Defence Subcommittee)

Members:

Senator MacGibbon (Chair)
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

JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

(Defence Subcommittee)

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Present

Senator MacGibbon (Chairman)

Senator Bourne

Mr Bevis

Mr Price

Subcommittee met at 9.30 a.m.

Senator MacGibbon took the chair.

CHAIRMAN—I declare open this public hearing of the Defence Subcommittee of the Joint Standing Committee of Foreign Affairs, Defence and Trade. This hearing is the second in an inquiry currently being conducted by the Defence Subcommittee into military justice procedures. The terms of reference for this inquiry direct the subcommittee to examine the legislative framework and procedures for the conduct of military boards and courts of inquiry in addition to discipline procedures primarily under the Defence Force Discipline Act 1982. There has been considerable media and public interest in military inquiries and in aspects of military discipline over the past few years, most notably as a result of the 1996 Black Hawk helicopter incident but also as an outcome of a number of other incidents.

As this committee begins to examine these matters, the Australian Defence Force is currently conducting another high profile board of inquiry into the calamitous events aboard the HMAS *Westralia* two weeks ago. It may prove instructive for the committee to follow the progress of that board of inquiry to provide a current perspective on the process.

In the course of the inquiry, the committee will conduct a number of public hearings and will speak with serving and retired members of the Australian Defence Force, government agencies, members of the public and the legal profession. The committee hopes to table its report on this reference towards the end of this year.

I wish to take this opportunity to remind witnesses that this inquiry is a serious matter aimed at rectifying deficiencies in Defence's processes and procedures. It should not be viewed as an opportunity to pursue longstanding differences with specific individuals within the Department of Defence, however justly founded those grievances might be. The committee will view unfavourably any attempts by witnesses to misuse the protection of parliamentary privilege to make defamatory comments against named individuals. I also remind representatives of the media that remarks made at this hearing are not afforded the protection of parliamentary privilege until authorised by the committee at the completion of this day's program of hearings.

KARDAS, Miss Lucy Kazimiera, Unit 3, 9 Ewart Crescent, Yarralumla, Australian Capital Territory

CHAIRMAN—Welcome. In what capacity do you appear here today?

Miss Kardas—As a private citizen.

CHAIRMAN—I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect that proceedings of the respective houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of the parliament. The subcommittee prefers that all evidence is given in public, but should you at any stage wish to give any evidence in private you may ask to do so and the subcommittee will consider your request.

We have received your submission and it has been authorised as evidence for the inquiry. Are there any additions or corrections to that submission, and do you wish to make an opening statement?

Miss Kardas—There are no additions or corrections, Senator MacGibbon, and I would like to make a brief opening statement. First, I would like to thank you for giving me the opportunity to appear before the committee this morning. My aim in coming here today is threefold. It is to show how I fought against a corrupted process and to highlight the inequality and inconsistency of the application of the Defence Force Discipline Act and why the Defence Force Discipline Act goes beyond justice; it is about discipline as well as maintaining the chain of command and about maintaining morale.

This is important when you look at the process that I was involved in. It completely went off the rails. There was a time when someone in a senior position should have said, 'This is wrong. Stop.' Instead of investigating me in secret—not once but twice—regarding my alleged sexuality, if this was an issue, I should have been charged under the DFDA where I could have defended these allegations in a more public forum, been vindicated publicly and the matter would have gone away and been dealt with. The reason I say this is that I was never given the opportunity to know who the people were who had made these allegations against me. The first investigation was conducted entirely without my knowledge, and I was found guilty of being a lesbian without ever having been spoken to. The second inquiry then proceeded. Thank God I found out by accident that I was under investigation, and then the matter was brought to a head. That is all I would like to say in regard to my opening statement. Thank you.

CHAIRMAN—Through your period of service when these problems arose, was there any career officer, management system or guidance system in place in any way? Was there no impartial referee you could resort to to discuss these career problems you had?

Miss Kardas—When I found out that these investigations had been conducted in private, I went to my supervisor—my wing commander—on the very morning that I found out. I was in shock, and his response was, 'I knew that you would eventually find out.' So the officer who was my supervisor—the wing commander in charge of me—knew of these investigations.

CHAIRMAN—Was he your commanding officer?

Miss Kardas—We were not in a structure. I was then in the Directorate of Personnel Airmen, and he was the wing commander that I worked for. The commanding officer of the support unit, Canberra, ran the investigation. It is a very different structure to what you would normally experience on a base. I went to my immediate boss to ask for help and he already knew, and my immediate response was that I could not trust him.

CHAIRMAN—Because he had not advised you—

Miss Kardas—Yes, I had not been told. The person I worked for knew, and that, to me, was a complete betrayal. We are not talking about defence secrets or a highly sensitive intelligence issue; this was an issue of an allegation regarding my alleged sexuality.

CHAIRMAN—Do you think that where they used your poor 1992 performance appraisal against you—and you stated that your problem with that was that you think you are a good officer—was a misuse of an administrative system as a form of informal discipline?

Miss Kardas—Most certainly. I challenged that report for a number of months. That OER—officer evaluation report—was also a vehicle to advise me that my wing commander had been considering placing me on an unsuitability report because of my reaction to the investigation—in other words, that I was unsuitable for the job that I was in because I had become emotional about the issue and been hurt and had let this affect my work. I also challenged this. This was also something that had gone on without my knowledge. I had found out in my annual report that they had considered placing me on an unsuitability report. In response to your question, I would say yes, it was an inappropriate use of the administrative system.

Mr PRICE—Prior to these things happening, what were your reports?

Miss Kardas—I was commissioned as an officer in 1987. I had previously been a sergeant. I was the dux of my officer training course, and I also received the leadership prize. In my first job as an officer I received a very good report; in fact, my commanding officer wrote that, in his opinion, I would be promoted to squadron leader very quickly.

I then went on to another position at a flying squadron in the Northern Territory

and again my reports were good. I was called upon to represent the Air Force in overseas deployments and to deal with senior foreign military officers in a representative capacity. I was also called upon to attend functions where the Governor-General and the Prime Minister were present—not at the same time. My career was going well; my reports were good. When I arrived at this other job it all seemed to go downhill. I have since returned to university to restore my own faith in my abilities and I graduated with a high distinction average and received the management prize.

Mr PRICE—There is no need to show off!

Miss Kardas—I am just saying that that period was an aberration; it was a clear aberration.

Mr PRICE—Hear, hear.

CHAIRMAN—Who instigated the ministerial inquiry and what was the reason for it being instigated?

Miss Kardas—I wrote to the Minister for Defence Industry, Science and Personnel after I had been to a human rights conciliation hearing with two representatives of the Air Force present—two wing commanders—myself and my solicitor. We had agreed at that conciliation hearing for some outcomes. A couple of weeks later I received a letter from Major General Baker at the ADF saying that all the agreements that we had made at that meeting were set aside and that the two wing commanders who represented the Air Force had no authority to make any agreements about conciliation. My response was that that was the whole point of conciliation at the human rights commission—you send the people who can resolve the issue there and then.

It was at that point that I wrote to the minister. I had gone along with the process; I had not stepped outside the process the whole way. That was when I wrote to the minister and the minister asked the Air Force to conduct a ministerial inquiry.

CHAIRMAN—Detaching yourself from your own involvement in this, what problems within the wider system of military justice do you see exist at the present time?

Miss Kardas—I will answer that question in the context that I left the military in September 1996. The way I see it is that there is an administrative system and there is the DFDA—Defence Force Discipline Act. One is administrative and one is legal. They operate in tandem. The problem is that a commander or senior officer can choose to take administrative action or disciplinary action under the DFDA or they can do both and it is up to them when this happens. That, for me, is the inconsistency.

I can give an example from my previous experiences. I was at a unit and a couple of months after I had arrived at the squadron, I was asked to prosecute two airmen who

had done a very foolish thing. They had been skylarking at a barbecue and drinking. They took a tractor and drove it and unfortunately hit a service vehicle. So they were charged under the DFDA and I prosecuted them. I had great difficulties with evidence because when I presented evidence it was thrown out because it was not from a civilian policeman who had measured the skid marks of the brakes and those sorts of things. Anyway, those two junior airmen were charged, found guilty and were punished.

A couple of months later at this same base there was a squadron leader, a senior officer, on the base who had been drinking and who had an accident with a service vehicle—hit a pole out the front of the officers' mess. He was not charged under the DFDA; he was simply made to repay the money for the damage to the vehicle. When he left the base at a dining-in he was presented with a trophy of a car up against a pole.

The inequality there is that two young airmen basically did the same thing, but you need to ask yourself the question: of those two incidents, who should have been dealt with more severely? I would say that it was the senior officer because of the message it sends out. Senior officers and NCOs have a responsibility greater than those of people of other ranks to be seen to be doing the right thing and to be dealt with in the right way to maintain chain of command, discipline and morale. What was the message that went out to the junior people on base?

Mr BEVIS—I have two questions. Firstly, congratulations on your success at officer training school. That is no mean achievement. You should both be proud of and congratulated for that. I noticed your comment that you were paraded before a group captain for putting in a submission to HREOC. Could you elaborate on that for me as to what happened, why you were there and what was said to you?

Miss Kardas—Thank you for that question. I will just put it in context a little bit. I started on my human rights submission in August 1992. It took quite some time for it to be processed and to eventually be accepted by the Human Rights Commission. It was accepted by the Human Rights Commission two or three days before the *Swan* incident hit the newspapers in a very sensational way. A directive came down from HQADF to commander saying: 'If you are aware of incidents that may cause concern or that HQADF needs to be aware of you must tell us.' So I thought it was my responsibility as an officer to write a minute to my officer, the OC, the officer commanding of the wing, and say that I have put in a human rights complaint—it has nothing do with this base; it is from a previous job—and it has just been accepted for investigation by the Human Rights Commission.

It was received very badly. I was called down a few days later to the group captain's office. I had my squadron leader administrative officer from the wing present. I was told that I was an embarrassment to the RAAF because I had put in a human rights complaint. In the group captain's opinion, his experience with investigations when he had been in charge of the military police was that it was okay to be investigated in secret and

that there is nothing wrong with this. I tried to explain to him the details behind my submission. Mind you, he made this comment without knowing any of the details; he only knew that I had put in a human rights complaint. I can only surmise that his strong response was because of the HMAS *Swan* incident. But I had very carefully stayed within the process the whole time. I had not gone outside it, nor had I called upon any senior officers who were friends to intervene on my behalf. I was determined to do it the right way and to be vindicated in the right way.

Mr BEVIS—This may not be something the committee would want to do but I certainly would welcome your advice in private to the committee in relation to the names of those senior officers that you refer to in your submission. I do not do that out of any vindictiveness or out of any personal concern per se, but some of those individuals may be still with the service and may be before this committee in other capacities.

Miss Kardas—Yes. There were five senior officers censured by the Chief of the Air Staff in relation to my matter. I only know the name of one person definitely because the letter that I received from the Chief of the Air Staff told me that five officers had been censured. But I could not know their names to protect their privacy.

Mr BEVIS—Sure. Could you would take on board my request and provide that to the committee in private? The group captain six years ago could be anything today. I think that the committee needs to be aware, if we are receiving evidence from other people, and that we have the full picture.

Miss Kardas—Certainly.

Senator BOURNE—You were an officer for nearly 10 years in the RAAF. Did you find that there was any difference in the way sexual harassment was treated from the time you started off as an officer to the time you finished?

Miss Kardas—Most certainly. As I said in my submission, I repeatedly reported an officer for sexual harassment and nothing was done. By the time I had left, in September 1996, the officer commanding of the base where I finalised my resignation, down at Laverton, called me in to talk to me. After my previous experience with having been briefed by a group captain I asked, 'What does he want to see me for?' To my question: 'What do you mean what does the group captain want? He wants to talk to you.' I said, 'I am not going there unless I know why.' Because I did not trust anybody, as you can see by my thinking.

He called me in and he apologised. Needless to say, I started crying and I said, 'Thank you very much.' He confided in me and said that he in fact had had a sexual harassment investigation on his base and that he had removed the young woman concerned to a different area to protect her from the sorts of pressures that I had been subjected to and that he was very mindful of the difficulty and of his responsibility. It was

treated very seriously. It was not pushed under the rug, for want of a better expression, that he felt very strongly about it and he knew his responsibility to look out for the welfare of this person. But that is one person. I can only say what his response was. It is an individual thing. I would hope that that is how these things are dealt with now—that they are dealt with in a sensitive way.

Senator BOURNE—When you were trained as an officer, was there anything about sexual harassment in the training at all?

Miss Kardas—No.

Senator BOURNE—Was there anything about gender specificity? Nothing at all?

Miss Kardas—No. In fact, it is an astounding coincidence because in 1991, when I had been reporting this officer for sexual harassment, I became deeply interested in the whole legal issue, so I got out the act. I got out the law. I started making some inquiries. I spoke to people who had done the same thing in the United States Air Force. I was in the midst of putting in a suggestion to the RAAF suggestion scheme that we needed an education process for these matters. However, the events of March 1992 put paid to any of my efforts. But even then I was cautioned about how I did it: 'Do you think it should be a suggestion scheme?' or 'I don't think you should talk to the air vice marshal about this.' Now, thank God, there is a process through which people can be protected.

I suppose this is a bit of a generalisation, but we would like to think that an officer or a senior NCO could look after themselves, know who to go to to get help and how to deal with these issues. My concern is for the junior people, the young ones in the military. That is not in a patronising way, that is in a real way, because when you are junior you do not know how the process works and you can sometimes be frightened by the whole process. I think it is important that it has changed now. I would like to think it is a lot better than it was when I was in and that the interests of the more junior people are also protected.

Senator BOURNE—Do you still have friends in the RAAF, female friends in particular?

Miss Kardas—Yes, I do. My friends in the RAAF are very few because, regrettably, when the investigation took place I was not a person to be associated with. But, yes, I still have two very close friends: one in the Reserve, who is a senior officer, and one still serving in the military as an administrative officer.

Senator BOURNE—As they are still in there, do they think that it has improved? Do you think the whole situation of sexual harassment—the way women are treated in particular—has improved?

Miss Kardas—The process has improved. I still think it comes down to an individual basis. This is a difficult question because you are asking me to express other people's feelings, but I would say that it is still there. But there is now a process to deal with it. I think that is the important thing. Culture, values and behaviours do not change overnight. The more education there is at a lower level—at the entry level, at officer level and in junior training—the more that will filter through in a number of years time.

Senator BOURNE—Yes, in a number of years. Is it a matter of women being 'one of us' or is it something completely different?

Miss Kardas—In my experience it all depended where you were. If there was a culture of camaraderie, togetherness and doing a good job, it did not matter whether you were old or young or male or female. But most certainly my experience in the Directorate of Personnel Airmen was that there was a very distinct division. The chap that I reported for sexual harassment I also reported for fraud, and he was just made to pay the money back—that was it.

So I would say that it depended on the situation, the culture, the values and perhaps also the courage of the officer in command in being willing to step out and take on these people by saying, 'You cannot do this,' and then take it further and actually do something about it. My feelings always were that I should not have been the one removed in August 1992; he should have been. But it took me two years to prove that he was in fact involved because of the Freedom of Information Act blanking out names, so the only way that I could get an opportunity to find out names was to go external to the system with the Human Rights and Equal Opportunity Commission where eventually I might be able to sit in a room like this and listen to cross-examination.

Senator BOURNE—Thank you.

Mr PRICE—Why was the fraud not reported to the civilian police?

Miss Kardas—I do not know.

Mr PRICE—Fraud is a fairly standard criminal thing.

Miss Kardas—I agree with you: it is criminal.

CHAIRMAN—With respect, that is not really the question. Why was fraud not punished, whether it was treated by the civilian courts or the military courts? Do you regard it as a fair outcome that he just had to pay the money back?

Miss Kardas—No, not at all, because he went on again to perpetrate fraud, and because there was no record of the fraud in 1991 they could not see that there was a track record.

Mr PRICE—So in repaying the money nothing was put on the record?

Miss Kardas—No.

Mr PRICE—So you can commit a criminal offence in the RAAF and not have it recorded—this is interesting. This is the same person who was rewarded by being sent to America, posted to Washington?

Miss Kardas—Correct.

Mr PRICE—Unbelievable.

Mr BEVIS—How long after these incidents did he first get a posting to America?

Miss Kardas—The ministerial inquiry was conducted in December 1994. His posting was put on hold—temporarily suspended, if you like. I believe the charges were heard in the January. He was found guilty and was placed on formal warning for the rest of his career, and then the posting was reinstated and he went to America.

Mr BEVIS—So the sequence was that he had a posting—to Washington, was it?

Miss Kardas—Somewhere in the States.

Mr BEVIS—He had a posting to the States. Subsequent to that posting being announced, the ministerial inquiry occurred.

Miss Kardas—Correct.

Mr BEVIS—Then a finding of guilty, effectively.

Miss Kardas—He was charged under the DFDA. I do not know what the charge was. He was found guilty of that charge.

Mr BEVIS—And then his earlier posting allowed to stand, so he was off to America?

Miss Kardas—Correct.

Mr PRICE—That would have been a RAAF decision to allow him to go to America?

Miss Kardas—Certainly. I didn't find out about it until some time afterwards. I don't know the reasons behind it. I had been told in an informal way it was because he was the only person qualified to do it, but that to me was just expediency.

CHAIRMAN—Do you have a view as to the relative frequency and scale of sexual harassment within the ADF vis-a-vis the civilian community? Playing devil's advocate, I would say that women get pursued by men in civilian and service life and men also get pursued by women, as some of these stalking cases are showing. Insofar as the ADF in the last 15 years has had a major influx of women to the extent of anywhere between 13 to 16 per cent, which it did not have before, as integrated members of the ADF rather than the WAAFS or the WRANS, is the incidence higher or less than in civilian life?

Miss Kardas—This is a little difficult. I have to be subjective about it because I have worked in the military for so long and not had much experience in the civilian work force, but I would say some of the responses were extreme. Whilst it has been a long time since women were admitted to the military, it takes a long time, for example, for women to reach group captain rank. That takes quite some time to filter through, and they would not be there in large numbers relative to the males, whilst we might have a lot of women at the junior ranks, at the more senior positions. And that also goes for some of the areas where women had only more recently been accepted—for example, some technical areas.

In 1990, when I was at a flying squadron, we had a squadron of over 200 people and the majority of those were maintenance technicians and engineering staff and there was one female technical airman; that was it. Even then, by 1990, you would say, 'But there were so many women.' So it depends on the rank and your field of professional expertise—where you are. There are some extreme instances.

I remember—I do not know whether this is relevant—when maternity leave was introduced. I was working in Canberra and one of the chaps that I worked with was furious; he maintained that, if a woman went on maternity leave, she should not accrue seniority, that this was just appalling. There were many other comments about pregnant women in the military and those sorts of things that we do not need to delve into. But there were some very strong responses.

CHAIRMAN—Is the nature of sexual harassment in the services different qualitatively to that in civilian life?

Mr PRICE—What does that mean?

CHAIRMAN—It's a delicate subject but—

Miss Kardas—Do you mean more extreme?

CHAIRMAN—Is it directed towards the capacity to do the work and being put down because you are a female, or is it explicitly sexual? Is there a qualitative difference in the way a male service personnel would treat you to the way a male civilian would treat you in the university or civilian world if they were indulging in sexual harassment?

Miss Kardas—Most certainly.

CHAIRMAN—Do you follow that, Roger?

Miss Kardas—Most certainly. In my experience I had been called worthless because I was a woman. Comments were made about my body. When I was at a flying squadron there were some women whose nicknames were Bart and Bant. Please excuse me, but Bart was 'Big arse, reasonable tits' and Bant was 'Big arse, no tits'. This was in 1993. I can give you many examples. I was grabbed on the buttocks and bitten on the bum. That was one extreme—

CHAIRMAN—Did you report that?

Miss Kardas—Most certainly. I did not take any action because at this squadron where I was three people had died in one year, one of then being the commanding officer, in an aircraft accident, and the brother of this particular NCO had committed suicide earlier that year, so I felt there were many extenuating circumstances. But I most certainly called him in and told him exactly what I thought the next day. I did in fact then go to my commanding officer, and he told me afterwards that he called everybody together and gave them a brief. I was just simply furious. I can give you other examples, but I do not think they would help any further. I would say that the instances that I saw were extreme and I do not think would have been tolerated in private enterprise, and I will tell you why. When the sexual harassment and equal opportunities acts came in I think it was about 1983, and we are talking about some 10 years later and they still had not been put in force in a positive and real way in the military. Yet it was already in force in civilian life.

CHAIRMAN—The long and short of this is that in your period of service you think there was quite a lag with service practice as opposed to civilian practice.

Miss Kardas—Absolutely.

Mr PRICE—I am interested in the charge that you were a lesbian, though that was not specific. Were you ever advised who put that complaint in?

Miss Kardas—No, not in an official way. I asked for information documents through the Freedom of Information Act.

Mr PRICE—But they were denied.

Miss Kardas—I was actually given some documents, but they were heavily censored. Names were blanked out, places were blanked out, dates and times were blanked out. I found out eventually, quite some time later—in 1994.

Mr PRICE—What I can't help thinking, particularly given your absolute denial of

the charge, is that yours may not be the only case where to apparently defend a sexual harassment charge a charge of lesbianism might have been put in. Are you aware of any other—

Miss Kardas—I was not aware of any other direct parallels to my case, but I do know of a young woman who had refused advances from a young man and somehow found herself investigated for sexual harassment. I came by this information in my capacity as an officer in the Directorate of Personnel reading personnel files. As coincidence would have it, I read this folio on this young woman's file. I do not know whether she was ever made aware of it, but it most certainly was a matter of record on her personnel file.

Mr PRICE—It seems a serious omission that you cannot be aware of what is on your file.

Miss Kardas—I would have to agree, yes. I paused because I was thinking you can write. I know that there is a way that you can write to Air Force Office and request copies of your personnel file. But, again, it depends on the person releasing the documents, because I know for a fact that I asked for the instrument of appointment of the investigating officer into my inquiry. I was desperate to find out the date because I made an irrevocable financial decision about the same time that the commanding officer was recommending my change to a different superannuation scheme and being given a financial bonus to stay in until 20 years. It was very close to the same time that he was appointing an investigating officer.

This decision that I made has cost me in excess of $200,000. I cannot prove it because I cannot get an uncensored copy of the document so that I can then take further legal action. That, to me, has been the concern with the FOI documents I received. My response was, 'They are protecting these people.'

Mr PRICE—They are still protecting them?

Miss Kardas—Yes.

Mr PRICE—You have given us a lot to think about.

CHAIRMAN—Do you think the ADF has 'a guilty until you have proved your innocence' approach to matters?

Miss Kardas—In some instances, yes. In fact, that is one of the notes that I made. Particularly in my case, and in other cases that I had seen, people were selecting a technique to achieve a predetermined outcome based on misconceptions which may or may not be true. So, yes, I would have to agree, from my experience.

CHAIRMAN—Is that a uniform approach to charges or do you think it is more prevalent in some areas than others? The example you give in the opening part of your statement was about how the person was convicted but required to repay the money, yet nothing was followed through on the sexual harassment case.

Miss Kardas—It would appear that way. It depends upon the individual choosing to apply an administrative action or an action under the DFDA. It is down to the commander that makes the decision doing it, and you have to ask yourself, 'Have they in fact got enough training to do this? Is there enough training in legal matters or in fact can they do it at arms-length?' For example, in accounting issues, you must always deal at arms-length to be transparent and open so that things are dealt with the right way. I would suggest that this would be a perfect example of how it should operate in the law. Can these people deal objectively—at arms-length—with these issues? Quite obviously, by the differing outcomes that I have spoken about today, that must indeed be the case: that it is not consistent, that it is not equal.

CHAIRMAN—If you were CDF, how would you fix the problem?

Miss Kardas—I certainly would not—

Mr PRICE—Firing squads are out.

Miss Kardas—No, no. I certainly would not throw out the DFDA or anything like that. The law depends upon the application, upon the individual applying it. If I were the Chief of the Defence Force, I would look at where is the division between the administration of formal warnings or adverse reports, at what point does it cross over into the Defence Force Discipline Act and when does this need to happen? I would make sure the people had correct training on what is evidence and what is hearsay and on evidentiary and legal procedure.

Administrative officers are not legal officers. Why was I made to prosecute two young men when they were defended by a qualified solicitor? I will admit quite freely that I was presenting the evidence from the prosecution brief and at least two or three pieces of that evidence were tossed out because they were not considered to be correct. Was the commanding officer right in doing that? I would say, in a legal sense, yes. But there needs to be training and the right people involved in the appropriate process.

CHAIRMAN—Basically, you are saying you would accept the present system and try to make it work more efficiently rather than introducing a new scheme?

Miss Kardas—Yes. That would be my response, yes.

Mr PRICE—We have talked this morning about your own experience and tried to extrapolate a little bit out of that. In your experience, how did the RAAF handle so-called

personality clashes? And what are the mechanisms for handling those?

Miss Kardas—Personality clashes were often difficult. They normally led to confrontation—be it was a counselling session that this behaviour was to stop—but often, if it was a personality clash with someone who was senior to you, it was really difficult. I have a very good example of that. There was a female officer in the mess and there was a junior officer standing with a wing commander and the male junior officer was throwing spoons at this woman, who was quietly reading a newspaper in the mess. Eventually she had had enough, and she stood up, gathered the spoons and went to this male officer said 'If you don't stop throwing these spoons'—and the rest was deleted. She was called in before the wing commander the next morning and told that she had behaved in an unladylike manner. She actually had the presence of mind to say, 'You're only doing this because you don't like me,' and, thank God, he had the courage to say, 'Yes, you're right. Okay, let's talk about this in a grown-up way.' I would suggest that there would not be too many people that would deal with a personality clash in an open and honest way. Remember, you have the rank structure and that confuses issues sometimes—the lines are not that clear—because you have a responsibility to behave in a certain way.

CHAIRMAN—Thank you very much for your evidence this morning, Miss Kardas. It must not have been a pleasant experience for you, but if you are to provide additional material would you forward it to the secretary? You will be sent a copy of the *Hansard* transcript of the evidence you have given this morning which you can correct for grammatical errors and resubmit to the secretary.

Proceedings suspended from 10.17 a.m. to 10.29 a.m.

JAMES, Lieutenant Colonel Neil Frederick, 33 Adamson Crescent, Wanniassa, Australian Capital Territory

CHAIRMAN—On behalf of the Defence Subcommittee, I welcome Lieutenant Colonel Neil James of the Australian Army. In what capacity do you appear before the subcommittee?

Lt Col. James—I appear before you in a private capacity.

CHAIRMAN—Thank you, Colonel James. I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in the respective houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of the parliament. In light of my earlier statement, I remind you of my warning that this inquiry should not be misused as an opportunity to make defamatory comment against named individuals under the protection of parliamentary privilege.

The subcommittee prefers that all evidence is given in public but should you at any stage wish to give any evidence in private, you may ask to do so and the subcommittee will give consideration to your request. Your submission has been received and it was authorised for publication. Are there any additions or corrections to that submission?

Lt Col. James—There is one missing word and I have already spoken to the secretary about it.

CHAIRMAN—Thank you. Would you like to make a short opening statement before questions?

Lt Col. James—Thank you. Purely as background to assist you in placing my testimony in context, I have served in the ADF since January 1973. I am an officer in the Australian Intelligence Corps and I am currently working in a non-corps capacity as Director of the Land Warfare Studies Centre, which is in effect the Army's corporate think-tank and charged with researching Australia's potential land warfare needs two or three decades ahead.

During my ADF career I have served in a wide range of regimental, staff and teaching postings, including exchange service with the British and Canadian armies; overseas duties in Malaysia, Singapore, Indonesia, Pakistan, India, New Zealand and West Germany; and an appointment as the directing staff at Command and Staff College.

I have also undertaken United Nations service in Kashmir and, last year, in New York and Iraq, where I led the first UN special commission team to mount a challenge

inspection of an Iraqi presidential palace, in Saddam Hussein's home village of Auja, near Tikrit in central Iraq.I am married with three children, and I am a practising Anglican and a Collingwood supporter.

The events detailed in my submission relate to my time in Darwin with Headquarters Northern Command, from January 1994 to January 1997. In this posting, I had to raise the joint intelligence branch of the headquarters from virtual scratch and integrate ADF intelligence and surveillance requirements into Australia's wider barrier law enforcement activities across northern Australia. I thoroughly enjoyed the challenges involved and enjoyed considerable success in building one of the ADF's finest intelligence elements. The few who know what I achieved have been gracious in their appreciation.

The difficulties summarised in my submission were an unnecessary distraction from these efforts. My intention in making this submission, and in appearing before you today, is to prevent any other ADF officer, or other rank, from having to endure the same or similar treatment that I had the misfortune to receive whilst at Headquarters Northern Command.

My submission proposes measures to eradicate or minimise the scope for similar miscarriages of justice and abuses of power by misguided, unscrupulous or otherwise deficient senior ADF officers. In particular, the command prerogative to lay charges under the Defence Force Discipline Act should be amended to allow service personnel the right to clear their name. Furthermore, the much and seemingly increasing abuse of power whereby less than forthright senior commanders abuse the disciplinary and administrative powers vested in them, by refusing subordinates the option of proving their innocence in an open court while at the same time attempting to censure such subordinates administratively, must be eliminated. The reversal of the presumption of innocence involved by such action is offensive to Australian democratic traditions and the sense of fair play that I am proud to defend as a member of the Australian Defence Force.

Thank you for accepting my written submission to your inquiry, and I hope it is of some use in your deliberations.

CHAIRMAN—Thank you very much. I will start off by asking what suggestions you would make for a more equitable handling of the case that leads your submission with the RAN commander.

Lt Col. James—In my submission I have suggested four measures that could be taken, and I will expand on these if you wish me to. I think the command prerogative to prefer charges needs to be amended to allow an accused to have the right to be charged. When it was suggested to me that I committed an offence, I did not believe that I had, my lawyers did not believe I had and most people I spoke to did not believe I had, so I was quite willing to be charged because in an open court with people being able to be cross-examined, I would have got off. The Commander Northern Command concerned was

unwilling to allow me to go into an open court. My legal advice and the considered opinion of most other people was that he believed that a court martial of me would reflect badly against him, so he proceeded administratively against me. A simple way to stop this occurring, in my opinion, is to give people the right to demand to be charged. When I said to this officer, 'Sir, I believe I am innocent and I would like to be charged,' he said, 'I am not going to charge you.'

CHAIRMAN—Would it be possible for that process to be abused—for an inferior to undermine a superior by repeatedly coming up with false charges?

Lt Col. James—I do not really think so; for the simple reason that it was the commander who was muttering about the charge in the first place and then proceeded to use the evidence gathered for that charge to proceed administratively. I would think it would be very hard for a subordinate to misuse that power. All I am seeking is a minor amendment to the prerogative.

CHAIRMAN—Let us get clarification of this: you are not allowing an open season then for inferiors to demand that they be charged; it is only if some administrative action has been taken against an officer that you would want the right of appeal?

Lt Col. James—Essentially, yes, but where there is the intention to proceed against you administratively and not to follow disciplinary procedures, I think you should be allowed to then ask to be charged under the disciplinary procedures where the onus of proof is not reversed.

The second thing which I think can be fairly easily cured is that administrative action concerning possible or actual censure or reprimands or procedures like that based on unsworn evidence gathered in a disciplinary investigation should be absolutely prohibited. In my case, one of the officers concerned lied at length, and in detail, to the investigating service police, but because his evidence was not given under oath I had absolutely no come back and because witness statements are not public documents, I could not sue him for defamation. To allow the current procedure where administrative action can be based on unsworn evidence is an outrage and should be fixed forthwith.

Third, I believe a service member in receipt of a notice to show cause—say, censure or reprimand or something like that—where the issuing officer is substantially involved in the circumstances—and I would suggest that this would probably happen a fair bit—should be able to refer the propriety of such an action to a higher authority for decision on disqualifying the issuing officer because of the real or perceived conflict of interest. Furthermore, that higher authority should not be in the chain of command involved. In other words, there should be someone in the Defence Force appointed—an inspector-general, for instance, or someone outside the Defence Force—with that right to disqualify someone who has a conflict of interest.

Finally—and I realise that this one is difficult because we have the same problem in civil law—I think serious consideration should be given to require witness statements taken during service police investigations to be made on oath in order to deter malicious persons from making false accusations, deliberately omitting or understating favourable evidence about the accused or otherwise providing tendentious evidence. At the very least, any statement containing allegedly prejudicial matters about another person should be taken on oath. I think those four measures would largely eradicate the problem I faced at Headquarters Northern Command.

CHAIRMAN—Why can't that latter provision be implemented? It would seem a reasonable sort of step to take.

Lt Col. James—I am not a lawyer, but I understand it is the same procedure in civil law. A witness statement that you tender to the police tends not to be sworn. It is only when the witness statement is then admitted in the court that it then becomes subject to perjury procedures.

Senator BOURNE—It seems from what you have told us and from what we heard from the last witness that secrecy is a real problem with a lot of this. You did not know that this investigation was taking place until it had gone a fair way; is that right?

Lt Col. James—I knew an investigation was taking place, but what I was told was that it would be an impartial investigation into the circumstances. Unknown to me, the investigation had in fact been based on a witness statement sworn by a naval officer of equivalent rank to myself which I was able to prove was full of deliberate mistruths.

Mr PRICE—Sworn or unsworn?

Lt Col. James—That was the problem: it was unsworn.

Mr BEVIS—Could I just clarify how you did that? You refer to that in paragraph 13 of your submission after recounting the sequence of events. I would be interested to know what process was available and what you did in order to clear your name and demonstrate the falsity of the original allegations.

Lt Col. James—I had to answer the notice to show cause for censure by in effect saying why I thought I should not be censured. Luckily, I had a reasonably good lawyer. Also, one of the naval intelligence officers who worked for me in Darwin was a solicitor in private practice, and he was a good mate and particularly helpful. We basically wrote the submission and walked through everyone's evidence and walked through the true sequence of events and were able to prove to any objective person that the witnesses statements were, in effect, rubbish.

Mr BEVIS—Who did the show cause go to?

Lt Col. James—This was the problem. The show cause then went back to one of the senior officers who was involved in the whole incident in the first place. So there is a reverse cycle effect that we need to eliminate because one of the people who was the cause of the incident was in effect my judge, jury and attempted to be my executioner.

Mr BEVIS—I assume, though, that that person, in spite of that potential or real conflict of interest, was the person who determined to declare null and void the original censure. Can you have a look at paragraph 13 and expand it for me? I want to get it clear in my mind what the process was.

Lt Col. James—No, the person who made the decision that I had no legal case to answer was the chief of staff, Headquarters Northern Command. It was not the same officer as the commander of Northern Command, who was the person who instigated the investigations and the alleged charges.

Senator BOURNE—I am learning all this too. In an administrative action, then, there is no necessity for any arms length at all. Any person who is intimately involved in whatever you have been charged with can still sit in judgment on you, virtually.

Lt Col. James—There are some safeguards, but I would argue that the safeguards are inadequate. Not only must justice be done, it must be seen to be done. The problem is that officers who are involved do have a conflict of interest but continue to be involved. But, more importantly, the perception of a conflict of interest is likely to arise a lot more often and still they are involved. That is why I have proposed in my submission those four steps which I think will largely eradicate that aspect.

CHAIRMAN—One of the common themes running through the whole of this inquiry is the matter of impartiality. It does not matter whether you look at a big thing like the Black Hawk inquiry or your particular case, the fact that you have a hierarchical structure inherent in the ADF and people on a promotional ladder and annual reports and the rest of it, makes the question of impartiality a very vexed question.

Lt Col. James—It certainly is a problem with administrative procedures. I have reasonably full confidence in court martials. Australian history shows, for instance, that during the last war many of our senior Air Force, Army and Navy officers were practising lawyers in civilian life—chief justices of states after the war and things like that—and they were all great defenders of the court martial system. The court martial system is quite good. I was quite prepared, in my case, to be judged by my peers. The problem was that I was denied that opportunity.

The practice of then proceeding administratively against someone instead of charging them means that the onus of proof is reversed and you, in effect, have to prove you are innocent—and you have to prove yourself innocent to the person who thinks you are guilty in the first place. It is a logical absurdity, but it can be fixed. As I have said in

my submission, I am not against the DFDA. I have some concerns about it. When I was a young officer cadet at Duntroon we were taught our military law by warrant officers. Officer cadets at Duntroon and ADFA now have to be taught their military law by lawyers. That is hardly an improvement. But overall the defence forces need a body of disciplinary law—I do not doubt that—but there are some extra safeguards that we need to build into it to show that disciplinary cases are handled under disciplinary proceedings and not administratively.

Mr BEVIS—You refer at the end of your submission to the gender harassment case. You refer in paragraph 23 to what you identify as two minor wholly legitimate and factual statements. What were they?

Lt Col. James—That refers to a medical in confidence document that I submitted so without compromising privacy, the background to this is that I had working for me a young female officer whom the service were trying to throw out. She was an exceptional officer. The ground on which they were trying to throw her out was that she had a crook back and was therefore not a 20-year prospect. Amusingly, she objected to two statements. The first one was that I pointed out that, since the average length of service of a female officer in the Defence Force, based on the Glenn review and other official figures, was about 12 years, she may not be a 20-year prospect anyway; therefore, their policy of chucking her out short of the 20 years was an absurdity. She objected to the statement. She said it stereotyped her as a female. That was something I found reasonably hard to credit.

The second statement was essentially that the air force medical system had asked me whether she was capable of lifting heavy weights. I said that, in the duties she had, she really was never required to move heavy weights. She was an officer serving at an operational level at headquarters, and a female officer at that, and I could not envisage the circumstances where she would be required to lift heavy weights.

Mr BEVIS—That is fine. I was just trying to get the flavour of the rest of the text there.

Lt Col. James—This was a young girl who basically got some bad advice and put in what was, in effect, a frivolous complaint. My problem was that, unfortunately, in the climate of near hysteria in the ADF at the moment, if a female subordinate complains about a male superior, no male in the chain of command will dismiss that charge no matter how false or frivolous or whatever it is. They are all too scared.

Mr BEVIS—Going back to your earlier comments about the situation with administrative reprimands outside of a formal charge process, when we had evidence last week talking about the formal procedures available for charging and the way in which they are progressed, there was also a comment made—if I remember it correctly—that, where it is determined that they are not going to proceed with these formal charges, it was

considered quite appropriate for a commanding officer to initiate that less formal but nonetheless significant to the person's career punishment or censure. It was actually advanced that this is a reasonable part of the process, that this is a midway house—at least, that is the way I interpreted it. How do people in the ranks interpret it? How do people who are actually likely to be subjected to it interpret it?

Lt Col. James—I can only comment on my own experience. I have actually issued administrative warnings myself. I think what people have to grasp is that we are comparing apples and oranges here. Administrative warnings should only be issued for administrative problems, not for disciplinary problems. For instance, if you have a soldier, sailor or airman who is a particularly poor performer and you say, in effect, 'Look, your retention is not in the best interests of the particular service; within 21 days provide reasons why we should not throw you out,' as long as those proceedings are done for true administrative problems—in other words, the man or woman is a chronic debtor or some other administrative embarrassment to the forces—I think that is okay.

The problem is that we misuse administrative procedures for disciplinary matters. My argument is simple: if it is a disciplinary matter we should use the DFDA and proceed against people under disciplinary things. Then, if they are innocent, they will usually get off. If they are guilty they will usually get convicted. The problem with proceeding on administrative lines is that the onus of proof is reversed. You have to prove you are innocent, and that is just not on. We have not had that system in our system of government for 400 or 500 years and we should not have a system in the military where it glimmers on in some small rabbit hole.

Mr BEVIS—In a practical sense, identifying people who are not in the chain of command or who are not involved with an incident can sometimes be difficult. In a force that is getting smaller as each year goes by, looking at incidents that might have lead times traversing a couple of years, how do you think you might guarantee that independence and absence of potential conflict or the perception of conflict of interest? It is a question that has been raised in terms of very high profile inquiries in recent times. Finding people who have not, either in their current or previous postings, been somewhere in the chain of command can prove difficult under the current structure.

Lt Col. James—I agree it is a problem and I do not think we can guarantee it. We have to take steps to ensure that the potential for a conflict of interest is minimised as much as is humanly possible. Mistakes will always occur. There will always be some miscarriages of justice caused just by failings of human nature. What we have to do is reduce the scope for those abuses to occur.

In the case of the gender harassment one, my simple argument was that any senior female officer in the ADF who knew the circumstances of that complaint would have dismissed it out of hand, as is allowed under the procedures, as frivolous. It would have saved an enormous amount of money and an enormous amount of time and effort by a

large number of people if it had been automatically referred to a female group captain, colonel or a Navy captain, who would have said, 'This is a frivolous complaint,' called the young female office in and said, 'This is a frivolous complaint. Forget about it.' But because the system had to churn through this, with the full panoply of process, and they were basically all men involved, common sense did not come into it.

Mr BEVIS—I note from your submission it was in fact withdrawn subsequently and the process did produce that outcome.

Lt Col. James—Only because I screamed blue murder. The unit was prepared to process the complaint and I said, 'Hang on. You haven't even followed the normal ADF procedures on this.'

Mr BEVIS—One of the joys of establishing these sorts of mechanisms and structures is that, where it is a complaint between two people or amongst more people, you have to look at the procedural rights of everyone involved.

Lt Col. James—Yes. One of my big complaints, which I hope I brought out in the submission, is that the way the young lass in particular was treated was not clever, either. The relationship psychologist brought that out.

Mr PRICE—You mentioned that you had used administrative forms but these had really been when the person's continuing service was in question. In other words, you were giving them an opportunity to say, 'Pull your socks up or you are going out'?

Lt Col. James—Yes. Things like continual drunkenness. If a person is a driver in a transport unit and he is drunk all the time, his retention is obviously not in the best interests of the service and indeed the community. There will always be bad soldiers, bad sailors and bad airmen that you will need to get rid of under administrative provisions from time to time. If he is drunk on duty, he can be charged. But if he is drunk off duty, and he is a danger to the service people he is carrying and the general public, basically you need to proceed administratively.

Mr PRICE—Where is the cut-off line between administrative procedures and discipline charges under the act?

Lt Col. James—I think the cut-off is a simple one, that is, something that is an offence under the act should only be punishable under the act. The problem is that people are seeking to use administrative procedures as punishment. They are not there for punishment; they are a management tool to be used in effectively managing the Defence Force.

Mr PRICE—Where do you use those two procedures as opposed to the civilian justice system or criminal system?

Lt Col. James—I suppose you have to go back to the philosophy of why we have the Defence Force Discipline Act in the first place. Servicemen and servicewomen submit themselves to defence extra laws because it is required. You can't run a Defence Force without—

Mr PRICE—I am sorry, I may not have put the question very well at all. If today there was an allegation of rape or murder at some base or unit that would get referred to the civilian police, as I understand it. What are the other issues that should get referred to the civilian justice system, the police in particular?

Lt Col. James—I would not pretend to be an expert in this area. My suggestion would be simply that as the ADF downsizes I would suppose that the capacity of the ADF service police to investigate offences is probably declining. As long as the offences are serious and they occur in Australia on Australian soil, I personally cannot see too much of a problem with the police investigating offences in a unit. If we are on overseas service, then it is a different case.

Mr PRICE—If there was a fraud or stealing of more than $1,000 and less than $10,000, how would you see the appropriate way to handle that?

Lt Col. James—In the case of fraud and theft, you really have to look at it from the point of view of the service overall in that society generally is a bit more tolerant of thieves than the services can be. We force young men and women to live together and if you cannot have absolute trust in those you serve with, there is obviously a problem.

I myself have been on a courts martial board where a serviceman was charged with an offence where he and a civilian accomplice had knocked off some watches in a storehouse. The civilian accomplice was tried in a civil court, went up before the local beak and got a $1,000 fine; the corporal in question came before a court martial, was reduced to the rank of private and dismissed from the service—which is a far more draconian penalty. My argument would be that I think that was probably justified because the requirements placed on that corporal were far greater than the requirements placed on the civilian storeman. And, in that case, the military and civil police investigated the offence together because one of the offenders was a civilian and one was a serving soldier.

Mr PRICE—But, if there was no civilian involved, it would merely be an ADF investigation.

Lt Col. James—It was in those days; I could not tell you whether it would be these days. I think, to an extent, it depends on the amount of money involved and on the type of stolen goods.

CHAIRMAN—Why should the amount of money come into it? If someone thieves $500, if the opportunity exists for half a million, they are going to take the half a million,

surely?

Lt Col. James—Again, I am not a great expert in this area, but I would think, just for simplicity's sake, there has to be some jurisdictional cut-off before you refer things to the civilian police. One of the problems of course is that the civilian police are very busy and probably would not investigate small amounts of money theft, whereas the service police may not be as busy and can.

CHAIRMAN—In your experience, though, theft is always dealt with severely. The evidence we had preceding you was to the effect that in one case restitution was allowed and somebody's career continued without let or hindrance.

Lt Col. James—I can only talk on my experience. Certainly, as a commanding officer, as a member of courts martial boards and as a junior officer in units, theft is always treated quite seriously.

Mr BEVIS—In your submission you refer to the fact that your notice to show cause ended up in the Directorate of Officer Career Management. This was before the actual process had been completed so there had been no censure, I understand, registered against you at that point, but the show cause has found its way on to your official file.

Lt Col. James—It has since been removed from the official file.

Mr BEVIS—How did you know it was there and how did it get there?

Lt Col. James—I was given an information copy of the letter and I said to my lawyer 'They aren't meant to do this, are they? The censure has actually got to be issued before it is actually a censure.' My lawyer actually went to town on this, but the problem was that the officer who had made the mistake and sent the information copy down to the Directorate of Officer Career Management was the same person making the decision on my motion to show cause. He goofed, and he goofed quite severely. He admitted that, but it just added to the complexity of the conflicts of interest involved.

Mr BEVIS—Were you in fact censured and that overturned or was your show cause successful?

Lt Col. James—My show cause was successful and I was not censured. In theory, all paperwork is then destroyed; it is as if it never happened. In practice it does not quite work like that because obviously the ADF grapevine goes into overdrive. But also in my case, because this information copy had been incorrectly sent down to Canberra from Darwin, I had a problem in that regard too.

Mr BEVIS—If the Chief of Staff, I think it was, who made the error to forward the show cause—as distinct from what might have been a final determination, a censure—

has made a mistake and it has been received down in the directorate, the directorate would be aware of what they are supposed to store and not store. Did they contact your commanding officer or the Chief of Staff and say, 'Hey, listen, this isn't a document that we are supposed to hold. Tell us what happens at the end if you want to.'

Lt Col. James—I am not aware that that occurred. As far as I can recollect, they only realised that they should not have got the information copy when I raised it formally.

CHAIRMAN—I have a broad question: do you think that military justice should apply equally to officers and ORs or do you think there should be a different system for offences?

Lt Col. James—Again, I can only give a personal opinion, and my personal opinion would be that military justice should apply equally but you have to take the circumstances into account. If someone is a senior NCO or an officer and commits an offence, the offence in most cases would be greater because we would place more trust in our senior NCOs and officers. Therefore, we would need to punish them probably more heavily for the same or a similar offence than we might punish a soldier, sailor or airman.

Mr PRICE—As a result of your fighting to protect your name, is there an unofficial administrative stamp on the file now or can you say you have escaped unscathed?

Lt Col. James—You would have to ask other people that. I would certainly contend that I have not escaped unscathed. In effect, the people responsible for—I will not use the term 'persecution' because I do not think it was persecution; but a little bit of incompetence, a little bit of malice, a little bit of a mix of other things—have essentially got away scot free. One of them has since been promoted rear admiral; I am still a lieutenant colonel after ten years. I put it to the committee to draw your own conclusions from that.

Mr PRICE—It is some time since we have deployed in numbers at war. I suppose Vietnam is the last one. So our sense of how we operate military justice in peace and war is a bit distant, I guess. Do you see that there are differences in terms of peacetime military justice as opposed to wartime military justice?

Lt Col. James—The problem is that we have the defence forces and we must have the culture that the defence forces are here to fight wars. If we draw too fine a line between what are allegedly peacetime offences and what are allegedly wartime offences we will have trouble having an efficient fighting Defence Force that has actually got to go away and do things. Whilst it is a long time since we were in Vietnam, we have actually deployed fairly large contingents to Somalia, Cambodia and the Sinai, and the military justice system worked quite well in those circumstances.

Mr PRICE—I am not trying to dispute that, but is it a function of, because you are being deployed, people are focused on what they have to do and therefore the instances requiring justice become diminished, as opposed to a peacetime situation where you have got a lot of time to contemplate and talk and booze and say, 'Here we go,' or whatever?

Lt Col. James—That would certainly be the case, but the other thing that would come into it would be the quite simple aspect that we tend to take our best people overseas, not our worst people. If someone has less than perfect ethics or is a bit of a troublemaker, then we are less likely to take him overseas than we are someone who is a better soldier, sailor or airman. So there is a bit of a self-selection process involved with the honesty aspect here.

CHAIRMAN—As a reasonably experienced officer, would you reflect on the influence of current military justice procedures on the effectiveness of the ADF? Anecdotally there are a lot of stories told about battalion commanders and people of that rank equivalent in the other two services being inhibited in promptly exercising disciplinary measures. Whereas 20 years ago they would have dealt with the issue without a second thought, today they are inhibited by charges and counter-charges that might relate to the misapplication of power. If those stories are true—and I stress that they are anecdotal—the possibility exists for the effectiveness of the Defence Force to be downgraded to some degree. Do you have some views on that?

Lt Col. James—Once again, I must stress that these views are entirely personal. As I touched on before, in the old days military law was a bit simpler and was taught by senior non-commissioned officers. It now has to be taught by lawyers and procedures are much more complex. The old system pre-1974 obviously had some problems, and the DFDA did a lot to fix them. I think the DFDA itself has brought in some additional problems and maybe it is time for the pendulum to swing back a bit.

My experience, once again, would be only anecdotal but I would suggest that, yes, there has been considerable inhibition placed on commanders at all levels by some aspects of the DFDA, but they are not aspects that cannot be fixed. The principle of the DFDA itself is quite sound. We just need to tinker a bit more.

CHAIRMAN—Are you quite happy with the overall system that we have in place?

Lt Col. James—Pretty much. We have some problems. Again—purely a personal opinion and it would probably be disputed by many—I think one of the problems we face is the quality of our lawyers. My personal experience would indicate that the quality of legal advice provided to some of the people involved was not adequate.

CHAIRMAN—Is that from regular legal officers or from reserve legal officers?

Lt Col. James—Some of the problem is with regular legal officers. The rule of thumb that I would now apply to anyone charged with anything is to get yourself a Navy, Army or Air Force reservist lawyer. I believe that they are probably better lawyers. That is a rough rule of thumb. There will obviously be individual exceptions. I know a couple of superb regular Defence Force lawyers but I also know some fairly average ones.

Mr BEVIS—Better lawyers in plying their trade or less restricted by the prospect that their annual review may be affected if they happen to tread on the wrong toes in defending someone?

Lt Col. James—I am really not equipped to answer that question. Let's face it: no lawyers become generals anyway.

Mr PRICE—Some might say, 'Thank god!'

CHAIRMAN—Some of the divisional commanders were.

Mr BEVIS—No, they become Prime Ministers instead.

Lt Col. James—But they were not serving as lawyers in the Army; they were serving as divisional commanders. I would suspect that would not be too serious a problem. It is pretty hard for a commander who does not like one of the lawyers to have a go at him. They are literally segregated functionally.

Mr BEVIS—So if it is not because they are pulling their punches, it must be because they cannot punch as well? That is the option, isn't it?

Lt Col. James—In effect, yes. Any system is open to abuse. For instance, there is the last convening order I looked at when I was a member of a court martial board. At that stage I was noted as a bit of a hardliner—I have mellowed a lot. The president of the board was a noted hardliner, the other member of the board was a noted hardliner, the prosecuting officer was a regular lawyer who had spent 10 years as a barrister with the Commonwealth Crown Solicitor, and the defending officer was a fairly average reservist. Just by looking at the convening order, you could make the assumption that the person issuing the convening order really thought that the person involved was guilty—

Mr PRICE—He was going to be smashed.

Lt Col. James—and was going to make sure that there was no way, as long as the evidence was appropriate and the person was actually guilty, he was not going to get the full weight of the law thrown at him. That is human nature. The potential to do that in civil life is obviously a lot less but we all know in civil life that, with the way cases are allocated to judges, the same measures do come into play.

CHAIRMAN—From the submissions that have been made to us, the heart of a lot of the problems that have appeared get back basically to personality differences or incompatibilities. Do you think the ADF has a good series of mechanisms in place to resolve personality differences or to minimise the consequences of incompatibility?

Lt Col. James—The simple answer to that question is no.

CHAIRMAN—Do you think it is required?

Lt Col. James—The simple answer to that is yes. One of the problems, I would contend, is that the three services have different cultures, and when you mix the three services together often inadequate attempts are made to adjust for the different cultures.

As an Army officer, for instance, I would say most senior Navy officers are bullies. Because of the culture that breeds them and the way the Navy works—with commanders working often in isolation from other officers—the bullies tend to rise to the top. A Navy officer would say the exact opposite. He would say, 'No, that is not true. Senior Army officers are all nongs, et cetera.' There is probably a great deal of truth in both contentions.

I feel that often inadequate thought is given to how you very carefully blend the three service cultures together. A lot of the personality clashes that occur across service lines are not actually personality clashes; they are clashes of the cultures that have built those officers in the first place. I have had three joint postings as a lieutenant colonel and I have seen some very interesting things over the years that lead me to believe that, if we put a bit more effort into adjusting the way we mix the three service cultures—because they all have their strengths and weaknesses—we would probably minimise what people often perceive to be personality clashes between individuals.

CHAIRMAN—Thank you very much for your evidence. You will be sent a copy of the transcript of the evidence you have given today, to which you can make corrections of fact. Thank you very much for coming along this morning.

[11.11 a.m.]

BALDWIN, Wing Commander Edwin James, 45 Burns Circuit, McKellar, Australian Capital Territory

CHAIRMAN—Welcome. In what capacity do you appear here today?

Wing Cmdr Baldwin—As a private citizen.

CHAIRMAN—The proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in the respective Houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of the parliament. I also remind you of my warnings that I issued at the start this morning. This inquiry should not be used as an opportunity to make defamatory comment against named individuals under the protection of parliamentary privilege.

The subcommittee prefers that all evidence is given in public but should you at any stage wish to give any evidence in private, you may ask to do so and the subcommittee will give consideration to your request. Your submission has been received and it was authorised for publication. Are there any additions or corrections that you wish to make to that submission?

Wing Cmdr Baldwin—I would like to make a short statement.

CHAIRMAN—Yes, I am just on the point of inviting you to do that. We invite you now to make a short opening statement before we commence questions.

Wing Cmdr Baldwin—Thank you. I believe my case is fairly well documented in the written submission I made to this committee, and it would therefore be unproductive of me to go over those details again this morning. Nevertheless, I suggest that it is important that I encapsulate my submission for you. Notwithstanding what has happened to me over the last five years, basically I still believe that there is a need for a military system of justice, that there is nothing inherently wrong with our disciplinary system and that the main faults lie with the people who administer military justice and the way in which it is administered.

As you will see from my submission, I was falsely convicted of an offence in April 1994. That offence was trivial, yet it still resulted in the full weight of a court martial being directed against me. Conservatively, that court martial cost the Australian taxpayer about $100,000 to stage. I was convicted of telling my superior that he was gutless; a remark, I suggest, considering the circumstances, which hardly warranted the excessive force of the DFDA—yet it happened. That it happened clearly demonstrates how, in the

hands of an unscrupulous person, the DFDA can be used for vindictive purposes.

I hasten to add that this is not an overemotional statement on my part but one that is now borne out by fact. The subsequent inquiry conducted by Wing Commander Robbie Robertson in 1997, and the action of the Chief of the Air Force in quashing my court martial in January of this year, clearly indicate that the actions of my superior officer at Williamtown, Group Captain John Donahoo, were more than simply questionable; they were nakedly vindictive.

Unfortunately, as my submission also demonstrates, not only was Group Captain Donahoo to blame for the injustices I have received but the questionable actions of a number of very senior Air Force officers that allowed him to act in the manner that he did must also be brought into sharp question. The action, or more to the point the inaction, of these senior people undoubtedly added to the situation that developed—and a situation, I must add, that is yet to be properly resolved.

It is unfortunate that in my case, instead of being fair and honest in the application of both DFDA action and administrative procedures, Air Force, as a collective body, was dishonest and, notwithstanding the clear signs that very senior officers were receiving, chose to blithely support Group Captain Donahoo with seeming official sanction. Because of this, the Air Force must carry the majority responsibility for what subsequently happened to me. The Air Force stood by and allowed injustice to be perpetrated not only on me but on many others as well. In my submission I make mention of Malcolm Townrow and Dot Melvin, but there were others who were unjustly affected by what happened at Williamtown from 1993 to 1995 and I believe this committee should be made aware of them. Before I mention these people, I would refer you back to my submission.

You will note that I also make comment about unsuitability reports being raised on me. Just as formal discipline can be brought to bear against an individual through the application of the DFDA in an unfair way, so can the administrative action of unsuitability and adverse reports be used in a similar manner. These administrative tools have a rightful place within defence administration, but in the wrong hands they can used as a nasty quasi-discipline vehicle. In my case this is what happened. These reports were made all the more potent by an unwillingness on the part of Air Force to accept that the reports were so much nonsense and dismiss them.

In my submission I note that it was only after I had petitioned the Chief of the Defence Force, General Baker, that the reports were finally cancelled. This was two years after I relinquished the command at Williamtown that I had been reported as supposedly unfit to command. Although I do not go into the unsuitability reports in any detail in my submission, you should be aware that, in character, these reports reflected the trivial charge I faced under the DFDA. The unsuitability reports were no more than the vindictive actions of my superior towards me. The fact that something like 12 of the incidents, recounted in the unsuitability reports that he raised, predated his arrival at

Williamtown—and in one case predated it by over two years—I suggest bears testimony to the vindictive nature of those reports.

As with the DFDA action, the most disappointing aspect of the unsuitability reports was that Air Force seemed incapable of doing anything constructive to quickly deal with the issue. The reports remained alive for over two years and in that time, in their own way, presented as a form of perhaps unintentional, but nevertheless institutionalised, punishment. Promotion boards were continually reminded of their existence and I am sure that my career suffered accordingly.

I believe that in considering the application of discipline in the ADF this committee should also look closely at the use of administrative reports. There is a need for checks and balances in the administrative system so that the very legitimate and useful intent of these reports is not open to the abuses from which I suffered. In considering the abuses I suffered, but more especially the inappropriate use of the DFDA against me, there are a number of aspects that this committee may care to consider.

I believe my case would not have progressed to this point had there been a clear division of powers and responsibility within the application of military justice. If those divisions had been there, the vindictive use of the DFDA would never have occurred. There would have been no court martial. I would not have taken nearly five years to clear my name. I must stress, I am still trying to clear my name. But I suggest it is highly unlikely that I would be here before you today. Nor, I hasten to add, would the Air Force in 1993, when I was charged, and then again in 1994, when I faced a court martial, have intentionally ignored the abuse of the DFDA by my superior. In so doing, they have forcefully placed me in the position that I am now in.

Notwithstanding what has happened to me, there is no question in my mind that we do need a military justice system. However, in my opinion, it is unfortunate that too much of our style of military justice is based on a military system, the British system, that does not necessarily fit neatly over our national character. While traditionalists will probably be horrified at what I am about to say, our military traditions are not those of the British regiment, but more those of a citizens' force based on a belief in a fair go, openness and public accountability. I believe we need a system that reflects these ideals. We need to be accountable, not only to ourselves in the military but to the public at large. After all, the military spends something in excess of $10 billion of the public's money annually, and the public deserves to know that all those dollars are spent wisely and well.

I doubt that the public would be all that impressed if it knew that probably somewhere over $100,000 was expended on my court martial—a court martial, I must add, that was brought on by the whim of a vindictive man, aided and abetted by the unwillingness of Air Force to face the reality of what was happening at Williamtown at that time. Nor would the public be at all impressed if the real cost of the last five years of my fighting to clear my name was considered. I have no idea what the costs are, but I

suggest that they would be substantial. On an accrual basis it is probably well into the hundreds of thousands of dollars, if not over the million dollar mark. I believe that most of you, probably all of you, would agree that what we need is a military justice that clearly reflects our Australian society in the year 2000, not the British regiment of the mid-1800s.

Accordingly, I believe that we need to rethink the breadth of charges that are presently available under the DFDA. For example, I doubt that we need to repeat charges in the DFDA that could be better handled by civilian courts. As far as discipline is concerned, I suggest we need to rethink sections of the DFDA that allow for words and actions that would not raise an eyebrow in our civilian society to be viewed as insubordination. I believe we need a system where those in uniform are not the policemen, the DPP, the magistrate, the judge and jury nor higher courts of review. We need a system that clearly makes the person in uniform accountable for his or her actions. Therefore, I believe that, once a charge has been laid, an independent body needs to judge the merits of the case. I suggest we need an independent body that reflects the civilian office of DPP and an independent judiciary, both bodies totally divorced from the present military rank system. I believe if we do adopt such a system then the sort of misapplication of military justice that was so painfully evident in my case will be averted.

As I suggested a few moments ago, I would also ask this committee to consider the present use of the administrative reporting chain. I strongly believe this form of action needs to remain, but just as strongly I believe it must also be open to review. Those who take the action must be held accountable for what they have done. There needs to be an independent review mechanism put in place to oversee all administrative action. I suggest that this could become the responsibility of the Defence Force Ombudsman. If this body was to review all administrative reports before they were finalised, commanders would be circumspect in using this system and abuses in the present system would be curtailed.

In my submission I made some comments on military inquiries and investigations. I suggested the problem, as I saw it, was one of personalities and honesty. I still believe this to be so and suggest that my case shows how personalities can abuse the system yet also get it right. The Robertson findings clearly demonstrate how we can investigate ourselves. Robbie Robertson, although a retired long-serving officer of the Air Force, was a reservist when he conducted his investigation. As such, he brought an independent view to his deliberations. He was beholden to no-one and he could approach the task with honesty, not worrying if an unpalatable finding would impact on his future career. This, I contend, suggests that we need a measurable level of independence in any investigation we carry out.

To this I would add one more proviso: that as a matter of course, whenever possible, investigations and inquiries be open to the public. In any formal investigation, we must be able to show publicly that we are serious about finding out what went wrong and that we are determined to put in place mechanisms so it will not happen again. As a

possible model, may I suggest that this committee may care to view the arrangements of the present board of inquiry into the accident aboard HMAS *Westralia* as a possible way to go. This investigation is open and it actively involves the public.

There are two more aspects which I wish to place before this committee. The first concerns Air Force's unwillingness to initially tackle the problem it faced at Williamtown between 1993 and 1995. Not only did Air Force's inactivity lead to my being court martialled but it also resulted in a number of people being traumatised. In all, I am aware of nine such people; it could be more. The people I am aware of are: Mr Malcolm Townrow who, in mid-1993, was unilaterally dismissed from his position. Notwithstanding a Defence investigation that found he had been incorrectly dismissed, he was not reinstated. Townrow is still receiving psychiatric help for the manner in which he was treated. Dot Melvin: while a very sick lady, Dot was harassed by management at Williamtown and on Friday, 19 November 1993 went home and died. Her death occurred after a day in which she had been subjected to much emotional stress at work. I do not believe that any of the circumstances surrounding her death were ever investigated by Air Force or the civilian side of the fence.

Mr Brett Johnson: Brett is an ex-flight lieutenant who was so traumatised by the treatment he received at Williamtown that, after his discharge, he developed agoraphobia. At one stage, because he was so depressed he burnt all his uniforms. Johnson is still receiving psychiatric help. Wing Commander Sue Graham: this is the officer who replaced me at Williamtown. In my submission I note that it was from her official complaint that an investigation was carried out into the conduct of Group Captain Donahoo while he held command at Williamtown. The subsequent report prepared by Wing Commander Robbie Robertson allowed me to petition the Chief of the Air Force and have my court martial conviction quashed.

Others who were traumatised were Squadron Leader Deborah Perry, although she subsequently married and I don't know what her married name is; Wing Commanders Mel Selkirk and Barry Muir; Miss Jenny Pearson; and Mr Paul Johnson. I am unaware of the extent to which these people were affected by what happened at Williamtown, but I do believe from discussions I have had with them that it was probably of some magnitude.

The final point I wish to raise concerns the impact the effects of 1993 and 1994—if you remember, I was charged in 1993 and faced a court martial in 1994—and my subsequent endeavours to clear my name have had on my career and on my personal life. My career has been effectively destroyed and my personal life has been subjected to such unrelenting stress and pressure that my marriage has badly suffered and has probably been destroyed. In my submission I noted that Air Force had agreed to consider the impact of the last five years on my career. This has happened in a fashion but, unfortunately, the outcomes to date have been most unsatisfactory. While I believe there now exists within Air Force an appreciable level of goodwill—although I am unsure what that level is—negotiations have been painfully slow, and much of what Air Force has done has been

cloaked in secrecy. Why they will not tell me what they are doing, I do not know.

While I am the innocent man in all of this, the incessant delays mean that I am still being effectively punished for something for which I was not responsible. At this stage, Air Force seems unwilling to accept that the abnormal events of the last five years require special consideration. To date, Air Force has unfairly applied normal rules to an abnormal situation. As a consequence, the results have disadvantaged me. Unfortunately, as of today, I cannot say when some form of fair and equitable outcome—which is all I am after—is likely or if, indeed, such an outcome from Air Force is at all likely.

CHAIRMAN—Listening to your statement and reading your written submission, you put a great deal of blame on Air Force collectively. How just is that rather than putting the blame, if blame exists, on one person? In other words, is the whole system at fault or is it the way one or more people administer the system or interpret the system that is at the heart of your problem?

Wing Cmdr Baldwin—It is probably a little bit of both, or a lot of both. If I look back—and I now have somewhere in excess of 25 centimetres on this subject—there is little doubt that, by the middle of to late 1993, senior people in Air Force were aware that they had a major problem at Williamtown. They had two senior commanders who were not agreeing and were entering into a paper war that was escalating beyond belief. They did nothing. Why they did nothing, I do not know. The system allowed them to do something. The system allowed them to investigate what was happening. The system allowed them to post those two officers apart so that they could get to the bottom of it and resolve it quickly. They did not do that. I do not believe at the time that there were senior people in the Air Force who were anti me; I just believe the senior people in the Air Force did not know how to resolve this situation.

I cannot talk for the Army or the Navy here but, quite honestly, in the Air Force, if things do not fit within squares, our senior management have trouble knowing how to handle them. The situation at Williamtown did not fit into any squares at all. It was quite abnormal and, quite honestly, I do not think our senior management knew how to handle it.

The other thing that you must remember is that you had two senior commanders. If they had come down—and I have no doubt that this was in the back of certain people's minds—

CHAIRMAN—If I could intrude there, I do not want to know the names of these people or to identify them. You say two senior commanders?

Wing Cmdr Baldwin—That is me and Group Captain Donahoo.

CHAIRMAN—I see. The group captain was the tactical fighter force commander,

was he not?

Wing Cmdr Baldwin—No, he was the commander of the support wing. He was my direct superior.

CHAIRMAN—And he was on base with you?

Wing Cmdr Baldwin—Yes.

CHAIRMAN—And you ran the base squadron?

Wing Cmdr Baldwin—The equivalent of the base squadron.

CHAIRMAN—You ran the maintenance squadron.

Wing Cmdr Baldwin—No, the administrative support squadron, which was really the old base squadron by another name.

CHAIRMAN—Would you have been in day-to-day contact with the group captain?

Wing Cmdr Baldwin—Probably in some cases minute to minute.

CHAIRMAN—But he was responsible for all the units around Australia.

Wing Cmdr Baldwin—All the support elements at RAAF Base Williamtown, yes. All the elements that supported the tactical fighter wing.

CHAIRMAN—That was your responsibility—no, that was his responsibility.

Wing Cmdr Baldwin—That was his responsibility.

CHAIRMAN—That would have been Amberley, Laverton—

Wing Cmdr Baldwin—No, only at Williamtown.

CHAIRMAN—I see.

Mr BEVIS—I am not clear from the submission and what you have said how the CDF got to be involved in this.

Wing Cmdr Baldwin—I was getting nowhere with the Air Force. As was my right in the system, I wrote to CDF, pointing out where I believed Air Force had made mistakes, and he agreed with me.

Mr BEVIS—When you say he agreed, did he conduct an investigation? Presumably there was an investigation.

Wing Cmdr Baldwin—I would imagine so. I was told that in fact he had employed lawyers outside Defence to look into the case.

Mr BEVIS—So you were not asked to give evidence or anything of the kind in relation to that?

Wing Cmdr Baldwin—No.

Mr BEVIS—How did you come to know then about the conclusion the CDF had found you had been wronged?

Wing Cmdr Baldwin—Because he wrote back to me and said that I had been wronged, and then set out in three pages the reasons that he came to that conclusion.

Mr PRICE—Would we be able to have a copy of that letter?

Wing Cmdr Baldwin—Most definitely, yes.

Mr BEVIS—Was the Chief of Air Force's involvement flowing from the same sequence of events or was that from a different—

Wing Cmdr Baldwin—No, the same set of events. My experience through Air Force was that the air commander dismissed it, the Chief of the Air Force saw the actions of Group Captain Donahoo as being merely reflective—I think were his words—and CDF found that in actual fact I had been wronged, they had not been reflective, and both the air commander and the chief had not acted correctly.

Mr PRICE—What does 'reflective' mean?

Wing Cmdr Baldwin—I have no idea what the Chief of Air Force meant by those terms.

Mr PRICE—Are you able to give us that letter as well?

Wing Cmdr Baldwin—Yes.

Mr BEVIS—Was the court martial into the incident where you had this exchange with the group captain where you referred to him as gutless, or was that one of a range of things that were before the court martial?

Wing Cmdr Baldwin—There were three charges that I faced. Two were

insubordination. One was that I had said to the group captain that his actions were despicable. You can think about that for a moment. To this day I do not believe that is insubordination. The other thing I was charged with as far as insubordination is concerned was that Group Captain Donahoo said to me, 'You are getting close to the line'—whatever that meant—and I said, 'So are you.' So I was charged with insubordination. The third charge was acting in an insulting manner. As I said in my submission, the group captain had slammed the door in my face, then locked his door, and I said through the door, 'You're gutless.' The charge was acting in an insulting manner. The third charge I was found guilty of.

Mr PRICE—What was the third charge?

Wing Cmdr Baldwin—Acting in an insulting manner.

Mr PRICE—So you were not found guilty when you said he was gutless?

Wing Cmdr Baldwin—Yes. That was acting in an insulting manner.

Mr PRICE—So the other two—

Wing Cmdr Baldwin—They were dismissed by the court martial.

Mr PRICE—They were?

Wing Cmdr Baldwin—They were insubordination.

Mr PRICE—Arising from?

Wing Cmdr Baldwin—Well, it was a one to one discussion—a somewhat heated discussion, I must admit—that we had in my office where I said his actions were despicable. That was insubordination as far as Air Force was concerned.

Mr PRICE—And that was dismissed?

Wing Cmdr Baldwin—That was dismissed. The other one was that he said, 'You are getting close to the line,' and I said, 'So are you.' That was also regarded as insubordination.

Mr BEVIS—Why do think it is that the system produces an outcome where you get charged with those three offences, found guilty in a court martial—fairly serious proceedings—a court martial finds you guilty of one, but subsequently the CDF and the Chief of Air Force come to the opposite conclusion? How can a court martial be so different from what a CDF subsequently concludes?

Wing Cmdr Baldwin—Well, CDF didn't conclude. You have got to remember that there were a number of administrative actions going on in parallel to all of this. CDF found in a redress of grievance that I had raised, which Air Force had dismissed, that I had been aggrieved in the actions that I put up to him.

Mr BEVIS—That was different, was it, to the matters before the court martial?

Wing Cmdr Baldwin—Yes, but they were parallel.

Mr BEVIS—So you subsequently petitioned the Chief of Air Force to have your court martial's finding quashed?

Wing Cmdr Baldwin—Yes.

Mr BEVIS—Which they were at the start of this year?

Wing Cmdr Baldwin—That is right, yes.

Mr BEVIS—The grounds for having them quashed were what?

Wing Cmdr Baldwin—The ground for having those quashed was the Robertson report, as I said in my opening submission. Robertson investigated complaints made by Wing Commander Sue Graham at Williamtown concerning the actions of Group Captain Donahoo. The outcome of that report, which I did not get a copy off because, as you can imagine, it mentions quite a number of names, was handed to my solicitor. With the information that was in that report, we were in a position where we could petition the chief. I have got a copy of the petition here, and if I could just read out a couple of sentences I think it might help you to understand why the chief overturned the court martial finding:

With the benefit of the evidence now available, there is a real question as to whether the events of 12 November 1993—

that was the date that I was charged—

may not have been calculated by Group Captain Donahoo to ensure a situation in which I could be compromised into committing a breach of the Act. At the time of my trial there was insufficient evidence to take the suspicion of mala fides on the part of the group captain very far. My defending officer alluded to it by giving the example of Brer Rabbit saying that he did not want to be thrown into the briar pit when at all times that is just what he wanted.

Furthermore, the failure of high command to step in and rectify the mismanagement of Group Captain Donahoo in a timely way has contributed to my being placed in an invidious situation with respect to the circumstances of 12 November 1993. In effect, higher authority knew the gravity of the situation at Williamtown well before 12 November but did nothing about it. The Air

Commander, as well as being aware of the situation, permitted the proceedings to be convened and thereby tacitly endorsed the inappropriate command of Group Captain Donahoo.

Mr BEVIS—And the $64 million question then is: what changes in structure and procedures do you think would have prevented those unpalatable events from occurring? I guess I am really trying to distinguish between personnel who are not doing their job as well as they should and structures that should either prevent that situation from arising or at early warning signs correct it.

Wing Cmdr Baldwin—If you look at it from the legal point of view, as I said in my opening address, I believe that we need to separate the powers and in fact we need an independent judiciary. It is interesting to recall what the judge advocate on the court martial said in his summing-up. Basically, as I recall it, he said, 'This is nonsense. It should not proceed.' Then, having given his summing-up, he walked over to where my wife and I were sitting and said, 'You heard that. They will now dismiss it.' They did not. I might add that the judge advocate was a justice in real life, if you like. He was a justice in the Family Law Court. So, from a strictly legal point of view, if a proper judge had been sitting to hear this then the thing would have been dismissed, because he argued that it had no grounds to proceed.

Mr PRICE—Was it a 2-1 decision?

Wing Cmdr Baldwin—I have no idea. That is not the sort of information you are given out of a court martial.

Mr PRICE—So a court martial does not say how it has arrived at its decision?

Wing Cmdr Baldwin—No.

Mr PRICE—You were saying there were some administrative actions being taken in parallel. Could you outline what they were?

Wing Cmdr Baldwin—I raised a redress of grievance. As I said in my submission, I tried to get a parade to the air commander because I wanted to talk to him personally and explain to him that the situation at Williamtown was not very nice, not very good, and that I had some reservations about Group Captain Donahoo's ability to hold command. Quite honestly, I expected that parade to proceed, and I also expected at the end of it the air commander to say, 'Thank you very much, Wing Commander. You are now posted.' I thought that would be the way it would be resolved. He would not grant me a parade—

CHAIRMAN—Was there any reason given for his refusal?

Wing Cmdr Baldwin—The reason at the time was that he just did not feel that I

needed a parade. Later on I got a copy of the paperwork associated with this to find that he had written on my request for a parade that he would not grant it because he saw me as being a negative person. I have no idea what that means. I assume that at that time the air commander was only seeing what he regarded as positive people. But there was no other explanation given.

I raised a redress of grievance, which is an administrative process, trying to set out what I had hoped to be able to set out to the air commander. In what I believe was retaliation, John Donahoo raised an unsuitability report against me. The thing just proceeded from there. As I said, it took something like two years before Air Force got around to cancelling the unsuitability report, and that was two years after I had ceased holding command of the unit that I was supposedly unsuitable to command. If there is any logic in that, I cannot see it.

Mr PRICE—I apologise for asking questions that must be simple to you. What was involved in the redress of grievance? Just explain that to me—the procedure and in what way you were able to utilise that procedure.

Wing Cmdr Baldwin—The redress set out those areas where I felt Group Captain Donahoo was not exercising command correctly. They revolved basically around his personal approach to command—the way in which he dealt with people.

Mr PRICE—This would be a very serious matter; this was not something trivial.

Wing Cmdr Baldwin—At my level and his level, yes. We are not talking about corporal and sergeant stuff here; we are talking about two senior commanders at RAAF Base Williamtown who were in disagreement with each other. It was well known across the Air Force—in fact in some ways I believe I have become part of the folklore of the Royal Australian Air Force. You would go somewhere and people would be able to tell you all about it. It is because of the level that we were at and because of the bitterness that developed. As I said, it became well known across the Air Force very quickly.

Mr PRICE—So you lodged that prior to your court martial?

Wing Cmdr Baldwin—Yes, I lodged it in September 1993.

Mr PRICE—When was the unsuitability report raised?

Wing Cmdr Baldwin—At about the same time.

Mr PRICE—When were you court-martialled?

Wing Cmdr Baldwin—I was charged on 12 November 1993 and the court martial started the day after Anzac Day 1994.

Mr PRICE—What happened with the redress of grievance?

Wing Cmdr Baldwin—The redress of grievance is still alive. I have not cancelled it because until such time as this whole thing is resolved in, as I said before, an amicable and fair way there are still issues outstanding in that redress that, in my opinion, need to be addressed by the system. Group Captain Donahoo is out of the Air Force so there is very little that can be done as far as that is concerned. As this redress went through the system—as it went through Air Force headquarters and then Air Force office—because of the manner in which Air Force mishandled what had been relatively simple issues that I had raised at Williamtown concerning the ability of somebody as I saw it to hold command it started to expand and become questions of the way in which Air Force at the higher command level had treated my redress and treated me. In fact, the redress became more than a simple complaint about a superior officer; it became also a complaint about the way in which I was being unfairly treated and the manner in which this redress in some ways, I believe, abused my rights.

Mr PRICE—And then you finally wrote to the CDF about the way the redress—

Wing Cmdr Baldwin—One aspect of it, yes. One of the things that I had been accused of by Group Captain Donahoo was that I had used our confidential reporting system on junior officers to intimidate officers under my command. That is an extremely serious allegation. I asked for evidence of this. I also asked to be told who were the officers I had intimidated. None were ever produced—no officers and no evidence was ever produced. Air Force ignored it and I went to CDF and said, 'I have been wronged.' CDF came back and said, 'Yes, you have been wronged; in one aspect of the sort of administrative action that has been taken against you, you have been wronged.'

Mr PRICE—When you say your court martial was quashed, what does that mean? For example, people can be found guilty in the courts and then released, but in a sense the sentence still hangs over them. What is the effect of a quashing of a court martial?

Wing Cmdr Baldwin—It is as though it never existed. Basically, in January this year, the Chief of Air Force said, 'For it to stand, it would be unsafe and unsatisfactory.' Therefore it was quashed. So, effectively, what happened in 1993 and the subsequent years did not happen. Air Force is having trouble seeing that at the moment.

Mr PRICE—You said that you wanted a fair and equitable outcome. What you see as being a fair and equitable outcome or does this prejudice your negotiations?

Wing Cmdr Baldwin—Probably the answer to that question is yes, it does in some way.

Mr PRICE—Would you be prepared to give that answer in camera?

Wing Cmdr Baldwin—No, I think I can answer by saying that I wrote to Air Force after the chief had quashed the court martial and said, 'Okay, we are now in a situation where it is all over. I would like to sit down with the appropriate people and negotiate our way through this. I am willing to be involved in negotiations.' Air Force wrote back and said, 'Thank you very much,' and then proceeded to do what it wanted to do without involving me at all. The outcome of that was that I wrote to Minister Bishop because I saw Air Force as acting incorrectly. Minister Bishop wrote back and said Air Force had done one thing; I called for some paper out of Air Force to find that they had done something else. They had told the minister one thing and they had done something else. So I wrote again to the minister and, as you can imagine, negotiations with Air Force are somewhat tense at the moment because they do not like being shown where they have got things wrong.

Instead of being honest and open and sitting down and saying, 'Well, look, okay, let's see if, as adult people, we can't work our way out of this,' again Air Force has retreated behind a veil of secrecy. They are not telling me what they are doing. They are not telling me what is going on. I have to ring them and ask them, and then I get very clipped and short answers—not nasty answers by any means.

It seems to me that this is an issue that could be resolved probably on a Friday afternoon and we would still have time to go and have a beer, but we are not doing that. I do not believe it is hard. I honestly believe we can sit down and talk this through. I believe, for example, that if none of this had happened I would have been promoted.

Mr PRICE—But, if they took some years to find out they made a mistake, isn't it reasonable to expect that they will take some years to try to work out the consequences of their mistake? Why should we anticipate that they would want to fix things up expeditiously?

Wing Cmdr Baldwin—I would have thought that, having been shown to have made a mistake—and they have now been shown to have made several mistakes over the last couple of months—you would quickly want to resolve this issue and get it behind you. The last thing you want from an organisational viewpoint is to have this thing continually hanging around your neck—like whatever the ancient mariner killed—but they do not seem to want to do this.

Mr PRICE—Given that the CDF was the one whose intervention appears to be critical, is it a reasonable working hypothesis that RAAF will be incapable of sorting this out without CDF's intervention again?

Wing Cmdr Baldwin—My answer to that is no, they should not be. I should never have had to go to CDF in the first place. I believe that there is the ability to resolve the issue within Air Force Headquarters.

Mr PRICE—I would have thought that there was also a tremendous ability for total incompetence—demonstrated incompetence.

Wing Cmdr Baldwin—At the moment, Air Force is probably heading more towards that side of the scale than the competent side of the scale.

Mr PRICE—It would be interesting to follow this up.

Wing Cmdr Baldwin—Not as interested as I am, I can assure you.

Senator BOURNE—At what point do you think alarm bells should have rung somewhere that there was a real problem between two senior people?

Wing Cmdr Baldwin—I would suggest probably August-September 1993. You have a senior commander—and let us be truthful: as a wing commander, there are not too many people in the Air Force that are senior to me—and a CO with 193 people under his command. I would suggest that when you ask the Air Commander for a parade that is when alarm bells start to ring; there is something wrong. People of my rank, and given the position I held at that time, do not ask for parades so that is when the first—

CHAIRMAN—How do you ask for an appointment with the Air Commander? Do you write to him? Do you phone him?

Wing Cmdr Baldwin—First of all I just picked up the phone and spoke to his staff officer. He said, 'Fax me a request,' which I faxed him.

CHAIRMAN—I see. So you are not obligated to go up a chain of command?

Wing Cmdr Baldwin—Not necessarily. Some commanders ask you to do that.

CHAIRMAN—I am just wondering if there would be a chance of an adverse opinion coming from an intervening officer between you and the Air Commander.

Wing Cmdr Baldwin—That may very well have happened in my case. I do not know.

CHAIRMAN—But you were not obligated to go through that pathway—you went directly to the Air Commander.

Wing Cmdr Baldwin—I rang the PSO to ask him whether I could petition him directly for a parade and the PSO said, 'Yes, you may do that.'

Senator BOURNE—So when that happened that was so unusual you would have thought alarm bells would have gone off not only at that level but somewhere else. Would

your request have gone any higher? Would it have just stopped with this person who decided you were negative?

Wing Cmdr Baldwin—It is pretty hard to get any higher in the Air Force. You are talking about a two-star general. There is only one person higher than him—that is the Chief of the Air Force.

Senator BOURNE—Obviously it has to be able to go somewhere else because that is where the alarm bell should have rung. It should have rung with one individual, but it did not. How do you think that could be resolved?

Wing Cmdr Baldwin—I do not know, because I have been subsequently told that in actual fact either towards the end of that year or the very early part of 1994 the then Chief of the Air Force, who was Air Marshall Gration, was actually verbally—and, I understand, in writing—briefed on the situation that had developed at Williamtown and did nothing. This is one of the things that has hurt me most in all of this: the system just stopped. There are all sorts of analogies you can use but I am reminded of the snake and the frog: the Air Force was the frog, I am afraid, and it did not know what to do.

Senator BOURNE—You also mention conflict of interest as being one of the real problems—and we have had a bit of evidence on that, I must say—and a separate justice system. Do you see that as a separate justice system involving all three services? Would it be one system separate to all three but dealing with all three?

Wing Cmdr Baldwin—Yes, I cannot see why you would have individual justice systems for the three services.

Senator BOURNE—So there would be only a few problems with putting the three together as a triservice justice system? There would be only a few things that would apply only to the Air Force, only to the Navy and only to the Army?

Wing Cmdr Baldwin—I disagree with that. I listened to what the previous speaker said; I do not agree with that. We may wear different uniforms but the same things happen similarly in the three services—just as military justice is military justice, in my opinion, whether you are wearing a green uniform, a white one or a blue one. I do not see any need for any differences; what I do see though is a need to take the personalities out of it to allow an independent procedure.

If you are a policeman outside, you do not hear the case. We have the silly situation of where, as I said in my submission to you this morning, we actually charge the people and then we hear it. The person who charges does not hear the charge but it is the same organisation. I think this is wrong. It leads to the sorts of excesses that I have been subjected to for something like five years. Okay, the court martial happened in 1994 but I am still being, in a way, punished by what happened because the system is taking so long

to redress what happened way back then.

Senator BOURNE—And then of course, because you want to see justice, you become a problem to the system because you are asking for that constantly.

Wing Cmdr Baldwin—I do not know whether that is true or not. I really do not know if that is true or not. I think within any organisation—like Air Force, Army and Navy—basically people are inherently honest—we get some very bad ones in; there is no doubt about that—but they are inherently honest and they want to do the right thing by you. Unfortunately, if you look at my case you will see there were a couple of senior people who stopped action happening. Why? I have no idea.

Now we are in a situation—and we are almost five years removed from the incident—where the problem is that the rules of today in 1998, which are designed for things that do not go off the rails, do not fit my case that did go off the rails, and the system is incapable of saying, 'We have to think outside the box; we have really got to come up with a new set of rules.' This is the problem, I believe, that I am facing at the moment: the inability of the bureaucracy, this amorphous mass of bureaucracy, to try to think outside the rules. If you think about it, that in itself is stupid because a bureaucracy can do what it bloody well likes if it decides to—it does not have to stay within its own rules.

CHAIRMAN—You make a claim that there was a lack of honesty in the upper echelons of the RAAF. In one line of your submission you say:

In my case the senior people involved were dishonest. They knew the truth, yet didn't want to accept it, or, more to the point see it formally recorded (for then they would have been forced to do something?).

Is that literally true or is that an opinion?

Wing Cmdr Baldwin—I would suggest that in any organisation like ours there are certain ideals which we must be true to; if you are not true to those ideals, you are being dishonest—not only dishonest to the organisation but dishonest to yourself. I believe they were dishonest because of the ideals of fairness in a system that I always thought said that, no matter who you were and no matter what rank you were, you would get a fair hearing and, if you were right, that would not be held against you. That did not happen in my case. Therefore I have used the term 'fairness and unfairness'.

I believe that the senior people who were involved in my case—and we are talking about people with stars on their shoulders—were dishonest. That does not mean to say that they are dishonest people. As for their application of what I said earlier—the ideals of the organisation—they were dishonest in not applying those fairly.

CHAIRMAN—If we could move away from your particular case without diminishing the importance of it, do you have a view on how effective the military justice system and the system of inquiries across the whole of the ADF are? Most of the witnesses we have called to date have presented personal examples to us. These are very important because, unless there is personal satisfaction, morale suffers and a whole lot of other things flow from that. When we look at big issues like the Black Hawk inquiry—and I do not want you to comment on that inquiry specifically—and accidents that involve loss of life or major property damage, do you think that the ADF has a good system in place to effectively deal with those situations or do you think the same sorts of outcomes that you have instanced in your case apply?

Wing Cmdr Baldwin—As a basic principle, the answer to that must be yes. There is not a great deal wrong with the concept of the system. What tends to happen is that personalities get involved. The worst of it is that there is too much that happens behind closed doors: there is too much secrecy built into what we do, and in most cases it is totally unnecessary.

Secrecy allows for mistakes to be made, it allows for them to be continued, and people can hide behind the secrecy because they have made mistakes. If our system of inquiry were made open and the public were allowed to be involved—and the example I use of the present board of inquiry into the accident on *Westralia* is a very good one—the chances of people hiding behind the secrecy that we have had up to date would stop.

When people are accountable publicly, they tend to do honest things. When they are behind closed doors and nobody really knows whether they did the right or wrong thing, even if they are not dishonest people and they make honest mistakes, they tend not to want to go back and correct the honest mistakes that they have made.

So, to summarise what I am saying, I believe our system of inquiring into incidents and accidents and those sorts of things within the ADF is sound but it needs to be open and the people who are involved need to be accountable. I do not know whether I would go so far as to say a major inquiry should have a retired judge involved. I can see nothing wrong with a senior military officer actually chairing such boards of inquiry, but it does, in my opinion, need to be open and it does need to involve the public and even have members of the public on that board of inquiry.

Mr PRICE—To properly understand the circumstances surrounding your case, would you contend that it was important for the committee to obtain the Robertson report—which I think you referred to?

Wing Cmdr Baldwin—I have not seen the Robertson report. However, it was one of the things that was instrumental in getting my court martial overturned. I would therefore say, yes, it probably is. You have got to remember, though, that Robbie Robertson interviewed something like 40 or 50 people, so we are probably talking about a

report that is quite large.

Mr PRICE—We have a very literate secretariat. The second question that I would ask you is: what is the reaction of the serving men and women in the ADF to this inquiry? Do you think they are keen to see results?

Wing Cmdr Baldwin—I have no idea. The views of the few service people who are around my section could probably best be summed up as: we probably deserve what is happening; others have shrugged and said, 'So what?' I really think it only becomes important to those people—

Mr PRICE—Who have been caught up in it.

Wing Cmdr Baldwin—Yes. To anybody else who has never been caught up in military justice, I think it does not mean a great deal.

Mr PRICE—Nowhere in the ADF's submission, as I recall it, but I could be wrong here, do they outline other overseas systems of military justice. You have suggested that we owe a substantial debt to the British regimental system. Are you aware of any other military with a justice system that you find we might learn from, other than obviously the British?

Wing Cmdr Baldwin—One of the things that annoys me greatly in this country—and this is a general statement—is that we seem to want to rush overseas to find out how people overseas do it.

Mr PRICE—I do not mind rushing overseas, by the way.

Wing Cmdr Baldwin—Neither do I, I guess. It is all well and good to see how people do it overseas, but at the end of the day we have got to do it here in this country, ourselves.

Mr PRICE—I do not disagree with you, but I notice that, in a lot of the inquiries we have, there is almost an ignorance by the ADF of what is going on overseas, other than the latest techniques, the latest bit of war fighting kit. I think I agree with you: we need an Australian system that suits Australia. But that does not mean that we cannot observe and try to understand what works overseas for them and whether or not bits and pieces have an applicability here.

Wing Cmdr Baldwin—From my rather limited knowledge of what happens overseas, there are things in the American military justice system which I think would be worth looking at. While I think the TV show *JAG* overemphasised that system—and the worst about that is that it is people in uniform—there is a lot to be said for a branch that is specifically divorced from the command chain. I would go one step further: I believe

that the military judiciary should not be wearing rank and should not be in the system.

The Americans have some very good ideas for what you would regard as minor punishments, and perhaps we should be looking at that. From what I can understand, the system is basically, where a mistake or an offence is committed and you—that is the person which has committed the offence—are quite happy that, yes, you have been caught out, there is a limited amount of punishment that can be given to you. I think the American terminology is 'Out the pocket and up the arm'—basically, you can be fined or you can be reduced in rank.

I really think, though, to reduce anybody in rank, they would have to have committed a pretty dastardly offence. As far as fines are concerned, one of the things that I have noted is that people who have been fined in the military tend to be fined a lot harder than people would be in civilian courts outside. Quite honestly, I find that to be offensive because I do not believe that we should be facing any more severe punishments than people outside for similar offences.

CHAIRMAN—Wing Commander, thank you very much for your evidence this morning. You will be sent a copy of the transcript of your evidence, which can be corrected for errors of grammar. Thank you very much for your attendance.

Sitting suspended from 12.11 p.m. to 2.03 p.m.

CLARK, Mr James Grant, Barrister at Law, Blackburn Chambers, 12th Floor, AMP Building, Hobart Place, Canberra, Australian Capital Territory 2601

CHAIRMAN—Welcome. In what capacity do you appear today?

Mr Clark—I appear in a private capacity.

CHAIRMAN—I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in the respective houses of parliament demand. Although the subcommittee does not require you to give evidence under oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of the parliament. I also remind you of the warning that we issued this morning, that this inquiry is not to be used as an opportunity to make defamatory comments against named individuals under the protection of parliamentary privilege.

The subcommittee prefers that all evidence be given in public, but should you at any stage wish to give any evidence in private, you may ask to do so and the subcommittee will give consideration to your request. Your submission was received and authorised for publication. Are there any additions or corrections that you wish to make to that submission?

Mr Clark—Yes, there are only two. I think it appears in volume 2 at page 3. Unfortunately there was a typographical error. It says 'Findlayson's case' but I think the committee would be very well aware that it is Findlay's case, which is the UK—

CHAIRMAN—There is a 't' missing somewhere on 'no' for 'not'.

Mr Clark—Yes, that is true; my proofreading must have been deficient. The fourth last line starts with the word 'There'—I don't know if you have it—on page 3 of the submission or page 285 of the booklet.

CHAIRMAN—We have different reprints here. Page 47, Findlays; yes.

Mr Clark—Underneath that, the fourth last line says 'There is' and then there is a little star and it says 'impartiality it is silent.' It should read, 'There is no scintilla of impartiality.'

CHAIRMAN—I thought it was 'sign'. Those are accepted. I would now like to invite you to make a short opening statement, if you would like to do so, before we move to questions.

Mr Clark—Thank you. The reason I made the submissions that I did is that I believe that I am uniquely placed. Although I make these submissions in a private

capacity, my military and legal background put me in a position where I have either participated in boards of inquiry of some note in recent times or participated either prosecuting or defending in many trials. I have also conducted a lot of investigations. I note that the terms of reference which were issued seem to be directly on point, and that was the main motivator for my making the submissions that I did.

CHAIRMAN—You are an important witness for us, Mr Clark, because most of the submissions have dealt with alleged miscarriage of process or justice in some way.

Mr PRICE—You could almost make a prima facie case out.

CHAIRMAN—We are not a court of appeal in any way at all.

Mr Clark—I understand that.

CHAIRMAN—We are not re-running all those boards of inquiry or personal cases that have been brought in the past. We are interested in how well the process is working, what shortcomings there are and how they can be corrected, if it is possible to change them. From your position, you do fulfil a very valuable role from the inquiry's point of view.

Mr Clark—Where I have made the submission specifically concerning the Judge-Advocate Administrator, I think the main point that I was trying to stress is that we need to have independence. I have read the submissions that were signed by CDF and were therefore the submissions made on behalf of the Defence Force, which appear in the green folders—I think at volume 3—and it appears to me that the general thrust there is, 'Steady as she goes; we have had a couple of hiccups but we will be all right. Leave us alone.' But the fundamental problem, as I see it, is the lack of independence.

I can well understand, and if I were the CDF I would probably be imploring you to do the same thing, let the commanders command, but to give them the duality of commanding and making legal decisions brings into conflict fundamentally, in my submission, the appearance of justice. The impartiality has gone.

CHAIRMAN—I think you are quite right in your interpretation of it. If you read the *Hansard* for the CDF and the three chiefs of staff, when the proposition was put to them that there could be an independent body they reacted instinctively against that.

Mr Clark—I know that Lieutenant Colonel Boyd is to appear before the committee after me this afternoon, and he has made a submission arguing very strongly for an independent prosecution branch—I will call it a prosecution branch for lack of a better word. I have read his submission and I agree with it because it creates that independence which has been lacking. By way of illustration, and I do not use this in a critical way, when the Black Hawk inquiry had been completed and a decision was to be

made whether people were to be charged with disciplinary offences under the Defence Force Discipline Act, a decision was made to remove the ability of the convening authority—who was the Commander of Land Command at the time; I don't remember his name—and it was given to the Commander of Logistics Command in Melbourne. From a legal viewpoint, I have no doubt that that was done to give the appearance of independence.

But there is no doubt that both of those commanders would have still been subject to direction and therefore would not have truly independently considered the matters which they were required to consider. If the system worked as well as Defence says it works, they would have been able to justify it by saying, 'We will leave the convening authority as the Commander Land Command.' The reason they shifted it was because the Commander Land Command did the investigation to see whether the charges should be preferred.

Having done that investigation, it is ludicrous, I submit, for him then to make an independent decision whether to charge or not, then to convene a court—and all of the members of that court are under his command. He appoints the prosecutor, he appoints the defending officer, he appoints the trial judge, for want of a better word—the judge advocate—and the members of the court. All of them are in the chain of command and all of them, to a lesser or greater degree, rely on that commander for their future career and its progression or lack of.

Mr PRICE—What is the difference between that system and a kangaroo court?

Mr Clark—I was just using that for illustrative purpose. The United Kingdom has recognised the problem. They overcame it as a result of Findlay's case. The contra-argument in Australia would be that we are too small and we cannot establish an independent prosecutions branch. We are not too small. If one person is affected, that is one person too many.

CHAIRMAN—The common theme through all the submissions is the matter of independence, and there are many facets to that. You would have, of course, read the Abadee report?

Mr Clark—No, I have not had access to it. It is not a document that has been publicly released.

CHAIRMAN—Paraphrasing it, one point Abadee makes is that the British Army situation was a consequence of one of the conventions of the European Union protocols and so on. There is no direct parallel with Australia. Also there is some case in Canada that he bases it on. Anyway, that is irrelevant for the moment. Let us address that matter of independence because—

Mr Clark—Can I just answer that question?

CHAIRMAN—Yes.

Mr Clark—Brigadier General Abadee is a justice of the Supreme Court and he is one of the Deputy Judge Advocate's administrators. For the moment, I am quite prepared to defer to his greater legal knowledge. However, it has always been my understanding that Australia has been a signatory to all of the international conventions of customary law and human rights. It has always been my understanding that the Australian government is a signatory. We have not got a European Court of Human Rights, but that does not denigrate our having signed the protocol. One cannot say it is different because we have not got a formal structure called the court of human rights. You cannot say that because there is no equivalent, therefore there is no analogy.

Mr PRICE—Why wouldn't the Abadee report be made public?

Mr Clark—I do not know.

Mr PRICE—Why would you have difficulty in getting access to it?

CHAIRMAN—I think it is very recent. It has been brought down in the immediate past and—

Mr PRICE—It has been responded to.

CHAIRMAN—it was subject to a Chiefs of Staff review.

Mr Clark—I would have imagined that, until they had considered it fully, they would not release it to anyone.

CHAIRMAN—They have just released it to the Chiefs of Staff.

Mr PRICE—I thought they had considered Abadee. That is what they told the committee.

CHAIRMAN—Yes, but that has only just happened. That is why it has not become general knowledge.

Mr Clark—Certainly, there is reference to the Abadee report in the submissions.

Mr PRICE—Do you expect it to be made public?

Mr Clark—I do not know. It is a matter for them. The CDF would say quite properly that he had commissioned Brigadier General Abadee to consider a report.

Mr PRICE—Let me put it another way. If there is some public concern about boards of inquiry and the way these things are being conducted, wouldn't it be important to bolster public confidence—let alone the confidence of serving men and women—by making a report like Abadee public?

Mr Clark—I agree with your question.

CHAIRMAN—Let us get back to this business of independence and see if we can resolve some questions about that. Is it possible, in your judgment, to have an independent legal authority within the Department of Defence, or do you need a legal authority outside the Department of Defence? In other words, if you are within, can you quarantine it from influence?

Mr Clark—Yes, you can.

CHAIRMAN—How can you do that?

Mr Clark—You can quarantine it quite easily. In my submission you can. You can appoint a lawyer who is an Army reservist, and if you haven't got one of the requisite rank you can promote him to the rank of brigadier to give him the status to be able to argue with the service chiefs if he needs to. You could call him the 'Director of Military Prosecutions'.

CHAIRMAN—Do you give him tenure of three or five years in the post?

Mr Clark—It would be a tenured post, yes.

CHAIRMAN—How would you prevent somebody who was at loggerheads with a CDF or a Chief of Staff being posted somewhere else?

Mr Clark—I am sorry, my first qualification was that it would be a Reserve person, because you have that independence.

CHAIRMAN—I accept that. I am not arguing that. I am just arguing the matter of independence.

Mr Clark—I would see a tenure being given only for the reason that if you have a turnover of people you don't have somebody there like Brigadier Ewing, God rest his soul, who was the director for 28 years. That brings its own difficulties. If somebody is somewhere for such a long time, they bring their own points of view and tend to win everyone else around to them. In any event, I would see it as quite a simple structure. You have a Reserve lawyer of some experience in the rank of brigadier appointed to be the director of military prosecutions. You have posted underneath that person—

CHAIRMAN—If I could intervene there, you give him powers similar to what the Commonwealth gives the Auditor-General?

Mr Clark—No. The DPP would be the analogy. You then have either a full colonel or a lieutenant colonel. Excuse me for using Army ranks, but they are the ones that I am familiar with. Whilst those people would be in the regular Defence Force, their confidential reports would be compiled by that brigadier, which takes them out of the chain of command and gives them the independence as well.

Not taking the command decision away from the convening authority at all, if a legal officer in a training command or field force command or anywhere else as a result of a military police investigation conducts and compiles a report, if you like, an advice on evidence, and says, 'Dear General, we have this military police report and it appears that X may have done something—we have given the report to you,' the convening authority, who is normally a general, says, 'Yes, I agree. Send it to the prosecutions branch, to the director of military prosecutions'. The director of military prosecutions, with his staff, examines it independently and says 'He will be charged with'—and decides which charges he or she will be charged with. At present if you prosecute at a military court martial the prosecutor cannot, even at the trial stage, say, 'I am not proceeding with charge 8.' There has to be an adjournment. The prosecutor has to go, cap in hand, to the convening authority and say, 'Sir, in my professional legal judgment, charge 8 cannot be sustained. Can I have your permission not to proceed with it?' And the convening authority can say, 'Proceed.'

CHAIRMAN—Does that happen?

Mr Clark—Yes, it has. So, going back to the independence, when those charges have been formulated and laid, they are prosecuted by people within that branch maintaining their independence. The convening authority has not then appointed the prosecutor and has not then appointed the defending officer. If the judge advocate administrator—whom I address in my other submission—is independent they have appointed the judge advocate or the Defence Force magistrate, and the convening authority's function therefore remains merely to certify whether the punishment is correct after having received advice from a section 154 legal officer.

There is a section in the Defence Force Discipline Act which appoints a certain number of Navy, Army and Air Force officers as certifying officers. For example, before a punishment of imprisonment can begin, it has to be confirmed and before it can be confirmed a transcript of the proceedings has to be gathered. It has to be given to an independent 154 reviewing authority. Generally, it is a QC or a magistrate—somebody with military and great legal experience—who then certifies that there are no errors of law, gives his report to the convening authority, the punishment is confirmed and then the punishment takes effect.

In that way the convening authority does not become like Hydra. He can remain focused on his job and still retain the command function which he is placed there to do, but then has nothing more to do with it except to review and confirm that it has been correct in law. I am sure that the committee has heard of more than one instance, but there are many instances where people do not perceive that they get an independent, fair trial, and that is the problem.

CHAIRMAN—For a non-lawyer, why couldn't this director of military prosecutions division control the whole process, that is, decide if charges need to be laid, have a second division which is the convening authority to implement the decision of the DPP-equivalent and take over the judge advocate's position as well? Is that undesirable?

Mr Clark—It would certainly be better than what we have now. That is only my opinion. The reason why the Judge Advocate Administrator's position—and it is a very important position—was downgraded, then paid lip service to and all but done away with, and certainly done an injustice to, was because of the cuts: 'We need to lose a colonel here or we need to do this or that. Oh, that one will go.'

You need to have a person who has the independence and knowledge to say, 'There is a trial coming up and it involves a captain who has been charged with negligent performance of duty because one of his soldiers has been killed. We need a military judge who is a lawyer and has some infantry background, some experience, has been around the traps and is not a constitutional lawyer. I will ring X and see if they are available.' There needs to be that independence of the appointment.

You cannot have the independence when you have—as I said in the submission and probably the Department of Defence will not thank me for it—the most ludicrous situation where we had the director of discipline law appointing the judge advocates. There could not be a greater conflict of interest, because there is a no-theft policy certainly within the Navy and Army and, if you are convicted of a theft offence, if you are not dismissed on the spot, there will be a notice to show cause why you should not be dismissed administratively, and that is all terribly proper. But the director of discipline law will appoint one of his hard-nosed hawk people and say, 'With this bloke it is a theft charge. I know the substance. I know this person will (a) dismiss him and (b) give him 89 days in the Defence Force correctional establishment.' It may have nothing to do with the merits of the case. He might have stolen because he has 12 children and it was a can of Campbells soup.

Mr PRICE—How would you describe the RAAF policy: a pro-theft policy?

Mr Clark—They have not got a policy.

Mr PRICE—Or an indifference to theft policy?

Mr Clark—I cannot comment except to say that all of the reports I have read about offences of dishonesty in the Air Force have not resulted in dismissal and have not resulted, necessarily, in notice to show cause why people should not be dismissed. They tend to have a different view.

Mr PRICE—It seems to be a surprising statement you are making, not that I doubt it.

Mr Clark—There is nothing surprising about it. The Army and the Navy have had a no-theft policy for many years based on the fundamental tenet that if you steal from your mates you do not deserve to have a job and you should not be there.

Senator BOURNE—We have had some evidence, last time we sat on this, that perhaps we should be looking at some sort of independent authority that could provide defence counsel as well. Do you have any views on that?

Mr Clark—I stress it is only a personal opinion again. One of the difficulties—and I am sure that the Attorney-General's Department probably finds the same difficulty—is that, if you have a corporate lawyer who works within the corporation, the great danger is that they will provide convenient rather than competent advice. That advice can tend—not always but can tend—to backfire on you whereas, if you have someone who is independent who fiercely advocates something, the person who is in command and has to make the decision—and this is equally applicable to attorneys-general, for example—can say, 'Thank you very much for your legal advice; I am ignoring it.' I am not suggesting that it occurs, but the tendency must be for it to sometimes occur. 'I will double-guess what the generals will want, I will give them some convenient advice and won't I be a nice fellow. Who can blame the poor old generals when they get their heads chopped off, because the quality of the legal advice that they got was lacking.'

Senator BOURNE—We have also heard of a problem where you have very—and it is something you have alluded to too—different standards between whoever is prosecuting and whoever is defending in any particular case. I can imagine that would be difficult to try to even up, under the best of circumstances, even outside the military.

Mr Clark—The apprehension within the military from the accused's point of view is that the Army—I will use the Army as an example—has unlimited resources to bring to bear against the individual, and the bulwark that protects the accused against the world is his defending officer. If you appoint an inexperienced defending officer, the guy goes away saying, 'I didn't get a fair go.'

Senator BOURNE—Would you include defending officers in your independent section?

Mr Clark—Once again, I cannot speak on policy considerations, but I can tell you

from my experience. I have done over 45 military trials, court martials. Invariably, if there was a difficult case—and it has certainly been, when I was in the regular Army, something that we did almost as a matter of course—so far as the defending officer was concerned, we said, 'They must be a reservist.'

That brings me back to the point of the independence. The reason we said they must be a reservist is that you must fiercely advocate your client's cause; whether you believe in the client or not, it does not matter. But there was also an awareness that, if a defending officer was a regular serving officer and they did their job—that is, defended competently—and let us say they got lucky and they got a result, that defending officer's career was finished because you then had commanders who did not sit in on the court, just the same as we are sitting in on these hearings. People may make uninformed or ill-informed comments about things that happened that they have had five minutes knowledge of. The talk in the mess is, 'How could you let that bloke get away with that?' They have not been there and they have not heard the evidence. That is why the defending officers, certainly so far as the Army is concerned, have generally been reservists—because their own personal career would suffer. That starkly illustrates, I believe, the lack of independence.

Senator BOURNE—You have also mentioned annual assessments.

Mr Clark—Yes. Many years ago—it is not a matter of not naming the person; I cannot remember who it was—I attended a legal corps conference at Canungra. All the lawyers from all over Australia gather for three days and we talk about all the different problems we have had and we get keynote addresses. We had a general address us, and the general said, 'I'm very concerned about the legal corps and I'm very concerned about lawyers. There have been too many acquittals.' That just shows a complete misunderstanding of the system.

Senator BOURNE—Very Chinese. It is a bit of a worry.

Mr PRICE—Back on this theft business, you provided the rationale for Army and Navy. Are you aware whether RAAF have ever publicly justified their apparent tolerance of theft or provided a rationale for that?

Mr Clark—I do not know. I can only tell you that I am aware of the Navy's and Army's policy and I am aware that the RAAF has no such policy.

Mr PRICE—You mentioned Black Hawk a little earlier. I want to put a hypothetical proposition to you. Some people may feel, or it may be the case, that there were problems that started, say, five years before, and it might go right up to CGS, as it was. Given that Land Command, I think you said, was the convening authority, was it ACLOG—

Mr Clark—I think it was the logistics commander in Melbourne.

Mr PRICE—The logistics commander on the same rank was the one that made a decision whether to prosecute. How would those people in either case in this hypothetical situation be able to finger a CGS, if that is where some responsibility or responsibility lay?

Mr Clark—I preface my remarks by saying that any views I would give about the Black Hawk disaster are jaundiced because I appeared for Major Bob Hunter, who was the SAS commander. I dare say, if the committee asks, the transcript of the board of inquiry would be made available. It is very long and it is very detailed, and I think for every 10 people you asked you would get 10 different views. It is a very emotional thing. Depending on your perspective, you hold different viewpoints. One of the most insightful stories into Black Hawk was the *Four Corners* program. People watched that program and, depending on their perspective, it either reinforced the views that they had or they formed new views. Ultimately Major Hunter was not charged; the charges were withdrawn. I do not know if I would like to say any more about it.

Mr PRICE—Wasn't there a program prior to the disaster? Is that the one you are referring to, or the one after?

Mr Clark—There were a number. There was a *Witness* program that was basically a synopsis, and the trouble with journalism is that you cannot let the facts get in the way of a good story. It was mainly a beat-up of, 'Look at these horrible people. They have killed people, they have done this and they have done that, and the Army has not done anything to them.' That was two or three weeks after the Black Hawk disaster, which occurred on 12 June.

General Sanderson was quite right when he answered a question from a reporter then. That person was dealt with in the civil courts. We have no jurisdiction to deal with them again. That might not have been a satisfactory answer to the journalist, but that was the fact. In that case, the military had decided, prima facie, that the evidence, if proved, would result in a long jail sentence—and referred the matter to the Director of Public Prosecutions. The Director of Public Prosecutions said, 'We'll take over the carriage of the matter.' The man was put on trial and was acquitted. That was the end of the story. But there was then the *Four Corners* program on the Black Hawk. I think it was colloquially called 'The buck stops here'. That examined the things that you ask about: the systemic failures.

Mr BEVIS—In a scenario in which there is a full investigation—a board of inquiry—and there is a determination, say, that no disciplinary action should be taken as a result of that inquiry, is it a sensible or desirable 'second tier' for those people who may have been subject to that inquiry to then be dealt with internally—that is, called upon to show cause or whether they should be censured or not—which does not bring with it the

same opportunity for defence on the part of those accused? I guess the broader question from that is: when is it appropriate for that course of disciplinary process to be followed? I would be particularly interested in your views where there has already been a fairly extensive inquiry.

Mr Clark—I assume that they are hypothetical questions.

Mr BEVIS—They are.

Mr Clark—If there had been a board of inquiry and if, as a result of that, there had been a recommendation that no disciplinary action should be taken, it would be wrong for someone to then be given a notice to show cause because, if they were not successful in combating the notice to show cause, that would have an effect on his or her military career. That is doing extra-curially by the back door what could not be done to the requisite standard by the front door.

CHAIRMAN—So it becomes vital that the BOI is accurate.

Mr Clark—Absolutely.

Mr BEVIS—One of the dilemmas that struck me when we were looking at this question last week was that in a number of these incidences—and we have seen it recently with the Black Hawk and *Westralia*—there is a public desire and a recognition by government for there to be public hearings: that is, the people, both as citizens and I suppose as taxpayers, want to know what has happened—how did this terrible thing occur? Separate to this 'how did this terrible thing occur?'—that is, the finding of the facts—there is also the role the board has of recommending whether or not there should be an investigation for disciplinary charges. That presents, it seems to me, a bit of a dilemma with those two roles being performed by the same body at the same time.

Mr Clark—It is not only an inherent conflict. If you are in a position to set the terms and say, 'These are the terms of reference for this board of inquiry,' you can do that and achieve a desired result. Obviously, there have to be constraints. One of the constraints is public expectation; there is also a time limitation and an expectation of thoroughness. And there is the dichotomy. The public and the parliament demand and expect to know what went wrong, if something went wrong, and they need to know as quickly as possible. The dichotomy arises because to give the public and the parliament a full, proper and frank answer the board of inquiry sometimes may have to go longer than the political will expects it to go. Sometimes it may have to have terms of reference that are broader than some people would like them to be.

Mr PRICE—Is there a provision for a board to request wider terms of reference?

Mr Clark—No. The Defence inquiry regulations are quite clear. They say that if a

decision is made to have a board of inquiry then it is entitled to inquire only within its terms of reference. The terms of reference are made—and once again, Mr Chairman, it may be getting back to the independence thing, I do not know—

CHAIRMAN—It is at the heart of the evidence.

Mr Clark—I do not know if we are going to create an all-singing, all-dancing subdepartment somewhere, but there must be a conflict. If you have a commander—and I am talking about a general—who believes, rightly or wrongly, directly or indirectly, that he or she may be involved or adversely commented upon by the board of inquiry there must be a huge temptation to say, 'I'll just cut out that term of reference; I won't run with that one.' Nobody is going to go back to the general and say, 'Excuse me, you have to do better than this.'

Mr PRICE—Is it fair to say that, because a tragedy like Black Hawk was done under a board of inquiry rather than a general court of inquiry, we can expect that that will never happen?

Mr Clark—There are three tiers. Under the defence inquiry regulations you can have an investigating officer appointed. Above that you can have a board of inquiry appointed. I know that there was much gnashing of teeth and beating of breasts within Defence as to whether to have that board of inquiry open or closed. The regulations say that it is closed unless it is deemed or ordered to be open. I think it was indicative of the maturity of the Defence Force to say, 'We will have an open board of inquiry and we will expose our processes to the world.' There was a cost to that, of course.

Mr PRICE—They had to do it really.

CHAIRMAN—Did they achieve their goal, though?

Mr Clark—That is for others to comment on. The third tier is a court of inquiry. To my knowledge, there has never been a court of inquiry. It is there within the regulations, but it is like a lot of laws: if you do not use it, it falls into disrepute and why have it.

Mr PRICE—That is what I am saying. If Black Hawk does not merit a general court of inquiry—

Mr Clark—I don't know. A decision was made within the military to have a board of inquiry. A court of inquiry is chaired by a judge. A court of inquiry is open to the public. A court of inquiry is not subject to the time constraints that a board of inquiry is.

Mr PRICE—Is it possible for a board of inquiry to bring down an interim report

or reports and final reports?

Mr Clark—There is certainly provision within the defence inquiry regulations for that to happen.

Mr PRICE—Does it happen? I suppose that, if they cannot seek an extension of their terms of reference to properly pursue something that they believe to be worthy of pursuit, there is no need—they are roped in.

Mr Clark—Theoretically, the president of the board of inquiry under the inquiry regulations can communicate with the convening authority by letter and say, 'Something has come up and we really want you to add (a), (b) and (c) to the terms of reference because we think they are vital.' The difficulty is that the convening authority can say, 'No, get on with your job.'

Mr PRICE—Are you aware of that ever happening—that is, a request for broader terms of reference?

Mr Clark—Not within my knowledge, but the facility is there. One of the difficulties with a board of inquiry is that the convening authority can dissolve the board of inquiry if he wants to. The convening authority, getting back to that independence, can dissolve a court martial at any stage. That is the antipathy of independence.

CHAIRMAN—Most of the submissions that have come to us relate to personal incidents in so far as the administration of justice is felt to impinge on their career prospects. There have been one or two submissions on boards of inquiry. The board of inquiry is very important in the whole process of the committee's inquiry, and most of the evidence we took from the CDF and the chiefs of staff related to boards of inquiry. They, as I said earlier, defended them in their pristine glory. But we come to the business of the AITs, the accident investigation teams, that are set up first of all and then you immediately launch into the BOI. There is a degree of overlap there.

Mr Clark—There is.

CHAIRMAN—Why do we need two investigations?

Mr Clark—In the Black Hawk example, because there was a fairly significant aircraft crash, they decided that obviously they needed an accident investigation team to technically put together what they believed caused physically the accident. They also had to exclude any physical problems with the planes.

CHAIRMAN—I understand that. Why can't that be combined into the one inquiry, though?

Mr Clark—In Black Hawk, for example, it ended up that a lot of the accident investigation team's recommendations and findings were ignored. The president of the board, quite properly, independently commissioned his own experts to say, 'Look, I am not satisfied with what they have told me. I want you to go and find an expert for me.' They found an expert and they said, 'Now you tell me.' It could be done conjointly. You can take evidence from your non-technical witnesses whilst your technical experts are preparing their evidence to present to the board. But you have asked about the independence. One of the other submissions that I made was about having regular legal officers appearing as counsel assisting. That is a nonsense.

CHAIRMAN—I want to come to that in a little while in relation to the Butterworth case. I want to stick with BOIs in general and the case for independence. The first is in the setting of the terms of reference, which is a crucial issue. It either convicts or frees people in advance of the event.

Mr Clark—It also sets the scene and makes sure that people are looking at the right things and asking the right questions, because people can be so easily hamstrung by a term of reference that is missing.

CHAIRMAN—Then we have the fact that the rank structure applies through the organisation of the BOI in so far as the officers supporting the president of the board are junior to him.

Mr Clark—And depending on the personality of the president of the board they could be overwhelmed by him.

CHAIRMAN—So there is a compromise of independence possible there. Then finally when the BOI reports itself, as with some of the evidence we have had in relation to accidents where loss of life has been involved, higher authority can blur, to put it politely, the course of justice that should flow from the BOI.

Mr Clark—It is worse than that, with respect, because if you have a convening authority who decides that something warrants the establishment of a board of inquiry, and then sets the terms of reference and then appoints the members, and then receives the report, that is an incestuous situation, there is no independence. In any hierarchical structure, people who are ambitious and want to get as high as they can and as far as they can, and should be commended for it, are dependent on people who are higher than them in the pecking order.

One of the best ways to make sure that you do not go higher up is to offend enough people in the higher-ups. If you exercise great independence in a board of inquiry and you say to the convening authority, 'Your terms of reference are lousy; we think that you are trying to blur the real issue and it is a joke because we are spending two months doing it, then we are going to refer back to you and then you will decide whether you will

consider it or not,' the reposing of power is in someone who, not directly but indirectly, can have a say in a number of people's future careers. I do not think anybody has that to the forefront of their mind when they are operating, but I think subconsciously it is always there.

Mr BEVIS—The board of inquiry's recommendations on an investigation of disciplinary action, of themselves, do not produce anything other than that someone considers whether or not there should be charges laid.

Mr Clark—Quite properly. Because of the defence inquiry regulations, there has to be a military police investigation into the recommendations as to whether there is to be disciplinary action.

Mr BEVIS—I assume that the legal onus on that other body is then to go over not just the findings and conclusions of the BOI but the evidence available and deciding whether or not they believe charges should be laid. Am I right in that assumption?

Mr Clark—Yes, that is right. But once again the problem is that if you have, as you had in Black Hawk, a command legal officer who works for the commander who convened the board of inquiry there must be incredible pressure on that person. If I have been asked to consider whether there should be charges and there have been recommendations from a pretty high powered board of inquiry, I had better find some charges.

Mr BEVIS—Given the process that we just described, why is it necessary for boards of inquiry to make any recommendations on disciplinary action?

Mr Clark—Because the board of inquiry is created as a creature of statute and is governed by its terms of reference, traditionally almost, the terms of reference always say 'whether any disciplinary or administrative action should be taken against any person and, if so, whom'. It seems to be the one that they throw in at the end.

Mr BEVIS—I understand why they have done it. I guess the question I am asking is: as a matter of system propriety and desirable structures and procedures, why do they need to do it? I understand why they have done it; they have been told that is part of their job. But why does it need to be part of their job? Why does a board of inquiry have to set about recommending disciplinary action when, in fact, another body separate from the board has to sift through the findings, the conclusions and the facts to decide whether a charge is going to be laid? Why do we not just leave it to that second body?

Mr Clark—In my submission, that is perfectly correct. It could be that the board of inquiry may focus on, 'Has he done something wrong?' or, 'Hasn't he done something wrong?' when they should maybe be focusing on, 'How can we prevent a recurrence?' Certainly, what you say is correct. There would have been nothing wrong with the whole

of the transcript of the board of inquiry and the report being given to the independent prosecution's branch and saying, 'There is some reading for you; sit down and tell me if there are some charges.' That person could independently decide whether there had been some charges or whether there had been an offence to the requisite standard committed.

CHAIRMAN—While we are on boards of inquiry, why did the Butterworth case go so dramatically and catastrophically off the rails? I am not sure whether it is within or outside this hearing, but I had one person tell me that nothing went wrong with it, that justice was done or something, which I found a little hard to follow.

Mr Clark—I could preface my remarks by saying, 'Well, I was involved,' and I was involved, and the person whom I represented could probably not be described as an angel. But, be that as it may, I was this particular person's third legal officer. I, as part of my duty before I could appear to represent that person, read all of the transcript. I had to. It was the transcript for the preceding 15 months. That board of inquiry was a joke. There should never have been a board of inquiry convened. Any competent commander would have said, 'I have difficulty with a detachment commander. I will get an investigating officer up there. I will counsel him. I will post him. I will put in an adverse confidential report on him.' What a waste of public money. I could amplify it, but it seems—

CHAIRMAN—Why did it go wrong? Why did the system allow it to?

Mr Clark—Once again, it is only my personal opinion. I believe that those who have been paid a lot of money to command were too scared to make a decision. They should have said, 'This is a nonsense.' They should never have convened a board of inquiry. They should never have allowed a very inexperienced legal officer to be counsel assisting to the board of inquiry, who was in the permanent Air Force, who was dependent on his superiors for his promotion through the stream and who must be constrained in what he asked. That was the fundamental mistake.

Secondly, you cannot. It brings military incompetence to a new height. How could you allow a member of a board of inquiry to resign halfway through the inquiry and accept the resignation, and thereafter sit at that member's convenience? It meant that you trucked in a whole bus load of lawyers from interstate, accommodated them, sat for a day, went back for a fortnight and then came back for a couple of days.

I think the Air Force, to its credit, realised that it may have had some difficulties and it commissioned an independent inquiry. I have not seen the results of that, but I think Walker SC did an independent inquiry on it and was commissioned from the Sydney bar. I have not seen the results of that. Once again it might have said, 'Steady as it goes.'

There was a lot of conflicting evidence. It was allowed to degenerate into a bunfight. The convening authority should have got hold of the president after three months and said, 'Stop this nonsense now.' He had the power to dissolve it; he should have

dissolved it. You can take administrative action against somebody and you are entitled to. If somebody does not do the job to the requisite standard, then you are allowed to counsel them. If they do it so far below the requisite standard, then you charge them with negligent performance of duty.

That did not need a board of inquiry and people going to Butterworth and staying there for a month in hotels while they took evidence from people. That is the kind of thing that brings the military into disrepute. It brings a system into disrepute which generally can work, but does need some fiddling around the edges to make it better. It brings the military into disrepute. It was a disgrace and it should never have occurred.

Mr PRICE—You mentioned that they were administratively charging someone.

Mr Clark—No, not charging. You cannot administratively charge someone.

Mr PRICE—Dealing administratively with someone whose performance was not up to scratch.

Mr Clark—Yes.

Mr PRICE—Are you aware of the recent COSC decision that professional negligence will be dealt with administratively?

Mr Clark—No, I am not aware of it.

CHAIRMAN—We are moving into a new field here. We have had quite a bit of evidence on the overlap between the Defence Force Discipline Act and administrative actions and where administrative actions have often been used for disciplinary purposes, which I think is what Roger is getting into. Can we start that story at the beginning? How do you see the definition between the two areas? Is it desirable to keep them discrete, or is it desirable to give an alternate pathway to a commander through administrative processes? In your scheme of the director of military prosecutions, do you see he or she operating purely with respect to the Defence Force Discipline Act, or going into a wider ambit?

Mr Clark—No. I would see that model that I would propose as being purely to do with disciplinary charges under the Defence Force Discipline Act, whether they be Navy, Army or Air Force. It is a triservice act. When I say ‘a brigadier’, I mean a brigadier equivalent, and when I say ‘a colonel’, I mean a colonel equivalent, but within that.

What you have piecemeal is a base legal officer who might be called upon to draft two charges a year and who has not got the experience, with the greatest of respect to that person. Their field of expertise might be operational law. We do not have problems with operational law. We have dreadful problems with discipline law and we have dreadful

problems with administrative law.

To get back to your question, I have always held the view that, if somebody is acquitted—and drug charges would be a classic example: they may be acquitted on a technicality, but the onus is to prove beyond reasonable doubt, as you would know—for the system to then turn around and say, 'Here is an administrative warning for you to show cause why you should not be discharged because of drug use,' is wrong in principle. It seems to me that it is attempting to do by the back door what you cannot do by the front door. It has always been explained to me that one is a disciplinary level and the other is an administrative level. I have always believed that it is double jeopardy, but that is just my view.

Mr PRICE—Could you help me define the boundaries of when things should be handled by civilian investigators and justice and when things should handled under administrative orders and then discipline charges?

Mr Clark—To take the first question, there are very strict parameters and guidelines that have been published. Section 61 of the Defence Force Discipline Act allows a terribly wide power that says, 'We can charge you as if it was any offence against the Australian Capital Territory as it applies in Jervis Bay.' But if there is a serious assault, a sexual assault or an allegation of intercourse without consent, as a matter of policy it will go to the DPP. There have been a number of those at the Australian Defence Force Academy in recent years, they have been prosecuted by the DPP and the defence forces had nothing else to do with them—and quite rightly so.

Mr PRICE—With great respect, it is because of the ADF's total inability to deal with these allegations properly. I think they have been forced into it.

Mr Clark—I do not know if it is that so much. There have been a number of High Court challenges to the Defence Force Discipline Act in recent years. It is not called the 'Defence Force Crimes Act'; it is a discipline act. If there are serious crimes committed, then the military properly notifies the civil authorities and it is dealt with by them.

There is a test; there is a guidance to the legal officer and it is this: is there a civilian equivalent for this charge? For example, there is no civilian equivalent of sleeping whilst on duty at a picket and I dare say the Magistrates Court, with respect to them, would not be interested in such an offence. But the army is interested in it because it affects discipline and, therefore, you can be charged for that offence. The first test is: is there a civilian equivalent? If there is a civilian equivalent, is it serious? If it is serious, we give it to the civilian authorities—not because the expertise is not there, but because the civilian authorities have the expertise. They have got the forensic examiners and people like that. They know how to investigate those very serious offences.

So far as discipline is concerned, I guess that is a commander's decision. It has

always been for the commander to decide whether there has been some infraction of the rules. We are talking about big infractions of the rules here. In recent years a discipline officer category has been introduced. They can hand out an on-the-spot fine, a parking infringement notice, for very minor infractions. That seems to work.

Mr PRICE—I might come back to that. Just going back to professional negligence, if I could set the scene: we are giving the RAAF a hard time, but if I am driving a plane—which is most unlikely—I am drunk and I crash it, causing some civilian loss of life, presumably that is professional negligence on my part and that is going to be dealt with administratively.

Mr Clark—I would have though it was manslaughter prima facie, but that is me speaking as a lawyer.

Mr PRICE—What about someone in charge of a ship then, where there is a loss of life on that ship through professional negligence?

Mr Clark—There is a charge within the Defence Force Discipline Act and there is the celebrated case of Lampard which sets the standard. The Federal Court set the standard and the test is this: if you fall short of the standard of someone of comparable rank, experience and training, then you can be charged and convicted of negligent performance of duty—that is, not doing your job properly.

Mr PRICE—I will have to have a look at the transcript, but I understood that I think it was the service chiefs who said that a decision had been made that professional negligence would be dealt with administratively. That was a recent decision.

Mr Clark—That might be a decision that they have made for some reason.

CHAIRMAN—You raised the business of manslaughter. Where lives are lost in exercises or something like that, the charge is very rarely laid of manslaughter. When you get the ADF representatives before you at an estimates hearing or something and ask them, they say, 'Well, that is a matter for the civilian police, and if the civilian police or the coroners do not get involved we are not going to get involved.' It is difficult to avoid the thought that there is a bit of evasion and subterfuge going on there. Some of the cases that I can think of, if they had happened in civilian life, you undoubtedly would have ended up in court on a manslaughter charge.

Mr Clark—Yes, I think that might be right.

CHAIRMAN—Absolutely no doubt about it.

Mr Clark—Can I give you an example. A few years ago unfortunately there was a sergeant killed at Duntroon in a motor vehicle accident. There was a board of inquiry and

the coroner said there would be a coronial inquiry, obviously, because of sudden death, but he did not start the coronial inquiry until he had before him a copy of the board of inquiry investigation that was conducted. There was then a full-blown coroner's inquiry and the coroner was entitled to come to whatever conclusions he wanted to come to. In that case he said nothing wrong had happened and it had just been an accident. I do not know if there has been a coronial inquiry into Black Hawk or not.

Mr BEVIS—Where there has been a death, is there a rule of thumb or some understanding about whether or not the military inquiry process will proceed rather than a coronial inquiry? I can think of examples where both—

Mr Clark—I get the feeling that there may be some loose arrangement, but I cannot talk for the Defence Department; I am speaking in a private capacity. It has always been the law under the Coroners Act that any unexplained or sudden death can be subject to a coronial inquest. It may be of assistance to the coroner if they have got the results of a board of inquiry before them, but the question is whether there needs to be legislation put in place for where there is a death. The military has, what, 15, 20 or 30 deaths, training accidents, a year: people getting killed in APCs when they turn over at Shoalwater Bay; people in trucks and things like that. There may need to be legislation saying, 'We won't have a board of inquiry if there is a death; we will refer it straight to the coroner's office.' I do not know. But it seems to me that we get rid of a whole lot of command influence that way.

Mr PRICE—That is right. And there would be nothing to stop you having a board of inquiry afterwards if you were trying to learn the lessons to be learnt out of it, if that were appropriate.

Mr Clark—No, and, as Mr Bevis said, if you also say to a board of inquiry, 'You do not comment on disciplinary matters,' that would work perfectly, because the board of inquiry is worried about the systemic things and the changes to the system. I mean, 'It was a terrible accident—let us make sure it does not happen again. The way we can make sure it does not happen again is first to find out how this one happened and, second, to make sure we do not repeat the same mistake.' If you build up corporate knowledge, which seems to be a happy word, and you learn how not to make mistakes, that is great. But if you keep reinventing the wheel, if every time you have a board of inquiry, what are the terms of reference, and you just go and get a precedent, that is totally inadequate. You get a general to sign it. 'Well, we had better get it done within the next month,' and then you feel constrained that way, and then you have a public expectation on top of it, depending on how high profile it is.

Perhaps one of the easiest ways out of the problem is for people to be very frank and up front and say, 'Look, this is a tragedy. This is going to take a while to sort out. Will you bear with us? We promise we will keep you informed,' instead of just letting the inquiry process muddle along and there being a lot of people left wondering what is going

on. They overcame that in Black Hawk because very bravely and, I thought, as a sign of maturity the Defence Force deemed it to be a public inquiry. They had the press there in their face every day and that is fine. They were exposed to public scrutiny, and they should be.

Mr PRICE—We are a democracy, after all.

Mr Clark—It is one of the linchpins.

CHAIRMAN—Then the matter of time comes into it, because justice deferred is justice denied. I have seen cases where it is difficult to avoid the conclusion that the department had extended inquiries to beyond the statute of limitations so that no disciplinary action ultimately could be taken if all the other defences fell down.

Mr Clark—That is the problem, if people wish to procrastinate. There is a very short time limitation in the Defence Force Discipline Act, for example—three years. It is a short time.

CHAIRMAN—When you look at some of those aircraft accidents that the Air Force have been involved in, you cannot justify the time that it took to wind the whole thing out.

Mr Clark—Hindsight is always a perfect science. But some of them were characterised by ineptitude. Some of them were characterised by, 'Look, we do not really care about the truth. We will just prevaricate and maybe that person will go away in time. We will grind them down.' That is the cynic speaking.

The difficulty is that if you have people who feel aggrieved and if you have people who are part of the inquiry process, whether it is one person or whether it is 70 people, they have an absolute right to be heard and they have an absolute right to have their grievance aired and investigated. It is not good enough for a general to say, 'I am busy getting on with the business of commanding,' because it is part of the business of commanding. If you do not look after your people, who are your most valuable asset, it is of little use looking after anything else.

Mr PRICE—You would be aware of the reports about the Holsworthy detention centre. We have talked about the whole aspect of discipline but not the result of it. Have you got anything to offer the committee in relation to Holsworthy?

Mr Clark—I thought the chairman said we were not descending into specifics, we were talking about generalities.

CHAIRMAN—We were not going to retry cases that have already been heard.

Mr PRICE—Apart from HMAS *Sydney*, we are our own board of inquiry.

Mr Clark—Do you want me to answer that question?

Mr PRICE—Yes. I am interested in the generality.

Mr Clark—I do not know what evidence has been given to the committee.

Mr PRICE—We have had little.

Mr Clark—I do know that an intermediate investigation—informal investigation—was carried out. I know that Major General Keating was told, quite correctly, that when he received the results of that intermediate investigation he would be well advised—not that a lawyer can tell a general what to do, but they make a respectful submission—to tell the Chief of the Army about this and probably even the Minister for Defence in time because this was dynamite. So far as I am aware, that course of action was followed.

That intermediate investigation said that—although no concluded view was reached—it could be that there have been a large number of instances of false imprisonment and deprivation of people's civil liberties and the only way to sort it out was to have a proper investigation. I think it was General Sanderson who was asked and who said that they had had legal opinion that there was nothing illegal in it. The committee may or may not be aware that there is more than one legal opinion that has been given on that topic.

Mr BEVIS—The report you were referring to, the interim report, was the one last year, I take it?

Mr Clark—No. I think that was signed on 2 January this year.

Mr BEVIS—Yes, that is right.

Mr Clark—The history was that it came to the notice of a couple of lawyers coincidentally, who then expressed an opinion about it. General Keating quite properly ordered that there be an informal urgent inquiry, that is, informal in as much as it was not sanctioned under the defence inquiry regulations and we did not have to go through these terms of reference. He gave it to a person and said, 'Right. Find out what you can and report back to me,' which is a perfectly proper course of action to take. That investigation found that there had been probably been 60 or 70 instances which could, if investigated fully, have resulted in a lot of serious things. Since then, there has been other legal opinion given on the topic. I am not privy to the content of that, and neither should I be. But to say that there has been legal opinion given and there is nothing illegal is a correct statement so far as it goes, but there has been many more than one opinion given.

Mr PRICE—And the matter has not been thoroughly investigated?

Mr Clark—No, I did not say that.

Mr PRICE—I thought you said that there had been a preliminary investigation?

Mr Clark—Yes, I think that is right and Minister Bishop announced in March this year that she had appointed a naval captain to do an investigation.

Mr PRICE—No, I was not reflecting on the naval captain's investigation.

Mr Clark—I do not know the results of his investigation.

Mr PRICE—No, I know that, but wasn't the first one merely a preliminary investigation?

Mr Clark—It was interim, if you like, yes. That was really along the lines of, 'What is the extent of the problem? What is going on?'

Mr PRICE—Could you perhaps explain the difference between the two investigations in terms of timing, methodology and thoroughness so that I can understand?

Mr Clark—If somebody said, 'Here is a topic. Here is a problem. Could you please conduct an informal investigation?' The word 'investigation' is probably unfortunate, but it is coincidental. That gives me a charter to go and talk to people. It does not give me a charter to make them answer questions, because I am not appointed under the defence inquiry regulations. I could only rely on my rank and experience and say, 'Can I have a look at these documents? Can I do this or that?'

You then write back to the person who appointed you and say, 'I have had some preliminary investigations carried out. I have conducted them. I think that you have a problem and it needs to be thoroughly investigated.' You certainly could not give a concluded view on an interim report. You are really only making a commander aware of the extent of a particular problem.

Mr BEVIS—I have one final question. You are currently in the reserves. You were formerly a full-time regular.

Mr Clark—Yes.

Mr BEVIS—Were you in the legal corps as a regular?

Mr Clark—Yes, for the latter half I was.

Mr PRICE—What were you before that?

Mr Clark—I was an infantryman.

Mr BEVIS—I refer to the comments that you made about the different ways in which a regular, as distinct from a reserve legal officer, might be inclined to act. It is not the first time someone has come before us and made the observation. I guess you are in the rare position in terms of witnesses that we have seen so far of actually having been in both those roles.

Mr Clark—Yes.

Mr BEVIS—Are your comments in evidence to us in that respect borne out by your own observations in both roles?

Mr Clark—Certainly I can recall when I was in the regular army I defended somebody and it was an emotional thing. It was an assault by a male on a female and, of necessity, the female had to be cross-examined by me in court. I was told in no uncertain terms that it would not do my career any good if I upset a witness like that again. That is command influence. I am not saying command influence is a bad thing, but in matters legal and for matters independent, it is a very bad thing.

CHAIRMAN—Thank you very much for a very informative interview. You will be sent a copy of the transcript of the evidence you have given in which you can make grammatical changes, and if need be the committee will contact you again.

Proceedings suspended from 3.21 p.m. to 3.32 p.m.

BOYD, Lieutenant Colonel Peter Malcolm, GPO Box 326, Canberra, Australian Capital Territory

CHAIRMAN—I welcome Lieutenant Colonel Peter Boyd of the Australian Army to the subcommittee hearing. In what capacity do you appear before the subcommittee?

Lt Col. Boyd—I am appearing in a personal capacity.

CHAIRMAN—I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in the respective houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as contempt of the parliament. I also remind you of my warning in opening this inquiry this morning that this inquiry should not be misused as an opportunity to make defamatory comment against named individuals under the protection of parliamentary privilege.

The subcommittee prefers that all evidence be given in public, but should you at any stage wish to give any evidence in private you may ask to do so and the subcommittee will give consideration to your request. Your submission has been received and authorised for publication. Are there any corrections or additions that you wish to make to that submission?

Lt Col. Boyd—No.

CHAIRMAN—I invite you to make a short opening statement, if you would like to make one, before we move to questions.

Lt Col. Boyd—Yes, I would like to make an opening statement. I thank the committee for the opportunity to appear before you today in support of my written submission. I am a legal officer of the Australian Army and have many years of experience in discipline law, administrative law and operations law, both in Australia and overseas. I have been a national serviceman in signals units and have served in the RAAF Reserve as an operations officer while studying law. Although I have relied on that experience in making a submission to you, I must clearly state that my submission is a personal one and expresses my own views. It is not an alternative or a complementary Defence submission—I do not speak for Defence.

My written submission is limited to the adequacy and appropriateness of two elements of the procedures for the conduct of discipline in the ADF. My concern has been directed to the role of the convening authorities and the appropriateness of a separate and impartial authority for the appointment and management of defence force magistrates and judge advocates, the judge advocate administrator and the creation of a director of military prosecutions.

At the outset, I believe it is important to distinguish between administrative functions and disciplinary functions. I understand that the Defence submission has already addressed this extensively and that you have been briefed by officers from the Defence legal office on this matter. Therefore there is no need for me to repeat it, except to say that many of the submissions made to you merge the two, intentionally or unintentionally, and blur the relationship between them. I consider this to be a serious error. It is crucial that you understand the distinction but I necessarily leave it to the Defence submission and the Defence witnesses to reinforce that point.

In my written submission, I indicated that the High Court had extensively considered the extent of and the basis for military jurisdiction. I commend that to the committee. This examination does not appear in any other submission, as far as I am aware. It is important that the committee appreciates that there is a place for military discipline jurisdiction and that the High Court accepts this and has not found fault with the application of it. It is my understanding that there are very few matters successfully appealed to the Defence Force Discipline Appeal Tribunal, the Federal Court or the High Court. Those that could have can probably be counted on one hand. Having regard to the legal system generally in this country, I consider that to be exemplary.

It is my view that the military discipline system has generally worked very well over the past 13 years of the operation of the Defence Force Discipline Act. However, there is considerable scope for change to ensure that it provides for judicial independence, that it is transparent and that it is significantly free from doubt. No system is perfect, as you would be well aware; our aim must be to constantly refine and to improve.

I understand that the chiefs of staff committee has agreed to implement the vast majority of the recommendations of the Abadee report and is giving further consideration to the remaining four ones they have not yet agreed on. One of the agreed recommendations is the appointment of a judge advocate administrator, one of the issues I addressed. This is an important position, as I indicated in my written submission. Because the position is now being established, either in the rank of navy captain, colonel or group captain and requiring a legal officer who has been appointed judge advocate and a defence force magistrate, I do not consider that I have to discuss that any further. It is important though that it be established immediately, rather than being allowed to just drift on. However, I would urge you to formally agree with the appropriateness and the necessity of this appointment in your report.

In my written submission, you will see that I proposed a similar approach to the change being undertaken in the British military justice system in April 1997. This would mean the abolition of the present convening authority and replacing that appointment with three separate authorities: the first would be a higher authority, the second a prosecuting authority and the third a courts martial administration office. The full details are in my written submission.

I want to make it clear that I do not advocate a complete duplication of the new British system, but there are useful indicators in that towards ensuring judicial independence. Essentially, a higher authority would consider whether an individual referred to him had a case to answer. The higher authority would then refer the matter to the prosecuting authority—and in Australia I would suggest that that should be a director of military prosecutions. The higher authority could alternatively refer a matter back to the commanding officer for hearing if he considered this to be appropriate—and that exists under the DFDA. The decision of whether to prosecute or not at court martial or at a defence force magistrate trial would be taken only by the prosecuting authority.

I briefly suggested the establishment of a director of military prosecutions and I note that this suggestion has support from others who have made submissions to you. The director of military prosecutions would be similar to the army prosecutions authority in the British model. It would be analogous to the Director of Public Prosecutions in Australia. There can be only one common standard of discipline applicable to all members of the ADF. The establishment of a director of military prosecutions will, in my view, go a long way towards ensuring one common standard for all matters going to court martial and to defence force magistrate trial.

Independent from the chain of command, the officer—I would also suggest that person be of the rank of navy captain, colonel or group captain, although I note that the preceding speaker had a different view—would consider all matters referred to him by a higher authority and decide whether to prosecute, and the appropriate charges to be laid. The director of military prosecutions would use uniformed legal officers to prosecute.

There are perhaps other models of a director of military prosecutions which may bear consideration. My preference is the one that I have just mentioned. For example, the director and his staff may simply undertake the prosecution function after a convening authority, however that person may be described, has decided that charges should be laid and convenes a court martial or defence force magistrate trial.

It does not necessarily follow, in my view, that the appointment of a director of military prosecutions imposes unacceptable limitations on the role of command in the disciplinary process. In the past the convening authority has also been the reviewing authority. This would clearly need to change to maintain transparency in the military discipline system.

I also wish to comment briefly on a submission by a Ms Ivory—submission No. 39 in the submissions that have been made to you—which is wholly directed at what she perceives to be problems in the model which I proposed. I believe it is important for me to address the thrust of her comments. I am not aware of Ms Ivory's experience of the military justice system, although this is not necessarily relevant. She indicates in paragraph 10 of her submission that after taking on judge advocate and defence force magistrate duties, those selected will be returned to the normal chain of command. This is incorrect

in the model which I have proposed. The judge advocate administrator and those officers appointed to be a judge advocate or a defence force magistrate will be senior legal officers. The judge advocate administrator will be a permanent officer and the vast majority—if not all but one—would be reserve officers. It is not intended that they undertake legal duties after they have been so appointed. The concerns Ms Ivory expresses in her submission on this point can be allayed.

Ms Ivory expresses concern over the appointment of a judge advocate administrator who, she says, would also return to general legal duties. She goes on to say in paragraph 11 that those skills would require the appointee to be drawn from military officers whose lack of integrity over the last decades in the administration of military procedures and justice has been exposed in the media and raised concerns in the Defence Force Ombudsman's annual report 1996-97.

I suggest that Ms Ivory has confused the two separate issues before the committee: administrative inquiries on the one hand and discipline issues on the other. The Defence Force Ombudsman does not comment on military discipline issues. The Defence Force Ombudsman, in her own submission—which is submission No. 6 to you—says, in part, that section 19C(5) of the Ombudsman Act 1976 precludes her from investigating matters relating to the Defence Force. The Defence Force Ombudsman is empowered only to investigate administrative actions relating to or arising from a person's service in the ADF.

I would suggest that Ms Ivory's comments in paragraphs 11 and 12 of her submission are an unwarranted and unjust reflection on those legal officers who have been involved in military discipline matters over recent years. Her comments are very generalised and there is no supporting basis for them. It is clear to me, from paragraphs 12 and 13 of her submission, that she has confused the two quite separate and distinct issues. Her comments about military discipline confusingly lead into mention of administrative procedures, personnel related issues and military administrative structures.

Before answering any questions you may have, I would like to end on a positive note. Concerns have been expressed about judicial independence. The ADF is in the process of implementing change to address this important issue. Change is needed and this has been acknowledged. I have made a positive written submission which proposes and addresses part of that change. A judge advocate administrator is shortly to be appointed. I urge the immediate establishment of a director of military prosecutions and a significant change to the role of the present convening authorities and reviewing authorities. These measures will require legislative changes to the Defence Force Discipline Act. The suggestions I have made, with the recommendations already being adopted from the Abadee report, will help ensure a military discipline system which gives transparency to its operation and ensures the protection of the individual.

Senator BOURNE—You talk about Mr Findlay's case and how it is based on the European human rights instruments. In your opinion, could it equally be based on the UN

human rights instruments that Australia has signed—ICCPR and the Universal Declaration and that sort of thing?

Lt Col. Boyd—It is possible, but I do not think it is necessary to even attempt to impose it upon that. It is sufficient, I believe, just to consider that there is a need for judicial independence and run with that—to just use this as an example. I have tried to say in my submission that we do not have to tie it to that. The European thing does not apply to us; therefore, this decision does not apply to us. But there are some useful guidelines in what the court has said when you apply it to the DFDA.

Senator BOURNE—And there are similar problems in Australia with the independence?

Lt Col. Boyd—I believe so.

Senator BOURNE—If you had a completely separate military legal section under the DFDA, would that solve the problem of having both adequate defence and adequate prosecution?

Lt Col. Boyd—I spoke of a director of military prosecutions, and I can talk about that separately. If you are talking about a separate defence organisation, I have not advocated that. I spent some time in the United States about a decade ago. I did a masters over there at the US Army Judge Advocate General's School, and I am aware that the Americans have what they call a trial defence service and officers—lawyers—are posted into that. They do a period of three years; some do much longer. The difference for them is that they literally do hundreds and hundreds of trials. We do not have that. When we are in an environment where we are trying to reduce our numbers, I do not think there is a need for it. We have a substantial number of reserve legal officers, and I heard Mr Clark talking before about reserve officers defending. I agree that that is the appropriate way to go. I do not believe it is necessary to have a separate trial defence service.

Senator BOURNE—That was my other question, so thank you.

Mr PRICE—I suppose, to date, we have concentrated on the higher order issues. What is the role of the defence force magistrates? What sort of cases can they hear? What is heard by the judges?

Lt Col. Boyd—A judge advocate is a lawyer who is appointed effectively as a legal adviser to a court martial. A court martial can be a restricted court martial with three officers who are not legally qualified or five officers for a general court martial, whereas a defence force magistrate effectively becomes judge and jury by himself, as you would with the Magistrate's Court. As far as what matters are referred to him are concerned, it really can be anything. A matter would initially come before a commanding officer who might decide there is a prima facie case where he believes that the punishment which he

can award is insufficient, that the person being charged really deserves a more serious punishment. He would then refer it to a convening authority. The convening authority might take a contrary view and send it back to the CO to deal with, but if the convening authority has a similar view, he might then convene a court martial or separately convene a defence force magistrate trial. So the short answer is: there is no particular offence that requires one or the other. It is really a matter of the seriousness of the offence, but more so the seriousness of the punishment the person looking at it might decide is appropriate.

Mr PRICE—Could you give me some examples of cases that have appeared before a defence force magistrate and others that have appeared before a general court martial.

Lt Col. Boyd—I would tend to think that perhaps a fraud or something like that—a complex matter—is the appropriate thing to go to a defence force magistrate trial, or something that might be an assault. Whilst it could go to a defence force magistrate, it perhaps more appropriately could go to a court martial.

Mr PRICE—And neither of those things should be dealt with administratively, in your view?

Lt Col. Boyd—In my view, if there is the evidence to deal with it, it should go to trial. I would very rarely look at taking administrative action in those circumstances.

Mr PRICE—On the civilian side, there are very distinct limitations on the jurisdiction of a magistrate as opposed to a district court judge. There are some matters that the magistrate can deal with, but there are other matters he does not have the competency to deal with. Is that right?

Lt Col. Boyd—I think the sorts of things they are going to deal with are set by the judges themselves, but the DFDA itself allows any charge, apart from a territory offence, to be dealt with by anyone. The real difference is the penalties that can be given out. If there were a belief that there was a need to change that, then you would need to change the act to reflect that.

Mr PRICE—Would it not make it clearer for everyone if there were a defined set of things that a Defence Force magistrate can determine?

Lt Col. Boyd—Frankly, I do not see that there is a real difference in it. Most of the matters these days go to a Defence Force magistrate; they do not go to a court martial.

CHAIRMAN—It has been a long while since I have worn a uniform, but I can remember once being an escort. The prisoner was marched in and I think he was asked before the CO—

Mr PRICE—That was a committee meeting.

CHAIRMAN—whether he wished to be heard or tried by the CO or whether he wished to appear for a court martial. Does that provision still exist?

Lt Col. Boyd—There are elective punishments. If a CO wants to give perhaps a more severe penalty than is allowed to him under the act, then he has to give the member the right to elect trial by court martial.

CHAIRMAN—What are the powers of a CO—a battalion commander or something like that—in today's army?

Lt Col. Boyd—Can I look at my material first?

CHAIRMAN—Yes, but I am just interested in the generalities of it.

Lt Col. Boyd—I think that I would rather be more specific.

Mr PRICE—Just to be fair, I will give you an outline of the powers of our current committee chairman.

Lt Col. Boyd—The sorts of punishments that can be opposed by a court martial or Defence Force magistrate are: imprisonment for life; imprisonment for a period exceeding six months; detention for a period exceeding six months; dismissal from the Defence Force; reduction in rank; forfeiture of service; forfeiture of seniority; a fine of an amount not exceeding an amount of the convicted person's pay of 28 days; a severe reprimand; and a reprimand.

CHAIRMAN—This is going down a different line. What I want to know is: with respect to discipline, what sort of misdemeanours are dealt with at what levels? If someone has committed a minor act of insubordination—failed to obey a lawful command promptly or something like that—where is that dealt with?

Lt Col. Boyd—I would think that in 99 per cent of the cases they would be dealt with by the CO.

CHAIRMAN—And he can just put them on extra duties in the cookhouse for a day or so.

Lt Col. Boyd—Extra duties or perhaps fine them.

CHAIRMAN—Where does the Defence Force magistrate come in—where thefts are involved or something like that?

Lt Col. Boyd—Theft is a good example, but it can be applied to almost every offence that is there. Most of them are not. I do not have the exact figures with me, but I would suspect the numbers at the present time would probably be no more than about 40 trials a year. If we go back three or four years ago, it was probably up around 70. Again, I do not have the figures with me, but I would suspect that there are several thousand charges laid each year; most of which would be regarded as minor infractions of the DFDA. We are not talking about a lot of matters going to a Defence Force magistrate or court martial, but we have had some that have gone wrong and there is a need to ensure that that does not continue to happen.

Mr PRICE—What would be the most severe penalty a commanding officer can impose short of a matter going before a Defence Force magistrate?

Lt Col. Boyd—It depends on how you would regard it, but I believe a fine of seven days pay is probably regarded as a fairly serious punishment. A person could be reduced in rank.

Mr PRICE—That is a fairly severe punishment.

Lt Col. Boyd—That is a fairly serious punishment.

Mr PRICE—And he can do that and it not go to a—

Lt Col. Boyd—In the second case he would need to give the election to go to court martial, but if that election were not taken, then it could be dealt with by the CO.

Mr PRICE—Are there any statistics available on how often that is meted out as a punishment?

Lt Col. Boyd—I cannot provide that evidence because I am not here as a Defence witness.

Mr PRICE—That is fair enough. Can you help me to understand the role of boards of inquiry? What happens if there is a minor incident in a base? Let us say there is dingle between two cars. What happens on the base there? What is the procedure?

Lt Col. Boyd—Generally speaking, an investigating officer would be appointed, would find out what had happened and provide a report—probably to the CO who has appointed him.

Mr PRICE—It must be inquired into? The respective people do not have to just fill out an incident form?

Lt Col. Boyd—Perhaps I should clarify that: if there is a military vehicle involved.

If they have just got two personal vehicles then there probably would not need to be that.

Mr PRICE—If there is a military vehicle involved, there must be an investigation?

Lt Col. Boyd—I believe so. There is provision for preliminary inquiries. In something like that, depending on the seriousness again, if it is a very minor thing, you could probably get away with a preliminary inquiry or an informal inquiry and that would be sufficient.

Mr PRICE—I presume that in the ADF there must be literally hundreds of these minor incidents that can occur, with the best will, that really are not worthy of detailed investigation?

Lt Col. Boyd—I do not believe that I can answer that question, for the same reason I gave before.

CHAIRMAN—If we went to a director of military prosecutions, would that provide opportunities to speed up the administration of discipline?

Lt Col. Boyd—It would do that, yes. But it also introduces this concept of judicial independence that I was talking about. I am sure that others have mentioned the problems to you.

CHAIRMAN—The matter of independence is a constant theme in all levels in the submissions and we do spend quite a long while discussing the need to get there. It is important that we do not get all this out of context. The point was made by a previous witness that the DFDA is a discipline act, not a crimes act, and the end point of that is the discipline of the ADF. While there are always defaulters, by and large the discipline is very good, particularly when you see the ADF deployed in peacekeeping operations and suchlike. The conduct of our troops, by and large, has been exemplary overseas, whether they are in Kuwait today or Rwanda or Somalia or Cambodia or elsewhere, so whatever is happening does work. We are concerned about making it work better and more efficiently and overcoming any anomalies in it that can be overcome.

Lt Col. Boyd—I have the same view. That is why I have made the submission.

CHAIRMAN—Yes. Any further questions?

Senator BOURNE—I have one qualification and you probably have already told us this. I am sorry to ask it again. Where you are talking about the JAA—and I know that that is one of the recommendations that has been accepted, which is good—you have suggested in paragraph 32 some prerequisites for a JAA: that they be legally qualified; already appointed, et cetera, as a defence force magistrate; and so on. Is that what you understand to have been agreed to?

Lt Col. Boyd—I understand that that has been agreed to. I was told a couple of weeks ago that there was an intention to establish this position with the rank of colonel. I do not believe that a decision has been made as to who the person will be. But it has been indicated to me that the person who is presently the director of the complaints resolution agency will probably be appointed to that position, because that person probably is the only person who presently meets those qualifications.

Senator BOURNE—And who is experienced.

Lt Col. Boyd—I understood that that person is the only one who has had experience as a JA or a DFM. No-one else has that. That is an important post in my view and it should have been filled before. You have already heard from Mr Clark about the problems that have occurred in the last year or so, so I do not need to recount those at all.

At the same time I should mention that the intention to put the present incumbent of the director of the complaints resolution agency position into the JAA does mean that the director of the complaints resolution agency position will also need to be filled, and will also need to be filled straightaway. If I may, I might also suggest that that also needs to be a legal officer of some experience, particularly in administrative law, because I see the role of that particular position as being necessary to help settle terms of reference. I am talking about terms of reference for a board of inquiry. I understand that there is a directive presently under consideration which passes a number of functions over to the director of the complaints resolution agency; that is one of them. I understand that it has not yet been agreed. It may be agreed, but certainly it needs to be agreed. It is something else that the committee also ought to take on board and ensure that that occurs along the lines that I have just suggested as well.

Senator BOURNE—Thanks.

CHAIRMAN—Going back to that director of military prosecutions for a moment—and you suggested that it would speed up the administration of disciplinary matters—we would also have to get a clear gateway into it, wouldn't we, so that, administratively, matters referred to the DMP were not bogged down in a bureaucratic assessment before him?

Lt Col. Boyd—The present route that goes from a commanding officer to what we now call a convening authority would remain the same as it is. But role of the convening authority, as it presently is, would simply be either to refer the matter to the director of military prosecutions or refer it back to a commanding officer. That, I would think, would be a fairly simple task for most things.

CHAIRMAN—But you are suggesting in your submission that the role or the numbers of convening authorities ought to be reduced significantly, aren't you?

Lt Col. Boyd—I do not think I suggested a reduction in the number of them, but I suggested that there be considerable change to the role of the convening authority. I may be wrong in that.

CHAIRMAN—Paragraph 2 states:

Specifically, I submit that the role of convening authorities under the DFDA be severely circumscribed and several independent bodies be established.

Lt Col. Boyd—I have suggested to you today that there ought to be a replacement of the convening authority by a three-tier organisation: a higher authority; the prosecuting authority; and a courts martial administration office. The number of the convening authorities I do not think is a matter which I have addressed. I do not think it is a matter of great concern. If you had a reduced number of convening authorities—however you want to describe them: convening authorities or higher authorities—then the lesser number that you have, the more likely things are to bog down in getting it through that funnel and on to the director of military prosecutions, given that, I believe, their task is simply to decide whether to refer it on to the director of military prosecutions or refer it back to a CO.

I do not think it really matters how many there are. In fact, it might be best if there are more than less because I see that as speeding the thing up. That person is not going to make a decision as to whether to prosecute or not; that role will go the director of military prosecutions.

CHAIRMAN—It looks like you have exhausted us, Colonel. Thank you very much for coming along. You will be sent a copy of the transcript of your evidence to which you can make corrections of grammar and fact.

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

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

Subcommittee adjourned at 4.04 p.m.