COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE

ON

FOREIGN AFFAIRS, DEFENCE AND TRADE

(Defence Subcommittee)

Reference: Military justice procedures

SYDNEY

Friday, 19 June 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 Brereton
Senator Margetts	Mr Bradford
	Mr Brough
	Mr Dondas
	Mr Georgiou
	Mr Hicks
	Mr Lieberman
	Mr McLeay
	Mr Price
	Dr Southcott
	Mr Taylor

Matters referred for inquiry into and report on:

(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 the 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)

Military justice procedures

SYDNEY

Friday, 19 June 1998

Present

Mr Ted Grace (Acting Chair)

Senator Bourne

Mr Hicks

Subcommittee met at 9.02 a.m.

Mr Grace took the chair.

ACTING CHAIR (Mr Ted Grace)—I declare open this public meeting of the Defence Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade. The hearing today is part of an inquiry presently 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 disciplinary procedures primarily under the Defence Force Discipline Act of 1982.

There has been considerable media and public interest in military inquiries and aspects of military discipline over the last few years, most notably as the result of the 1996 Black Hawk helicopter accident but also as an outcome of a number of other incidents. These include the current board of inquiry into the calamitous events aboard HMAS *Westralia*.

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 and members of the public and the legal profession. The committee hopes to table its report on this reference towards the end of year.

[9.03 a.m.]

NORTHWOOD, Colonel Kenneth Edward, PO Box 177, Brighton le Sands, New South Wales 2216

ACTING CHAIR—On behalf of the subcommittee, I would like to welcome Colonel Northwood. In what capacity are you appearing before the subcommittee?

Col. Northwood—I am by profession a solicitor in private practice. I am currently a member of the Army Reserve and, at the present time, I am serving as a reserve officer, completing work as the head of the investigation section of the review into the Australian Defence Force Academy.

ACTING CHAIR—I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect as the proceedings in the parliament. 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 parliament. The subcommittee prefers that all evidence be given in public, but should you at any stage wish to give evidence in private, you may ask to do so and the subcommittee will give consideration to your request. We have received your submission but it has not been authorised for publication. Do you still wish your submission to remain confidential?

Col. Northwood—No, Mr Chairman. The only reason for suggesting that the submission be confidential at the time that I submitted it was that it contains some references to the review into the Australian Defence Force Academy and the report at that time had not been released. The report has been released and I have no difficulty with the submission now being an open submission.

ACTING CHAIR—Thank you, Colonel. Would you like to make any additions or corrections to your submission?

Col. Northwood—I do not want to make any corrections to the actual submission, Mr Chairman. I have noted a couple of minor typographical errors, but I do not think we need detain the committee with those. However, there are some additional points which are not covered in the actual submission itself, which I might make as a preliminary matter.

ACTING CHAIR—I invite you to make a short opening statement before we proceed with questions.

Col. Northwood—Yes, thank you, Mr Chairman. I will endeavour to be reasonably brief. The one matter which is referred to in the submission and to which I would like to give strong emphasis is the question of jurisdiction. In the submission, I pointed out the

difficulties that we are having in the defence force with respect to our inability currently, post-*Swan*, if I can put it that way, to deal with minor matters of sexual assault—what I generally call acts of indecency—and I referred to that in the submission.

May I say that is something which has been picked up in the ADFA review report. I will read onto the record a very short extract from that report. In chapter 4, commencing at 4.8, the review said—and there are strong similarities between what is here and what is in the submission:

4.8 Police forces around Australia are frequently unable [or unwilling] to investigate minor acts of indecency. Complainants of sexual assault who are ADF members and who are prepared to refer matters to the civil authorities, complain of delays in civil investigations and that matters are not properly investigated. Even when investigated and prosecuted, offenders are frequently perceived to be given lenient sentences by the civil courts. All in all, the effect of the present policy leads to the charge that the ADF claim that there is zero tolerance of sexual assault is empty rhetoric, and that the ADF is either 'washing its hands' of the victims or giving them insufficient support. The ADF is in an invidious situation. The case study in the following paragraph illustrates this.

4.9 A former Defence Academy cadet appeared on the 'Sunday' program and stated that she was sexually assaulted by an ADF while 'on exercise'. She said 'The Military washed their hands of me and he's free to go and continue. I had had enough.' In fact, the Service Police had accompanied her to the Sexual Offences Investigation Squad in the State in which the incident occurred, and her options were explained to her. She declined to make a statement as she did not want to appear in the civil court and she wanted some action taken by the Service Police. No action could be taken by the ADF in respect of this matter.

This was a problem which occurred for us on a number of occasions in the ADFA review. I did speak with the head of the Sexual Assault Unit with the Australian Federal Police and he explained to me that, when people come to the unit with respect to sexual assault and become aware of the full horrors, if you like, of subjecting yourself to the civil process—for example, in the ACT, there are still committals—and the full process and the rigour of the process and the cross-examination at the trial, almost without exception, these young women choose not to proceed with the complaint. It is also explained to them, and I understand it is the fact, that there was not a single conviction for rape in the ACT in 1997.

Can I say—and it has appeared in the newspapers—that we, on the investigation side, identified 26 cases of what we believe were rape—and the old term 'rape' is the best way to describe the particular form of sexual assault to which I am referring—between I think it was the beginning of 1994 and the end of 1997. Of those, to the best of my recollection—and my recollection could be faulty in one or two cases—only two have ever proceeded to complaints made to the civil courts and have gone to trial. One of those two matters is awaiting trial in the ACT at the present time.

It is an appalling situation that, in serious matters like that, the ADF is not in a position to take any action at all because of the present policy. Worse still is the situation

that the incidents of acts of indecency—and I referred to some examples in my submission; there were others—again cannot be dealt with if the complainant, under the existing guidelines, chooses not to make a complaint. In some situations the incident will come to the notice of the appropriate officer or the commander or the commandant of the Defence Force Academy, but, again, unless the person is prepared to proceed with the complaint, under the existing guidelines there is nothing he can do, and, technically, those matters should go to the Federal Police for investigation.

So I go back to the report which says:

4.10 COs believe that the current policy restricts their ability to manage their respective units. For example, once a victim of sexual assault decides not to make a complaint to the civil authorities, the CO is left with management difficulties in that the victim and the alleged offender may still have to work together in an emotionally charged work situation which then negatively impacts on unit morale and cohesiveness. COs are required to be mindful of their duty of care responsibilities to all members, yet are prevented from taking any effective action to meet these responsibilities.

No-one suggests that matters of rape and serious sexual assault ought not to be tried by a judge and jury and tried in the civil courts. I think it would be fair to say that no-one in the ADF wants to take for themselves the jurisdiction to try those sorts of matters, which I think everyone agrees should properly be tried by the civil authorities. But if, for some reason, the complainant is not prepared to make a complaint to the civil authorities, then there should be, it is submitted, the ability to take some action of a disciplinary kind or conduct some sort of administrative investigation with respect to those sorts of matters, particularly the minor matters which are acts of indecency.

I do stress to the committee that, whilst I know that what I am putting to you is contrary to the view and the policy that was implemented post-*Swan*, I simply say that one of the results of implementing that policy has been this unexpected difficulty with respect to these minor matters. It is a most unfortunate situation that we are not in a position to provide some real assistance and to further maintain discipline and do as much as possible to stamp out this sort of activity, given these constraints. It is simply, I think, a matter of revisiting that policy to try and deal with these matters. That was all I wanted to say about that particular aspect, but it is the most important matter, so far as I am personally concerned, in the light of my recent experience.

The second thing that I wanted to refer to was with respect to scoping of inquiries and the preparation of terms of reference for investigations and for boards of inquiry. I spent, with a small team, commencing in May of last year, about six months preparing a report to the Vice Chief of the Defence Force, which was dated 4 November 1997. It was a report to the Chief of the Defence Force and is not a public report at this point in time.

In that particular report, one of the things that our team identified as a major concern with respect to boards of inquiry was illustrated by the Butterworth board. That major concern is the failure with respect to boards of inquiry for the incident to be scoped

when determining whether or not it is necessary to hold a board of inquiry or appoint an investigating officer.

If a proper scoping of the incident is conducted then one can obtain some genuine idea of the actual and real issues that need to be investigated, and so they can be confined. If you have a realistic indication of the number of witnesses and of the number of persons who are likely to be affected, those matters are very important things in determining the nature of the inquiry that you are going to conduct. Certainly, it gives you a good idea of the length and cost of the inquiry. As I say, all those things are best illustrated by the Butterworth board.

One of the major difficulties with the terms of reference at the present time is that where there is a major incident, there is a great tendency, almost universal I found, for the senior officers who are responsible for appointing boards of inquiry to rush to prepare some terms of reference to indicate that there is going to be some particular type of inquiry just to be able to demonstrate that they are acting promptly and decisively in relation to the matter. I made some reference to that in the submission. That seems to be an important factor.

The result is that you have hastily prepared and ill-considered terms of reference without any real scoping of the activity. That is what happened with the Butterworth board. The inquiry was not scoped. The terms of reference were thrown together and attached to them was a redress of grievance. That redress of grievance, as I mentioned in the submission, and I am sure others have done so too, raised something like 150 issues.

Had the matter been carefully scoped and considered before the terms of reference were prepared, the real issues could have been identified. The terms of reference would have been much tighter and more confined. There would have been an indication as to where the matter might head because of the number of persons who might be affected. Because there was no careful preparation of the terms of reference, a whole host of people ended up being involved.

Once you have a number of people who are affected being represented, lawyers having the ability that they have to make simple matters complex, the thing gets out of control and it is difficult to manage. You then have a board which perhaps should have taken two to three months taking many months. So this question of the preparation of terms of reference and scoping is terribly important.

Our little team, our Ombudsman Implementation Team, made the recommendation that there needed to be some external assistance provided to commanders who generally do not have the knowledge and experience in relation to these very serious matters. After all is said and done, the real disasters like Black Hawk and latterly HMAS *Westralia* are thankfully fairly rare. So most commanders do not have a great deal of experience in dealing with those sorts of things.

What we recommended in our report was that it should be mandatory for the head of the complaint resolution agency which has been formed, or some other officer, to be consulted in relation to matters of unacceptable behaviour—which tend to be complex personnel related matters—incidents which are likely to attract the attention of the media or have the potential to embarrass the ADF, and matters which relate to personnel incidents which are likely to significantly impact upon a member's career or their career management. I feel it is terribly important that there be great care taken to scope the inquiry and to prepare carefully considered terms of reference.

I have no close personal knowledge of the HMAS *Westralia* matter which is, of course, still current, but I did see a draft of the original terms of reference for that board of inquiry. I have to say they highlighted all of the worst points, all the more serious matters, which the ombudsman identified in her report. In other words, whilst it is true that the new draft manual which is proposed contains quite detailed guidance with respect to the terms of reference, although it was not available to the appointing authority, the fact is that as things are and without much better guidance we are not improving, and we certainly need to improve in this area. I just mention that as a very important matter.

Another very important matter that we identified in our team was the need to monitor and supervise boards of inquiry as they progress. In the past that has not really been done at all. There is an argument that is put forward that one should not and cannot interfere with investigating officers and boards of inquiry over the manner in which they conduct their inquiries once they commence those inquiries. It is my view that that is not a correct view and I do not believe the Defence (Inquiry) Regulations actually say that.

It is certainly my view that it is very important that appointing authorities, who are the officers who have appointed either an investigating officer or boards of inquiry, keep some supervision of the matter as it proceeds. If we refer to the Butterworth board, I do not know the precise amount that board of inquiry cost but had I been the appointing authority, once it passed something like the $1.5 million mark I would have been inclined to say that enough is enough.

Certainly I would have been wanting to say to the president of the board of inquiry, 'For Christ's sake, where are you going with this? Why is this now taking nine months?' One could then revisit the terms of reference and appropriately amend them. I appreciate that persons who are affected are then going to say, 'I am not going to get justice if you amend the terms of reference,' and someone else will say, 'Now that I am involved, I am not going to get justice.'

That is true, but if you take that particular matter, and if you have some knowledge of it, I appreciate that it is perhaps something of an oversimplification but we are really dealing with the management ability of Squadron Leader Vance to manage and command his unit. Because of the nature of the terms of reference all these side issues were brought in and all these other people became involved.

Of course, as one would see from the submissions that have been made to this committee, a great deal of heat is generated in these sorts of matters and not a lot of light. People, once they are caught up in it, feel that they have to justify their positions and so forth. If the thing is being monitored then the appointing authority, I would suggest, is in a position to perhaps confine the issues that are being dealt with by the board.

If the president objects to that, it is open to him when he produces his final report, I would suggest, to say, 'I felt confined because the appointing authority did not permit me to investigate a particular matter.' If that is so, and if higher authority believes, in reviewing the matter, that it is necessary for some particular aspect to be further pursued, that can be done. It is terribly important, though, that investigating officers and boards of inquiry be kept on track.

ACTING CHAIR—Colonel, if I could interrupt you at this stage, most of what you are saying now is actually in your report. It might be beneficial if we could move on to questions, and then you can elaborate, and we will take it from there.

Col. Northwood—By all means.

ACTING CHAIR—My question was actually along the lines that you are proceeding with. You state in your submission that 'military justice can never lose sight of the chain of command and its responsibilities', yet the interconnectedness of the chain of command and the administration of military justice seems to be one of the key issues giving rise to grievance from members and ex-members of the ADF. How might this issue be addressed? I know you have covered some of it. Adding to that, what would be the benefits of setting up a position of Director of Military Prosecutions? In your answer, could you address your opinion as to why the Chiefs of Staff Committee disagreed with Justice Abadee's suggestion to this effect? The whole thing is encompassed in this. In other words, what do you think should be done?

Col. Northwood—My recollection of Mr Justice Abadee's report in this respect was that he did not say that this was a 'must have'. I think he said that it would be rather nice to have, or prudent to have. As for my own view—to deal with the latter part of your question first—I think that the Chiefs of Army, Navy and Air Force see this as an interference with the powers of command and that they will always resist anything which seeks to take away what they perceive as the necessary powers of commanders.

In fairness, bearing in mind that discipline is something that has to be exercised both in peace and war, one wonders just how effective it would be to have a director of military prosecutions office in a time of major war, where the hostilities may be spread over several theatres. But, having said that, certainly so far as I am concerned, as we are now in a time of deep peace, there is a place for a director of military prosecutions. I certainly believe that it would be some clear evidence that there was an independent approach to prosecutions and that an independent body was looking at the matter. It would

also provide some consistency with respect to prosecution. They would be the main matters.

Of course, they would then be remitted to a convening authority, for the convening authority to actually set up the trial. I have certainly known of only a few examples of cases, over many years now—although not a case of people being prosecuted where they ought not to have been prosecuted, because they generally would be acquitted if that were to occur—where I believe that senior officers have not been entirely honest in the way they have dealt with the process. There are very few such occasions, but they do exist. There is, at this stage, real merit in having a director of military prosecutions as a separate officer.

Senator BOURNE—We have had a lot of evidence about terms of reference for inquiries, and I thank you for your comments on those, because that is a really important part of this. The catch-all that seems to turn up in most of them is obviously a problem. Do you think that the new draft manual, *Administrative inquiries and investigations in the ADF*, covers adequately what should happen—especially if, as you say, everything has to go through a complaint resolution board and have a scoping study? If you were setting up a board of inquiry based on those three things, do you think that the terms of reference would probably then be quite adequate?

Col. Northwood—I really think there would be great improvement. I must emphasise that I believe that the scoping itself should be conducted within the particular service and with the particular unit responsible. I have no difficulty with the appointing authority and his staff—and hopefully that would include a legal officer—preparing the draft terms of reference, but it is important that they get a tick in the box, as it were, before they are finally settled, from someone who is an expert in the area and who is dealing with these things all the time. Really, there is not and should not be a great deal of delay involved in that process, particularly with a major disaster. That is something which would be given the highest priority and should be able to be resolved within 24 hours or so.

Senator BOURNE—Exactly.

Col. Northwood—But again, you see, there is resistance from commanders, because they like to think that they can manage things all by themselves and handle things themselves, and the ADF is a 'can do' sort of organisation, and everybody thinks he 'can do' and does not need assistance. If I can trot out another one, half the time the case is that they do not know what they do not know, and so they blithely go ahead—and that needs to be constrained.

Senator BOURNE—You also make the point, and I think it is a very good one, that judge advocate and Defence Force magistrate numbers are dwindling: there are fewer and fewer. Can you see a way that we could encourage having a larger pool of people to

be able to do this? Also, what sort of training do you think would be appropriate for such people?

Col. Northwood—The question of appointing people to be judges advocates and Defence Force magistrates is not a terribly difficult one. As I see it, the real problem at the moment—and I think it may have come through in the submission, and I hark back to the earlier part of the submission where I talked about the nature of military justice and so forth—is appointing people who have the right balance of military experience and legal experience. That is the real problem. As we came out of Vietnam, we had a whole host of people who were either already young lawyers or going into law, and young people who stayed on as reserve officers. Although I did an earlier form of national service, I am one of those people. I became involved in the military through national service.

It is terribly important not simply to appoint a magistrate of a local court, nor some other lawyer who thinks he might like to be a Defence Force magistrate. It is terribly important that they do have some military experience. How do we get that to them? Certainly, training is very important. If we are not getting people who have the military experience, then I think we have got to be prepared to put some resources into ensuring that they get some of that military experience.

You do not get that experience simply by going for a day on a warship outside the heads or by doing a three-day exercise with the army or by going for a fly in an aeroplane. They need some worthwhile military experience, so that they do understand at first hand the problems of commanders at various levels and also appreciate the importance of relative rank, the importance of command and the instinctive obedience to command that is necessary in a military unit, if it is to be an effective fighting force. Those are the sort of things that we have got to get to them.

In addition, we have also got to give them a better grounding, and keep them up to date, in the Defence Force Discipline Act and the rules and regulations that are associated with it. At the present time, as I indicated in the submission, they get something like a day and a half once every three years. I do not care how good the lawyer is—and, in a time of great speciality, people have their own particular specialist areas—they need to be brought back and given some proper formal training in relation to some of these things. It is not going to be terribly hard to select the people, but there has been no effort to do so in recent years, and I have flagged in my submission that the time is coming when this is going to be a real problem for us.

Senator BOURNE—Yes, we have got to do something about it now, obviously, before then. You were talking about personnel problems and the need to have an administrative solution when people do not want to go on with some sort of huge civil case—and I can perfectly understand that you would not want to. It also struck me when reading this that you were suggesting—you may not have been, but I thought it was a good idea—that there be a more formal get-together, similar to what HREOC does now,

for people to talk out the more minor problems, to be able to resolve them without them actually having it get bigger than Ben Hur in the end. Was that the sort of thing that you were thinking of?

Col. Northwood—Yes.

Senator BOURNE—If it was, what sort of model would you see?

Col. Northwood—Because it was raised again in the ADFA review report, I would draw your attention to chapter 6 of the report—in particular, to paragraphs 6.38 to 6.42, where this issue is again dealt with in a little more detail. Having said that, we have the alternative dispute resolution techniques available to us in mediation and conciliation. We need an informal sort of inquiry so that, when an incident occurs, the person who is identified by the commanding officer as the one to conduct the investigation can, unconstrained by the defence inquiry regulations, actually go to people and say, 'Look, you do not have to answer this question. I have been asked to give a brief to the CO in relation to the matter; and, if we can reach some accommodation, we want to try and do so without formality. What is the gravamen of your complaint?' He or she can then say what it is.

Without requiring people to participate in any particular sort of mechanism, you could have a dialogue. I know it sounds a bit airy-fairy. In the submission, I made the point that over and over again the young women at the Defence Force Academy said, 'Look, we do not want to take action in the civil courts. We do not want this person to be charged with a military offence. We just want the behaviour to stop.'

Senator BOURNE—Exactly.

Col. Northwood—That is all they want. If there were an informal sort of inquiry that could be conducted—and then it might just end up being a two-page informal report—the CO can then get the particular alleged offender in and say, 'I have got this information, and I have to say that on the face of this you have got a problem, and we have got to resolve it.' But that is as far as it goes.

The great problem that we unearthed at the Defence Force Academy was the unwillingness, because of the strength of the culture, of young people to come forward. If they were confident that, when they brought these things to attention, the person was not going to be formally charged—which in turn brings the full weight of the cadet culture back down on them so that they are ostracised, victimised, marginalised, subjected to adverse reporting and so forth—that would go a long way to both satisfying the complainant and reducing the problems associated with this culture.

Senator BOURNE—Exactly. Thank you.

Mr HICKS—I found your submission very interesting, and I thank you very much for it. For the record, in relation to serious sexual assault matters or other serious misdemeanours, what was the situation that applied pre-*Swan* as compared with post-*Swan*?

Col. Northwood—The situation pre-*Swan*, as I recall, was that there was no requirement that we refer matters of serious sexual assault to the civil police. But I can say, having regard to my experience, that where there was an allegation of rape the civil police were invariably called in immediately. That was, to my recollection, a universal rule. I am speaking with respect to Army, and we did not have the problem that Navy has of warships deployed overseas. That was the invariable rule then.

I am not suggesting that we ought not still adopt that approach. Certainly, we still must in those serious matters. But, where the complainant does not wish to proceed, the commanding officer or the commander at the appropriate level ought to be able to conduct some sort of investigation and, if necessary, take some sort of administrative action. For example, I can recall a particular case where the big problem for one young woman was that the person involved was in the next building and on a slightly different floor, and so she had to look out onto his window every day. Or else it might be that the young woman is going to lectures and he is in the same lecture group and she has to sit within 30 feet of him every day.

You tend to find that, after a short period of time, those young women start to show signs of psychological difficulties, which tend to manifest in a lessening academic performance and a drop-off in their officer qualities performance. It is a very difficult problem for a CO. After all is said and done, we still do have the principle that you are innocent until proven guilty. Nevertheless, there needs to be enough flexibility for a commander to be able to be more proactive in resolving the problem. For example, a recommendation might be that both of them leave the academy and complete their education elsewhere—which has happened on occasions with respect to young women, particularly. Does that answer assist you?

Mr HICKS—Yes. It is a difficult one. As you said, a person is innocent until proven guilty; yet, if a person is guilty of something like rape, which is a serious offence, but the young lady does not want to go to the civil court with it, it makes a very difficult situation for the administrator. Somehow or other, within the military system, they have to find out whether the person is guilty. It is a real dilemma.

Col. Northwood—It may be that you would want to conduct an administrative investigation to see whether you could improve the way you managed, for example, the accommodation or the working arrangements of the members of your unit, and whether you could make an arrangement to move the person to some other part of the organisation: all those sorts of things.

Mr HICKS—On the question of scoping, you were saying that a number of the officers involved in the inquiries would want to be seen to be doing something about inquiring into matters that were serious—loss of life and things like that in the service. Wouldn't a lot of that be political? I mean, you would have tremendous pressure from the media on the minister. For example, he would ring his defence force people and say, 'We have to sort this out and get it sorted out quickly.' I can see tremendous political pressure coming onto the military to do something about something that had happened. I wonder how the military would react or how the minister should react in a rational manner. Do you see political pressure being applied?

Col. Northwood—I certainly do. I think one of the best examples that one can refer to in relation to the very point that you raise is Black Hawk. If you take the preparation for the Black Hawk board of inquiry, I have to say that, because I have seen the scoping that they conducted, I think it was impeccable. It was put together very quickly. The terms of reference were well prepared and the board of inquiry was completed within three months. I know the scoping—this is another important aspect of it—was reviewed constantly as the board progressed to ensure that they were still on track.

If I might just take a moment, Black Hawk raises an interesting point. As I recall it, one of the main criticisms that came to Army, with respect to Black Hawk, was the fact that the systemic issues involved in that disaster were not addressed—in other words, the failure to supply sufficient resources to enable the helicopters to be kept in the air or to pay for training and the suggestion that the chief of the army, the minister, and so forth, were all involved.

One has to say that the systemic issues were considered and a conscious decision was made to exclude them and I would suggest, in the circumstances, quite properly. After all is said and done, what we were really concerned to know was why 18 soldiers, or thereabouts, were killed and why the aircraft crashed. Had a term of reference been included with respect to the systemic issues, we would probably still be conducting the Black Hawk inquiry, because there would have been a succession of chiefs of army. There would have been the old problems and the old sores would have been raised—with respect to the taking away of the helicopters from Air Force to Army—and the ministers would have been involved.

Again, this is a question with respect to the terms of reference. If this is a matter that needs to be investigated, some other board can investigate that. I do not have a difficulty with those things being excluded. That brought a lot of flack and there still has not been an investigation in relation to those matters. Again, that is a question of judgment for those who have the responsibility. I think it was quite proper and appropriate that that particular term be excluded. That is what I mean by crafting the terms so that the real issues are addressed.

ACTING CHAIR—As is always the case, father time catches up with us. I would

like you to give some examples to the committee of the problem areas within military investigations which could be improved with the release of the new inquiries manual.

Col. Northwood—What areas will be improved?

ACTING CHAIR—Yes.

Col. Northwood—Yes. There is much more detailed guidance with respect to the actual conduct of investigations by investigating officers. There is even a Q&A area there to deal with knotty little problems that they might strike in an investigation. There is much more detailed guidance with respect to the conduct of boards of inquiry. There is a short chapter of four or five pages devoted to the preparation of the terms of reference and the scoping of boards of inquiry. There is a matrix there to help commanding officers to determine which type of inquiry they might conduct. There is now a procedure to assist with a quick assessment of a matter to determine the way ahead. It is easy, I might say, with regard to something like Black Hawk, with 18 dead and so forth. It is clearly going to be a board of inquiry but it is much more difficult with respect to personnel related type of matters. There is guidance with respect to help them with that.

In the draft manual, there is a suggested procedure for monitoring boards of inquiry and there is a section on monitoring the implementation of recommendations, which is another important matter that I have not addressed, but which is a significant matter—in other words, ensuring that there is some mechanism there to keep reviewing the board findings to see that things are implemented, where they can be implemented, as quickly as possible. That has not been done formally in the past.

ACTING CHAIR—You seem confident that there will be an improvement.

Col. Northwood—I have no doubt that there will be a very significant improvement. Doubtless, with the new manual and its constant use, there will be further improvements. Certainly, it will be a vast improvement. What we found with our implementation team was that the best way to implement most of the ombudsman's recommendations was to prepare a new manual. By doing that, we were able to pick up most of the things. I started off somewhat sceptical about the ombudsman's recommendations but the more we got into it, at the end of the day, I thought she was about 95 per cent right in what she said and her recommendations were quite sound.

ACTING CHAIR—Thank you for your attendance here today. If you are able to provide any additional material, would you please forward it to the secretary. You will be sent a copy of the transcript of your evidence, to which you can make corrections.

Col. Northwood—Thank you.

[9.52 a.m.]

BROWN, Dr Roger Alasdair, Court House, Windsor, New South Wales 2765

ACTING CHAIR—Welcome. The committee may appear small in number but we are in very difficult times, as you can imagine. Nevertheless, it is still significant that the required number of people are here. I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect that proceedings in the parliament command. 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 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 committee will consider your request. We have received your submission and it has been authorised for publication. Would you like to make any additions or corrections to that submission?

Dr Brown—No, thank you.

ACTING CHAIR—I invite you to make an opening statement before we proceed with questions.

Dr Brown—I believe the actual details of what I propose are fairly thoroughly covered in the submission itself. I will not repeat it. It may be of some benefit to the subcommittee if I outline the underlying constitutional position.

You may well be fully acquainted with it in any event because it is really that, as a key issue, that leads to my suggestion that the present process needs to be substantially changed and could be changed without great difficulty to provide a better process for dealing with what are, in many cases, quite serious offences. Would that be of assistance?

ACTING CHAIR—Yes.

Dr Brown—Certainly, the position of courts martial is, obviously, one of great antiquity. In Australian legal history, their validity was first challenged during the Second World War before the High Court and, needless to say, in the circumstances in which the court found the nation and itself, it was most unlikely at that stage to disturb a process which had been in operation since federation and which was clearly appropriate for the functioning of a wartime army. The matter again came before the High Court in 1989 in the matter of Tracy ex parte Ryan. The court there started to show signs of no longer holding firmly to the view that was indicated before.

The primary issue that was raised is whether service tribunals, courts martial and Defence Force magistrates are exercising the judicial power of the Commonwealth under chapter III of the constitution. If that is the case, the judicial members of those bodies

have to be appointed in accordance with the constitutional requirement—that is, up to a fixed retirement age and subject to removal only in accordance with those provisions. Defence Force magistrates and judge advocates are not and have not been appointed in such a manner. They are, at present, all serving or reserve military officers who are subject to removal from the panel of judge advocates or Defence Force magistrates by command decision. On that basis, they have no independence, in my view, from the military command structure. They all, of course, as reserve officers, hold rank and are subject to command in the ordinary way for any officer.

The matter came again before the High Court and, at that stage, the court split on a basis of, I think I can summarise it as, a 2, 2, 3 decision. We do not have a clear position as to what matters are subject to military jurisdiction only or what matters are subject to a combination of military and state jurisdiction. There the position remains with three justices of the High Court taking the view, though a minority view, that the process was unconstitutional and there was a requirement that the judicial officers be appointed in accordance with the constitution.

The membership of the court has changed substantially since then. It is impossible to say what the present court's view of the position may be. Certainly, a shift from a seven-nil position to a four-three position, with the majority four split quite radically as to how they would approach matters, suggests that the case will come back before the court again. There must be a prospect, and I would never wish to seek to predict the outcome of a High Court decision, that the entire military justice structure, as it presently stands, could be declared unconstitutional.

Consequently, the proposal that I have made seeks to avoid that possibility coming about, but I think, even if it were not to come about, there would be room for improvement of the way the essentially criminal matters, and many of them are, that come from the ADF could be dealt with, with greater fairness to all concerned, with greater and clearer public independence of the tribunal's dealing with offenders and, ultimately, I believe, with a great saving of money and time for all involved and for the Commonwealth. I do not think I need to elaborate further upon the matters in my submission because that is really background.

ACTING CHAIR—Thank you. Perhaps we will give you an opportunity to elaborate on the matter further. You suggest that, in the continuing absence of the federal magistrate's court, the Commonwealth commission a number of existing state magistrates with military experience as military judges able to exercise the powers under the DFMs and the RCMs.

Dr Brown—Yes.

ACTING CHAIR—Would any additional or ongoing training be required with that new system, as far as the magistrates were concerned?

Dr Brown—I sat through part of Colonel Northwood's submission and I would have to agree with him that, for any specialist area—and this would be a highly specialised area—continuing training would certainly be required. Military court matters are not so frequent as to give or create, in my view, the need for a full-time position in that regard, and certainly one could imagine, given the way they are scattered around Australia, that you could have a full-time military judge spending most of his or her time travelling, rather than actually dealing with matters.

Senator BOURNE—This seems a very interesting system for peacetime, which we have now. How would you envisage it working during wartime or when there was some sort of conflict overseas that had to be dealt with and people were overseas? What would happen there?

Dr Brown—I think there are a number of possibilities. I have only framed it for a peacetime position, which is clearly what we are in. It seems to me that, when it is well established and working, it is something that is capable of being transported. We take all sorts of other specialist services overseas at need. There is no reason at all, for matters that required it, why a military judge could not be transported to an appropriate location to deal with matters and deal with them expeditiously. Certainly, I would be of the view that it could work in all circumstances. I had not attempted to expand it to wartime situations only because, if it were going to be operational, as with all matters I would very much want to see it thoroughly tested in a situation where the stresses on it are somewhat less than very early on in a conflict. Certainly, my long-term view would be that it would be capable of replacing the entire structure.

Senator BOURNE—What is your view of a director of military prosecutions, similar to the DPP? Do you think that is a good idea, and would it work?

Dr Brown—My objection to it would be that it is simply a duplication of function. We have a large and well-established Commonwealth DPP's office where officers who, if this were to become part of their bailiwick, would be able to be appropriately trained in it. Certainly, the volume of material is unlikely—even if the army and the ADF as a whole were to expand substantially—to justify a substantial office being created for a director of military prosecutions.

We have people skilled in prosecution work and, to a very large degree, the matters that we are considering that are going to go to a court of any sort for hearing are basic criminal offences. Some of them are very special: matters such as looting, which only occurs in very peculiar circumstances; and mutiny, which in almost all cases one would desire to have tried—certainly from the defence point of view—well away from an immediate situation of conflict. You would do the sort of thing done with the *Bounty* mutineers and bring them home to try them, rather than to try to deal with them out there. Certainly, it is a situation where, overall, I think the process would work perfectly well overseas and could be transported without great difficulty.

Senator BOURNE—Yes. Could I ask one more question. We have heard a great deal about the case of Mr Findlay in Great Britain. Do you think that is relevant to what you are suggesting here?

Dr Brown—The structure I am suggesting is somewhat different from everybody else's, largely because it fits very well into what we have already. Certainly, with all large organisations and particularly with the military, the less you tinker with things the better. Once you have made major changes it is best to let them settle in for a while, so that people get to understand them. The British have always used their official judge advocates; the Americans use the Judge Advocate General's Department, with officers who are actually part of the military as well. I am proposing a complete separation of these members from the Defence Force. The English have that model.

My feeling is that particularly where the English are dealing with matters, as they have done with the British army on the Rhine, where they have regular local judge advocates constantly dealing with these things, that experience greatly enhances their ability to deal with them expeditiously and fairly. However, they remain subject to control from outside in a way that properly appointed independent judicial officers are not.

I was very aware earlier of Mr Hicks's questions to Colonel Northwood with respect to the question of political pressure. Political pressure can be applied just as much in military prosecutions, if they are thought to be of significant trouble to the nation, as it can be applied in inquiries. Again, it strikes me as being fundamental to the fairness of the process that the judicial officers are entirely independent, as far as that can be achieved. The touchstone of that has always been in our system the independence of judges from the executive to deal with the matter judicially and not otherwise. This model, I hope, has those benefits over and above both the American and British systems. I do not think the British system is a good model to compare it with. I hope it is not, anyway.

Mr HICKS—Dr Brown, one of the things that concerns a lot of people—and this becomes evident in some of the evidence put forward—is the lack of people skilled in military law. I notice that you were saying that you could perhaps have someone from outside the military service being given appropriate rank, so that, as you say, military judges could not be, or could not be seen to be, 'in any way subject to the military's chain of command.' But the military has a special culture, doesn't it?

Some of the submissions we have are saying that something that may not in civilian terms be considered serious—for example, stealing from lockers, and things like that—could have a dramatic effect on discipline within the armed services. We are not dealing with the same culture, so that can be handled within the military force. But, when it becomes a serious matter, you are saying to take it out to a more civilianised court, if you want to put it that way.

The big trouble is that the military is a special culture. The defence of the nation

depends on it, you could say. I suppose the military will consider some things, even serious matters, even more seriously than a civilian court would. How do we handle that situation? How do we handle the fact that we are talking about the reserve? I understand that you are in the reserve forces.

Dr Brown—That is right.

Mr HICKS—I have also been in the army reserve, but I would never consider myself, even in the army reserve, to have had—although I would like to have had—that full inculcation of the culture of the military. I find it very difficult to think that a civilian court could handle things of a military nature.

Dr Brown—One particular suggestions that I made, Mr Hicks, was that the people appointed to this office should have military experience. I have been an army reserve officer for some 18 years. I would concede immediately that my experience of the services falls far short of that possessed by Colonel Northwood, who not only had been in regular service in Vietnam but had also been associated with the army for years.

Nevertheless, with the vast bulk of these things, service knowledge and an understanding of the importance of the matter ultimately come to be used at the sentencing stage. What one should be doing, I suggest, in the trial of offences comes back to a principle to which I hold very dearly: service personnel, when they are dealt with for infractions should not be dealt with any less fairly than anybody else is dealt with for any other crime or any other offence or any other circumstance.

We owe it to service personnel to give them at least as good a system as everybody else has: as you say, there are many things which they may do which will have a very dramatic impact upon them in a way that would be unlikely in civilian life. A soldier convicted of barrack room theft would, in the normal course, be dismissed from the ADF, and that would be an entirely proper course. A person convicted of stealing from a friend in civilian life is most unlikely to lose his job over it. He might lose it if he stole from his employer. Oddly enough, a serviceman who steals from the Commonwealth does not always get dismissed. We do certainly see those matters as different.

My proposal is that the military judges should have military experience and that certainly they should undergo continuing contact with the ADF and continuing training. But at the end of the day that is largely and most importantly directed towards sentence. When that comes, there is a much greater freedom to put before the court all the matters that should be taken into account on sentence. I have taken particular issue on this question of dismissal from the ADF, because what tends to happen is that it becomes a massive additional administrative penalty inflicted upon a serviceman months after the event. But that is only one special aspect of it.

I entirely agree with you that there is a special culture. There must always be that,

given the nature of the job that the ADF does; but that does not, to me, detract from the fact that first of all a trial must be conducted as objectively, independently and fairly as possible, and then all matters that are relevant to sentence can be put to somebody who has some substantial military experience and can be expected to understand that material and put it into an appropriate context when dealing with the offender. Does that answer your question?

Mr HICKS—That is good, thank you very much. Earlier today you raised the question of the situation of sexual assault and rape within the forces and the difficulty faced there in getting to the truth of the matter, in that young women in particular do not want to go to the civilian court and so they probably brush over it and let it go. How would you handle that within the military?

Dr Brown—Let me say that, in my civilian occupation as a magistrate, I see that happening just as much on the civil side. There are very many matters that appear by way of complaint but are then withdrawn, for reasons that I never become party to, although I obviously have my thoughts about them. One thing you cannot do, ultimately, is legislate or create a structure in which people will be able totally freely to decide whether to make a complaint and pursue it. We can give them the best possible assistance and the best possible facilities, but that always has to be consistent with the right of the defendant to be able to defend the matter properly. Certainly, as we advance matters in this state in the law of evidence with respect to trial of sexual assault offences, the balance can be swung in such a way that a defendant starts to think he is not going to get a fair trial.

You cannot make people pursue their complaint. Certainly, if it were a matter as serious as sexual intercourse without consent, it is very difficult to provide a process where something which the general criminal law treats so seriously, in my view, could be fairly dealt with by an administrative or a warning process. You are raising an allegation of a crime which, even in my early days in the Australian Capital Territory, formally attracted the death penalty. It is not a matter which is capable of, at that extreme, being dealt with by an administrative process. I should say that that had its own side effects, because juries would never convict in the ACT of rape. They had their own view of the matter.

ACTING CHAIR—In times of peace, how do you suggest that the application of military justice should be altered, or should it be altered?

Dr Brown—Apart from the proposal I am actually putting, perhaps you could clarify the question.

ACTING CHAIR—In your submission you talk about the application of military justice itself in times of peace. Should there be a differential between the application of justice in times of peace or when the military are at war?

Dr Brown—Short of battlefield necessity, and even that is itself substantially limited by international law concepts as to what may fairly be done, if we are dealing with crime then two things tend to need to be done when handling it. It needs to be dealt with dispassionately and it needs to be dealt with calmly. That is rarely something that is likely to happen in a forward edge of battle area in the heat of conflict. If it is a matter that requires the attentions of a criminal court of any nature then certainly it is going to have to be brought away from the immediate conflict zone, if we are dealing with matters overseas, and dealt with some time later.

There will, of course, be matters of battlefield necessity, but we are long past the days, I hope, where soldiers were shot on the spot for not going over the top of the trenches. We would rather deal with them rather more compassionately these days than taking that attitude. I certainly would not be one to favour any approach that left a person facing a very severe penalty to be dealt with in a very summary way.

ACTING CHAIR—There has to be a differential, you would agree. What would be any additional benefits under your proposal?

Dr Brown—The primary benefits that I am suggesting are, firstly, that one has a completely independent trial structure which is designed to guarantee fairness to the accused and a genuinely fair hearing to the state, in the form of the Commonwealth, independent of the pressures that might occur in a conflict and also independent of all the pressures that currently are capable of applying, whether directly or indirectly, to judge advocates and Defence Force magistrates who reside in the normal part of the chain of command.

It seems to me fundamental that, if we have a justice system that is to be seen to be fair and independent, those who are exercising judgment should be outside of the chain of command completely. As I said, they must have military experience, but we do that as a matter of course. We do not appoint Family Court judges from the ranks of workers compensation lawyers. We pick people with skill and we try to make sure that those skills are maintained. Certainly a military judge would require military experience and continuing training. I would suggest that those are very valuable things for the judges, in any event.

Fundamentally, I think the benefits of this proposal take it out of the chain of command and create an independent structure. They also create a structure that is not subject to constitutional challenge, I hope. I have tried to avoid that as far as possible.

I think they are also likely to have some substantial benefits in terms of the Commonwealth's position in managing how it deals with crimes of all sorts. If the Commonwealth DPP is the prosecuting agency dealing with all of these matters, not just civil matters but military matters as well, then a degree of skill and experience will develop there that will assist in these matters proceeding expeditiously and fairly.

I just take a recent example. On my last stint of reserve service I organised a trial by a Defence Force magistrate. I did not participate in it; I was involved in the administration of it. The paperwork for the administration is horrendous. Simply the issuing of orders to get everybody to attend at the one place, doing the basic organisation for rations, for staff, and getting the Defence Force magistrate certainly was not a quick process. I had originally advised the commander that certain of the charges should be dropped, and they were. The defendant went to trial on the single count of prejudicial behaviour. This was a matter which, if it had come before me in a civil court, would almost certainly have attracted a plea of guilty and been dealt with by way of a fine. He was an inmate in detention who had been observed having sexual intercourse with his girlfriend. He thought nobody could see them. There were no standing orders to prevent it and he was charged with prejudicial behaviour. His commanding officer indicated he would impose an elective punishment and the defendant exercised his right to trial. At that point there was no way that that could not proceed.

I am advised that the trial on this single count lasted for six days. The cost to the Commonwealth—a rate of around $7,000 a day was the best estimate I could obtain—was about $42,000. This was for a matter which, if I had heard it as a magistrate in the local court or as a properly commissioned military charge, would probably have disappeared in half an hour at the most. We end up with a system that at present tends to lend itself to that because everybody essentially in the process is an amateur. The Defence Force magistrates are mostly practising lawyers but they are amateur judges. The prosecuting and defending officers are usually practising lawyers and to some extent they are certainly not amateurs in that regard, but we are almost all reservists, so our military backgrounds and our immediate availability to the service is limited. The entire process was just ludicrously complicated and unbelievably expensive. I think all of those would essentially be done away with if the proposal I am putting in were to be adopted.

ACTING CHAIR—It would seem there would still be a problem there, with due respect, Dr Brown. For instance, in a conflict like Vietnam, and more especially now with the influx of females into the ADF, how do you see cases dealt with in what would be a forward position, in the case of Vietnam, of sexual conduct that would be considered prejudicial against military conduct? How do you see your system dealing with a sexual complaint in a forward position, if the commanding officer would not be allowed to deal with it?

Dr Brown—I would be very concerned if the commanding officer did deal with it if it is a serious complaint. What is he going to do? The present penalties available to him under the DFDA are relatively minor. If it is a serious sexual assault, they hardly recognise the seriousness of that. Certainly, if we have an established force overseas, it is entirely feasible to have a military judge either available on stand-by or, with a large enough force, present. We have regularly flown judge advocates to New Guinea, Malaya and Vietnam itself to deal with courts martial there. There is no reason why they cannot be done there on the spot. Certainly, if there are local witnesses, that becomes almost

essential.

You have the advantage of still having somebody who is experienced and skilled in the handling of courtrooms and dealing with the process of taking evidence to ensure that there is a speedy and fair trial for the defendant, even if it is in the back of the standard base area. If a committee like this can operate in a room such as this, a court can operate almost anywhere.

Mr HICKS—Given the perceived shortcomings of the system as it is—obviously that is why we are holding the inquiry to see whether there are shortcomings and what they are—what is the general consensus? With your experience in the reserve forces, have you noted any cases of injustice towards defendants who may have had problems in the ADF? Is there a general perception that there have been injustices on people who have come before the military courts? What is the general feeling? I do not want to know individual experiences but what is the general feeling amongst the legal fraternity?

Dr Brown—I have to say that it is very difficult for me to answer that. The situation with courts martial is that, because you are creating them ad hoc on every occasion, with a panel consisting of officers who may never come together again and who may never have been together before, the ultimate complaint of most defendants would be that they have been punished too severely. The courts martial have a bit of a tendency to be heavy handed, certainly by comparison with the scale of penalties that I would be expected to impose for similar matters in the civil court. I do not have any complaint about that, having prosecuted and defended a number of courts martial.

The military does have its own culture and its own special needs. To put a matter sufficiently seriously to go to a court martial to then have it dealt with by a slap on the wrist is in my view very bad for discipline generally within the service. But, that apart, I cannot really offer any comment. My involvement, especially since I came on the bench, in actual trial proceedings has been nil, as it should be. I am really not in a position to indicate anything more than that matters do get taken to the Defence Force Discipline Appeals Tribunal and complained about there. Sometimes there are some fairly strong comments made.

I think it is also a case that matters are not so common that there is a widely established view one way or the other. We have quite a panel of available DFNs and judge advocates. So one does not tend to develop a clear picture of the sentencing attitudes of any one or the other. I suppose the one comment I would make is that it appears that our military justice system is viewed as being far too legalistic to that extent, perhaps leaning too heavily on the side of defendants. It is not a view I share but I believe it is fairly widely held.

ACTING CHAIR—Just one last question affecting your own profession. It has been put to me that part of the problem with a new system in the defence forces—and you

have touched on it—is the differential in your own profession of the sentences handed down by magistrates. We see every day in the paper comments that, for any nominated offence, the sentence varies from the harsh to the ridiculous. I think you would probably agree with that. In the defence forces the perception is that there are laid down guidelines—whether they are right or wrong is immaterial at this stage.

For instance, if you biff a senior officer and you go to court martial, it is presumed that a certain sentence is going to be handed down, whether it is dismissal or six weeks in the jug or whatever it is. There is a perception of the sentence that you are going to get for specific offences. With the lax sentences handed down by magistrates, the danger is that lighter sentences could be given to Defence Force personnel, therefore breaking down discipline within the defence forces. Apparently that is a perceived worry for Defence personnel.

Dr Brown—It seems to me that when you start any new system, it will take some time to find a level. As I said to Mr Hicks, when we deal with somebody for barrack room theft, it may be a petty theft but, in terms of the army's view of it—I have no doubt the other services take the same view—it is an extremely serious undermining of the trust that is necessary between soldiers.

ACTING CHAIR—Because of the living conditions?

Dr Brown—Yes. One would normally expect dismissal from the Defence Force. In earlier days, one would have got a dishonourable discharge.

ACTING CHAIR—Is there not a danger that outsiders, like magistrates, might look at it more leniently, therefore breaking down that—

Dr Brown—This is why you need to have people appointed to this office with military experience and certainly some continued training, because it is those aspects of how a disciplined force has to be held together and what is important to its discipline. We are certainly very aware of that. It is a very different situation to be dealt with from the person who comes in for stealing $200 from mum and dad, who usually do not want to prosecute, or stealing $200 within the army.

On the other hand, there are going to be situations where, for example, the discharge of a firearm would probably be dealt with more seriously for a civilian than for a person in the army—it is the nature of the business that firearms go off. We punish unauthorised discharges fairly severely but I would imagine a civilian letting off a 7.62-millimetre Steyr in public would get a much heavier penalty from me than a serviceman doing the same thing. They will differ; they must differ.

ACTING CHAIR—With all due respect, you run the risk of punishment being dispensed by magistrates on two levels. You are going to have two levels of justice,

virtually. You have one for the Defence Force, dispensed by a magistrate, and the same magistrate has to dispense different sentences for a civilian.

Dr Brown—I do not see that as a problem. We do it all the time. I can have a person charged with stealing under the New South Wales Crimes Act, where the maximum penalty that I can impose is two years. I can have a person charged with stealing under the Commonwealth Crimes Act, where I think the maximum penalty that I can impose is 12 months. I will sentence them differently. Parliament has expressed a view as to a different range of sentencing and I will approach it appropriately. If the Commonwealth says that in its view stealing Commonwealth property is a less serious offence and the only measure we are ever given as judicial officers is the maximum penalty then of course we will approach it as a less serious penalty to be imposed for what might be an identical offence.

We have a wide range of those variations between even provisions in the same statute. I can have somebody before me who has punched someone in the nose. If the nose does not bleed, he is charged with common assault and the maximum penalty is 12 months goal, which he is not going to get. If the nose bleeds, it is an assault occasioning actual bodily harm and the maximum penalty is two years goal. We get differential sentencing depending on the facts all the time.

ACTING CHAIR—Point taken. Thank you very much, Dr Brown, for your attendance here today and thank you for your frankness in answers to questions. If you have any additional material, could you forward it to the secretary. You will be sent a copy of the transcript of your evidence and you can make corrections of grammar and fact. As Hansard may wish to check some details of your evidence, would you please check with the reporters before you leave? Once again, thank you for your appearance.

Proceedings suspended from 10.35 a.m. to 10.47 a.m.

BARKER, Professor David, Dean, Faculty of Law, University of Technology, Sydney, PO Box 123 Broadway, New South Wales 2007

CROFTS, Ms Penny, Lecturer, Faculty of Law, University of Technology, Sydney, PO Box 123 Broadway, New South Wales 2007

MANION, Ms Danielle Kala, Former Research Assistant, Faculty of Law, University of Technology, Sydney, PO Box 123 Broadway, New South Wales 2007

ACTING CHAIR—Welcome. Is there anything you wish to add about the capacity in which you appear before the subcommittee?

Prof. Barker—I appear as the leader of research team which has ongoing research into military justice.

ACTING CHAIR—Thank you. 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 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 parliament. The subcommittee prefers that all evidence be given in public but should you at any stage wish to give evidence in private, you may ask to do so and we will consider your request.

We have received your submission and it has been authorised for publication. Would you like to make any additions or corrections to your submission?

Prof. Barker—I put in, and I think it has been distributed now, a 'brief for oral hearing', which is an additional four pages. At the beginning of that there are the errata to our evidence—three minor changes, minor typos, made to the original document. In addition, this document is, I hope, a further explanation of our written evidence: we are wishing to draw the attention of the subcommittee to additional matters which we have set out therein.

ACTING CHAIR—I move that the subcommittee receive as evidence and authorise for publication the submission from Professor David Barker to the inquiry into military justice procedures. That has been moved and seconded. There being no objection, it now becomes part of the submission. I invite you to make a brief opening statement before we proceed to questions.

Prof. Barker—Thank you very much. I would like to just explain to the subcommittee that this is part of an ongoing research project. So far, we have looked at the matters which we have highlighted with regard to the inquiry which is now taking place. We welcome this opportunity although, as you would appreciate, we have not

finally completed all our research in this regard, particularly in respect of boards of inquiry, courts of inquiry; that is something which we have not approached yet. We realise that when we look at the inquiry with regard to the Black Hawk helicopter disaster, if you would like to call it that, as it was, then there are 17 volumes there which still need to be gone through; the same with regard to the inquiry taking place in respect of what took place on the *Westralia*.

Having said that, can I also mention—it might be helpful—that I did two years national service in 1953-55 in the English army. That was as an other rank. I served as an other rank in the Army Emergency Reserve and then I served for 15 years in the Territorial Army, in the Honourable Artillery Company, as a sergeant. During my time in national service, part of that was as a court martial clerk in A branch and also as a drill and weapon training instructor. So I have had experience most probably at the lower end of military life and I think it is important for the committee to appreciate that.

The statement I would like to make today is that you can see that we have looked at this under three headings. The first is with regard to Australia's possible breach of article 14(1) of the International Covenant on Civil and Political Rights. We try and explore that in our statement and we have tried to expand on that in our supplementary brief. I think it is fair to say, as anybody would who knows about research in universities, that the expertise of Penny Crofts and Danielle Manion, who have carried out the basic research on that, is most probably much better than mine, although I hope that I can also answer questions relating to this topic.

Under the second heading, we then move to what I suppose is one of the very difficult areas for the Defence Force which is the service connection test. Reading through the reports of the Judge Advocate General, what I would say is that I think the Defence Force itself is under no illusions. It is a very difficult area, both with regard to Defence Force discipline but also in respect of what the constitution will permit within this area and the problem with regard to the chapter III courts and what constitutes the constitutional position in respect of courts martial at the moment.

The third is the position of the Judge Advocate General under the Defence Force Discipline Act and the conflict there with regard to the submission of his or her annual reports to parliament in that respect and to the minister. Thank you very much.

ACTING CHAIR—Thank you, Professor. It seems we have something in common regarding a previous life. Just to set the scene, perhaps I could ask you a question to put the thing in perspective. What are the implications for the Australian military of the outcome of Findlay v United Kingdom? Because all service officers are in a chain of command under the Chief of the Defence Force, could the Findlay case be taken to imply that no service member may try another service member?

Ms Manion—The issue with the Findlay case was really about the position of the

convening officer in that case and the powers that they have in relation to setting up the court martial. The issues there were not just the issue of a serviceman trying another service person, but just the connection between the convening officer in appointing those service people to try the personnel. That was the main—

ACTING CHAIR—Do you think that the case could imply that no service member could try another service member?

Ms Manion—I do not think it necessarily implies that. I think the issue is where the service member is under the chain of command of the person that appointed them. That was the problem there, that it was not necessarily the case that those service members would not be reporting to their convening officer, or that the rank of those service members was such that it was guaranteed that they would not be beneath the convening authority. I do not think it necessarily implies that, but I would submit that this committee should look at the issue of service members trying other service members from the standpoint of having an independent and fair tribunal that meets the guarantees that are provided in the civil system.The Findlay case did not necessarily imply that, but it was part of the issues in that case. There were a number of different—

ACTING CHAIR—'Independence' being the key word?

Ms Manion—The independence of those members? The factors in that case which went to whether there was an independent and fair tribunal were that the service members were beneath the rank or the chain of command of the convening authority, that the tribunal was convened ad hoc—it was not a permanent tribunal—and that the convening authority had the power to dismiss them at any stage. There were a number of factors that went into making it not an independent, impartial tribunal, and the fact that service members were trying other service members was just one part of that.

Prof. Barker—Could I ask Penny to add to that.

Ms Crofts—I would agree with Danielle.

ACTING CHAIR—The other question I wanted to kick off with, to give us room to manoeuvre, is this: although Australia is a signatory to the International Covenant on Civil and Political Rights, the ICCPR, is this only an agreement in principle, or is there a binding legal requirement for the Australian judicial system to comply with that covenant?

Prof. Barker—In our additional submission, we point out that, with regard to the first optional protocol, there is an obligation within public international law which is placed upon Australia to comply as an original signatory to the covenant. Although the Human Rights Committee in fact only expresses views, as a signatory to the original covenant Australia would have to take note of that. That is most probably the important element.

There is a difference between the way in which the Human Rights Committee of the United Nations operates under the covenant and the way in which the European Commission operates in that way. Nevertheless, I think it will be accepted that, within public international law, Australia would be under an obligation. I think that will be the way to accept that.

Ms Manion—If I could add to that: although we have not specifically enacted the convention under our law—we have made it a direct legislation—it is a schedule to another act. The reason for that is that Australia is of the opinion that our laws provided anyway for all the rights that were provided for in the ICCPR. In essence, Australia is saying we have complied with the ICCPR and it is part of our law.

ACTING CHAIR—Have you any comment on the opposition to Australia being too much involved in international conventions? It is not really popular in certain quarters at the present time.

Prof. Barker—We could ask Penny. We have highlighted the Toonen case in our supplementary submission.

Ms Crofts—I think what you are asking is more of a political than a legal question. However, I would point out that we have actually signed, we have ratified, the International Covenant on Civil and Political Rights. The effects of that have been felt by an individual applying to the Human Rights Commission, in the case of Toonen v. Australia which we refer to on page 2. In that case, although Australia would not have been compelled—there is no international prison for Australia if they had not actually complied with the ICCPR—the federal government obviously took it quite seriously and actually passed legislation which, effectively, overrides the Tasmanian Criminal Code provisions which were offensive under the ICCPR. So we would suggest that, the way that the international law operates, the ICCPR is quite a powerful instrument, particularly as we have actually signed the First Optional Protocol.

Senator BOURNE—I loved the way you said that there is a strong possibility that somebody might rely on the First Optional Protocol. I would love to see it; I think it would be really fascinating. But what do you think would be the upshot of that? We would have to change the Defence Force Discipline Act if that happened, wouldn't we? Do you have any suggestions for the ways that could be changed in anticipation, perhaps, that this might happen?

Ms Crofts—What we have suggested is to create a military court within the Federal Court. That would actually bypass the constitutional questions which are raised as well as the international issues. That is a way of ensuring the independence of the judiciary.

I heard before that one of the questions you were asking was: doesn't that mean

that there are two sorts of justice operating within the court? I would suggest that at the moment we already have two sorts of justices—one is military justice and one is civil justice. But at the moment the military justice does not have that guarantee of independence and does not necessarily have that guarantee of justice that you might be able to obtain within the civil courts. So that would be our major suggestion, which would then resolve all the issues that we have raised in our submission.

Mr HICKS—Did you agree with the decision in the Findlay v. United Kingdom case?

Ms Manion—Yes.

Prof. Barker—Yes.

Mr HICKS—Could you tell us why—apart from the international convention.

Ms Manion—The personnel in that case was being tried for a serious crime, and what was happening was that a person within the military was appointing the members of the tribunal that would try that crime. It was not that they found that the people that were trying that crime were subjectively biased against that person; but, objectively, if you looked at the principles of independence and impartiality which are required of a tribunal, they did not meet those requirements. The reasons they did not meet those requirements were that it was convened ad hoc; it was not a permanent establishment; they were within the chain of command; and there was a power to dismiss them at any stage. You had those connections of the convening authority who appointed the members to try that personnel, combined with the fact that he, effectively, assisted the prosecution in the essence that he could direct the charges to be tried upon and could request witnesses and those kinds of actions. There was the connection of that convening authority, who was essentially acting for the prosecution, having a role in appointing the members of the tribunal. It was that link which created the problem in the case, and that is why we agreed with it.

Ms Crofts—I would like to add that we are dealing with a hierarchical structure when we are dealing with the defence forces. Whilst we would not suggest that there is necessarily bias operating at the moment, there is a great deal of potential for bias to operate. Not only should justice be done, but it should be seen to be done. It is almost impossible to escape that hierarchical structure within the defence forces unless you remove the trial from that situation.

Mr HICKS—I have asked this question before. Do you have any instances where you think there may have been or there has been bias within the military in Australia? I am not talking about Britain or anywhere else.

Prof. Barker—I understand that. But I think this is the problem really, that you

have to remove the possibility of any suggestion that there will be bias. That is the difficulty. We know, and there are obvious examples all the time, that those officers who would be on the tribunal would be going up for having their individual promotion reports signed, maybe by somebody who constitutes the convening authority. I think that is really one of the difficulties. So, if there is any suggestion of bias, I think that works against the Defence authority. That is the problem. However genuine and however real will be views of those people who constitute that tribunal, that is the difficulty which arises at the moment.

Mr HICKS—So what you are saying is that there is no way that a person could be guaranteed justice within the military system? You have to get outside the military system because of the convening of the court? You are saying that it is an ad hoc court. I would have thought that that would have been a strength because you would perhaps not have some of the prejudices you might otherwise have had. But what you are saying is that there is no way you can guarantee justice for a defendant within the military system; you have to go outside the military system.

Prof. Barker—We then come into the second part of our submission, with regard to the service connection test. The difficulty is separating out those offences which would normally be dealt with by a civilian court—this is the real problem—from those actions which would constitute purely disciplinary matters. We know that is one of the real difficulties. The Defence Force is also a fighting force. There is a difficulty today because many of the aspects of the Defence Force take place within a civilian ethos, because of the way that everything is outsourced. There is a difference between what takes place within the civilian ambience of the Defence Force and, separated out, disciplinary offences and what might happen during times of emergency. That is the real problem, and that is the dilemma which we have got when we are looking at this today.

Mr HICKS—So, really, you are speaking mainly about serious offences more than just day-to-day 'stealing from the locker', as I put it before? You are talking mainly about something that is of a very serious nature? For example, you were talking earlier about the military culture and the fact, I suppose, that we expect more discipline and more self-control within the military force than we do in the civilian world. When we go to court in the civilian court that you are talking about, the Federal Court, just thinking it over I am interested in what you are saying. I would see that it would not be the same as military justice, and that is the whole purpose of the decision made in this case in Europe, isn't it?

Prof. Barker—When the Human Rights Committee have discussed article 14, even where they have said that article 14 should also cover military courts, that is a very wide definition because they are talking about guerillas and all this type of thing. I think it is a dilemma with which the Defence Force is faced. As an example—not apocryphal—I can remember four or five years ago when somebody in the Household Brigade who was the drummer at the trooping of the colour was charged for coming in on the wrong note. I would say that that is strictly a disciplinary matter. But the problem, when you are in the

area of serious offences, is trying to seek out whether theft should be a matter which is purely military discipline—I suppose it depends on the context—or whether it is something which should be dealt with within the civilian ambit.

ACTING CHAIR—We get back to judicial independence. The problem with that is one of the central issues that have been examined in all of the submissions that have been received by the committee. How might a lack of independence be avoided? Would the establishment of a dedicated military prosecuting authority answerable, say for instance, to the Judge Advocate-General, comply with the criterion of judicial independence?

Ms Crofts—That would deal with one of the central issues in Findlay's case, the centrality of the convening authority. But it does not bypass the issue of hierarchy and the potential for bias operating there. It would deal with a great many of the issues raised in Findlay but you have still got the hierarchy and thus a minimising of independence as well.

Prof. Barker—Within the Defence Force, with regard to the creation of the Defence Legal Office, I think that is one way they have tried to centralise the way in which cases are convened and the way in which cases are prosecuted. In my view, if the Judge Advocate-General is regarded as a chapter III judge, as I believe that he or she is, then in fact you could have chapter III courts which would ensure that independence. That could be a division of the Federal Court, as there have been other divisions of the Federal Court. I think that would resolve the dilemma.

ACTING CHAIR—You obviously heard the evidence given earlier by one of our witnesses, when I questioned them, with regard to the activity of the army in forward defence areas and the danger of magistrates from civilian organisations taking part in any trial where military discipline would be perceived to be breached. The worry of some of the question, to me, was a breakdown in military discipline in a case which perhaps could break security, for instance in a forward position. We quote Vietnam, because that is obviously a point in question. How would you see the independence of the hierarchy, as Ms Crofts has said, being taken away in a forward position? Would you still agree, for instance, on a court martial for a military offence being held in a forward position?

Prof. Barker—We might differ on this, I feel.

ACTING CHAIR—The point I am making is: how do we get around this?

Ms Crofts—It is extremely problematic. For example, if you do have a sexual assault at the front, it may actually—

ACTING CHAIR—Not necessarily a sexual assault.

Ms Crofts—Okay. I will start with that and move away. If you have a sexual assault at the front, for example, there may be very sound military reasons for not prosecuting or there may be very sound military reasons for prosecuting in an extremely harsh way. I think that that is always going to require a balancing act. One way to distinguish what we have got at the moment, where the Defence Force is essentially acting within civil society, is that we are not at war. So one way to distinguish is to say, 'If you're at war, then this is the system that would operate. If you are not, then this is the other system which would operate.'

I would have problems with court martials at the front, but I realise that they are a necessity. I think one way to do that is to continue with the reforms that have already been implemented to strip back the convening authority's powers, to try and minimise the possibilities of bias. But I do not think that that is a necessity that we have at the moment, because we are not at war, we are not at the front.

ACTING CHAIR—I am not advocating court martials for all offences; do not get me wrong. But the nature of the beast is that we have an army, whether it be the army, the air force, or whatever, that we are preparing for war.

Ms Crofts—Yes.

ACTING CHAIR—You are saying that it is not necessary because we are not at war, but that is the object of the whole procedure. All our arrangements, our training, are predicated on the fact that some day we will have to go to war and defend ourselves. It worries me and worries some of the people who have spoken to me that then you would seem to have two separate judicial systems operating.

Ms Crofts—I do not understand the issue, because there already are two separate judicial systems operating. There is the military system, without the guarantees, and there is the current civil system, in which we have as many guarantees as possible under the constitution. I really do not see what issues you are seeking to raise about these two separate judicial systems.

ACTING CHAIR—But the forces, as you are probably aware, are very pessimistic about the judicial system from the outside operating. That is because of, say, the case I put to the previous witness, where you have a magistrate who is perceived to hand down ridiculously lenient punishment, on the one hand, and a colleague of his, for the same offence in another court the next day, goes to the other extreme. I am sure that that type of dishing out, to use the terminology in the forces, would not be conducive to good military discipline. That is the worry that we have. I am just playing the devil's advocate.

Ms Crofts—I am going to make a vague point. I remember reading in the paper relatively recently about use of disciplinary procedures within the military in a way which was quite illegal. It has only recently come to the surface. I cannot remember specifically

the report but I remember reading about it.

You have the same issues in military justice as you do with the judiciary. The issue probably for the defence forces is that they do not want to remove their power in this area and move it to the judiciary. The judiciary may be coming up with very lenient sentences but they also may come up with more serious sentences for offences which the military may not consider serious enough but which a civilian may consider are very serious and should be treated in a serious way. So it is probably an issue of power with the military. I am playing devil's advocate.

ACTING CHAIR—It would be very hard. I would suggest that the position actually is because the influx of the opposite sex into the forces over recent years has brought the whole thing to a head. I agree, I do not think the military are qualified. I am completely on the side of anybody who says that they would not see a military court martial being competent to deal with a sexual offence. I completely agree with you, but I am basically talking about military offences. That is what I was getting at.

Ms Manion—In establishing an answer to the question of being able to take account of military discipline issues but still meeting the requirements of independence and impartiality, when we talk about a military court, it does not necessarily mean a military court composed of purely civil judges. There could be a military court that meets requirements of independence and impartiality where there is a pool of judges that are permanent members that have had military experience and training, but is not a court that is convened ad hoc.

Maybe we can find a compromise where you have permanent members, they meet these requirements of independence and they cannot be dismissed. Maybe they are not even within the Defence Force, though they may have been at one stage, but they do have experience and the legislation provides for them to take account of disciplinary issues. For example, with an offence such as hitting an officer, which has disciplinary aspects as well as the criminal aspects, it might be appropriate that the sentence be more severe and that that court would have the ability to take account of those factors.

So what is required is a specialist court which deals with this which has members who are trained in military issues and can take account of military discipline but at the same time it meets the requirements of independence and impartiality. I think the answer to both issues is just raising the level of the court martial to a permanent court but still being able to have members that have the military background and can take account of those issues.

ACTING CHAIR—Let me read another scenario to you. Technically, Defence Force members may be liable to double jeopardy provisions for a single offence—that is, defence members may be tried under civilian law and also under related DFDA charges. Even if those are not successful, administrative action can be taken against them in the form of adverse reporting or administrative discharge of a person not suitable for the

ADF. Could this be viewed as a breach of basic civil rights?

Ms Manion—I would say yes, but there is a proviso to that in that I understand there is agreement between the Commonwealth and the states that they agree beforehand whether they are going to prosecute them for a civil offence or under the DFDA. So, in effect, I do not think that it would happen in Australia, but it is just not provided for in our legislation that it could not happen, because of the results in Re Tracy.

Senator BOURNE—You mentioned that the human rights committee has said that article 14 does apply to military courts. What would happen at a time of war, though? Obviously you could not have this big judicial system if you are in the middle of Somalia and somebody is attacking you and something even more horrible happens. How do you think you could guarantee independence outside of peacetime?

Ms Manion—I think there are provisions in the ICCPR which allow you in times of war and emergency to derogate from your obligations under the conventions. I think in time of war it is a completely different situation. You can derogate and you need to do what is necessary in your country's interest at that time.

Senator BOURNE—Yes, I think you are right. It would be nice if we could think of some way to do it, though. I will leave that with you. The other thing—and I speak here as someone who took 10 years to finish a masters degree, so I am casting no aspersions—is that if you happen to get up to boards of inquiry before the end of the year, when we finish this, I would be really pleased to see what sorts of things you come up with. If you do not, we understand perfectly.

Mr HICKS—What was the history of the case Findlay v. United Kingdom? Did they go to the highest court in the UK before they went to the European court?

Prof. Barker—Yes.

Mr HICKS—What did they say, in Britain?

Ms Manion—In Britain it was not looked at under the human rights convention. Because the law said what it said, that they had followed the provisions that were provided for in England, the court did not consider the human rights aspect because the convention was not enacted in their law at that time, although they were still party to it under access to it. But, yes, they went to the highest court. The convention also provides that, as well as the ICCPR, before you can rely on their provisions, such as if a defence member here wanted to rely on the optional protocol, you have to exhaust all remedies within your local jurisdiction first.

Mr HICKS—So they could have actually bypassed the European court and gone straight to the UN—used that provision?

Prof. Barker—I do not know whether they could do that under European law. They would most probably have to go to the European Commission first of all. I am sorry, I am answering that on the run, but I think that is so because it would be part of the legal hierarchy of the European Union. I might have to qualify that. When I get back I would like to check that out, but I think that would most probably be the convention.

Mr HICKS—Being an Australian and having recently visited the European court, I just could not imagine Australia being part of that. Here are all these different nations who have subjected themselves to the whole, and to see those judges from the different countries sitting up there and telling Australia what we should or should not be doing I would find very difficult, given our unique nature. That is the nature of the world now, but that is my personal opinion. If a case is going on in military law, can you appeal to the High Court of Australia?

Prof. Barker—Yes, you have an appeal procedure. As far as I remember, you have an appeals tribunal which this goes through but eventually it would go to the High Court. Am I correct?

Ms Manion—Yes, you can go all the way. I think there are limitations on when you can actually go to the High Court. I do not have the name of the case, but there was a case in Canada which said that even if you can eventually go through chapter III courts, through courts that do meet the requirements of independence and impartiality, because the crime has been tried at the court martial and all the facts in evidence have been given there, when you are appealing you are essentially appealing on the judgment that has been given in that case.

Even if you can finally get to the highest courts in the land, the chapter III courts, it still does not satisfy the requirements of independence because it was at that beginning stage when you had the issues tried and the facts in evidence given that there had to be the independence and impartiality, and it cannot subsequently be remedied by finally going to the chapter III courts. That is my understanding of that, and I think that would apply in Australia as well.

In Findlay, they found that the court martial lacked independence and impartiality, and they went on further to consider whether appealing to the High Court in England then remedied any defects in the law. So, in Findlay, they looked at that same issue again. In that case, Findlay had pleaded guilty, so he did not have the right to appeal completely and that meant that the independence and impartiality was not satisfied. I am not sure what the limitations are in Australia in terms of appealing to the military court of appeals and then to the High Court, but the importance is that the independence is met at the beginning stage.

Mr HICKS—Thank you.

ACTING CHAIR—One of the submissions to the inquiry suggested that state magistrates be given defence reserve status to combine their authority to try both military and civilian offences. I assume they would have to have specialist training if they did not have the military background. In your opinion, would that proposal be feasible and practical?

Prof. Barker—My view would be no. If we are talking about courts that are dealing with Defence Force matters, I think the point that has been made with regard to—I hope I have got this correct—the deputy judge advocate generals is that these are people who normally have at least reserve service experience. In other words, they are not just designated as officers in the Defence Force. I would be extremely cautious if we are trying to distinguish, still maintaining the checks and balances with regard to judicial independence, but we are still trying to distinguish the fact, as we have recommended with regard to chapter III courts, that there should be people who do have the experience, as there would be in the compensation court or as there would be in the industrial courts, that there are people there who have experience of the system. If you are in the Industrial Commission or the Industrial Court, you will have people who have had experience of conducting cases relating to industrial matters or, if they are on the commission, they will be there by virtue of having been employers or trade unionists. I still think it is essential that, if you are having any system, you still have the checks and balances but you must have people who have the experience of the Defence Force. If not, they cannot deal with that aspect of it. That would be my view.

ACTING CHAIR—You do not think you could get a group of esteemed magistrates together and instruct them on military matters? That has been a suggestion.

Prof. Barker—I understand that. If we look at much of the material that has come out in the Judge Advocate General's reports, one of the great problems is military officers who are given a very cursory legal course to conduct or be involved in court martials; from the opposite point of view, I think there is just as much a danger with people being involved with forms of courts which involve the defence forces if they have not had Defence Force background. At least some people on that tribunal should have Defence Force background. That would be my view. It is purely a personal, subjective view.

Ms Crofts—That is not to suggest that magistrates are not capable of change or learning through legal education.

ACTING CHAIR—You would not be in favour of military officers coming out and being a magistrate?

Prof. Barker—There are no doubt some who have done that, and I am thinking about somebody who is involved in another research project with us, the Hon. Russell Fox, who had a very distinguished war career and was a very successful judge as well.

ACTING CHAIR—Can you suggest a way that the service connection test could be limited to prevent expansion into state criminal jurisdictions under the notion of service discipline? Can you comment on the effectiveness of the current self-imposed limits already accepted by the defence authority? It automatically hands serious criminal cases to the civil authorities.

Ms Manion—I think it is hard to try and limit the service connection test. You could theoretically legislate and say, okay, there is a service connection if it occurs on military grounds, and put in a number of requirements to say why it is falling within the DFDA as opposed to why it is falling outside. I think it is hard to actually define. You are talking about every type of criminal act, trying to define when it is related to the service and when it is not. I think that is hard to try and delimit. In America they have given up. They did have a case in Redford where they had 10 factors listed as to what judges could look at to say whether it was service connected or not, but eventually they just said, 'It is too hard. There are too many issues to take into account, and it is easier if we say that every member of defence personnel who commits a crime is subject under the act.'

ACTING CHAIR—You brought up the American connection. There was in America an alleged sexual assault case where they had directly handed it over to the civilian authority. The actual service guy got away with it on the grounds that the civilians put a different connotation on the actual offence. They put a different connotation on it completely as it applied to military discipline, and the case was thrown out. Maybe it was a miscarriage of justice. Nevertheless, the case was put up that it was not really a sexual assault case.

Ms Crofts—I am trying to think of an example of where that would arise.

ACTING CHAIR—This case was, I think, one with military police involved, where both sexes were on a mission or something, and obviously something happened, and then the female 'cried rape'.

Ms Crofts—We are basically talking about issues of consent, I would assume, and what they are saying is that the female consented in this situation, but in a military situation then that would be deemed non-consensual. It is very easy to deal with that: just be more specific in the act. We have already got something like 10 provisions of when consent would be vitiated in sexual assault. There would not be a problem with adding an additional—

ACTING CHAIR—It is a red area, though, isn't it? You do not see it that way?

Ms Crofts—It is an incredibly complex area, but I would think that situations where that would arise would be quite limited.

ACTING CHAIR—I am looking at it from both sides of the fence, not

necessarily—

Ms Crofts—Incredibly complex; I would agree with you, yes. There is no easy answer. You could start from the basis that they are entitled to a fair trial, and part of a fair trial would be being tried by people who are experienced with military or defence matters but also have judicial experience. That is one way of trying to meet the two requirements. Then one way to deal with your question about that sexual assault where it was found not to be a sexual assault would be just to be more specific in the act about what would amount to vitiated consent.

ACTING CHAIR—Are there any further questions?

Ms Manion—I just have one more point, on that issue about the service connection test. If we did establish a military court and that was essentially a chapter III court that met those requirements of the constitution, then the service connection test would not be an issue any more, because the service connection test was only a limitation. I am sorry, I am not explaining it very well. The service connection test was there because the court martials were not chapter III courts, but once they become chapter III courts the service connection test does not apply any more because it meets the requirements of the constitution. So, if the court does become chapter III, the service connection test is not relevant anymore because you are not going outside the constitution anymore and you do not need it to be service connected to try it. If you have a military court, then it is a chapter III court and you can try all crimes there.

Prof. Barker—There would be no question of constitutional challenge nor any questions of absence of independence anymore. That would be a great advantage to the Defence Force, of course.

ACTING CHAIR—I am already convinced that a lot of discrimination has taken place in the defence forces regarding sexual offences during the years, and we wish you well in getting some form of words together that can deal effectively with the whole process.

There being no more questions, I would like to thank you for your attendance here today. I am sure that if any additional information comes up regarding your deliberations you will inform the committee. That would help us. You will be sent a copy of the transcript of your evidence and you can make corrections of grammar and fact. Thank you again for appearing before us, and thanks for being so frank in your answers to our questions.

Prof. Barker—I would like to thank you on behalf of the team for giving us a very fair hearing. Thank you very much.

[11.36 a.m.]

ABERNETHY, Mr John Birley, New South Wales Senior Deputy State Coroner, New South Wales State Coroner, 44-46 Parramatta Road, Glebe, New South Wales 2037

ACTING CHAIR—Welcome, Mr Abernethy. In what capacity are you appearing before the committee?

Mr Abernethy—I am the New South Wales Senior Deputy State Coroner. I am a magistrate of the local courts and have been appointed by the New South Wales cabinet to continue as Senior Deputy State Coroner for the next three years. The State Coroner, Mr Hand, is on leave and has asked me to appear before this committee.

ACTING CHAIR—I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings would effect in either of the houses. 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 parliament. The subcommittee prefers that all evidence be given in public, but should you at any stage wish to give evidence in private, the subcommittee will give consideration to your request.

While the New South Wales coroner has not made a submission to the inquiry, the subcommittee believes the relationship between the Department of Defence and various state coroners in investigating incidents involving deaths needs to be examined. Do you have any documentation you wish to table to the inquiry?

Mr Abernethy—I have prepared a submission which I am prepared to table. I can also read it. It is not long—some four pages. It basically covers the jurisdiction, as I see it, and some issues involving state and federal military matters.

ACTING CHAIR—We request that you read it into the transcript.

Mr Abernethy—There is no federal coronial jurisdiction. As a general proposition, the states and territories, including the Australian Capital Territory, must deal with all coronial military cases, whether a death occurs on Commonwealth land or not. To this end, as I understand it, each jurisdiction has its own territorial jurisdiction. For example, section 13C of the New South Wales Coroners Act 1980 provides that a coroner has no jurisdiction unless, firstly, the remains of the person are in New South Wales, or the death occurred in New South Wales; secondly, the death occurred outside New South Wales, but the person had sufficient connection with New South Wales. That is defined as including: being ordinarily resident in New South Wales at the time of death, or on a journey to or from the state, or having been last at some place in New South Wales before the circumstance of death arose. So it is fairly wide.

On applying that section to military deaths, whether or not a person dies on military property or resides on military property, it is clear that the New South Wales coroners have jurisdiction, subject to any Commonwealth law, to investigate the death. It is clear under the scheme of the act that, if the death is a coronial death, the State Coroner must investigate the death—again, subject to any federal law to the contrary.

I ask you to consider that land or a place acquired by the Commonwealth within a state to which section 52(i) of the constitution applies is subject to the laws of the state in which the place is situated, so that a coroner has jurisdiction in respect of deaths at such places, but subject to the Commonwealth law in respect of specific deaths. Regulation 27 of Defence Force Regulations 1952 sets out, for example, that the minister may give directions for the disposal of the body of a member of the Defence Force who died whilst on service as he thinks fit.

In 1971, apparently the minister issued a direction that a commissioned officer may give such directions and must certify in writing that the circumstances surrounding the death are such that the exigencies of the service preclude compliance with the provisions of the law of the state which relates to coronial inquiries. If that regulation is still in force—and I have not heard that it is not—I would suggest that, in peacetime at least, its necessity may be moot. I find it hard to see why a commissioned officer should be able to give those sorts of directions and rely on those directions to oust a state coroner of jurisdiction in respect of deaths where a body is lying within Australia or Australian waters.

It may be that the committee should also consider the Defence (Visiting Forces) Act 1963, which basically precludes an inquest into the death of a member of a visiting force unless the Attorney-General advises that there are no circumstances which make it undesirable that an inquest into the manner and cause of death be held. That act was apparently passed for diplomatic or security reasons. This state has given the coroner quite ample powers to suppress publication and evidence in certain circumstances.

I referred a moment ago to ‘died whilst on service’. There is case law in New South Wales dating back to 1947 which really does render that term to be very wide indeed. We are talking about citizen or army reserve and areas like that. I would ask you to consider that the ramifications for the next of kin alone are extreme, if, simply by dint of being a Defence Force member, access to the coroner may be denied.

The second point I would make is that about 6,000 coronial deaths occur annually in New South Wales. Obviously coroners need agents in the field to investigate for them. In the case of New South Wales, those agents are members of the New South Wales Police Service. It ought to be clear that police and the coroner perhaps need ready access to military bases and property, including ships of the Royal Australian Navy. They also need ready access to armed forces personnel, both for interrogation and to seek advice. It may be necessary to try to obtain military documentation. I am fully aware that much

material may be classified or sensitive or secret. There is ample provision in the Coroners Act to prohibit publication of that material—that is section 44 of the act. I would point out that coroners have been able to cooperate fully with organisations such as the Independent Commission Against Corruption and the recent Royal Commission into the New South Wales Police Service. Those organisations, in their turn, have had no difficulty in cooperating with the coroner in matters of mutual interest.

The third point I would make is that coroners rely heavily on the expertise of other agencies. For example, with civilian aircraft crashes, operatives of the Bureau of Air Safety Investigation—BASI—through established protocol liaise with coronial investigators, give evidence at inquests and generate a report which is usually of great assistance to the coroner and usually tendered at inquest. New South Wales Workcover works in a similar way and I could give other examples. Recently I went to a plane crash in the southern alps where six people died. At that scene I had to make sure that my investigators established clear links with the BASI personnel there so that there would be full cooperation as the investigation progressed.

The fourth point I would make is that, whilst cooperation has improved with the armed services in recent times, it was only in the late 1980s that the then State Coroner, Kevin Waller, encountered major problems with the Royal Australian Navy in his attempt to investigate the deaths of two seamen left on deck when the HMAS *Otama* dived. Ultimately the matter was resolved, as I understand it, when the navy became satisfied that the state coroner had jurisdiction and presumably decided it should not utilise any real or perceived federal powers or attempt to utilise them.

The navy then offered the coroner its cooperation to a large extent, taking him to sea, showing him a dive and so forth. In effect, that all became part of the inquest and was of great importance to the coroner. More recently, police have been denied access to military property in the first instance to investigate deaths on it. That has resolved itself, but only after negotiations at quite a high level between the State Coroner and some suitable counterpart within the military.

Those problems have led to a real need to implement protocols with each of the eight states and territorial jurisdictions. In this state at least, there is a need for both New South Wales coronial investigators and relevant federal personnel to fully cooperate in order that all coronial deaths can be properly investigated. I see that cooperation as facilitating the coronial process, obviously, but surely it should also be of benefit to the military. I can see no reason why any coronial inquiry, or aspect of a coronial inquiry, including the actual inquest proceedings themselves, cannot be tendered at a military inquiry if necessary and appropriate, and vice versa. The military inquiry documentation, if tendered at inquest and considered by the coroner prior to inquest, may be of great benefit to the coroner in shortening the inquest and making it more relevant.

I have to talk a little about the area of disaster victim identification. There is

significant state expertise in that area. It is an area not fully understood by many people but, in essence, where there are multiple deaths, the danger of incorrect identification is greatly increased. The coroner has to be satisfied that positive identification has been established in respect of each victim. An explosion, say on a military base, will almost certainly require extensive coronial involvement just to establish the identity of the victims. On the other hand, an explosion on board a 747 over the Simpson Desert would present the relevant state with a disaster of such magnitude and a crime scene of such size that the military would almost certainly be asked to assist.

I ask you again to consider that there will often be a need for immediate access to the site of death. The coroner and a team of experts who advise the coroner must have access to ensure that proper procedures are followed, not only to maximise the correct identification of victims but also to ensure that the investigation is carried out on a best practice basis. I doubt that Defence Force personnel are expert in the area of homicide, suspicious death or multiple death. The removal of bodies alone may destroy or contaminate evidence and hinder identification. Crime scene and homicide experts are trained and advise the coroner when all investigations are complete and the bodies can be removed.

In a disaster, haste to remove bodies may lead to particular bodies or parts of bodies not being identified, causing enormous distress and trauma to families and friends. For example, I am told that in the Black Hawk disaster, where several bodies were not able to be positively identified, the intense heat rendered the teeth very fragile. Removal of the bodies took place and the teeth crumbled and compromised the identification. An expert in dental ID would have advised the coroner in a civilian situation that the bodies should be left in situ and the teeth suitably secured and preserved.

Therefore, I would like to see a liaison officer appointed by the armed forces to facilitate coronial investigation, including entry to military properties, vehicles and the like, and also the production of necessary documentation. Such a person would also be available to readily explain procedures and military protocols, which to the civilian are literally another world. That person could perhaps be selected from a legal corps of the three armed services.

I see education of senior military personnel on the nature of coronial process as important. The Office of State Coroner has an educative role and would be happy to play its part in education. I have not thought much about the integrity of military inquiries but, if that is ever questioned, a coronial investigation separate from a military investigation may go a long way to allay such questions.

The whole process would surely be seen as more independent. Most citizens seem prepared to accept that coroners generally are independent of organisations such as the New South Wales Police Service, and there is no reason why we should not be seen as independent of the armed forces. In the state example, where there is a death in the police

operation, the police have to investigate themselves but they do that on behalf of the coroner. There are strict protocols in place to ensure maximum independence, for example, by way of police from a different area investigating the area where the incident happened, with high ranking police investigating, internal affairs input and that type of thing.

Finally, I would like to see federal legislation reviewed and amended if necessary to ensure that there is no bar to state and territorial coroners readily investigating coronial deaths of military personnel and civilians involved in military enterprises or on military land, vehicles and the like. I will leave you with this thought: if a member of our armed forces is killed overseas and that person hails from this state, the state coroner or the coroner has jurisdiction to investigate that death if an interested party presents him with a reasonable forensic reason for so doing. He should not be fettered from doing so. I would like to thank you for allowing me to say that. I am happy for that to be tendered if you wish.

ACTING CHAIR—Thank you. You have probably answered in part the first question that I intended to ask you. How does the coroner's office interact with the Defence Force in the case of a fatality in the ADF in peacetime in Australia? Has there been any change in recent years in the relationship between the defence forces and the coroner's office?

Mr Abernethy—I think the perception is that the relationship has improved since the *Otama* incident in the late 1980s. I think Mr Waller was initially denied cooperation by the Royal Australian Navy. If I am wrong about that, I apologise, but that is my understanding. He then said, 'I am sorry, but I do have jurisdiction and I can see no reason why I should not investigate the matter.' The navy then thought about that and decided to cooperate, and in fact gave great cooperation. I think that is a bit of a watershed. Since then I think there has been cooperation. The example of the incident in Western Australia recently is an example of cooperation. I have heard nothing from the Western Australian State Coroner, Mr Hope, that there have been any problems in that matter. I am not sure about the relationship between the Townsville coroner and the Black Hawk incident.

I will say this: each state and territory virtually has its own state or territorial coroner. The exception is Queensland, which has no state coronial system. In Queensland you have just got a series of coroners, and the chief magistrate of the state is the chief coroner but does virtually no coronial work. Leaving Queensland aside—our third largest state—we have basically got a state or territorial coronial system which does facilitate this level of cooperation. There is a ready person the armed services can contact, and there is a person who should contact the armed services in the event of an incident like the Black Hawk incident, a disaster or the naval incident in Western Australia a few weeks ago.

ACTING CHAIR—So in your professional opinion changes have occurred for the better.

Mr Abernethy—Changes have occurred. I would like to see more work done on clarifying the protocols. It is not just New South Wales; there are eight jurisdictions and there are bases and military personnel in all of those jurisdictions, some of great size.

ACTING CHAIR—That would apply to the interaction between the office and the defence forces?

Mr Abernethy—Yes. I would like to see the federal interaction with each of those eight jurisdictions more formalised and clarified.

Mr HICKS—Have there been instances in the past where the coroner has had to depend on evidence brought forward by the Australian Defence Force?

Mr Abernethy—I can speak only about New South Wales. I do not know of any such cases, but I can only go back into recent times. There certainly have not been any instances in my time as a full-time coroner, and that is since 1994. To answer your question, I do not know of any. As the second coroner in this state I would find it absolutely unconscionable if all I could go on was a military report. I would certainly digest it, analyse it, and look critically at it and form a view about it, but I would like to be unfettered in being able to make my own judgment from other areas if necessary.

Mr HICKS—Would you like to see a set-up where the coroner is immediately called in if certain criteria are met? What is the procedure now?

Mr Abernethy—If a death occurs in New South Wales—and that includes on a military base—then the death has to be reported to the coroner if it is what we call we a coronial death. The New South Wales Coroners Act sets out a series of types of death that are coronial—violent or unnatural deaths. For example, if someone hangs himself on a military base, that is a coronial matter; it is really not a matter for the military. It does not matter in coronial terms whether he is an armed services person, a police officer or a nurse; the fact is the person has hanged himself or herself in New South Wales and it is a matter for the coroner. So the procedure is that the police should be able to go onto that base in order to get the data to report the death to the coroner and then, of course, investigate it.

One of the main things in, say, a hanging is to make sure that it is a suicide and not a homicide. The body has to be taken to a forensic pathologist for a post-mortem which will confirm, hopefully, that it is a suicide and not a homicide. Those are the sorts of mundane things that happen in the coronial world every day with civilians and we hope there are no problems if it happens to occur on military property or involve personnel from the armed services.

Senator BOURNE—I was really interested in what you said about visiting defence services, which is something that had not even occurred to me. Can you tell us what the

relationship would be between the coroner and visiting defence services? Is there any at all?

Mr Abernethy—There are very seldom any problems. I do not know of any, but there is a Commonwealth Defence (Visiting Forces) Act which really does restrict coroners. If the minister—presumably the Minister for Defence—chooses to restrict the coroner, the minister can. Section 14 of the act makes it pretty clear that the federal Minister for Defence can impinge quite substantially on the coroner.

The parallel, of course, is a visiting civilian. We get thousands of them in a week. If they die in Australia in coronial circumstances then there is no issue, we investigate the death. Indeed, if they are English, the English law requires that the English coroner is required to investigate the death too. So we send a copy of our finalised investigation back to Her Majesty's Coroner at Uxbridge or somewhere who probably rubber stamps it but, nevertheless, investigates it.

Senator BOURNE—Do you know what sort of investigation would be carried out? I suppose it would depend on where the visiting defence forces were from.

Mr Abernethy—It depends on the nature of the death, whether they are on shore leave and get into a fight up at the Cross, or overdose up at the Cross. It happens all the time. Or they could die on operations between allies. If it is on land, in New South Wales particularly, but also in the sea, it may be that one of the states or territories has jurisdiction.

Senator BOURNE—Would you look at any of those cases? Have you been stopped from looking at any of those cases?

Mr Abernethy—No, I have not. The cornerstone of our jurisdiction is to have a death reported to us. Until it is reported to us we have no jurisdiction. It is usually reported to us by the police. I would expect, if there was a death on, say, a military range in Queensland, the police would learn of it and it would be reported to them. That starts the coronial process.

Senator BOURNE—As it happens now, if an American soldier does die in a brawl in Kings Cross, you would have been—

Mr Abernethy—There would be no problem. I do not think the minister would intervene. There is no reason to. It might become a lot more sensitive if the death occurred during some sort of operation or exercise.

Senator BOURNE—Thank you very much.

ACTING CHAIR—If the case was not reported to the coroner what access would

the family or the next of kin of the deceased person have to the coroner if he was not happy with the Defence Force proceedings?

Mr Abernethy—It does not have to be the police who report it to the coroner; any person can report a death to the coroner, and regularly families of the deceased, friends of the deceased, will report a death and ask us to investigate the death. We can seize jurisdiction in that way.

ACTING CHAIR—If they were not happy with a decision made by the defence forces, could they appeal to the coroner's office to have another look at it?

Mr Abernethy—I could not imagine us in New South Wales, or Victoria for that matter—I know the Victorian state coroner very well—being happy to allow, say, an incident like Black Hawk or the *Otama* go by with just a Defence Force board of inquiry. We just would not. We would have to take issue with it and say, 'Fine, go ahead with your inquiry, and you can have it quickly, but we have our jurisdiction.' Under our state law, unless we are ordered not to by lawful federal process, we must inquire.

ACTING CHAIR—So they would have access. Thank you very much.

Mr HICKS—You must have tremendous access to assistance in coronial inquiries. From what you are saying you can call on the police first of all and, obviously, experts from all over the place—

Mr Abernethy—Yes.

Mr HICKS—Therefore, exactly what powers do you have as a coroner?

Mr Abernethy—Under the law the coroner owns every body that dies within the jurisdiction of the Coroners Act and has very wide powers to investigate. Of course, the agencies, and the New South Wales police force is one of the largest on the planet, have substantial resources. For example, when the Port Arthur massacre occurred the Tasmanian experts felt it would take three days with the bodies in situ to examine that killing ground. We sent crime scene personnel to do the job for them and they did it in less than a day. They could not believe the quality or the speed with which it was done. Similarly, we poured forensic pathologists into that to handle the work.

Incidentally, in that matter there was a mix-up with bodies. It was sorted out but it does highlight the point that disaster victim identification is a very difficult field. The bigger the disaster, the more disfigured people are, the harder it gets. Of course, the worst case scenario is an explosion on an airliner at high altitude. You then might have a crime scene that is 200 kilometres long by about 80 kilometres wide, which is what happened when the Pan Am aircraft blew up over the village of Lockerbie in Scotland.

There are two concepts of disasters—open and closed. An airline disaster is normally a closed disaster because of passenger manifests, but a train crash is an open disaster because anyone can get on a train. The Lockerbie thing was both open and closed because although there were manifests of passengers and crew, parts of the plane landed in the village and villagers were killed. In that case the CIA, the FBI and Pan Am officials descended on Scotland to try to run things but the local Procurator Fiscal said, 'There are 225 or so murders here, get out of my way.' That is the stance of the coroner. Our first job is to investigate and make sure homicide does not go undetected.

ACTING CHAIR—How heavily does the coroner depend on evidence taken from the Defence Force investigation team regarding a serious defence accident?

Mr Abernethy—I think we rely very heavily on it. I have not done a defence case of that nature, but I liken it to a major aircraft crash where we rely heavily on BASI. We believe BASI does an honest job, as a general rule, and has great expertise. So we have worked hard to ensure there are protocols between us and the Bureau of Air Safety Investigation. Those protocols have made sure that there is cooperation and that the BASI reports are received. We usually rely pretty heavily on them because they do tell us the technical side of things as to how a plane has gone down.

Similarly, if an industrial accident occurs in New South Wales we use Workcover, the New South Wales organisation. Their expertise in industrial accidents is significant. Their reports are usually very closely considered by the coroner and relied on. So I would see a military investigation properly conducted as being of great assistance and possibly shortening the formal proceedings, the inquest.

ACTING CHAIR—One submission given to the inquiry stated a belief that it was the right of the family to request a coronial inquest into an accident involving a fatality, yet that case was not the subject of an inquest. Under what circumstances would you see that such a request be refused?

Mr Abernethy—If it is a coronial matter, any family can request an inquest and it is ultimately a decision for the coroner as to whether an inquest will be held. If the coroner decides not to hold one, ultimately the family can go to the state's Attorney-General. But we tend to look very carefully at families. We are very aware of the grief process. If the family shows us reasonable reasons for wanting a close investigation and probable inquest, we do it. In many hospital cases, for example, the manner and cause of death are clear if a person dies under an anaesthetic, but there may be real issues of the standard of work done or issues of public health and safety. In those sorts of cases, we regularly will hold inquests, even though technically the manner and cause of death are clear. Does that answer your question?

ACTING CHAIR—Yes, partially. This is a technical question: where criticisms are made of the defence organisation as an outcome of the defence BOI or coronial

inquest, coronial directions may be given to Defence to rectify hazards and deficiencies. Does any agency have the power to require compliance?

Mr Abernethy—No, we can only recommend. Under section 22A of the New South Wales Coroners Act, there is power to recommend. We would make recommendations to the defence forces if we found areas of criticism. We do that all the time to New South Wales organisations. For example, I can talk of deaths in custody and deaths in the course of police operations where we analyse closely the procedures of custody and the procedures of police operations where police shoot someone, where police or civilians die in a police pursuit. If we find matters of criticism and matters where we ought to recommend change, we do so.

In the end, it is up to those organisations that we make the recommendations to to do what they want with them. We cannot make them. Our experience in New South Wales is they take our recommendations very seriously. We do not make them lightly. We try to make them sensible and realistic and they are usually taken on board by the state organisations. I would expect the federal sphere would be no different. In fact, some of our recommendations encroach on federal areas. We will make recommendations to the federal minister for health regarding importation of anabolic steroids where a death occurs through steroid use, which is becoming very common these days. In that area, the federal government becomes involved in considering our recommendations and addressing them. We have found that there has been cooperation there, too.

ACTING CHAIR—Mr Abernethy, thank you very much for attending this hearing today. If there is any other material you would like to submit, you could pass it on to the secretary. You will be sent a copy of the transcript of your evidence to which you may make corrections regarding grammar or fact. As Hansard may wish to question you regarding any comments that they do not understand, perhaps you could talk to them before you leave.

Mr Abernethy—Yes.

ACTING CHAIR—Once again, thank you very much and thank you for your frank answers to our questions.

Proceedings suspended from 12.10 p.m. to 1.05 p.m.

SLATTERY, Mr Michael John, QC, 7th Floor, 180 Phillip Street, Sydney, New South Wales 2000

ACTING CHAIR—On behalf of the subcommittee I welcome you here today. Do you have any comments to make on the capacity in which you appear?

Mr Slattery—I am a barrister and I am appearing in my personal capacity. I happen to be a lieutenant commander in the Royal Australian Naval Reserve but I am appearing as a citizen of Australia.

ACTING CHAIR—I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect that 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 parliament.

The subcommittee prefers that all evidence given should be given in public. But should you at any stage wish to give evidence in private, you may request the subcommittee to do so, and we will consider your request. We have received your submission and it has been authorised for publication. Would you like to make any additions or corrections to your submission?

Mr Slattery—I do not wish to correct it in any way, Mr Chairman.

ACTING CHAIR—I invite you to make a short statement before we proceed with questions.

Mr Slattery—For the sake of convenience, rather than my explaining what my academic and professional career is, I have brought a curriculum vitae which I might have added to the record, if that is appropriate.

ACTING CHAIR—Thank you. We still invite you to make a short statement.

Mr Slattery—I do not wish to correct the written form of my submission, but there are a number of ways in which I might usefully expand it for you. I have had the benefit of an opportunity to discuss with Mr Hislop some of the areas of concern to the committee. Partly as a result of that and partly with the benefit of reading many of the submissions which have been put before the committee by other members of the public, I can expand a little on the points that are raised in my submission.

To summarise my experience, I have been a barrister since 1978 and I have been in the navy since 1990. I have appeared as a defending officer and a prosecuting officer in courts martial. I have been counsel assisting a board of inquiry and I have conducted an

investigation. Both the board of inquiry and the investigation were under the Defence (Inquiry) Regulations, which are the areas of concern of this committee. My court martial experience consists of about six or eight courts martial over the period between 1990 and 1996.

To expand my submission, I want to explain the reasons why I submit that it is essential to have as counsel assisting boards of inquiry persons who have what I call forensic experience. I have read many of the submissions which have been submitted by members of the public. They raise a range of problems including: failure to afford natural justice to individuals who are affected by inquiries; failure to look after families who are affected at the periphery of inquiries; and failure to notify individuals who are affected by inquiries in sufficient time.

At the end of the day, it is my submission that the real problem with boards of inquiry is that, under the regulations presently in existence, so many different kinds of boards of inquiry are sought to be fitted under the one rubric, under the one umbrella. There is an immense variety of boards of inquiry and they all raise different problems, not all of which need to be addressed by the one set of regulations. From the very simplest board of inquiry to do with a simple technical fault in machinery, you do not have counsel assisting, lawyers and all that legal apparatus at all. At the other extreme, you can get boards of inquiry that are immensely complex, which plainly need counsel assisting, lawyer representation and very finely honed terms of reference.

Many of the problems that have emerged from the submissions made to you and from my own experience of boards of inquiry, at least from reading about them and being involved in them, show that the essential discipline of the appointment of counsel assisting and the setting of the terms of reference are the major factors that need to be addressed. A board of inquiry is in truth a mini royal commission. A royal commission is presided over by a judge, normally, in this state—and, in other states, often by senior counsel—but always by someone with 20 or 30 years legal experience.

Someone who is used to presiding, corralling issues, getting rid of the irrelevant and concentrating on the relevant—but, in the process of excluding evidence and material, doing so in a way that does not cause injustice to anyone—is ideally suited for a royal commission. The problem with boards of inquiry is that, under the defence regulations, the only person with that legal experience within the room is counsel assisting. The board of inquiry itself rarely has that level of experience. You do not have the discipline from the bench: the only place you get it is from counsel assisting.

Counsel assisting is often facing a battery of lawyers—usually in a more complex case which involves perhaps a death or serious injury, or a range of personal relationships that affect a number of members of the Defence Force, or endemic problems such as that—and those lawyers seek to represent their particular parties. Counsel assisting needs to have a wide range of forensic experience in dealing with the games that lawyers can

play. Speaking as a lawyer, I can say to you that lawyers can play games and they can expand inquiries: one of the very complaints which has led to this inquiry itself stems from allegations that that sort of thing has been taking place in certain inquiries.

Ultimately, this is a personnel problem as much as it is a regulation problem and a defence instruction problem. If you have one of the more complex sorts of inquiries that has to be dealt with by a board of inquiry, essentially the only way that you can make sure it is properly controlled and does not go on too long but still produces fairness to everyone involved—so that every person affected is given adequate notice that they are affected and they have a right to be represented—is to appoint someone of deep forensic experience who can control the proceedings and give appropriate advice to the president of the board, as counsel assisting.

Unless you do that, you are always going to get yourself into trouble in these sorts of inquiries. This is simply because, if the balance of legal experience is in favour of those representing persons affected, who are appearing before the board, but you do not have a president or other members of the board of inquiry with legal experience, those on the other side of the table who are representing parties tend to run the show, and all the temptations of irrelevance, prolixity and lack of discipline within the proceedings take over.

I am really saying that there is only one way that you can avoid that in the board of inquiry process, and that is by the appointment of sufficiently experienced counsel assisting. That is usually someone who has had courtroom experience for probably 10, 15 or more years. If a person has less experience than that, when they are facing representatives on the other side of the table representing interested parties, they will have difficulty dealing with them, because of the variety of manoeuvres, if I can put it that way, that can be undertaken by interested parties.

The other reason why I believe that the appointment of a person of such quality is necessary in the more complex boards of inquiry is this—and this is not a general rule. As I said at the beginning, in the easier boards of inquiry which involve technical or engineering matters, I am not even suggesting lawyers be involved at all, because you do not get persons who are affected. In those situations sometimes you do, but they can be done at a much lesser level. They can be done often just with some lawyer input from a person with fairly minimal forensic experience but who is legally qualified, as counsel assisting.

The other way that counsel assisting can be of value is this: again I discern from many of the submissions put to this committee—and I know it from my own experience in dealing with the problem myself—that terms of reference are a continual source of angst for persons affected by investigations, and particularly boards of inquiry. There have been so few courts of inquiry that I really do not bother to mention those in the course of what I am saying to you.

The role of counsel assisting there is of extreme importance as well. Again, you would normally expect that a president and other service-experienced members of the board themselves will not in their prior lives have had much obligation or cause to ever settle or look at a set of terms of reference: it is just not their business. You do not need a set of terms of reference to drive a ship; it is as simple as that. Lawyers look at them and construe them all the time. The complaints that I see before this committee—and again from my own experience—really raise two problems about terms of reference: sometimes they are too wide and sometimes they are too narrow.

To the extent that they are too wide, the lawyer's discipline again has to be used to try and confine the issues sensibly within the terms given, but still to make sure that those who want to raise issues that fairly lie within the terms of reference have a chance to do so but without derailing the inquiry.

To the extent that they are too narrow, a very special obligation then arises which you do not see very often, but where particularly someone who is in the reserve will have an opportunity and a greater degree of independence to perhaps push this course. Sometimes terms of reference have to be expanded. That means going back to the authority, the commanding officer, who issued those terms and saying: 'These aren't good enough. There are issues out there that are related to the issues you have asked us to inquire in that need to be looked at.' One can think of inquiries in the recent past where perhaps that sort of thing might have been usefully considered but I do not want to talk about particular inquiries in my evidence unless I am particularly asked.

You have seen the same thing occur in a wider context of royal commissions, sometimes very controversially. You may recall that in the Costigan royal commission into painters and dockers back in the 1970s and early 1980s there was a series of applications to expand the terms of reference. That was a highly controversial matter. But within the service sometimes, my evidence is that you cannot always fairly address what is given unless the terms are expanded, and that requires the courage of an individual to advise a board to go back to the command and say, 'These terms need to be expanded.' The only power that the individual has, if the command says no, is to advise the board—plainly the board would not have gone and asked for that unless the advice had been taken—'You can include in your report the fact that there was a request to expand the terms and that was refused.'

Courage of that sort may be necessary from time to time. Unless you have appropriately experienced counsel assisting who have had the experience of dealing with terms of reference in that kind of situation, affording justice to those who want the inquiry relevantly expanded, will be difficult to achieve.

There is one other matter on boards of inquiry that I wish to raise. It is not included in my submission but I have been giving thought to it. It is the problem of regulation 29 of the Defence (Inquiry) Regulations and what I would call the openness or

confidentiality provisions of the board of inquiry regulations. There are three parallel regulations: one applying to courts, one applying to boards, and one applying to investigations. Investigations are private. Courts of inquiry are all public, but in the middle are boards of inquiry. The presumption presently with boards of inquiry is that they are private, internal inquiries of the Defence Force but that a decision can be made for parts of them, or all of them, to be made public.

In my submission—and I know this is at variance with the position put by the ADF itself—the discipline of boards of inquiry having to ask the question of themselves, 'Why should this be made confidential or private rather than kept public?', is an appropriate discipline to be asked in respect of every board of inquiry. The current presumption is in favour of confidentiality and a decision has to be made as to openness in regulation 29.

In my submission, without any great injustice to the service or the Australian public, that onus of proof could be reversed. That is, the presumption should be made that boards of inquiry are public. But plainly, for security reasons or for reasons of the protection of individual personnel, for their staff-in-confidence matters, or for their reputations, things may have to be kept private. But if the presumption is reversed then the discipline of asking the question, 'Why should this be kept secret?', is an appropriate discipline for future boards of inquiry.

I will give you an example. The current *Westralia* inquiry is an inquiry which is obviously of great public interest. It was a terrible tragedy. It is a matter though where public interest has caused a decision plainly to be made to publicise parts of the inquiry and allow persons to be present at it, but to keep other parts confidential.

If a matter as fundamental to the service of the navy as that is able to be made at least substantially public, one has to ask the question of oneself, 'Why shouldn't a lot more be made public?' and the presumption be in favour of matters being held in the public domain, but tempered always by a broad power—and I do not think the power in regulation 29 is now wide enough—to make things confidential for the interest of individuals or the public, or national security?

The last matter I want to cover is the question of investigations under the Defence (Inquiry) Regulations. In my written submission what I have essentially said to you is that to the extent the investigations concern matters of personal relationships—harassment, sexual harassment issues—every effort should be made to direct those sorts of complaints out of the area of investigations under the Defence (Inquiry) Regulations and into the arena of alternative dispute resolution.

I have experience as a member of the Bar of being a conciliator of such complaints when people complaining of harassment have sought somewhere to go. They complained through the executive of the Bar Association and I have been involved in conciliating such

complaints. I can say to you that these things can be done without a great apparatus to support them, provided the right personnel are appointed as conciliators and resolvers.

What has concerned me, again from what I read in the submissions to you, is that the Defence inquiry procedures have the potential for—and if the allegations put to you are to be believed, have actually resulted in—a considerable abuse of the rights of individuals in the course of those investigations. It is a matter for you to decide what you make of the particular submissions, but where investigations are held in private, where there is an authority to question such as there is, the capacity to go overboard and ask questions of an inappropriate nature is there and the temptation to use it can be strong.

If you ask me what the solution to that problem is, it is very difficult to say. Short of abolishing the Defence (Inquiry) Regulations concerning investigations, I am not sure that there is a lot you could do about it. One of my concerns about what I read is that people are being investigated, or are allegedly being investigated, when they have not even been informed of the fact that an investigation is taking place. If that is what is going on it is the plainest breach of the most obvious form of procedural fairness that any lawyer would ever recognise. If that is occurring it is something which plainly needs to be stopped. That is just one example of the many which you will no doubt have had an opportunity of reading.

I would not want to be accused of trying to give jobs to lawyers but one way of solving this is to have a kind of buddy system within the services so that where non-lawyers are appointed to investigating positions they have a kind of buddy arrangement with a service lawyer who is looking over their shoulder to make sure the inquiry is a more disciplined one and that rules of basic procedural fairness are observed.

I do not suggest—because for a whole lot of service and operational reasons it is frankly inappropriate—that only lawyers be tasked with that job. I can well understand that in the field and in operational spheres you just cannot always do that, and I do not suggest that. My only solution, short of abolishing those procedures, is to create a kind of buddy system to make sure basic rules of procedural fairness are observed. It is something that may well be able to be achieved to impose some discipline on some of these inquiries.

I have had the experience of conducting one investigation. I have to say to you that it was of a fairly technical nature and it was to do with contracting procedures within Naval Support Command. I made some recommendations about the reform of them. I did not once have to use the coercive power of the regulations which enable me to ask questions. I went along and was as charming as I could be, trying to find out if people would cooperate with me, and they always did.

There is another form of proceeding under the Defence Act itself that permits an investigation, which is not otherwise empowered by the Defence (Inquiry) Regulations.

Perhaps use of that could be expanded more.

In my view, something does have to be done to rein in some of the more regrettable instances of abuse in these inquiries, if what is put before you is correct. Even if you do not accept what is put before you, I would say to you that the danger of that occurring is very high given the regulations as they now exist and something does need to be done procedurally to control the situation.

That is all I wish to say. I am sorry I have taken so long. I intended only to be about 10 minutes.

ACTING CHAIR—Thanks, Mr Slattery. You mentioned forensic experience in your remarks. What would constitute adequate forensic experience?

Mr Slattery—I used that term deliberately because I am not trying to choose between solicitors and barristers and I am not trying to choose between employed solicitors and persons in private practice. I am not trying to choose necessarily between employed service lawyers in the permanent services and independent practitioners who happen to be members of the reserve. I am talking about a set of qualities that the person has that fit them for the task. If they are permanent force personnel or solicitors or barristers or whoever, if they have these qualities, then I am suggesting that is the level of experience which is appropriate for the job of counsel assisting.

In my opinion, you would be fairly poorly equipped for the task unless you had a minimum of about five to 10 years experience in a courtroom presenting cases of fairly wide variety. I put that as pretty much a minimum. I know I have given you a range. You can be appointed a Supreme Court judge in this state after seven years experience, so I cannot make the hurdle any higher than that, can I? But I would regard between five and 10 years experience as appropriate.

If you wanted to actually make or think of the test as similar to appointment to the Supreme Court, I notice that under the regulations a person can be a president of a court of inquiry under these regulations with five years experience as a solicitor or barrister. Perhaps that is the appropriate level, but there is a difference between what I put to you as a minimum legal level and what I suggest to you as a desirable outcome. A desirable practical outcome is that 10, 15 or 20 years experience is the appropriate level of experience for the job. A judge who sits on a royal commission has probably had 20 or 30 years experience in a courtroom. Does that really answer your question, Mr Chairman?

ACTING CHAIR—This is not a smartypants question, but in view of your remarks: are you familiar enough with the Butterworth case to offer an opinion on how it went so far off the rails, even though some of the lawyers were very experienced in forensics?

Mr Slattery—I do know a little about the Butterworth case. Without criticising any one person, I would say that the remarks I have made to you are very much directed to a solution of that sort of problem, in that you had on one side of the table lawyers of quite deep forensic experience who acted for a series of individuals. As I understand it from what I am told, what you did not have was a lawyer in the counsel assisting position with the right and complete level of forensic experience. If that experience is there in the counsel assisting position, control of proceedings—that, like that one, are apt to get out of control, because of the issues and the people—can be gently imposed, by the usual means that a judge imposes it, by simply turning to particular counsel and saying, 'This inquiry is not assisted by that line of questioning or this approach; unless you can justify it on any greater grounds, we want you to move on to another subject,' or by just simply confidently declaring that an issue is just irrelevant and controlling the tone and style of questioning. That can be done. But, in the absence of a strong judicial officer, which you never get in these inquiries, the only person who can replace that discipline is counsel assisting.

ACTING CHAIR—You want more lawyers, like you said before.

Mr Slattery—I am not asking for the job. I have a lot of other things to do. I do not want to be accused of giving jobs to lawyers, but I can see the harm that lawyers can do when they are not controlled. I am saying to you that you do need at least one very experienced lawyer in the room to control those who, in their own judgment about what is in the interests of their client or interest, are prepared to push things further than reason and justice might objectively demand.

Senator BOURNE—Mr Slattery, we have had a bit of evidence about the need for legal experience and military service experience as well. I take your point, and it is an important one, that you have to have appropriate legal experience as well. What is the bottom level of military experience that you think would be appropriate to the lawyers, the council assisting, and whoever you suggest might be involved?

Mr Slattery—I am glad you have asked that question because it reminds of something I meant to say that I left out. You are absolutely right, Senator. I have been pushing the idea of legal experience and I had forgotten, because I had assumed it, to say and to emphasise that really it is a combination of skills that are perfect in this situation, not just the one I have been emphasising—the combination of service experience and legal experience.

When I said forensic experience, I meant forensic experience ideally of someone who has had time within the services. That time within the services can arise in a variety of ways. It could be as a member of the permanent services who has retired from that service and is probably but not necessarily a member of the reserve, who then goes into a legal career and gets forensic experience through that. It may be someone who, like myself, has acquired a legal career first and then joined the reserve.

The commitment to the service as well as the discipline of the law is a very important part of the overall qualities in my view. I am not recommending jobs for lawyers in the purest sense. What I am suggesting to you is that there be a skills base in both professions. The very reason that the navy reserve was started arose out of the first *Voyager* inquiry in 1963 or 1964 when it was perceived by then Admiral Harrington, the Chief of Naval Staff at the time, that the navy was not being adequately represented by the civilian lawyers whom Navy had engaged; they were a group of barristers from Sydney. He appointed the legal reserve, which was a group of barristers mainly in Sydney and Melbourne. They joined the navy reserve and appeared in courts martial. In fact, the reserve that I joined is part of that original conception, 40 years on.

Senator BOURNE—Do you think you have enough experience of what it is like to be in the navy? I have discovered just through sitting through these hearings that I started off with no conception of what it would be like to be in the services. Do you think that you have probably got enough?

Mr Slattery—Senator, I would say two things to that. The first is that you never have enough experience. I have been to sea once. I went out on FFG HMAS *Adelaide* some years ago after doing a board of inquiry. I was invited to go out for a week and live life out there. I have otherwise done a fairly basic knife and fork course but then gone on a variety of courses in service institutions and spent a lot of time representing sailors and officers and advising them in various capacities.

The skills you learn as a lawyer generally enable you to get into the hearts and minds of a whole variety of occupations, professions and people. Provided you have that sort of open mind, you are reasonably well able to adjust to what their life is like. It is a skill that you acquire over many years. I have some experience and I am always open to make sure I have adapted to the language and ideas of any particular situation. I have had to learn navigation on the run to present a navigation trial. That is something that is part and parcel of legal life generally.

ACTING CHAIR—They do not call it the blunt end any more.

Mr Slattery—No. We were looking towards the sharp end most of the time.

Mr HICKS—In your experience of the military such as the boards of inquiry and the justice system, have you always found them to be fairly transparent, apart from the matters you have raised? You have raised some fairly important matters. How have you found the system? Have you found it to be satisfactory?

Mr Slattery—Could I inquire, Mr Hicks: are you asking about the processes of the court martial system or the board of inquiry system under the defence inquiry regulations?

Mr HICKS—Both.

Mr Slattery—I have actually found the processes extraordinarily fair. I have been remarkably surprised on almost every occasion as to how fair the processes are. If you were to judge what I had said before by any standard, it is looking at the services and saying what I have just said to you. I am concerned in everything else that has gone before to keep that standard as high as it is, and that is why I am putting these submissions to you today. The processes of a court martial do differ considerably from a board of inquiry or the parts of the defence inquiry regulations that I have been criticising today.

Apart from a general view that the recommendation of Admiral Rowlands, which I understand has been adopted by the Abadee report, that a DPP within the services would be appropriate—and I agree with some reforms of that sort—the system, I think, is a very healthy one and a very good one. It imposes its own disciplines on people who are working within it, in that a lawyer in my position finds that there are a lot of things that you cannot do in a courtroom full of soldiers and sailors that you can do in an ordinary courtroom. The way you cross-examine, the way you present argument, always must be oriented to loyalty to the service; otherwise you are not going to convince anyone that you are right. That is not a problem. It is just that, in many domestic tribunals that you appear before as a lawyer, you have got to orient your submissions to the character of the tribunal that you are dealing with. A service tribunal is just one example of that and I do not think that should be regarded as a limitation for lawyers or something which produces any unfairness. It is just the nature of the character of what is a specialist tribunal, and there should be a specialist tribunal here.

I have noted from the submissions to this committee that there are very few complaints, as I see it, about courts martial. They are mainly about boards of inquiry and investigations. I do not think that is any accident because the court martial system is directly hooked into the judicial hierarchy of Australia, through the court martial appeal tribunal and through there to the Federal Court and ultimately to the High Court. The discipline of the appellate process works directly on courts martial. Also the Defence Force Discipline Act has a very detailed elaboration of the procedures for a court martial which are very fair and very appropriate. That is why I do not think you get many complaints about courts martial and I think the appeal process itself and the review process generally show that they are fairly conducted. There is that distinction to be drawn.

The board of inquiry process is not hooked into the judicial hierarchy of Australia other than by administrative review. Again, through the Federal Court, one can seek relief to quash or vary at least some of these processes, but I believe the difference in those two disciplines of supervision does account for the difference.

I would also say that, except in the respects that I have mentioned, I do regard the board of inquiry process, in particular, as fundamentally a very fair one. If the individuals who have been the subject of complaints to this committee are to be criticised for

anything, it is probably overzealousness in trying to be fair, in ways that meant that they became undisciplined in the course of inquiries. I do not think overall fairness within the board of inquiry system is a problem.

You asked me the same question about investigations. The true answer is that, I do not know, but I have deep fears that the investigation process is one that has a potential within it for abuse unless very carefully controlled. I am not convinced that—although intense efforts have been made to create very reasonable and sensible defence instructions to persons appointing investigators and to investigators themselves—when you appoint someone who is untrained in the law, who has no concept of procedural fairness intuitively, to that sort of job, you are asking for trouble.

To give you an example, not everyone appreciates, in the course of such an investigation, that you have to give to any fresh allegation that is raised a right of reply to someone who is affected. That is something that a lot of people can so easily—and without any fault on their part as investigators—overlook. Even a lawyer, unless reminding himself or herself, could readily overlook it. I know the Defence Ombudsman has made a number of recommendations about the conduct of investigations. Frankly, I agree with all of them as areas of concern: it is the potential for unfairness there that needs to be looked at. My suggestion to you is that, short of abolishing the area, all one can do is create some sort of buddy system with someone who is looking over the shoulder of the investigators to make sure that basic procedural fairness is accounted for through the whole process.

The essential difficulty, I think, is created by the power to question in private, which is what those regulations create. For failure to answer questions, the power of contempt is actually incorporated into that aspect of the defence inquiry regulations. Overall, to get back to your original question, Mr Hicks, the system, I think, works very well and is fundamentally very fair. I think all Australians should be proud of it.

ACTING CHAIR—Mr Slattery, I know you touched on it positively in the last question, but is there a convincing argument to establish the Director of Military Prosecutions to act in a similar way to the DPP? In that answer, could you give an explanation as to how a commander of a ship, say, on foreign deployment could dispense the swift justice needed to maintain military discipline using the DMP position? With questions this morning, we seem to have no problem with Army or Air Force, but we have a small problem with ships that move around as far as whether we have justice dispensed by the ship's commander, whether we have civilians on board with experience or whether we fly one out. We would like to hear your opinion on that.

Mr Slattery—As I have said earlier, I am in favour of the introduction of such a body. As a result of Findlay's case in the United Kingdom, such a thing was done there; it is a recommendation of the Abadee report. There is a true logistical problem, particularly for the navy in the implementation of such a reform. It is a bedevilling one, frankly, if

you are going to have that directorate operate at all levels both summarily and for courts martial. The fact is that you would not run a court martial itself other than ultimately on land. I cannot envisage a situation where a court martial would be run actually on a ship where an indictable offence is preferred under the Defence Force Discipline Act. So the problem really does not arise for the serious offences. It may just be that, for the authority of commanders operating at the summary level on operations, the law has to give way and that logistical practicality has to be observed.

The fact is that the High Court says these powers are authorised under the defence power and that if a choice has to be made, ultimately, between operational effectiveness and justice, and the choice is an absolutely irreconcilable one, you go back to where the power came from. The power comes from the defence power under section 51 of the constitution. It does not come from chapter III of the constitution under which the courts are created. For that reason, you may just have to say that justice to some extent has to be sacrificed for operational efficiency. But it seems to me you would only have to do it at the summary level and in certain exceptional circumstances within one service—namely, navy—or in other particular situations such as active service with other forces in times of war. But that is the best I can do.

I think there is less to be troubled about in not having such an independent prosecuting body at the summary level than in not having it at the indictable level. For that reason, I am really not too troubled by putting to you what I am. You can perhaps give more independence to the coxswains or someone on board ship tasked with preferring charges. I have not thought this aspect of the practicalities through all that well.

ACTING CHAIR—I was thinking mainly in the case of, as I have said, foreign deployment overseas. What about a sexual harassment case where a decision would have to be made one way or the other either at sea or in a foreign port? How would you envisage that it would be conducted? Do you just take them off the ship and take them back to Australia? How do you see it being dispensed with in a foreign port?

Mr Slattery—It really depends on what the charge is. If it is a charge of the most serious kind, of a major assault, then there is probably little alternative—and this has happened on occasions—than to take the alleged offender and the alleged victim off the ship, preferably both, rather than one or the other, and take them back to Australia, and for a trial to take place back in Australia. Usually, except in emergencies, the ship's complement can be replaced at reasonably short notice.

As far as lesser offences are concerned, I return to the distinction I made earlier that if it is a complaint of sexual harassment that does not involve an allegation of an offence, my very strong submission to you is that it should be dealt with by alternative dispute resolution procedures and not through anything which would even involve the Defence Force Discipline Act or the Defence (Inquiry) Regulations. If it is between the two and it is an offence of an assault or sexual nature but it is summarily triable, then the

problem presents itself more acutely. But if the present system is the only one that will handle such offences at sea, then the present system is not working too badly. That is really what I am saying to you.

ACTING CHAIR—When a defence member is found not guilty of an offence in a civilian court, what legal and practical prohibitions exist against trying him on lesser charges under the DFDA?

Mr Slattery—This raises the concerns of the minority justices of the High Court in a series of cases that have concerned the defence power. There has been a debate going on in the High Court for about 10 years, since Tracey's case through to the current cases. Those members of the High Court who uphold the present width of the Defence Force Discipline Act essentially say that it does not matter if a criminal offence happens to coincide with a service or discipline offence. If it has criminal characteristics, so be it. If it is justifiable on service grounds, you can try them for it, and that is that. The minority are saying that you can only justify the Defence Force Discipline Act to the extent that it is purely service related and there are no general criminal elements involved.

Most jurists would say that, if a person had been found not guilty in a civilian court of a crime on one set of facts and substantially the same set of facts were the subject of an allegation within the service, the defendant would have a very interesting argument for a stay of the proceedings within the service. There are rights to pursue stays under the Defence Force Discipline Act and the argument in my view would be a very powerful one. At the end of the day, it would depend upon how closely related were the facts needed to be proved to make out the service discipline offence compared with the facts necessary to prove the offence in the criminal sphere upon which the individual was acquitted.

Mr HICKS—This morning, Mr Slattery, we heard about an interesting case in the United Kingdom where a soldier had apparently gone on a bit of a rampage, he had assaulted people and then he had threatened to kill with a rifle. He went to military court and he was found guilty and then he wanted to appeal. He appealed to the High Court and the High Court said, 'No, he's been charged in accordance with military law.' He then appealed to the European Court and the European Court ruled in his favour, saying that the convening of the court was wrong because of the hierarchical system. I may be wrong and the committee might correct me here. They said that justice had to appear to be done; not only be done, but appear to be done. Because it was a hierarchical system within the military, he really could not get a fair go. They based it mainly on the convening of the court and the fact that it was an ad hoc committee; it was not a full-time court system.

Having listened to what you have said about how you believe the Australian system seems from your experience to be fair, et cetera, the argument this morning was that we should take those serious cases outside the military system and put them in a civilian court. It does not mean that in the civilian court you could not have people

experienced in the military, but they had to be totally divorced from the military to have it be seen that they were getting a fair trial, under the auspices of the International Covenant on Civil and Political Rights. Would you like to comment on that?

Mr Slattery—That is a very interesting question. I think the reference that must have been given to you this morning was Findlay's case in the United Kingdom. Quite interestingly, as I understand it, the United Kingdom government did not defend itself before the European Human Rights Commission, which, frankly, sounds extraordinary. It invited reform, obviously, immediately afterwards, if they took a position that they were not going to defend themselves.

I have a very strong view that offences which are alleged to be committed in a service context should be tried in a service context. I have said to you that the system is fair, and I believe it is very fair. Interestingly, although I am of the view that the equivalent of a DPP or the DMP, whatever it is called, should be set up along the model of what has happened in the United Kingdom, the reason I answered the earlier questions to the effect that if that were not possible operationally, you should simply put up with the system you have got, is because I think the present system does fundamentally, so far as courts martial are concerned, work very well.

I have been in a situation of defending sailors where the convening authority is instructing the prosecution, has appointed the court, and is the party I have to go to to get subpoenas issued to various parts of the service and the civilian world to produce evidence to defend my sailor client. Although that sounds very mixed up, I believe that that sailor got a very fair trial. I am thinking of a particular case; I fought very hard and I have seen defence counsel do the same thing and I have never, ever encountered a situation where I thought the convening authority was seeking to interfere with the course of justice. I make that very clear. I have never seen such a situation and, frankly, I would be amazed if I ever did encounter one.

With regard to the reason why I am in favour of a DMP, I have just said what is my experience, but that does not necessarily coincide with public perception. If public perception is that they should be separated—and I can understand that argument very powerfully—then I think they should be. I think the English experience should be adopted to the extent that it possibly can.

That is not because I perceive that there is any actual problem. The system, in a way that perhaps civilians might find extraordinary, works fundamentally extremely well and permits an accused person a real right to ask what they want, do what they want, present what evidence they want, and preserve the right of silence. Again, in a service context, the right of silence is a little different. The fact is that a service tribunal expects to hear from the defendant in some way, in the same way that if a barrister is charged with misconduct within the profession, the tribunal that is charged with deciding that barrister's fate expects to hear from them. But they actually have a right of silence.

The process, with the special characteristics it has got, is fundamentally a very fair one and I have never felt, acting for the defence, constrained in any way by the present structure. I cannot emphasise that enough. It is a good system.

ACTING CHAIR—Mr Slattery, thank you very much for your attendance here today. If you have any other additional information or material, you can forward it to the secretary. You will be sent a copy of the transcript of your evidence, and you can make corrections of grammar or fact. Hansard may wish to have a chat to you before you go. Thank you for the frankness of your remarks and your response to the questions put to you.

Resolved (on motion by **Mr Ted Grace**, seconded by **Mr Hicks**):

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

Subcommittee adjourned at 2.03 p.m.