COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE

ON

FOREIGN AFFAIRS, DEFENCE AND TRADE

(Defence Subcommittee)

Reference: Military justice procedures

CANBERRA

Friday, 24 July 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
Senator Ferguson
Senator Sandy Macdonald
Senator Margetts

Mr Bob Baldwin
Mr Bevis
Mr Brereton
Mr Brough
Mr Dondas
Mr Georgiou
Mr Hicks
Mr Lieberman
Mr McLeay
Mr Price
Dr Southcott
Mr Taylor

Matters referred:

(1) the adequacy and appropriateness of the existing legislative framework and procedures for the conduct of:

(a) military boards of inquiry;

(b) military courts of inquiry; and

(c) Defence Force discipline.

(2) Without limiting the scope of the inquiry, the committee shall give consideration to:

(a) the needs of Australian Defence Force in peace and in the conduct of operations within Australia and overseas;

(b) the constitutional and legislative framework within Australia, and particularly precedents established by the decisions of the High Court of Australia;

(c) the Judge Advocate General's annual reports; and

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

WITNESSES

BARRIE, Admiral Christopher Alexander, Chief of the Defence Force, Australian Defence Force, R1-5B-CDF Suite, Department of Defence, Canberra, Australian Capital Territory 2600 373

BROOKS, Mrs Kathryn Janet, 78B Endeavour Street, Red Hill, Australian Capital Territory 2603 361

CALLAGHAN, Mr Peter Raymond 407

DUNNE, Commodore Michael Thomas (retired), 11 McBride Place, Calwell, Australian Capital Territory, 2905 322

MACKNEY, Mr Gordon Neville, Jerrabomberra, New South Wales 295

MELICK, Mr Aziz Gregory 348

JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

(Defence Subcommittee)

Military justice procedures

CANBERRA

Friday, 24 July 1998

Present

Senator MacGibbon (Chairman)

Senator Bourne	Mr Bevis
	Mr Price

Subcommittee met at 9.35 a.m.

Senator MacGibbon took the chair.

CHAIRMAN—I declare open this public hearing of the Defence Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade. This hearing 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. There has been considerable media and public interest in military inquiries and aspects of military discipline over the last few years, most notably as a result of the 1996 Black Hawk helicopter accident, but also as an outcome of a number of other incidents. The latest military board of inquiry into the calamitous events aboard the HMAS *Westralia* earlier this year provides a recent example of the inquiry process to inform the committee's deliberations.

We are getting towards the end of the public hearings of this inquiry, and today might be the last day, although one can never be sure of those things. The committee has spoken with a number of serving and retired members of the Australian Defence Force, with government agencies, members of the public and the legal profession. The committee hopes to table its report on this reference towards the end of this year. I wish to take this opportunity to remind witnesses that this inquiry is a serious matter aimed at rectifying deficiencies in Defence's processes and procedures. It should not be viewed as an opportunity to pursue longstanding differences with specific individuals within the Department of Defence, however justly founded those grievances might be. The committee will view unfavourably any attempts by witnesses to misuse the protection of parliamentary privilege to make defamatory comment against named individuals.

At the same time, the committee has not set out to re-hear and reconsider the outcomes of previous inquiries. The committee is directed towards examining flaws in the processes where they exist, and hopefully coming up with recommendations that will eliminate those flaws which lead to a miscarriage of justice or inefficiencies in the administration of the Defence forces.

[9.37 a.m.]

MACKNEY, Mr Gordon Neville, Jerrabomberra, New South Wales

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

We received your submission and it has been authorised for publication. I would now like to invite you to make a short opening statement. It is usual in these circumstances for a witness to speak for five or eight minutes to an opening statement, if they choose to do so. Most witnesses do make a short introductory statement, but it is not obligatory. In your case, you have supplied the committee with a written text that we have all read. It is a very long statement, and since we only have 45 minutes for your hearing, you have every right to read this verbatim, if you so choose, but if you would like to precis it and hit the key points for the committee, that might be a better way to do.

Mr Mackney—I appear in a private capacity on behalf of my wife and me over a long-running incident that we have had with Defence. We do not intend to get into the specifics of that. We prepared that detailed opening statement under some misapprehension of what we could put in it.

After discussions with the committee secretariat, we came to the conclusion that it was too lengthy and detailed for the purposes of the hearing, and we were advised that we should seek your permission to have it read into *Hansard*. That is what I seek to do. I also understand that the committee has been given a copy of it in their briefing packages, and all I want to do is make a two- to three-minute summary of it. I seek that it be read into *Hansard*, if that is agreeable with you.

CHAIRMAN—We are agreeable with that. Is it the wish of the committee that the document be incorporated in the transcript of evidence? There being no objection, it is so ordered.

The document read as follows—

Chairman and members, I have a prepared opening statement which I would like to deliver to the committee.

I wish to highlight that our case was listed in the published terms of reference of this inquiry, without our knowledge. Had we been approached we most probably would not have agreed to its

publication or use. I have agreed to appear here on behalf of my wife and myself on the basis that she has suffered overwhelmingly at the hands of the Defence bureaucracy, the administrative bureaucracy and the political process. She does not choose to continue that process. The damage she has been forced to suffer is twofold—first she has to deal as any victim would with the elements of the crime, secondly she has been forced to deal with the weight of a non compassionate bureaucracy who seeks to vilify her for being the victim. We have no expectation that any positive action will flow from this process and are here primarily to have our concerns on the public record.

In presenting our concerns to this Committee I am mindful of the necessity to remain unemotional and to focus on providing constructive measures to improve the current system, rather than to dwell on our own mistreatment at the hands of the military justice system. This of course is a most difficult task.

I would ask the Committee to note that both Stephanie and I were Administrative Officers in the Royal Australian Air Force with a combined total of in excess of 30 years experience. We therefore have extensive experience of the military justice system and are well qualified, as experienced line officers, to tender our observations and recommendations.

I wish to reiterate that we have no real expectation that any positive action will flow from this Inquiry. We have not adopted this position lightly nor with any degree of comfort. Experience over the past 5 years has proven that Defence in general and in our case Air Force in particular are adept at avoiding any acceptance of responsibility particularly at the political level. In our case this has reached the point where certain individuals have presented information at the political level that they know to be inaccurate or misleading. This has occurred at most political levels, whether it happens to be private briefing of members of parliament or evidence before public hearings in such venues as Senate Legislative Committees. Perhaps more alarming is that there appears to be no 'political will' to investigate or follow up on this misinformation. Hence no accountability. Sadly, from our observations to date we have no reason to believe that this situation will change. This should greatly concern the Australian public.

Layers within Defence also appear to be able to avoid any responsibility or accountability to either their own bureaucracy or even to competent authorities such as the Ombudsman's office. As members of this Committee will be aware, in our case the Chief of the Defence Force invited the Ombudsman to conduct an Own Motion inquiry because of the inability of HQADF to direct Air Force to address our case in a reasonable and rational manner. Defence now appears to be using this intervention as a moral victory to independence and a demonstration of purposeful action, instead of as an indicator of a dysfunctional and ineffective system. They have conveniently ignored the fact that it was Air Force's refusal to cooperate with Higher authorities that required this intervention by CDF and the Ombudsman's comments about the lack of cooperation by Defence personnel during her investigations.

Much was made here on day one of these hearings by the Chiefs of Defence about a number of issues that I believe need to be tested. Whilst the list could be almost endless there are some essential issues that I believe should be tested by this committee if this inquiry is intended to bring about any alterations of the military justice procedures in the Australian Defence Force. They include:

. the role of inquiries

. the use of Boards as opposed to Investigating Officers
. the selective method of questioning
. selective witness lists
. the treatment of participants
. the role of legal officers
. conflicts of interest
. use of other than the military chain of command
. level of competence
. conspiracy theories
. misuse of resources
. political will
. authority, responsibility and accountability
. the support of individuals
. culture within which this system operates; and
. commitment of the Services and the bureaucracy to achieve a true and fair outcome.

I will start with the role of inquiries.

Much was made here on day one by the Chiefs about the need for inquiries to establish the facts. In our case the first inquiry failed to do this and the second was struck down by a Federal Court ruling, which apparently concluded that it was flawed in law. Consequently, after two inquiries Air Force apparently failed to establish the facts.

Why, did this occur? Well I am sure that there is a raft of reasons, which could be offered and countered on both sides. Automatic gainsaying is not in this instance going to achieve a great deal. I would offer though the following points for consideration.

Firstly, the military justice inquiry system is inquisitional, supposedly interested in establishing the truth (facts) of a situation. However, for those facts to be tested in the civilian adversarial legal systems in which we operate a whole new set of incompatible rules come into play. Our case is the perfect example in that it was legal technicalities which led the Federal Court to rule on the outcome, not the facts of the case. This allowed Air Force to use the civilian system to bury its own inquiry because Air Force did not like the findings. The commitment to finding and addressing the facts is sadly lacking, both in the military and political system. The truth and justice is sacrificed to protecting careers and the system. This committee needs to understand and appreciate that even if the truth (facts) of a situation is established under the rules of a military inquiry, it is highly unlikely that such data will see the light of day. A gaggle of lawyers will descend like vultures ever ready to prove their legal expertise whilst at the same time being particularly disinterested in the truth. The situation, the people, the truth, the idea of justice becomes inconsequential to the egos of the legal gladiators who believe that they have no morale obligations other than to prove the rule of law. This behaviour suits the supposed commanders, whose careers it protects and the politicians who basically don’t want to be involved. Therefore, the process of military inquiries in flawed from the start if truth and justice is the required outcome.

The second point on inquiries which bears strong scrutiny is the lack of independence. From our experience this key issue is fundamental to any intended improvement to the military justice system. In our case the first investigating officer was most inappropriate and was in many ways a pawn of his superiors. This was borne out by subsequent investigation by a second inquiry and the

Ombudsman. The first investigating officer of the second inquiry was replaced about one third of the way into the inquiry by a lower ranking officer as a result of posting actions. It has been subsequently revealed that the appointing officer made it very clear what outcomes he expected from the inquiry and when these outcomes were not delivered his reaction was to ignore the facts and proceed on his predetermined course. This subsequently meant that he did not act appropriately on the information placed before him by the inquiry, because primarily it did not meet his preconceived outcomes. His subsequent refusal to deal with the matter in a reasonable manner finally led to CDF inviting the Ombudsman to conduct an own motion inquiry. On this matter I would like to diverge and make a couple of points very strongly. Firstly, the Ombudsman's Office had been involved in this matter since October 1993, therefore CDF's request was clearly understood given that the matter had been under investigation by the Ombudsman's Office for some considerable time. The second point I would make here is that Defence has claimed in this venue and many others, some credit for inviting the Ombudsman to investigate the systemic and specific aspects that arose from our case. I cannot see how credit can be attributed to such an open admission of the inability of Defence to internally deal with such an important and fundamental problem in a reasonable and professional manner. Moreover, the Ombudsman remarks in Part One of the report about the lack of cooperation by Defence personnel during her investigation. This is hardly a creditable performance by Defence.

On this point I would summarise by saying that Inquiries to collect the facts are only of value if they actually collect the facts; independently, impartially, without prejudice, fear or favour, bias or otherwise. They are of no value if they do not. Secondly, there appears to be no point in conducting an inquiry if the information will not or indeed cannot be used. Our experience would bear out Evan Whitton's assertions that inquisitional versus adversarial are incompatible. The first casualty of the present adversarial system seems to be the truth, the second appears to be justice.

The question this committee may care to consider is whether there exists a desire for truth and justice to prevail in the Australian military or whether there is a desire to continue to support the afore mentioned gaggle of highly paid lawyers to squander resources in an attempt to ensure that nobody is ever held accountable for unacceptable behaviour and to protect senior ADF and civilian bureaucrats careers. Not, as should be, a system designed to ensure that truth and justice prevail, that any defects within the system are corrected and that military personnel are safe to go about there duty in the knowledge that they will be afforded protection under the legal system.

This leads to the question of Investigating Officers versus Boards of Inquiry

I would just like to highlight one anomaly on the question of Investigation Officers versus Boards of Inquiry. On day one here the Chiefs stated that for minor matters, such as motor vehicle accidents, investigating officers were appropriate, otherwise a Board of Inquiry would be convened. It would appear in our case that either a grave error of judgement was made not once but on several occasions, or that the matter was not considered to be of a serious nature (itself possibly another error of judgement). Other possibility are that the ADF does not apply its policies uniformly, the policy is open to wide interpretation and therefore requires further clarification or that such policies have not been given wide circulation or import. Noting that the mere appointing of a Board of Inquiry is recognition by the appointing officer of the seriousness of the issue, the independence of the appointing officer in this decision becomes critical; particularly when it is not clear whose interests would be best served by a particular outcome.

Moving to the Conduct of Inquiries

Several of the points that I think need to be considered fall into the conduct of inquiries. The chairman has raised in this and other venues his concern over 'obvious' questions which go unasked. This was certainly the case during the first inquiry into our case and we suspect that it was also the case in the second inquiry. What goes hand in hand is the selectivity of certain questions and the appropriateness. A good deal of fishing and delving into clearly inappropriate matters seemed common and any reluctance on the part of witnesses to address even the most inappropriate questions was met with the force of the Inquiry. Moreover, a good deal of what was put to both inquiries was never fully or appropriately tested by cross examination or further investigation. Hence, poor questioning technique, whether deliberate or through a lack of expertise, was very much a determinate in the apparent poor and indeed supposedly unacceptable nature of both inquiries. This is not, I am sure, new information for the committee, but reinforces the systemic problems of ADF Inquiries.

Equally disturbing is the selective method of identifying witnesses. In our case a very senior Air Force officer (who is stilling serving, which is a rarity in itself) who was present during the events leading up to the incident, was in the immediate area during and after the incident, was the immediate past commander of the base and therefore holder of relevant information, was not questioned by any of the inquiries. In fact for all intents and purposes he did not exist; whilst unrelated officers were afforded the right to make assumptions and express basically uninformed opinion.

The area of conflict of interest is another focal point, which has been raised in a number of cases. Clearly, such was the case for us. The first convening authority was directly involved in the events yet chose to appoint a clearly inappropriate Investigating Officer to collect information over which he adjudicated. In the second Inquiry the convening authority sought to set the time and scope of the inquiry and to direct the outcome. As I previously mentioned, when the desired outcome was not produced, the decision was made to ignore and hide the outcomes. Throughout this process there were very clear conflicts of interest at many levels; whether that be direct involvement, the old boy network or legal officers attempting to prop up bad advice, seemed not to matter. In fact there is no doubt that in our case the matter became a personal challenge for a number of senior Air Force officers both as a face and career saving exercise. Their behaviour not only had effects on the way in which the inquiries were conducted and the subsequent mishandling of the matters involved but may have heavily influenced the public perception of events. Their use of the media to shift the focus and to send clear messages to any others who may think about complaining was blatant. The manner in which they misrepresented the situation at the political level was equally blatant.

Much was made on day one about levels of competence. Largely, the claims by the Chiefs as to the competence of individuals or boards needs to be reviewed. In our case two flawed investigations speaks volumes for the competence both of the officers involved and the legal advice being offered. The fact that the three Service chiefs sought their legal advice internally and the ultimate results of that advice speaks volumes. The fact that CDF sought independent legal advice on our case is in itself a strong indicator. I was some what bemused to hear Ms Kelly's evidence on day one in which she talked of the administrative and the legal chain in the Butterworth case. What she did not say was that both in the Butterworth case and our case, and the latter part of the Baldwin case the administrative chain to which Ms Kelly referred was headed by a Legal Officer. Her suggestion to the contrary, or indeed omission on this point, does not give a clear indicator as to the level or amount of legal advice that was available to the Air Commander of the time. Quantity would not seem to have been the problem. The problem would logically seem to exist in either quality or

uptake. In our case quality (competence or conflict) appears clearly to be the problem. This also was clearly the case by the time Air Force Office, HQADF and finally the Ombudsman became involved. The inability of senior legal officers to act impartially, their insistence on their right to justify behaviour behind veiled threats, their predicable tactics (again as described by Evan Whitton) and their apparent disregard for Government policy, all continue unchecked. This is a competence question and reflects their poor understanding on the role of the ADF, the leadership paradigm, Government policy and what they see as their role as Military Officers as opposed to being Lawyers. Their difficulty in separating these roles suggests that there is a clear case to review whether Lawyers should be in uniform or whether their services, especially in matters relevant to civil law or discipline, would be better purchased from high profile and proficient civilian legal firms. This would separate the conflict and cover the question of competence (including relevant legal experience).

A related issue here is the use of legal advice by Commanders. From my own observations, most Commanders are particularly naive with regard to legal matters and certainly the civilian legal system, to which they are being increasingly made to answer. In the world where there is a perception of increasing accountability of decision makers, Commanders are more and more turning to legal officers for advice. However, as a direct result of their sheltered backgrounds and lack of appreciation of the environment in which the Commanders are operating, many military legal officers are themselves somewhat naive in matters of civilian justice and couch their advice in terms of protecting the system, or the Commander, rather than seeking any equitable outcome. Lacking confidence in these matters, Commanders are accepting this ‘advice’ as ‘dogma’ at the exclusion of all other considerations. This was clearly so in our case with the legal officers protecting their bad advice with further, compounding, bad advice. In our view, the resolution here is not to necessarily educate Commanders in law, but to give them an appreciation that the aim of their decisions should be an equitable outcome and that legal advice is just one factor in that decision to be weighed with a number of other factors, such as truth and justice.

This is probably a relevant moment to at least mention chains of command. This was a matter of concern raised by CDF. In our case many informal, unofficial or pseudo chains of command were used. Some of these, such as the legal and medical exist because the specialist officers in these branches see themselves as being above the normal military chains and hence set up their own informal chains, which by and large become more relevant and powerful than the official chain. Unofficial chains of command arise because staff officers, in our case Air Command and Air Force Office, see themselves as a part of the command chain, instead of merely advisers to the commander. This allows many sins to be committed in the name of the father, but with no one person ever being held responsible. In our case, strictly in accordance with my official chain of command I sought to ensure that certain matters were dealt with correctly according not only to the chain of command but also to propriety and military custom. In the first instance, I was blatantly lied to by my superior, in the second I was rebuffed by an abusive, fouled mouthed, misinformed, misogynistic outburst by my Part 4 Assessor and in the third instance I was refused an interview on the basis of legal advice given to the officer in question. Therefore my military chain was denied me. By assistance afforded me by my civilian superiors at the time, a pseudo chain of command was established which gained the involvement of HQADF and ultimately some amount of accountability began to surface. Much was made of me going outside my official chain of command—nothing was done about the abuse of that chain by its incumbents. If the Chiefs are serious about preserving and using the military chain they must be equally serious that the incumbents within that chain must be held responsible and accountable for its maintenance. Interestingly, comparison of other high profile

Air Force cases will show the same behaviour by Commanders, staff officers and legal officers. Like many many aspects, this is not unique to our case, but is common practice throughout Defence.

Another significant factor relevant to the chain of command debate is the manner in which Defence attempt to hide behind its concept to their advantage. For example, we sought no publicity of our case and in fact went to great lengths to minimise use of such communications. Defence on the other hand used the media dishonestly in an attempt to discredit us. Moreover, they did so on at least one occasion having been advised independently on the errors in their information. Yet at one time or another they attempted to censure us for going outside the chain of command by approaching the media—we never did. We have from day one to this very moment never been the primary instigator in any media coverage. CDF should look to his own for responsibility and dare we suggest some degree of accountability.

Let now turn for a moment to Conspiracy Theories

Conspiracy theories were mentioned here on day one and are often the subject of discussion. We do not believe in our case that such events occurred. As the saying goes, if we had to choose between a conspiracy and a bureaucratic bungle, we would back the bureaucratic bungle every time. The very attributes that are required to ensure the success of a conspiracy are in the main the very attributes that have not been shown in our case. We are not saying that there has not been personal dishonesty on the part of a number of senior officers; nor are we saying that they have acted in an appropriate and professional manner—what we are saying is that between them, they have not been capable of conspiring to achieve any particular outcome. Frankly, they are been too concerned for their personal circumstances and attempting to ensure that they could never be held personally responsible for anything. Notwithstanding, there certainly have been occasions when senior people have colluded in the hope or desire to achieve a certain outcome, and at times they have had varying degrees of success—that is a long way off conspiracy. Conspiracy theories make good dinner time conversation but we cannot accept that anybody has conspired, per se, to achieve the grand level of mishandling and dishonesty evident in our case. Basically, they have proven that they are just not that clever.

However, we would question whether military ethos or culture is not itself a ‘plan’ to ensure that the military exists as a superior or a least parallel jurisdiction within a nation. The notions of honour, esprit de corps and loyalty are the strongest tenets of any military force. These notions are strongly reinforced in the ADF as principles to be upheld at all costs. The question through has to be in—defence of what? Certainly not the welfare of the individual and certainly not in support of moral behaviour. In our case, we were advised, counselled and even threatened on numerous occasions not to fight the system but to remain ‘loyal’. Why? Why would we remain loyal—so that the same inadequate and misguided ‘system’ could remain to mistreat others. We could never understand what these advisers believed that they were protecting—the same beast that will turn on them the moment they really need some loyalty in return. Is this the ‘conspiracy’ which many victims feel exists because if it is, whilst they have the correct effect they certainly have the wrong process. This is not a conspiracy—its an outward display of both arrogance, grown from contempt and ignorance, grown from ingrained fear.

Take the recent report on ADFA. The generals and the politicians feign surprise, the public yawns, the Defence community become indigent, the victims get no support, because like this inquiry individual cases are never investigated or dealt with, and the same astounding facts emerge. Defence has a culture—a masculine culture, probably misogynist and perhaps an element of blind obedience.

Bound by notions of honour, esprit de corps and loyalty. Abide the code or be ostracised and expelled. Question the customary practices and you will be either pressured into submission or expelled.

So nothing changes. These young officers, like graduates of all the military training establishments learn to conform and to take the culture out into the field with them. They reinforce it on the system at large, so nothing changes. Again, this is not a conspiracy, this is subtle (and sometimes not so subtle) and effective brain washing. It is a systematic culling of unsuitable individuals who may threaten the culture, it is a shielding of a self appointed culture of exclusivity and power. The ultimate boy's club.

The power of this club should greatly concern the people of this country—given its contempt for the political process, community standards and the law of the land. Fortunately for Defence most Australian's are largely apathetic toward the military, therefore the politicians are under no real pressure to respond.

Accordingly, the military will remain resilient to all forms of imposed change and new generations of politicians can hold similar inquiries in the future to address the same old questions.

Not because of some great conspiracy but primarily because of a culture built on hundreds of years tradition (fabricated or not) that is ingrained into the willing and forms an impenetrable fortress that is resourced well enough to withstand the greatest of sieges.

Lets move to the Misuse of Resources

I am sure that after the information before this committee on matters such as Butterworth there is a element of appreciation as to the waste and misuse of resources in dealing with these matters. In our case the Ombudsman reported some years back with a headline saying 1 million, three years and no answers. We have been threatened by senior legal officers that they have at their disposal unlimited resources our experience is that they do and they will use them not for truth, justice or resolution but to guarantee their own desired outcome, whether that be equitable or not. The fact that Defence can waste so many resources on attempting to cover up issues, to suppress the truth, or to avoid accountability is in itself a national scandal.

And what of Authority, Responsibility and Accountability

The very basis of command. Yet throughout this process we have seen no accountability, little, if any, responsibility, but unchecked and blatant misuse of authority for the benefit of senior individuals or to ensure the blocking of justice. Senior officers who have been named in inquiry after inquiry have walked away with large redundancies payments, huge superannuation payouts and in many cases are back on the government payroll. In one case in particular, not only has one very senior officer had is finger prints all over case after case, he has been paid a redundancy, superannuation, been reappointed to a very high paying Government position but is also being openly supported by Ministers of the current Government. This sends a very clear message.

Which brings me to what is in essence the crux of the issues here before you political will or lack thereof. The only body that can hold the military bureaucracy accountable on behalf of the people is the Parliament. Our experience is that there is a strong reluctance on the part of politicians on all sides to take the step of demanding accountability of the nations warrior classes. Both sides know

that be it ministerial representation, Senate Legislative Committee process, questions from members or specialised political inquiries that it is really a game. A political extension of the adversarial system on automatic gainsaying where the truth is the first casualty and accountability only has a place if one is unfortunate enough to get caught. That we have reached this conclusion based on our close observations of the political subjugation by the military is not only sad but frightening. However, the only other conclusion which we could have formed is that the political level is somewhat apprehensive of repressing the military and that our democratic notion of the military answering to the people is somewhat of a facade. This conclusion is almost too frightening to contemplate.

For the bureaucrats, life is that of a protected species—the Westminster System ensures that the politicians are accountable—if they get caught—but the bureaucrats are protected. From our experience the bureaucrats punishment at worst will be a large redundancy, good superannuation and another government or pseudo government post. The politicians are vulnerable—the political will expires and the system of military justice or accountability remains where it always has been—a low priority, especially in times of peace. In our case this can be followed through by the fact that at the very height of the activities in our case the Senate held an inquiry into Sexual Harassment in the ADF. At least two out of the three Service Chiefs just chose not to appear and the inquiry noted their non attendance. The recommendations of that inquiry whilst publicly accepted by Defence were never invoked and in fact in our case the same sins were committed repeatedly. On the heels of that inquiry came the Ombudsman's inquiry which highlighted no changes. Meanwhile, the Generals sit here before this committee hand on hearts and swear their collective goodwill to the acceptance of change—but where is the evidence? It does not exist. Evidence to the contrary though is prolific and easily collected whether it be individual cases brought before you, collective inquiries such as the ADFA report or other sources such as the Redress System, the Ombudsman, or complaints to the minister. The problem is that at the political level the system does not want to know therefore the bureaucrats are free to operate without accountability. Until these fundamental issues are addressed nothing will change.

Lastly we wish to highlight the most despicable part of this highly distasteful process—

Treatment of the Individuals

This committee and indeed the public at large need to understand, that each and every one of these crimes and they are crimes, not administrative anomalies, have a victim or victims. I spent over 23 years of my life in the Defence of this country and had what could only be described as a good solid career. I was well reported and seen as a good officer—my only transgression was to support my wife and hers was to be sexually harassed and finally assaulted and yet the system—a system that I had given well over half my life turned on us as would any pack of wild animals on injured prey.

What is more, from our observations, those who were seen to move in for the kill have been the ones who have subsequently been most heavily rewarded. All this whilst the politicians have stood and watched. The words of the Generals, the civilian bureaucrats and the politicians in regards to the handling of unacceptable behaviour, criminal behaviours in many cases, within the Defence Forces are hollow. The reality is that if you are a victim of crime in the Defence system you, not the perpetrator, are in reality the one who will be vilified and you, not the perpetrator, will be punished. The reward will go to the legal and administrative gang who wheel the final blow to silence you. There is no escape, there is no independent arbiter, there is no control, there will be no justice.

While we applaud this Committee for conducting an inquiry of this nature into military justice procedures in the ADF, we have seen it all before. So many times over the last five years we have had our faith renewed by an apparent will at various levels to ensure that justice within Defence is addressed. We may sincerely hope that on this occasion much needed change will be forced on to the military justice system unfortunately experience on the other hand has proven that this will not occur.

Notwithstanding we can only wish you well in your endeavours.

Thank you

CHAIRMAN—I invite you now to make your verbal statement.

Mr Mackney—Firstly, I would like to make it very clear to you, Mr Chairman, and the committee, that I am here to represent both Stephanie and myself. It is due to the nature of what occurred that Stephanie does not feel that she has the strength to be put through this sort of rigour. Secondly, she has asked that I reinforce the point that, had our case not been listed without our knowledge in the terms of reference, then most probably we would have made no submission to this committee at all. Thirdly, we have no expectations that any change will come from the process, and we do not take that position lightly.

We wish to stress that it is our strongest belief that had there been some political will to seriously address some of the issues of military justice some five years ago, and through the process of the last five years, what has happened to us may not have occurred, or at least would have been dealt with in a much more reasonable manner.

This committee has, as all inquiries of this nature to date, removed from itself the pressure to deliver measurable outcomes, we feel, firstly, by refusing to deal with individual cases and, secondly, by failing to acknowledge that, by default, individuals who come forward to these inquiries primarily do so in the last hope of obtaining some form of justice. Additionally, it does not recognise that there are many more out there who either have given up hope, do not have the skills or the resources to present their case or, in essence, are just too afraid to come forward to these sorts of inquiries.

We feel that the parliament of this country, and this committee is a part of that, has a moral obligation to the individual. What this case has proven to Stephanie and I is that the moral obligation is ignored under the current system, and that in this instance Defence is able to ignore the individual with political immunity. This, we stress, has nothing to do with some form of conspiracy which seems to be a very popular belief running around. We think it is a direct result of the lack of political will to control the Defence bureaucracy, and that bureaucracy's ability to squander immense resources to hide its unacceptable behaviour.

If this committee is to have any impact on the current situation, it must kindle the

political will of the parliament to hold Defence bureaucrats responsible and accountable. We do not believe that any alteration or change of process or procedure will, of itself, change the culture or the behaviour of Defence. Social or cultural change will not be successfully imposed by legislation, nor will it be achieved through some form of political gainsaying. What could, however, be successfully imposed is the proper imposition of political will, and the forced adherence of authority, responsibility and accountability.

CHAIRMAN—Thank you. I was just looking through your submission. I think in this you state that you and your wife have served for 30 years.

Mr Mackney—Collectively. I have had over 23 years of service, and she has had seven.

CHAIRMAN—Through that period of service until this final incident, what were your views of the administration of justice and discipline within the Defence Force? Did you have any concerns about the way those matters were organised?

Mr Mackney—I came up against the system on a number of occasions about my views on that. I worked at the Officers Training School in 1984 with the introduction of the DFDA, and was a part of the team that developed the training packages for new officers into the RAAF. I felt that we were trying to 'train a bunch of Perry Masons' instead of getting on and running the system. I also felt that the legal officers hijacked the system, building it into a legal circus rather than supporting what the system really needed to get on and get its job done. At that stage I came up against the system on many occasions.

I was the senior administrative officer at the RAAF base Edinburgh when the sexual harassment matters at the Recruit Training Unit took place. I saw the way in which they were handled in the old boys club. I have seen a number of those sorts of instances in various positions that I held. I ended up being the staff officer of administration at Air Command, which administers over half of the air force, and again the old boys club was very much in place in dealing with those.

I was appalled at the handling of the Linda-Anne Griffiths case at Amberley in 1986-1987. I happen to have been the senior administrative officer at Toowoomba when that was happening, so was not only in the local area but also watching the press releases. So I have, over the years, seen a lot of it, and I think the way it is handled is appalling.

CHAIRMAN—When this incident occurred involving your wife and yourself, what was your immediate response? Did you report the matter immediately?

Mr Mackney—My immediate response in fact, Mr Chairman, was to report the matter. We were in the middle of the Northern Territory, for those who are not aware. I actually reported the matter to one of the senior staff officers at air headquarters in Sydney

within a half an hour of it happening because I had no faith that it would be handled at Tindal, and after I had done that report I immediately reported it to the officer commanding at Tindal. So the matter was reported immediately.

CHAIRMAN—What was the response from those two officers?

Mr Mackney—Gratuitous platitudes, and then the removal of us—the dislocation and relocation of us away from Tindal with no support—and we were not kept advised of what was happening. We were given no support. We were banned from RAAF medical facilities; we were banned from RAAF base Darwin where they put us and left us with no support. We were told we were not to go on the RAAF base at Darwin and seek any support.

Mr BEVIS—But you were actually transferred to Darwin—you were actually—

Mr Mackney—We were just put on a helicopter and flown to Darwin, picked up at the airport, taken to the Travelodge hotel and dropped off and left to our own resources.

CHAIRMAN—I do not wish to go into the details of the case in public, but—

Mr Mackney—The details of the case are available to you, Senator. There is the Twigg report, there is the Butcher report—there are any amount of reports.

CHAIRMAN—Just let me finish. I do not wish to go through the details of the case at this public hearing, but the allegations were very serious. They were of a criminal nature, were they not?

Mr Mackney—Indeed they were.

CHAIRMAN—And you are telling the committee that your two superior officers—namely, the base commander and whoever you reported to in Air Command—did not act to investigate whether those allegations were true or not?

Mr Mackney—That is correct.

CHAIRMAN—Why was that so?

Mr Mackney—I cannot answer for them, Senator. I do not know.

CHAIRMAN—Is there any appeal mechanism, or was there any appeal mechanism available to you at the time or were you obligated to only those two officers to seek redress?

Mr Mackney—There was an appeal mechanism open. I rang my next superior in

the chain of command some days later saying that we had laid this complaint and nothing had been happening, and I got a very foul-mouthed, misogynistic response to that, telling me that if I could not control my wife that was my problem, not his.

Mr BEVIS—In the chronological events that you set out in your submission you refer to advice you got from the Chief of the Air Force that a statement of wrongdoing on behalf of the Air Force, apology and compensation would be forthcoming. Your next note in the chronology is that that position was changed.

Mr Mackney—That is correct.

Mr BEVIS—And the last item there is that the Ombudsman is looking at that. Is there any update on that?

Mr Mackney—No. In fact I am not sure what is occurring there. What happened was that, almost 18 months ago now, maybe a little longer, my wife and I were summonsed to the Ombudsman's office for a meeting with one of their senior investigators, and there is a transcript of that in the possession of our solicitors and the Ombudsman. She pointed out to us that the Chief of Air Staff had had a meeting with the Ombudsman, had agreed that there was a statement of wrongdoing, an apology and compensation to be paid, and that she had asked the Ombudsman to broker a deal with us because relationships between us and the air force had broken down to the point where there was no trust on either side.

That deal was brokered. We agreed that we would accept that we would put in a submission for defective administration, that we would put in a claim for sexual harassment and so forth. All that was done and, within a very short period of time, we were advised by Defence that they did not know what we were doing.

We attempted to contact General Dunne's office. He refused to take any of our phone calls or correspondence until eventually one of his colonels wrote to us and told us to go away and stop bothering them, that the case was closed. The only reason we knew it was not was that there was a report in the *Canberra Times* in which the last three lines of that report said:

A spokesman for Defence said that Major-General Dunne got it wrong. The case was still being looked at and there was a compensation claim possible.

We have heard recently from the Ombudsman's office that they still have not completed the report. The new Ombudsman was supposed to meet with the new CDF to work out what was going to occur. That is all we know at this stage.

CHAIRMAN—Mr Mackney, could we go through this in chronological order. You appealed to your superior officers and your appeals were rejected.

Mr Mackney—That is correct.

CHAIRMAN—What happened after that? There were a series of reports made, weren't there?

Mr Mackney—What happened simultaneous with that was that there was a squadron leader air traffic control officer appointed by the officer commanding at Tindal to carry out an investigation.

CHAIRMAN—How much later was that?

Mr Mackney—Some two to three days after the phone call, so probably four or five days after the incident. His inquiry was later struck down for a number of reasons, not the least of which was that he had no qualifications or experience in running investigations of that nature.

We were then transferred back to Canberra. When I arrived in Canberra, I found that the Headquarters ADF had been briefed by Air Force that my wife had been involved in a long-running affair with her assailant and that she was just screaming because she had been caught out, and that I was an alcoholic and I was just jumping up and down. I then asked in writing for a parade to the Chief of Air Staff to discuss that matter and was refused a parade to the Chief of Air Staff. The civilians whom I was sent to work for got me an appointment with General Baker's office; he was VCDF at that stage. General Baker's office took the details. It was then that General Baker suggested to the then deputy chief of the air staff and later CAS that they open the Twigg inquiry.

CHAIRMAN—Who was Twigg?

Mr Mackney—The Twigg inquiry is another example of where inquiries go off the rail. They originally appointed a guy called McDermott to set up an inquiry—

CHAIRMAN—Was he a serving officer?

Mr Mackney—He was a group captain—appointed to run an inquiry into the whole of what had happened from when our postings had first been set up to go to Tindal—

CHAIRMAN—Was he a legal officer?

Mr Mackney—No, he was a navigator. Halfway through the inquiry, Group Captain McDermott was posted to Japan, so there was a guy called Squadron Leader Alastair Twigg, who was a reserve legal officer and ex-RAAF navigator, and they gave him carriage of the inquiry. So they dropped it by two ranks, and the officer who started the original inquiry just disappeared into the ether to Japan.

CHAIRMAN—When was the Twigg report completed? How many months after the incident?

Mr Mackney—About August 1994 or thereabouts.

CHAIRMAN—That was about a year after the incident, was it?

Mr Mackney—The incident happened in October 1993.

CHAIRMAN—What were the findings of the Twigg report?

Mr Mackney—We do not know—no, I inadvertently tell you a lie. We were told that the Twigg inquiry found that my wife had been drugged and sexually assaulted. Within two hours of having been told that, we were then told that the air force had taken Federal Court action to suppress the findings of the Twigg report and that if we discussed it with anybody we would be held in contempt of the Federal Court. We were told that if we wished to debate that we would have to take the air force to the Federal Court. At the same time the air force informed us that if we did and we lost they would be pursuing all costs against us as individuals.

Mr BEVIS—Was that the point at which you made comment that you were advised that 'Air Force have unlimited resources and if you attempt to fight us . . . '—

Mr Mackney—That is correct, Mr Bevis.

CHAIRMAN—Who made that statement to you?

Mr Mackney—Then Group Captain, now retired Air Commodore, Skillen rang us and told us that if we attempted to take Air Force on in any way he had unlimited resources and he would bury us.

CHAIRMAN—Let us return to the Twigg report. You never saw the Twigg report officially.

Mr Mackney—No.

CHAIRMAN—You did see it unofficially?

Mr Mackney—We had copies of the findings of the Twigg report delivered in our mail box in an unaddressed envelope. I immediately advised our solicitors of that and destroyed the copies that were given to me. Yes, I have seen the unabridged findings of that report, but not officially, and for us discuss them outside this sort of venue would certainly be contempt of the Federal Court. That is my understanding.

CHAIRMAN—And so the air force went to the Federal Court and got—

Mr PRICE—I think we have got parliamentary immunity here.

Mr Mackney—Yes, that is what I am saying. I can discuss them here, but I cannot discuss them outside here.

CHAIRMAN—Let us get back to the detail of this. On the Twigg report then, the air force took an action through the Federal Court to control the distribution of the report. Is that correct?

Mr Mackney—Correct. That is my understanding.

CHAIRMAN—So what is the fate of the Twigg report now? It is still subject to that requirement?

Mr Mackney—As I understand it, it is still subject to that. To my knowledge, there are only two unabridged versions of the Twigg report still in existence; one is in the possession of Senator Newman's staff, and the other one is with our solicitors, although I suspect that the alleged offender's solicitors still have their copy.

Mr PRICE—How did the air force gain the suppression of Twigg—on what basis?

Mr Mackney—The alleged assailant took the matter to the Federal Court, with the support of the air force, saying that the Twigg report was fundamentally legally flawed—even though it was conducted by a barrister. I understand that that finding was supported by the Federal Court. However, having said that, they still maintain that there was no defective administration. I have a problem with that.

Mr PRICE—I think they are caught every which way.

CHAIRMAN—I think the committee will have to look at that hearing before the Federal Court, examine the detail of it and—

Mr Mackney—You might like to look at *Hansard* as well, Senator, because Air Vice Marshall Rogers was asked by Senator Newman the question as to whether in fact that order was taken out, which he denied. The ABC reporter, Irris Mackler, then got a copy of that from the Federal Court and supplied it to Senator Newman's office, but it has never been corrected on the public record.

CHAIRMAN—I think the committee will have to look at the actual details of the hearing before the Federal Court and what its determination was and consider whether it acquires a copy of the Twigg report.

Moving on from there, what happened after that?

Mr Mackney—After the Twigg report?

CHAIRMAN—Yes.

Mr Mackney—We attempted to have something done to bring the matter to a resolution. In that process, the then VCDF, Admiral Walls, had his staff officer ring me and ask me whether I would be prepared to meet with him to discuss the case. I understand that that arose from the fact that Irris Mackler, the ABC reporter, was friends with a barrister who had advised Admiral Walls during the *HMAS Swan* incident. By this time I had left the air force. I was a civilian working in Defence. I went and had discussions with Admiral Walls about various issues. He said that he would attempt to get some quick resolution to the matter. I got a message back from his staff officer saying that the air force had agreed to negotiate a settlement of the matter and the date was set down.

We sent our legal representatives to meet with Group Captain Hemingway, Air Commodore Blakers and Wing Commander Greenwood. When they arrived, Blakers laughed at them and told them there would be no negotiations, that they were not interested and the matter was closed. He said that Walls was—quote—'an interfering little turd'. That was the end of that discussion. Admiral Walls then called us back and said that he had had discussions with General Baker and that General Baker had asked him to meet with Philippa Smith, who was then the Ombudsman, to change our complaint to the Ombudsman into an own motion inquiry on behalf of the Ombudsman, at the request of General Baker.

What happened was that General Baker signed a letter to Philippa Smith asking her to conduct an own motion inquiry into the events. The next step in that was that the air force refused to cooperate in the inquiry. There was some debate about that and the air force made overtures to the Ombudsman's office about taking legal action to suppress her report, so the report was broken into two parts: a systemic part, which has been issued; and the specific part—which is ours—which is still being negotiated.

CHAIRMAN—When do you expect those negotiations to be completed?

Mr Mackney—We have been told for the last three years that it will be in the next six weeks. I do not know.

CHAIRMAN—I see.

Mr PRICE—What do you mean negotiated?

Mr Mackney—I do not know. I know that the new Ombudsman has met with the current CDF but we get told nothing. We are not allowed to know anything. The only

reason I find out anything is because the Department of Defence leaks like a sieve. If it were not for people who are still serving, who drop copies of letters to us, and phone us and tell us what is going on, we would not have the faintest idea what was occurring.

Senator BOURNE—When did you last have an interview with the Ombudsman?

Mr Mackney—Three years ago, other than the meeting that we had 18 months ago to say that we would agree to the brokering. We have never seen a draft copy of the Ombudsman's report, yet I could almost tell you half of what is in it. Everybody out in Defence, except us, has read it. It is the same with the Twigg report: officially, we have not seen the Twigg report but I could name you a thousand people who have read it.

Mr BEVIS—Do you have a view as to why all this has happened and how it has all come to pass?

Mr Mackney—Because I have had the hide to stand up and say that my wife does not deserve to be treated in this manner. One of the things that you have got to understand about this is that we were not the victims of Tindal; there are a thousand other people out there that were victims of Tindal.

The chairman knows about Tindal. He has been looking at Tindal and inquiring into Tindal for probably the best part of three or four years. I am not the first person that has come to this board and talked to you about Tindal. The culture that was set up in Tindal and allowed to run in Tindal was going to be protected at all costs.

At least two aircraft were lost and two lives were lost due to the lack of discipline in Tindal. Do you think for one minute that anybody was going to open up Tindal and have a look at what was really going on there? No way. That is not a conspiracy theory; that is just looking after your own career.

Mr BEVIS—Are you saying, therefore, that the location, the fact that it was at Tindal that this happened, is the reason—

Mr Mackney—The reason for the gross overreaction in our case?

Mr BEVIS—Had this occurred in Edinburgh, or Amberley, or Townsville, or somewhere, instead of Tindal, are you saying that you would not have been subjected to what subsequently followed?

Mr Mackney—If it had happened somewhere else, I doubt that it would have been handled very well but the gross overreaction in our case was because of Tindal. The gross overreaction in trying to suppress everything was because of Tindal.

CHAIRMAN—Are you saying that Tindal is some sort of wild west outpost where

discipline does not matter?

Mr Mackney—I am saying that there are many goings on at Tindal that the air force would be very happy never to come out, because of the reflection that they may very well have on some other more serious incidents.

CHAIRMAN—Will you pass judgment on the process of reference of an incident to the Ombudsman? Do you think it is worthwhile or do you think it is a waste of time?

Mr Mackney—Could you repeat your question? I am not sure I got the drift of it.

CHAIRMAN—What is your assessment of referring a matter such as yours to the Ombudsman? Is it a waste of time or is it likely to produce a positive result?

Mr Mackney—Let me step through a couple of chronological events there. We first contacted the Ombudsman's office within days of the incident, when senior people rejected us and refused to investigate the matter. We were under the impression that there was some activity taking place. We subsequently found out—the Ombudsman's office has acknowledged this and that it was unacceptable—that the person who was supposedly investigating our case, from the Ombudsman's side, had been taking whatever we would tell them and just giving it to air force and saying, 'This is what they are whingeing about now, et cetera.'

The Ombudsman's office was quite appalled at that. They picked it up and they appointed a senior investigator to investigate it. I think the professionalism and the manner in which she did her job was absolutely commendable. She put a huge effort in to try and get the thing on the rails. The Ombudsman says in her report that she was given no or very little cooperation by certain people within Defence. She criticised the level of cooperation that her investigators were given by Defence.

Secondly, Defence have done nothing with the Ombudsman's report. They pay lip service to it but they are not in the slightest bit concerned about it. Whether you view that as the Ombudsman being ineffective or whether you view it as the fact that VCDF was unable to achieve a result, I do not know. The CDF was unable to achieve a result so he invited the Ombudsman in and the Ombudsman is now struggling to achieve a result. There has been a succession of ministers involved in it who have not achieved a result. Where do you want to put the Ombudsman in it, Senator? I do not know.

CHAIRMAN—No, I was asking for your views; I have mine.

Mr Mackney—I do not know the answer to that. No matter where the pressure comes down, we seem to have an autonomous body called Defence that can do what it likes, and there is no political will or independent jurisdiction to bring them into line. That is how it appears to me.

CHAIRMAN—All right. Can I go off on a different tangent. You met obstruction from your superior officers in prosecuting your complaints. At the same time, though, did the air force support you legally with legal advice at air force's expense?

Mr Mackney—That is an interesting question, Senator. They will claim that they did that and you will need to be the judge of how that was done. We asked for legal representation. It was refused continually. Finally we were advised to go and talk to a certain legal firm in this town, of which the principal members were ex air force legal officers who advised us just to acquiesce. We did not accept that.

Through the assistance of Admiral Walls, we were given some assistance by the army to try and get some things sorted out in our lives and, out of that, we were referred to Sneddon Hall and Gallop who agreed to take on our case on a contingency fee basis. However, in between times we understand—we have written to air force and our solicitors and both have refused to answer our correspondence on this matter—that air force has supposedly paid Sneddon Hall and Gallop some $60,000 to $70,000 for work done on our behalf. We do not know what that work is. Nobody has asked us what that work is and air force refuse to advise us.

I wrote to the Chief of Air Staff and advised him that under finance directions 44A and 44B he needed a certification of services. I was told that the RAAF legal service do not have to abide by that, so I still do not know what the money was spent on. I also understand from a contact in A-G's department that air force has in fact paid mega-dollars for advice in relation to our case but they deny that they have sought that advice. So I do not know what the answer is. Maybe you would do better to ask them.

Mr PRICE—Could you give us copies of that correspondence you have referred to?

Mr Mackney—I will find copies of the correspondence and send it.

CHAIRMAN—Mr Mackney, you and your wife made certain allegations and, for the purposes of this inquiry, whether those were true or false is irrelevant.

Mr Mackney—I understand that, Senator.

CHAIRMAN—What happened though, and what you are telling the committee, is that when a complaint was made completely inappropriate inactivity took place or obstruction of the investigation of those claims.

Mr Mackney—Absolutely. Without question.

CHAIRMAN—How do you see that matter being corrected?

Mr Mackney—I think there were a number of issues that came out as far as we were concerned. Firstly, we were dislocated and isolated. We had nowhere to turn to and nobody to turn to. By the time that we arrived in Canberra, some three months after the alleged incident, air force had already set the scene with the bureaucracy, with the political process and with the media as to what they would have liked to have thought occurred. So there was no way that we had any advocate or independent advocate that we could have turned to for assistance.

Secondly, any grounds of appeal were always back to the same people who made the original decisions. Thirdly, and I stress this as being the crux of the issue, there is no political will in this country to call Defence to heel. They do what they want to do. I was told by the current minister's office that the minister was not in a position to question any decisions made by the Chief of Air Staff. So I have to ask the question: who is running Defence? Is it the minister or is it the Chief of Air Staff?

Mr BEVIS—The process of inquiry and investigation following your wife's complaint was actually at a time when there was quite a high profile given to questions of sexual harassment and things of that kind. This was at a time when very clear views were being expressed by both governments, by relevant ministers, by the parliament, by senior military officers, and in your case by the efforts of the CDF and VCDF. What you are saying, effectively, is that despite all of those things—official policy, public statements, and quite a deal of focus on that as a personnel issue—at senior levels within particular services, and certainly at middle rank levels within the services, those people were impervious to that.

Mr Mackney—Absolutely, and if you want a recent example of that, even though we were told by Headquarters ADF that we were to deal with the Complaints Resolution Agency and negotiate on the sexual harassment part, and that we were to work with them, the current DBE refuses to take our phone calls and had his colonel write to us and say, 'Don't you dare write to Defence again', basically. The only recognition we get that he is not right are three lines in the *Canberra Times* which say that Major General Dunne got it wrong.

They are totally impervious. We are five years down the track yet we are no closer to any resolution. Let me talk about the impervious nature. In 1993 this Senate ran an inquiry into sexual harassment in the ADF. What has changed since then? The Ombudsman conducted a systemic inquiry where the results were re-issued in relation to our case, but nothing had changed. Then we had an ADFA inquiry which said nothing has changed. They are totally impervious to reports because nobody is ever held accountable. The sins of the father are there, but nobody is ever held accountable. When has any general been called before this parliament and told, 'General, you're responsible'? Nobody has been told that.

CHAIRMAN—I would like to come back to the question I asked before: how

would you fix it? How would you make people in the ADF accountable for their actions?

Mr Mackney—To start with there needs to be an empowered independent body to deal with these matters, a body that has access to the political system, to be able to enforce that accountability. That is the first thing.

Mr BEVIS—Can you define what matters should go to such a body?

Mr Mackney—Matters that, if proven, would be shown to be of a criminal nature, or matters that threaten the health or wellbeing of individuals employed in the ADF.

Mr PRICE—Today, if the same incident occurred, would it be the police investigating that matter?

Mr Mackney—It should have been the police in the case of the Tindal matter.

CHAIRMAN—Why did you not go to the police when you were blocked? Why did you not go to them within half an hour of your complaint or something?

Mr Mackney—You are assuming that in the early hours of the morning, in the middle of nowhere, where I found what I found, I am going to act in a normal and rational matter. I think that is an unreasonable expectation.

CHAIRMAN—Yes.

Mr Mackney—I turned to the people that I thought could help me, my colleagues that I had served with for over 20 years of my life. I had known no other system. I think that was reasonable. It is easy to sit here and say, in hindsight, that I should not have talked to them, that I should have picked up the phone and rung the local police. That is easy to say in hindsight, Senator, but put yourself in my position. Hindsight is a very easy thing to have.

The second point that I would make is that I still had an ingrained loyalty to a family that I believed was going to look after us, and look after us in a very compassionate manner. That did not happen. In hindsight it was quite a different story.

The third point is that we are sitting in Canberra and pontificating about these matters. I do not know how much you have had to do with regional Northern Territory policemen, but they are not there to deal with sensitive issues such as sexual assault; they are there to deal with more violent domestic issues and issues that we think do not happen in the backblocks of Canberra.

Secondly, if you have a look at the medical facilities available in a town like Katherine, you will see it is hardly the sort of facilities that we, as average Australians,

expect to be provided with. Maybe we were spoilt by being so well housed and so well protected in comparison with the local community but, in hindsight, all those things are very easy. I was rational enough to know that, as this was the crux of what was going to come out of it, I did not go directly to the OC. I thought that, if I at least put the pressure of having reported it to air headquarters in Sydney, he would have to behave in some reasonable manner. I got that wrong, too.

CHAIRMAN—Let us come back to the details of your independent authority. How would that be constituted?

Mr Mackney—I think it could be constituted under a current framework of the Ombudsman, to be quite honest.

CHAIRMAN—You see it as being quite divorced from the Department of Defence?

Mr Mackney—Absolutely—totally divorced from the Department of Defence. I would probably try to recruit some Defence experience in there because one of the things where Defence beats everybody all the time is that it is such a complicated bureaucracy that you can live in it for your whole life and only know about this much of it.

CHAIRMAN—As for it being a complicated bureaucracy, it is dealing with highly technical matters which have no civilian equivalent.

Mr Mackney—But highly technical matters is no excuse for bad behaviour.

CHAIRMAN—Quite, but that is also a non sequitur to the argument. The argument is that if you are judging people's competence in making decisions, not in relation to the particular topic we are talking about here today but in relation to an accident with a platform—an aircraft or a ship—you do really require an experienced mind to be brought to that to know what is reasonable and what is not reasonable in the circumstances.

Mr Mackney—Absolutely.

CHAIRMAN—Your case, quite frankly, is a civilian case.

Mr Mackney—That is right.

CHAIRMAN—It is either a criminal action or it is not.

Mr Mackney—That is right.

CHAIRMAN—It is an important but a particular part of this inquiry.

Mr Mackney—But if you look at platform problems, whether they be aircraft, ship accidents or whatever else, there is no reason why a totally independent, properly empowered body cannot bring together the appropriate technical knowledge that they need to investigate that. Certainly, that seems to be the case with what they have done with the *Westralia*.

CHAIRMAN—Thank you.

Mr PRICE—You refer to other lapses of discipline at Tindal. I got the impression that you were talking about something completely different. Were you aware of any other similar occurrences at Tindal or are you suggesting that a similar occurrence had perhaps happened in the past?

Mr Mackney—Yes, I am aware of other similar occurrences at Tindal.

Mr PRICE—Okay. Thank you.

Senator BOURNE—Do you think that it would have made any difference if this had been investigated from the first by the civilian authorities, the police?

Mr Mackney—I do. Can I be a little bit pragmatic at the moment? I do not believe this for one second, but let us be a little bit pragmatic at the moment. You have also got a person out there who has had very serious allegations made against him who is also unable to defend his position because of the way this matter was handled. So he has never been able to handle his position either. I am being pragmatic about that.

I have my own personal views about that particular individual but let us balance it off: nobody won out of this—not the alleged assailant, not the victim and not the system. Nobody won out of it, all because it was easier to try to sweep it under the carpet than to handle it correctly in the first place.

Defence, I believe, just keeps the pressure on in the hope that people will go away—that in the end you will give up. We are not going to give up. We are not going to win either, but we are not going to give up.

Senator BOURNE—You are not alone in that. We have had a lot of evidence from people who feel very similarly, so you wonder how much else there is out there.

Mr Mackney—Run an ad in the paper and try a class action suit. You might find out how many are out there.

CHAIRMAN—There are a couple of loose ends that I would like to tie up before we conclude. Were the Northern Territory police involved in this at any stage?

Mr Mackney—Yes, they were.

CHAIRMAN—At what stage?

Mr Mackney—About the Thursday after the incident, so about four or five days after the incident, a RAAF legal officer brought an inspector from the Northern Territory police and an offsider who interviewed my wife and myself in the offices of the chaplain at the RAAF base at Darwin.

CHAIRMAN—That was done at the instigation of the RAAF?

Mr Mackney—No, it was not. It was done at the request of us to get some assistance. Again, if you talk about rational hindsight, RAAF have made a big deal out of the fact that I said to this legal officer, 'What do you want me to do—take my wife down to the Darwin lock-up and get her to be spoken to by some constable or whatever from the Northern Territory police?' He said, 'No, that would be quite unreasonable', and that he would arrange for the appropriate people to talk to us. It took some two or three days for that to happen.

CHAIRMAN—So you had an interview with an inspector from the Northern Territory police?

Mr Mackney—That is right.

CHAIRMAN—You stated the events as you believed they occurred?

Mr Mackney—That is correct.

CHAIRMAN—What was the action of the inspector of the Northern Territory police?

Mr Mackney—He told us that he was not prepared to investigate it because it was too late after the event, that there was no forensic evidence and that he was not prepared to put the resources into chasing it up. He also had some questions that he wanted to get clarified—in fact, whether he even had jurisdiction to investigate something that had happened on Commonwealth property.

CHAIRMAN—That was done in front of a RAAF legal officer?

Mr Mackney—That is right. And a padre and a doctor.

CHAIRMAN—Where was the doctor? Was that a RAAF doctor or a civilian doctor?

Mr Mackney—A RAAF doctor.

CHAIRMAN—Was that the RAAF doctor that was the doctor on the base at the time of the—

Mr Mackney—It was a RAAF doctor who was acting as a senior medical officer at Darwin who had been called in about four days after the event to see what had happened and why Stephanie had not been given any medical assistance or medical examination.

CHAIRMAN—So it was four days after the reporting of the event that the air force provided medical assistance?

Mr Mackney—They did not provide it. They called him in to see whether she had been provided with medical assistance. By that time the chaplain had arranged for his wife's doctor to see Stephanie.

CHAIRMAN—I see.

Mr Mackney—Let's not twist words. They did not provide medical assistance.

CHAIRMAN—At no stage?

Mr Mackney—No. At no stage. Even when we got to Melbourne—and they are claiming they provided us assistance there, which is a very long bow to pull—they provided assistance there because Stephanie's father spoke to the senior chaplain who arranged for us to go and see some people. It was a father to a friend relationship that we got treatment, not an RAAF intervention. 'Oh dear, look at the victims; let us give them some treatment.' It is easy for them to twist the words.

CHAIRMAN—Let us go back to the Twigg report. Was the investigation by Squadron Leader Twigg an independent and objective investigation in your judgment?

Mr Mackney—I do not know. I have not seen the whole of the Twigg report.

CHAIRMAN—You have told the committee that you have seen it.

Mr Mackney—I told you I saw the findings. The Twigg report, I understand, is over 6,000 pages.

CHAIRMAN—Six thousand pages!

Mr Mackney—I understand the Twigg report itself is 6,000 pages. We asked for a copy of it and were given three Reflex boxes full of blank paper with headings on it

saying, ‘Been expunged, been expunged, been expunged’. But I understand the actual report itself is some 6,000 pages. We saw the findings.

CHAIRMAN—That is 10 American novels.

Mr Mackney—Absolutely. More than I would probably read in a lifetime. But I have not seen the entirety of the Twigg report. I have seen the findings.

CHAIRMAN—What were the reasons the air force gave you for not giving you a copy?

Mr Mackney—The Federal Court injunction.

CHAIRMAN—That was the only reason?

Mr Mackney—That is the only reason.

CHAIRMAN—You are aware that in the case of boards of inquiry the next of kin always get a full report even though the report is confidential?

Mr Mackney—Yes.

CHAIRMAN—You did not challenge that at the time?

Mr Mackney—We have challenged it many times.

CHAIRMAN—And you just met a brick wall.

Mr Mackney—And we have just got nothing. We have got the ridiculous situation where our solicitors have a complete copy of the Twigg report with a Federal Court ruling saying that they are not to tell us what is in it.

CHAIRMAN—How many copies of the Twigg report exist, to your knowledge?

Mr Mackney—To my knowledge, Senator Newman’s staff have one, our solicitors have one, and I assume the alleged offender’s solicitors have one.

CHAIRMAN—Why should Senator Newman have a copy? She is not a minister in relation to defence?

Mr Mackney—I know she has got a copy. When she was the shadow minister of defence and extremely interested in this, as you would be fully aware from Senate estimate questions, she asked for and was ultimately provided by Mr Punch’s office with a complete copy of the Twigg report. That copy of the Twigg report, as far as I am aware,

is still in the possession of Matthew Francis, who is one of her staff.

Mr PRICE—Have we requested the Twigg report?

CHAIRMAN—I think that is a matter for the committee to consider.

Mr PRICE—It seems extraordinary that one parliamentarian can have it and we cannot.

CHAIRMAN—Apparently the minister had it, in the form of Mr Punch. As there are there no further questions from the committee, is there anything you would like to address before we conclude your hearing, Mr Mackney?

Mr Mackney—Not really; I would just like to thank the committee for taking the effort to look into this. I am not just talking about our individual case. I think it is time that the whole matter gets dealt with correctly and put to rest so that we are not here in five years time discussing the same sorts of matters again. I wish you every success with your endeavours and I thank you for taking the time to listen to what Stephanie and I have to say. I thank you very much for that.

CHAIRMAN—Thank you, Mr Mackney.

Proceedings suspended from 10.25 a.m. to 10.36 a.m.

DUNNE, Commodore Michael Thomas (retired), 11 McBride Place, Calwell, Australian Capital Territory, 2905

CHAIRMAN—Welcome. I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in the respective houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of the parliament. The subcommittee prefers that all evidence is given in public, but should you at any stage wish to give any evidence in private, you may ask to do so, and the committee will give consideration to your request. We have received your submission and it was authorised for publication. We have also received a second submission from you.

Resolved (on motion by Mr Bevis):

That the document from Commodore Dunne into the inquiry into military justice procedures be received as evidence and authorised for publication.

CHAIRMAN—I now invite you, Commodore Dunne, to make a short opening statement if you wish to do so.

Cdre Dunne—Thank you. I would like to use the second submission as the basis of my opening statement. It will go on for about 10 or 15 minutes. I think it answers a lot of the questions that you might like to ask me. My objective in bringing this case to your attention is to demonstrate to you the unsatisfactory judicial procedures which followed the naval board of inquiry set up to investigate the accidental death of two sailors from HMAS *Otama* on 3 August 1987. As you probably know, I was the president of that board. Our report was submitted to the fleet commander, Rear Admiral Peter Sinclair, on 25 August 1987.

Over the years since that tragic accident, I have been deeply concerned that justice in this case was neither done nor seen to be done. I have tried in vain to come to terms with the strange decisions taken by higher authority in response to the findings of negligence made, in no uncertain terms, by my board of inquiry. The finding of negligence was also made about a year later in the report of the state coroner's inquest into the same accident. I now have other important information which bears on the accident, of which I was unaware at the time of the board of inquiry. Of particular significance was information on the submerged grounding of the *Otama* off Sydney only a few weeks before the loss of the two sailors, as on both occasions the same officer was in command of the *Otama*, Lieutenant Commander, now Commander, John Taubman.

In the course of my board of inquiry, I asked for details of the grounding and the report of the board of inquiry into that incident. At the time, my request was refused, but I

later gained access to that report. I have now, very reluctantly, come to the conclusion that, after both of these boards of inquiry, the course of justice was deliberately perverted almost certainly in order to protect certain senior officers in the submarine arm from prosecution by court martial or at least from further investigation. Although he may have been unaware of this I believe that one of these officers protected on both occasions was Lieutenant Commander Taubman.

Last year, shortly before I retired from the navy, I read about your inquiry into military justice procedures. I realised that this offered me an unexpected opportunity to bring my concerns to official notice at an impartial forum. I hope to make a useful contribution in this way to your consideration of the broad issues of military justice procedures, and thereby to help ensure that future decisions taken by higher authority in these cases involving negligence or misconduct are more equitable and more transparent.

Now I would like to turn to the accident which is the subject of my submission and the important background information which has come to my notice since my board of inquiry. Throughout June and July of 1987, *Otama* was being prepared to undertake a highly classified surveillance operation. For this task, the submarine had been fitted with a range of special surveillance equipment—including a towed array passive sonar system—and the crew had been trained to an advanced level of operational capability.

Trials of the special equipment had been undertaken and the sea training staff from *Platypus* had conducted the safety training for the crew. The final safety assessment was made by the submarine squadron commander, Captain Peter Briggs. He judged Lieutenant Commander Taubman and his crew to have achieved an above average standard by early July 1987. The operational training and assessment of *Otama* had been delegated to Commander Kim Pitt, then the fleet submarine operations officer on the staff of the fleet commander. I believe this was done because Commander Pitt had first-hand command experience of surveillance operations, whereas Captain Briggs did not.

The culmination of all this training was an OPEX—an acronym for operational exercise—conducted by *Otama* over a two-week period in the Sydney-Jervis Bay exercise areas in July 1987. During the OPEX, the surface units exercising in the area were not informed of the presence of *Otama*. The submarine was required to remain submerged and undetected by surface ships and aircraft, moving as necessary to intercept all shipping detected, taking photographic, acoustic and electronic recordings.

CHAIRMAN—I thought from your evidence *Otama* proceeded leading the surface ships out of Sydney Harbour, so they must have known it was present.

Cdre Dunne—No. This is another incident two weeks before, Senator.

CHAIRMAN—I am sorry.

Cdre Dunne—And the ships and the submarine had sailed separately, and the submarine was not known to be at sea.

CHAIRMAN—My apology.

Cdre Dunne—In an exercise of this nature, there are inherent risks, and the responsibility carried by the commanding officer for the safety of the submarine is absolute. On the morning of the submerged grounding accident, *Otama* was at periscope depth, silently approaching the two frigates, which were almost stopped and preparing to conduct a towing exercise. The frigates were not operating their active sonars, as they assumed that there were no submarines in the area.

As *Otama* approached to within a thousand yards of the leading frigate, the submarine went into a well-rehearsed procedure of making recordings as she moved slowly down the frigate's starboard side. Short periscope observations were taken by the commanding officer to confirm the situation and to ensure safety. As *Otama* passed clear of the leading frigate, the commanding officer raised his periscope for a longer look and to make a visual correlation of the frigate's radars. But, in doing so, he seems to have forgotten that the second frigate, under tow, was following close astern of the first. Lookouts on board the second frigate sighted *Otama's* periscope during its prolonged exposure, close on that ship's starboard bow. The alarm was raised and both frigates switched on their active sonars quickly gaining contact. As no Australian submarines were believed to be in the area, the frigates assumed that an intruder had been detected, possibly from the Soviet Union.

The OPEX orders held on board *Otama* stated that, if detected by surface units, *Otama* should immediately identify herself on the acoustic underwater telephone and state that special trials were being conducted. These orders, however, were disregarded by Lieutenant Commander Taubman, who decided to attempt to evade the frigates by increasing the submarine's depth. Lieutenant Commander Taubman ordered the submarine deeper, but it appears that he forgot to check his position on the chart to ascertain the depth of water available. The outcome was that as the submarine passed through 300 feet it struck the bottom with considerable force. Fortunately, the bottom was sandy; had it been rocky, this incident could have had extremely serious, even fatal, consequences.

At this point, Commander Pitt intervened and ordered Lieutenant Commander Taubman to terminate the OPEX, break off his evasion and report his identity to the frigates. He was then to surface and return to Sydney for damage assessment.

A naval board of inquiry into the grounding was duly convened by the fleet commander. Two members of the board were submarine officers, Lieutenant Commander John Hodges and Lieutenant Commander Richard Shalders. The board reported in late July while *Otama* was still alongside the submarine base at Neutral Bay, Sydney.

I find it surprising and extraordinary, given the circumstances of the failed OPEX and the personality traits revealed, that Lieutenant Taubman was left in command of *Otama* for the forthcoming surveillance operation. This decision was made by Rear Admiral Sinclair after he had considered the report of the board of inquiry. I now know that vital evidence relating to Lieutenant Commander Taubman's reactions and decisions during this incident, including tape recordings made in the control room, had been concealed from the board of inquiry investigating the grounding. Why this detection and grounding incident was covered up has never been made clear.

Mr PRICE—You were aware of the incident, though, when you were chairing your board of inquiry?

Cdre Dunne—Yes.

Mr PRICE—But this vital piece of evidence was—

Cdre Dunne—Yes. Why this detection and grounding incident was covered up has never been made clear, but covered up it was. Lieutenant Taubman was endorsed to proceed on the planned surveillance operation as if he had passed his OPEX and as if nothing untoward had occurred. This outcome is in marked contrast to the action taken in February of this year after *Otama* had again grounded while submerged off Sydney. On this occasion, following a board of inquiry, the commanding officer was relieved of his command by the maritime commander, Rear Admiral Ritchie.

Now I will move on to the disastrous incident which resulted in the deaths of two young sailors and the judicial procedures which ensued. *Otama* sailed from Sydney at nine o'clock on 3 August 1987. In my then present appointment as captain of HMAS *Watson*, and the director of surface warfare training, I was scheduled to join HMAS *Darwin* by helicopter on Wednesday, 5 August to observe the final two days assessment of the students on the surface warfare officers course embarked in the warships working with *Otama*.

I was informed of the *Otama* incident by Lieutenant Commander John Hodges. Visibly upset, he told me that *Otama* had dived leaving two sailors on the casing and they had subsequently been lost. Initially, I didn't believe him. Such an event was impossible. He continued, stating he bore a degree of responsibility for the deaths as he had not stood by his beliefs when serving on the recent board of inquiry into *Otama*'s grounding. He told me that the board had been pressured by Captain Briggs to find that there was no case to answer against Lieutenant Commander Taubman. This was confirmed the following week by a similar statement to me by Lieutenant Commander Richard Shalders, a second member of the same board of inquiry.

I was contacted by the fleet legal officer that afternoon and informed I was to head a board of inquiry into the two deaths. Commander Tony Smith, a submarine command

qualified officer, and Commander Ian Whitehouse, a navigator, were to assist me as members of the board of inquiry, while Mr Tom Harrison, a barrister and former submarine officer, was appointed as counsel assisting. The board was set up in the Submarine School of HMAS *Platypus*, Neutral Bay, and started preparations immediately. It was a closed board, not open to the public.

Otama returned to Sydney at midday on Wednesday, 5 August, after 48 hours of searching for the bodies of the two lost sailors. Commander Smith went directly on board and, with the assistance of Lieutenant Earlam, the executive officer and second-in-command of *Otama*, took possession of a number of statements made by members of the ship's company and a series of tape recordings from the control room monitoring system.

That evening, I made an initial report to Admiral Sinclair and was told by him that he had decided that *Otama* should go back to sea the following Monday with Taubman in command. He used the analogy of a thrown horse rider getting back into the saddle as quickly as possible before he lost his nerve. He also directed that no *Otama* witnesses could be called on Friday, 7 August as it was intended to hold a memorial service for the dead sailors at Garden Island Chapel. I was being pressured to conclude the BOI as quickly as possible and felt that Admiral Sinclair had already made up his mind that Taubman was to be protected. After working through the weekend I advised Admiral Sinclair that, in my opinion, *Otama* was not safe to go to sea on Monday, 10 August.

The board of inquiry report details what occurred on board *Otama* on 3 August 1987, and I will not repeat that here, other than to say that, after 11 years, I have no doubt of the accuracy of that report. When presenting the report to Admiral Sinclair, I gave him a detailed verbal brief on my concerns regarding Lieutenant Commander Taubman and stated that in my opinion he should not be allowed to command a submarine again. I told the admiral that I believed Taubman had perjured himself, and pointed to transcripts of evidence where this had occurred. I believed at the time Taubman would be court-martialled and removed from *Otama*.

However, this was not what Admiral Sinclair intended. Influenced, I believe, by Captain Briggs and others, he wrote to Admiral Hudson, the Chief of Naval Staff, on 11 September 1987, forwarding his comments on the board of inquiry and outlining his recommendations. In that letter he questioned the motivation and professional competence of myself and Commander Smith. Admiral Hudson received further advice from Captain Roach, the Director of Submarine Policy in Navy Office, Canberra. Roach advised Hudson that Taubman should not be court-martialled but be given a note of displeasure and allowed to take *Otama* back to sea. I believe Roach would have given this advice after discussions with Captain Briggs.

Admiral Hudson took the advice offered to him by Admiral Sinclair, Captain Briggs and Captain Roach and announced his decision on the results of the board of inquiry via a press release on Friday, 18 December 1987. This announcement made no

reference to the findings of negligence by the board of inquiry, nor to the recommendations that disciplinary action should be taken against the commanding officer, Lieutenant Commander John Taubman.

But that was not the end of the matter. The State Coroner, Mr Kevin Waller, took an interest, as it seemed to him that this was something which should just not happen. A police task force, Gamma, was formed under Detective Sergeant Bruce Shiels and accumulated evidence throughout 1988. I was interviewed about various aspects of the incident, and the police kept returning to the reasons Admiral Sinclair and Captain Briggs might have had in protecting Taubman.

The navy did not regard the intervention of the Coroner with enthusiasm. Admiral Hudson instructed the Director of Naval Intelligence and the Director of Naval Legal Services to stop the Coroner's inquiry. In the first instance, the Navy challenged the State Coroner's jurisdiction as the deaths of the two sailors had occurred at sea in international waters. But, given that *Otama* was based in Sydney and had both sailed and returned to that port, this challenge was quickly set aside.

Then, Mr Murray Tobias QC, at the direction of Admiral Hudson, argued that the coronial inquest should not proceed as the navy had already conducted its own board of inquiry and had come to a financial settlement with the two families.The navy also refused the Coroner access to the board of inquiry report on the grounds of national security, and some officers, on advice from Naval Legal Services, refused to be interviewed by the police task force.

The inquest was conducted at the Coroner's Court, Glebe, in October and November 1988, and Mr Waller's report dated 11 November 1988 was previously forwarded to this committee. Mr Waller referred to the personal responsibility of Taubman and stated:

I would assess his personal responsibility as in the higher range.

In his book *Suddenly Dead*, published in 1994, Mr Waller is a little more forthright, writing:

. . . the testimony of the (naval) witnesses showed a disturbing state of affairs aboard the boat. There was plenty of evidence of negligence in this case.

Commander Smith left the Navy in the weeks following the *Otama* inquiry, telling me that he was deeply disturbed by both the unprofessional conduct of Lieutenant Commander Taubman and the high level of protection he was receiving from senior officers.

In conclusion, Mr Chairman, I suggest that the principal lesson to be drawn from the *Otama* incident for military justice procedures in the ADF is this: it is both

inappropriate and inconsistent to have, as the convening authority of a military board of inquiry, an officer who may have been responsible, because of his appointment, for the circumstances leading to the incident being inquired into. To have the same officer then review the findings and recommendations of such an inquiry, when the findings may have been critical of his own prior role, defies both commonsense and natural justice.

I believe it is time the ADF had an independent judicial branch to inquire into such incidents as is the case in the United Kingdom and the United States. Thank you, Mr Chairman.

CHAIRMAN—Commodore, were you satisfied with the way the board of inquiry was set up? You were a submarine commander yourself at one stage, and do you think you were in a position where you could be seen to be independent?

Cdre Dunne—In retrospect, no. I think the weakness of my board of inquiry was the fact that I was one of the senior submarine commanding officers in the RAN, and it was easy after the event to turn that against me in terms of my personal interest in the outcome, or it could be seen that I might have had a personal interest in dirtying the name of my peers or seniors. Indeed, that was what occurred.

CHAIRMAN—With respect to the accuracy of the outcome from the board of inquiry, could the role of president of the board have been fulfilled just as effectively by a captain of a DDG or a FFG?

Cdre Dunne—No. What was required on the board was an officer with my experience but not necessarily as the president.

CHAIRMAN—Somebody who had had command experience of a surface ship would not have been in a position to be an adequate president, in your judgment?

Cdre Dunne—No. He could have been an adequate president as long as there was somebody else on the board—

CHAIRMAN—Supporting technical advisers?

Cdre Dunne—Yes.

CHAIRMAN—That is what I am driving at.

Cdre Dunne—If I could use the *Westralia* board as an example—and without prejudging any of the outcomes of that board—the constitution of the board appeared to me to be much more sensible than the one that I had for *Otama*. I do not think the rank was right with the *Otama* one; I think a commodore would have been better than a captain, as was the case with *Westralia*. A senior seaman commodore, supported by me or

another submarine CO, would have been a better level.

CHAIRMAN—You have made allegations that you were pressured to wind the inquiry up quickly. Admiral Sinclair has written to the committee refuting that. But, putting that issue aside, do you feel that in any way you were obstructed in the prosecution of your inquiry by Navy or Defence in any other ways?

Cdre Dunne—No, only with the time issue; pressure was put on there. The witnesses were not very forthcoming and it was a struggle to get at the truth of the matter, but the navy did not interfere with the conduct of the inquiry as such, no.

CHAIRMAN—It has been argued before the committee that there ought to be no defence by certain members of the ADF on the grounds that they would incriminate themselves if they gave evidence. Apparently one witness who has written to us has claimed that in some police forces police are compelled to answer all questions that are put to them at an inquiry, whereas that does not apply in the ADF. Have you a view on that?

Cdre Dunne—Yes, I think they should be required to answer questions. In the first instance, we were trying to get at the truth of the matter to ensure that the next submarine we sent out to sea was not going to have a similar occurrence because of some deficiencies in the procedures we had. I was fairly comfortable that the procedures were okay, but we had to make sure that that was the case. If you have witnesses who will not answer questions or who tell lies, it is very difficult to get to the truth of what occurred.

CHAIRMAN—Yes, but you just said that the procedures were okay. I am reading your submission, which is rather a lengthy one—and I am not criticising you for that at all, because I think it is a complex subject—and it seems to me that the procedures were pretty slipshod. You wrote your name or you put a tally before you went up the conning tower or out onto the weather deck. If there is an emergency or you are in a hurry, it is very easy for that to pass. It seems to me that there were no effective measures of knowing where everyone was on the ship at the time.

Cdre Dunne—There were, but they just were not applied on that submarine.

Mr PRICE—I thought in your submission you made the point—or it may have been in the board of inquiry report—that there were some formalised procedures but that others were more a matter of tradition rather than being formalised.

Cdre Dunne—Yes.

Mr PRICE—That seems to me to have been a weakness in the system.

Cdre Dunne—It was a weakness, yes. That was in the board of inquiry report.

CHAIRMAN—Admiral Hudson is arguing that a board of inquiry's findings are not binding on the convening authority. I can see the academic basis for that but surely there is not much point in having a board of inquiry if its recommendations are not applied?

Cdre Dunne—I agree entirely. It is the same with *Westralia*, I do not know what the board is going to come out with there but if the same thing happened to that, its recommendations would be just be put in the bottom draw and nothing would occur.

CHAIRMAN—Are you aware of other occasions where the recommendations of boards of inquiry have not been implemented by the army, navy or the air force?

Cdre Dunne—No, I am not.

Mr BEVIS—On the procedural point that the board inquires into the circumstances, identifies the facts and then makes some recommendations to the convening authority about what it thinks should be done, including any disciplinary action, given that the current process is that that is only a recommendation and the convening authority is obliged to exercise an independent discretion in looking at that and determining what there needs to be done, what is the purpose of having a board of inquiry with a recommendation? In other words, is there any value in separating out the roles of the board of inquiry so that the board actually does investigate what transpires and makes the finding of facts and does not bother making any recommendations?

Whilst it may be the practice that overwhelmingly those recommendations are adopted, my understanding is that as a matter of law they are not to be rubber stamped, they are to be independently assessed by the convening authority. If they are to be independently assessed by the convening authority, why bother getting the board to make a recommendation on discipline, why not just get the board to do the factual stuff?

Cdre Dunne—Some boards are given terms of reference that do just that.

Mr BEVIS—Do you have a view about that as a structural thing in terms of how these matters should be dealt with?

Cdre Dunne—I have a view. As I said in my closing paragraph, my view is that a board of inquiry does serve a very useful purpose of not only getting to the facts of the matter but also of forming a view of what the future action should be, including disciplinary action. The big weakness in the system is that those recommendations then go back to a convening authority who has got an overwhelming interest in the outcome in that he is in the firing line, he may bear a degree of responsibility for what has occurred. That is the weakness. It is very easy just to chop the board off there and say, 'We are taking this no further because if we do then I am going to get burnt.' That is what happened in the *Otama* one.

Of course there is no legal requirement for the convening authority to adopt the recommendations of the board of inquiry, and that authority would be stupid to do so if the board was recommending that the convening authority should be court-martialled. That is the weakness in the system.

Mr BEVIS—So if you had an independent judicial arrangement whereby the convening authority was separate to the command structure, would you then envisage that the board of inquiry would need to make a recommendation on action, or could you restrict the board to dealing only with an investigation of the incident?

Cdre Dunne—Given that the board has spent a lot of time and expertise in investigating a situation, it would be wise to make the best use of that investment and get some recommendations for future action out of it. Those future investigations have got to be taken separately from what the board has found, and that is the case now if you continue through. It gives you a steer of where you should be looking. The person who makes the decision to take the follow up action must be independent of the people who have been involved in the accident occurring in the first place.

I joined the navy the year before *Voyager* was sunk and I was at the naval college when it happened. My first impression of boards of inquiry, royal commissions and courts martial was all to do with the *Melbourne* and the *Voyager*. That left a big impression, particularly as I knew blokes on the *Voyager* who had been at the naval college with me. It was obvious that that inquiry was not being done correctly. It was obvious that people were getting in there and stirring the pot and protecting their own backs. It has happened for the whole of my 35 years of naval career.

I was involved in one inquiry 11 years ago. I have not made it an obsession but I was determined one day to try to put it right, and this was the opportunity.

Mr BEVIS—Under any of the various structures, whatever structure the board fits into, clearly it has to operate with independence. You have indicated that you felt under pressure to conclude the matter.

Cdre Dunne—I was under extreme pressure.

Mr BEVIS—Can you tell us what that was? You commented that you were under pressure about timing, but you also indicated that you believed that the convening authority, or other senior officers, already had a view about the conclusions before your board had its first day of hearing.

Cdre Dunne—Yes. I do not know the reasons but Lieutenant Commander Taubman was protected right from the start. He was protected when he put the submarine aground two weeks previously, and he should have been removed then. I have had arguments with Commander Pitt and Captain Briggs over that, the professional judgment

to leave Taubman there.

After the second incident there is absolutely no doubt that the man should have been removed from his submarine. In any other navy in the world he would have been, without a doubt. That is a professional judgment that every submarine commanding officer I have ever spoken to—except two—would agree with. I never understood why this man was being protected. I approached Admiral Sinclair—I had a lot of respect for Admiral Sinclair—and I spoke to him at length about this during the six months following the board of inquiry. I think Sinclair himself was under pressure from Admiral Hudson, and that was part of why Admiral Sinclair did what he did. In 1988, when another submarine ran aground, he called me across to fleet headquarters to talk about submarine operations, and he was very concerned that these incidents were continuing to occur.

I have not seen his submission. I am sure he feels very upset about what I have said but I can only report to you the way I read it, and the way I felt the pressure coming on and what he said to me. I just could not understand why they were leaving this man in command of the submarine, and neither could the police a year later.

Mr PRICE—Was the pressure coming directly from spoken words or was it by—

Cdre Dunne—It was words. It was very direct. On one particular night—I think it was Monday, 10 August—the three board members went across to see Admiral Sinclair in his headquarters at Garden Island. All three of us went in and said that if the pressure was not taken off, and if the push to get this submarine back to sea as quickly as possible was not stopped, the three of us were going to resign from the board of inquiry. I further stated that I was going to resign from the navy over it.

CHAIRMAN—What you are telling the committee is that the pressure to conclude the inquiry was to get the submarine out on an operation?

Cdre Dunne—Yes.

CHAIRMAN—That presupposes then that the inquiry was going to exonerate all the crew—

Cdre Dunne—Yes.

CHAIRMAN—Because it would not have been practical to put in another captain or XO or whoever else—

Cdre Dunne—They would have to retrain. They would have to go through another month of training.

CHAIRMAN—So the very fact that the pressure was put on you indicates that

there was a mind set to exonerate?

Cdre Dunne—Yes.

CHAIRMAN—Be that as it may—

Mr BEVIS—That was the point I wanted to clarify.

CHAIRMAN—The former CDF, General Baker, has given evidence to the committee that, even where civilian or Defence Force Disciplinary Act charges cannot be progressed, the defence reporting system provides a means whereby administrative action will clear up these glitches in the system and any officer who has made a serious error will be dealt with. Do you have confidence in that statement?

Cdre Dunne—No.

CHAIRMAN—All services have their own ethos, but is there a subset within navy of a submariner club?

Cdre Dunne—Yes.

CHAIRMAN—Was Admiral Sinclair a submariner?

Cdre Dunne—No.

CHAIRMAN—Was Admiral Hudson a submariner?

Cdre Dunne—No.

CHAIRMAN—At the end of the day we are not inquiring into the correctness, or otherwise, of the retention of Lieutenant Commander Taubman. This is a very different case from the one that immediately preceded it this morning—totally different—because here the facts are irrefutable.

The previous case was an allegation that something happened, and the service failed to investigate that. In this case, there is no doubt that two sailors died. There is also no doubt that somebody had to accept responsibility for that, and no-one was censured. I presume, from what you have said, the submarine went to sea on its next deployment, and the captain remained in command.

Cdre Dunne—That is correct.

CHAIRMAN—No-one, in any way, had their career impeded by what clearly was a major calamity.

Cdre Dunne—They were all promoted.

Mr PRICE—That is the whole point. You recommended that action be taken and they were subsequently promoted, which is a slap in the face to the board of inquiry, isn't it?

Cdre Dunne—Yes.

Mr PRICE—Extraordinary.

CHAIRMAN—How do you maintain discipline in a defence force when that happens?

Cdre Dunne—With great difficulty. I think that this particular incident and the way it was handled was the start of the decline of the submarine service. I do not think the submarine service has ever recovered.

CHAIRMAN—Really?

Cdre Dunne—Really. A lot of people left, particularly sailors. A submarine commanding officer is the only person who looks through the periscope. He has total control, much more so than in a surface ship where you have a group of other senior officers supporting you. I have been the captain of both; I know the difference. But a submarine commanding officer is the one on whom all the rest depend. He is the man who makes the decisions to bring the submarine up from deep to periscope depth, which is a very dangerous procedure. He makes the decision on when to surface, when to snort. He is the man who looks through the periscope. He is the man who knows what is going on. How do you think those 80 sailors in *Otama* felt when they were sent back for the third time to sea with the man who had run them aground and then had left two of their brethren outside the pressure hull? They did not feel very confident.

Mr PRICE—I don't think I would feel confident.

Cdre Dunne—For the navy to put those sailors in that position I think was negligent, to be mild.

CHAIRMAN—Let us move into the detail of the event itself. Those two sailors would not have gone of their own volition; they would have been detailed by a petty officer or a lieutenant or someone to go—

Cdre Dunne—They were ordered to go outside.

CHAIRMAN—They were ordered to go outside. The person who gave that order would necessarily have seen that it was executed and completed, wouldn't they?

Cdre Dunne—Yes, normally.

CHAIRMAN—Why did that not happen?

Cdre Dunne—It did not happen because the order was relayed down through three or four sets of people. The two who actually went out were not the two who were initially ordered to go out, so there was a degree of shoulder sloping there. It was a miserable day. Whoever went out was going to get pretty wet and cold. In fact, it was an abnormal day. The two junior people ended up being the ones who went out. They procrastinated to a certain degree, had a coffee, got themselves warm, left it to the last minute. There were all those sorts of things going on.

Then there was a changeover of personnel in various positions on the submarine at that time, and they were just simply misplaced, overlooked. They were overlooked to the extent that the submarine dived when everybody had to go to an assigned station in the submarine. They were still not identified as not being in their assigned station. It was some half an hour—

CHAIRMAN—Whose responsibility is that—the officer of the watch?

Cdre Dunne—Once the submarine goes to diving stations, and is preparing to dive, the responsibility that everybody is in their assigned station goes back to the person who is in charge of that particular compartment where that sailor might be. One of the sailors was supposed to be on the echo sounder.

CHAIRMAN—We have two or three watches, do we not? How many watches have you got?

Cdre Dunne—They have three watches when the submarine is on the surface, but they had actually gone to a watch routine or a station called diving stations to dive the submarine under the water.

CHAIRMAN—In that condition, everyone had a assigned spot.

Cdre Dunne—Yes, everyone has an assigned spot.

CHAIRMAN—So not only the section commander but also the person of equivalent rank beside them, and other sailors, should know that Bill Smith ought to be there at his post.

Cdre Dunne—Yes.

CHAIRMAN—So you have multiple checks.

Cdre Dunne—Yes.

CHAIRMAN—None of those checks took place.

Cdre Dunne—None of those worked.

CHAIRMAN—Why was that?

Cdre Dunne—I do not know. One of the reasons was, I think, that there were so many people on board the submarine. There were 80 people on the submarine that day. The submarine is complemented for 64 or 65. They had the additional people on board because that is the sorts of numbers you need to go and do the work they were going to do. When I was the captain of *Otama* a couple of years previously, we had about 78 people on board, for the same sorts of reasons.

The difference with *Otama*, though, was that half of that ship's company—40 of the 80—had only been in submarines for a year or so. They were very inexperienced. Even though all but 18 were qualified submariners, the qualifications that some had were very thin. It was a bit of the blind leading the blind; bad habits breeding bad habits.

CHAIRMAN—Getting back to the sailors that went outside the hull, why were they not wearing life jackets and why wouldn't they have had safety lines? This is elementary on a yacht.

Cdre Dunne—The routine then—and it was a routine that had served us well—was that unless you were going out on to the casing of the submarine, outside the fin structure itself, you did not need a life jacket. On top of the fin, you were high out of the water and there was no expectation you were going to fall off. If the weather was particularly rough, you did strap yourself into the fin, but not necessarily with a life jacket.

These two boys were going into the back of the fin, which was a protected area, not onto the casing of the submarine, so there was no way that they could be washed out of the fin. That was physically impossible. So a life jacket in the confined structure of the inner fin was more of a hazard than a help.

CHAIRMAN—Why weren't the bodies in the fin?

Cdre Dunne—Because as soon as they realised the submarine was diving, first of all they went to the hatch and tried to lever the hatch open. There were markings on the hatch to indicate that that had occurred. Then they climbed up the ladder onto the top of the fin and opened the voice pipe cock to try to communicate down to the control room. As long as it is open at the top and the bottom you can make contact through the voice pipe, but it was shut at the bottom so they could not make contact. They were left on the

top of the fin when the submarine finally went under.

CHAIRMAN—How many cocks are on this voice pipe?

Cdre Dunne—Two—one on the fin at the top of the bridge, the upper voice pipe cock, and another one down in the control room that shuts the voice pipe cock off at the pressure hull and makes it watertight at the pressure hull.

CHAIRMAN—So there was absolutely no way they could have communicated?

Cdre Dunne—No. Probably the only way would be to climb up the periscope and smash the top of the periscope with a knife or something like that. But I think they were panicking by that stage.

Mr PRICE—I may have just misunderstood you, but you mentioned two maritime commanders. Admiral Sinclair was the maritime commander.

Cdre Dunne—They called him the fleet commander in those days.

Mr PRICE—Right.

Cdre Dunne—He was the fleet commander, or what is now called the maritime commander. I mentioned Maritime Commander Chris Ritchie in the context of a grounding that *Otama* had in February this year off Botany Bay. There was a board of inquiry. The commanding officer of *Otama* was found to be at fault. He was taken off the submarine and another commanding officer was put onto it.

Mr PRICE—That was in exactly parallel circumstances?

Cdre Dunne—Yes. In fact, I would have thought that Taubman's actions were worse than the—

Mr PRICE—Yes.

Cdre Dunne—Taubman made a basic mistake in his processes of collecting intelligence. When he was operating against the two frigates—and we have procedures which are pretty easy as to when you put periscopes up and how you conduct yourself and how you look after the trim—what he did was almost unbelievable in putting his periscope up behind the beam of one ship and forgetting that there was another ship behind. While he was behind the first ship, he was directly ahead of the second ship, and that is the one that saw him. He lost track of the fact that there were two ships there.

To send a submarine away, to send a commanding officer away to do some sensitive work when he had made a basic mistake like that, was something that should

have been sorted right out. And then he compounded the mistake by trying to evade when his orders said, 'If you are sprung, let it be known that it is you before all the P3s come out of RAAF base Edinburgh and the whole world alights.'

Mr PRICE—Commander, you seem to be making the point that the failure to take appropriate action in the first instance of grounding really put the crew's life at risk. Without going into the detail of the mission, was the mission in peace time so sensitive and the continuation of the exercise so important that people be exonerated and able to go on?

Cdre Dunne—No. The whole point of the OPEX—the operational exercise—that we do is to confirm that the submarine is in all respects ready to go and undertake the type of activity that we worked it up for. There is always an understanding that, if the submarine commanding officer does not come through that OPEX properly, the whole thing is terminated. Unless you tick all the boxes in these sorts of activities, and make sure that you have all your ducks in row, you can come terribly unstuck.

As it turned out, after the board of inquiry, Taubman did remain in command of *Otama* but its mission was changed. It was still deployed overseas, but it did not do anything like what it was supposed to. So we got the message through, but the system did not acknowledge it and they still left Taubman there.

Mr PRICE—Commodore, I apologise. I temporarily demoted you. I will refer to you as Rear Admiral now in recognition of the service that you are doing your country today. How can the public have confidence in a board of inquiry, when a convening authority can have contact with it? I will give you a parallel in the political area. If we set up a royal commission, it would be, I think, beyond the pale for a responsible minister, or even the Prime Minister or a Premier, to have ongoing contact or even suggest to the royal commissioner, after he has been given his commission, how the inquiry should take place. If they want wider powers or time extended that is legitimate. But how can the public have confidence that boards of inquiry are truly independent if the convening authority can formally, directly or indirectly, have contact with that board of inquiry?

Cdre Dunne—I agree but, in this case, I had almost daily contact with Admiral Sinclair.

Mr PRICE—I beg your pardon?

Cdre Dunne—I had almost daily contact with Admiral Sinclair.

Mr PRICE—Daily contact?

Cdre Dunne—Yes. I was reporting to him most nights.

CHAIRMAN—You were reporting or he was talking to you?

Cdre Dunne—I was required to go across to his headquarters most evenings after the day's proceedings to—

CHAIRMAN—Who instructed you to do that?

Cdre Dunne—He did; Admiral Sinclair did.

CHAIRMAN—I see.

Mr PRICE—No wonder you felt under a bit of pressure.

Mr BEVIS—Did you participate in any other boards of inquiry during your career?

Cdre Dunne—Yes, I have been on a couple of court martials. I was president of the *Darwin* court-martial when the *Darwin* was run aground in the States in 1990 in Hawaii.

Mr BEVIS—How did those other boards that you participated in, in terms of process, compare with your experience at the *Otama* inquiry?

Cdre Dunne—Court martials were different. We were not under the same sort of pressure and directions in the court martials. The *Otama* board of inquiry was the worst one I ever participated in because people were protecting themselves and protecting each other.

Mr BEVIS—I am sorry; I did not mean to cut you off.

Cdre Dunne—No.

Mr BEVIS—Outside your own personal participation in boards, from your extensive experience of many years in the service, you would have been around and have been, I guess, if nothing else, in the officers' discussions in the dining room about different incidents. Is your experience with *Otama* reflected in the sorts of things that are said of other inquiries?

Cdre Dunne—No.

Mr BEVIS—Then, I guess, it gets back to this particular incident. How would the system get so twisted? Why would the system get so twisted?

Cdre Dunne—You would have to ask Admiral Sinclair. I think they got

themselves—when I say they, I think it was Admiral Sinclair and Captain Briggs and possibly Commander Pitt—into a situation when they exonerated Taubman over the grounding. When he lost the two sailors, it had got to the stage where I think they all realised—certainly Commander Pitt did, because I have spoken to him about it—that a mistake had been made. They had made a bad call in leaving that officer in command of the submarine and the only way was to bluff their way out of it. Both Captain Briggs and Admiral Sinclair were very capable, very ambitious men.

Mr BEVIS—Admirals do not make mistakes.

Cdre Dunne—No.

Mr PRICE—Except when they lose a fleet.

Cdre Dunne—Say again.

Mr PRICE—Except when they lose a fleet.

Cdre Dunne—The police spent some 10 months trying to unravel this. Why would they protect him?

Mr PRICE—Without the cooperation of the navy.

Cdre Dunne—Yes, without the cooperation.

Mr PRICE—I will just finish up with a few questions. You mention that you felt that some of the evidence given to the board of inquiry was misleading or false. I guess we could say that people were perjuring themselves.

Cdre Dunne—Yes.

Mr PRICE—What remedy does a board have to insist that people state the truth?

Cdre Dunne—Evidence is taken under oath, so you have got the laws of perjury but that is just about all. The reason that we are able to make calls like that was that the first witness that we had in the stand was the captain of the submarine. The captain of the submarine was the man who should have been able to tell us what went on and why. We put him there up front. He explained his case, made some statements and denied all knowledge or responsibility. Then we analysed and broke down the tape recordings that we had from the control room monitoring system and there were words on there, spoken by Lieutenant Commander Taubman, that indicated that he did have knowledge of the two lads going into the fin.

Mr BEVIS—In your submission, I noticed that Lieutenant Commander

Taubman—or it may have actually been in the BOI document—approached you, I believe, or the board to retrieve the tapes which he claimed had been improperly taken from the submarine. You refused that. Was there any suggestion to you that they should have been returned?

Cdre Dunne—No. Once I made it quite clear to Lieutenant Commander Taubman that that was the end of the conversation and that the tapes and the statements were staying where they were, nobody came back at me. But if we had not had those statements or those tapes, we would never have unravelled what occurred on that submarine.

Mr BEVIS—I would have thought the practice that your board followed in getting those tapes immediately on return of the submarine and interviewing people at the first opportunity would be precisely the practice that any competent board would undertake.

Cdre Dunne—Yes, I agree. And they are the sorts of actions that were taken by the Western Australian policemen when *Westralia* came in straight after her incident. The New South Wales police were not involved in this nor was the coroner until six months later. That was a weakness in the system.

CHAIRMAN—In what sense? Surely, the BOI would have had to have taken place first and the coroner hardly goes in while the body is still hot.

Cdre Dunne—He did in the case of the *Westralia* incident.

CHAIRMAN—Yes, but that is unusual.

Cdre Dunne—I thought it was interesting, but it is belts and braces, and I think it certainly protects the navy and the community from any—

Mr PRICE—And the evidence.

CHAIRMAN—It leads to a multitude of questions. First of all, having read coroners' reports of a number of fatalities involving members of the ADF, I have doubts about the competence of some coroners to handle the topic—

Cdre Dunne—Yes.

CHAIRMAN—Because they come from a totally different background, to be kind about it. They understand neither the culture nor the technology involved, but there is this great area of uncertainty where the civilian authorities are very reluctant to move even though the ADF says that, if it is a criminal matter, it should go through the civil courts—or whatever the legal term is—rather than be investigated by the Department of Defence authority itself. There is a very great reluctance to become involved on the part of the coroner's court. It seems to me, as an outsider, that you have got to drag the coroner in,

kicking and screaming, although they will not admit to that in public. So you have this great uncertainty as to whose baby it is to be picked up and nursed.

The second point is, in relation to the *Otama*, when the coroner did move in, he found there was no criminal activity. He found no-one was to blame. Was he influenced by the actions of the maritime commander or did he genuinely come to that view?

Cdre Dunne—The coroner did not hear all the evidence. The system was selective in the evidence that the coroner was presented with. The coroner did find that there was a case of negligence but it was not criminal negligence as far as he could discern, so there is a difference between the two.

I am not saying it was criminal negligence. What I am saying is that there was negligence enough to warrant the removal of Lieutenant Commander Taubman from the submarine. If there was anything over and above that, that was something for the courts to decide.

Mr PRICE—By a court martial.

Cdre Dunne—By court martial, criminal action or whatever. Certainly I am saying that there was negligence there—the coroner said there was negligence. I believe that as a professional submarine commanding officer—and at the time I was the most experienced in the Royal Australian Navy, and probably still am. I was making those calls up until six months before this, when Commander Pitt relieved me. For three years, I was the submarine commanding officer who was running the OPEXs and firing COs off submarines because they were not up to scratch. I was not all that much out of date when I was making this call, and I still stand by it. There was negligence there.

I think the evidence that the coroner heard was selective. He certainly never heard any professional submarine advice that gave the other side of the story. The professional submariners that were called in before the coroner, as expert witnesses, weren't any that were going to say that Lieutenant Commander Taubman had erred professionally. I was never asked to give evidence to the coroner, and Commander Smith was never asked to give evidence to the coroner. The submarine commanding officers that were called in were basically supportive of Taubman's actions. It was stitched up, to a certain extent, by the navy.

CHAIRMAN—Was there a proposal ever to court-martial some of the junior ratings?

Cdre Dunne—Yes, there was.

CHAIRMAN—How could that be contemplated?

Cdre Dunne—I do not know.

CHAIRMAN—Surely the captain is the responsible person.

Cdre Dunne—Yes.

CHAIRMAN—If there is any action taken, it must be taken against the captain, and it should have been taken, I would submit, in this case.

Cdre Dunne—That is why the proposals to go ahead with the court martials of Sublieutenant Webber and Petty Officer Weymouth—I think they were the two who were identified—didn't go ahead, for the simple reason that their legal advice was, 'If you go ahead against these two juniors, we are going to get after the captain.' It was inconsistent.

CHAIRMAN—It would have been quite proper to charge the captain before a court martial, in my judgment, not only to enforce discipline, but to give him the opportunity to clear his name. His professional career was at stake—

Mr PRICE—No, it wasn't. He got promoted. It wasn't at stake.

CHAIRMAN—No, it is forever blighted.

Cdre Dunne—Yes, it is. You are absolutely right. That would have cleared the air.

CHAIRMAN—Yes.

Cdre Dunne—I think it was foolish not to have done so.

Mr PRICE—Commodore, General Baker said to the committee that when the forces did not proceed with things like court martials, they were able to take administrative action or, effectively, put a black ball or a black spot on a career, but this didn't obviously take place in this instance. Do you have any faith in assurances that were given to the committee about administrative action?

Cdre Dunne—No.

Mr PRICE—How can we establish a board of inquiry and have confidence that a very senior officer in the services will not demand a president report daily to him?

Cdre Dunne—I don't think it happened in the *Westralia* one. The way the ADF has it set up at the moment, allowing the convening authority to be in that line of command, just leaves it open to that sort of abuse. It comes back to depending on personalities. If you have a personality like the present maritime commander, who is a pretty straight arrow, the last thing he would do is interfere with—

CHAIRMAN—It may well be that a safety element is emerging in the case of aircraft and naval accidents through the inquiry, and there may be a legitimate reason for the person—

Cdre Dunne—But that can be passed across very quickly. You do not have to be the convening authority of a board of inquiry to get quick feedback on—

CHAIRMAN—Okay.

Mr BEVIS—Especially when it is a public inquiry like the *Westralia*.

Cdre Dunne—That is another thing.

Mr PRICE—This is my concern: is every board of inquiry now going to be public? If it is, it gives you some reassurance about independence.

Cdre Dunne—There is no reason why the *Otama* one should not have been public.

Mr PRICE—I entirely agree.

Cdre Dunne—The system was that the navy used the word surveillance to try to stamp 'top secret' on everything. That is why I have been quite open today in using words like surveillance and intelligence collection, because that is what submarines do. It is acknowledged in the white papers that we have written since the mid-1980s that that is what we have got submarines for—and selective submarines that are highly trained do do it. I was the captain of one. But you have to make sure, if you do these things, that you are watertight, otherwise there will be extreme political embarrassment, amongst other things.

CHAIRMAN—I am not too happy that you go around trailing aerials and periscopes within a few hundred feet of ships. That alarms me.

Cdre Dunne—That is my point.

Mr BEVIS—In an issue like the *Otama*, I think there probably would have been some people say, 'Because this is surveillance, because of that particular task, these are things that you could not have on public display.' Your assessment is that the inquiry into the incident, which you were the presiding officer of, could have been conducted in public—

Cdre Dunne—Yes.

Mr BEVIS—without harm to the operation of the *Otama* and its future role or other such considerations.

Cdre Dunne—Yes. Certain parts of the evidence may have had to have been taken in camera. We had civilian lawyers there for the whole of it; they had no special clearances. There were about 11 of them at one stage.

Senator BOURNE—The first of my questions was your view on open versus closed inquiries. I think you have answered that, that in general it is quite reasonable.

Cdre Dunne—Yes.

Senator BOURNE—Plus it gives the general public, and also the families of anyone who is involved who has lost their life, confidence that at least they know what is going on. The second of my questions is that you mentioned the *Westralia* inquiry, and that you thought it was a better way to go primarily because of the rank of the person in charge. Are there any other parallels that you would draw with the setting up of that inquiry and the way it was constituted?

Cdre Dunne—I was pleasantly surprised at the way the *Westralia* inquiry was formed and the way it went. There was the openness, the involvement of the minister up-front who made some statements, the formation of the board at the right sort of level with the commodore in charge for that type of inquiry—and, I think, a carefully thought out commodore—the fact there were two civilian experts on the board, and the fact that they were given an extension of time and not pressured to come up with results.

It would appear to me that many of the things that I have been criticising over *Otama* have been put right with *Westralia*, with the exception that Rear Admiral Ritchie has been put in the hot seat as the convening authority. He has now got to review the report of the board of inquiry into *Westralia*. It will be interesting to see what those outcomes are. What is going to happen to that report now? I have absolutely no concerns about the integrity of Rear Admiral Ritchie, but there is still a long way to go after that, to see what sort of actions are taken.

Mr PRICE—If we had a military director of prosecutions that would be the office that would review the recommendations of the board and decide. That then absolutely frees the integrity of our maritime commander.

Cdre Dunne—It frees the good man and freezes out the odd rotten apple.

Mr BEVIS—You have been in command of ships, you have been responsible for allocating responsibilities to others in the fleet, and you have had the experience with this board of inquiry. One of the central arguments about whether you have this independent strain for judicial matters—defence office of prosecutions or whatever—is whether or not that seriously undermines the command structure that is essential to the proper functioning of any military.

Cdre Dunne—It does not undermine the good commander; it supplements him and gives him strength. A good commander should not be frightened of being looked at in a proper way. If there are things wrong with the command, what better way to sort it out? That is the way the Americans do it.

Mr BEVIS—You might be interested to have a look at a recent report that has just been done for Defence, the Abadee report, which includes some recommendations on that. In fact that particular recommendation is one of the few that Defence has decided not to adopt.

CHAIRMAN—We must draw this to a close.

Mr PRICE—Could I ask some questions please, Mr Chairman?

CHAIRMAN—It is twenty six minutes past time. What is your question?

Mr PRICE—Perhaps I could just have the same leeway as you have given yourself. I am really interested in the independence of the board of inquiry. Would you see the committee being too dogmatic if we were to suggest that boards of inquiry should always be public, or that there should always be independent or civilian people or persons on a board of inquiry? If not, where do you see that coming?

Cdre Dunne—Only by exception should they not be public. In most cases it would be appropriate to have civilians on them. The *Westralia*, again, is a good model. I am waiting to see what the outcome might be.

Mr PRICE—With great respect, let me just say that it took a horrific disaster, Black Hawk, before they took that step. I congratulate them and I congratulate them on *Westralia*, but there was one hell of a message.

Cdre Dunne—I have not talked about Black Hawk. I suspect the outcome of the Black Hawk board of inquiry is not too different from the *Otama* one. It appears to me that there have been 18 boys killed and nobody is held accountable.

Mr PRICE—And nobody is guilty. Absolutely. In terms of making it the exception, should there be a requirement that the public be informed as to why it is a closed inquiry?

Cdre Dunne—Yes. A closed inquiry would be very rare and there would have to be a very good explanation as to why it was so. It helps everybody to have it open because it stops all the innuendo and the misinformation that goes around.

Mr BEVIS—One of the difficulties with the open inquiry though is that if you have a board of inquiry where military personnel are required to answer questions in

public—going back to an earlier point about whether you provide incriminating evidence against yourself—and that is subsequently used in legal proceedings, that does present a dysfunction between the two. With legal proceedings people are entitled to certain rights which are being suggested they should not be entitled to at a board. That is the catch-22.

Cdre Dunne—Yes. I am not a lawyer.

Mr PRICE—You were making too much sense, with respect, Commodore, to be a lawyer. The public, if not the service personnel, are getting very frustrated. You have this loss of life and no-one is adjudged responsible. You mentioned the number of people, but in your board or your submission you point out that there was really quite inadequate training in a significant number of people. I do not understand how you can have the crew embarked as being fit and proper to run the submarine, but there are all these training gaps in significant ranked officers or petty officers.

Cdre Dunne—Yes.

Mr PRICE—Was there a change to that after the accident, or could this still be the case today?

Cdre Dunne—I think that it is still the case today. The submarine services have always had problems attracting and retaining high quality people.

Mr PRICE—So this is a function of the wastage rate?

Cdre Dunne—Yes. In 1987 the wastage rate of submariners was pretty high. It was probably the No. 1 problem. Captain Briggs was very aggressive in getting the numbers up and he probably pushed it too far with the training pipeline and people going through too quickly. As a result, *Otama* was significantly diluted in experience levels and even though they will put their hands up and say, 'But there are only 18 trainees on board.' In fact, if you look deeper, as I said before, 50 per cent of the ship's company had only been in submarines for a year, as well as the trainees, so there was not all that much experience about.

Senator BOURNE—I had one more question about the independence of a triservice legal branch. Could you think about that and let us know your thoughts? I do not want to make you think about something that is completely different.

Cdre Dunne—Yes.

CHAIRMAN—Commodore, I would like to thank you for your attendance here today. If you provide additional material, would you please forward it to the secretary. You will be sent a copy of the transcript by Hansard of your evidence to which you can make corrections of grammar and fact.

Cdre Dunne—Thank you, Mr Chairman.

[11.47 a.m.]

MELICK, Mr Aziz Gregory

CHAIRMAN—Welcome, Mr Melick. In what capacity are you appearing before the subcommittee?

Mr Melick—As a private citizen.

CHAIRMAN—I apologise at the outset for being about 33 minutes late, but you can see that I have some loquacious colleagues. I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in the respective houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of the parliament. The subcommittee prefers that all evidence is given in public, but should you at any stage wish to give any evidence in private you may ask to do so and the subcommittee will give full consideration to your request. We have received your submission, and it has been accepted as evidence to the inquiry. Would you like to make any additions or corrections to that confidential submission?

Mr Melick—No.

CHAIRMAN—I now invite you to make a short opening statement before we proceed to questions.

Mr Melick—It may assist the subcommittee to know something of my background.

CHAIRMAN—First of all, do you wish your hearing to be in camera?

Mr Melick—No, I do not, but I would rather the submission I made remain confidential. I will cover most of the matters during this hearing anyway.

CHAIRMAN—Please go ahead.

Mr Melick—I have been in the army reserve for over 30 years. I am currently a colonel, but as I said I appear in my private capacity. I have commanded at all ranks from corporal to colonel, including regimental and training group commands. I have never practised as a lawyer in the Defence Force, although I have been involved in court martials as a prosecuting officer because I am a lawyer. I spent 10 years as a Crown prosecutor, I spent seven years defending people and I am now a Commonwealth government statutory officer. I have considerable experience in criminal law, and I practised mainly in the areas of criminal administrative and appellate law.

My comments are not made out of any sense of grievance. As far as I am aware, none of my decisions have ever been overturned, either as a commanding officer or a convening authority. I have a genuine concern in that I think a lot of the submissions made to this subcommittee have been based on a flawed premise, and this is the premise that when one enters the services one retains all the rights one has as a civilian.

As I have already said in my submission, it is a different sort of environment altogether. We now have a disciplinary system which is, in fact, a criminal law system and it brings with it all the baggage and encumbrances of that system. I am not so sure we need it, especially at what I would call the minor disciplinary level.

In my submission I have drawn some comparisons with the way in which some police forces work. In fact, all police forces have a system of standing orders which deal with most of the regulatory and minor disciplinary matters, and they are dealt with in a manner inconsistent with the way in which criminal matters are dealt with in a court. For example, standards of proof are often different and some of the principles of natural justice such as having people involved in the chain of command dealing with the hearing, do not apply. And, generally speaking, commanders are left to sort out their own problems. I realise at times that can cause disadvantages to individuals but at the end of the day a good commander will not have any problems at all, and a bad commander should be found out by the system.

By introducing, essentially, the criminal system to the Defence Force Discipline Act we have a bizarre situation where a disciplinary authority or commanding officer hearing a charge before it has every one of his decisions reviewed whether there is a complaint from the person who is being dealt with or not. He is required to bring to bear considerable legal expertise for which he has had absolutely no training. Also, he has to rule on points of evidence and he has to rule on points of law.

He may have a completely uncontested matter before him involving something as simple as somebody being absent without leave. The evidence sheet indicates that the sergeant before him said it was a designated parade and the person did not attend, and so he finds the person guilty. However, while the person who is found guilty does not in any way dispute there was a place of parade later on, a legal officer overturns the conviction on the basis that the evidence given by the sergeant was hearsay and that there should have been some independent evidence at first principle indicating why it was a place of parade, et cetera. Those sorts of technicalities do not do any good at all and really are not necessary.

It has also got to be realised that basic military discipline often involves very low levels of criminal law—things such as assault, offensive behaviour, intoxication and the like. The most difficult area in the criminal law is the question of intent. In ordinary criminal law it is often combined with questions of intoxication and mental disease. Fortunately, we do not have too much by way of mental disease elements arise in the

military, although some cynics would probably suggest you have to have some elements of it to want to be in the system in the first place.

The question of intoxication intent drives lawyers mad. I have written several papers on it. I have appeared as senior counsel in the High Court on such issues and I still do not know what it is all about. How we expect a commanding officer of the rank of major or half colonel to get those sorts of things right is beyond me. A simple brawl in a canteen which he has to sort out can degenerate into a real question of whether he directed himself correctly when determining what effect intoxication had on the knowledge of the person who is before him at the relevant time and whether he intended to do certain acts. If you look at the way in which criminal law has gone in Australia, it is now possible to be so drunk as to remove the capacity to form an intent, according to some judgments in Australia.

There is real dissatisfaction amongst the services at the moment caused by a belief that the lawyers are taking over the system. A lot of officers and warrant officers just do not charge people for offences when they think it has become far too difficult. I am not suggesting that that in itself is an excuse, but it is just indicative of the frustration that applies.

As I mentioned in my submission, we are open to criticism because of the denial of natural justice as the ordinary criminal law system knows it. That is because in the military you combine the executive and the judiciary in the one person when you have a commanding officer dealing with the offence. He is the person who often issued the order which the person is being charged with disobeying. You do not have the traditional separation of powers that you have in the ordinary civil system. That taken to its nth degree would mean eventually that commanding officers would lose the ability to properly command or do what I think is necessary for the functional efficiency of their own unit.

There would be nothing worse than being saddled with a system with somebody who just does not fit in and not being able to do anything about it because the matter is heard by somebody else who does not understand the nuances and the aspects of the system.

I hasten to add that these comments only go towards disciplinary proceedings, I am not commenting on boards of inquiry, although at some stage I could probably make a couple of comments on boards of inquiry, about whether they should be in public or private, because of the work I do. I have some very firm views about that which somebody may care to ask me about at some stage. I think that is all I need to do to expand the matters and I will happily answer questions.

CHAIRMAN—Thank you, Mr Melick, and thank you for the distinction between minor behavioural matters, which have a great impact on discipline, and the major issues in relation to boards of inquiry, which we will come to later. It is a matter of concern to

the committee that the 1982 Defence Force Discipline Act does not debase the authority of commanders to command, whether they are corporals or colonels. Wherever you have a body of troops you will always have these minor discipline problems such as somebody getting drunk, going AWOL, answering back or something like that.

That has to be dealt with promptly, fairly and efficiently. Experienced soldiers accept that, and they do not really need batteries of QCs or senior counsel beside them when you march them up. In my day you just marched the witness in and that was it. The CO said, ‘How do you plead, guilty or not guilty?’ If guilty they got 10 days confined to camp or something like that. There is a lot of anecdotal evidence, but is there any real evidence that the authority of commanders at those lower levels is being eroded by the present system?

Mr Melick—I can indicate there is a lot of anecdotal evidence. I cannot produce people who have said it has happened to them, and it certainly did not happen to me. As I said, I was never overturned but, again, I was a very experienced and senior criminal lawyer when I was commanding and, therefore, I did not have the problem.

However, I have had people commanding at the same time who have experienced extreme frustration because they have just had a whole series of AWOL charges dropped. That had come about because while they accepted the evidence of their battery sergeant major that there was a designated place of parade and the person on the charge had failed to attend, a legal officer had ruled out that evidence on the technical basis that it was hearsay. It is absurd when that sort of thing gets into it.

CHAIRMAN—Yes.

Mr Melick—The basic problem is that what we have done is incorporate all the common law elements of intent into the DFDA, which incorporates also the minor offences which should be dealt with by regulation or strict liability. In other words, if you hit somebody with a stubby in your hand, you do not get involved in determining what was the intentional act. Was it the hitting of somebody? Was it the hitting of somebody with a stubby in your hand? Then, if the person was intoxicated, can you use intoxification to go to the knowledge of the fact that you had an object in your hand when you struck the person, et cetera?

If you look at the way in which the High Court has looked at the criminal law and regulatory laws in Australia, in a leading case called He Kaw Teh the court designated that the more serious the outcome, the greater the court will infer intent into the action. The less serious, or regulatory the offence, the more it could be a matter of strict liability. Therefore, a traffic offence could be absolute liability. If you do a certain act then it does not matter what you intended to do or what you thought you were doing, or what your honest and reasonable belief was, you are guilty. There is a half-way house, and it is strict liability. If you do the act then you are guilty unless you can prove that you had a

reasonable belief that a situation would have rendered your act lawful or a lawful excuse for committing the act. At a serious level, of course, full intent must remain.

My view is, and I know it is not shared by a lot of people in the military, that any serious offence should be dealt with by the civil courts and not by the military anyway. So your full criminal justice system comes into play, you have your independence and you do not have all this rubbish about a director of military prosecutions, which I think is a completely unnecessary concept and creates an unnecessary overlay.

CHAIRMAN—How do you propose to handle the situation when somebody answers back to a superior officer or gets drunk and punches one of his colleagues? What is your proposal?

Mr Melick—It should be dealt with by regulatory offences within the military.

CHAIRMAN—What is involved in bringing that about?

Mr Melick—You have a system of regulatory offences whereby a person is then charged. He is entitled to have a defending officer, and you have a prosecuting officer. It is very similar to the orderly rooms we have now, it is just that you do not have the overlay of the criminal law and the criminal intent and all the baggage that goes with it.

Mr BEVIS—How does it maintain the command integrity that you are concerned would be eroded if there were to be a military officer for prosecutions, let us say, to instead remove the process altogether out of the military and place it in civilian hands? Does that not erode command in exactly the same way? I am not sure where the difference is.

Mr Melick—I think once you reach a certain degree of criminality—it often gets very hard in assaults—you draw the line. There will always be criticism that an assault which is so serious it should be dealt with by a civil court will be dealt with, in some cases, in a military court because the commander wants to look after a good soldier. If he wants to get rid of a soldier he sends him off to the civil system. I cannot come up with a perfect system but I think once a person is involved in a serious matter which would normally involve substantial terms of imprisonment that is a matter more properly dealt with by the civil justice system.

Mr BEVIS—And that, in your assessment, does not impact on the authority of the command structure?

Mr Melick—No, I doubt it. I agree with what the commodore said. Good commanders should not worry about somebody independent looking over their shoulder. It is a question of what level you have that because it becomes an embuggerance, an unnecessary—

Mr BEVIS—Can you give us any guidance on that, what the level is? I know you said how hard it is but you have more experience of this than many.

Mr Melick—Perhaps something punishable with a term of imprisonment of more than three months or six months or something like that. I think it is something that would have to be looked at. Not being a military lawyer, I am not aware what terms of imprisonment are handed out, what level of fines are handed out as a general rule. I see the reports at the end of the year but I do not go into too much detail—and in fact they are not all that detailed.

The other problem you have to bear in mind is that in a uniform system there will always be unfairness. People play favourites on promotions. I am talking about police, I am talking about the services and anything else like that. In any sort of hierarchal system there is going to be a system of patronage and there is not much you can do about it. Everybody who joins the system accepts it. You get bitter and twisted about it. I got bitter and twisted about it over the years. I do not think anybody stays in the system and does not get concerned about it but you accept that when you join the service.

What you have to really do is get yourself into a situation where when you give somebody an order they will obey it because of the system. Hopefully, they will obey it because they respect you and they think you are a good leader. I like to think that is why people obeyed me, not because they were frightened of me or frightened of the consequences.

I have been involved in units—I was in a special forces unit for 10 years—and it was absolutely critical the people performed as a team. In combat, and I have never been in combat, it is once again absolutely critical that people perform as a team. If you have a bush lawyer in an organisation who uses the full weight of the law to prolong inquiries or do things on relatively minor matters it can really severely disrupt that harmony and in times of conflict I think that can have fatal consequences. It will certainly erode the confidence of a commander to be able to get his men to do what he wants them to do.

Mr BEVIS—If we were to adopt this system in terms of minor offences that would require changes to the act, wouldn't it?

Mr Melick—Yes. I hasten to add that, when Brigadier Ewing came around Australia trying to sell the act, I raised these very issues then and he could not answer the problems I raised. A lot of other people also had concerns right from the word go.

Mr BEVIS—Is there a parallel with the issue on the right to silence; that is, there are some areas where you should still be able to maintain your right to silence? I guess, if things were transferred to a civilian environment then obviously you would retain that opportunity to be silent. But, for the more summary offences, if you like, that are dealt with by the military you are, I assume, suggesting or arguing that you should not have the

right to silence in those matters?

Mr Melick—Yes. I am not so sure the right to silence should go altogether but you have derived immunity should the matter go to a civilian court and that is that that answer cannot be used against you.

Mr BEVIS—I was going to ask you, because I am not familiar with the police case that you have referred to, whether or not there are some guidelines with the police force that might be useful for us to look at as a committee?

Mr Melick—I would have to do some research and come back to you on that. Part of the problem is that most of the cases that become involved with the police force are involving relatively minor matters like cheating on overtime. They are not like being involved in a murder. I am not quite sure how the High Court would handle the extension of Morris's case if a police officer is required to answer questions which would inculpate him with serious criminality. If you have issues of safety involved, or security on operations and matters like that, I think it would be absolutely absurd that somebody should be able to claim the right to silence to frustrate your inquiry with a weakness in the system when he may have been at fault.

In my organisation at the moment we have a major problem. I am a member of the National Crime Authority, for those members of the committee who are not aware of it, and I essentially act as a royal commissioner, although as a statutory royal commissioner. Our act has the ability for a person to refuse to answer questions on the ground it may incriminate him, and that causes us enormous problems, whereas other organisations such as the Australian Securities Commission and the ACCC do not have that requirement. People are compelled to answer questions, but they have a derived immunity in that you cannot use the answer to that question against them in future prosecutions.

It allows the inquisitorial function in the inquiry to continue without overly interfering with the rights of the person before it. I think that is one of the things that could be extended to military inquiries.

Mr PRICE—Could you explain the derived immunity? Does that prevent them from being asked the same question that derived that answer in a court?

Mr Melick—No, that does not prevent them being asked the same question, but in a court they have to answer questions because they go on oath. What it means is that you cannot use that answer as part of the prosecution case against them. In other words, the prosecution—

Mr PRICE—But can you re-ask the question?

Mr Melick—Sorry?

Mr PRICE—As part of the prosecution team, you are aware of the answer. Does derived immunity prevent you, in effect, putting the answer back in? Can I ask the same question if I am the prosecutor or whoever?

Mr Melick—Ask it of whom, though? If the accused gets in the box, you are going to ask him that question anyway. If he gives an answer which is inconsistent with the answer that he gave in the inquiry, you cannot put the answer he gave to the inquiry to him as a prior inconsistent statement, and nor can you use the evidence of the inquiry to charge him with perjury for the answer he gave in the trial or the evidence on the trial for perjury in the other matter.

Mr PRICE—That is crazy.

Mr Melick—It allows the inquiry to do what it is there to do and that is to get to the truth of the matter.

Mr PRICE—Yes.

Mr Melick—The basic trouble with the criminal justice system is that it is not a search for the truth. It is making the crown prove the case. At the end of the day, any similarity between the law and justice is merely coincidental.

CHAIRMAN—Yes. I find your proposition quite attractive—separating off into the civilian courts the criminal activity. Something like theft is very important in the services for the maintenance of morale and a whole heap of reasons. If someone steals $1,000 or even $600 from another soldier, that must be jumped on immediately and the person prosecuted.

Mr Melick—Yes.

CHAIRMAN—If you refer that to the police, though, the police will say, '$600—don't waste my time.' I have a case running in Brisbane where there is the sum of $200,000 involved, and I cannot get the ASC or the police force to pick it up. They say it is too small an amount.

Mr Melick—That sort of theft could be dealt with by the summary jurisdiction. In a civilian court, that person would probably not go to gaol anyway. In a military establishment, you might—

CHAIRMAN—You could cover it with your regulatory proposal?

Mr Melick—Yes. I am talking about the whole range of criminality, except that in some cases you remove the aspects of the intent. You make it a statutory decision.

CHAIRMAN—Let us move on to the BOI because you tempted us there to ask you some questions on that. Could you expand on your views, briefly, please?

Mr Melick—I think there is a very real risk in holding public boards of inquiry if there is likely to be a criminal trial coming out of it because you prejudice the rights of the person who is going to go before a jury at a later stage. I have great difficulties with royal commissions that are held openly and people's character and reputation are slandered under the protection of a royal commission. There is nothing they can do after the commission to recover it. If you look at the allegations made by Costigan against Packer in his inquiries, and when it was all—

CHAIRMAN—Did he ever name Packer?

Mr Melick—I do not think there is anybody in Australia who did not work out who the goanna was. At the end of the day, when all of that evidence was analysed, there was not sufficient evidence to sustain a charge of a parking ticket, let alone anything else.

I remember a trial after the Fitzgerald inquiries of a Queensland politician or official who was charged with rorting his travel claims, and the judge directed the jury at the end of the crown case to acquit on the basis that there was insufficient evidence to convict. The jury said, 'No, we don't want to acquit; we want to convict this man.' They could not have said that on the evidence before them, but they had read everything that had come out of Fitzgerald about that accused and they had a preconceived idea.

My view is that these matters should be held in private if there is a chance that the matter is going to go to a criminal trial later on. And when the trial is finished and the appeal processes are out, you then release the transcripts of the hearing so that you have the public perception of openness and all the rest of it, and you protect the rights of the person before the inquiry. I do not think a person gets a fair trial after they have had every bit of their evidence commented upon nationwide by every current affairs reporter, court reporter, the newspaper editorials, et cetera.

CHAIRMAN—Do you think that decades of inquiries by boards of inquiry into major accidents in the ADF that have been conducted in secret have been fair and just in their outcomes?

Mr Melick—I do not know. I have not had enough experience with boards of inquiry. I see nothing wrong with having a judicial officer, or a very senior barrister, as president of a board of inquiry, in appropriate circumstances. That to me would overcome the problem of having the person directly involved in the chain of command. You have your other people there for the necessary expertise. It would be bizarre to have a board of inquiry into a submarine accident and not have an experienced submariner on the board of inquiry. I do have a real problem with a person in the chain of command being involved in the board of inquiry. I am aware of a couple of people who have been put in a difficult

situation.

CHAIRMAN—There is no quarrel with that argument. If you do have a senior barrister or somebody like that as president of the board of inquiry, you then make it easier for the old boy network to say, 'We have only had a damned barrister who has never been to sea or been in the air chairing this thing. No wonder we got the wrong outcome. Let's ignore it.'

Mr Melick—Bear in mind that boards of inquiry are there to ascertain the truth, to ascertain what happened and to make recommendations. It is up to the person who convenes the board of inquiry to adopt or not to adopt those recommendations. He can always override it. If he says, 'We had that senile old fool there as the chairman of the board of inquiry and I do not agree with it', he can look at the matters that have been uncovered by the board, including the answers to questions asked by the officers on the board who have the technical expertise, the experience and the service to ask the questions. I am not saying that it is a perfect solution; I am just saying it is one of the matters you can take into consideration.

CHAIRMAN—Why shouldn't we make it mandatory that the board of inquiry's findings be implemented?

Mr Melick—There may be situations, because the board is limited by its reference for a start, when its findings do not take into account matters that are outside the board of inquiry's reference—which shouldn't have been, of course, but were.

CHAIRMAN—I think we have seen evidence where the terms of reference are specifically designed to dictate outcomes, so in one sense the composition of the board of inquiry is irrelevant. We have to go one step beyond that to the authority that convenes the board, haven't we?

Mr Melick—Yes.

CHAIRMAN—And should that be an independent body?

Mr Melick—It becomes very difficult.

CHAIRMAN—It is a very real question.

Mr Melick—Yes, I know that. The problem I have is, if there is no suggestion that the convening authority can be in any way responsible for any of the actions being inquired upon, I see no difficulty. You probably will not even know that until you are halfway through the board of inquiry anyway. My personal view is, and I know I am at odds with a lot of my senior officers on this, that if I was the convening authority I would want to be way out of the chain of command. No matter what my integrity was, I would

not want to be seen to be in a position to have to answer to somebody who is my superior in a situation like that. Therefore, you get somebody with the appropriate expertise from another functional command within the same service or, in some cases, perhaps another service—we are supposed to be going purple these days—and that would overcome a lot of those problems.

Mr BEVIS—You think it is at least worth considering, where there may be a perception if not the reality of a conflict of interest between the convening authority and the incident into which an inquiry is being held, where you could even look outside the individual service? That is worth looking at?

Mr Melick—Yes, I think it is.

Mr PRICE—As the convening authority or in terms of the personnel on the board of inquiry?

Mr Melick—I am talking about the convening authority.

Mr PRICE—You are saying outside that particular service?

Mr Melick—Yes. If it was a matter involving allegations that the chief of army had implemented directions which had directly affected the safety of the people concerned in the incident, I think it would then become very difficult, as a convening authority, to be seen to be independent, no matter what the integrity of the person.

Mr BEVIS—Can I just clarify a comment you made earlier in terms of the question of open and closed? I appreciate the point you made that, to ensure the public accountability aspect of all of this, your suggestion is that you maintain closed inquiries but that, when the inquiry is complete, the military action is concluded, whatever action may follow the BOI—and, if there is civil action, when that is concluded—at that point you release the transcript of the board of inquiry. That should be the normal course of action unless there is some extraordinary reason that you might want to keep it secret, but that would be the exception.

Mr Melick—Yes, that would be my view.

CHAIRMAN—The practical consequence of that, though, is that if there is any cover up, the fires are out, the trail is cold and it is five years into history, and effectively justice cannot be done. I have seen this happen.

Mr Melick—I cannot comment on individual cases. I would have thought it would be unusual to take five years, although, the way some boards manage to prolong things these days, it could. One of the advantages of an open inquiry, of course, is that if somebody gets up and says something which is reported, other members of the public may

read it and say, ‘No, I can bring evidence to bear upon that matter.’ That is the one disadvantage about a closed inquiry—you do not get that external check. I do not how often it occurs.

CHAIRMAN—Believe me, Defence does delay intentionally so that the statute of limitations under the DFDA is exceeded.

Mr BEVIS—If people knew that what they had said and heard was going to be made public, notwithstanding their own reputation, their own ego would come into play in the process if they knew that someone was going to read about it, even if it was five years down the track. Anyway, that is something we should talk about later.

One aspect of your submission that we have not touched on, and I just want to raise it because I am really delighted you included it, is the reference to the basis of remuneration for legal officers. In fact, I remember having a conversation with some legal and military reserves one time about some of these matters. Not surprisingly, they expressed a different view. Are you saying that, if we have got legal officers that are serving commissioned officers, they should be engaged at the rate of pay that their rank accords? Is that what you are saying?

Mr Melick—Yes. The medical corps do it. They get a locum allowance which is not much to assist. When you look at the service the medical corps give the various services, it is exemplary. They go overseas at the drop of a hat and all those sorts of things, and they accept very low rates of remuneration. I can understand a lawyer wanting to maintain his income and all the rest of it. That then becomes a choice. It is a real privilege and honour to take the Queen’s commission and wear the uniform and to get the privileges of rank. I think they have got a hide to do that and then expect to be paid at sessional rates.

CHAIRMAN—There is another point that you are not mentioning. Medical, dental and legal officers are promoted to a higher rank to give them pay compensation because of their professional standing.

Mr Melick—Quite frankly, the rates of pay in the reserve are nothing to get excited about. My daily rate of pay in the reserves never approached my hourly rate in court. I am not complaining. I have had 32 fantastic years in the reserve and I have enjoyed every minute of it—or most of it. I can understand if you have a reserve legal officer who has already put in 30 or 40 days for that year and he is required to attend a long board of inquiry. That is a completely different matter. He then should be entitled to sessional rates.

You could be a barrister or a partner in a law firm, running a battalion, and doing 150 to 160 days a year to run that battalion, and not getting much sleep and all the rest of it, drawing about $10,000 to $13,000 a year tax free for that. But a legal officer

would go away and do 20 days worth of court martials and earn twice as much for doing a fraction of the time and be no better qualified in his civilian capacity. It is just that he is being used in the army in his legal capacity. If he wants to do that and use his expertise to assist the army but charge at those rates, he can wear a lounge suit and call himself a consultant.

Mr PRICE—Yes.

Mr Melick—We are getting to a stage now where they want to create a rank of brigadier for a director of military prosecutions. You already have a judge advocate general. You have a whole lot of colonel consultants. There is a lot of rank and privilege and status involved in this. Some of us view the status differently. I do it for the enjoyment rather than the status, but a lot of people get reward out of the status. The other problem I have with the legal corps, as I mentioned in the paper, it would not hurt to throw it open, to advertise positions—'Wanted: lawyers, part-time, for the Defence Force'.

I have heard many frustrated people say, 'I would like to become an army lawyer, but I cannot get my foot in the door because every time I make an inquiry the job has already been offered to somebody else.' There are some superb legal officers in the service and the service is often well served by them. There are some very ordinary ones as well, and there has been no real selection process. In times gone by it was the first people to put up their hands and say, 'I want to come along.' Sometimes people can no longer serve as officers in an arms unit and they transfer and become SSO officers because they have law degrees. This has no reflection on their legal ability. They may been conveyancers and some day they find themselves as the defending or prosecuting officers in a court martial in an orderly room when they have never been in a court room in their lives.

CHAIRMAN—Thank you very much for coming along this morning, Mr Melick. If there is any additional information you wish to provide, would you forward it to the secretary? You will be sent a transcript of your evidence to which you may make corrections of grammar and fact. Thank you very much for your attendance this morning.

Proceedings suspended from 12.21 p.m. to 1.15 p.m.

BROOKS, Mrs Kathryn Janet, 78B Endeavour Street, Red Hill, Australian Capital Territory 2603

CHAIRMAN—On behalf of the subcommittee, I apologise for the late start and welcome Mrs Brooks. In what capacity are you appearing before the subcommittee?

Mrs Brooks—As a private citizen.

CHAIRMAN—I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in the respective houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of the parliament.

I also remind you of my warning on opening the inquiry this morning that this inquiry is not to be used as an opportunity to make defamatory comment against named individuals under the protection of parliamentary privilege—not that I think for a moment you would dream of doing that—and nor is it our business to re-hear and come to fresh decisions on any cases that have been held before. We are here to look at the process and what flaws might or might not exist in the process and, if so, how they might be corrected.

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

Mrs Brooks—No.

CHAIRMAN—Would you like to make a short opening statement before we proceed to questions?

Mrs Brooks—Yes.

CHAIRMAN—Please go ahead.

Mrs Brooks—My experience has only been with military boards of inquiry as a result of the death of my husband, Lieutenant Brooks, in December 1995. I made this submission to the subcommittee not out of revenge or vindictiveness but rather out of a need for something positive to come from such an unbelievably unnecessary tragedy. It is important that I make this clear, as I am aware that through naming names in the information I provide it may at times sound as if I am looking for a culprit. I do not see

Geoff's death as being caused totally by any one individual—though several were significantly responsible through their lack of action to prevent it—but rather see that it was a result of the systemic failure of the system.

The military psyche is archaic in its attitude and approach to both its role and its responsibility to its personnel. Through my experience with the military prior to Geoff's death, immediately after his death, through the board of inquiry process and subsequent contact, it has become unavoidably evident that although a lot of rhetoric is espoused about being in the navy family and 'we will look after you', in fact the contrary is the position. By including you in the family, your loyalty is relied upon not to rock the boat. Unfortunately for the navy, I have been incredibly disloyal through trying to expose the mockery of its systems of investigations to ensure that some permanent, positive change occurs as a result of Geoff's death.

The military board of inquiry process, in my experience, is a modern token concession of its current-day concerns with occupational health and safety. The traditional and archaic attitude and unaccountability of the military still prevails within the hierarchy of the military. Because of this prevailing attitude, the board of inquiry process is not designed to provide practical results. This is evidenced through words used in board of inquiry recommendations, such as 'should' or 'by an appropriate body'; no personal responsibility being assigned either to causes or recommended actions; no requirement for the commissioning officer or Chief of Naval Services to accept the recommendations; no guidelines or regulatory processes seeming to be in place to guide or direct the commissioning officer when framing the terms of reference, leaving large scope for personal biases or agendas; and no procedures for a board of inquiry after its submission to the commissioning officer.

In my experience, the board of inquiry report was actually lost on Legal Desk for almost two months until I called Maritime Commander Australia to find out its progress. Only then was it relocated to be sent to the minister for approval and release. My hope is that this committee will assist in identifying methods of modifying military inquiry and disciplinary processes to ensure that they become more accountable and provide the results that they promise, in the future. In my opinion, the methods required for this to occur must include an outside objective body being responsible for overseeing the process, and individuals being accountable for their actions and not being able to hide behind the military mantle. I do hope that I will be able to assist you.

CHAIRMAN—Thank you, Mrs Brooks. Could we start with the terms of reference? Did you find that the terms of reference were adequate in your particular case, in relation to your husband, or were they too narrow?

Mrs Brooks—I was never actually fully apprised of the terms of reference of my husband's board of inquiry.

CHAIRMAN—Were you invited to attend the inquiry?

Mrs Brooks—I was invited to attend.

CHAIRMAN—Did you attend?

Mrs Brooks—Yes, I did.

CHAIRMAN—Surely the terms of inquiry were read at the outset of the inquiry.

Mrs Brooks—To be honest with you, I do not remember that occurring nor my being aware of that at the time. The board of inquiry started on 16 January, I believe. I would have to check that date. I am not saying that it was not read out, but I do not remember it being read out.

Mr PRICE—You mentioned the navy as a family.

Mrs Brooks—Yes.

Mr PRICE—Obviously you have this tremendous trauma with the loss of your husband. The news was shattering, but what did you expect that the family might do?

Mrs Brooks—The reason I raised that in my opening statement was because it was constantly said to me, 'You are part of the navy family, and of course we will look after you and of course we will look after Geoff. We will make sure that this problem is fixed.' Yet, in my experience, it was only through an awful lot of pressure from my position and through media exposure that hooks were changed and action steps were taken. It came across very strongly to me—not from Commodore Sloper but from higher up the chain—from Commodore Morton and Maritime Commander Oxenbould saying, in a manner, 'Don't worry; there, there; we'll look after it.'

Mr PRICE—Did anyone specifically have the task of explaining what would happen, that a board of inquiry would be set up and that terms of reference would be developed?

Mrs Brooks—No.

Mr PRICE—No-one. How did you learn about it?

Mrs Brooks—I apologise. Commodore Sloper would have advised me that a board of inquiry would have been set up to investigate what had happened. I actually requested that I be allowed to attend that board of inquiry, and it was said that I would have to make application to Legal Office. I did that and was then invited to attend the board of inquiry. Other than that, I was given no background to it at all.

Mr PRICE—Did you ask if you were allowed to have legal representation there?

Mrs Brooks—No.

Mr PRICE—Was that ever raised with you?

Mrs Brooks—No.

Mr PRICE—Would you have liked to have had a legal representative there?

Mrs Brooks—I do not see that that would have assisted. I do not see that that would have been necessary in that situation, given that it is such a closed environment and also that the board of inquiry was not at that time really looking into Geoff's role. I knew that he had not had alcohol. I knew that he did not have any drugs in his system or anything like that. So there was no—

Mr PRICE—questioning of his role. No; I did not mean it like that.

Mrs Brooks—From that point of view, that would have initially been my only reason to have legal representation. I could not exercise any control through my legal representation to make the navy do anything.

Mr PRICE—It picks up the important point that the Chairman raises about the terms of reference. Having advice as to whether the terms of reference were adequate or inadequate would have been pretty important.

Mrs Brooks—Yes. To follow on from that, in my whole experience it was basically, 'We are sorry your husband has died. Here is the paperwork; fill it out. Thanks very much. We will look after everything.' It was only as a result of my communications with Commander Morgan that a booklet has now been put together by the navy to advise family as to what the process actually is when one of their members in the force dies. It was very much a matter of me finding out information as I stumbled upon it; and it was only because I probably am the sort of person who asks a lot of questions that I even actually ended up at the board of inquiry, otherwise I would never have got there. With regard to the terms of reference, I was not advised about anything. I was totally unknowledgeable about it at the time.

Senator BOURNE—You mentioned that you still do not know what has happened with regard to the recommendations from the board of inquiry. Is that right?

Mrs Brooks—That is correct.

Senator BOURNE—So nobody has followed up with you from the department and said, 'This has happened' or 'This is likely to happen'? You simply have not had any

response from them?

Mrs Brooks—As I noted in the submission that I made to you, I had arranged an appointment with Aldo Borgu from Bronwyn Bishop's office and with Michael Smith as well, to go through that on 7 June 1996, but that meeting was suspended because I had initiated legal action, and I was told I could not be spoken to.

Senator BOURNE—What legal action did you initiate?

Mrs Brooks—I have initiated legal action for trauma compensation and punitive damages.

Senator BOURNE—So they could not even talk to you about recommendations?

Mrs Brooks—They would not even speak to me on the phone—

Senator BOURNE—At all?

Mrs Brooks—beyond advising me of that.

Senator BOURNE—Has anyone in the department spoken to you since then?

Mrs Brooks—No.

Senator BOURNE—For the same reason?

Mrs Brooks—Yes.

Mr PRICE—How long was it after your husband's death that you instituted this legal action?

Mrs Brooks—I instituted legal action on 17 May 1996 and I am still in the process. I am actually being taken to court by the Department of Defence at the moment to stop me from suing.

Senator BOURNE—Naturally.

Mr PRICE—Sorry?

Mrs Brooks—I have been taken court. The case is in the Supreme Court at the moment to stop me from suing under the Workers Compensation Act.

CHAIRMAN—Mrs Brooks, there are a number of issues here. There was the response from the navy that you have outlined. The inference can be drawn that you were

not happy with the way the board of inquiry was conducted. Could you be a bit more specific about both the conduct of the inquiry and the circumstances? Was there any corporate knowledge within Navy that the sequence of events which led to the death of your husband was possible and could have occurred?

Mrs Brooks—It is documented that the navy knew about it from 1967.

CHAIRMAN—That is the failure of the winch hook. How can you date that precisely from 1967?

Mrs Brooks—That was documented as a result of a minute from the Naval Attache in London, who had been advised by Westlands that this could occur with the hook on the precursor to the Sea King aircraft, which would have been the Wessex.

CHAIRMAN—Your claim is that, for a period of about 20 years, Navy knew there was an inherent problem procedurally with the hoisting apparatus that they had?

Mrs Brooks—That is correct.

CHAIRMAN—And they did nothing? Did that come out in the BOI, or did you find that out independently?

Mrs Brooks—No. I was actually advised a couple of days after the accident that there was definitely knowledge of the problem in the civilian industry, and that Careflight had actually modified their equipment because of the problem. I actually have copies of documentation that there was a crossover between Careflight, when they made this change to their equipment because they had dropped one of their doctors; they copied it to CASA, or CAA as it was at the time, and that was passed on to the Navy—through, I think, unofficial means. But also the Navy attended a Helitech conference in 1986, where it was actually a specific item of discussion.

CHAIRMAN—So you think Navy not only was aware of it but also should have taken action to prevent the situation occurring?

Mrs Brooks—Pages 86 to 90 of the board of inquiry report document the time line of knowledge within the Navy of the problem. The time line actually starts in 1967 and goes to 1995 and it lists however many instances there were of things that related to this specific problem. They were well aware of it, and that came out in the board of inquiry; it was openly admitted. Rayden Gates, who was the chairman of that committee, seemed to be quite taken aback. In terms of the board of inquiry actually uncovering that information, I have no problems with that at all. They seemed to do a very thorough, effective job.

CHAIRMAN—But they drew no conclusions from that in their recommendations?

Mrs Brooks—They most definitely did draw conclusions from the recommendations, and I was quite happy with the recommendations, on the whole. I did not have any problem with that. What I do have a problem with—

CHAIRMAN—You were happy with the BOI process then, overall?

Mrs Brooks—The BOI process itself, in Geoff's particular case, was a good process.

CHAIRMAN—And were the recommendations of the BOI all implemented?

Mrs Brooks—I know that—

Mr PRICE—In 1996, 'Joanna Gash advised she was unable to assist in furthering my communication about the implementation of the recommendations of the BOI, but that a decision was imminent . . . ' That is in your summary.

Mrs Brooks—Yes.

Mr PRICE—Have you had any further communication with either Joanna or the ministers—

Mrs Brooks—No, as I said—

Mr PRICE—or the Navy or anyone in the Department of Defence about the BOI?

Mrs Brooks—Officially, no. Officially I have not; and they have all maintained that they cannot do so, because of my legal action. Unofficially, as I mentioned on the next page, I had a conversation with Lieutenant Commander Geoff Fiedler in March this year. He is actually now at Garden Island and he confirmed that the recommendations regarding communication procedures, which was 345(d), were still in the process of being addressed—and that was in March 1998, which was going on for 2½ years after the accident. The procedures were simply a matter of hand-held communications.

Mr PRICE—At the moment, boards of inquiry make recommendations about changes to procedure or whatever. Should we encourage such boards to give time lines? Clearly, the convening authority can accept or reject those recommendations; but, where they are accepted, should the board indicate a degree of urgency or a time line associated with change rather than just make the recommendation that we need to produce a manual or change a bit of equipment or whatever?

Mrs Brooks—Definitely. That would assist greatly. But the problem—

Mr PRICE—Do you think it would help the relatives—such as in your case,

particularly—to know that the recommendation does carry a time line?

Mrs Brooks—Yes, that would assist with the process. However, there is still a larger issue with the fact that there is no obligation to accept the recommendations.

Mr PRICE—Yes; I accept that.

Mrs Brooks—At this point in time I do not know if those recommendations were asked to be rewritten, as they were in the Bamaga incident. I have no confidence in the end result of the board of inquiry process after what I have experienced.

Mr PRICE—You would expect that there are circumstances where it is entirely appropriate to reject recommendations, but if we are moving to more public boards of inquiry, more open and transparent process, do you think where a recommendation is rejected that that rejection be detailed and on the public record?

Mrs Brooks—Yes, most definitely.

Mr PRICE—Thank you.

CHAIRMAN—There has been an inference by witnesses before this inquiry that there is a reluctance to admit any errors by the services in these inquiries, to put it in its simplest form. Whether it extends to being described as a cover up is not really fair to the way the proposition has been put to us, but that is basically the inference, that the defence force has a reluctance to admit to any fallibility in relation to these major accidents. Do you share that belief in any way at all, do you have sympathy with it, or do you think the services are ruthlessly objective in their inquiries?

Mrs Brooks—If you were to look at the board of inquiry report I would have to say that it was objective. However, I requested a full coronial inquest into my husband's death and at that inquest the navy took the line that it was Geoff's fault, he was careless, and his death was of his own doing.

CHAIRMAN—This was the evidence they gave the coroner?

Mrs Brooks—This is the evidence that the navy gave the coroner. It was also stated to HMAS *Albatross* officers that the navy line was that Geoff Brooks had been careless, it was his fault, and that they were not to discuss the issue outside with anyone else.

CHAIRMAN—What was the coroner's finding?

Mrs Brooks—The coroner's findings was that his death occurred as a result of dynamic rollover and rollout and that there were individuals who were significantly

responsible for that situation being allowed to occur. However, they could not be indicted as the military line of responsibility was too nebulous for any properly instructed jury to be able to find any individual guilty.

Mr PRICE—Did I understand you correctly to say that navy personnel at *Albatross* were advised of what the navy's view was of the cause of the accident?

Mrs Brooks—Yes.

Mr PRICE—Could you just repeat that for me?

Mrs Brooks—Fundamentally, that the navy line was to be that Geoff Brooks was careless and that it was an accident that occurred through carelessness. End of story.

Mr PRICE—I just want to make sure I understand the point. Are you saying that those who subsequently gave evidence to the coronial inquiry reflected that advice? Was this the official version by the navy of what had happened and they were not to discuss it, or is it your belief that the advice was given and people therefore were to follow that advice?

Mrs Brooks—As far as I was led to believe from lieutenants and lieutenant commanders of 816 and 817 Squadrons, they were told that that was the navy line that they were to follow. Bob Ferry, who gave an extensive amount of evidence as the accident investigation officer, contradicted that line extensively at the coroner's inquest, and he got a very bad posting thereafter.

Senator BOURNE—Would not the coroner have had access to the board of inquiry?

Mrs Brooks—That is right, so it was actually quite a silly thing to say to him.

Senator BOURNE—Exactly.

Mr PRICE—Is it fair to infer then that this concept of family that operates in the services is such that the reputation of the family as a whole needs to be protected at all cost? Has that been your experience?

Mrs Brooks—That is correct, yes.

CHAIRMAN—In the case of boards of inquiry, do you think they ought to have some disciplinary power that is enforceable?

Mrs Brooks—Yes, most definitely. In this particular instance, a Mr Peter Routh was actually identified and was cautioned in the coroner's inquest because he may have

been—I cannot remember what the correct word is—putting himself in a legal situation. He admitted that he had not done his job properly and that if he had then Geoff Brooks may not be dead at this point in time. It actually says here in the board of inquiry report at point 200:

Mr Routh admitted in evidence that he signed the AIM before he was satisfied that no further action was required. The Board finds that this action contravened paragraph 5 of NALO (I) 2-15.

That was a direct contravention of orders, but there was no disciplinary action either recommended or taken against Mr Routh.

CHAIRMAN—Would you have preferred that there be an independent authority to investigate all the circumstances of your husband's death, or were you happy to have it within the navy provided some changes were made to the system?

Mrs Brooks—I think there definitely needs to be an independent body involved, in that it has the authority to recommend disciplinary action and also enforce follow-up of recommendations. There is too much scope within the current board of inquiry process to make recommendations, or avoid making disciplinary recommendations, and nothing further happens, it just disappears. When it stays within the military, things are seen to be done but then nothing more happens.

CHAIRMAN—You said you have initiated legal proceedings in relation to compensation. I thought compensation was automatic in the event of accidental death.

Mrs Brooks—It is in relation to negligence. It is because of the negligence involved. I wanted to make a punitive damages claim but it cannot be taken out without a compensation for negligence claim.

CHAIRMAN—I will jump back to the previous point about the coroner. You do not see the coroner as providing that independent and objective platform?

Mrs Brooks—I do, but unfortunately the coroner has no jurisdiction over the military. The coroner is unable to force the military to do anything.

CHAIRMAN—But presumably if a coroner found that there had been criminal negligence and recommended that a charge of manslaughter should be laid—to take a hypothetical position—it would be very difficult for a CDF not to act on that.

Mrs Brooks—Yes, most definitely, I agree with you on that point. However, because the chain of responsibility within the military is so convoluted and interconnected, it is very difficult to actually identify any one responsible person.

CHAIRMAN—I see.

Mrs Brooks—So a coroner is put in a position where he cannot ever recommend one individual to the DPP because of the fact that the person can always say, 'But I wasn't fully responsible for this. I still had somebody further up the line.'

Mr PRICE—You are also alleging that the coroner has difficulty in establishing the facts. That is, coroners are not given the cooperation you would ordinarily expect in such a serious inquiry as a coronial inquiry.

Mrs Brooks—That could be potentially the case. Also, I believe the coroner does have difficulty in understanding the military structure. Anybody outside the military would have problems understanding the military structure and lines of responsibility.

Senator BOURNE—It seems from this that you have not had much to do with the Defence Force Ombudsman. Is that right?

Mrs Brooks—I did go and speak with the Defence Force Ombudsman; however, he said that he was not in a position to do anything because a board of inquiry had been conducted and at that point in time—

Senator BOURNE—He had no jurisdiction?

Mrs Brooks—Yes.

Senator BOURNE—We have had some evidence that there are people who think that the Defence Force Ombudsman would be an appropriate independent authority to oversee things like whether recommendations from boards of inquiry are taken up, that sort of thing. Do you have a view on that?

Mrs Brooks—That would seem to be very logical.

Senator BOURNE—Do you think it should definitely be somebody from outside the Defence Force?

Mrs Brooks—It definitely has to be somebody from outside the Defence Force. The Defence Force, as we have previously covered, has very much of a family psyche. If you are within that framework, you are immediately put under pressures of loyalty and all sorts of other peer group pressures that occur. Consequently, it has to be somebody from outside.

Senator BOURNE—Is that more an individual service oriented thing; would it be a Navy family, an Army family and an Air Force family? Do you think if you had a triservice legal section to carry out this sort of thing that that might be independent enough, or do you think you really have to go right outside?

Mrs Brooks—I believe you would have to go right outside. I do not have a lot of experience with the air force; however, exactly the same sort of attitude pervades the army, certainly in the aviation section of the army. Obviously, I still have a lot of contact with them, and they experience exactly the same sort of problem. If you went into a triforces situation, all you would do would be to broaden the family structure.

Senator BOURNE—Thank you.

CHAIRMAN—Is there anything additional that you would like to contribute or comment on?

Mrs Brooks—No, I do not believe so at this stage.

CHAIRMAN—Thank you for coming along to what is obviously a very difficult circumstance for you. You will be sent a copy of the transcript of your evidence to which you can make corrections of grammar and fact. Once more, thank you very much for appearing this afternoon.

Mrs Brooks—Thank you.

[1.53 p.m.]

BARRIE, Admiral Christopher Alexander, Chief of the Defence Force, Australian Defence Force, R1-5B-CDF Suite, Department of Defence, Canberra, Australian Capital Territory 2600

CHAIRMAN—Welcome, Admiral Barrie. I must advise you that proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in the respective houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. 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 at any stage, should you wish to give any evidence in private, you may ask to do so and the committee will give consideration to your request. We have received the department's submissions. Three of those have been authorised for publication. Are there are any additions or corrections that you wish to make to those three submissions?

Adm. Barrie—No, not at this stage.

CHAIRMAN—Thank you. I now invite you to make a short opening statement before we proceed to questions.

Adm. Barrie—Thank you. As the brand new Chief of the Defence Force, I welcome this opportunity to be able to speak formally to the subcommittee. This is a very important and complex inquiry. It is of great significance to the Australian Defence Force and to Australia. It will have far-reaching consequences. Therefore, it behoves all of us to consider carefully what needs to be done to improve our military justice system. The results of this work will be one of the foundations on which our nation's security will rest, because it will underpin the operational effectiveness of the Australian Defence Force.

Military justice is fundamental to the professionalism of the Australian Defence Force. The rule of law is a key element in the reputation of the ADF as a national institution and in other parts of the world, including with the United Nations. Our commanders at all levels hold their unique powers only as provided for in our constitution, and the legitimate exercise of those powers is the building block around which the ADF's capacity for operations is structured. The structure of the Australian Defence Force is based on the concept that we are prepared for war and adapted for peace.

Military justice procedures are integral to our defence effort. They must seamlessly support it across the entire spectrum of our defence commitment—that is, from training through to conflict. When the Senate passed its resolution on 25 October last year to establish this inquiry, a major opportunity was presented to the Australian Defence Force

to demonstrate the considerable strengths and account for certain evident shortcomings in its current military justice procedures. This has been a difficult task, because we are constantly looking at ways to adapt the procedures to meet new or unexpected requirements. This is an ongoing process, but I do think this illustrates the importance of this inquiry to us all.

There have been two written Defence submissions, including the recent supplementary submission, an extensive legal briefing and evidence from my predecessor and from the service chiefs. We remain very ready to assist the work of this inquiry in any way that we can.

The first Defence submission emphasised the needs of the ADF for both discipline and inquiries in peace and war. It attempted to distinguish carefully between the outcomes our systems for inquiries and discipline are designed to achieve. Having regard to the terms of reference for this inquiry, I urge the subcommittee to place those needs at the centre of their deliberations, and I have every confidence that you will. In particular, the cornerstone of both Defence submissions is the fundamental requirement for the ADF to have appropriate disciplinary procedures to support command authority in war and peace, and to conduct internal inquiries into accidents and incidents. I am also confident that your breadth of knowledge as members of a defence subcommittee will enable you to fully appreciate these needs.

The subcommittee has received a broad range of written submissions and taken oral evidence during the hearings. I have read the publicly available submissions and the *Hansard* of proceedings. There have been some proposals for changes to military justice procedures which deserve our full consideration. The balance of submissions and evidence emanates from serving and former ADF members, or their relatives, concerning dissatisfaction with past investigations and inquiries. If individual members or their relatives are unhappy or dissatisfied with the outcome of a particular investigation or inquiry, it is naturally of concern. A number of relatives have appeared before the subcommittee. They have either lost loved ones in accidents or they seek to make representations on behalf of serving members who they feel have been mistreated.

Operational service in the Australian Defence Force is very much a young person's occupation. It is inherently dangerous in peace time when most other people in our community are not facing the imperatives to train for war, as we do. When accidents do happen and deaths occur, the victims are likely to be young: they will be husbands and wives; they will be parents; they will be partners; they will be sons and daughters, brothers and sisters and, of course, friends. Those they leave behind have a sudden burst of grief thrust upon them. These people all want to understand what happened. These people need and deserve all of our understanding and help.

It is the ADF's responsibility to assist these people to understand the cause of the accident. Relatives wish to be convinced that all possible steps are taken to prevent a

recurrence. In some cases, and understandably, they wish to be assured that appropriate disciplinary action is at least considered against those individuals who they perceive to be responsible.

Communicating with relatives and providing them with appropriate support are key areas where the ADF is resolved to do better. Boards of inquiry and the processes for the Australian Defence Force can be difficult to understand. We try to be as fair as we can. Where appropriate, representation at boards of inquiry of those we have lost and their relatives is to be provided. Follow-up support, already frequently provided through the good offices of commanding officers and supporting agencies, will be mandated.

I considered it important, and hopefully useful to the subcommittee, to lodge a supplementary defence submission at this late stage of the inquiry. Its purpose is to sharpen the focus on various key issues as we see them and to indicate where change is required consistent with the needs of the Australian Defence Force.

In regard to inquiries and investigations, in line with the measures outlined and consistent with the current legislative framework, I think we can achieve a more open, internal inquiry system, better controlled and more transparent in its outcomes. To this end, the inclusion of external members on boards of inquiry and better communications with regard to post-inquiry actions are key aspects.

In regard to Defence Force discipline, the current system has been subject to constant scrutiny and modification since its introduction. The Australian Defence Force's initiative leading to the report of Mr Justice Abadee is but a further iteration in this process designed to keep our standards of military justice high and appropriate to our needs. This is of course fundamentally important to our professionalism.

Finally, Mr Chairman, I would again like to thank you and the members of the subcommittee for your interest in our military justice procedures. It has been an opportunity to examine publicly our approach to these issues which, I reiterate, underpins the very operational professionalism of the Australian Defence Force of which our community is so proud. The service chiefs and I look forward to the opportunity to meet with the subcommittee as it considers its report.

CHAIRMAN—Thank you. Before we go on to detailed questioning, I would like to take you to the opening part, the summary of your latest submission. On the second page, you say:

In summary, the ADF needs for military inquiry procedures include:
. the Need for Internal inquiry procedures
. the Need for efficient management and control of inquiry procedures . . .

That is a rather unfortunate choice of words, 'control of inquiry procedures', is it not,

because hopefully you would intend those inquiries to be independent not controlling the outcomes of them?

Adm. Barrie—By 'control' I mean to deal with perceptions that some of those inquiries are out of control. I do not mean 'control' in the sense of interfering in the process of independence or in the process of being able to establish the facts.

CHAIRMAN—Moving to the second and third supplementary submissions, at the bottom of the page, you say:

Internal inquiries will continue to be conducted within the ADF, particularly where a death has occurred.

Is that a maintenance of the status quo and are you rejecting the *Westralia* open inquiry form with civilian members of the board, or do you include the *Westralia* type of inquiry?

Adm. Barrie—I think the *Westralia* model is a model that we should very carefully consider. It stands before us as a model particularly appropriate in the circumstances where a death has occurred.

CHAIRMAN—But then you go on to say:

A Coroner's inquiry provides the necessary avenue for independent external review of such cases.

There is evidence before this committee that in many cases coroners lack the technical expertise to comprehensively investigate military accidents; they lack an understanding of the command structure and the technicalities of it; and furthermore, in an intangible way, coroners are reluctant to intrude civil actions into what they see as a military area. I put it to you that a coroner's inquiry may not provide—it may, but it may not—the necessary independent review source.

Adm. Barrie—I could not comment on behalf of any coroner that I have ever met, but I would be surprised if any of them would accept the proposition that they were not capable of delivering independence. Certainly, from our side of that equation, two things stand out. Firstly, we have to be ready to provide whatever assistance any coroner might require to understand the systems and the issues that need to be addressed. Secondly—and I think this is also very important—in the interest of fairness across our Australian community, it is the coroners who have this task on behalf of the general community, and we should not stand outside that process.

CHAIRMAN—At the heart of my question is not a diminution of the coroner's role. I was wondering whether that statement of yours really implies that there is no need for any independent review other than that provided by a conventional coroner's report, because clearly one of the dominant themes in this inquiry from many witnesses is the

need for an independent inquiry structure of some form or another. Everyone has different ideas about it, but it is a very common theme that the services stand lacking when they are judging themselves.

Adm. Barrie—I think some people have a perception of that, but the same problem presumably exists when there is an instance involving the police force.

CHAIRMAN—I would think after the last 12 months in the history of the New South Wales police force you would not have brought that up as a figure of comparison.

Adm. Barrie—The problem remains the same. I would think it is a very serious matter if any coroner in Australia were to say to the ADF, 'You have withheld information from us. You have not provided full access to the information we need to make a fair and independent judgment in this case.' That, I think, would be a very serious matter and certainly one I hope does not crop up in my term of office as CDF.

Mr PRICE—But it has cropped up, hasn't it? A coroner has said that one of the services has not given full cooperation to his inquiries. Doesn't that then render the coronial inquiry as an inadequate mechanism of external review?

CHAIRMAN—It is only one step removed.

Adm. Barrie—That is a matter for judgment at the time. I am not going to rewrite history on that, and I certainly do not know all the circumstances because I was not associated with them. If a coroner's report said that the ADF had withheld information and not enabled that coroner to make a proper judgment about the circumstances, I think that would be a very serious matter.

Mr PRICE—So if we were to call retired New South Wales State Coroner Waller and he tendered that evidence, that would have an impact; you would accept that? I appreciate it has not occurred in your time.

Adm. Barrie—I think, in truth, you would have to talk to all the people associated with the circumstances at the time. As I said, I cannot rewrite the history on that and I would not intend to do that, but I would certainly take it very seriously.

Mr PRICE—Can I just raise with you a difficulty that, whilst the subcommittee can accept your statement of intent as CDF, to what extent are we guaranteed that that is then accepted by the service chiefs or even middle management within each particular service?

Adm. Barrie—I would be surprised if any service chief would not understand that requirement and if any service chief did not do his utmost to ensure the independence and fairness of the coroner's finding.

Mr PRICE—What is wrong with having the coroner involved while the evidence is still fresh?

Adm. Barrie—I do not think there is anything wrong with that. In some cases that I am remotely aware of in the past, getting a coroner's office involved in the early stages of the process was quite valuable, particularly when it came to disturbing evidence.

Mr PRICE—Are there clear directions for the convening authority in making terms of reference to encourage coroners to be involved straight away?

Adm. Barrie—That is our intent.

Mr PRICE—So you intend to issue guidelines that reflect that?

Adm. Barrie—Yes.

CHAIRMAN—Admiral, you raised the point in your submissions that a director of military prosecutions will not be appointed as this would severely hamper the authority of a commander in administering discipline which is essential in a miliary organisation. We would not question the importance of the maintenance of discipline, but a couple of points come from that. You would have been aware, since you have told us that you have read all the submissions and the evidence, that that is a point that is floated off. Are you trying to pre-empt the power of parliament to direct you to set up a director of military prosecutions?

Adm. Barrie—Mr Chairman, you and I both know far be it for me to pre-empt anybody's power in these regards. But let me just share with you what went through my mind when I read all those submissions. It is not a question of whether or not this could work in peacetime. That is not the issue. The question that I was very troubled by was: how would this work in significant military operations not only in Australia, but a long way offshore in somebody else's country? I was very troubled by that, simply because, if we are to have an effective ADF which works under the rule of law being able to deal with cases quickly, expeditiously and properly is central, I think, to what makes Australian servicemen so good. In all those submissions, I did not read much evidence which suggested how this would work in operational circumstances.

CHAIRMAN—Let us take that in some detail. We have had a very large number of forces deployed overseas on peacekeeping operations, UN operations. In fact, I have just come back within the last month from the four United Nations commands in the Middle East. I think Australians are posted to all of them. In one of them, Major General Ford is one of the two stars. We have not had a history of undisciplined actions overseas. In fact, the conduct of Australian troops, by and large, in all three services, has been exemplary. I think it has probably been better than within Australia. So the peacetime operation really is not a matter of great concern. If we are on operations on active service,

a different set of rules apply entirely, probably to a degree that, with the greatest respect, you cannot comprehend.

Adm. Barrie—The closest I can come to comprehending that is to read the accounts of Australian performance in World War II.

CHAIRMAN—Yes.

Adm. Barrie—They are the sorts of circumstances that go through my mind when I read those submissions.

CHAIRMAN—But what I am saying is that, if a director of miliary prosecutions was set up for peacetime operations, there could be a rider that it did not apply on active service, or something like that, that alternative arrangements could be in place.

Adm. Barrie—But we are a force structured for war and adapted for peace. The structures we have in peacetime—

CHAIRMAN—With the greatest respect, you could not go to war tomorrow.

Adm. Barrie—But all those structures that underpin the way we operate in the Australian Defence Force in peacetime must be relevant to the way we would work in wartime.

Mr PRICE—Can I just take that up? If you will just bear with me, I will put a hypothetical proposition—and that is, that you have, for relatively minor disciplinary matters, a summary procedure that is very swift and effective and then you have a board of inquiry. Why wouldn't a director of miliary prosecutions be an appropriate authority in peace and war to review the recommendations of that board of inquiry?

Adm. Barrie—I think it still comes back to the core question of what are the essential ingredients here of allowing our commanders to get on and do the job? I guess one of the teasers is: is this a system which would be expeditious, efficient and get those results quickly or is this a system which would bog us down in a great deal of legal argument, and other things, before we could obtain a result? I think the record in peacetime throughout many of the courts in this land shows that we are not particularly timely and we are not particularly efficient in getting the results. I find it very hard to see how we could maintain expeditiousness on one hand and not get ourselves bogged down in all those other things.

Mr PRICE—The real problem of your position or the current position is that the line command selects someone as a convening authority who may be involved. He develops the terms of reference. The board of inquiry is set up. The recommendations go back to the convening authority for a decision. There is absolutely no impartiality in the

process.

The thing that you have added to, and I commend you for it, is—now—public boards of inquiry and independent or civilian people on the board of inquiry.

Adm. Barrie—Going back to the role of the director of military prosecutions, I think there is a separation between what we require of an inquiry system and what we require of a disciplinary system. I think that is well appreciated by most of us here. The inquiry is there to get to the facts. In my view, in wartime, we would want to get to those facts very, very quickly indeed, because things will roll on and then we will be into something different.

A question about disciplining people also has, I think, in wartime, a very short fuse on it as well. These things which are allowed to drag on in an operational theatre of war can become cancers if they are not readily dealt with.

Mr PRICE—Presumably, a director of military prosecutions deals with only the most serious issues, including recommendations of boards of inquiry. During wartime, why can't those things be done expeditiously, but at least be done by an external party not directly involved in whatever it was that was being investigated?

Adm.Barrie—I do not know the full answer to that question. All I could really do is say that, having read all those submissions dealing with that matter, I was constantly troubled by the question of how would this work in significant military operations. If we could find a system that would persuade us that it could work, I would not have a problem with it. But that is my difficulty.

Mr PRICE—Would you agree that the current system lacks public confidence, and it is that lack of public confidence that has moved the ADF to the recent moves that it has made, but the public still lacks full confidence in the system, notwithstanding those welcome moves?

Adm. Barrie—I would certainly agree that there is a perception, in my view fostered by media reporting, that the system is not fair. But, when I looked at the statistics of performance since 1990, and put against that—this is the 1998 boards of inquiry and so on—the question of whether this is a fair system, I would have to say that, by and large, it does seem to be fairly fair.

There are two tests, in my view. Firstly, is this a fair system to all of those people involved and, secondly, is it a useful system? I share, with everybody, concern about a public perception that all is not well generated by some media reporting. On the other hand, looking at statistics and all of that, I would have to say, by and large, it does seem to be meeting our needs.

CHAIRMAN—If we could persist with this for a minute or two longer, you have raised the police force, and I think the royal commission in New South Wales showed quite clearly that the police force is incapable of investigating itself and maintaining its standards.

Mr PRICE—And in Queensland.

CHAIRMAN—I know you are sensitive about New South Wales, but I think it is true across the spectrum. But what I am saying is that small bodies, by their very nature, are inward looking, and it is very difficult to be objective. I would put it to you that there is abundant evidence that the ADF has not been able to objectively investigate itself, as the submissions have shown, in so far as there has been no disciplinary action taken where negligence or incompetence has been demonstrated. That is the real concern.

Adm. Barrie—That is a view lots of people are entitled to hold; it is not a view that I share particularly. I think it does, if you like, draw into question the process for dealing with boards of inquiry on one hand, and the handling of those recommendations which, of course, are eventually handled to a point where they satisfy the Minister for Defence, and, on the other hand, suggestions of discipline where the rules of evidence are actually quite different from what they are at inquiries and where, of course, in fairness, people are not enjoined to incriminate themselves. There are actually two quite different standards of work here, and the fact that you get recommendations out of the board of inquiry along a particular line or course of action, which is not taken up through a conviction through the disciplinary process, I do not think places the system in question.

CHAIRMAN—Could I rephrase it and come at it from a different angle. As CDF, and having read all these submissions and the evidence given, do you have an absolutely clear conscience with respect to the past that justice has always been done? You have no personal involvement. I am not aware that you have ever been on a board of inquiry or on a charge of any nature at all. When you look back over the last 20 years at the major inquiries in the ADF, can you honestly say to this committee that you believe justice and fairness and the correct disciplinary approach has always and invariably taken place?

Adm. Barrie—Mr Chairman, I could not possibly say that—

CHAIRMAN—That is really the test.

Adm. Barrie—for this reason. For those matters that I have been involved with I am prepared to give you an absolute guarantee on that. For those matters which are subject to hearsay, innuendo, rumour and all the other things and about which I am not in possession of all the facts, I could not give you an absolute guarantee.

Mr PRICE—Could we take the *Otama* as an example. Does the navy operate on the basis of three strikes and you do not have command? Must there be three balls-ups

before you get removed from command? What is the rule there? Did you have regard to the first grounding of *Otama* before the loss of life in the second incident? How do you explain the continued command of the commander given the board of inquiry and the complete failure for anyone to be disciplined?

Adm. Barrie—I am not going to account for it in the first instance. I would not want anyone to trivialise the responsibility of command. Command is a responsibility that people in the ADF hold and it is given to them under the constitution. Everybody holds their command responsibilities in the Australian Defence Force at the pleasure of the Governor-General, who would remove somebody's responsibility from command on the advice of the organisation. I could not possibly answer the question because I do not know what was in the minds of the commanders and all the people who dealt with that incident.

CHAIRMAN—I do not really think that is the question.

Mr PRICE—We were told it was extraordinary—

Adm. Barrie—I thought the question was: if you have got three strikes, are you out? I am saying simply I was not there. I do not know. There is just no way I could make a judgment on it.

Mr PRICE—I guess the point that was made to us was that it was extraordinary to still be in command after two strikes and the loss of personnel, and that no other navy would do it. If you want us to have confidence in the system, this is not a bad example to look at. And far from being disciplined, those recommended for court martial were promoted. I think it is extraordinary.

Adm. Barrie—That is a view some people have put to this inquiry. I do not know the circumstances. I do not know what was in the commanders' minds at the time. I do not know what the material was that lead to the handling of all of that. All I can say is that any person in the ADF holds those command responsibilities at the pleasure of the Governor-General, and when we become dissatisfied with their ability to hold those command responsibilities it is beholden on us to do something about it.

CHAIRMAN—Admiral, can we move away from the *Otama* where personalities are involved and look at the principle, and the principle surely is responsibility. You invest certain powers in a commander and both the ADF and the community are entitled to see that those powers are exercised responsibly.

When a board of inquiry shows that there has been negligence or incompetence and a person remains in the post, or is promoted, as has happened in all the inquiries, that is extraordinary. I invite you to give the committee one instance where a commander has been penalised where there has been a death, through negligence or incompetence, in the ADF in recent years. It has not happened. It is this question of responsibility, as well as

the gold braid, of taking the bad side of it that is a matter of concern to this committee—

Adm. Barrie—Let me give—

CHAIRMAN—We see no examples that that side exists.

Adm. Barrie—I understand that. Let me give you my perception on it. I cannot possibly speak for my predecessors or for any other persons who were formerly in the command chain. Every board of inquiry recommendation is disposed of at the service chief level. Every board of inquiry recommendation must be disposed of to the satisfaction of the Minister for Defence. It is all very well to have a view that all these things did not happen. My view is that any CDF who decided not to accept a recommendation from a board of inquiry would have to have compelling reasons not to do so, but I do say that those compelling reasons, when they have been put to the Minister for Defence, clearly have been accepted.

Mr PRICE—To what extent is the public entitled to know what those compelling reasons are? In the absence of a process that does not provide it in the public arena, is that not another issue as to why the process is lacking in public confidence?

Adm. Barrie—You could certainly see a view where the judgments being made in public are through the media or through some other process of reporting. I happen to believe firmly that it is the minister and the parliament that are ultimately responsible and that is why we have the process we have.

CHAIRMAN—The reason we emphasise this is that there is a degree of public concern. We run a volunteer defence force and it is impossible to maintain the central theme of your submission, namely discipline, if soldiers see that inadequate commanders operate with impunity. That is putting it in its simplest terms. On all the evidence that has been put before this committee, it is very hard to see where incompetence has been censured in any way at all.

Adm. Barrie—I understand all of those difficulties and perceptions. All I can say is that if I thought any commander in the ADF had acted in dereliction of his duty, he would not hold that command for very long.

Senator BOURNE—Can you tell me, firstly, how closely you work with the Defence Force Ombudsman and whether you intend to work even more closely in the future, or whether you intend to distance yourself?

Adm. Barrie—That is a tricky question. I have worked very closely with the Defence Force Ombudsman. At the higher level of the defence organisation I regard working closely in conjunction with the ombudsman an essential ingredient in making sure that we do have a progressive, up-to-date disciplinary and inquiry system. I do not think

that we are silly enough to think that we are the only experts in the field, and we are certainly not silly enough to reject out of hand any sensible recommendations that come along for making change. So, as a staff officer I have worked very closely with the ombudsman in the past. It is a little bit different as the Chief of the Defence Force because I hold the ultimate responsibility for deciding one way or the other on the basis of all the advice. In a sense it precludes me having too close a relationship with the ombudsman, but my staff having a close relationship with the ombudsman is certainly high on my priority list.

Senator BOURNE—I was really pleased to hear you say right at the beginning that the *Westralia* board of inquiry seemed to you to be a good model to look at very closely. We have had a fair bit of evidence from people who have been involved in other boards who would agree with that, I think. Do you see any more lessons that can be learnt on boards of inquiry, just from the most recent ones? Do you think that the *Westralia* model could be further improved and, if so, how?

Adm. Barrie—The problem about drawing up terms of reference for a board of inquiry and making a decision about whether it is going to be an open or a closed inquiry is that once you have done all that you have no way of knowing where it is to lead you. So you are making all sorts of guesses—if that is the right word—about what it looks like when you actually begin the process.

Where we can strengthen the guidance to presidents of boards of inquiry and in a way to protect people's privacy to deal with security matters and other things is to give more strength to guidelines about taking evidence in camera during open inquiries. I do not think that we have done that well enough. Of course, if you have not done that, the instant reaction to the question is that automatically the inquiry has got to be closed. Certainly, I think that there is a clear preference for it being open wherever that is possible, for strengthening the guidelines to the conduct of inquiries to say that where particular issues would not be fair we should take the evidence in camera in preference to having a closed inquiry. But, of course, if it were your expectation that the inquiry were to deal specifically with somebody's behaviour in very great detail, then you might have to consider a closed inquiry from the outset.

Senator BOURNE—As far as the recommendations of boards of inquiry go, we have had a couple of witnesses say that it has taken a very long time for them to find out what has happened to recommendations, or even find out at all. Do you have a system whereby relatives and people who are involved are notified when recommendations are either accepted or not accepted, and are they notified of the reasons for either of those happening?

Adm. Barrie—We have certainly tried to do some of that. I do not think we have done it comprehensively as well as we could. We can do more to make sure that those people understand what has come out of it even if it is hurtful for them because I think it

is important that they do know. One of the difficulties I sense is that in the final days of a board of inquiry a relative who then decides to take legal action against us puts us in a position of being a plaintiff in a case and at that point, of course, our relationship becomes governed by legal process and not by a willingness to share the results.

Senator BOURNE—Perhaps if recommendations have been made, and are about to be either put into effect or not, it would be useful to look at whether you could at least go through your lawyers and—

Adm. Barrie—I think that disposing of those recommendations should be done at chief of staff level.

Senator BOURNE—Yes, exactly.

CHAIRMAN—You are arguing very strongly by inference for attention of the BOI, as it is constituted. The evidence that has been given to this committee questions, firstly, the terms of reference. It is often cynically said of parliaments that you never set up a royal commission until you know the outcome, or the terms of reference. The same can quite justifiably be said of the ADF: that the terms of reference do dictate the outcome to a certain degree. Secondly, another criticism is the selection of personnel, the president of the BOI and the other members of the panel and, thirdly, the final criticism is that a BOI has no power of enforcing its recommendations. They are valid criticisms in the public arena with respect to the integrity of the process.

Do you believe that BOIs should be empowered to see their recommendations enforced, except in absolutely extenuating circumstances and, in which case, why doesn't the CDF or the chief of staff move in at the hearing stage as a witness and intercept the outcome if it is going to be against some operational procedure, or is some other major factor like that?

Adm.Barrie—There is a lot of material inside those questions. Firstly, let me deal with terms of reference. There are some boards of inquiry which have taken place and with 20-20 hindsight lots of people said that the terms of reference were drawn far too widely and the board got into all this material, et cetera. There are many other boards of inquiry where the 20-20 hindsight vision is that the terms of reference were drawn too narrowly and they did not get into all these other things.

It goes back to the point I made: when you launch a board of inquiry you have drawn up the terms of reference, you have assembled the team that you think might be able to produce the facts that you require to know, and you should give them the best support that they can get. But, from that point onwards, its commission really is to use its independent view to arrive at the facts so that we can make sure the accident, or whatever it is we are investigating, does not recur.

But we do not get it right. No matter what we do, we are never going to always get it right. I think your metaphor of setting up the royal commission is a pretty good one because the circumstances are much the same. You might think that you know what it is going to look like, but my guess is that 90 per cent of the time you get surprised, as part of the process.

In terms of selecting people, I think there is a balance in selecting people for boards of inquiry that does need fair attention. If all of the people who are selected to be on boards of inquiry work directly under the commander who is seeking to find the facts, I think that there may be a perception that this would not be as independent as it might be. I think that also goes to the question of whether having external members on a board is also helpful—I think it is.

I go to the third point now, and this is the enforceability of recommendations. I would say emphatically that that is a commander's responsibility. Handing over those responsibilities to anybody else would attack the very foundation on which we structure the Australian Defence Force. The command responsibilities are awesome and I think commanders who do not accept recommendations and who do not proceed with them have got to have compelling reasons for not doing so. I can see a range of circumstances where a board, for whatever reason, has drawn a whole set of recommendations which, after subsequent consideration, it has decided not to proceed with. To my mind, the protection in that system is that whatever the reasons there are for not proceeding with those recommendations, the minister has got to accept them. I think that that is where the parliamentary accountability is signed for.

Mr PRICE—Could you tell us for the record how many recommendations to the minister were overturned by him?

Adm. Barrie—I would have to get that on notice. All the recommendations do go to the minister, all with the subsequent disposal action on them.

Mr PRICE—I do not know that that is quite the safeguard. If the process is flawed, ministerial intervention can be a safeguard, but you would expect ministerial intervention very rarely, I would have thought, on those issues.

Adm. Barrie—I would have to get the data but, if we do not accept parliamentary responsibility through the minister, that is a very fundamental question for all of us.

Mr PRICE—I accept that but I guess I am making the point that we ought not to shift the responsibility onto the minister. I accept that he has final responsibility. I guess we want a system in the ADF that either works better, or is perceived to be fair and transparent.

Adm. Barrie—Certainly, when the minister gets advice from the department about

the disposal of those recommendations, what we do about making sure that people are comfortable with that ought to be a part of that advice.

Mr PRICE—How do you preserve the independence of the president of a board of inquiry? Would you expect that the convening authority would have any contact with the president of a board of inquiry?

Adm. Barrie—I would think it should be the opposite. I think any convening authority that makes contact with a president of a board of inquiry, or a president of a board of inquiry that makes contact with a convening authority, is threatening the independence of that inquiry.

Mr PRICE—But what if a president were directed to report to the convening authority before the board had completed its inquiries?

Adm. Barrie—Presidents of boards are—

Mr PRICE—That is abusing a command.

Adm. Barrie—Presidents of boards of inquiry, of course, have an obligation to advise convening authorities that the board is expected to run two more weeks or another six weeks—

Mr PRICE—I have no problem about lengths of time or why the reference is—

Adm. Barrie—If they talk about the material in front of the board, I think that is a very serious question.

Mr PRICE—Would you expect that a convening authority would request weekly reports, or direct that it be given weekly reports? Would you see that as being appropriate?

Adm. Barrie—It might be appropriate to have a progress report—that is, on how is it going—but I do not think it is appropriate for the questions under investigation to be reported.

Mr PRICE—If we had a hypothetical set of circumstances where we had a service that has not been created—your fourth service, so that no-one is going to get offended—and there is a tragedy that leads to a board of inquiry, it might be argued that responsibility or accountability might go right up the line to perhaps even chief of service level.

Adm. Barrie—Or CDF, indeed.

Mr PRICE—Perhaps. How do you ensure that in that situation there is not a conflict? It is most likely it will be the chief of that service, that fourth service, who does the terms of reference for the board of inquiry.

Adm. Barrie—Where a board of inquiry was dealing with a matter which attacked the very fabric on which the entire service was based, where there were significant suggestions of a dereliction of responsibility by the service chief and by other people in the chain of command, I do not think that a president of that board of inquiry could guarantee independence. There would be very real concerns. But, again, I think that accountability would really have to come back to the minister and to the parliament.

Mr PRICE—I apologise for another hypothetical question. I understand that no courts of inquiry have ever been instituted. Can you envisage a set of circumstances where courts of inquiry would be the appropriate mechanism? If so, could you share that with us? Alternatively, are courts of inquiry a useless bit of machinery and never likely to be used?

Adm. Barrie—To my knowledge they have never been used. The only circumstance I could think of would be the *Voyager* royal commission, and the question there is: would a court of inquiry have been a more appropriate mechanism? It may well have been. But that was a disaster that stands aside, I think, from most of the ones since then.

CHAIRMAN—If I could take you back to your defence of boards of inquiry before the last series of questions from Mr Price, you are saying that it would debase a commander's authority if you gave increased power to the board of inquiry. Surely there is an inescapable and inherent conflict of interest there. There is the commander, and the board of inquiry is set up under his command. You are saying that, if you give power to that board of inquiry to correct a mistake, somehow or other you are compromising his command authority. I cannot see that.

Adm. Barrie—Let me give you my view on that, Mr Chairman. The problem is this: the commander has had a problem inside his command, for which there has been the need for a board of inquiry. He is now presented with a range of recommendations to make changes to ensure it does not recur. If for whatever reason he decides that in his command authority he is not going to do it, I would have to say he had better think very seriously about it. If we were to get into an argument about whether I thought he was exercising that command responsibility properly or not, then I am afraid he would probably lose his job. To put in place a mechanism where we do not trust our commanders to do the right thing, where we are not giving them the necessary tools to get the right things done and we are not really re-emphasising the extent of those command responsibilities, is a bit flawed.

CHAIRMAN—We obviously have a flaw when we need a board of inquiry and

someone is killed, or a major piece of equipment is damaged or lost. These things happen, and we have to have a process that is not dependent on personalities. I am quite happy to take without reservation your belief that you would fire someone you thought was incompetent, but we are running a defence force and we cannot base it on personalities. We have got to have systems in place that are fail-safe, and it seems to me that your system turns on personal integrity more than anything else. Regrettably, I think that that will not stand the test of time.

Adm. Barrie—Mr Chairman, if our Australian Defence Force is not based on the personal integrity of all the people who serve in it, then we do not have a defence force worth talking about. I think the operational record of our defence force over the last few years attests to the fact that there is a great deal of personal integrity in the force.

Mr PRICE—I do not dispute that.

Adm. Barrie—We are not disputing that at all.

Mr PRICE—Is it not also true that you inculcate—as one witness said—this sense of family? And is it not a very human response for people sometimes to want to protect the family and be perceived to be acting in the best interests of the family when in fact perhaps the reverse should be true? At least in theory there is a problem of culture, and a need to change the culture.

Adm. Barrie—I agree entirely with you that there is a sense of family in the ADF. There is a sense of great loss whenever a tragedy occurs, even to people we do not know personally. But we have the same difficulty in dealing with those circumstances when a tragedy like that occurs in any of our other families. Where a suicide occurs in a family or where there is an accident resulting from a parent or a brother or a sister who was not all that careful, it is just the same problem that we all have. We all feel it. It is all very difficult for us. I think some of those families do move to protect the family. That is what we have got to make sure the system does not do.

CHAIRMAN—I have one final point in relation to BOIs and their outcomes. Boards of inquiry in general, up to the Black Hawk inquiry, were always secret. It did not really matter what the recommendations were, the public had no way of knowing what the findings and recommendations of that board of inquiry were.

Over the past 20-odd years I have had a large number of unsolicited BOIs given to me by relatives of deceased members of the ADF. The inherent secrecy of the process protects the commander from censure, because no-one knows what the findings of the BOI were. You, as CDF, cannot know the outcome of every inquiry: you have better things to do with your life, I would suggest. Certainly a chief of staff who hopes to be CDF in your place is not going to come padding up to your door and say, 'One of my guys messed up on this and the BOI has crucified him'; he is going to try to sweep it under the carpet.

Adm. Barrie—I hope not.

CHAIRMAN—It comes out in the end, and that is the point I would make.

Adm. Barrie—I think that culture is changing.

CHAIRMAN—I hope we move it along a bit faster, because it is not moving fast enough at the moment. The larger issue of fairness relates to representation. We have had evidence given to us that the services have taken the view, when they are challenged, that, 'We have more money than an individual member of the service and, if you choose to fight us in court we will break you financially, we will outspend you.' It is exactly the same as a citizen challenging the Australian Taxation Office: it is a waste of time and you are better off paying. That is a very unfortunate culture, and we have had evidence that that has been done. The solution to it is to automatically provide resources to members of the ADF to defend themselves at the BOI. Do you have a view on that?

Adm. Barrie—It is a very difficult issue comprehending all the matters that a BOI might take but, as a general principle, I think every person who appears is entitled to be properly represented. I would certainly take the view that anyone who thinks, 'Our money is better than your money, so we will just see the process out until funding is exhausted,' is expressing a view that demonstrates an improper use of public money. However, I am just a little challenged—and I cannot think of an example—where it is somebody's private matter that we are being enjoined to represent rather than what I would call the public matter of being a member of the Australian Defence Force.

CHAIRMAN—A slight variation of that—

Mr PRICE—I do not understand the last point.

Adm. Barrie—I could probably think up a scenario if I had enough time; but, before saying it should always be so, I think there may be some cases where people are acting not as a consequence of being a member of the ADF, or in a way which is representative of the ADF, but entirely of their own volition, in their own behaviour, and doing something which is really quite contrary to what our standards are. In those circumstances I would really be concerned that they had an automatic right to full representation when, in my view, if you want to behave like that then do it in your own time.

Mr PRICE—Are you not disturbed by the chairman's allegation that responsible middle rank officers are, in fact, advising aggrieved people that the particular service will go to the last dollar, with no limit, to beat them?

Adm. Barrie—I would be very concerned to hear that. It is an improper use of public money.

Mr PRICE—This is in a circumstance where there have been ministerial statements by both governments, by CDFs and by service chiefs, and the action is completely contrary to all of the above statements.

CHAIRMAN—A variation of the same theme relates to accusations of impropriety or improper actions in a broad sense. We have had evidence given to us that members of the Defence Force claim that they have been investigated by their service for activities and yet they have not been advised that they are under investigation. The implications of that are that there is a secret inquiry going on into their service life and that natural justice has been denied them. Is that a concern to you at all?

Adm. Barrie—That used to be a practice. I have not heard of that practice in recent times. I would be concerned if it had occurred in recent times. I myself was the subject of one of those investigations many years ago, so I do have some knowledge of it.

CHAIRMAN—Really? I would not have raised it, had I known that.

Adm. Barrie—In fairness—and I think that is a very good test for a lot of this—that is improper. That does not attach to a case where somebody thinks something might have gone wrong and we just need to find out if there is a circumstance here; but, where there is a proper investigation by the authorities, in all fairness it has to be done properly.

CHAIRMAN—There seems to be a reluctance to proceed to courts martial in the ADF in recent years. Can you explain why that has come about?

Adm. Barrie—I cannot explain it, but I can say it is not on my account.

Mr PRICE—That seems to be a pregnant statement.

Adm. Barrie—I think the court martial serves a very useful purpose.

CHAIRMAN—It certainly enables an officer or a soldier to clear his name.

Adm. Barrie—There is a whole range of purposes that it might serve.

CHAIRMAN—It might convict someone, too.

Adm. Barrie—Yes, absolutely.

CHAIRMAN—There seems to be a great lack of will to resort to that course of action, which to me—

Mr PRICE—Is there a statute of limitations on recommendations for disciplinary action?

Adm. Barrie—I think the normal statute of limitations applies.

CHAIRMAN—It is three years under the Defence Force Discipline Act, and the minister has indicated that he will extend it because of the—

Adm. Barrie—It was good advice to him.

CHAIRMAN—It was good advice that I gave him. There are allegations dealing with disciplinary matters more than boards of inquiry at a lower level. There is quite a variation between the three services: Air Force deal with more matters under summary authorities than do Army, and they tend to allow parties better legal representation before the summary authorities. It seems to me to be very important that conditions relating to discipline are standardised as much as possible. I think it is different being on a ship from being in the army in a section, and things like that, but at the end of the day, it is a common service.

It was brought to my attention, when visiting Kuwait about five or six weeks ago, that Army were complaining about conditions of service—not conditions of discipline but conditions of service—and the way they were interpreted by army authorities in relation to Air Force. But it seems to me that, if we do have an ADF, it ought to try for standardisation as much as possible.

Adm. Barrie—I would agree with that. I think my first premise, though, in agreeing is to say that the navy, army and air force require systems which meet their needs and it may, indeed, provided it stands that test, lead to slightly different results. But, where it makes sense, the first point is that we should learn from each other. I think that is one of the cultural chains that we have been trying to break down over many years. But learning from each other is important. So we should always asks ourselves: why is this different? If it is different for a good reason, we will let it be different. If it is not different for a good reason, we should change things.

Mr PRICE—Could I ask you about a different issue? The chairman quite rightly says that we cannot be an examining body for every grievance that has been placed before us. You would be familiar with the Mackney case?

Adm. Barrie—I am familiar with all the cases that I read in the public submissions.

Mr PRICE—If the committee were to request it, would it be possible to get us a copy of the Twigg report?

Adm. Barrie—I am sure the committee can have whatever material exists on that case.

Mr PRICE—Okay. Are you satisfied that this case has been handled as expeditiously and as compassionately as it should have been?

Adm. Barrie—I could not sit here and say I am satisfied about it because, as Vice Chief of the Defence Force, my predecessor and I had something to do with trying to get things expeditiously resolved.

Mr PRICE—But it is not resolved to date.

Adm. Barrie—No.

Mr PRICE—Are you able to share with the committee a time frame in which you think it may be resolved?

Adm. Barrie—I would like to be able to do that. Let me just say that the Vice Chief and the Ombudsman are working hard on that. I could not possibly offer a guess about that time frame, but both of those people have that matter in their sights.

Mr PRICE—You would have no difficulty with the committee requesting the Ombudsman to appear before it?

Adm. Barrie—Not at all. In fact, let me go further. I think I would almost encourage it—because, as I said earlier, in my relationships with the Ombudsman I think the Ombudsman has a lot to offer on perceptions about these sorts of matters.

Mr PRICE—The base at Tindal: does its isolation subject it to more difficult management or command problems? Given the allegations that this may not have been an isolated incidence—its distinction or differentiation being that it is the only reported incidence—are you satisfied that whatever may have been happening at Tindal is no longer happening?

Adm. Barrie—I cannot answer that question. I have not been to Tindal for 10 years, so satisfying myself about what is going on there is not something I could do. Furthermore, I am not in possession of all the knowledge of what people may allege has happened there or not happened there, and so on and so forth. I would be disturbed, though, to hear allegations that there are practices which are not appropriate going on in any of our bases. Managing people in a remote area is always difficult, but it is not impossible.

CHAIRMAN—Admiral, in the former CDF's evidence before this committee on 11 May this year, he stated that 'more serious offences were handed directly to civilian authorities, and investigating officers were only used in less serious incidents.' Do you hold that view?

Adm. Barrie—Yes, I do.

CHAIRMAN—Can I ask you why there was a board of inquiry appointed to look into the celebrated Butterworth case? Why wasn't that handled in some other fashion? Why didn't the immediate superior officer say, 'Look, this is a load of nonsense' and post someone into a different area?

Adm. Barrie—I cannot answer that question, Mr Chairman. You would really have to ask the person who commissioned the board of inquiry. To go back to my answer on 20/20 hindsight, there may be all sorts of other avenues that we might think ought to have been considered, but I cannot know what was in the mind of the commander who commissioned that board of inquiry.

CHAIRMAN—This is a totally different thing from the other boards of inquiry we have dealt with, where submariners were drowned through negligence and all that sort of business. This is a simple command decision which, if the Defence Force can claim anything, it is that they are command oriented and the rest of it. Here we had a minor administrative problem which blew out into a $6 million plus legal nonsense.

Adm. Barrie—I think the 20/20 hindsight and what came out of that still applies. I cannot answer the question as to why. I certainly appreciate the view that that public perception prevails.

CHAIRMAN—Is there any definition in existence as to what constitutes a serious incident, to use the words of the former CDF?

Adm. Barrie—My view of a serious incident in the context that he was using it would be those matters involving criminal behaviour which ought properly be dealt with by the civil authorities.

CHAIRMAN—I see. He also said that you cannot keep commanders in the field if they have failed or if they have lost the confidence of their men. How easy is it to remove a commander? Is it your business or is it the Chief of Staff's duty?

Adm. Barrie—It is all our business. The Chiefs of Staffs, of course, bear their responsibility to me. In turn, responsibility is borne to them by their subordinate commanders. But ultimately the test of any commanding officer is that he is appointed at the will of the Chief of Staff. It is the Chief of Staff who gives him that commission and it is the Chief of Staff who will take very seriously a recommendation from the field to remove a commander.

CHAIRMAN—Could I put it to you as CDF that, in the last 15 or 20 years, as we have moved from a chairman of the chiefs of staff through the CDFS to the CDF, there has been more and more power aggregated by the CDF of the day, irrespective of

personality, and that consequently there has been a lack of authority invested in the chiefs and that therefore we have seen things like these boards of inquiry where people have been negligent and no accountability has been demanded of personnel, and that that is a consequence of more and more power flowing to you, not personally, but by virtue of the organisational structure that we now have?

Adm. Barrie—I am a bit surprised by that view. In truth, the commission that is given by the Chief of Staff to any commanding officer has not changed over that time. It is still the same—

CHAIRMAN—No, it has become more diffuse—imperceptibly.

Adm. Barrie—I am not sure I can agree with that, but I am not the only one who would hold a view.

CHAIRMAN—We have talked about getting rid of commanders. What about personnel? When you have got square pegs in round holes, how easy is it in the services to remove people? It used to be cynically said when I was a soldier that you were promoted and posted. Of course that would not happen in a meritocracy based unit like the modern ADF, but how do you get rid of a junior member of the forces if he just should not be there, if he is unsuited?

Adm. Barrie—You have to go through the administrative processes.

CHAIRMAN—Is that easy?

Adm. Barrie—No, it is not. It is a system designed to be fair; it is a system designed to make sure that there is every opportunity for a member to make representation and to be heard on their side of this particular story; and, ultimately, there are rights of appeal.

CHAIRMAN—As CDF, have you seen any change during your 30-odd years of service in the confidence with which commanders, whether they be corporals or colonels, exercise their authority? Are they worried about someone looking over their shoulder on minor disciplinary matters?

Adm. Barrie—I would like to say there has been no change, but there has been change. Perhaps I ought to characterise the answer in this way: in today's Defence Force there are some units which I would describe as high performing units: they are well led; their commanders have no doubt about their responsibilities and accountabilities; they have no doubt about their leadership profile and they have no doubt about their competence to do the job. As you move around the ADF and you see these organisations, you are reminded about the high quality of people who serve today. I think these are units which are performing 10 to 15 times better than anything I remember in the past. But, equally,

there are some other units where morale is not high, where the effects of change are creating all sorts of ambivalence about commitment and other things, which to me seems basically a problem of leadership more than of responsibility.

Why I draw that differentiation is that 30 years ago or so when I joined the Defence Force most commanders thought it was the Defence Force Discipline Act that actually made things work. I do not believe that. I think good leadership works in any walk of life where it is properly effected. I think it works in the ADF even better where it is properly effected. So anyone who said to me that because there has been a weakening of the Defence Force Discipline Act and they cannot do all these things they used to do—and therefore they cannot command their troops properly—would be a worry, because I would say that they do not understand the first principles of leadership and command.

CHAIRMAN—As a development of that question of the debasement of authority, do you think that the ADF is too involved in internal legal procedures and that it devotes too many resources to it?

Adm. Barrie—That is a very good question and one which one has to be careful of, because the same statement might be made of public life in our country. In my nearly 40 years of service I have seen a much more legalistic approach to solving a lot of our nation's problems than we used to have. I am not saying that is good or bad; what I am saying is that getting involved in legal procedures is taking up a deal of time in the ADF, much as it takes up a deal of time in the ordinary walks of life in our country. I would probably judge that it is about the same; that is, our practice in the ADF is reflecting a community standard. Once again I think it transcends the view of whether this is fair. Do our people think this is fair or not? It is a very interesting question. I do not have an answer to the problem of whether there are too many resources.

Mr BEVIS—I was interested in your answer to the chairman's question about the Butterworth inquiry. I recall that you indicated that maybe it was a question that only the convening authority could answer. Your department's supplementary submission does make particular reference to the Butterworth board of inquiry and a subsequent review of the proceedings of the inquiry, so it is clearly not just something that was in the mind of the convening authority at that time. I therefore invite you again to consider the question of whether those processes were appropriate, given that clearly the current—or at least the former CDF and possibly the current—CDF deemed it appropriate to be reviewed.

Adm. Barrie—The question I was asked was, 'Was framing a board of inquiry in those terms of reference the right thing to do?' The answer I gave carefully drew a distinction between those terms of reference and the proceedings of that inquiry, as opposed to what was in the mind of the convening authority when it was launched. I did say, in earlier evidence, that there is a range of inquiries for which we with 20/20 hindsight would say the terms of reference were too wide. On another range of inquiries, with 20/20 hindsight we would say they were too narrow. The problem is, as the events

unfold, we do not know what is going to happen. We have to make the best guess we can at the time. My answer was to say that I do not know what was in the mind of the commander when that was launched. All I can say is, we now have that thing.

The review—and I think the former CDF said he would provide an outcome of that review—was to find out whether there were any things we needed to be concerned about with Butterworth and whether there were any issues arising out of complaints about the process that we ought to proceed with. The review has delivered a report which is still under consideration. That report sustains the view that having a board of inquiry was fair and reasonable—or words to that effect. It makes some comment about the wideness of the terms of reference and how that allowed the board to go off and do all sorts of other things. I might say that having read the transcripts of Butterworth I do not feel that the simple reporting by the media that this took too long and was too expensive really understands the difficulty under which that board operated. It was a very difficult board. It was a very difficult matter to bring to a conclusion, and I think the president of that board did a superb job.

Mr BEVIS—The issue of Butterworth as it came before this committee included not only the media reports but also a written submission from a former legal officer who is now a member of the parliament.

Mr PRICE—From the RAAF.

Mr BEVIS—Yes, from the RAAF. She was involved, if my memory serves me correctly, at least in the periphery of that case. That evidence does not support the position you just advanced.

Adm. Barrie—A lot of the evidence that I read in the transcripts and a lot of the media reporting was attached to particular days of hearing of that board. It is not the totality of the proceedings, taking into account all that we have heard and drawing some judgments.

Mr BEVIS—I understand that, but what I am saying is that what the committee has had before it is not simply the journalist view of the world but the view of the world of a former legal officer in RAAF who is now a member of parliament and who has given evidence before the committee. That seems to be at odds with what you have just told us.

CHAIRMAN—You have to stand back and look at it in perspective: $6 million just on a simple administrative matter! There is no way on earth you can justify that.

Adm. Barrie—One of the difficulties we have with a board of inquiry launched on terms of reference and not knowing how it unfolds is in being fair to all the parties concerned. It has to be fair and, if it costs us $6 million to be fair, so be it.

Mr PRICE—The Hilton and Renwick study, which is referred to in your submission, is referred to as seeing no reason to accept the suggestions in the media and elsewhere that this inquiry was 'off the rails'. It goes on with a couple of sentences that basically say that they thought things were on track and that everything operated as it should. It then states in italics that it included 'significant recommendations' to improve the effectiveness and efficiency of Defence inquiries and that these would be taken up in the new manual. Apart from the submission, we do not have any other information from Defence that actually tells us what those significant recommendations were. Can you tell us?

Adm. Barrie—I cannot give you that but I can say that they are reflected in the draft of the new manual, because they have been taken very seriously. They are consistent with the work of this subcommittee.

Mr PRICE—Could we have a copy of them?

Adm. Barrie—Of the recommendations about boards of inquiry?

Mr PRICE—Yes.

Adm. Barrie—Certainly.

Mr PRICE—Let us say a person is serving as a member of the board or serving as a president of the board. Should that particular element of their service be taken into account for promotion?

Adm. Barrie—I could think of circumstances where it would—where there was complete and utter failure of process or of independence or of whatever. But, in the ordinary course, I do not think it should.

Mr PRICE—Although, probably in the *Otama* case, a decent argument could be made out that careers were truncated as a result of service on that board of inquiry.

Adm. Barrie—I could not comment on that. I have no knowledge of that.

Mr PRICE—How does the committee get a view about how service is considered and whether an individual serving on a board of inquiry that brings down recommendations for disciplinary action that are later ignored does not suffer career wise? That goes to the heart of the issue of independence of a board of inquiry, I would have thought.

Adm. Barrie—As I said earlier, if the proceedings of a board turned out not to be independent or had been ruined in some way like that, that would be something we would take into account. We do not promote people and we do not employ people in the Defence

Force for their work on boards of inquiry. How would we assure people that that is never going to be a problem? I could not do that.

Mr PRICE—I suppose the committee is left in the position that we take on board the recent changes, and we take on board the commitments you have made in the supplementary submissions and the evidence today. How can we be confident that, given CDFs have such generally limited terms, your view about what is appropriate today is going to be sustained or even reach middle level management ranks in the ADF?

Adm. Barrie—That is a very tricky question.

Mr PRICE—It is not meant to be a tricky question.

Adm. Barrie—You are suggesting this is person specific, and I hope it is not.

Mr PRICE—No, I am not trying to single you out. I accept the direction that you have taken but I guess the problem is that, if we were in any other organisation, you would not be employing a chief executive or a managing director for two years and then saying, 'Goodbye, we don't want you any more. We will take someone else.'

Adm. Barrie—No, I accept that problem. My answer is that it is a matter of leadership; it is a matter of finding the right people for the right jobs. I would trust the wisdom of the people who make those selections to get it right.

Mr PRICE—I just do not know that we have got it right in the past; the evidence before the committee appears to be that we have not got it right.

Mr BEVIS—I want to pursue an issue that came up earlier today in one of the submissions that I would imagine you have been acquainted with and that is the submission from Stephanie and Gordon Mackney. In that submission they referred to a conversation they had with the head of the Defence Legal Service at one point in their process. Their submission says that this person, an officer, stated that 'Air Force have unlimited resources and if you attempt to fight us on this we will bury you.' Do you have any comments on that?

CHAIRMAN—That question has been asked in your absence.

Mr BEVIS—Okay, I will read the transcript.

Mr PRICE—We can test whether we get the same answer.

CHAIRMAN—I think we can assume that.

Mr BEVIS—One of the other issues that was raised in the same submission was

the question of negotiations between the Ombudsman's Office and Defence, and whether there had been an indication that there would be a settlement and whether that has been subsequently changed or whether those negotiations are ongoing. Do you have any advice you can give the committee about that process?

Adm. Barrie—Yes, we have also done that one. The matter is being—

Mr BEVIS—I am afraid it escaped my colleagues, because they just advised me it had not been.

Adm. Barrie—The matter is under consideration between the Ombudsman and the Vice Chief of the Defence Force. I cannot say when it will be resolved, but let me say that it is being handled at the highest possible level.

Mr PRICE—Your predecessor made an offer for the committee that, in coming to grips with the subject, we might be afforded an opportunity later when things were becoming clearer to bounce ideas off your chiefs of services. Is that offer still standing?

Adm. Barrie—Let me just reinforce that offer. As I said in my opening statement, the matters we are embarked on here today are going to have far-reaching consequences for the ADF and it is very important that we do everything we can to make sure that we shape these outcomes in ways that are going to be useful to us. We stand ready to help the committee in any way that we can.

CHAIRMAN—At arms-length, though.

Mr BEVIS—How do you satisfy yourself about both the real and the perceived independence of members of the board of inquiry to avoid the perception of conflict of interest? There are a number of submissions that I could refer you to where this issue has been raised, including some that we only received today, but also quite a number in the past.

Adm. Barrie—As I said earlier, I think the *Westralia* model—in instances where there has been a tragic accident and that sort of thing—is very useful to us. Attaching to that external people who are experts in the subject matter is very useful, and I think it lends credibility to the findings of that report.

I also said that, in framing even less important boards of inquiry, there is quite a good case for making sure members of that board are not all drawn from the immediate confines of the command in question. Again, I think that is reasonably important to make sure you get an argument about independence, if one is needed, in drawing up the findings of that board.

CHAIRMAN—In relation to that, do you personally think there was the potential

for a conflict of interest in relation to the appointment of the president of the board of inquiry in the Black Hawk inquiry? I am very specific on that point: was there the potential for a conflict of interest there?

Adm. Barrie—I do not know the answer to the question, because I do not know what the respective involvements were.

CHAIRMAN—It was Chief of Staff for Land Command.

Adm. Barrie—Yes, but it goes to the issue of what that person's involvement was.

CHAIRMAN—I make it perfectly clear that I am not saying there was any conflict. Was there the potential for it?

Adm. Barrie—I guess you can always say that there was a question but I would also say that it is certainly not unusual for a chief of staff to be used as a president of a board of inquiry. So that question may or may not be true.

CHAIRMAN—Could I jump back for a moment to my earlier question about getting rid of unsuitable members from the services? Is the evaluation reporting system used as a means of administratively achieving this?

Adm. Barrie—In terms of people failing to perform to the standard?

CHAIRMAN—Yes.

Adm. Barrie—Yes, it certainly is.

CHAIRMAN—What is the protection there against personal bias—personality incompatibility between a superior and a junior?

Adm. Barrie—The first level of protection is, of course, an appeal mechanism against particular reports where a member is dissatisfied, and then an investigation about whether the report written is sustainable. We would go a bit further than that, I would suggest. With regard to what we might see here as a personality clash between two people, we would probably remove the subordinate person to another command for a different view.

Mr BEVIS—I want to raise some issues that came up in one of the earlier submissions we received—that is, the case concerning Macklemann, which I assume you are familiar with. This concerned the air force Mirage jet. There is a range of issues in terms of process that that case identifies, and there are some, in my mind, still unanswered questions: things such as the normal record of armaments that would have been checked when the aircraft returned, and the question of film which was in one testimony sighted

and in another testimony withdrawn by the same person. That is to say, the earlier testimony of having sighted the film was subsequently withdrawn and advice was given that no such film existed—although, as I understand it, normal practice would be that film would be taken of an exercise like that. What has Defence's investigation of that incident uncovered in respect of the process that you can tell us about?

Adm. Barrie—I cannot answer that question. What I can say is that some of those submissions were dealing with matters which are in effect closed. Whilst the findings of those particular things create a lot of anguish for relatives and other people, I do not think it is appropriate for us to re-open a whole range of issues and revisit history without at least asking all the people who were there at the time what actually took place.

Mr BEVIS—The case I am mentioning is pretty much current. It is being dealt with by the Administrative Appeals Tribunal this year. I assume Defence is represented there and therefore has a current, active file on the subject.

Adm. Barrie—Certainly, but the administration of the case per se in Defence is closed, and that really pertains to some of the questions you just asked.

Mr BEVIS—It is not closed as far as this committee is concerned, it is not closed as far as the Administrative Appeals Tribunal is concerned, and there clearly is an ongoing working party or someone within Defence who has coverage of that issue. So I again ask: what can you tell us?

Adm. Barrie—I cannot tell you anything.

Mr BEVIS—Is that because you do not know the answers to the sorts of concerns which Mr Macklemann has raised?

Adm. Barrie—Exactly.

Mr BEVIS—Can you suggest someone whom we might have before us from Defence who can?

Adm. Barrie—The best I can offer you is that you should ask for people who were involved in the decision making processes at the time.

Mr BEVIS—Frankly, that is not good enough. The simple fact of life is that a number of serious issues have been raised. They have been going on for some years. There are arguments about alterations of transcript of the transmissions that were monitored between the aircraft. There are films that were, on testimony and under oath, seen and then not seen. There are omissions of normal procedures in respect of weapons and munitions records. And you are telling us that, in that process, that is still before the Administrative Appeals Tribunal and there is nothing you can tell the parliamentary

committee. That is your considered view, is it?

Adm. Barrie—My considered view is that, as far as we are concerned, all the facts of that matter have been dealt with. There may be allegations about certain practices, and we await the result of those allegations. But as far as we are concerned, the matter has been dealt with.

Mr BEVIS—Let us go to a specific allegation, the fact that transcripts of different hearings show a lapse of record of time that may well be crucial in identifying what transpired. What is Defence's view about those allegations?

Adm. Barrie—I am not in possession of the facts, and I would not offer a comment on it.

Mr BEVIS—This was a submission which we received very early in the piece. It raised a number of important questions. I would have thought Defence would have identified those submissions that might require some response. If Defence has not identified this as one of those issues, can I now put you on notice that it is?

Adm. Barrie—I was drawn, when I came to this hearing, by the terms of reference. The terms of reference do not draw me to investigate particular cases for the purposes of appearing before this subcommittee.

Mr BEVIS—Indeed; but they do highlight the need to have processes that meet the objectives of the act, and what may be separate from the act—objectives that the public would want to see in an amended act. I would have thought that anybody who has perused the sorts of concerns raised in that case would identify that there may have been some failure of process, at least. There may not have been, but the allegations, if true, would indicate some failure. To the extent that that relates to the proper administration of existing laws and procedures, quite distinct from what might be accepted by the community as required by any subsequent act, they are things that should be under your consideration.

Adm. Barrie—Certainly, any measures we can take to make the processes fair and to make the processes meet our requirements, we will do. In reading the public submissions—and that is all the knowledge I have about that particular case—where there are issues that have been raised, the test is this: are what we are doing now and what we are proposing to do going to meet those concerns? I am reasonably satisfied that that part of it is true. I think it is a different question to ask me would I now go back into all those past cases and investigate what took place and ask all the people who made the decisions what happened. My answer to that is that clearly I cannot.

Mr BEVIS—What processes were in place then, what was done to change it and

what would stop the same circumstances arising tomorrow? That is the germane part for our consideration, and I have not heard anything that you have said that addresses that.

Adm. Barrie—This is an evolutionary process. When things are brought to light that we need to change, we set about trying to change them. That is the very purpose of having the subcommittee inquiry.

Mr PRICE—The only way in which the committee can get a feel for, and an understanding of, this matter is not by trying to determine each and every case that may have been brought before it, but certainly, for some, to get a deeper understanding of what went on, and to try to then make the test about whether or not the practices and the culture are still current, whether there have been some changes, or whether the legislation, the system, the accountability or the line of command need to be changed.

Adm. Barrie—I accept that.

Mr PRICE—That is why it is very relevant for us, although some of these things have happened some years ago, to raise the specifics of it, to get a feel for it.

Adm. Barrie—My problem with that is that I assumed the command of the Defence Force three weeks ago. I have no knowledge about the chapter and verse of this particular case.

Mr PRICE—Sure, but you are saying that no-one in the air force can help us with the case that we are looking at.

CHAIRMAN—We are getting into detail that is outside the purpose of the inquiry. Mr Macklemann had an opportunity to appear as a witness. I would make the claim that I know more about the Macklemann action than anyone in this room, because I have been involved in it from the outset and have patiently followed it through. It is now before the courts. I do not think we can proceed much further with this line of questioning.

Mr PRICE—Other than to call you as a witness.

Mr BEVIS—I want to make it clear that there are questions about how procedures are applied that the Macklemann case raises, and I have yet to see the response from Defence to tell us either that the claims are bogus and that things were different in actual fact or that there were some systemic questions that were identified and addressed then that are now altered in such a way that we will not have a recurrence of that incident. That is a procedural matter, a systemic matter, which is quite proper for this committee to consider and for this inquiry to consider. What I have heard so far from the CDF is that, from Defence's point of view, the file is closed. Frankly, I do not regard that as a satisfactory response.

CHAIRMAN—Your recourse is to put a question on notice or a series of questions on notice to the minister.

Mr BEVIS—No. That is a recourse. It is not the sole recourse and it is, in my view, a legitimate thing. But I do not intend to have the argument here in public. If that is a matter that we need to talk about in private and deal with in that way, that is fine.

Adm. Barrie—I would certainly have to consider a position where we responded specifically to the submission put to the subcommittee and published publicly.

CHAIRMAN—Further questions? Is the outcome of the Defence Corrective Establishment inquiry available yet?

Adm. Barrie—I would have to take that on notice. If it is not available, it is pretty close to being available.

CHAIRMAN—Can it be made available to the committee when it comes out?

Adm. Barrie—Certainly.

CHAIRMAN—Thank you. Can the committee be provided with a copy of the report of the Ombudsman implementation scheme into the Tindal thing?

Adm. Barrie—Certainly.

Mr PRICE—And a copy of the manual that you referred to?

Adm. Barrie—The manual is in its draft form. You can certainly see the manual in its draft form. What I would say about its present format is that the expert team—that is, the people who have actually been supporting this work—are going to have a great deal of input into changing its format and appearance.

Mr BEVIS—When a person is the subject of an investigation, I understand that they have some opportunity to get legal representation to defend themselves: very often, it is a reserve legal officer. Is that the usual practice?

Adm. Barrie—That is right.

Mr BEVIS—What is usually the arrangement for remuneration of those defence counsel people?

Adm. Barrie—There is a combination of measures. Sometimes counsel are provided from within the service, in which case they are normal service legal officers. It depends on the matter. Sometimes, when it is a significant matter requiring expert legal

opinion, we will make resort to our reserve legal panel; and a decision will be made, depending on negotiations with those members, as to whether it will be taken on sessional fees or as part of salary.

Mr BEVIS—Having arrived at an agreement through that process, what is then the process: monthly accounts, quarterly accounts, or what?

Adm. Barrie—I would have to take that on notice. I have no idea.

Mr BEVIS—I would appreciate it if you would give me an answer to that.

CHAIRMAN—Thank you very much, Admiral, for coming along this afternoon. You will be sent a copy of the transcript of evidence by *Hansard* and you can make corrections with respect to grammar and fact in that. Thank you once more.

Adm. Barrie—Thank you very much, Mr Chairman.

CHAIRMAN—It may be that we would like to develop more points with you, or maybe not.

Adm. Barrie—I stand by what I said and stand ready to help in any way.

CHAIRMAN—We will give you due notice if that eventuality should arise, but thank you very much for your attendance.

Proceedings suspended from 3.33 p.m. to 3.50 p.m.

CALLAGHAN, Mr Peter Raymond

CHAIRMAN—Welcome.Captain, I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect as proceedings in the respective houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of the parliament. The subcommittee prefers all evidence to be given in public; but, should you at any stage wish to give your evidence in private, you may ask to do so and we will give full consideration to that. Your submission has been received and authorised for publication. Would you like to make any additions or corrections to that submission?

Mr Callaghan—Yes, I would like to make a correction. I spoke of Sir Laurence Street having been seconded to the Royal Australian Naval Reserve after the second *Voyager* royal commission: it was in fact after the first *Voyager* royal commission. In terms of additions to the submission, I apologise for not having completed that submission, but I was somewhat overtaken by events over the last couple of months, when I was tied up with the HMAS *Westralia* board of inquiry. I did not have the opportunity to follow through the information from the army and the air force, but it would be along similar lines to the short submission that I put in concerning the navy.

CHAIRMAN—Thank you very much. I invite you to make a short opening statement.

Mr Callaghan—I would like to say a few words by way of opening. I speak here in a number of roles: first of all, I am a barrister, a senior counsel, and a captain in the Royal Australian Naval Reserve, albeit as a legal officer. As such, I have been involved in probably half-a-dozen boards of inquiry—in only a couple of those, however, as counsel assisting. The most recent was *Westralia*. I have been a Judge Advocate and a Defence Force Magistrate under the Defence Force Discipline Act for about 10 years; and, as such, I have performed judicial functions at about 40 trials.

The essential point that I sought to make in the short preliminary submission that I put in was that the Australian Defence Force is not alone in coping with the administration of justice and that, through the various legal reserves, there is a bank of experienced legal talent available to it. I am delighted to say that in the *Westralia* board of inquiry there were a number of legal officers who assisted but that of the five who assisted for the longest times—that is, for periods in excess of two weeks—four were reserve lawyers. The point that I was endeavouring to make in that short preliminary submission has fortunately been made in practice.

So far as HMAS *Westralia* is concerned, I trust it will be appreciated that the board of inquiry is not yet complete. The board members are considering and preparing

their report. I would not wish to comment on the content of evidence given before the board nor on any factual issues raised before the board. Nevertheless, I feel no real problem—stating this generally—in commenting on some procedural and organisation aspects of that board of inquiry. There are some matters that I could comment on, but I think I prefer to answer questions.

CHAIRMAN—Thank you very much, Captain. You have patiently sat through a long day and you have got the general drift of questioning from the committee. Are you satisfied that the present system provides a fair and equitable outcome in those cases?

Mr Callaghan—The short answer is yes.

CHAIRMAN—So you defend it?

Mr Callaghan—Yes, I do.

CHAIRMAN—Why?

Mr Callaghan—There are two aspects: the investigation side and the disciplinary side. I will deal with them separately. So far as the investigation side is concerned, we have these things called boards of inquiry. There are other schemes, but the principal formal investigatory device is the board of inquiry. The Australian Defence Force is a disciplined organised body whose task is to prepare in times of peace to deal with conflicts should they arise. If something goes wrong within such a force, there has to be a system whereby that force can get on to the problem straightaway in an expeditious way to find out precisely what happened and to take appropriate steps to ensure that the problem is not repeated.

I must say I look on a board of inquiry as being an investigating body. Certainly, boards of inquiry are commonly given the function under the regulation of making recommendations. For my part, and this is my personal attitude, I do not see boards of inquiry as having any disciplinary function or as being a necessary part of disciplinary proceedings. The recommendations which they do make and which are appropriate for them to make are that 'this procedure went wrong, this is where it went wrong and this is what we should be doing to overcome it.' I, for my part, do not particularly like to see in reports of boards of inquiry recommendations that Officer So-and-so or whoever was guilty of some disciplinary offence and ought to be dealt with. That is a matter which is considered in any event. Once the board of inquiry report comes out, that aspect of the matter is considered by others.

On the disciplinary side of it, as a Judge Advocate and Defence Force Magistrate, I am aware that there is thoroughgoing judicial independence within the Defence Force. Nevertheless, I appreciate the perceptions of others or the perceptions claimed by others and I appreciate the Abadee report. Generally I accept what the Abadee report says. There

are ways in which the appearance of the dispensing of justice in the Defence Force can be improved. There are aspects of Abadee that I am not totally persuaded by. He has in mind a substantial reorganisation. I wonder to what extent there needs to be a substantial reorganisation. Similarly, I am not necessarily persuaded at the moment that a director of military prosecutions is an appropriate person. But I appreciate that ADF at the highest level—and that is now done—has made decisions on this and, unfortunately, particularly because of my being somewhat incommunicado for the past two months, I am just not up to speed on just what parts of Abadee they have decided to adopt. On both limbs of it, I express my personal satisfaction.

CHAIRMAN—Thank you. I think the committee clearly is of the view that the board of inquiry is to establish the facts and to establish what led to the accident or the incident, and that disciplinary matters are a secondary point of view. As I said in questioning to the CDF, disciplinary matters are really a matter of the exercise of command and are one of the responsibilities or negatives of a good part of being a commander.

If you look back over the BOIs of the past 20 years you will find that probably the majority have been done to fulfil the objective of finding the cause of the action. You will find some BOIs, some where lives have been lost, have been so inadequate that the leading questions have never been asked of the witnesses. On average, most of them have succeeded, but I think we ought to be looking at a system that tries to succeed, or has a high probability of success, every time.

Mr Callaghan—Yes, I agree with that as an ideal. I hear what you say about the problem and I am, to a degree, familiar with a lot of the particular complaints that are being made to this committee.

CHAIRMAN—We start with the terms of reference, and I do not want to rehash that argument as to the objectivity of terms of reference, or the membership—the president and the members of the board of inquiry—but there is no mechanism, really, to ensure that those leading questions are asked by the barristers running the inquiry. Do you agree?

Mr Callaghan—Yes. You cannot write that into a rule; you have to rely on the wit of the team that is given the task. People are looking at what is happening in a board of inquiry, even in a private board of inquiry. People are looking at it and you know that. It is under scrutiny within the Defence Force as it is going on.

CHAIRMAN—I can think of one case of a board of inquiry where these questions were not asked, and I know that amongst the barristers in this capital city in which the inquiry was held they were all laughing at the conduct of it. There was a life lost in this case. It is all very well to laugh in private about the inadequacies of the process, but nothing happened: there was no censure of the people who conducted the inquiry, let alone of the people who were responsible for the incidents that led to the death of this person.

Mr Callaghan—These reports are reviewed.

CHAIRMAN—Nothing happened. I am not a barrister. I went through university and when some people that I know very well, my colleagues who did law, tell me in private that the whole process was a joke, and they are not trivialising it, then I take them seriously. The review system did not work in that case.

Senator BOURNE—I am really interested in what you would see as the improvements in process of the boards of inquiry, particularly since *Otama* that you were closely involved in, and up to *Westralia*. It seems to me that it has improved enormously. Can you give us any insight as to where you think particular improvements have been made and where you think any further improvements in process could be made to boards of inquiry after *Westralia*?

Mr Callaghan—I do not think *Otama* was a bad board of inquiry. But that said, yes, there are areas. For example, on *Otama* there was the situation of the coroner. In my perception, the situation with the coroner ultimately worked out perfectly properly in that case.

I will give you an example concerning *Westralia*. This is a matter of public record; it has been said in a public hearing. On the evening of the tragedy, the Western Australian police established contact with Navy. They gave full assistance to Navy and they did so on behalf of the coroner. They established a police unit adjacent to the wharf when the ship came alongside, and that unit comprised an emergency operations unit, a forensic division, members of the arson squad, and the forensic pathologist.

There was mutual and full cooperation between Navy, police and coroner, right from the word go in *Westralia*, and we as the counsel assisting team received enormous assistance from the police. That led us to be able, in the first week of the hearing, to lead them into the post-mortem evidence—which was very important—and the preliminary opinion from the officer from the arson squad as to the commencement of the fire. That is one way in which we can do things better. We should be going to the trouble of communicating with appropriate civilian authorities up front.

As for the public hearing aspect, yes, in some cases it is desirable to have a public hearing, particularly in a situation like *Westralia*. It causes some problems. The regulations are not all that marvellously worded when it comes to privacy or going into private. However, problems like that can be overcome. I am referring to problems such as with classified material—which we experienced only to a minor degree—and problems concerning sensitive personal evidence about injuries and matters pertaining to the deceased and so forth. We worked out a way of doing this with a board of inquiry in-confidence exhibit and so forth, and on one occasion at least the board of inquiry did adjourn into a confidential session.

Senator BOURNE—In camera.

Mr Callaghan—Yes. So that is one way we can go. But at the same time I would not suggest for one moment that all boards of inquiry should be in public. For example, on safety issues, if there has been an accident and there is a real problem you need to find out in a hurry what the safety situation is. I would imagine that that board of inquiry should convene quickly and deal with the matter in private, at least to that point, and act accordingly.

Mr PRICE—And the report then could be released publicly.

Mr Callaghan—Yes, most certainly, and it would be. The problem with some of the situations that confront the ADF, particularly with ships, is that if there is a safety issue involved there are people at sea who might be similarly affected, unless it is pushed along as quickly as it can be pushed along, and a public hearing is not necessarily—

CHAIRMAN—Isn't that for the AIT, the accident investigation team, to move rapidly while the wreckage is hot?

Mr Callaghan—Yes. That is another matter that I would like to raise, and I was going to raise. It was our counsel assisting team's experience in *Westralia* that we felt the need right at the start to get some technical assistance of our own to guide us as to the various issues. I think that it should not be left to counsel assisting, in effect, to profess expertise they do not have. In some cases you need engineering people. There should be a team dedicated by the appropriate appointing authority, by the convening authority, to that team as an investigating team. They go in, they investigate, they look and they see what is going on. Of course, the information that they get you is then placed before the board of inquiry. This evidence is being looked at in advance of the hearing and is being put into evidentiary form so that we know where we are going. I think that is a very important point.

CHAIRMAN—But accepting and agreeing with your proposition that there is a need for haste where safety is involved, why is an open inquiry slower than a private inquiry? Why can't it be driven at the same tempo irrespective of whether the doors are open or closed?

Mr Callaghan—That is a good question. You can use techniques such as getting all evidence-in-chief into written form, if you can, and putting that into a public document, so that there is no time wasted with extensive oral evidence-in-chief. Certainly, that can be done in a public hearing. The need, I suppose, to convene at regular hours for a public hearing, which probably has to be done, could delay it. You could have a board of inquiry which says, 'We'll sit tonight. We'll sit through to midnight.' It is very hard to do that in public, really.

CHAIRMAN—Parliament is public and we do it.

Mr Callaghan—Yes, it is very public. I hear what you say on that. I am not presenting a closed mind on any of these issues.

CHAIRMAN—Of course.

Mr Callaghan—I am trying to assist.

Senator BOURNE—We have heard a lot of evidence, too, about relatives, particularly of deceased members of the Defence Force. Do you have a view on how the relatives in this case were treated: whether it was different from any other way and whether there is any way in which you think that could be improved?

Mr Callaghan—There was evidence led before the board as to how the relatives were treated, and that is something that the board is going to deal with. We made the offer publicly—and, of course, it was being dealt with privately in any event—to the relatives of the deceased that, if they had any concerns at any stage, they could access us, as counsel assisting. Indeed, we extended the invitation even further—to Comcare, for example. Indeed, if any persons in the public arena thought an issue should be raised, they were publicly invited to speak to us. That happened as far as the relatives were concerned.

We were also concerned with the situation of the ship's crew as a whole in the early stages of the hearing and we arranged for senior counsel to be made available by Navy to come across and assist the ship generally. If any member of the crew, any member of a family, had any concern at all, that senior counsel was available to speak to them. He came back on two occasions. He was there overall for in excess of three weeks during the hearing. Have I answered your question?

Senator BOURNE—Yes, you have. Thank you.

Mr PRICE—With regard to the investigating officers, is there somewhere in the ADF that has functional responsibility for their expertise and the way they perform their role?

Mr Callaghan—I am not aware that there are investigating officers as such within the ADF, but you would seek someone with the relevant expertise—for example, engineering expertise. You would look for some engineering officers plus, say, a senior engineering sailor. You would talk the matter through with them, task them and they would come back. It is public that a lot of testing went on during this *Westralia* thing. We did achieve a situation whereby we had naval people overseeing that testing, and that was particularly helpful. When a board of inquiry such as this is set up, this is one of the logistical matters that my team is going to recommend to Navy should be considered right at the start and not left to be dealt with on an ad hoc basis after the board of inquiry has

got going.

Mr PRICE—Is it unusual for boards of inquiry to have investigating officers?

Mr Callaghan—A board of inquiry is an investigative body. That was one of the things about this board of inquiry.

Mr PRICE—Are you saying they do not have any extra personnel to conduct their business?

Mr Callaghan—Not necessarily, not as a standing thing. That is what I think ought to happen.

Mr PRICE—But they can?

Mr Callaghan—Yes.

Mr PRICE—If Joe Bloggs, or Ms Bloggs, is seconded in that way—that is probably the wrong term—they may have inherent expertise themselves, but in terms of being an investigating officer, is there an area with functional responsibility?

Mr Callaghan—As far as I am aware, no. I would like to find that out, but at the moment my answer is no.

Mr PRICE—If that is wrong, I would be grateful if you would let me know.

Mr Callaghan—Yes. No doubt someone sitting behind me will tell me.

Mr PRICE—With boards of inquiry, is there an area of functional responsibility—that is, how they may conduct themselves, making sure the evidence is clean, not tampering with it and that sort of thing—in Defence that they can look to? I know we have the convening authority that appoints. I am talking about this investigative area of expertise.

Mr Callaghan—First of all, you have got the counsel assisting. One of the burdens on counsel assisting is to make sure it is done properly. You then have this new ADF publication that Admiral Barrie spoke about this afternoon, which is still in its draft form. That is, even in draft form, a significant upgrade on what currently exists, which is Defence Instruction General, DI(G) ADMIN 34, which is less than helpful.

Mr PRICE—Let me put it to you another way: if we were to appoint three of the committee members to be presiding officers of different boards, whilst you want to cater for and not unnecessarily fetter their individuality, you do not want a huge variation either; you do want some consistent processes and procedures. How do you guarantee

that? Manuals are fine, but Defence is not exactly short of manuals. There is a deficiency in that regard which I acknowledge, and it is pleasing to see it fixed. But shouldn't there be some area that they can look to if they have a want of expertise, not in their speciality but in the processes of the board of inquiry, other than the convening authority?

Mr Callaghan—Are you speaking about before a person has been appointed as president of a board of inquiry or after?

Mr PRICE—I suppose after.

Mr Callaghan—After, there is no problem. I would not perceive a problem, because if that person has some inadequacies in understanding what that person should be doing as president of a board of inquiry, that person would be very quickly straightened out by counsel assisting. Counsel assisting should be proficient in these matters.

Mr PRICE—What is it about the officer training that gives us confidence that people understand all their responsibilities, with or without the assistance of the manual? Is there a board of inquiry course that they do, or is this a specific subject area at command and staff level? Do you have to wait until—

Mr Callaghan—No, it is not. There are general courses. I have never been a permanent naval officer. Whilst I hold a certain rank, you may not assume that I know everything there is to know about the navy, but I am fairly familiar with it.

Mr PRICE—I am sure you know a lot more than I do.

Mr Callaghan—There are courses at senior level that officers do. They do staff courses. If they are going to become an executive officer of a ship or establishment, they do an XO desi course. They are given general broad training in command responsibility and the general areas that they are going to go into. Whether these matters are touched on then, I do not know; they may well be. They would not be a pillar of the course, I would have thought.

Mr PRICE—It is a question we should put to the three service chiefs, as to the extent to which their officers are currently being prepared for the eventuality of such a responsibility.

Mr Callaghan—There are resources within the Defence Force whereby, if a person is told to be a president of a board of inquiry—orders are orders—and they feel a little deficient, that person can find out and educate himself or herself pretty quickly by speaking to lawyers within the service.

Mr BEVIS—Your written submission deals principally with the availability of reserve legal panels and the role that they can fulfil. You have probably heard the advice

in the submission from Mr Melick about the remuneration arrangements for reserve—

Mr Callaghan—I am not up with that, I am sorry. I know the name Melick, but I have not read the submission.

Mr BEVIS—He appeared before us earlier today. I thought you may have been here.

Mr Callaghan—No, I was not here.

Mr BEVIS—I will paraphrase his comments as being that a number of people in the reserve forces are solicitors but do not actually fulfil the role of legal advisers in Defence, and get paid according to their rank for being possibly an infantry officer. There are other legal people in reserve situations who in civilian life work side by side but, because one is acting as a legal officer in the reserve, rather than be paid by rank, that officer gets paid somewhere in the order of $1,200 a day, tax free. He raised the question of whether that is a desirable thing to continue, or whether people should be paid by rank. If someone wanted, as a solicitor, to be engaged at those sessional rates, then they should do so as a consultant rather than as a uniformed officer. Do you have a view about that?

Mr Callaghan—Yes, I do. I have a number of views about that. Firstly, you would have detected from the thrust of the preliminary submission of mine that I regard it as very important that the Defence Force has reserve officers: people who are competent lawyers, hopefully, and who have a commitment to the Defence Force.

There are various methods of remuneration. As you are aware, there is pay for rank, which is given to those who seek it—and not all seek it for all work, I can assure you. A lot of work is done by these reserve people quite voluntarily. There is also payment at sessional rates. I will explain this in relation to *Westralia*. Of the four reserve officers, two of us were barristers. I am not bleating; I am informing you that the reservist is dragged away from a practice and must maintain a practice while away, and that costs money. There is some recompense for that professional situation that the officer is put in. One of the others resigned her employment with the Australian Government Solicitor to continue her involvement on *Westralia*, and another was able to secure leave of absence without pay from her employer in New South Wales. So, if there is some criticism made of sessional fees, I am not sure that it is well-balanced criticism.

Mr BEVIS—I guess that the point Mr Melick was making is that you have a barrister who is equally qualified and who has to maintain a similar practice for similar costs; but, when he puts on the uniform—instead of appearing in a military court—and goes out onto the battlefield as a battalion commander, he does not get paid $1,000-plus a day, tax free.

Mr Callaghan—You appear as a legal officer. There are various views as to the

matter, sir.

CHAIRMAN—From your experience of boards of inquiry, what is your judgment of the reticence or freedom with which witnesses give evidence? Is there any generalisation you can make about it? Do you find that the average service person opens their heart up at a board of inquiry, or do you think that part of the culture intimidates them and prevents them from putting everything on the table?

Mr Callaghan—In terms of generalisation, it is the former rather than the latter. Generally, I have always been thoroughly and particularly impressed with the frankness and openness of service witnesses.

CHAIRMAN—One of the criticisms of the Black Hawk inquiry related to the fact that the press tended to be looking for a grab for television each night, and that was available to the them because of the open nature of the inquiry. Was there a parallel, in your opinion, in relation to the *Westralia* hearing?

Mr Callaghan—For my part, I tried to have as little to do with the press as I possibly could.

CHAIRMAN—That is a highly desirable state of mind. But you take the point that—

Mr Callaghan—You people know better than I do how the press work. I observed it happening, and I suppose it is a fair comment. That is the way the press work. They have to have a grab. They have to have a headline. They have to have a story, and they are looking for it each day.

CHAIRMAN—Do you think there was any pressure on the *Westralia* board of inquiry to complete the inquiry as rapidly as possible, or do you think it was an open slather?

Mr Callaghan—Yes, there certainly was pressure. The original instrument of appointment was dated 7 May, which was two days after the incident, and required a report by 30 May. That time constraint was an enormous pressure, but reality emerged. There was an ongoing time pressure—not immutable, as evidenced by the presently varied report date. In terms of the speed, if it were speed, with which the inquiry proceeded, yes, there were difficulties. As I think I have said, the preferable course in these things for putting the evidence-in-chief of witnesses before the tribunal or the board is to get witness statements; but, when you are doing this on the run, you find situations where facts are unravelling and situations are unravelling, and you have to recall people to deal with changed circumstances. That was a problem.

Another problem or potential problem was that we were dealing with the crew of

Westralia, who were emotional. They had undergone a terrible tragedy. But in the end that did not really become a problem, because they were totally cooperative and were very well supported by a peer system that the ship itself had set up and by the chaplaincy and so forth, and by the CISM or critical incident stress management facilities that the Defence Force has. That I saw as a looming problem but it did not eventuate—and full marks, if I might say so, to the crew for having stuck with us on that.

There are great advantages in a quick inquiry like this, because it emphasises the investigative function of the board. We had a situation where the factual matters were, to repeat myself, unravelling as we went on, and so that was an advantage. The seriousness of the matter was such that the time constraints that were suggested and are still suggested are tough, but I am not saying they are inappropriate.

CHAIRMAN—Were you involved in drafting the terms of reference of the *Westralia* inquiry at all?

Mr Callaghan—I saw a first draft of the terms of reference—or a second draft—and events then overtook me. I was trying to cope with a practice and getting to Western Australia, and a set of terms of reference then arose without my having had any formal involvement in their drafting, as such.

CHAIRMAN—Do you think the terms of reference were appropriate and carefully drafted?

Mr Callaghan—We have thus far encountered no problems with the terms of reference. Certainly, they are wide enough.

CHAIRMAN—Do you think they are absolutely adequate? I do not have a view on that.

Mr Callaghan—'Absolutely adequate' is not a term I would use. I have never thought of it in those terms, but they have presented no problems thus far. At no stage did I feel that we were in trouble with the terms of reference. If we had felt that, we could have made a representation for the terms to be expanded or qualified or whatever.

CHAIRMAN—That facility is open to counsel assisting, is it?

Mr Callaghan—Having now said that, yes. Under the regulation, if the convening authority can set up some terms of reference, he can surely as a matter of commonsense—a lawyer should not say this—vary them. That facility certainly would be available to the counsel assisting. Counsel assisting has the opportunity to be quite forthright on these matters.

CHAIRMAN—Thank you very much for coming along, Captain. Are there any

other issues you would wish to comment on and bring to the attention of the committee before we close?

Mr Callaghan—The lay membership of the board of inquiry was quite effective and quite satisfactory. That is probably understating it. It was worth while having lay people there, for their obvious experience elsewhere. Apart from anything else, it acted as a steadier for us to question more so than perhaps we might otherwise have done. It is all very well saying, 'This was done according to the navy's way of doing it,' but is the navy's way of doing it correct? You test that by thinking of the experience of these lay people. I thought that that worked well. Beyond that, there is nothing really that I would like to add.

CHAIRMAN—Thank you very much for your attendance here today. If you do have any additional submissions, please make them to the secretary of the committee.

Mr Callaghan—Yes.

CHAIRMAN—You will be sent a copy of the transcript of the evidence in due course by *Hansard*, which you may correct for grammar and fact. I would like to thank all the witnesses who appeared today. I would also like to thank those members of the public who gave up a day of their time or part of a day to come along and provide us with an audience.

Resolved (on motion by **Mr Bevis**, seconded by **Senator Bourne**):

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

Subcommittee adjourned at 4.33 p.m.