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JOINT COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

Defence Subcommittee

Friday, 2 March 2001

Members: Senator Ferguson (*Chair*), Mr Hollis (*Deputy Chair*), Senators Bourne, Calvert, Chapman, Cook, Gibbs, Harradine, Hutchins, Sandy Macdonald, O'Brien, Payne and Schacht and Fran Bailey, Mr Baird, Mr Brereton, Mrs Crosio, Mr Laurie Ferguson, Mr Hawker, Mr Jull, Mrs De-Anne Kelly, Mr Lieberman, Dr Martin, Mrs Moylan, Mr Nugent, Mr O'Keefe, Mr Price, Mr Prosser, Mr Pyne, Mr Snowdon, Dr Southcott and Mr Andrew Thomson

Subcommittee members: Mr Hawker (*Chair*), Mr Price (*Deputy Chair*), Senators Bourne, Calvert, Ferguson, Hutchins, Sandy Macdonald and Schacht and Fran Bailey, Mrs Crosio, Mr Laurie Ferguson, Mr Hollis, Dr Martin, Mr Snowdon, and Dr Southcott

Senators and members in attendance: Senators Bourne, Ferguson, Gibbs and Sandy Macdonald and Mr Hawker, Mr Hollis and Mr Price

Terms of reference for the inquiry:

That the Defence Subcommittee continue its examination of the Annual Reports of the Department of Defence 1998-99, and when tabled, 1999-00 with specific reference to:

- the conduct of military justice and the alleged events in 3RAR;
- equipment fleet management and life cycle costing of equipment;
- personnel issues including Mutual Obligation Agreements upon both the unemployed and Army recruiting, changes to service conditions and superannuation;
- the use of military exercises as a means of assessing military outputs.

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Subcommittee met at 9.03 a.m.**GRUTZNER, Lieutenant Colonel Timothy Adrian, Commanding Officer, 1st Military Police Battalion and Provost Marshal, Army, Department of Defence****SMITH, Warrant Officer Class 1 Shannon, Company Sergeant Major 5 MP Coy (SIB), Department of Defence**

CHAIR—I open this public hearing of the Defence Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade. This is the second public hearing examining a report of the Department of Defence. This hearing will focus on the issues of equity and justice with specific reference to alleged incidents of brutality in the 3rd Battalion of the Royal Australian Regiment. The aim of today's hearing is to understand and make a determination on the adequacy of military police and defence legal organisations, policy and procedures. The manner and timeliness with which defence dealt with the incidents at 3RAR would suggest that there may be serious inadequacies within the military police and Defence Legal Office. This may include a failure of policy, procedure, resourcing or training. Today's hearing is structured to examine the military police organisation and the Defence Legal Office before speaking to Mr Burchett regarding implementation of the military justice audit. Today's hearing is designed to enable the committee to determine whether there were shortfalls in either organisation that led to the lengthy delay in the investigation of alleged incidents and whether action has been taken to address these issues. I emphasise that it is not a court of inquiry to make judgments on individual guilt or blame.

I would like to make all members of the committee and witnesses aware that investigations and legal proceedings are still currently under way in relation to incidents that occurred at 3RAR. Because of this, and because of the fact that Mr Burchett's military justice audit is not yet concluded, some discussion may be held in camera. When a decision is made to have that discussion in camera, I will announce this and would ask that the press and public leave the room quickly and quietly.

I welcome the witnesses here today. I must advise you that proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in 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 this subcommittee may be regarded as a contempt of 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 consideration to your request.

I remind you and members of the committee not to enter into public discussion on individuals who are or may be subject to legal proceedings. If it becomes necessary to discuss any specific case subject to legal proceedings, we will adjourn and take the evidence in camera. The subcommittee appreciates the time you have set aside to discuss the inquiry topic. Would you like to make a short opening statement before we proceed to questions?

Lt Col. Grutzner—Thank you. As Provost Marshal of the Army I am directly responsible to the Chief of Army for all policing issues within the Army. As the Commanding Officer of the 1st Military Police Battalion, I command all the military police units around Australia, both

Regular Army and reserve. The battalion is organised into five military police companies, four general policing companies and one special investigations company.

Accompanying me today is Warrant Officer Smith, who is the senior non-commissioned investigator within the military police. He presently holds the appointment of Sergeant Major of 5 MP Company SIB. He is very experienced in investigations and is ideally suited to answer any questions you might have about the technical conduct of investigations or military police training. He is located here with the headquarters of 5 MP Company in Canberra. That is all I would like to say at this time.

CHAIR—Warrant Officer Smith, do you wish to add anything?

Warrant Officer Smith—No, sir.

CHAIR—I thought maybe we would start with a general question. Since the subcommittee began this inquiry, has anything changed? Has it altered the approach or has it helped in the way the military police have been operating?

Lt Col. Grutzner—On 15 January this year we raised the 1st Military Police Battalion. Prior to that all military police units around Australia were commanded by varying formations and even commands within the Army, and most of the investigator assets were actually located outside Army within the defence corporate support program. We are now all brought together under a single unified command within Army. That has been a great step forward for us in our ability to coordinate and conduct investigations. That has just occurred very recently, partly as a result of the experience that we have gained in the conduct of large and complex investigations such as this. That is the main internal thing that has happened with my organisation.

CHAIR—As a consequence of the committee's work?

Lt Col. Grutzner—No. It is something that we have looked at for a number of years. I could say this type of investigation and the difficulties that we have experienced have probably had quite an influence on that.

CHAIR—You do not want to expand on 'influence'?

Mr PRICE—Just say, 'You've done good, committee,' and move on.

Lt Col. Grutzner—It has forced both my organisation and Army in general to have a look at the way we do business. It was quite clear that we were not getting the best out of the police organisation. Prior to this year I did not command any of the military police; I was purely the technical head of the corps as Provost Marshal, Army. I had no command at all. That was throughout the commands of the Army and the defence corporate support program. My ability to influence how they operated was limited to technical matters. That affected our ability to bring large numbers of investigators together for the conduct of complex investigations. It has forced both the Army and me to have a look at the importance of military police in conducting these investigations. It was also the catalyst for the review that was conducted last year that led to the formation of the battalion.

CHAIR—So that would be a flow-on from the committee's interest?

Lt Col. Grutzner—Partly, yes.

CHAIR—With regard to the investigative process around 3RAR, it seemed to take a very long time. I was just wondering whether you would like to elaborate as to why it took so long on the issues we have been looking at.

Lt Col. Grutzner—Are you referring to the initial investigation from September 1998 to April 1999?

CHAIR—Yes.

Lt Col. Grutzner—I have had a look at that. At that time I was not in the position that I currently hold, but I have reviewed, as part of my preparation for this meeting, a letter to Justice Burchett and also a brief to Chief of Army late last year. Initially the investigation was into what appeared to be a simple case of assault, not unlike many that we get within the Army. The investigation started off with two investigators assigned to it, which is normal. Two more investigators were added within two months. Then that grew in February 1999 to a major investigation team of 10 investigators. It was quite a complex investigation. I have the figures for the number of man-hours and the number of statements taken, if that would be valuable. But on review I do not believe that it was overly long. It was a large-scale investigation.

CHAIR—How often do you go through these large-scale investigations? Is this a rare occurrence?

Lt Col. Grutzner—Not rare, no. At the moment we have three comparable investigations of that type that have required the formation of a major incident team, or a task force as we sometimes call it, with upwards of five or six investigators working on the same case and being centralised in the one location. So it is not rare, but not every day.

CHAIR—In terms of the time taken—seven months I think—is that longer than normal or about average?

Lt Col. Grutzner—Again, it is difficult to say. For a major investigation probably not. I have figures for the average time taken for an investigation, but of course the average is across all investigations from one- or two-day very simple thefts or simple assaults right through to the more complex fraud investigations. We definitely had problems in the conduct of this investigation, but I do not think it was overly long, given that there was a lock leave period in the middle of that—December to January. There was the initial investigation phase, when it just looked like a simple assault and the magnitude of it was not clear to anybody let alone the two investigators working on it at the time. In fairness to them, I would argue that it was not overly long.

CHAIR—You said you had problems. What problems did you see?

Lt Col. Grutzner—Prior to this year we did not command all the MPs. There was a feeling within the formation at that time that they wanted to just use their own military police to find

out what the scope of this investigation was. If more investigators were required, they had to go outside their own formation to request those. Because I did not command them, it sometimes became a matter of begging and borrowing investigators from other commands. There is the resourcing question. Our investigators are spread across Australia and bringing them into a central location costs money. Prior to this year we did not have clearly laid down procedures for achieving that resourcing and coordination. But it is something that we have learnt from these experiences and with the formation of the battalion now it is quite a simple matter for me to do that.

CHAIR—You say now you are in a position that you could handle this quite quickly and effectively?

Lt Col. Grutzner—Absolutely. I do not have a central pool of investigators for major taskforces. My battalion is designed and structured regionally around Australia. There are investigator sections from one to six personnel located in all the major Army areas. There is not a central pool for these major taskforces. They are brought from those locations around Australia as needed. It takes time and it costs money and resources to bring people in. The fact that I command them all now means I can do that. We now have very, very good procedures with the office of the Chief of Army for coordinating those when they are required.

Mr PRICE—The changes seem to be particularly good and are welcome. I am coming from this not to beat you around the head about 3RAR but to look at the way we may strengthen the investigative role. Already steps have been taken in terms of the military police. I guess one of the problems we have with highly specialised skills such as in investigation, or even medical skills, is that they are not always exercised frequently and that causes problems. Do you have a reserve structure at all within the military police? To what extent are you able to call in people whose normal occupation would be investigation?

Lt Col. Grutzner—I have within the 15P Company, the SIB Company, a platoon of 20 general reserve investigators ranging from corporal rank through to captain. Predominantly they are ex-Regular Army investigators and to a large part they are still in their civilian employment: state police or in some other law enforcement or investigative body, such as Telstra investigators. They are an extremely valuable resource to us and we certainly use them a lot. Because they are reservists they are located all around Australia and again it is a matter of bringing them in when they are available to do their full-time service during the year. We employ them all around Australia for those reasons.

Mr PRICE—The ADF has been downsized considerably. Has the military police organisation been downsized as a consequence of the overall downsizing of Army?

Lt Col. Grutzner—Yes. In 1993 we lost around 100 full-time positions. Because we were not able to impact on the operational role, the preparedness to deploy role, those positions were lost within the general duties policing and at the SIB. We virtually lost our capability to patrol military garrisons and some of the investigative capability.

CHAIR—A hundred out of how many?

Lt Col. Grutzner—At that stage we had about 400. Since the formation of the battalion we got back about 20 of those full-time positions late last year.

Mr PRICE—I am interested in exploring with you whether or not, in your opinion, there is scope in the future to expand that reserve contribution to military police investigations?

Lt Col. Grutzner—I will make a few comments and I will ask Warrant Officer Smith if he has any comments on that. Like with all reservists, it depends on their ability. We have some extremely highly qualified people in the military police Army Reserve who work in all areas of law enforcement and investigation. As I said, they do give us tremendous support, but as with all reserves their time is limited. The thought of one of them being able to come in for a seven-month investigation is problematic, as you would appreciate. We have to be very careful that we give them tasks when they do come in that are achievable within the two weeks or the four weeks that they are able to work.

Mr PRICE—Can I just clear something up? When did it occur to the military police that this was more than just a bit of random violence that needed investigating in 3RAR?

Lt Col. Grutzner—From a review of the report, it was as statements were taken. The terms of reference that were issued for the report did actually say they were to look wider into any other instances that occurred. Without having been there and without speaking to the people, I would say it was progressive as more statements were taken and more people were implicated. Do you have anything to add?

Warrant Officer Smith—I was not part of the original investigation, sir.

Lt Col. Grutzner—It became quite clear that, between the end of September and February, as soon as they came back to work it went from two investigators to 10 investigators working on it full time.

Mr PRICE—So if you were able to call in these very highly valuable resources in the reserves you would really have been looking at a two-month period until the penny dropped and you threw your best at it, without reflecting on anyone in the regular force under your command.

Lt Col. Grutzner—Certainly, yes.

Mr PRICE—Don't we do that sort of thing? I know with medical specialists it is two weeks, but is there not scope for us to recognise the highly skilled nature of some of the work that comes within your ambit and to develop approaches with the relevant authorities that would allow a successful secondment for a couple of months?

Lt Col. Grutzner—There are a number of issues with that. The DFDA only allows for a service policeman to conduct an investigation. Obviously that could be overcome with changes to the legislation. I would say that with the two-week, or even the two-month, period that you are talking about you would have to be able to be very specific about what you could achieve within that time. As we have found, this is a seven-month investigation that we are still working on. It can take two months to read into an investigation that you are working on so that you are

sufficiently able to ask the right questions. I think we do have pretty good procedures for calling in specific experts when we need them, such as fraud experts and forensics.

Warrant Officer Smith—Within our system we have an inactive and an active GRES system. Those which are in 54 MP Platoon, which is the GRES Platoon, are currently active GRES members. We also have a number of inactive people who have left the Regular Army and have gone into other investigative areas within the community. We encourage them to at least remain inactive so that, if there is an investigation like this that has come recently and we need their resources, we can activate them as quickly as possible.

The big problem we have with the GRES is their civil employers. A lot of them obviously do not like to lose these employees and they have to give them notice. A lot of them work for state police agencies and other agencies and, even though they have a reciprocal agreement back with the GRES, they also have their commitments to their own police agencies. We are limited sometimes as to when we can call them and for how long we can actually call them. With forensics and everything else we do not have a problem—those we have good liaison with, either state or federal authorities, as far as forensic work goes.

We also have identified over the years a number of experts around Australia. For example, our document examiner is an ex-federal police document examiner who has his own civil employment. Most times when we have suspect fraudulent documents we forward them to him. He does them in a very timely manner and gets them back to us. So we do utilise agencies outside and other police agencies to get to the end product we need to get to.

Lt Col. Grutzner—Could I just add to that? You talked about the February to April period. Just as an example, we could have thrown a million investigators at it. If they had been contract investigators, (a) I would say they probably would not be as well trained as my people are and (b) the understanding of the culture of the Army is a huge part of what we do—knowing where to look and what questions to ask. I would prefer to see any outside support being in those expert areas that we need. I have not thought it through, but I am not sure that there is a great role for just a straight investigator coming from the outside to do that because I think they would be limited by their experience and what they could achieve for us.

Mr PRICE—You talked about two-men teams. That combination of an outsider and an insider would be fairly powerful. You also have the problem that you do not regularly have these major investigations, therefore, again with no disrespect, the most constant practice you get is the lower level skills within your organisation.

Lt Col. Grutzner—To an extent, but—

Mr PRICE—You get an exciting variety, but I hope you understand the point that I am making.

Lt Col. Grutzner—If you take the 3RAR, we investigate complex assaults regularly. I found this in Timor. We are limited with what we can investigate in Australia. There are certain things that we do not have jurisdiction to investigate and that must be handled—

Mr PRICE—It is the state police and federal police?

Lt Col. Grutzner—It must be, yes. However, we are authorised to investigate those matters overseas. In Timor at very short notice we virtually took over the policing of the country after the withdrawal of the UN civil police. We investigated everything from murder through human rights abuses to kidnapping and rape, and our investigators were more than up to the challenge. They performed superbly. I do not think there is a problem with our ability to investigate anything.

Warrant Officer Smith—In relation to the offences in the actual 3RAR matter, there has been no complex offence identified. There is just a number of assaults and harassments which have actually occurred. The actual complexities that are involved are the actual size of what actually eventuated from that and the resources that actually then went in to trying to do the investigation in a timely manner. The offences themselves were relatively minor offences when you compare them with other offences that may occur within society.

Mr PRICE—That is a fair point. Bearing in mind the chairman's remarks, let us take the case of the sergeant who was convicted in Queensland. There seems to be a problem in investigations not in identifying the actual assault or rape or whatever but in going beyond that to investigate command responsibilities.

Lt Col. Grutzner—I think that is a pretty key point. It is something we are looking at at the moment in conjunction with PERS branch and DLO. Normally we have a report of an alleged offence and we investigate that. In terms of command responsibility and the wider scope of the whole question of if there was culture in the unit, traditionally we have not deliberately gone looking for that. That is something for the command chain, not necessarily specifically within the military police chain, to investigate.

Mr PRICE—Can I just stop you there? You get called in because you are given terms of reference, do you?

Lt Col. Grutzner—No, not normally.

Mr PRICE—How do you get called in?

Lt Col. Grutzner—We get a report of an alleged offence. We do not normally get terms of reference for an investigation.

Mr PRICE—So then you investigate it?

Lt Col. Grutzner—Yes.

Mr PRICE—You have unfettered rights of investigation?

Lt Col. Grutzner—Yes, within the DFDA.

Mr PRICE—That is fair enough. Let us just use the other case that I referred to. If you had concluded that hypothetically there was some command failure, what would happen with your report then? It would go to the commanding officer, would it not?

Lt Col. Grutzner—And also to his higher formation headquarters. This is a good example of this. You would be familiar with the initial report that went in. It did on the very first page highlight a possible wider scope of the problem, but it was not automatically investigated by the MP team. I am not sure of why that was not done or what was said to those investigators at the time, but it did highlight it there. Certainly if they had identified any other specific offences, yes, they would have pursued those.

Mr PRICE—In a civilian situation we have a director of military prosecutions. A case is made out to charge Smith or whatever and the director gets all the material relating to that. As I understand it, he makes the decision as to whether or not to proceed, and there may be insufficient evidence to proceed. Alternatively, in the case of him not being convinced of a thorough investigation, he throws it back to the police. What happens in the ADF? What happens with your investigations?

Warrant Officer Smith—It is very similar, sir. We will compile our investigation. We will put a service brief in with our recommendations in reference to what charges should be proceeded against the alleged offender.

Mr PRICE—Who does that go to?

Warrant Officer Smith—The distribution list for that is the commanding officer of the alleged offender's unit; the legal officer who represents the formation within that area; the Provost Marshal, Army; and SCMA or DOCM, depending on whether the soldier is an OR or an officer. A report also comes to my office, where we also keep an overall view of the technical control of that investigation. The legal officer in that area will then make the decision through his legal chain on whether or not there is sufficient evidence to charge the person. If he believes there is not and we can do further investigations, he will refer it back to us. Then we will take those extra statements or whatever he requires to be done.

Mr PRICE—What percentage of cases are referred back for further investigation?

Warrant Officer Smith—In my experience, and I cannot speak right across, predominantly about 80 to 85 per cent get through the first time. About 10 to 15 per cent may come back to us with, 'Look, we require you to take further statements or to speak to further people'.

Mr PRICE—Stop me if I am on dangerous ground. Was there an issue that the investigation was insufficient in 3RAR? I do not believe it was but I need to put that on the record.

Lt Col. Grutzner—At the time the final report was submitted and accepted, no. It was not until the central Defence Legal Office review that the additional avenues of inquiry were identified.

Mr PRICE—Has there ever been pressure on a military police investigation to wind it up?

Lt Col. Grutzner—Constantly. That is simply because no-one likes to have outstanding cases, particularly in a busy unit. They could be preparing to deploy and they do like to get through the disciplinary process quickly. We do have a constant backward and forward with units trying to explain how difficult it is to finalise investigations for a number of reasons.

Every investigator has more than one investigation going at one time. They are trying to get witnesses in an organisation who constantly move around the country on postings or deployment or exercises. It takes time to get medical records and telephone records.

Mr PRICE—There are some suggestions in military police investigations that not all information is provided to your investigators.

Lt Col. Grutzner—By units?

Warrant Officer Smith—I think it is like any type of police agency. When you try to extract information from people, some people are very reticent about giving you all the information.

CHAIR—We have found that on occasions, even though we are a parliamentary committee.

Warrant Officer Smith—I do not think we are any different from any other police agency in that sometimes we have to revisit on numerous occasions. We get the information and then we have to go back to the person and say, ‘Now we have it, why didn’t you come forward with that?’ We have a problem with that.

Lt Col. Grutzner—I would say we are no different from—

Mr PRICE—Given that you have had a new structure, would you see any difficulty in the establishment of a director of military prosecutions? Would you see that as strengthening the position of your battalion or weakening it? Or have you not had time to look at the proposition?

Lt Col. Grutzner—That is something that is outside our—

Mr PRICE—Outside your field?

Lt Col. Grutzner—Our direct contact with the legal system is being strengthened all the time just by working closely with them. We are about to have a full-time legal officer put into 5 MP Company who will assist that process even more.

Mr PRICE—Do you think that is a good thing?

Lt Col. Grutzner—Absolutely. But, further than that, I am not really qualified to say.

Senator SANDY MACDONALD—It might be helpful to the committee if you could give us a bit of a breakdown of the numbers of people in the battalion—I know that you are situated here in Canberra—and the numbers in the companies around the country. I think you said there were four. I would also be interested to know what is the proportion of females in terms of investigations in those companies.

Lt Col. Grutzner—There are five companies: four general policing companies and the special investigation branch company. All up I have 269 full-time Army personnel and 350 reserve personnel within the battalion spread all around Australia. My battalion headquarters are located in Sydney. I have company headquarters in Townsville, Brisbane, Sydney, Melbourne

and here in Canberra. The SIB Company headquarters are in Canberra and they have platoons spreading to every location. We have a one-man section in Tasmania. In Darwin we have six investigators and about 32 to 35 uniform or general duties personnel. It varies throughout the country. I have Army Reserve platoons spread throughout those locations as well. That is our general spread. We do have an investigator capability in every location.

Senator SANDY MACDONALD—Do you have a headquarters at each Army Reserve, like the 12th/16th Hunter Lancers in Tamworth?

Lt Col. Grutzner—No, we are regionally based. They would be run by our small SIB detachment at Singleton. It is not in every small location; it is in every significant military location. I have a map here.

Senator SANDY MACDONALD—You say SIB. Are the general duties of SIB as a special investigation branch?

Lt Col. Grutzner—That is right.

Senator SANDY MACDONALD—Why do you identify the SIB? Is the only reason they might be involved that they had a particular incident?

Lt Col. Grutzner—Yes. For instance, in Singleton I do not have a uniform presence. I only have an SIB, a small detachment of two investigators, who look after the region that includes Singleton, Newcastle and the Hunter Valley. I have an Army Reserve platoon in Newcastle itself that provides uniform support to that area within the limitations of reserve work. Any further support that is needed uniform-wise comes from the company in Sydney, when required.

Senator SANDY MACDONALD—Can you explain quickly what the uniform branch does?

Lt Col. Grutzner—It does general patrolling, proactive patrolling, as required. We are developing a policing plan for every Army location in Australia, which will look at what are the problem areas and the problem nights particularly. Normally it becomes Thursday, Friday and Saturday nights—pay night and Friday and Saturday nights—when the soldiers are more active and are socialising. Those are the times when we need to patrol. Obviously there is a big difference in the patrol effort that I can put out in a place like Brisbane, where I have over 60 MPs, and a place like Singleton, where I do not have any uniformed MPs. That is limited to the occasional patrol from Sydney or when the reserve are working, as they are right now in Singleton because there is a large courses camp for the General Reserve going on. My Army Reserve platoon in Newcastle is doing daily patrols through there. So they coincide their two weeks full-time duty with major activities going on in those areas.

Senator SANDY MACDONALD—And you have females in the SIB?

Lt Col. Grutzner—Yes. There are five females in a company of 65.

Senator SANDY MACDONALD—Can you explain how the command restructuring that occurred in January affected your command of the MP battalion?

Lt Col. Grutzner—Going back to 1993, the decision was made to put all the investigators into what was then logistics command. Later they transferred to corporate support. So they were completely regionally based. They worked for local defence corporate support managers to simply police that region. There was very little central coordination, if any, other than my role as technical control. I could tell them how to conduct an investigation in terms of procedures and policies, but their full command was invested in those corporate support managers.

Senator SANDY MACDONALD—When you talk about a corporate support manager, was that the local senior military officer?

Lt Col. Grutzner—Or a civilian; in some cases my people were commanded by civilian corporate support managers. There was a bit of a mix. Our ability to task them and to move them around the country as we needed them was minimal and it did cause problems. We had the situation where we were submitting reports to people who did not understand the investigation process, and that caused delays and confusion as well. It was just generally unacceptable. We had some areas that were very well resourced by their corporate support agencies and some that were very poorly resourced because they did not attract the priority from that manager.

Senator SANDY MACDONALD—Do you envisage any further command streamlining or any further command changes?

Lt Col. Grutzner—The structure in the battalion is that when a new unit is raised in the Army it is automatically reviewed after 12 months. I have until March next year to record every problem that we have with the current balance and to put in a full report, which will be reviewed by Army headquarters. We could, on the basis of those lessons learnt during this year, find that we want more investigators or that we need to adjust the balance in different locations, but that is under way all the time. I would definitely like more investigators. One point I would like to make is that, in terms of the formation of these teams for big investigations like the 3RAR case, they come from those regional areas and that adversely affects what goes on in those areas. All those reports in those areas get shelved or further delayed, which means the local commanders who want cases to be dealt with as quickly as possible lose their priority completely as a major team is formed. That slows down the whole process.

Senator SANDY MACDONALD—With the restructuring of the command, did you have any change to resources at the same time?

Lt Col. Grutzner—Absolutely. All the resources allocated to military police through their different command formations were redirected to me. As a single unit I bid to my higher headquarters for resources for next year. I have recently submitted my budget estimate for 2001-02 and we are waiting for those allocations. We do not have a problem getting resources for major investigations like this. We just work straight to the office of Chief of Army, and that has not been a concern so far at all. But as to whether I get everything I ask for for next year, that is the same as for any other unit.

Senator SANDY MACDONALD—For the uninitiated, what priorities do you provide in terms of resourcing? If you could bid for anything, what would you like to have? What are the real open-book things that you require in terms of doing your job properly?

Lt Col. Grutzner—I put it as two areas. Police technology is changing all the time; there is no question about that. There is new equipment that we could acquire every day. That is the same for the military in general. I have to bid along with everyone else for that. That is an area that we could constantly be looking at. I mentioned before the Army Reserve. I have no problems with employing an Army reservist. The provision of Army Reserve salaries is not an issue. We get those when we need them. But what is always a problem for me and for the Army in general is getting money to move people around the country—just the administrative funds to move people. That is always tight for a unit commander anywhere and it needs careful budgeting. But, as I said, when we need it for big investigations we do get it. I do not have a concern with that.

Senator BOURNE—Would you say that the standard of levels of investigation has become more even since you have taken over as one single commander? Or do you think that it was pretty even before that?

Lt Col. Grutzner—I am very satisfied with the level of the training and the competence of the people I have now—with individual exceptions; there are some who are better than others. You could probably ask Warrant Officer Smith to talk about that one because, as I said, we have only been up and running formally for about six weeks.

Warrant Officer Smith—I think the good thing about the restructure that has happened is that we get command again of our own people. The good thing about that is that we can then turn around and identify our people for future training and be able to provide that future training for them without having to go through cross-commands to get people released to go and do future training. The level of investigative work they are doing out there is comparable to anywhere across any of the other police agencies. I have done detachments with other civil police agencies and at no time did I ever feel inferior working with those types of agencies.

I do have a little bit of concern with my junior investigators these days that they have not had that exposure. Now that we have our command back, I believe that exposure for them will come and they will then be able to do more complex investigations in the future, keeping in mind our deployments. On our deployments is when these more complex investigations come into our scope because we take full jurisdiction on those whilst we are overseas in places like Timor et cetera. As far as the restructure is concerned, it can only benefit for the investigator's future for making them more enlightened to what is actually required for more complex investigations.

Senator BOURNE—So training is obviously ongoing. How do you organise what sort of training people have? Not just training, but is there any coordination between Army, Navy, Air Force? I imagine you would have similar sorts of problems that would be different from the sorts of problems the ordinary old police forces face. I imagine it would be useful to discuss those. Do you discuss those and does that result in any sort of new and different ongoing training?

Lt Col. Grutzner—I speak regularly with my counterparts: Provost Marshals Navy and Air Force. We have the next meeting with them in two weeks time. We have a regular meeting with them and the Inspector-General Division—the investigators. As part of an ongoing rationalisation of training across the Defence Force, there is a project team working on rationalising police training within the defence force and the Army military police centre is

taking the lead on that. That has been identified as being the centre that will coordinate future policing training. The Navy police school has just moved into the Army police school in Holsworthy. They have taken up residence with us. The committee is working constantly on identifying opportunities to do joint training and rationalise the existing training.

We have also formalised more in the recent past our training opportunities with the state and Federal Police. We sent a number of our people on state police courses, Federal Police courses and overseas courses as well, both civil and military police. I am quite comfortable with that. We could always do more with other outside agencies, but our cooperation with the Navy and the Air Force is getting better and better every day. In fact, Warrant Officer Smith's headquarters, the headquarters of the SIB, is located in the same building now with Provost Marshal Navy and Provost Marshal Air Force at Fyshwick. That was a deliberate decision that we took to further that cooperation.

Senator GIBBS—You were saying that in 1993 you lost 100 investigators. Was that a budgetary decision?

Lt Col. Grutzner—Not investigators, 100 military police overall. I think we lost about 10 investigators and about 90 uniform positions. That was as a result of the Force Structure Review.

Senator GIBBS—Do you simply have to make do now?

Lt Col. Grutzner—Yes.

Senator GIBBS—Could you do with a lot more staff?

Lt Col. Grutzner—We could. I used to have companies that were structured to deploy on operations into the field. There were also companies and platoons whose sole role was to police military garrisons—provide a 24-hour patrolling capability of those garrisons. The decision was taken that that 24-hour patrolling capability was not required.

Senator GIBBS—Why?

Lt Col. Grutzner—It was for reasons to fit under the budgetary or manpower cap something that was not specifically required. I could not tell you why. It was not our decision.

Senator GIBBS—No, I realise that. Why did they feel that it was not required—because nothing was happening?

Lt Col. Grutzner—No, we certainly had the reports. We provide a proactive policing presence that I could argue as a policeman that that helped to, in a proactive sense, reduce the opportunity for crime and other incidents to occur. I cannot tell you what the thinking was at the higher levels.

Senator GIBBS—Police presence usually does do that.

Lt Col. Grutzner—Yes, I agree, absolutely. That was the basis of that decision.

Senator GIBBS—I just noticed before that you said you have regular complaints of assault cases in 3RAR. How does that compare with the other regiments?

Lt Col. Grutzner—No, I meant across the board. Simple assault is across the Army, not specific to 3RAR, no.

Senator GIBBS—So it is not really a high proportion in 3RAR and then a lower proportion in the rest?

Lt Col. Grutzner—Without looking at the figures, I would be guessing.

Warrant Officer Smith—The main factor, especially with regiments, is the age group—the mean age group at that particular time within particular regiments. If the age group is a little bit lower, it is just like out there in society—out on the common street you have youths punching each other all the time over small issues. If the age group is a little bit higher, people are a little bit more civilised and—

Senator GIBBS—They mature.

Warrant Officer Smith—Exactly right. So sometimes you can have one particular regiment that might have more assaults one year than the year before. It may just strictly come down to that they have got younger fellows within the regiment and they just decide to give each other a slapping rather than talk about it.

Senator GIBBS—Yes, hotheads.

Warrant Officer Smith—That is right.

CHAIR—On a couple of general matters, in terms of the number of military police and the number of people they look after, how does that ratio compare with the civilian population?

Lt Col. Grutzner—As I said, we have 269 operational MPs for the Army of about 24,000. I do not know how the state police come up with their numbers, but there are 13,400 New South Wales police for a population of 6½ million. We have an average of about one military policeman—not investigator but uniform and investigator—to every 425 soldiers roughly. In New South Wales I think the ratio is about one to 470. Whilst those figures might not mean a lot, given that we are closed areas roughly and we do have a different role, I think we compare pretty well.

CHAIR—In terms of the time taken for these investigations, do you have some comparative figures with the civilian police on a similar type of investigation on the time that is taken?

Warrant Officer Smith—To answer your question, once again, if we look at the assaults which occurred within 3RAR, some of those assaults there—and I do not mean to trivialise what actually happened in 3RAR—were just minor assaults. Normally if an assault like that was

reported to civil police, unless there were witnesses there and then and it was not just a one-on-one assault, they would just record it. The civil police, because of their workload, probably would not do any further investigative action. We do not have that workload that they have so therefore we put more time into it. Also, we have far-reaching issues that come into morale and discipline that go with those types of things that happen. I think it would be hard for us to compare that type of question in reference to the way we do business.

CHAIR—On the question of assaults, I know it is a bit hard to make some of those comparisons but, with a similar age group of military versus civilian, would you have any sort of rough comparisons on the ratio of the number of assaults?

Lt Col. Grutzner—I have got the figures here but I have not got them at my fingertips. I actually have the New South Wales figures here as well as ours, but I could not give them to you off the top of my head. I would have to look through them.

CHAIR—Could we take those afterwards?

Lt Col. Grutzner—Yes. We have an unofficial aim of 28 days from the time of a report of an incident to getting the final report out. Obviously that will vary with the complexity of the issue. That is our aim. What we have achieved has risen over the last four years progressively. In 1999-2000 we were averaging 45 days from the time of a report of an incident to the time the final report is issued. Obviously I would like to get that figure down, but there are a number of things that impact on that.

CHAIR—What would the figure have been five years ago?

Lt Col. Grutzner—In 1996-97 it was 29 days; in 1997-98 it was 31 days; in 1998-99 it was 38; and then last year it was 45. So it has been progressively getting up. With the formation of the battalion, I would certainly hope to see it turn around and head back down again for this current year.

Mr PRICE—I have a couple of questions on procedures. You said that in some cases you do get terms of reference but mostly not. What dictates that and does that limit your ability to investigate?

Lt Col. Grutzner—We do not need terms of reference. An officer appointed by a commanding officer to investigate something in the unit requires a terms of reference. We do not need a terms of reference under the DFDA.

Mr PRICE—You do not get terms of reference?

Lt Col. Grutzner—Very rarely.

Mr PRICE—Why do you get some terms of reference rarely?

Lt Col. Grutzner—In this case, I do not know why the terms of reference were issued.

Mr PRICE—But it did hinder the military police investigation, did it not?

Lt Col. Grutzner—No.

Mr PRICE—Or the truncating of the military police investigation.

Lt Col. Grutzner—No. I think the wording of the terms of reference allowed them to go as wide as possible. It said words to the effect of, ‘If you find anything outside these terms of reference, you are to report back to headquarters before you investigate it.’ That is very unusual. Technically, we do not require anybody’s authority to look wider into incidents. So it was unusual in that respect. It would be a hindrance if that commander said, ‘No, I do not want you to look at that.’ That would then be brought back to me through my chain and I would go to the appropriate authority to have that explained.

Mr PRICE—I can’t take you through in camera evidence. I do not want to go through that, so I will just leave that at that. But could you take on notice—as I am really interested to understand the process—why terms of reference are rarely given and who makes that call?

Lt Col. Grutzner—I cannot recall another one being given other than this one.

Warrant Officer Smith—Neither can I.

Lt Col. Grutzner—We would have to check.

Mr PRICE—Do you just drop off cases once one is proceeding to court? I give you the example of Sergeant Rush from Queensland. There were, I think, six victims. Did you investigate all six instances?

Warrant Officer Smith—I am not quite familiar with the case. To answer your question, I think you might be alluding to the jurisdictional area of whether or not we follow the investigation all the way through. Is that what you are alluding to?

Mr PRICE—I am sorry. I am not quite sure whether it was a combination of police. It probably was police—the raping of soldiers under his command.

Warrant Officer Smith—What normally happens when something is reported to us is that we will do the initial investigation. Once we believe that we have hit the jurisdictional barrier, we are then duty bound to inform either the state or Federal Police. Once we inform them, we will do a parallel joint inquiry with them and assist them in all ways then to carry through. To answer your question, no, we do not drop off an investigation. We still have a reporting responsibility.

Mr PRICE—I suppose the point I am trying to elucidate is that, as a matter of course, are you required to investigate all instances?

Warrant Officer Smith—All instances that are reported to us; that is right.

Mr PRICE—You were aware of the six victims? That has been reported to you?

Warrant Officer Smith—Once again, I am not quite familiar with the actual inquiry you are talking about.

Mr PRICE—Could you take that on notice and get back to us on that?

Warrant Officer Smith—Yes.

Mr PRICE—What is the situation when, in the transcript of the court martial, there clearly appears to be issues of command failure? Do you need to be tasked then to look at that? Or do you automatically pick that up? How does that work?

Lt Col. Grutzner—If we pick up something, we will keep the senior officer formation commander or unit commander involved.

Mr PRICE—Clearly this was not picked up initially when the sergeant was charged, but these issues came forward in the court martial.

Lt Col. Grutzner—There was a time requirement to complete the investigation by 12 April 1999. The investigators have acknowledged that they were not able to complete all avenues of inquiry, and that was made quite clear to the headquarters at the time. They were instructed to conclude the investigation.

Mr PRICE—So it is quite possible that there are instances that never benefit from a military police investigation because of time constraints?

Lt Col. Grutzner—No. Under normal circumstances they would come back to all of those later.

Warrant Officer Smith—The normal process with any brief that is actually put up is that we will follow through the investigation to its fullest limit of the information that is given us at the time. On a number of occasions, 12 months later, I have had someone come up and see us—either because he is either getting out or he has had a change of mind—and say, ‘Look, this has also happened.’ We probably know in the back of our minds that something else has happened, but because of other work priorities that come in and everything else well you can only deal with the information that you have at the time.

Mr PRICE—Even if they are very serious allegations?

Lt Col. Grutzner—Then they would get the priority.

Mr PRICE—But they did not, I do not think. Anyway, maybe you can look at your records and if there is anything else you can usefully tell us about it I would be most grateful. If the reserve unit was more available to you than it currently is—in other words, I accept all the problems you have in wishing to utilise your reserves—would you be seeking to make greater use of reserves?

Lt Col. Grutzner—Absolutely, yes. When you say more available—

Mr PRICE—There are a whole series of problems of utilisation of reserves and their civilian employment, et cetera. I am putting a hypothetical question to you, but if the reserves were more available you would draw on them to a greater degree than you currently do.

Lt Col. Grutzner—Certainly.

Mr PRICE—Lastly, we sought to have the original report of the audit of the regimental post on 3RAR rather than the official report that was done as a result of the audit. We have had terrific cooperation but we have not got that yet. There was an officer who would have been under your command now but was not then who did the audit of the regimental posts—that is 3RAR.

Lt Col. Grutzner—The regimental?

Mr PRICE—Posts—where you put your prisoners.

Lt Col. Grutzner—Sorry, the guard room.

Mr PRICE—We have got a report but we sought the original document. We have not got that original document. We have got great cooperation, perhaps that has just been an oversight.

Lt Col. Grutzner—I would have to have a look at that, yes.

CHAIR—Any further questions? If not, I thank you both very much for your attendance here today. If there are any matters for which we might need additional information over and above what we have already asked, the secretary will write to you about it. You will be sent a copy of the transcript of evidence to which you can make corrections of grammar and fact. Lieutenant Colonel Grutzner and Warrant Officer Smith, thank you very much for coming before the committee today.

[10.08 a.m.]

CLARKE, Mr Ian Thomas Keith, General Counsel, Defence Legal Office, Department of Defence

CRONAN, Wing Commander Paul Arthur, Chief Legal Officer, Department of Defence

MARKS, Captain Helen Elizabeth, Director of Discipline Law, Defence Legal Office, Department of Defence

SMITH, Commodore Michael Francis, Director General, Defence Legal Office, Department of Defence

WATSON, Captain James Patrick, Staff Officer, Defence Legal Office, Department of Defence

CHAIR—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 and deliberate misleading the subcommittee may be regarded as contempt of 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 consideration to your request. I remind witnesses and members of the committee not to enter into public discussion on individuals who are or may be subject to legal proceedings. If it becomes necessary to discuss any specific cases subject to investigation or legal proceedings we will adjourn and take the evidence in camera. The subcommittee appreciates the time you have set aside to discuss the inquiry topic. If you would like to make a short opening statement before we proceed to questions, please do.

Cdre Smith—With your permission, Mr Chairman, I would like to tender two documents concerning the Defence Legal Office. First, there is the joint directive I have been given by the Chief of the Defence Force and the Secretary to the Department of Defence, dated 6 November 2000, shortly after I assumed this appointment on conclusion of my command at the Royal Australian Naval College, Jervis Bay. My responsibilities to provide legal advice and services across the Defence organisation are comprehensively stated.

The Defence Legal Office is an integrated joint nationwide organisation. It includes all permanent and reserve uniform lawyers, defence civilian and legal officer positions, paralegal and other legal support and APS positions. With 495 staff across Australia, 450 being legally qualified, we are indeed a significant mid-sized law firm but quite unique in how we are configured and in what is required of us. We are a relatively recent amalgamation of disparate legal elements in Defence, declared by the Chief of the Defence Force to be a joint Defence organisation in October 1998. That is the second document you have, Mr Chairman and members of the subcommittee.

As Director General, I exercise technical authority and control over our legal officers. This extends to their professional behaviour and standards, employment in command or staff environments, their training and career development. Essentially, my job is to lead and manage

the Defence Legal Office in such a manner that we earn and deserve the best possible professional reputation amongst our many and varied clients, but particularly ministers, the Chief of the Defence Force, the secretary, the service chiefs and commanders at all levels. With regard to the subcommittee's proceedings, as a key custodian of military justice, it is essential that the Defence Legal Office retains the confidence of the parliament and the Australian community.

Against the backdrop of the subcommittee's ongoing concerns with the processes of military justice, I can only conclude that your confidence in the Defence Legal Office is to some extent at least in issue, but I sincerely hope this is not the case. However, if this is the case, Mr Chairman, it would be of profound concern to me as a naval officer and as a lawyer. No-one in the Defence Legal Office, whether as individuals or in teams, could stand aside from efforts to win back the confidence of the subcommittee should this indeed be necessary.

Coming primarily from a strategic operations law and command and staff background, I strove to understand how military justice procedures could take so long in this case. I am hardly alone in this, Mr Chairman. I naturally want to know whether the professional performance of the various legal staffs was adequate, ethical and timely, and I am accountable for this. Noting that military justice proceedings associated with 3RAR are not yet complete, it is clear that, in addition to any matters to arise for action by the Defence Legal Office from this committee's report, the Burchett audit of military justice or matters of policy directed by the minister or the Chief of the Defence Force, at my level there is a need to undertake a bottom-up technical review of military justice processes and professional performance within the terms of my personal technical control and accountability.

This will commence as soon as practicable. An aspect of this work must be our links with service police authorities and are integral to the military justice process. In early August last year after the Defence Force Magistrate's trials were stopped, my office was tasked by Commander 3 Brigade to take carriage of the 3RAR disciplinary matters in the interests of the impartial administration of military justice. In effect, what is supposed to be a decentralised command based system of military justice necessarily defaulted to the Defence Legal Office in Canberra. The prevailing circumstances were very unusual and hopefully never repeatable. It was highly unusual, but correct in my view, that my office stepped in to assist, but this decision removed the administration of justice to some degree from normal command processes.

Many lessons are to be learned about the implications of this in the bottom-up review of the technical process. Upon conducting a quick assessment of the state of play in November and noting the universal preference to get these matters concluded, I urged that all proceedings be concluded by the end of last year. This was lawful and feasible. My impatience proved nugatory largely because of the need for heavily committed reserve legal counsel to be available. The interests of the defendants lie in affording them access to reasonably available counsel of the right capacity and this can involve unavoidable delays. But as part of the bottom-up review, I want to look at the operation of the rules to determine how the all round interests of justice can be served more expeditiously.

Recent discussions with visiting high level officials from Canada, the United States and the United Kingdom have convinced me of the urgent need to understand much better how military justice is administered at a working level in these countries. There have been significant recent

developments, but we need to understand them and search for ways and models to do our business better. Accordingly, I have directed Captain Marks to depart shortly, subject to funding approval, on a highly focused study tour to look at comparative military justice systems. She will also examine the scope for alternative dispute resolution mechanisms to operate in the ADF. In this era of outsourcing of commercial legal services, one might wonder why sitting before you now are lawyers in the uniforms of each of the services and indeed so proudly worn. We are accompanied by the General Counsel of the Department of Defence, their pre-eminent in-house civilian legal adviser to the highest levels of the Defence organisation on the most complex issues.

The need for service and departmental lawyers was reaffirmed a few years ago by the Defence Efficiency Review and suffice it to say that no defence organisation against which we would wish to be compared and measured has moved to outsource stewardship of its military justice system howsoever steps may otherwise be taken to enhance the impartiality and independent of it. This is fundamentally core business for service and departmental lawyers. Relatively cheap to retain, we must give value for money and deliver the highest possible professional service in peacetime and during operations. Fifteen lawyers have thus far rotated through our Timor commitment. Competition is fierce for such operational opportunities which require the application of the broadest range of legal skills in which service lawyers specialise.

More generally across the Defence organisation, our lawyers are highly valued from all indications I have received. Indeed, demand seems to be outstripping supply. But we must deliver on quality, and that is of course the way to earn and sustain the best professional reputation and the confidence of this subcommittee. In the Defence tradition of assessments after 100 days or so, my candid impression is that we are quite a good, if still relatively new, outfit. But there is a way to go to build the requisite professional identity and standards that we must achieve to be a high performing organisation. Accordingly, I have initiated programs and activities to revamp soon the organisation nationally as the Defence Legal Service to build and reinforce behaviour based on professional ethics and values amongst our lawyers, to better train them throughout their careers at the Military Law Centre, to fundamentally review the roles of our highly valued and talented reservists, civilian lawyers and paralegal staff.

In my view, we need to move much closer to the broad legal profession in the civilian community through appropriate placements, mentoring and professional affiliations. This will be done. The recent establishment of a dedicated prosecution cell is a principal means of ensuring that we grow in-house lawyers and highly competent advocates. Many of our young lawyers have made it very clear to me that they value most highly advocacy opportunities, and I intend to provide them as much as possible. There is, in my view, also a self-evident need to better organise administrative arrangements for major trials, and this will be examined.

The committee's examination of military justice procedures over the last several years has, in my view, been pivotal in shaping the way in which the Defence Legal Office and soon to be the Defence Legal Service goes about its work and perceives its future. For that and for the opportunity to be heard today, Mr Chairman and members of the subcommittee, we thank you.

Resolved (on motion by **Senator Bourne**, seconded by **Senator Ferguson**):

That the joint directive by the Chief of the Defence Force and the Secretary to the Department of Defence to the Director General, Defence Legal Office, be incorporated into the Defence subcommittee records as an exhibit to the inquiry into the annual report of the Department of Defence.

Resolved (on motion by **Mr Price**, seconded by **Senator Gibbs**):

That the instrument establishing a joint Defence organisation and making provision for command within that organisation, Defence Legal Office, be incorporated into the Defence subcommittee records as an exhibit to the inquiry into the annual report of the Department of Defence.

CHAIR—Commodore Smith, you mentioned the concerns you had about the time taken for this particular inquiry—30 months. Would you like to elaborate on why it did take so long?

Cdre Smith—It is explainable but, as I said, it is unacceptable. The involvement of the investigating police was about seven months initially and that was about 1998 into March 1999—six or seven months. That matter was then passed to the appropriate commander and his legal staff whereupon it was decided, owing to the complexity of the matters, to pass them to some reserve legal counsel in Queensland for review. That took a month or two. When those matters were returned, we moved into the Timor build-up, and these matters were then referred to the Command Legal Office in Sydney as the force deployed. When the force returned in February-March 2000, it was then a subject to be returned to. I think by mid-year when we got to the point which we all know so well, that was about the point that matters were referred to the Defence Legal Office—July-August last year—and I have recounted, in part, the history of that.

CHAIR—Would you say that there are systemic shortfalls that delay proceedings like this?

Cdre Smith—In the sense that there are in-built delays which are accepted, no. One of the key elements that the Defence organisation has put to the subcommittee over the years is the need for expedition. I think you heard from the service police this morning that every attempt is made to get these matters through. We have some fairly raw comparative data, and it is only based on the Queensland system, which is known to be one of the faster moving systems in these matters. When you look month to month at civil processes, you find roughly it is an equivalent amount of time, even slightly ahead in the military case if you allow for the fact that there was the deployment to East Timor.

CHAIR—I do not know whether it comes in your area, but the previous witnesses did mention that when they looked at this problem at 3RAR in their initial report they did highlight a possible wider problem in what was going on in the unit. Would you have that drawn to your attention or does that only go to the commanding officer and his senior?

Cdre Smith—It certainly would not be drawn to the attention immediately of the Defence Legal Office and the Director General. As I said, this is a decentralised military justice system where major formation commanders are responsible for the administration of justice within their commands and those subordinate to them are tasked, certainly in the commanding officer role, to execute justice according to law. The question I have—and I have not yet had an opportunity to look at it, and I indicate I do want to have a thorough review of this process—is where were the legal staff in this process and were they aware of any of these issues? My best inquiries so far have not indicated that legal staff working in those units were aware that these problems

were taking place. I have not yet concluded on that investigation, and that will take me some time. In a sense, we have to get through these matters as quickly as we can and then sort out what happened—in some ways analogous to what the Army intends to do with its survey of command responsibility. That will occur essentially when the proceedings are finished, and that is when I see that I can look at what happened with any legal staff. At this stage, I am not aware of any problems that arose because of their involvement.

CHAIR—You are saying the reason you cannot conclude that now is that there are still charges pending or is there some other reason for the delay?

Cdre Smith—The reason is essentially that I want to get through this. It has taken a lot of resources in my office. It is not normal for these matters to be dealt with in my office at this level. It would normally be done elsewhere. The need and the time to get to know the organisation—I am still fairly new in it—and to understand who was where and what may have happened is something that I need to get to. I do want to get through what the task is at hand and then we will look and see where the legal service performed, and similarly the legal processes.

Senator FERGUSON—I am just not clear in my own mind at what stage you actually become involved in any investigation. Is it after the initial investigations have taken place by the military police? Who determines whether or not or at what stage you become involved to determine whether or not there is a case to answer or a charge that should be laid? I am just not quite sure at what stage you actually become involved.

Capt. Marks—If you are talking generically of an investigation that might happen, the military police would normally render their report to the command authority. At that point in time, the legal resource available to that command would give advice or would ask a reservist to provide advice in a preliminary sense perhaps at that stage. There may be a need to go back for further investigation if there are some loose ends to be tied up, or there may be a recommendation the matter proceed from there.

Senator FERGUSON—They would seek advice from you as to whether or not to proceed, virtually?

Capt. Marks—They would seek advice from a legal officer attached to the brigade or unit or establishment where the incident is alleged to have occurred in the normal course. Is that the question you were asking?

Senator FERGUSON—Investigation is obviously initiated before you become involved. I am just concerned about what time you actually become involved, whether you help to determine whether or not there is a case to answer or legal advice determines whether there is a case to answer and then you would become involved at that stage.

Capt. Marks—Certainly in terms of the investigation the police can seek advice from legal officers in the field, if there is a particularly technical issue at hand or whatever. As a previous witness to the committee suggested to you, they are hoping to have a legal officer attached to a unit in Canberra, so there will be ongoing day-to-day legal advice provided to them separate from a command situation. You might become involved at that stage as a legal officer, but

normally you would become involved at the end of the military police investigation. It would be referred to a legal officer for a legal review and a report would be rendered on that.

Cdre Smith—My experience as a commanding officer is that you would get a report of an incident as the commanding officer. You would then have whatever investigative resources are necessary deployed on the task. Then that would be concluded and the legal review of the matter would then be done subsequently to that depending on what level it is, whether it is unit or—

Senator FERGUSON—You have already said that there was an unacceptably long period involved in the case of the 3RAR. Unfortunately, Mr Hollis and I were not here for the initial hearings. What was the actual timing of your initial involvement with those cases?

Capt. Marks—If I could again respond to that. On about 24 July 2000, Commander 3 Brigade wrote to me in the Defence Legal Office. The event that sparked that letter was the fact that two matters had gone before a Defence Force Magistrate. The Defence Force Magistrate had ruled in those matters that the referral had been void, and returned the matters to the convening authority. The convening authority had never been faced with an issue like this before, as neither had I, and so decided that he would seek the advice of Canberra, the Defence Legal Office. They were referred to me, and a matter of a couple of weeks later a box of folders arrived with the military police reports. At that point we started up what I would call a review or an audit of what had gone on, what had caused the problems before the Defence Force Magistrate. That is really how it then started.

Senator FERGUSON—Did I hear you say before, Commodore Smith, that you have 450 reserves and regulars with law degrees?

Cdre Smith—Yes. If I can break that down perhaps a little bit. There are 105 permanent uniformed lawyers; there are 15 Australian Public Service civilian lawyers in the organisation; there are 330 reserve ADF lawyers spread across each of the three services.

Senator FERGUSON—I am pleased to know they are not all in parliament.

Mr PRICE—I would like to explore this issue of advice. The ADF legal office, if we could call it headquarters to just signify the Canberra section, was not involved in any of the advice to General Cosgrove that resulted in the throwing out by the Defence Force Magistrate? That was all done at a local level?

Cdre Smith—That is the correct view and my understanding.

Mr PRICE—When General Cosgrove appeared before the committee in camera on 28 August—clearly I cannot go into the detail of it, was General Cosgrove briefed by the ADF legal headquarters section?

Capt. Marks—Yes, he was.

Mr PRICE—As a result of that in camera meeting, did the general or any of his staff have cause to thank you for the briefing? Did you get any feedback on how well the briefing went and how well it prepared him?

Capt. Marks—No.

Mr PRICE—None whatsoever?

Capt. Marks—Not in a specific sense. What the general did was appoint a battle captain, for want of a better description, to look at the issues, and Colonel Davie was the central point of contact from that point between the Chief of Army's office and Defence Legal Office. I certainly mustered our resources to work for and assist him with dealing with the issues of concern to the Chief of Army.

Cdre Smith—There has been exceptionally close cooperation between the Chief of Army's office, his Director General of Personnel area, where Colonel Davie and now Colonel McCullagh work from, and the Deputy Chief of Army's office, and of course the subcommittee has taken other briefings in that sense.

Mr PRICE—For the record there has been very close cooperation by Chief of Army with the subcommittee too. I just want to understand. At that in camera hearing the ADF legal headquarters people were very concerned about sub judice. I do not think I am breaching confidence there. Pull me up if I am.

CHAIR—I think the committee is a bit concerned about it too.

Mr PRICE—I know that ADF Legal have had great concerns about sub judice. I think the minister and the Judge Advocate General wrote to us. I think, Captain Marks, you took us in camera to express your concerns. Given that there is some time elapsed, do you still harbour those fears you had about the subcommittee's work interfering with the process of justice in relation to 3RAR.

Cdre Smith—I have read the transcripts and that is my knowledge of Captain Marks's involvement. Matters are ongoing but there is no evidence that has come to my knowledge that any of the subcommittee's deliberations have in any way prejudiced the ongoing proceedings.

Mr PRICE—We had a hearing on 6 October but I understand—I may be wrong—that either that week or just prior to that week in fact there was a case being heard by Lieutenant Colonel Singh, now the commanding officer of 3RAR where in fact there was an attempt that would have led to the same problem, wasn't there, before him in that case?

Capt. Marks—Could you perhaps explain?

Mr PRICE—The aborting of the two trials was because there was an attempt to remove it to a higher authority. I am saying that in the week before the hearings on 6 October, was there not a case before Colonel Singh where the same attempt was made by the prosecution but Colonel Singh demurred.

Capt. Watson—Perhaps if I could answer that. There was a submission put before the commanding officer of 3RAR—

Mr PRICE—Was this by a QC?

Capt. Watson—Yes, that is right—In relation to the future conduct of those particular trials. There was concern, as a result of the ruling from the Defence Force Magistrate and General Cosgrove's minute, that any perception of bias should be looked at very carefully by the commanding officer and for the commanding officer to consider the avenues open to him under the particular section of the DFDA. There were submissions about the commanding officer continuing to hear those matters within his chain of command, having regard to the previous finding.

Mr PRICE—Is it usual to have QCs appearing before commanding officers making submissions?

Capt. Marks—It is not usual to have counsel appear at commanding officers dealings or at trials. Normally they are reserved for courts martial, Defence Force Magistrate's proceedings.

Mr PRICE—But we have got senior counsel appearing—QC?

Capt. Marks—He was a lieutenant commander and rank obviously plays a part in this thing.

Mr PRICE—A QC reflects experience, doesn't it?

Capt. Marks—That is right. Perhaps I could just explain to the committee. As the commodore has said, the circumstances of this case were unusual and the fact that it was referred to me by the Commander 3 Brigade is unusual as well. There was obviously an irregularity in the initial dealing and referral process, and that had to be rectified. When the material arrived, it seemed to me that with various reports that had been made in the media and elsewhere and the concerns that were raised, we needed to actually do a review of the material that had been sent to me—and the initial legal advice and the charges—and to conduct that because there were experienced barristers engaged already to do this. It seemed to me that I needed somebody more experienced and more senior than those previously involved to actually conduct that review and to provide me with a report that would give me confidence that any irregularities that had arisen could be overcome and that the proceedings could be put back on track. That review was undertaken. Again the matters were referred back to the commanding officers because the dealings were regarded as being alive, and those proceedings were to start. As Captain Watson has said to you, there were also other concerns that I certainly had that, as some of the commanding officers previously had been those who had received correspondence which was regarded by Defence Force Magistrate as being a problem in some way, there were certain submissions that ought to be put to the commanding officers at those dealing stages so that the commanding officer could properly exercise his rights and duties and responsibilities, but also to look at his options in accordance with section 110 of Defence Force Discipline Act.

One of the submissions—and it was merely a submission—that was put to a commanding officer was in relation to what Captain Watson said, directing the commanding officer's mind to

really think about his role—whether he could properly administer justice in accordance with law, without any fear, favour, affection or bias, so that the trials could be properly conducted. That was what occurred I think on that occasion.

Mr PRICE—You refer to all these legal officers. Captain Marks, could you just explain your role in the organisation?

Capt. Marks—My role is as the Director of Discipline Law. I also have other roles within the Defence Legal Office. I am the head of the Navy Legal Corps and assist the commodore to administer and manage the careers of all naval legal officers. In addition to that I have duties and responsibilities with respect to the initiation of a proposal for the whole of the Defence Organisation to introduce what is called a dispute management—or alternative dispute resolution, as it is more generically known—program for the whole of the Australian Defence Organisation, service and civilian.

Mr PRICE—So wearing either hat you would get constant calls and emails, I presume, seeking the benefit of your experience: would that be the case?

Capt. Marks—Certainly the Defence Legal Office and the Directorate of Discipline Law will get telephone calls when there are problems. You would appreciate, as the Commodore has explained, most of the day to day advice on discipline and other matters is done through the command chain. You have command legal officers in the three services.

Mr PRICE—But you yourself get a lot of telephone calls and emails seeking assistance and the benefit of advice.

Capt. Marks—Yes, I do.

Mr PRICE—I guess that really adds to the workload?

Capt. Marks—It certainly does, yes.

Mr PRICE—And you are able to respond to them very promptly.

Capt. Marks—It is a matter of prioritising I suppose. I tend to delegate certain tasks. One of the difficulties I have of course with the management of my personnel and the reserve is that when there are crises like this or other crises that go on, they take a lower priority than obviously my responsibilities with respect to discipline issues.

Mr PRICE—You are familiar that in Rwanda, Commodore Smith, the medical service, both the doctors and the nurses, were very good at treating fit people with coughs, colds and broken bones, but in fact really had not had a lot of experience with trauma. That was one of the significant outcomes, and I have not caught up with the now Surgeon General, but there were proposals that they would make sure that they got accident and emergency work. What would you say about the requirements you have on those who work for, putting aside the reservists, for courtroom experience? Is this a critical factor in the skill and expertise and the ability to provide advice?

Cdre Smith—It is certainly highly desirable in the development of -all-round competence. Last year the defence pay tribunal took a new pay structure for ADF permanent lawyers and, in that, five competency levels were elaborated. Against those competency levels, at the base level is the development of advocacy skills. We have now quite a vigorous program in place to train, certainly in the first two or three levels, people from the ground up in those skills.

Mr PRICE—Could you give me a snapshot of what they are prior to that?

Cdre Smith—Prior to joining?

Mr PRICE—No, prior to that initiative?

Cdre Smith—I would say it varies, as some of the people here today have certainly had more experience than me in trials. My background is in operations, putting the force to war, which is pretty useful; there is a very deep specialisation in that. I certainly did not get the depth of advocacy training that I would think I would have preferred if I had my time again. I started off with a county court judge for several months on joining and then did some trial work, not much.

Mr PRICE—I was not actually asking you the question. I am really interested in the profile of the people that work for you. I understand there are significant complaints about the fact that defendants have highly professional people, reservists, defending them, and they are up against people with little or no trial experience: is that correct?

Cdre Smith—This is a perception I have, and I have seen it first-hand, albeit not just reservists against permanent people. I have seen reservists against other reservists and I have perceived a significant disequilibrium in the professional background of the varying counsel. The solution lies in building well, and we have established this prosecution—

Mr PRICE—I am happy to talk about that, but I am just interested if you could give me the snapshot and what impact this has on the legal office, and I suppose the fairness of the system really.

Cdre Smith—It is up to those governing the proceedings to ensure that, where there may be a more experienced counsel than another, the judge advocate or the president of the court martial ensures that there is indeed a fair contest, if you will, and that the interests of justice are served. The problem is we only have about 70 trials a year significant courts martial, and with 90 to 100 lawyers it is really not a lot to go around.

Mr PRICE—So you have initiated a pro bono system where all your lawyers get that requisite court experience to make sure there is no deficiency. Is this a longstanding practice?

Cdre Smith—No, it is not a longstanding practice; it is new.

Mr PRICE—When was that introduced?

Cdre Smith—This prosecution cell was only stood up this year and we have started to rotate people through various opportunities such as with the state directors of public prosecutions to prepare them to undertake that work.

Mr PRICE—What I do not understand is that when there is an outcome in the medical service, as I understand it, the Surgeon General develops an approach where he has his doctors and nurses trying to gain important trauma experience at accident and emergency services. That you ever develop a specialised cell, I am not going to quibble with you on that. What I do not understand is that there are avenues to ensure that your people get the requisite support skills outside of the ADF.

Cdre Smith—They are growing. They will be enhanced by the use of what I have in mind—and I have not had an opportunity to do everything, as you would appreciate, in three months. But I want to put our young lawyers certainly with reserve counsel in their chambers to give them opportunity to get on their feet. In my experience and that of other junior counsel, you need to do this almost day in day out to become good at it, and that is going to take a bit of doing.

Mr PRICE—This is where I start to have a lot of trouble. If you are developing an advice centre for practising lawyers and, the advice centre then does not have people with that experience, in fact deep experience, does this not then affect the quality of the advice? Or are you saying that you can have a completely theoretical understanding of everything with little practice and be in a position to be, as it were, the senior partner shooting out advice all over the country.

Cdre Smith—We are establishing this prosecution cell with people already who have had some background in standing on their feet. We do send them off to the state authorities. They do not go into this cell completely unprepared. They will take roles as junior counsel in the most complex matters and learn from there. Matters which they should be able to handle with some basic experience: they will take those. We have got to start somewhere and we have to give organisation—

Mr PRICE—Would not it be a good place to start with your reservists, tapping into the reservists who may or may not be very unhappy with how things are going? Have you done that?

Cdre Smith—No, that is the plan. I am looking for a mentoring system both with the reservists and also I would like to approach some of the firms with which we have affiliation on the defence panel to see whether we can obtain placements. These ideas are not new; they have sporadically been trialed over the years and some people have had opportunity to either go overseas or into civilian organisations for up to six months or a year. The continuity and the disciplined approach to building this sort of capacity has not been there, and that is what I intend to do.

Mr PRICE—I understand that you have taken an initiative in terms of the cell. Bearing in mind that this was an initiative since the first military justice report was brought down—have you made a submission about the professional—I think Captain Marks has referred to it before. Perhaps we could get some detail on that. But really what I was saying is that if you are open—

and you appear open—to the suggestion that there may be criticisms of the ADF legal service, wouldn't it be a good starting point to understand what some of those criticisms are, apart from at the highest levels in the ADF, to actually talk to the practitioners down on the ground about the service that they are being provided?

Cdre Smith—Indeed.

Mr PRICE—Have you done that?

Cdre Smith—Not yet.

Mr PRICE—Do you intend to do it?

Cdre Smith—Yes.

Mr PRICE—When will that occur and what will be the mechanism?

Cdre Smith—I have already done visits to Queensland where these matters were centred, and also to Adelaide. The week after next I intend to go to Darwin and Perth where I will meet with both permanent and reserve lawyers. I need to get around the country to see what shape we are in before I can establish—

Mr PRICE—I think that is a good initiative.

Cdre Smith—I have discussed it also in part with the Judge Advocate General.

Mr PRICE—We have yet to speak to the Judge Advocate General. If a reservist officer of long standing were critical of your Defence organisation, would that be a cause to not proceed with their promotion, or would you welcome criticism? They would not be victimised?

Cdre Smith—No, certainly not to my knowledge. People are promoted on the basis of merit and potential; that is my understanding.

Mr PRICE—Whether or not they have been somewhat constructively critical of the organisation?

Cdre Smith—We have had longstanding and vigorous criticism from within our system, but again to my knowledge people's careers have not been held back for that.

Mr PRICE—So no-one in your office would take a special trip to suggest to someone that they were not going to be promoted?

Cdre Smith—No.

CHAIR—I was wondering whether these changes that you have been talking about, Commodore Smith, are a consequence of the committee's inquiry in some way?

Cdre Smith—They are a consequence of my assessment of the state of development of the Defence Legal Service. I did have some involvement in 1998 with the subcommittee's previous report, and I suppose I had some momentum when I was invited to apply for this position as to ideas that I might put forward to constructively build the organisation.

CHAIR—So not as a direct consequence of this current inquiry.

Cdre Smith—The prosecution cell idea was derived from the previous work that Chief of Defence Force Baker put forward with the Abadee review which goes back to about 1996-1997 when there was a lot of downstream activity from that. Several initiatives were put in place over the couple of years since that first report has been taken and are in the process of being worked through, including I think some legislative measures, which are queued.

Mr PRICE—Is it fair to say that the prosecuting cell is a sort of Claytons director of military prosecutions? If that is unfair, let me ask a fairer question. The ADF was stridently against the setting up of a director of military prosecutions at the time of the last report. I think it is fair to say that this posed severe difficulties for the subcommittee, who were anxious to recommend it, and therefore we put a sunset review on it. Have you had cause to reflect now as to whether or not a director of military prosecutions may be a sensible development, and is that in the pot of your looking at the total organisation?

Cdre Smith—The position taken with respect to the director of military prosecutions was set by the Chief of the Defence Force of the day and the service chiefs, and any position to vary that would come from them. Some of the elements involved in the prosecution cell I would not describe as a Claytons version of that. They are directed towards building competence and they still do not take away from the convening authority the key decision to refer matters. Developments overseas interest us in making sure we bring to the chiefs the best possible advice on a range of options, and that is why we should always be looking at other models. It may well be that the decision is not taken to vary the position, but there was a sunset clause built into the previous report, I think at three years, and we understand that that is still a matter of interest to the subcommittee.

Mr PRICE—Very much so.

Senator BOURNE—You mentioned, Commodore, right at the beginning that Captain Marks is doing a comparative study of military justice in other countries. When you come back from that and have conclusions and recommendations I am sure the subcommittee would benefit from hearing what those are. So if you think that is possible, we would appreciate those.

Capt. Marks—Certainly.

CHAIR—You mentioned I think a number of trials but I was wondering how many cases go to the Judge Advocate General.

Capt. Marks—The role of the Judge Advocate General in the review process following a court martial really only comes into it when there is a petition or a call for a further review from a higher authority. So in the normal case when there is an automatic review by a reviewing authority separate to the convening authority, you would get a report from a very experienced,

what we call 154 reporting officer, and that will then go with the other documents to the reviewing officer. Persons who are convicted have a right to appeal to the Defence Force Discipline Appeal Tribunal, but below that they can petition a service chief for a further review. If it goes to the Chief of the Defence Force as part of that review, it would be the Judge Advocate General who would do that one. Otherwise it would be one of the deputy judge advocates general who would normally have the matter referred to them for the advice to begin with.

CHAIR—How often would that occur?

Capt. Marks—It is hard to say, but deputy judge advocate generals would probably do that for about 10 per cent of those matters. The JAG himself would rarely give advice because it is rarely called for.

Mr PRICE—In the civilian law profession I do not think it is unusual for people to move outside the law. As I understand it—and I am certainly not an expert—people practise as barristers for a lifetime and acquire skills but I am not sure that people can move out for 10 years and then come back in without some great difficulties. But the structure of the ADF Legal Service is different, is it not? Do people practise for a lifetime as ADF legal officers?

Cdre Smith—The opportunity to certainly do the things that I have done was built into the naval legal service about 25 years ago. To some extent the recent pay case which was taken for lawyers has sanctioned the ongoing development of those opportunities but for a period of only three years. In the person's career there will be opportunity to take what you might call 'out of category postings' for up to three years. The Army, which has a specific army legal corps, has generally never provided people with that opportunity. They have remained exclusively as legal officers. The Air Force was somewhere in the middle but in more recent years has provided people the opportunity to get command leadership and management experience beyond the legal service. Someone needs to learn how to run an organisation and that is not necessarily the skill of a barrister or a solicitor.

Mr PRICE—They are usually very poor at that, if I might say so. I hope that is not defamatory. I am talking about the civilian barristers.

CHAIR—Commodore Smith, could you just give us a thumbnail sketch of what in your career was spent inside the law and outside the law. Perhaps Captain Marks could do the same?

Cdre Smith—I joined in 1976. I was initially put with a judge of the County Court, then was brought to Canberra where I spent five years initially doing discipline law, but not for long, and then civil and administrative law. Then I moved into the international law field. I remained essentially in that international law field for about 16 years. That included time deployed at sea on an aircraft carrier in Asia and other opportunities with allies. In 1981 to 1983 I was sent to the United Kingdom where I did my doctorate in law and operations. In about 1991 or 1992 at the end of the Gulf War, I spent a period working for two vice-chiefs of the Defence Force, running their office. I then did a personnel review of the Defence Force—the Glenn review—with which I am sure the subcommittee is familiar. I then returned and served two chiefs of Navy as the chief staff officer. I then did the military justice inquiry defence management of that in 1998. I then took command of the naval college as commandant, commanding officer of HMAS *Creswell* and Navy's training authority for leadership management and personnel

Creswell and Navy's training authority for leadership management and personnel development. I had a nationwide responsibility for all initial training and leadership training in the Navy.

It was at that point that I assumed my present appointment. I should say that as commanding officer of HMAS *Creswell*, I was also a special magistrate and coroner in the Jervis Bay Territory and I used to sit on community justice matters.

Capt. Marks—In relation to my career I have provided you with a CV. Briefly, I was admitted as a barrister and solicitor in Victoria before I joined and had worked in practice for a period. Then I joined and went to HMAS *Cerebus* as the base legal officer for a couple of years. I then went to Canberra and was the desk officer on the criminal law desk, as it was called in those days. From there I went to be the fleet legal officer providing advice to the maritime commander for a period of years. From there I was selected to be the first naval prosecutor and was sent off to spend a period of nearly a year with the New South Wales police prosecution service and the Australian Government Solicitor's office. Then I came back and was the naval prosecutor for two years. During that time I prosecuted a number of trials and I subsequently have also defended. I then went on from there to the command legal officer job to the naval support commander and from there came back as a deputy director of naval legal services. Somewhere in that time, I cannot remember quite where, but I went as the command personnel services officer in Victoria, which was responsible for all personnel and family support for the whole of the Navy—housing, personnel family support and deaths and a range of other things. From the deputy director of naval legal services I did a staff course. I then went to the US Army JAG school for 12 months, predominantly focusing on military justice and criminal law issues. I obtained a Masters of Military Law there.

I came back to the country and went as the director of naval personnel services providing all personnel family support policy across Australia, running the personnel services organisations around Australia. It was the time of the HMAS *Swan* sexual harassment incident. At that time I had the responsibility from a personnel side of it to put in place all the change management and cultural change issues with respect to unacceptable behaviour, sexual harassment and that sort of issue. From there I went over as the director of military and administrative law in a tri-service position. I then went as the director of discipline law at the military law centre and from there have come in as the head of corps and also the director of discipline law in the Defence Legal Office.

Mr PRICE—Is it possible if I were to rise outside of the legal profession, say within the Army, which would be very unlikely, to become a captain or a major –

Cdre Smith—It is a possibility, given what I understand.

Mr PRICE—I would need a lot of retraining I have to tell you. But if I then had completed a law course, would it be possible for me to be employed as a lawyer at my substantive rank? Sorry, I guess your recent case would stop that. So, historically, would that have been possible for me to have had a service in the Army outside of the law—I am just picking on Army—passed a law degree and then transferred in to the legal section on my substantive rank?

Cdre Smith—Yes, indeed. One of my predecessors was Brigadier Bill Rolfe, who was an infantry soldier who subsequently transferred to the legal corps and built a very successful

career. There are numerous other officers who have done that. My predecessor, Commodore Earley, was a supply officer and subsequently did law in his own time and transferred across with no detriment or otherwise.

Mr PRICE—I do not mean to put this offensively, but the rank really means nothing in your legal branch in terms of legal experience?

Cdre Smith—For the permanent officers, certainly progression in rank will equate to experience and with the way our pay structure is geared that is the case. In the case of the reserves you can have a very experienced officer who may be relatively junior.

Mr PRICE—No, I understand that. But in the case that you mentioned, here is someone who has proven himself, as I understand it, a very good officer in the Army, qualifies in law and moves across with his rank—and without deprecating him—has merely passed a university exam and qualified as a graduate. He has gone from an undergraduate to a graduate.

Cdre Smith—They are not demoted because they have got a law degree and set back to give a sense that they need years to build their experience.

Mr PRICE—So you are saying that when they transfer, although they may be of higher rank they are then assigned very low-level duties because they are just a fresh graduate?

Cdre Smith—No, I did not say that.

Mr PRICE—I am trying to understand, I apologise.

Wing Cmdr Cronan—In Air Force certainly—and each of the services until recently have been different—I am aware of a number of cases. In more recent years we have had one case where we had a wing commander, for example, who was an electrical engineer. He went out and obtained a law degree and applied to cross over directly to the legal service with his rank of wing commander. At that time when we were a single service legal service, our director at the time said, ‘It would not be appropriate for you to come across to legal service with your wing commander rank because there would be an expectation that as a wing commander legal officer that you would have been in the system for many years, have a certain level of experience and be able to provide a high level of legal advice.’ So that member was perhaps given the option of coming in at a lower rank.

Mr PRICE—That is in Air Force?

Wing Cmdr Cronan—Yes, but they chose not to.

Mr PRICE—But in Army that was not the case?

Wing Cmdr Cronan—I am not aware of the Army case. But what I can say certainly in the Air Force there are examples where that transfer has not been approved.

Mr PRICE—Thank you for that.

Cdre Smith—Not to my knowledge. We can look at the history if that would help.

Mr PRICE—That would be helpful.

Cdre Smith—For the last 20 years?

Mr PRICE—I do not want it to be a major exercise; I am just very curious. Clearly there have been cases where someone has earned their rank in other areas of service quite meritoriously but have transferred across into the legal office with that rank after having graduated?

Cdre Smith—Yes, that is my best knowledge.

CHAIR—Thank you very much for coming along today. If there are any other matters that we might need some more information on I am sure you would be happy to accept the secretary writing to you on that.

[11.15 a.m.]

BURCHETT, Mr James Charles Sholto QC, Investigating Officer, Military Justice Audit Team, Department of Defence

EARLEY, Commodore Geoffrey John, Inquiry Assistant, Military Justice Audit Team, Department of Defence

CHAIR—On behalf of the committee, I welcome Mr Burchett and Commodore Earley. Do you have any comments to make on the capacity in which you appear?

Mr Burchett—I was formerly a judge of the Federal Court and president of the Copyright Tribunal until October last year. I am now an investigator appointed by the Chief of the Defence Force.

Cdre Earley—I am in the Royal Australian Naval Reserve. I am an inquiry assistant appointed by the Chief of the Defence Force under the Defence Inquiry Regulations as assistant to Mr Burchett.

CHAIR—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 and 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 time wish to give evidence in private you may ask to do so and the subcommittee will give consideration to your request. I remind you both and the members of the subcommittee not to enter into public discussion on individuals who are or may be subject to legal proceedings. If it becomes necessary to discuss any specific cases subject to investigation or legal proceedings or to discuss specific allegations we will adjourn and take the evidence in camera. The subcommittee certainly appreciates the time you have set aside to discuss the inquiry topic. Would you like to make a short opening statement before we proceed to questions?

Mr Burchett—Thank you, Mr Chairman. You will recall that in October last year Admiral Barrie advised the subcommittee of his intention to undertake an audit of the military justice system and thereafter to create the position of Inspector General of the Australian Defence Force. Pursuant to the first of these initiatives, on 15 December 2000 I was appointed by the CDF to be an investigating officer under the defence inquiry regulations. To assist me in this task, the CDF has also appointed five experienced senior officers from across the three services to be inquiry assistants. The audit team is supported by a small staff and we have been provided with very satisfactory office accommodation in Sydney where we are based.

The terms of reference for the audit cover two principal areas of inquiry. The first goes to whether or not there exists any evidence of a culture of systemic avoidance of due disciplinary processes. The second is concerned with whether or not there are any irregularities in the administration of military justice within the ADF which may require corrective action. I am also directed under the terms of reference to review the management of allegations arising in

connection with 3RAR where it appears to me there is sufficient reason to do so and to make recommendations as to the possible role and function of the projected Inspector General of the ADF.

The audit team formally commenced operations on 8 January 2001, although a free call 1800 number had been in operation since 15 December 2000 for anyone wishing to make contact with the inquiry. It is of course very important that the existence and activities of the audit team and the existence of the opportunity to make submissions to it be made known as widely as possible. To this end, notices calling for submissions were placed in all capital city and major provincial newspapers. Dissemination to the ADF has been made by general message, notices and articles in the three service newspapers and by means of the discipline stand-down period at which videos featuring the CDF and service chiefs were shown and members were addressed by their commanders. In addition, a significant level of media interest has further served to draw attention to the inquiry.

To date there have been in excess of 375 calls to the 1800 number and we have received about 150 submissions. I should not wish these figures to be misinterpreted. It should not, for example, be assumed that either the calls to the 1800 number or the actual submissions necessarily represent new allegations or, indeed, allegations at all. This is simply because the raw figures include some already known cases, some matters that are clearly outside the terms of reference and other submissions that are in the nature of comments and suggestions.

The cut-off date for submissions is 16 March, although we would be prepared to consider late submissions, provided they can be processed in time to be considered for the report. It would not be appropriate for me to make any comment on the import of any submission before all submissions have been received and fully examined. It is as yet too early to draw conclusions and it would be unhelpful to the process and unfair to those involved to engage in speculation as to what findings may be made in due course.

As well as inviting submissions, the audit team has commenced a series of visits to major bases and units around the country to meet with representative groups of various ranks. These visits are being conducted with a view to seeking more general comments and suggestions on the military justice system and the operation of the disciplinary process in particular, and with a view to my understanding fully how the military justice system works in practice and how it is perceived by all ranks throughout the Australian Defence Force. Visits have so far been made to units and commands in the Wagga Wagga, Townsville, Brisbane, Cairns and Sydney areas. A great deal of very useful and constructive feedback has been received.

The task I have been given is clearly a big one carrying considerable responsibility in relation to a very important national institution and, while I am very satisfied with the resources that have been made available to me, it is possible that the due date of 30 April 2001 for submission of my report may need to be extended. The Chief of the Defence Force has indicated his agreement to an extension should this prove necessary. He considers, as I do, that it is vital I should get it right rather than rush to conclusions. Is there anything further you wish to ask me?

CHAIR—I note you said it is a bit too early to come to conclusions, but you have had 150 submissions and 375 calls and you are accepting those for another couple of weeks. Nonetheless, at this stage are you able to give some indication of any patterns that are coming

through in those calls, whether they indicate something that you did not expect, particularly in relation to 3RAR? Can you just elaborate a bit on what you have got so far?

Mr Burchett—We have received a variety of contacts, to use the more neutral term, ranging from complaints of various kinds, some of which appear to have a very personal flavour about them. I know this committee has received similar submissions because many of the submissions of that kind that we have received expressly say that we are the next port of call, as it were, after a failure to achieve what was desired at various other ports of call, including this committee. So we have got that kind of thing.

We have had submissions that are in the nature of suggestions—which is a different thing altogether from a complaint about what has happened in a matter—for what might be thought to be an improvement. We have had others which do raise suggestions of specific complaints by a particular individual, and when I said it is too early to draw conclusions, we simply have not had the opportunity, for instance, to investigate those fully. Indeed, in many, many cases we would wish to do so against the background of a broader investigation of practice and attitudes within the three services. That is what has taken up a very large part of our time thus far. We have visited a number of bases and establishments and we are continuing that process and will be continuing that process for some time, and it is not possible to do two things at once. Furthermore, I think it is not desirable to attempt to reach conclusions on a particular submission of a complaint kind in particular as a discrete matter as if it arose with no context—because that is very unlikely. It is better that we examine the context first and form some idea of that. Does that answer what you had in mind?

CHAIR—Yes and no. It sort of answers it, but I am going to continue probing. When I say any pattern, I did mention 3RAR. Is there anything that is coming forward that would indicate there is something special there?

Mr Burchett—3RAR is a case where peculiarly one needs to get all the information in and we have the problem that there is still a number of prosecutions outstanding. It would obviously be a very problematical matter for us to examine in detail an individual case which is subject to prosecution while it is subject to prosecution. There would be the clearest issues of natural justice and other problems arising in connection with that. If on the other hand we put to one side such cases which, on the face of it, would appear to be of major importance for the drawing of any conclusions about 3RAR, then we would be attempting to evaluate the rest, minus a particularly important tool. I have preferred to take the view that 3RAR ought to be towards the end of the process for that reason—that by then I would hope that some or all of these prosecutions will be concluded. By then at any rate I know that I will have a better understanding of the setting within the whole of, first of all the Army and then the other services.

CHAIR—I appreciate the points you are making, but do you see anything there that has made you feel there is something different there?

Mr Burchett—Well, the allegations are different. The allegations are very different from other allegations, speaking generally, that we have received. We have received numerous allegations which suggest that particular people are unhappy about particular things, but they are more in the nature of individual issues. Plainly enough, there are allegations—one only has

to read the police report—in respect of 3RAR which, if they turn out to be correct, will suggest something which falls precisely within a term of reference that we have, which is concerned with whether there is systemic avoidance of disciplinary processes. If those allegations are correct, one might infer that there was, at least within a particular company within 3RAR.

Senator FERGUSON—I am concerned about the process that you talked about where you say that you are receiving submissions until 16 March and yet you are supposed to report by 30 April and you think you may need an extension. With 150 written submissions and 375 phone calls, is it your intention to conduct interviews with people who have made submissions? You do not have to have a public hearing in many of the ways that we do when we are looking at these things. But will you be conducting private interviews?

Mr Burchett—In those cases which appear to fall squarely within the terms of reference or to require it, we already have commenced that process.

Senator FERGUSON—So you have commenced interviews already?

Mr Burchett—We have had private interviews. We are a bit limited in time at the moment because we have also been going to Townsville. We cannot interview someone in Sydney while we are in Townsville, but we have interviewed people in Townsville. We are, as it were, killing two birds with one stone when we go to a base in a place like Townsville. The primary object of going there in one sense is to speak to groups of privates, junior NCOs, senior NCOs, officers, each in separate groups, that enable us to get the feeling within those groups about the operation of the military justice system and to get ideas from them. At the same time, there are other ways of getting that kind of information. For instance, it occurred to us that chaplains may be a particularly good window into what goes on in the daily life in the particular service, so chaplains are interviewed. If there are individual people at the particular base we visit who have put in a submission or have been referred to in a submission and we have the opportunity while we are there to interview, then that also can be done, and has been done.

Senator FERGUSON—If you are already conducting interviews with people, do you expect that by the time you get to 16 March that you will have conducted the bulk of the interviews that are required, or will there still be a lot needed to be done after 16 March?

Mr Burchett—I suspect there will be a lot that will still need to be done, which is why I indicated I think that it is possible, and indeed I have already raised it with the Chief of the Defence Force, that we might need more time. Of course, when he fixed the time he did not know how many submissions we were going to get.

Senator FERGUSON—I do understand that. It would appear to me that you are probably going to have to do more after 16 March, and then of course if allegations are made you have to give people a chance to respond to the allegations, which will require more interviews. It would seem as though 30 April is out of the question and in fact it possibly could be looking more like 31 July or something like that.

Mr Burchett—There is just one issue in what you put to me. I do not see myself undertaking a series of whatever the number of interviews are—it is not 150 of course, because as I said many of the submissions are in fact suggestions rather than the kind of thing that would lead to

an interview; and I have not counted them up. It does not follow that in all of those one would need to call upon someone to respond, because it depends on the nature of the allegation one is concerned with. I do not see myself as being appointed to conduct X number of individual inquiries into X number of individual propositions that someone has chosen to put forward; I see myself as having to answer the terms of reference. What people put forward may be extremely valuable material going towards drawing conclusions on the general questions that have been raised. A primary issue is whether in the services there are indications of systemic avoidance of discipline.

Senator FERGUSON—Finally, are all of your interviews confidential interviews?

Mr Burchett—Well, yes, the process is confidential. Under the defence regulations, the minister has the power to make it public but unless he exercises that power, it is a private process. It is not like a public hearing.

CHAIR—When individuals bring a grievance to you, you say you are not going to be in a position to follow individual grievances. I appreciate that point. How then would that person progress their grievance after that?

Mr Burchett—I have been given power to refer any matter that I think calls for further investigation that may involve a wrong, or some other reason for having an inquiry, that may involve a breach of the law. I have power to refer such a matter to the police. There are also attached to the inquiry some military police, so I have a choice really there. I can either get them to make at least preliminary inquiries and see where that leads or I can, from the moment I reach such a view, refer that particular matter out to the normal processes. If I do that I have power to require that reports be made back to me so that I can monitor what happens if I do choose that avenue. I have done that in some cases already.

Mr PRICE—Are you aware that whilst we have concentrated on the so-called alleged instances in 3RAR there are at least two people who have come forward who put those type of instances earlier than 1996, whom we have not examined?

Mr Burchett—Instances before 1996, you say?

Mr PRICE—Yes. There have been quite a number of other witnesses who have come forward from outside 3RAR. I understand it is our intention to give those people who have not already done so an opportunity to be part of your audit. If that were the case, would it be possible for the subcommittee to be briefed by you on the conclusions you form of those witnesses who specifically came forward to this inquiry from outside 3RAR.

Mr Burchett—I have been given terms of reference and a specific task. They are not the same, as I understand it, as the terms under which you would be operating. There may be an overlap but they are not the same. I have certainly not been given a general commission to make inquiries on behalf of this committee.

CHAIR—The first point you raised: if any individuals who have come to this committee have not already made submissions to you, are you happy to accept those?

Mr Burchett—That is a different thing, yes. If individuals have brought matters before this committee—as I have said, there is an overlap although the terms are different—and if their complaint falls within our terms of reference and they wish to have their matter looked at by my investigation, of course, I am delighted to have the additional material. As I think I indicated before, in a number of cases that has already happened. You may find if you go to particular individuals you have in mind and ask them, they may say, ‘I’ve already put something in to the military justice investigation.’

Mr PRICE—For those that have not already volunteered and from whom the committee is able to secure agreement to have the issues referred to you, would you be prepared to report back informally to the committee just about those?

Mr Burchett—I do not really understand what you mean by the question of reporting back. I am concerned about the possible breadth of meaning that might be attributed to it. I have been appointed to do a quite specific task. I am happy to answer a request to give evidence in this committee and, if there were another request that you have in mind, well of course I would be in the same position. I do not see myself as having a task of reporting to this committee. I have a task of reporting to the Chief of the Defence Force who, because of the terms of the defence inquiry regulations, would, as I understand it, be referring that to the Minister for Defence. Doubtless you would get it in due course.

Mr PRICE—Yes. If I had had my druthers, I feel that the committee had a responsibility to get everyone who approached it an opportunity to have their say in front of the committee. And if I use the term ‘report’, I have overstated that. I accept your responsibilities both to the CDF and the minister. In no way do I wish to compromise that. But at the end of the process and after you have made all your conclusions and submitted your report, I think it would be helpful to the committee if it were possible for you to give us an overview of those that were specific or referred. I want to make it quite clear this has never been my choice.

Mr Burchett—There is only one thing I should add to what I have already said: one would have to look at the legal question. I did not come here in the mood of looking to see what powers you had to require things. I am conscious that I am subject to defence inquiry regulations and can certainly say that in general terms I have a duty to keep private the matters that come before me.

Mr PRICE—Sure. Clearly the CDF deserves to be complimented on your appointment, and particularly without reflecting on any ADF personnel, you as an outsider heading up the team. Can I say in this year of sort of transparency and accountability, did you form a view about a need to have any other people from outside the ADF as part of your team?

Mr Burchett—No. What I saw need of was assistance that had expertise in the services, and that I have been provided at a high level and of a high quality. You would appreciate other people may have other views. As far as I am concerned, after fifteen years as a Federal Court judge and some time on the Copyright Tribunal, I have been used to doing inquiries on my own. I did not feel that my need was other than need of the necessary assistance to cope with the volume of work. I received office assistance and the necessary expert assistance on the peculiarities of service problems. Certainly I have needed to be educated in those but then I am

used to that. I was the principal patent judge in Sydney and I am used to being educated on things that I would not know a thing about—until I was educated.

Mr PRICE—Are there people on your team who are expert at dealing with or interviewing people involved in sexual harassment or rape?

Mr Burchett—I am not sure I know what you mean by ‘expert’ in that.

Mr PRICE—I understand all the sensitivities about interviewing people who are complaining of sexual harassment.

Mr Burchett—Let me answer it this way: I have not had any complaints thus far that have called for any expertise that has not been available to me in the team. I think that is the fair answer. It may be that something will crop up and if and when it does, I will look to what has to be done about it.

Mr PRICE—Another area, that we are not going to cover, in 3RAR but it seems to be a problem, is the use of psych reports to exit people. That is people who seem to have made complaints. At the very end of the process there seems to be a psych report which is the final instrument of their exiting the service.

Mr Burchett—Are you talking about cases where people have been retired on medical grounds? And you say the grounds are in some cases psychiatric?

Mr PRICE—I am talking about people who have been whistleblowers or who have made complaints of harassment of different sorts. There seems to be a pattern of recourse to psych reports as the final instrument or clincher in them being exited from the service.

Mr Burchett—I am sorry, I am not aware of that. I am aware of what I just put back to you. I am aware of cases where people have been retired on medical grounds. There may or may not have been two opinions in some such cases but I am not aware of any that would fit the description you have put to me as yet. There may be. There may even be amongst what is being submitted to me because I have not read every one of the 150 submissions yet. Members of my team have, of course. I mean no one member has read them all but members have read every one and I have read a number.

Mr PRICE—There have been complaints that officers have been dismissed from the service rather than facing appropriate disciplinary charges. Have you had any of those?

Mr Burchett—That is certainly an issue that I am looking at, whether that is so or not. That is one of the issues that my team is raising at every single base we visit. We have been raising it so far and we are trying to get a picture on that. You would appreciate you do not always get the same answer at different places and we are trying to assess that. That is certainly an issue that I have had in mind from the beginning as requiring examination, irrespective of particular complaints. I had it in mind as something on which there might be issues.

Mr PRICE—Has the Brewer report been included?

Mr Burchett—Yes, I have read that.

Mr PRICE—Are you also looking at issues of how victims may be compensated, whether there is a common—

Mr Burchett—No, I do not think I am concerned with that. Am I concerned with that?

Cdre Earley—No, not so far.

Mr Burchett—I am just checking in case I have misreclected something but I think that is outside my terms of reference.

Mr PRICE—It is not outside ours.

CHAIR—If there are no further questions, can I thank both of you very much indeed for coming before the committee. If there are any matters we might seek further information on, I am sure you would be happy to respond to us.

Mr Burchett—Yes.

CHAIR—As there are no further questions, I thank everyone who has come before the subcommittee today, the Hansard staff and also the members of the subcommittee.

Resolved (on motion by **Senator Ferguson**, seconded by **Senator Bourne**):

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

Subcommittee adjourned at 11.50 a.m.