Chapter 3

Issues

The Australian Defence Force (ADF) and the three Services

3.1 The Acting Chief of the Defence Force, Lieutenant-General Ken Gillespie, gave his strong support to the bill commenting that:

> The bill as it is framed, provides for the recommendations of the Senate Committee, whilst still enabling the Australian Defence Force to maintain discipline effectively and fairly, thereby facilitating the operational effectiveness of the Australian Defence Force.[1]

3.2 The Acting Chief of Navy, Rear Admiral Russell Crane, indicated that the Royal Australian Navy fully supported the bill as it provided a balance between the Navy's operational requirements and the legal rights of its service personnel. His submission stated:

> I am confident that the provisions of the bill meet Navy's operational requirements and will support the Navy in its ability to operate effectively and safely. I am equally confident that the changes incorporate the safeguards that are necessary to protect the right of individual Navy members.[2]

3.3 Major-General John Cantwell, Acting Chief of Army, believed that the bill would promote increased confidence in the summary trial system and the wider military justice system. Like Rear Admiral Russell Crane, Major-General Cantwell believed that the bill's provisions found the appropriate balance between ensuring that the Army could meet the challenges of the future, while also ensuring that the rights of individual Army personnel were protected.[3]

3.4 Finally, the Royal Australian Air Force (RAAF) endorsed the bill. Acting Chief of Air Force, Air Vice-Marshal John Blackburn, expressed his support for the initiatives in the draft legislation, indicating that the RAAF had been involved in the development of policy proposals given effect to by the bill.[4] Air Vice-Marshal John Blackburn believed that the bill significantly contributed to the ADF's military justice system being fair, transparent and accountable.[5]

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1 Acting Chief of the Defence Force (A/CDF) Lieutenant-General Ken Gillespie, *Submission 4*, p. 2.

2 Acting Chief of Navy (A/CN) Rear Admiral Russell Crane, *Submission 6*, p. 2.

3 Acting Chief of Army (A/CA), Major-General John Cantwell, *Submission 3*, p. 2.

4 Acting Chief of Air Force (A/CAF), Air Vice-Marshal John Blackburn, *Submission 5*, p. 1.

5 A/CAF, *Submission 5*, p. 2.

The Judge Advocate, the Inspector General-ADF and the Director of Military Prosecutions

3.5 The Acting Judge Advocate General (JAG), Brigadier Tracey indicated that the issues that were of concern to him have been accommodated in the bill's provisions. Accordingly, he had no issues to raise, though he suggested that the legislation may need to be 'fine tuned' after its implementation.[6]

3.6 The Inspector General-ADF, Geoff Earley, referred to the Discipline Officer scheme and welcomed the proposal to extend the scheme to junior officer ranks. He noted, however, that the intention was for the scheme to apply to non-commissioned officers. He explained that additional work was required to establish appropriate punishment limits for these ranks which meant that the application of this scheme to non-commissioned officers would 'need to be effected at the first opportunity for subsequent legislative amendment'.[7] Although he believed that there was nothing in the bill that ought to impede its passage to enactment, he agreed with the JAG's observation saying that:

> Inevitably there are likely to be some aspects that will need to be revisited in the light of experience gained through the application of the new system. It is not always possible to foresee what those issues may be during the process of drafting legislation…[8]

3.7 The Director of Military Prosecutions, Brigadier Lynette McDade, also noted the omission of non-commission officers and senior non-commission officers from minor discipline infringements. She regarded this as 'unfortunate' but informed the committee that she had been advised that the omission had been unavoidable.[9] Otherwise, she was generally supportive of the bill, and recommended its passing without delay. Brigadier McDade also provided in-principle support to the powers of the Provost Marshal-ADF, but believed some time would be required to provide suitable feedback on the section's operation.[10]

The Law Council of Australia

3.8 The Law Council of Australia expressed concern over the appeal provisions of the bill. It argued that two distinct lines of authority had developed with respect to appeal provisions in criminal proceedings which require consideration. They were:

> 1) that the prosecution should have no rights of appeal which can affect any ruling in favour of the accused at any stage: the most that can be done is that there be a criminal appeal reference which will clarify an issue of law (for future trials in different matters) but will

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6 Acting ADF Judge Advocate General, Brigadier R.R.S Tracey, *Submission 2*, p. 1.

7 Inspector General-ADF, Geoff Earley, *Submission 1*, p. 3.

8 Inspector General-ADF, Geoff Earley, *Submission 1*, pp. 3–4.

9 Director of Military Prosecutions (DMP), Brigadier Lynette McDade, *Submission 7*, p. 1.

10 DMP, *Submission 7*, p. 2.

not interfere with a final verdict in the case in which the reference is brought….

2) that the prosecution be permitted to appeal interlocutory points and, indeed, to reverse a verdict of not guilty. The policy involved recognises that a jury verdict is sacrosanct, but that, as an element of the rule of law, judicial rulings during a trial should be subject to appropriate appellate review, albeit sometimes imposing a leave function to avoid undue disruption….[11]

3.9 The Council did not favour any amendment to the bill that would allow any overturning of a verdict of 'not guilty'. With regard to the second line of authority, the Council proposed the introduction of provisions similar to s.5F of the New South Wales *Criminal Appeal Act,* which have been the subject of much appellate consideration and have a well accepted meaning, would be more appropriate.[12] The suggested provisions are:

(2) The Attorney General or the Director of Public Prosecutions [the bill would refer to the Director of Military Prosecutions ('DMP')] may appeal to the Court of Criminal Appeal [The Defence Force Discipline Appeals Tribunal ('DFDAT')] against an interlocutory judgment or order given or made in proceedings to which this section applies [any Australian Military Court proceeding].

(3) Any other party to proceedings to which this section applies may appeal to the Court of Criminal Appeal [DFDAT] against an interlocutory judgment or order given or made in the proceedings:

a) if the Court of Criminal Appeal [DFADT] gives leave to appeal, or;

b) if the judge or magistrate of the court of trial [the military Judge] certifies that the judgment or order is a proper one for determination on appeal.

(3A) The Attorney General or the Director of Public Prosecutions [DMP] may appeal to the Court of Criminal Appeal [DFDAT] against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case.[13]

Hearing testimony

3.10 On Wednesday 5 September 2007, a public hearing on the bill was held in Parliament House, Canberra. Mr Paul Willee QC appeared in his capacity as the Chairman of the Military Justice Working Group in the Law Council of Australia, and also in a private capacity.

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11 Law Council of Australia (LCA), *Submission 8*, p. 1.

12 LCA, *Submission 8*, p. 3.

13 LCA, *Submission 8*, p. 3.

The right of the Director of Military Prosecutions to appeal to the Defence Force Discipline Appeals Tribunal against an interlocutory judgment

3.11 As a representative of the Law Council, Mr Willee reiterated the Council's concern about the omission of the right of the Director of Military Prosecutions to appeal to the Defence Force Discipline Appeals Tribunal against an interlocutory judgment or order. He reiterated the Council's proposal that the s.5F provisions of the NSW *Criminal Appeal Act,* which he indicated had 'stood the test of time', should be included in the bill. He advised the committee:

> When a ruling is made which in itself will be so fundamental to the way in which the proceedings will or will not go on, there ought to be a provision similar to the provision that we have extracted from the New South Wales act. That provision ought to enable those issues to be dealt with in appropriate cases to prevent unfairness, a miscarriage of justice and, perhaps equally important, a colossal waste of time by people trying to go through the same process using the prerogative writs.[14]

3.12 Mr Willee was of the view that there was 'nothing complex about his proposal': that it was 'a simple thing'.[15]

3.13 Defence noted that the Law Council had correctly observed that two distinct lines of authority had developed with respect to appeal provisions in criminal proceedings relating to matters arising while a trial is underway requiring the judge to make a ruling on a particular issue. In discussing the first approach the Law Council observed that, 'it reflects the position that there should be no unnecessary interference with the course of a criminal proceeding and that the defence is ultimately protected by a right of appeal'.[16] Defence noted that the basis of the provision that Defence is introducing in the bill will enable the Director of Military Prosecutions (DMP) to refer a question of law that arises in a trial before the Australian Military Court (AMC) to the Defence Force Discipline Appeal Tribunal at the conclusion of that trial.[17]

3.14 Defence agreed with the Law Council's view that it does not favour any amendment to the bill that would allow any overturning of a verdict of not guilty. Defence observed that there is no such provision in the bill, and that the safeguards for the accused remain the overriding consideration.[18]

3.15 With regard to the second line of authority, Defence did not discount for future consideration the Law Council's proposal. Rear Admiral Bonser advised the committee that the appeal of matters raised in interlocutory points by the prosecution is a complex issue that is subject to two differing points of view. Defence believed that such a proposal required 'considerable deliberation and policy development

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14 *Committee Hansard*, 5 September 2007, p. 1.

15 *Committee Hansard*, 5 September 2007, pp. 1 and 5.

16 Opening Statement, Rear Admiral Mark Bonser, *Committee Hansard*, 5 September 2007, p. 13.

17 Opening Statement, Rear Admiral Mark Bonser, *Committee Hansard*, 5 September 2007, p. 13.

18 Opening Statement, Rear Admiral Mark Bonser, *Committee Hansard*, 5 September 2007, p. 13.

before being considered for inclusion in the Defence Force Discipline Act (DFDA)' and therefore could be considered in the context of an amendment to the bill.[19] Rear Admiral Bonser told the committee that 'Defence is clearly keen to consider it as a possible provision in legislation to be brought forward in future years'.[20]

3.16 The Director of Military Prosecutions also commented on the Law Council's proposal. She indicated that members of her unit and those involved with Defence legal, have 'struggled long and hard for some time in relation to how the DMP should have an appeal to resolve matters, whether they should be done on interlocutory basis or indeed after the event'.[21] She outlined some of the matters that needed to be considered including the Defence Force Tribunal being ad hoc, questions involving whether a duty judge would be available, and how quickly matters could be heard. She supported Rear Admiral Bonser's observation that: 'there is more debate to be had and more consultation to be had as to whether or not it would ultimately be beneficial to our proceedings to have the capacity to take matters at an interlocutory stage'.[22] She added:

> …we were content at this point in time, given that our court is yet to stand up and given also that we do not have a standing appeals tribunal that still remains ad hoc. The concern was about delays and the fragmentation…It is just a question of time. Ultimately, down the track, it may well be that those amendments will be sought.[23]

Committee view

3.17 The committee notes the conflicting views of the Law Council on the one hand and Defence and the Director of Military Prosecutions on the other. Mr Willee was clearly of the view that amending the bill to allow the Director of Military Prosecutions to seek interlocutory relief would not be complex. Defence noted, however, that a number of matters need 'considerable deliberation'. Even so, Defence indicated that it was keen to consider a possible provision in legislation at a later date.[24]

3.18 The committee urges the government and Defence to give serious consideration to the proposal by the Law Council. As part of its continuing monitoring role on reforms to Australia's military justice system, the committee will continue to seek advice from Defence on the state of its deliberations on this matter. It will monitor closely progress toward introducing legislation that would allow the Director of Military Prosecutions to appeal to the Defence Force Discipline Appeals

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19 *Committee Hansard*, 5 September 2007, p. 13.

20 *Committee Hansard*, 5 September 2007, p. 13.

21 *Committee Hansard*, 5 September 2007, p. 14.

22 *Committee Hansard*, 5 September 2007, p. 14.

23 *Committee Hansard*, 5 September 2007, p. 15.

24 *Committee Hansard*, 5 September 2007, p. 13.

Tribunal against an interlocutory judgment or order given or made in any Australian Military Court proceeding.

Rules of evidence

3.19 In his private capacity, Mr Willee, who at various stages in his legal career has been a judge advocate, a Defence Force Magistrate and head of the military bar, was critical of the bill.[25] He expressed particular concern at Section 146A regarding evidence in proceedings before a summary authority. This section requires the summary authority in proceedings before a summary authority, to comply with the Summary Authority Rules. The statutorily independent Chief Military Judge makes these rules which are to be legislative instruments and subject to Parliamentary scrutiny.[26] The section stipulates that the summary authority, consistent with those rules:

(i) must act with as little legal formality or legal technicality as possible, while ensuring fairness; and

(ii) is, subject to this Act, not bound by the rules of evidence, whether statutory or common law; and

(iii) may admit any documents or call any witnesses that the summary authority considers to be of assistance and relevance; and

(iv) may give such weight as the summary authority considers appropriate to any evidence admitted under subparagraph (iii), having regard to the importance of the evidence in the proceedings and its probative value.

3.20 Mr Willee felt that the provision stipulating that a summary authority was not bound by the rules of evidence was a retrograde step. Indeed, in his opinion:

> …this would take us back to the time when we first started to do something about the imperial acts and make sure that there are proper rules for dealing with summary matters—the importance of which cannot simply be downgraded, and never were up until this time, as being something that does not matter. If it is worth doing, it is worth doing well and it is worth doing properly.
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> The problem, then…was of course the caprice and ignorance with which summary authorities treated those brought before them. It was encapsulated in the phrase, which you will excuse me using: 'Wheel the guilty bastard in.' It is one that caused a pervasive feeling right through the service that any summary proceeding was predetermined, and that particular pervasive feeling was not misplaced. That is inevitably what happened in many, many cases, but it made it extremely difficult for those who tried to follow the rule of law—however lacking in legal training they were—to provide a

25 *Committee Hansard*, 5 September 2007, p. 5.

26 Explanatory Memorandum, paragraphs 80 and 81.

> reversal of that feeling and to convince people that they were being dealt with appropriately.
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> That is why nearly 30 years ago steps were taken to provide a system which did away with that and to make sure that there were provisions for the use of rules of evidence in a proper way and instruction, particularly of commanding officers, to a limited extent as to what was required in that regard.[27]

3.21 Mr Willee argued that proposed s146A would contribute to the undermining of morale in the ADF as there would be a perception by its members that they may not be treated fairly. Moreover, Mr Willee expressed further concern that any appeal to the AMC as described in Section 168B would also be under the same provision—that the rules of evidence would not apply.[28] He explained:

> …in respect of both reviews and appeals, the reviewing authority and the court are bound to take account of the fact that the rules of evidence need not apply. And just because they have been ignored or have been circumvented in a way would be no reason to set aside the result, because the summary authority was entitled to proceed in that way.[29]

3.22 Mr Willee also expressed reservations about the qualifications of the reviewing authorities. He argued that under the bill's provisions a 'competent reviewing authority does not mean competent in the sense of properly or sufficiently qualified, capable or legally fitted for the task; it just means untainted by previous involvement in a particular matter'.[30]

3.23 In response to Mr Willee's testimony, Rear Admiral Mark Bonser argued that the bill addresses widely held concerns that current summary procedures are overly legalistic and complex and introduces a fair but simple and easily understood evidentiary framework, similar to the Canadian Forces summary trial system. He noted that the Explanatory Memorandum clearly indicates that the rights of members to a fair process with regard to the rules of evidence are protected. The Explanatory Memorandum states:

> Given the nature of summary proceedings and allowing for the fact that very few summary authorities are legally qualified, complex rules of evidence at this level are inappropriate and can unnecessarily delay and complicate a trial. It is intended to exclude the operation of more complex evidence provisions, such as the *Evidence Act 1995* (Cth) and to allow summary trials to occur on a less formal basis while nonetheless ensuring appropriate safeguards for a fair trial. The requirements in the Criminal Code (Cth) (as applied by section 10 of the DFDA) dealing with the principles of criminal responsibility, including the burden and onus of proof

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27 *Committee Hansard*, 5 September 2007, p. 2.

28 *Committee Hansard*, 5 September 2007, p. 3.

29 *Committee Hansard*, 5 September 2007, p. 3.

30 *Committee Hansard*, 5 September 2007, p. 3.

> will remain applicable in summary trials. The very important protection against self incrimination will also be enshrined in the DFDA to avoid any doubt of its continued application, notwithstanding the exclusion of the rules of evidence.[31]

3.24 Reinforcing his argument that the purpose of the summary authority rules is to ensure that the requirements of natural justice and procedural fairness are adhered to, Rear Admiral Bonser added:

> This includes the absence of bias and the ability for a person to know and to answer a case made against them. The application of the simplified rules of evidence for summary procedures will reflect that relevance is determined by looking at the substance and contents of the evidence put forward and how it is related to a fact in the issue.[32]

He noted further that:

> …the process and procedures to be followed will be established by the Chief Military Judge, and this will clearly overcome the flawed process that Mr Willee described as a case example. In conducting a trial, the proposal requires that the summary authority may determine the probative value of any evidence received during the course of a trial that it considers appropriate, including the relevance, reliability and weight to be given the evidence. The onus of proof will remain 'beyond reasonable doubt'. To say that this means cases are predetermined is grossly incorrect and ignores the good judgement of the officers who will be making these decisions.[33]

3.25 The Inspector General-ADF, Mr Geoff Earley, also advised the committee on the proposed summary authority rules and explained why this position had been taken. Firstly, the reviewing officers—who are laypersons and not trained lawyers—are not sufficiently trained to understand the rules of evidence. Mr Earley used the example of the major fleet unit's three day pre-command course at *HMAS Watson*, to prepare personnel for taking over as ships' Commanding Officers and Executive Officers. He argued that it was simply not possible to bring officers to a sufficient standard where they understood the rather complex formal rules of evidence.[34]

3.26 Secondly, there are the operational demands of units in the field. Mr Earley described how summary trials are conducted in many places: on the decks of ships at sea; out in the bush—and other places where lawyers are not generally available. So summary discipline had to be a system that can be reasonably applied, simply and expeditiously, by laypeople but at the same time preserve the rights of the accused person.

3.27 Finally, the summary system must operate expeditiously. Mr Earley believed these three arguments were sufficient not to have the rules of evidence applicable as

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31 Explanatory Memorandum, paragraph 75.

32 *Committee Hansard*, 5 September 2007, p. 21.

33 *Committee Hansard*, 5 September 2007, p. 13.

34 *Committee Hansard*, 5 September 2007, p. 16.

they normally would in civilian magistrates' jurisdictions. In his view, this bill, with regard to changes to the current summary system, achieved the appropriate balance between these constraints and suitable protections and safeguards for the accused person.[35]

3.28 Rear Admiral Bonser concluded by describing how the ADF was using the Canadian example to construct a new framework for summary discipline. The Canadians had produced a comprehensive training regime which explains the entire application of the summary rules of evidence in 'plain English'. The Admiral believed that this system was easy to teach, easy to learn and easier to apply, yet entirely fair to the accused.[36]

Committee view

3.29 The committee notes Defence's assurances that the purpose of the new summary rules is to ensure that the requirements of natural justice and procedural fairness are adhered to. The committee also notes the wording of section 146A and the impression it conveys about discarding the general guidance of the rules of evidence. The sub sections state that in complying with the Summary Rules, the summary authority 'must act with as little legal formality or legal technicality as possible, while ensuring fairness; and is, subject to this Act, not bound by the rules of evidence, whether statutory or common law.'

3.30 The language is clear about not being bound by the rules of evidence but there is no equally forceful statement in the provision about natural justice and procedural fairness. There is no stated requirement for a summary authority to observe as a minimum the principles that underpin the rules of evidence.

Recommendation 1

3.31 In order to strengthen the recognition of the rules of evidence, but not mandate their application, the committee recommends that the government amend the bill in either of the following way:

Schedule 3, Item 8, page 32, (after line 19) Section 146A, after the note insert:

"Note 2: The Summary Authority Rules may be simplified but not depart from the fundamental principles underpinning the rules of evidence."

or

Schedule 3, Item 8, page 32, (after line 25) at the end of Section 146A insert:

"4) The Summary Authority Rules may be simplified but not depart from the fundamental principles underpinning the rules of evidence."

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35 *Committee Hansard*, 5 September 2007, p. 16.

36 *Committee Hansard*, 5 September 2007, p. 20.

3.32 It should be noted that paragraph 81 of the Executive Memorandum states clearly that the Summary Authority Rules are to be legislative instruments as defined in the *Legislative Instruments Act 2003* and 'be subject to Parliamentary scrutiny via the registration and disallowance provisions in that Act'.

Committee inquiries to Defence

3.33 In response to the written questions to Defence (Appendix 3), the committee received Defence's responses to the questions on 4 September (Appendix 4). The committee notes that some provisions—such as dealing with mental impairment and the inclusion of warrant and non-commissioned officers in the coverage of the Discipline Officer scheme—remain to be addressed with legislation proposed for introduction in 2008. The committee also notes that some terms in this bill—including the definition of 'hearing' and the clarification of the term 'at the commencement of dealing with the charge'—are still to be developed through a plain English chapter of the Defence Law Manual, an inclusion in the Discipline Law Manual or through a judgment by the Chief Military Judge. Nonetheless, the committee is satisfied with the responses provided by Rear Admiral Bonser and his team and looks forward to examining the anticipated legislation in 2008.

3.34 In this regard, the committee recognises the need for close monitoring of this legislation and the operation of the Australian Military Court and summary proceedings. It will include consideration of these matters as part of its continuing examination of the implementation of reforms to Australia's military justice system.

Consultation

3.35 In its report on the Defence Legislation Amendment Bill 2006, tabled in October 2006, the committee noted that the bill required thorough consultation and open public debate. The committee was of the view that such a process did not take place and because of a number of problems with the proposed legislation recommended that 'the government undertake a comprehensive consultation process designed to promote wide public debate before amending or re-drafting the bill for presentation to the parliament.'[37]

3.36 Evidence to this committee suggests that, although Defence consulted with people such as the Judge Advocate General, the Inspector General-ADF and the Director General of Military Prosecutions, and government agencies including the Solicitor General, it did not consult with external bodies such as the Law Council of Australia. The committee does and has relied on advice from the Law Council. Members of the Council are highly experienced and knowledgeable legal authorities who, on many occasions, have generously given of their time to assist the committee. In particular, the committee notes the assistance offered by Mr Paul Willee who appeared before the committee in its examination of the Defence Legislation Amendment Bill 2006 and of the current bill.

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37 Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions],* pp. 6–7.

3.37 The committee is of the view that the proposed legislation, which represents a significant change in the ADF's disciplinary system, should have been subjected to considerable consultation.

Recommendation 2

3.38 The committee recommends that the government undertake a comprehensive consultation process on any future proposed legislation that is intended to make significant changes to Australia's military justice system. The committee cites in particular the importance of consulting with the Law Council of Australia.

Committee conclusions

3.39 While the committee notes the strong support for the bill and the need for its speedy enactment, it also notes that a number of witnesses identified important omissions from the proposed legislation. Although they were of the view that such omissions should not impede the passage of the bill, they indicated that future amendments would be needed. In its response to questions on notice Defence indicated that two important matters would be dealt with in legislation proposed for 2008—the detention and release of people found unfit to stand trial or not guilty of an offence on the grounds of mental impairment and the extension of the Discipline Officer scheme to non-commissioned officers. During the public hearing Defence also indicated that it was considering the right of the Director of Military Prosecutions to appeal to the Defence Force Discipline Appeals Tribunal against an interlocutory judgment or order given or made in proceedings in an Australian Military Court. The committee also notes that the Defence Department is in the process of drafting material, such as the Defence Law Manual, the Discipline Law Manual, and the Summary Authority Rules.

3.40 The committee recognises the need for close monitoring of this legislation and the operation of the Australian Military Court. It will include consideration of these matters as part of its continuing examination of the implementation of reforms to Australia's military justice system.

3.41 The committee has reservations, however, about the provisions governing the evidence in proceedings before a summary authority. It has made a suggestion designed to put beyond doubt that the summary authority rules must be consistent with and adhere to the fundamental principles underpinning the rules of evidence.

Recommendation 3

3.42 The committee recommends that, subject to clear statutory guidance that summary authority rules will not depart from the fundamental principles of the rules of evidence, as set out in recommendation 1, the bill be passed.

3.43 The committee also recommends that there be an evaluation of the new practices involving consultation with the Law Council of Australia.

SENATOR MARISE PAYNE
CHAIR