Chapter 5

Disciplinary tribunals

5.1 This chapter examines the issues surrounding the structure of the disciplinary tribunals system. The committee acknowledges the point made in both the original and supplementary Defence submissions concerning the operational need for an effective military justice system in response to the unique requirements of military service. The committee also acknowledges the emphasis placed by Defence on the link between operational effectiveness and the military justice system as part of an effective chain of command to support commanders. In the supplementary submission to this inquiry, General Cosgrove, CDF stated:

> The control of the exercise of discipline, through the military justice system, is an essential element of the chain of command.[1]

5.2 The committee accepts this basic premise, but its acceptance is not unconditional. Despite acknowledging the general validity of this underlying proposition, the committee nonetheless holds concerns regarding the means through which operational effectiveness and the individual rights of Service personnel are balanced within the current disciplinary tribunal structure. The weaknesses in the system, described in submissions and evidence to this inquiry, evident in cross-jurisdictional comparison, identified in academic writings, and highlighted in recent Australian judicial decisions, all suggest that current structures are adversely affecting the rights of Service personnel.

5.3 Various submissions to this inquiry have invited the committee to consider the nature of disciplinary tribunals and appeals processes available to Service personnel. Evidence raised concerns regarding both the structure of Service tribunals and their operation. Both factors were identified as impeding the capacity of the disciplinary system to deliver impartial, rigorous and fair outcomes.

5.4 In an era where open and accountable governance is increasingly demanded by the citizenry, all arms of Government must be seen to deliver rigorous, fair and impartial outcomes—the military justice system should not be exempt. Evidence before the committee regarding the independence of Service tribunals suggested that the disciplinary process' capacity to provide basic standards of fairness and justice is problematic, especially when measured against the standards and protections afforded in overseas military justice systems. The root cause of this weakness appeared to be endemic to tribunal structures.

5.5 The committee also notes a recent decision of the High Court that raises questions concerning the validity of disciplinary tribunals.[2] In addition, it has

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1 General Peter Cosgrove, Chief of Defence Force, *Submission P16F,* p. 1.

2 *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004).

examined judicial and legislative developments overseas. At all times it remained cognisant of Australia's obligations under international instruments for the protection of human rights. The following section explores the various issues surrounding the two main disciplinary processes—courts martial (CM) and Defence Force Magistrate (DFM) trials, and summary disciplinary proceedings.

Courts Martial and Defence Force Magistrate Trials

Submissions

5.6 A number of submissions to the inquiry concerned the structure of Courts Martial and Defence Force Magistrate (DFM) trials, and made various recommendations aimed at improving their capacity to provide fair outcomes.

5.7 In his submission, the Judge Advocate General of the Australian Defence Force (JAG), Major General Justice Roberts-Smith discussed the desirability of formally establishing a standing military court to try DFDA offences currently tried at the court martial or DFM level.[3]

5.8 The JAG examined the evolution of the current disciplinary system, outlined overseas developments, and made a number of recommendations to improve the current Australian structure's independence and transparency. He based his recommendations on the inherent need to give Service personnel access to a fair and impartial tribunal.

5.9 The JAG noted that an obligation to protect an individual's right to a fair trial exists in both the UK and Canada, and is enshrined in the *European Convention of Human Rights* and *Canadian Charter of Rights and Freedoms* respectively.[4] He briefly outlined the development of tribunal structures aimed at protecting this right and observed that, although Australia does not possess a Bill of Rights per se, it is nonetheless a signatory to the *International Convention for the Protection of Civil and Political Rights* (ICCPR). The ICCPR provides in Article 14(1):

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by the law.[5]

5.10 The JAG's primary concerns about the current Australian model dwell on the capacity (or lack thereof) of DFM and CM tribunals to provide Service personnel with a fair and impartial trial. His concerns stem from the location of Judge Advocates and Defence Force Magistrates within the chain of command and the implications this has for their independence.

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3 Major General Justice L.W. Roberts-Smith, *Submission P27*, p. 1.

4 Major General Hon Justice Roberts-Smith, Judge Advocate General, *Submission P27,* p. 2.

5 *International Convention on Civil and Political Rights* Article 14(1).

5.11 The JAG noted that the line of High Court decisions over the past decade challenging the validity of the DFDA have focussed primarily on constitutional and jurisdictional issues as opposed to a determination of their consistency with standards of impartiality and fairness. Even so, the High Court has seen fit to apply the principles enshrined in the ICCPR in other contexts. He commented that *Re: Tyler* (the major decision upholding the validity of the current DFDA structures) was decided almost a decade ago:

> Since that time, there have been significant developments affecting the court martial jurisdictions of our Commonwealth common law allies, in particular, the later decisions of the ECHR and the changes initiated by NZ. The question must arise as to whether the High Court, as currently constituted, would continue to uphold the existing arrangements under the DFDA in light of those changes overseas. It is also the case that the 'fair and impartial trial' issue has not been comprehensively argued before the court.[6]

5.12 In evidence to the committee on 21 June, the JAG further elaborated on this point, observing that the current structural arrangements under the DFDA do not fully reflect the considerable body of law that has developed overseas in recent years concerning the ability of Service tribunals to provide a fair and impartial trial. The JAG considered that a High Court challenge to the existing structure:

> Would at least be arguable in light of these developments and it would be better, in my view, to take a proactive approach at this stage.[7]

5.13 The JAG argued:

> I submit to the committee that consideration should be given to doing more to genuinely establish the perception (as well as the reality) of the independence of the JA's and DFM's consistent with the judicial functions of these appointments.[8]

5.14 The JAG's suggestions concerning the establishment of a permanent independent military court drew extensively from the Canadian model. He noted the 'distinct separation between the judicial, prosecution and defence functions',[9] and highlighted the complete independence of the appointment processes, tenure, and remuneration for military judges in the Canadian system.[10]

5.15 In the Australian context, the JAG argued that the establishment of a permanent and independent military court 'offers significant advantages',[11] including:

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6 Major General Hon Justice Roberts-Smith, Judge Advocate General, *Submission P27,* p. 3.

7 *Committee Hansard,* 21 June 2004, p. 37.

8 Major General Justice Roberts-Smith, Judge Advocate General, *Submission P27,* p. 4.

9 ibid., p. 5.

10 ibid.

11 ibid.

- ensuring disciplinary tribunal compliance with Chapter III of the Commonwealth Constitution;[12]
- removing the perceived impartiality inherent in renewable terms of appointment;[13]
- providing perceived and actual independence for judge advocates and DFMs;[14]
- increasing the efficient expedition of interlocutory matters and the concomitant transferral of pre-trial issues to independent judicial officers;[15] and
- creating a smaller panel of judge advocates and DFMs, facilitating greater expertise and specialisation development.[16]

5.16 In terms of the actual operation of an independent tribunal, the JAG put forward a number of suggestions, including:

- altering the DFDA to allow JAs and DFMs to preside in a manner similar to civilian judges;[17]
- requiring published reasons;[18]
- establishing a military bench of the Federal Magistrate's Court,[19] or attributing appropriate status and perceived independence under the auspices of Chapter III of the Commonwealth Constitution (or an otherwise federally recognised court);[20]
- making judicial appointments to the bench analogous to Federal judicial appointments by the Governor-General, on the advice of the JAG;[21]
- making judicial appointments for renewable five-year terms during good behaviour, with automatic renewal unless a judicial committee recommends removal to the Governor-General (this arrangements falls, however, outside the scope of Chapter III compliance);[22]

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12 ibid.

13 ibid.

14 ibid.

15 ibid.; *Committee Hansard,* 21 June 2004, p. 39.

16 Major General Justice Roberts-Smith*, Submission P27,* p. 5.

17 ibid.

18 ibid.

19 ibid.*,* pp. 5–6; *Committee Hansard,* 21 June 2004, p. 37.

20 *Committee Hansard,* 21 June 2004, p. 40.

21 Major General Justice Roberts-Smith *Submission P27,* pp. 5–6.

22 *Committee Hansard,* 21 June 2004, p. 37.

- judicial appointments until compulsory Service retirement age, with provision for part-time appointments to accommodate reservists (compliant with Chapter III).[23]

5.17 The JAG also proposed two alternative amendments to the current appeals processes. First, abolish automatic reviews and replace them with a right to request an appeal. Second, broaden the right of appeal to the DFDAT to include appeals against sentence. The JAG indicated the latter was his preferred option.[24]

5.18 He further suggested that an accused Service member could also be given a right to elect a trial by DFM or court martial when charged with an offence that is currently dealt with under the Summary trials process.[25] To enhance the independence of the position of JAG and DJAGs, the JAG also suggested the removal of renewable terms, and the introduction of fixed term appointments.

5.19 Mr David Richards, a lawyer specialising in military justice, provided a detailed account of various aspects of the disciplinary system, reviewed international developments and raised several matters of interest to the committee concerning the structure of disciplinary tribunals. Mr Richards highlighted his concerns regarding a fundamental lack of fairness, independence and impartiality in Service tribunals. He based his assertions on:

- an inherent conflict of duties through CDF's control over the appointment of convening authorities, who in turn control the forum and rules of a trial;[26]
- the very nature of the military adjudicating the military;[27]
- CDF's role in appointing judge advocates, court martial presidents and members, and DFMs;[28]
- the capacity for tribunals to determine which witnesses are required by the accused;[29]
- the capacity for tribunals to question witnesses, creating an inquisitorial style of hearing;[30] and
- reviews of convictions by commanding officers or military legal officers.[31]

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23 Major General Justice Roberts-Smith, *Submission P27,* pp. 5–6.

24 ibid., p. 6.

25 ibid.

26 *Submission P38*, p. 13.

27 ibid.

28 ibid., pp. 17–19.

29 ibid., p. 24.

30 ibid.

5.20 Mr Richards highlighted several factors endemic to the military which he believed impede impartiality. He identified unlawful command influence, described as the 'mortal enemy of military justice',[32] as a significant factor inhibiting the independence of tribunal members.[33] Mr Richards drew from reasoning in High Court and European Court decisions to support the proposition that the chain of command may operate to influence the outcome of military tribunals, thereby denying a fair trial.[34] Mr Richards also identified bias in the disciplinary adjudication process, and stated that military tribunal members lack perceived independence due to their status as 'military personnel'.[35]

5.21 Drawing from a number of public statements from General Cosgrove and the Hon Mal Brough MP, (then Minister Assisting the Minister for Defence), Mr Richards also claimed that there is opposition to change within the ADF.[36] He stated:

> The direction given by the CDF and the Minister with portfolio responsibility for these issues, supports a perception that the Government is seeking to preserve its interests and investments in its leaders. Moreover, it appears that the Government is not willing to consider implementing any mechanism to improve the transparency and public accountability of military justice procedures.[37]

5.22 In evidence before the committee, Mr Richards expanded upon a number of points made in his submission. He outlined his objection to a person being given a criminal conviction, punished (potentially imprisoned), and stigmatised by a system that lacks impartiality and independence and does not meet the basic standards of fairness, impartiality or independence expected by Australian citizens:

> To allow a person's liberty to be taken away from them without procedural fairness and due process is a fundamental breach of the rights of an accused in the Australian system of criminal justice.[38]

5.23 Mr Richards considered that the ADF's discipline system lags behind world's best practice in upholding human rights and natural justice. He identified a need for radical change if the system is to approach the basic standards of impartiality and

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31 David Richards, *Submission P38,* p. 29.

32 *United States v Thomas* (1986) 22 M.J. 388, 399 and Eugene Fidell, 'A World Wide Perspective on Change in Military Justice' *The Air Force Law Review,* vol 48 (2000), pp. 195–209, quoted in Mr David Richards, *Submission P38,* p. 84.

33 David Richards*, Submission P38*, p. 84.

34 *Findlay v United Kingdom* (1997) 24 E.H.R.R.221; *Hembury v. Chief of the General Staff* (1998) 155 A.L.R 514, as referred to in David Richards*, Submission P38,* pp. 84–88.

35 David Richards*, Submission P38*, pp. 92–94.

36 ibid., p. 77.

37 ibid., p. 79.

38 *Committee Hansard,* 9 June 2004, p. 35.

fairness established in other jurisdictions.[39] Mr Richards offered two alternatives through which change could be effected:

- a complete restructure of the Australian military justice system, bringing it into line with world best practice (especially drawing from Canada), involving:
  - the creation of a new military court using the judicial power under s71 of the Commonwealth Constitution;
  - the creation and appointment of independent military jurisdiction judges with fixed appointment until retirement;
  - structural change to military hearings to accommodate the role of the independent judges;
  - the application of the *Evidence Act 1995* and common law evidence principles to discipline system proceedings; and
  - a requirement for review and report every five years; or
- a modification of the current system which, although not creating a fully independent system, would go some way towards enhancing fairness, impartiality and independence.[40]

5.24 Mr Richard's first proposal is broadly consistent with the JAG's suggestion outlined above. His position differs slightly, however, in that he argued that both military and civilian judges should be eligible to sit on a military bench. He does not see military experience as a prerequisite for appointment.[41] In concluding his evidence to the committee, Mr Richards stated:

> I strongly supported in my opening statement today that the military should maintain total control over their employees in whatever fashion they need to do that. If there are criminal sanctions involved in maintaining discipline, so be it. I would support that.
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> What I have issue with is somebody being investigated, charged and convicted of a criminal offence in the military system. That is what Justice Roberts-Smith is asking for. He is, as Senator Johnston said, a very eminent man. He is asking for a separate military court under the Federal Court system. That would go a long way if you did nothing with the investigations. The mere fact of having a separate Federal Court would mean that, if there were any deficiencies at the lower level, they would become apparent in the court and things would happen. I think it is a really

39 David Richards, *Submission P38*, pp. 95–96.

40 For further detail on the suggested amendments to the current system, see David Richards, *Submission P38*, pp. 95–100.

41 *Committee Hansard,* 9 June 2004, pp. 37, 46.

> important issue that Justice Roberts-Smith in his current position has asked for a separate military court.[42]

5.25 Mr Griffin also discussed a number of shortcomings with the current disciplinary tribunal system, and made suggestions for change.[43] Drawing from the evidence of the JAG and comments from members of the High Court during *Re Colonel Aird; Ex parte Alpert,* Mr Griffin asserted 'there are real concerns about the legal validity of the whole system.'[44] Since the completion of Mr Griffin's paper, a decision in the *Alpert* matter has been reached and is discussed below. The decision indicates that the constitutional validity of disciplinary tribunals remains a live issue. Mr Griffin also drew from international developments. To highlight the uncertainty about the validity of the current system, he stated:

> In the light of recent Canadian and UK developments on fairness and impartiality which were not fully addressed in the High Court trilogy of DFDA cases, the JAG's concerns about the potential for the system to be struck down seem well founded.[45]

5.26 Mr Griffin commented on the drawbacks of convening tribunals on an ad hoc basis,[46] and the inability of the current system to expedite interlocutory matters efficiently.[47] Mr Griffin stated:

> One may readily accede to the arguments in favour of a court of military officers trying a military offence of insubordination etc. Some may have difficulty accepting the importance of having that court of officers decide a strictly criminal offence such as stealing Commonwealth property. Some may have greater difficulty recognizing the need for, say a Royal Australian Air Force (RAAF) Reserve DFM, to travel from Melbourne to Townsville to try a charge against an Army soldier for stealing that property. This is particularly the case if the trial has been delayed pending the availability of that RAAF officer.[48]

5.27 In his paper, Mr Griffin examined the issues surrounding a standing court and tenured appointments, with particular reference to the desirability of limiting judicial appointments solely to military officers.[49] He noted that the European Court of Human Rights considered the civilian status and civilian trial experience of the British Judge Advocate to be an important safeguard in the British military justice system. Further,

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42 *Committee Hansard,* 9 June 2004, p. 48.

43 Michael Griffin, Issues Paper.

44 Michael Griffin, Issues Paper*,* para. 34.

45 ibid, para. 35.

46 ibid.*,* paras 36–37.

47 ibid., para. 38.

48 ibid., para. 48.

49 ibid., para. 39.

that the Abadee report also affirmed the benefit of civilian experience (though it did not go so far as to endorse the substitution of civilian judges for military personnel). Mr Griffin noted that, at present, it is unlikely that there are any permanent military legal officers of the rank of senior major or above that have recent civilian trial experience and are available for judicial appointments. There are, however, many Reserve legal officers with relevant civilian and military experience.[50]

5.28 Mr Griffin accepted the:

> value and importance of having a court of military officers determining the charges against one of their peers on a military offence such as desertion or mutiny or insubordination or disobedience.[51]

5.29 He questioned, however, the 'importance of having that court of officers decide a strictly criminal offence',[52] especially when considered in light of the small volume of criminal matters tried in theatres of operation:

> A few courts and DFM trials have been conducted but almost all have been for service offences…Conversely, some serious criminal matters have been committed in theatre but were only tried on return to Australia.[53]

5.30 Statistics provided to the committee on 6 August 2004 by the Chief Judge Advocate, Colonel Ian Westwood, support this proposition.[54] Of the 29 Service personnel tried between 2000 and 2004, only four trials were conducted overseas, and all were Service, as opposed to criminal, charges.[55]

5.31 Mr Griffin cast doubt over the utility of maintaining a duplicate internal criminal justice system stating:

> The military justice system in its current form is an historic anachronism. It is a hangover from a time when the battlefield was so far removed from the normal world that the Defence Force needed to be self contained… However, this is no longer the situation and the civilian courts and civilian police are now readily available…There is no longer a requirement for the public purse to bear the cost of maintaining a separate but parallel criminal law process, particularly one which involves extensive delays and the risk of inept investigations and prosecutions.[56]

5.32 Mr Griffin offered a number of suggestions for reform, including:

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50 ibid., paras 43–45.

51 ibid., para. 46.

52 ibid., para. 48.

53 ibid., para. 51.

54 Colonel Ian Westwood, *Tabled Documents 142, 143, & 144*, 6 August 2004.

55 *Tabled Document 143,* 6 August 2004.

56 Michael Griffin, Issues Paper, para. 54.

- removing criminal offences from the military justice system completely;
- removing criminal offences from the military justice system in peace-time Australia;
- creating a standing military court of judge advocates (JA) appointed by the Attorney-General on the basis of suitable civilian court experience;
- disestablishing the office of CJA and using the position to create a Judicial Registrar of Military Justice (JRMJ);
- JA to sit only with a court martial of military officers selected by the JRMJ;
- locating the JRMJ in Townsville or Darwin and giving him/her the power to deal with all interlocutory matters and pre-trial dispositions, as well as sitting as a JA/DFM;
- appointing at least two JA/DFMs in Darwin and Townsville;
- appointing JA/DFMs as statutory office holders until compulsory retirement age;
- appointing JA/DFMs from the Reserve only and on the recommendation of the JAG;
- appointing the JRMJ (and any additional JRMJ) from experienced DMP staff on the recommendation of the JAG;
- abolishing the automatic review of courts martial and DFM trials; and
- broadening appeal rights to the DFDAT to include appeals against sentence (for both defence and prosecution).

The High Court's decision in "Re Colonel Aird; Ex parte Alpert"

5.33 The committee is aware that a recent decision of the High Court, *Re Colonel Aird; Ex parte Alpert*[57] (the *Alpert* decision) raises several issues surrounding the validity of courts martial. The case concerned a soldier deployed to the Butterworth base in Malaysia. The soldier was charged with crimes allegedly committed whilst on recreational leave in Thailand.

5.34 By a 4-3 majority, the High Court held that it was a valid exercise of the Commonwealth's legislative power for the Parliament to make the soldier's alleged conduct a Service offence. The majority based their decision on the legislative power to make laws for the defence of the Commonwealth contained in s51(vi) of the Commonwealth Constitution. The majority interpreted the defence power broadly and linked the charges to the maintenance of Service discipline.

5.35 The High Court appeal was mounted against the validity of the charges laid against the soldier, and not the tribunal system trying the charges. Several Justices

57 *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004).

indicated throughout the course of the hearing, however, that the constitutional validity of the military tribunal structure remained a live issue, and invited submissions concerning the validity of the purported exercise of the judicial power of the Commonwealth. Submissions on the subject matter were not, however, received.

5.36 Chapter III of the Commonwealth Constitution outlines the requirements for the exercise of judicial power, providing for the creation of judicial tribunals, the appointment of judges, and judge's conditions of tenure. Chapter III courts are independent from the parliament and the executive, as are the judges appointed to them. The independence of the judiciary is guaranteed by the judge's security of tenure—once appointed, federal judges are completely free from influence or interference when exercising the judicial function. Discussing the need for security of judicial tenure, Sir Robert Garran stated:

> The particular stringency of the provisions for safeguarding the independence of the Federal Justices is a consequence of… the necessity for protecting those who interpret it from the danger of political interference.[58]

5.37 Military tribunals are not constituted in the same manner as courts created under Chapter III of the Constitution. The provisions concerning judicial appointments, and the measures designed to impart independence and impartiality to civilian courts, do not apply to military tribunals. Whereas in Chapter III courts, judges are appointed by the Governor-General in council and have life tenure, in the military justice system, judicial officers are appointed from and responsible to the chain of command, and do not have the same security of tenure.

5.38 Prior to the *Alpert* decision, three High Court decisions failed to produce a consensus position on the validity of the DFDA in this respect or the conditions under which military tribunals may validly exercise a judicial function.[59] Although all three decisions held that courts martial may validly try strictly disciplinary offences, differences of opinion arose regarding court martial jurisdiction over civilian criminal charges and disciplinary charges involving civilian criminal elements. The High Court has determined that courts martial stand as exceptions to the general separation of powers principle contained in the Constitution, but has not conclusively determined the basis or extent of the exception. In each of the three previous decisions, the High Court has split on the reasoning upholding the validity of court martial jurisdiction.[60]

5.39 The *Alpert* decision has done little to clarify matters. In the course of hearing the *Alpert* appeal on 3 March 2004, several Justices indicated that they were prepared to hear arguments regarding the validity of courts martial under Chapter III of the

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58 Sir Robert Garran, *Commentaries on the Constitution of Australia,* Digital Text, University of Sydney Library, available from http://setis.library.usyd.edu.au/ozlit/pdf/fed0014.pdf

59 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

60 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 ; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

Constitution.[61] The parties to the case did not, however, make submissions to the Court, despite invitations to do so. Chief Justice Gleeson and Justices McHugh, Gummow, Hayne, Callinan and Heydon therefore excluded Chapter III considerations from their decisions. Justice Kirby, however, chose to discuss the Chapter III dimension, stating:

> This Court must uphold the Constitution. It must do so where the consequence of failure is a serious departure from past authority and constitutional history; the enlargement of a limited exception to Ch III of the Constitution; and an expansion of military law that is undesirable and out of keeping with our constitutional tradition. No agreement of the parties or concessions or assumptions in the course of advancing their arguments can excuse this Court from its duty to maintain the constitution and its own past decisional authority in such an important matter.[62]

5.40 Justice Kirby warned against the extension of military tribunal's capacity to try civilian offences:

> That conclusion could effectively exclude Australian criminal courts from their usual role in such trials. It could authorise a switch of the trials of defence personnel for crimes of rape to military tribunals, away from the ordinary courts, whose adjudications members of the public may more conveniently view, learn from and criticise. In practical terms, the election by a complainant could deprive service personnel in Australia of the ordinary right of jury trial in such matters. It could exclude citizens, as jurors, from participation in such trials. This Court may, as it pleases, ignore these consequences of expanding the ambit of service offences outside Chapter III. But it is a step opposed to past legal authority. It is antagonistic to very long constitutional history. It is also inconsistent with the Court's recent doctrine on Chapter III. And it is antithetical to the functions of citizen jurors and the rights of service personnel, enjoyed as Australian citizens, and long observed in the courts of our legal tradition.[63]

5.41 When discussing the value of independent courts constituted in compliance with Chapter III, compared to the nature of military tribunals, Justice Kirby further stated:

> The independent courts exist not for the benefit of the judiciary. They uphold the Constitution and defend the people of the Commonwealth and those dependent on its protection. The exceptions for service discipline should not be expanded. The true independence and impartiality of service tribunals has long been questioned in Australia. 'Typical criticisms of service tribunals…include: the tribunal may be concerned to adhere to the

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61 *Ex parte Alpert—Re Aird & Ors* [2004] HCA Trans 42 (3 March 2004). Gleeson CJ, Kirby, McHugh and Gummow JJ all raised Chapter III issues in the course of hearing arguments from the prosecutor and respondents.

62 Kirby J, *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004) at para. 151.

63 Kirby J, *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004) at para. 113.

> views of those higher in the chain of command; the tribunal members may be personally acquainted with or even in command over the accused; and the members' career aspirations may influence their conduct in the trial.' Chapter III of the Constitution provides protections for judicial independence through security of tenure and the maintenance of a long tradition of impartiality. Extending the meaning of 'service offence' to the present case means that such protections are bypassed.
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> …
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> The very fact that there have been three major investigations into 'military justice' or the 'military judicial system' in Australia in quick succession speaks volumes about the seriousness of the problems that tend to be endemic in such a system. The culture of the military is not one in which independent and impartial resolution of charges comes naturally. These considerations reinforce the need for great caution in expanding the reach of the system of service tribunals, particularly in time of peace.[64]

5.42 Justice Kirby also discussed the importance of instilling civilian judicial principles and protections into the military disciplinary system:

> The services have sometimes endeavoured to cut themselves off from ordinary law. In special and limited circumstances, where it is proportional and appropriate for national defence, it must be so, at least for a short time, as during actual conflict. But under the Australian Constitution, the armed services are not divorced from civil law. Indeed, they exist to uphold it. It is the duty of this Court to maintain the strong civilian principle of the Constitution. It is one of the most important of Australia's legacies from British constitutional law.[65]

5.43 Dicta from the *Alpert* decision suggests that members of the High Court may be willing to reconsider the Constitutional validity of Service tribunals. In light of several comments made during the course of proceedings, the committee suggests that it might be timely for the Government to consider questions of independence and impartiality in disciplinary tribunal structures.

5.44 Amending current structures to reflect the provisions of Chapter III would be a means of circumventing a potential challenge to the Constitutional validity of disciplinary tribunals. The discipline system should be reformed to impart greater independence and impartiality into tribunal structures. This would provide Defence personnel with a discipline system that more fully protects their rights, reflects the principles and guarantees underpinning the Commonwealth Constitution, and could prevent a potential finding of Constitutional invalidity.

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64 Kirby J, *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004) at paras 137-138.

65 Kirby J, *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004) at para. 145.

Overseas developments

5.45 Recent overseas developments also indicate that the current Australian disciplinary system is outdated and may not adequately protect Service personnel's rights. The JAG and other experts in the field drew the committee's attention to developments in Canada and the United Kingdom. Both these jurisdictions possessed similar structures to Australia's and introduced wide ranging programmes of reform. The rationale behind these modernisation processes suggests a need for similar 'root and branch' change in Australia.

5.46 A number of academic works discussing various overseas military justice developments also lend considerable weight to arguments advanced in support of broad-based Australian reform. These works often undertake inter-jurisdictional comparative analysis, are instructive insofar as they provide insight into the benefits and detriments of different models, and echo many of the issues and concerns raised in this inquiry.

5.47 Notably, commentators have tracked the increasing fusion of civilian judicial norms and principles in the military justice sphere, creating systems with far greater independence and impartiality. Mr Eugene Fidell notes:

> One country after another has in recent times focussed on issues of independence and impartiality in the administration of military justice.[66]

5.48 These reforms have apparently extended and protected the basic human rights of Service personnel whilst simultaneously serving the operational requirements of the relevant Defence force.

Canada

5.49 Canadian reform occurred following legal challenges to the structure of the disciplinary system. *R v. Généreux*[67] was the main decision challenging the validity of Service tribunals. In *Généreux,* the Supreme Court of Canada concluded that the court martial system violated constitutional guarantees to an independent and impartial trial. Courts martial were found invalid because of the commanding officer's role and the potential for someone located within the chain of command to interfere in matters directly and immediately relevant to the adjudicative function.[68] Perhaps most significantly, the Court held that actual lack of independence need not be established. The test should be whether an informed and reasonable person would perceive the

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66 Eugene R.Fidell, 'A World-Wide Perspective on Change in Military Justice', in *The Air Force Law Review,* vol 48 (2000), pp. 195–209.

67 [1992] 1 S.C.R 259.

68 For a detailed discussion on the rationale in the *Généreux* decision, see Jerry S.T.Pitzul and John C.Maguire, 'A Perspective on Canada's Code of Service Discipline' in Eugene R.Fidell and Dwight H.Sullivan, *Evolving Military Justice,* Naval Institute Press (Annapolis, 2002), pp. 233–245.

tribunal to be independent—in other words, 'the legal framework governing the status of the tribunal as opposed to the actual good faith of the adjudicator'.[69]

5.50 *Généreux* provided the impetus for a raft of changes to the Canadian disciplinary system. In 1999, *Bill C-25* was enacted. It granted personnel the right to elect trial by court martial for all but the most minor disciplinary offences; altered the appointment of judges (now by the Governor in Council and therefore outside the chain of command); and established a courts martial administrator to convene courts martial at the request of the Canadian DMP.

5.51 In 2003, the Rt Hon Antonio Lamer completed a review of the Canadian military justice system to assess the impact of the reform programme.[70] Lamer asserted that an independent military judiciary is the hallmark of a fair military justice system, and concluded that *Bill C-25* had enhanced the independence of military judges by including provisions outlining the appointment, terms and functions of military judges. He considered, however, that these reforms had not gone far enough to ensure independence and impartiality, stating:

> To further ensure judicial independence, I am recommending the creation of a permanent trial level military court, with judges appointed until retirement.[71]

5.52 Lamer argued that the establishment of a permanent court would not only protect the constitutional right to a fair, independent and impartial trial, but would also allow an independent judge to deal with pre-trial and interlocutory issues.[72] When weighing up the benefits of establishing a permanent court, Lamer stated:

> Constitutionality is a minimum standard…those responsible for organizing and administrating a military justice system must strive to offer a better system than merely that which cannot be constitutionally denied.[73]

5.53 The proactive approach advocated by Lamer was endorsed by the Australian JAG. The committee notes the apparent benefits of the Canadian reform programme and urges the Australian Government to adopt a similarly proactive approach to improving the disciplinary system.

United Kingdom

5.54 Reform has also been undertaken in the UK. Again, legal challenges to the validity of courts martial provided the impetus for change. The watershed decision

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69 ibid., p. 240.

70 The Rt Hon Justice Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D., of the Provisions and operation of Bill C-25.*

71 ibid., p. 2.

72 ibid., p. 26.

73 ibid., p. 21.

was *Findlay v United Kingdom.*[74] In *Findlay*, the European Court of Human Rights determined that courts martial were not sufficiently separated from the chain of command to be considered 'impartial tribunals' for the purposes of Article 6 of the European Convention on Human Rights. Article 6 of the European Convention reflects the provisions of Article 14(1) of the ICCPR, discussed above at paragraph 5.9.

5.55 Lack of impartiality stemmed from the role and position of the convening authority (a non legally-qualified officer) in the disciplinary process. Prior to the post-*Findlay* structural changes, the convening authority was responsible for:

- making the decision to prosecute;
- deciding the charges to be answered;
- appointing the prosecutor;
- exercising executive control of the proceedings;
- selecting members of the court martial (who may come under his or her authority in the chain of command);
- confirming any sentence awarded by a court martial; and
- determining whether to allow an appeal.

5.56 The Court was concerned that the convening authority's multiple roles raised the potential for unlawful command influence. In her discussion of the implication of the *Findlay* decision, Lyon stated:

> There was certainly an appearance of a lack of complete independence of the court from the convening officer…A reasonable man would most certainly conclude that there was a real possibility that a member of the court might be unconsciously influenced by his military and subordinate relationship to the convening officer, that this unconscious influence would prevent him from considering the evidence before him solely on its merits, and that there was a real danger of that unconscious influence causing injustice to the accused, even if there was no evidence of any actual lack of impartiality or of any attempt by the convening officer to influence the court.[75]

5.57 In 1996, the British Government introduced the *Armed Forces Act* to remedy the shortcomings highlighted in *Findlay*. The role of convening authority was abolished, and its functions distributed among three different bodies. The prosecuting

74 19972 Eur. Ct. H.R. 263.

75 Ann Lyon, 'After *Findlay*: A consideration of some aspects of the military justice system' in Eugene R.Fidell and Dwight H.Sullivan, *Evolving Military Justice,* Naval Institute Press (Annapolis, 2002), p. 221.

authority, courts martial administration officer and reviewing authority are now all distinct from one another, and have clearly delineated powers and personnel.[76]

5.58 The 2003 European Court of Human Rights decision *Grieves v. The United Kingdom*[77] led to further reform to the British military justice system. In *Grieves* the court found that Naval courts martial lacked independence and impartiality due to the role of the Judge Advocate. In the course of reaching its decision, the Court commented:

> The Court recalls that in order to establish whether a tribunal can be considered 'independent', regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.
>
> In this latter respect, the Court also recalls that what is at stake is the confidence which such tribunals in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.[78]

5.59 The Court noted that in the UK, Army and Air Force Judge Advocates are civilians working full time for the civilian Judge Advocate General. Army and Air Force Judge Advocates are therefore located outside the chain of command, and free from command influence. By contrast, however, Naval Judge Advocates are serving naval officers appointed by the Chief Naval Judge Advocate (CNJA), who is also a naval officer. This arrangement is analogous to the current Australian situation. The Court found that the nature of a Judge Advocate's appointment and his or her position within the chain of command was not a strong guarantee of independence, and concluded:

> The lack of a civilian in the pivotal role of Judge Advocate deprives a naval court-martial of one of the most significant guarantees of independence enjoyed by other services' courts-martial.[79]

5.60 Following the *Grieves* decision, the British Government amended the procedures for appointing Naval Judge Advocates. They are now appointed by the same body responsible for appointing Army and Air Force judge advocates, further enhancing the independence and impartiality of courts martial.

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76 For a detailed discussion on the reforms to the British court martial structures, see Ann Lyon, 'After *Findlay*: A consideration of some aspects of the military justice system' in Eugene R.Fidell and Dwight H.Sullivan, *Evolving Military Justice,* Naval Institute Press (Annapolis, 2002), p. 221; and G.R.Rubin, 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' in *The Modern Law Review,* vol. 65, no. 1 (January 2002), pp. 36–57.

77 [2003] ECHR 683 (16 December 2003).

78 [2003] ECHR 683 (16 December 2003), para. 69.

79 [2003] ECHR 683 (16 December 2003), para. 89.

5.61 The committee notes that the British Government is currently developing a legislative programme to further reform the military justice system. The new programme seeks to harmonise the framework and extend the reforms previously discussed across all three Services. Perhaps most significantly, the Ministry of Defence's M*emorandum: Tri-Service Armed Forces Bill* indicates that the legislative programme will lead to the creation of a standing court-martial, rather than ad hoc courts.[80] The Memorandum explicitly states that the proposals under consideration 'maintain an approach that is evolutionary rather than revolutionary.'[81]

United States of America

5.62 The independence and impartiality of military tribunals has been a contentious issue in the USA. Similar to the issues encountered in Canada and the UK, debate centres on the benefits of establishing an independent military judiciary and the position of the military judge.

5.63 Frederick Lederer and Barbara Zeliff provided an articulate explanation of the differences between military and civilian judges:

> The military judiciary is unique. Civilian judges in the US are either elected or appointed. Once named to the bench, they are not subject to the direction of any other person, and, absent removal proceedings, they remain on the bench until death, resignation or completion of the judicial term. Judicial independence is one of the defining elements of the civilian judiciary. The military judge, on the other hand, is appointed by the judge advocate general (JAG) of the appropriate armed service, serves without a fixed term at the pleasure of the JAG, and is evaluated at least annually by senior officers. Subsequent promotion and reassignment depend on the judge's annual officer evaluation and the personal knowledge and desires of the senior officers responsible for assignments.[82]

5.64 Lederer and Zeliff asserted that the military judiciary's independence problem is an 'inherent consequence' of its historical and statutory 'command control' basis. They identify the risk of, albeit subtle, 'command retaliation':

> The risk of 'command' retaliation—actions taken by more senior judges or by the JAG or his or her subordinates—can be very subtle. Any number of administrative decisions adverse to a judge can be taken in such a way as to defy either detection or clear causation. Real or perceived limitations on the independence of military judges stem directly from the structure of the

80 British Ministry of Defence *Memorandum: Tri-Service Armed Forces Bill,* p. 8.

81 British Ministry of Defence *Memorandum: Tri-Service Armed Forces Bill,* p. 5.

82 Fredric I. Lederer and Barbara Hundley Zeliff 'Needed: An Independent Military Judiciary. A proposal to Amend the Uniform Code of Military Justice', p. 28.

> military legal system, complicated by the culture within which the judiciary exists.[83]

5.65 Lederer and Zeliff recommended the creation of an independent military court. They recognised the benefit of military experience, acknowledging that an independent military bench should be staffed with personnel that have an adequate appreciation of the subtleties of military service. They emphasised, however, the importance of independence after appointment to the bench:

> The key to the proposal is the careful mix of selection provisions with post-selection independence.[84]

5.66 The American Judges Association has also commented on the position of military judges:

> The perception is that without tenure, a military judge is subject to transfer from the service judiciary should he/she render unpopular evidentiary rulings, findings or sentences. There is no protection from retaliatory action by dissatisfied superiors in the chain of command. Similarly, the perception exists that judges who make rulings unpopular with [the] military hierarchy are endangering their possibilities of promotion because that same hierarchy is the system which makes selections for promotion.[85]

5.67 Eugene Fidell also makes some incisive observations about the nature of military tribunals and judges. He contrasts the position of military judges with civilian judges, noting the independence of the appointment process and tenure enjoyed by the latter:

> The civilian federal standards of review the Court of Appeals has embraced emerged in the context of appellate review of decisions by senatorially confirmed district judges with the protection of life tenure subject only to removal by impeachment. Military trial judges, however, are not senatorially confirmed *as judges*. They preside over courts that appear without warning and vanish without a trace, in contrast to the district courts, some of which have been in continuous operation for two hundred years or more. Unlike their civilian counterparts, military judges are selected by the judge advocates general and are subject to evaluation like other commissioned officers. They enjoy no protected term of office and are therefore subject to removal without cause, subject only to the Court of Appeals (in my view) illusory and inadequate promise in *United States v*

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83 Fredric I. Lederer and Barbara Hundley Zeliff 'Needed: An Independent Military Judiciary. A proposal to Amend the Uniform Code of Military Justice', p. 39.

84 Fredric I. Lederer and Barbara Hundley Zeliff 'Needed: An Independent Military Judiciary. A proposal to Amend the Uniform Code of Military Justice', p. 56.

85 Quoted in Fredric I. Lederer and Barbara Hundley Zeliff 'Needed: An Independent Military Judiciary. A proposal to Amend the Uniform Code of Military Justice', p. 29.

> *Graf* that they will be protected from retaliatory removal. Military judicial discipline remains a secret.[86]

5.68 These various critiques of the American military justice system are useful to discussions surrounding the reform of Australia's military justice system. Australian Judge Advocates similarly lack tenure, are appointed from within the chain of command, and preside over tribunals that 'appear without warning and vanish without a trace'.

Committee view

5.69 The committee notes the reforms undertaken in other jurisdictions to address many of the difficulties currently experienced in Australia. Whilst not advocating an unquestioning whole-sale transplantation of a particular overseas model, the committee nonetheless feels that these developments should be examined in detail to extract useful lessons for the reform of our own military justice system.

5.70 Most notably, where other jurisdictions have encountered difficulties with the impartiality and independence of courts martial, they have removed the adjudicatory function from the chain of command, or are in the process of doing so. The growing international trend towards appointing tenured independent military judicial officials and creating standing military courts allows those Service personnel access to independent and impartial tribunals, and should not go unnoticed in Australia.

Tribunals and Appeals – Summary Authorities

5.71 The vast majority of offences prosecuted under the DFDA are tried at the Summary Authority level. The committee acknowledges the need for speedy and efficiently administered summary justice, and recognises its role in supporting commanding officers and maintaining Service discipline. However, inadequate summary processes have the capacity to affect a higher proportion of Service personnel than defective courts martial and DFM trials, and by failing to appear to provide just outcomes, can serve to undermine the very system they mean to strengthen. It is therefore important to address issues arising in the summary discipline context.

5.72 The JAG indicated in his submission to this inquiry:

> Summary Trials conducted by commanding officers and subordinate summary authorities present their own difficulties. In my view it is not possible to imbue these tribunals with guarantees of independence appropriate to the higher level tribunals.[87]

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86 Eugene R. Fidell 'Going on Fifty: Evolution and Devolution in Military Justice' in Eugene R.Fidell and Dwight H.Sullivan, *Evolving Military Justice,* Naval Institute Press (Annapolis, 2002), p. 23.

87 Major General Justice Roberts-Smith, Judge Advocate General, *Submission P27,* p. 6.

5.73 The JAG did not elaborate on these comments in his evidence to the committee, but did recommend that consideration should be given to providing an accused with the right to elect a trial before a DFM or court martial.[88]

5.74 The committee is aware that summary tribunals, structured similarly to Australia's, have been declared invalid in the UK, and have undergone significant change to enhance their impartiality and independence. Because of the improved protection of individual rights, and their enhanced capacity to provide impartial, rigorous and fair outcomes, the British reforms are therefore of particular interest to the committee.

5.75 Prior to 1996, the summary discipline structure in the UK was very similar to the current Australian model. In 1996, a right to elect trial by Court Martial was introduced following the passage of the Armed Forces Act. As was outlined previously, British courts martial are independent from the military, and it was thought that introducing a right to elect a trial by court martial would protect Service Personnel's right to access a fair and independent tribunal. If an accused elected trial by Summary Authority, however, the process was the same as the current Australian process, and review was only possible through the chain of command.

5.76 In 2000, following the UK's ascension to the European Convention on Human Rights (ECHR), the system was again altered to further protect the right to a fair trial with the establishment of the Summary Appeals Court (SAC). The SAC supplements the right to elect a trial before court martial, ensuring that those who are dealt with summarily have a second avenue to an ECHR compliant independent court.

5.77 The SAC consists of an independent Judge Advocate and two officers generally of the same Service as the appellant. When an individual is found guilty by their CO, they have 14 days to lodge an appeal against their conviction with the SAC. The appeal on finding, or on finding and sentence takes the form of a re-hearing along the lines of an appeal to the British Crown Court from a decision of the magistrate's court. The rules of evidence mirror those in the civilian system, with appropriate modifications. Where the appeal is on sentence alone, and there is no material dispute as to facts, the court will only hear a statement of facts followed by pleas in mitigation. The appellant is entitled to legal representation at the hearing of his or her appeal, and is entitled to apply for legal aid for this purpose, under the Service's legal aid system. Hearings before the SAC are held in public. Appeals are possible on points of law only to the High Court.

5.78 The capacity to elect trial by court martial and appeal summary convictions to the SAC gives the British summary discipline model a considerably greater degree of independence than the current Australian model. The committee considers that the introduction of similar mechanisms would better protect ADF personnel's rights and contribute to the provision of impartial, rigorous and fair disciplinary outcomes.

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88 Major General Justice Roberts-Smith, Judge Advocate General, *Submission P27,* p. 6.

Findings and recommendations

5.79 It is becoming increasingly apparent that Australia's disciplinary system is not striking the right balance between the requirements of a functional Defence Force and the rights of Service personnel, to the detriment of both. Twenty years since the introduction of the DFDA, the time has come to address seriously the overall viability of the system. Australian judicial decisions and the evidence before this committee suggest the discipline system is becoming unworkable and potentially open to challenge on constitutional grounds. Overseas jurisprudence and developments suggest that alternative approaches may be more effective.

5.80 The Committee recognises that peripheral improvements to the disciplinary system have been made. A piecemeal approach to reform, however, is proving increasingly ineffective and untenable. The time has come to address the more fundamental underlying structural weaknesses within the military justice system. A fork in the road is rapidly approaching concerning the administration of the disciplinary system.

5.81 Based on the evidence to this inquiry, leaving the disciplinary structures within the military justice system unchanged is clearly not viable. The status quo leaves too many members of the ADF exposed to harm. Overseas jurisdictions have increasingly moved towards structures that impart greater independence and impartiality. The approaches taken overseas were endorsed by the Judge Advocate General, Mr David Richards, Mr Michael Griffin and a considerable body of academic commentary.

5.82 Modern trends in governance emphasise greater openness, accountability, independence and impartiality where matters affecting citizens rights are concerned. The Defence Forces should not be exempt from this trend. Members of the ADF are subject to conditions of service unlike any other. It is therefore incumbent upon the Government and society as a whole to ensure that their rights and freedoms are protected to the fullest extent possible.

5.83 The committee reiterates the view expressed at the outset of its consideration of the discipline system that, in the first instance all 'non-military' offences should be removed from the military justice system. This would entail the referral of all offences currently under the DFDA that have a civilian equivalent or involve civilian criminal elements, in addition to all offences caught by s61 of the DFDA (all offences that are criminal in the Jervis Bay Territory) to the relevant civilian authorities for prosecution in the civilian courts.

5.84 The committee notes, however, that cases may be referred back into the military justice system. There may still be a need to prosecute these offences, in addition to offences that have no civilian equivalents, for the purposes of maintaining Service discipline. The committee holds the opinion that there is a need for fundamental structural reform to impart greater independence and impartiality into current tribunal structures.

5.85 An independent Permanent Court, staffed by independently appointed judges possessing extensive civilian experience, would extend and protect Service personnel's inherent rights and freedoms, leading to more impartial, rigorous and fair outcomes. Appointing Judges that may have had military experience, in addition to their extensive civilian experience, would render them capable of appreciating the exigencies of military service and the nature and purpose of Service discipline, simultaneously serving both the Service and Service member, to the benefit of both.

5.86 The Government should not wait for disciplinary tribunals to come under constitutional challenge before acting to address the weaknesses inherent within the current system. Rather, it should adopt a proactive stance and protect Service personnel *now*. Nor should the Government adopt 'constitutionality' as its minimum standard. The goal should not be to establish a system that will merely gain the approval of the High Court. The goal should be to structure a tribunal system that can protect the rights of Service personnel to the fullest extent possible, whilst simultaneously accommodating the functional requirements of the ADF.

5.87 Numerous witnesses and submitters to this inquiry have emphasised the need for the ADF to have the ability to maintain Service discipline as a means to enhance the operational effectiveness of the military. As quoted earlier, in both his main and supplementary submissions, General Cosgrove reinforced the operational need for an effective military justice system in response to the unique requirements of military service, stating:

> The control of the exercise of discipline, through the military justice system, is an essential element of the chain of command. This has not been challenged during the Inquiry and remains a significant distinguishing feature of military justice.[89]

5.88 Mr Neil James of the Australian Defence Association, also supported the notion that military discipline was essential to the operational effectiveness of the Defence Forces. He stated:

> The association considers the following broad philosophical and practical points are relevant to any review of the military justice system. First, a democracy cannot maintain an effective Defence Force without that force being subject to a code of disciplinary legislation that specifically covers the purposes, situations, conditions and exigencies of war. No extension of civil codes of law can, or necessarily should, meet those requirements. This inquiry, therefore, is surely about improving the Defence Force Discipline Act rather than abolishing it. Second, discipline is both a lawful and an operationally essential component of command.[90]

5.89 The Judge Advocate General, standing statutorily independent of the ADF, and appointed by the Governor General, endorsed the principle of ADF control over

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89 General Peter Cosgrove, Chief of Defence Force, *Submission P16F.*

90 *Committee Hansard,* 9 June 2004, p. 20.

the discipline system. Whilst discussing his suggestions for reform with the committee, the JAG stated:

> The first and fundamental point is that we are not talking about an exercise of the ordinary criminal law—although in some areas, as I am sure the committee appreciates, they overlap. It is a military discipline system. The object is to maintain military discipline within the ADF by a system which is, and is seen to be, fair and just and which serves the purpose of military discipline, which is, ultimately, success in battle. The historical need for a discipline system internal to the military force has been recognised by the High Court of Australia in a number of cases—and I think I have referred to them in my submission. So that need, as I would see it, is beyond debate in terms of principle
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> …
>
> The second point I would make is that it is essential, in my view, to have knowledge of and understanding of the military culture and context. This is something much more than being able to understand specialist evidence in a civil trial. There is a need to understand the military operational and administrative environment and the unique needs for the maintenance of discipline of a military force, both in Australia and on operations and exercises overseas. The third point is that the system must have credibility: credibility with and the acceptance of the Defence Force. It has been suggested that civilian judges have been seen as a success and accepted by the army and the Royal Air Force in the United Kingdom, but that view certainly is not universally held within the armed forces in the UK, as my recent discussions have shown.
>
> The fourth point is that Canada, for example, which is very comparable to Australia in this regard, is firmly of the position that military judges be serving military officers, but, again, that they have structured, legislative, guaranteed independence. Finally, the disciplinary tribunal, the court martial or Defence Force magistrate, as I have already observed, must be able to sit in theatre and on operations. It has to be deployable.[91]

5.90 Suggestions for an independent court contemplate and accommodate the need for ADF control over discipline, yet still allow for the protection of individual rights. The evidence to this inquiry shows that an independent judiciary could simultaneously support the maintenance of Service discipline, maintain operational effectiveness, and protect the rights of Service personnel.[92]

5.91 The committee reiterates Recommendation One: all suspected criminal activity in Australia should be referred to the appropriate State/Territory civilian police for investigation and prosecution before the civilian courts.

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91 *Committee Hansard,* 21 June, pp. 43–44.

92 *Committee Hansard,* 21 June 2004, p. 36.

5.92 Where, however, offences are referred back to the military, Service members should still retain the right to access independent and impartial tribunals for the determination of their guilt or innocence. Their decision to serve and defend Australia should not mean that they sacrifice the basic right to a fair trial possessed by every Australian citizen. Where the military purports to exercise jurisdiction over Service offences, the committee considers that this should only be done through a court created under Chapter III of the Commonwealth Constitution.

5.93 The committee considers that a Permanent Military Court, created possibly as a division of the Federal Magistrates Court, would offer a number of benefits:

- Service members charged with referred civilian equivalent, Jervis Bay Territory and non-civilian offences would exercise the same rights to a fair and impartial hearing as every other Australian citizen;
- judges would be independently appointed by the Governor-General in council and have tenure until retirement age, removing current perceptions of a lack of independence;
- the likelihood of constitutional invalidity is reduced;
- judges would have extensive experience within the civilian justice system;
- the Court would be open, enhancing the visibility of military justice to the general public and Service personnel alike;
- consistent decision-making would be promoted through the creation of a body of precedent;
- interlocutory and pre-trial matters would be dealt with by an independent and impartial judge;
- the considerable costs and inconveniences associated with the current ad hoc convening of Service tribunals would be removed;
- judges appointed to the bench would have military experience, enabling them to appreciate the institutional context within which military discipline applies, but would be completely independent from the ADF;
- Australia would uphold its obligation under Article 14(1) of the ICCPR; and
- the Australian system would be consistent with world's best practice.

Recommendation 18

5.94 The committee recommends the Government amend the DFDA to create a Permanent Military Court capable of trying offences under the DFDA currently tried at the Court Martial or Defence Force Magistrate Level.

Recommendation 19

5.95 The Permanent Military Court to be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality.

- **Judges should be appointed by the Governor-General in Council;**
- **Judges should have tenure until retirement age.**

5.96 The committee considers that judges appointed to the Permanent Military Court should have recent and extensive civilian legal experience. This would be best achieved by ensuring that appointees to possess at least five years recent experience in civilian courts at the time of appointment.

Recommendation 20

5.97 The committee recommends that Judges appointed to the Permanent Military Court should be required to have a minimum of five years recent experience in civilian courts at the time of appointment.

5.98 The committee considers that the bench of the Permanent Military Court should also include judges that have a knowledge and understanding of the military culture and context, in addition to civilian experience. The committee agrees with the proposition advanced by the JAG that Military Court judicial officers need to understand the military operational and administrative environment and the unique needs for maintaining discipline in a military force. The committee also considers that the presence of judges with military experience would strengthen the credibility and legitimacy of the Permanent Military Court within the Defence Forces. It may not be essential that all appointees have military experience, but the committee considers that the bench should include judges that have served in the armed forces and have an appreciation of the DFDA's institutional context.

5.99 The committee suggests that appointing experienced Reserve Legal Officers to the bench would ensure that judges possess an adequate degree of civilian and military experience. It is important to emphasise, however, that regardless of whether an individual has civilian legal experience alone, or possesses some degree of military experience, on appointment to the bench by the Governor-General, judges must be completely independent of the Defence Forces.

Recommendation 21

5.100 The committee recommends that the bench of the Permanent Military Court include judges whose experience combines both civilian legal and military practice.

5.101 The committee considers that reform is also needed to impart greater independence and impartiality into summary proceedings. Summary proceedings affect the highest proportion of military personnel. The current system for the

prosecution of summary offences, however, suffers from a greater lack of independence than Courts Martial and DFM processes.

5.102 The committee considers that Service personnel should have the right to access impartial and independent tribunals at all levels within the military justice system—the right should not be confined to 'serious' offences. All charges can potentially lead to a criminal record which could have a significant impact on the lives of Service personnel long after they leave the military. Where there is potential for a conviction to be recorded, all Australians should have the right to access impartial and independent tribunals for the determination of their guilt and innocence.

5.103 Creating a right to elect trial by Court Martial before the Permanent Military Court would ensure that a determination of guilt or innocence can be made by an independent and impartial tribunal.

Recommendation 22

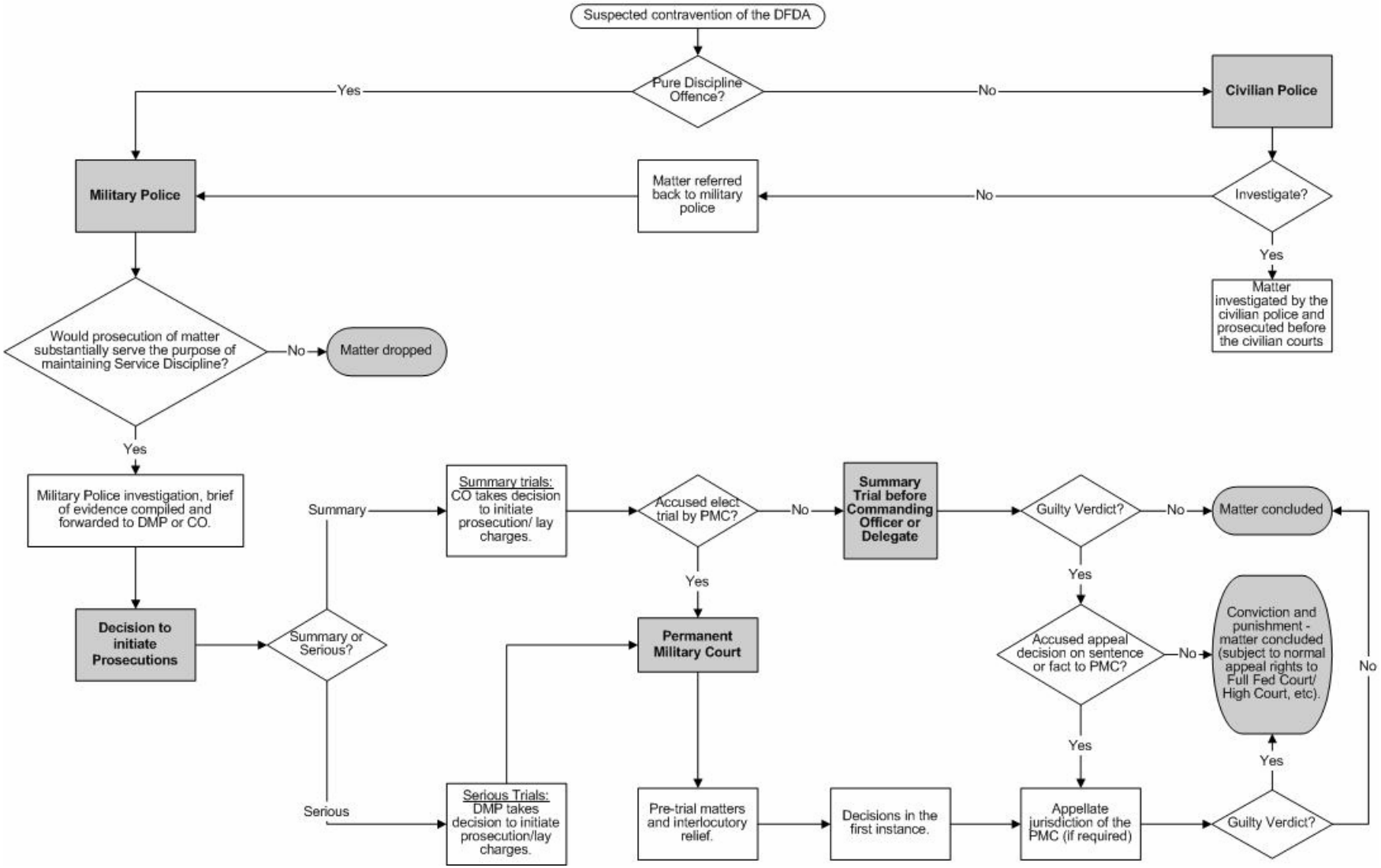
5.104 The committee recommends the introduction of a right to elect trial by court martial before the Permanent Military Court for summary offences.

5.105 Where a Service member elects to have their matter heard by the Commanding Officer, the committee considers that they should possess the right to appeal the Commanding Officer's decision to the Permanent Military Court, supplementing the right to elect trial by court martial, and further ensuring access to an independent court for the determination of guilt or innocence for all types of crime.

Recommendation 23

5.106 The committee recommends the introduction of a right of appeal from summary authorities to the Permanent Military Court.

Progress of Criminal/Discipline matters through proposed military justice system



Part 3

The Administrative System

The ADF uses the term 'military justice' in a broad sense. According to General Cosgrove:

> It covers disciplinary action under the Defence Force Discipline Act, including the investigation of offences. It also includes the conduct of administrative inquiries, adverse administrative action and the right to complain about such action. The military justice system, writ large, incorporates the laws, policies and processes under which military justice is administered.[93]

Senior Defence officers acknowledge that both the disciplinary and administrative components of the military justice system are 'essential to maintaining a disciplined and operationally effective military force'.[94] The systems, however, are quite distinct and separate. The administrative system has a different legislative source and serves a different purpose from the disciplinary system.[95]

Part 3 of this report examines the administrative component of the military justice system. It follows logically from and builds on Part 2 which dealt with the disciplinary system. It considers the following major components of the administrative system:

- the avenues and processes available to make a report of wrongdoing or to submit a complaint;
- the conduct of fact-finding administrative inquiries into issues such as safety, accidents, unacceptable or unprofessional behaviour and failures in command and control including
  - routine and investigating officer inquiries, and
  - boards of inquiry;
- the appeal and review processes open to people dissatisfied with the outcome of an administrative action including
  - the notice to show cause and redress of grievance, and
  - the IGADF and the Defence Force Ombudsman.

This Part concludes with a section on the offences and penalties under the military justice system.

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93 *Committee Hansard*, 1 March 2004, pp. 4–5. See also definition found in *Defence Instructions (General) ADMIN 61-1*, Inspector-General of the Australian Defence Force—role functions and responsibilities, para. 10 (b).

94 Air Commodore Harvey, *Committee Hansard*, 1 March 2004, p. 54.

95 Department of Defence, *Submission P16*, p. 22 and *Submission P16F*, p. 3.