

**Senate Foreign Affairs, Defence and Trade
References Committee**

SUBMISSION COVER SHEET

Inquiry Title: Effectiveness of Australia's Military Justice System

Submission No: P16

Date Received: 23.02.04

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Senator the Hon. Peter Cook

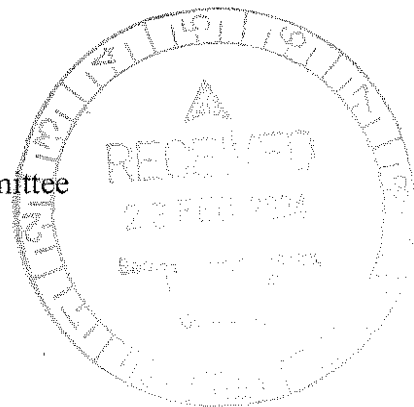
Chair

Senate Foreign Affairs, Defence and Trade References Committee

S157

Parliament House

Canberra ACT 2600



Dear Senator Cook

Inquiry into the effectiveness of Australia's Military Justice System

I enclose for consideration by the Senate Foreign Affairs, Defence and Trade References Committee, the Defence Submission to the Inquiry into the effectiveness of the Australian Military Justice System.

P.J. COSGROVE, AC, MC

General

Chief of the Defence Force

19 February 2004

Enclosure:

1. Defence Submission to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the effectiveness of the Australian Military Justice System

**TERMS OF REFERENCE FOR THE FOREIGN AFFAIRS, DEFENCE AND
TRADE REFERENCES COMMITTEE OF THE SENATE**

Reference Number 114 dated 30 October 2003, from the Journals of The Senate, record that the following motion was put and passed:

- (1) The following matters be referred to the Foreign Affairs, Defence and Trade References Committee for inquiry and report by 12 May 2004:
 - (a) the effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes, and mechanisms to improve the transparency and public accountability of military justice procedures; and
 - (b) the handling by the Australian Defence Force (ADF) of:
 - (i) inquiries into the reasons for peacetime deaths in the ADF (whether occurring by suicide or accident), including the quality of investigations, the process for their instigation, and implementation of findings,
 - (ii) allegations that ADF personnel, cadets, trainees, civilian employees or former personnel have been mistreated,
 - (iii) inquiries into whether administrative action or disciplinary action should be taken against any member of the ADF, and
 - (iv) allegations of drug abuse by ADF members.
- (2) Without limiting the scope of its inquiry, the committee shall consider the process and handling of the following investigations by the ADF into:
 - (a) the death of Private Jeremy Williams;
 - (b) the reasons for the fatal fire on the HMAS *Westralia*;
 - (c) the suspension of Cadet Sergeant Eleanore Tibble¹;
 - (d) allegations about misconduct by members of the Special Air Service Regiment in East Timor; and
 - (e) the disappearance at sea of Acting Leading Seaman Gurr in 2002.
- (3) The Committee shall also examine the impact of Government initiatives to improve the military justice system, including the Inspector-General of the ADF and the proposed office of Director of Military Prosecutions.

¹ As amended by the Senate on 12 February 2004, to reflect the fact that the RAAF investigated the administrative processes and procedures surrounding the suspension of Cadet Sergeant Tibble from the Air Training Corps (now known as the Australian Air Force Cadets), rather than the circumstances of her death. Her death was the subject of separate investigation by the Tasmanian Coroner.

TERMS OF REFERENCE - SOME PRELIMINARY OBSERVATIONS

Context. This Inquiry is one of a series of inquiries into aspects of the military justice system². There have been five major inquiries completed since 1997. They are:

- 1997 – Brigadier the Hon A.R. Abadee, *A Study into the Judicial System under the Defence Force Discipline Act*.
- 1998 – Defence Force Ombudsman, *Own Motion investigation into how the ADF responds to allegations of serious incidents and offences: Review of Practices and Procedures*.
- 1999 – Joint Standing Committee for Foreign Affairs, Defence and Trade, *Inquiry into Military Justice Procedures* (commenced in 1998).
- 2001 – Joint Standing Committee for Foreign Affairs, Defence and Trade, *Rough Justice? An investigation into Allegations of Brutality in the Army's Parachute Battalion*.
- 2001 – Mr J.C.S. Burchett, QC, *Report of an Inquiry into Military Justice in the Australian Defence Force*.

Matters currently in progress include:

- 2003 - Acumen Alliance Report – The Defence Legal Service appointed Acumen Alliance to conduct a management audit into the efficiency of the board of inquiry process. The report was presented in October 2003 and is being considered for a decision on the findings and recommendations.
- 2003 - Defence Force Ombudsman *Own Motion review of matters of administration relating to Defence's dealings with people under the age of 18 years*. The review commenced in November 2003 and is due to report in 2004, at a time to be confirmed by the Ombudsman.

The most recent annual Defence Report (2002-03) indicated that ADF total strength was 73,379 as at 30 June 2003, consisting of 51,791 Permanent and 21,588 Reserve

² Part Two of this submission provides further information on recent changes that have flowed from the recommendations of these reviews and the normal process of continuous improvement applied to the military justice system. A synopsis of the above reviews and inquiries is provided at Annex E.

members. Total numbers have fluctuated around this level for the last five years, from 1998-99 onwards. Taking into account the normal turnover of personnel through separation and enlistment (on average from between around 5,500 to 6,100 per year for Permanent members alone), well over 100,000 ADF members have been subject to the military justice system over the last five years, since the last major Parliamentary review of military justice procedures in 1998-99.

Definition of the Military Justice System. The ADF has adopted the following definition of the military justice system:

The term 'military justice' is used in its broadest sense. It encompasses matters associated with disciplinary action under the *Defence Force Discipline Act 1982* (Cth) (DFDA) including the investigation of such matters, the conduct of administrative inquiries, adverse administrative action and the right to complain about such action. The 'Military Justice System' means the processes and arrangements under which Military Justice is administered³.

³ Defence Instruction (General) Administration 61-1 *Inspector-General of the Australian Defence Force — role, functions and responsibilities*, para 10.b.

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INTRODUCTION

This is the Defence submission to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the Effectiveness of the Australian Defence Force (ADF) military justice system. Each of the terms of reference contained in the motion of the Senate of 30 October 2003 is addressed.

Purpose

The broad purpose of this submission is to provide background information to address the terms of reference of the Inquiry and to assist the Committee in its consideration of the military justice system. It addresses those cases identified in the terms of reference. It is anticipated that Defence, through evidence to the Inquiry and through any supplementary submissions that may be provided during the Inquiry, will respond as required to any additional matters that may be raised by the Committee or through public submissions to the Inquiry, as appropriate.

Structure of the Submission

The structure of the submission is designed to put the military justice system into its wider context, then take consideration from the general level to a more detailed consideration of the issues raised in the terms of reference. The submission starts with a general overview of the ADF, then establishes the link between operational requirements and the military justice system. Importantly, it discusses the essentiality of the relationship between the military justice system and the exercise of command throughout the ADF. The submission then moves on to an overview of the military justice system itself, including many recent developments and major systemic improvements. An overview of current personnel policies that apply to various issues raised is then provided, together with a summary of the internal and external processes and agencies available to ADF members for the review of administrative conduct and decision-making. Finally, the submission addresses the specific cases raised in the terms of reference, together with any other Service-specific points that arise.

This submission is divided into five parts:

- Part One of the submission offers a brief description of the role, activities, structure and organisation of the ADF. An understanding of the ADF's size, complexity and command arrangements is considered essential for a clear understanding of the military justice system that supports it, either within Australia or when deployed overseas, in both peace and on operations.
- Part Two describes the military justice system and its component parts. It reiterates the essentiality of a system of military justice for the ADF, embracing processes for discipline, inquiries and administrative action. The establishment of the Office of the Inspector-General of the ADF (IGADF), the Director of Military Prosecutions, the Chief Judge Advocate and the Registrar of Military Justice are described. Their establishment reflects the ongoing process of improvements to the military justice system and demonstrates the responsiveness of Defence to the need for change.
- Part Three describes ADF policies and processes relating to the general issues raised in the terms of reference. It includes a description of the policy settings that inform the ADF's management of the use of illegal drugs, alcohol abuse, sexual and other harassment, and a range of other policy issues, in addition to processes for the handling of suicides and accidental deaths on duty. It also provides literature disseminated throughout the ADF to further educate its people on these matters. It notes recent changes to ADF policies and processes, emphasising the ADF's commitment to the continuous improvement of the military justice system in particular and of personnel policies in general. It also deals with additional processes and mechanisms for handling and resolving complaints and grievances.
- Part Four consists of three sections, which address the single Service aspects in regard to the terms of reference. These sections contain information on the handling of the specific cases referred to in the terms of reference for which each of the Services are responsible. These concern the death of Private Williams; the fatal fire aboard HMAS *Westralia*; the death of Cadet Sergeant Tibble; allegations concerning the actions of Special Air Service Regiment members in East Timor; and the disappearance of Acting Leading Seaman Gurr.

- By way of conclusion, Part Five notes that a process of incremental change and continuous improvement has contributed to a more effective military justice system. Defence maintains that impartial, rigorous and fair outcomes are provided, supported by mechanisms that satisfy the need for a transparent and publicly accountable military justice procedures.

Supporting materials and publications to assist the Committee are provided as annexes to the submission.

PART ONE: AUSTRALIAN DEFENCE FORCE (ADF)

OVERVIEW

Defence Mission

1.1 The Defence mission is to defend Australia and its national interests. This may include participation in non-warlike operations or, ultimately, armed conflict. To fulfil its mission, the ADF must therefore, among other key tasks, be prepared to fight and win when called upon by the Government to do so.

Governance and Organisation of the ADF

1.2 The Minister for Defence has the general control and administration of the ADF, which is constituted under the *Defence Act 1903*. The Chief of the Defence Force (CDF) and the Secretary of the Department of Defence are jointly responsible for the administration of the Defence Force and are accountable to the Minister for the performance of Defence. The Minister's current directive to the CDF and Secretary⁴ requires the successful joint command of military operations by CDF, who retains sole command authority. Under the Defence Act 1903, the CDF is the principal military adviser to the Minister and the commander of the ADF.

1.3 In charters jointly issued by the CDF and Secretary, CDF has delegated the command of their Services to each of the Service Chiefs. As noted, CDF and the Secretary have joint responsibilities in respect of the administration of the ADF. The Service Chiefs' charters specify the requirement to raise, train and sustain the forces of their Service, by proper stewardship of people and of financial and other resources. They must provide timely, accurate and considered advice in connection with their specific responsibilities and act in accordance with specified values, policies and standards.

1.4 These collective powers of control, command, administration and management, variously exercised by the Minister for Defence, the CDF, the Secretary and the Service Chiefs, underpin the governance of the ADF in terms of its core business, the conduct of its activities and its structure and organisation. In accordance with the strategic capability requirements determined by Government, the ADF's

⁴ Minister for Defence, Ministerial Directive to CDF and Secretary, dated 29 May 2003.

governance arrangements and organisation (see Annex A) are designed to produce maximum capability within the available resources.

Command in the ADF

1.5 The ADF functions through a 'Chain of Command', which extends from the CDF through the Service Chiefs across the entire ADF. Below the statutory appointed commanders (the CDF and Service Chiefs), are subordinate single Service and joint Commanders of the major environmental or regional commands and Commanding Officers of joint and single Service flotillas, formations, groups, ships, bases, establishments, squadrons and units. All members of the ADF are under command of some nature. A commander is responsible and accountable for those personnel, assets and activities assigned under his or her command.

Key Strategic Tasks and Capability

1.6 Traditionally, the first priority for the ADF has been to maintain the capability to defend Australian territory from any credible attack, without relying on help from the combat forces of any other country⁵. However, the changed global strategic environment and the likelihood that Australian national interests could be affected by events outside Australia's immediate neighbourhood means that ADF involvement in coalition operations further afield has been increased. Involvement in such coalition operations could be limited to the provision of important niche capabilities. Australia's strategic circumstances have changed, with implications concerning the types of conflict in which Australia might become involved, the types of operations the ADF might have to conduct, and the capabilities it might require. These new circumstances indicate a need for some re-balancing of capabilities and priorities to take account of the new strategic environment; changes which will ensure a more flexible and mobile force, with sufficient levels of readiness and sustainability to achieve outcomes in the national interest⁶. As always, this continues to require that a strong defence capability, optimised for our unique strategic circumstances, needs be developed and maintained in the most cost-effective manner possible.

⁵ Defence White Paper 2000.

⁶ Australia's National Security – A Defence Update, 2003.

ADF Activities

1.7 The ADF undertakes a wide variety of single Service, joint (two or more Services) and combined (with foreign forces) activities within Australia and overseas. More recently, the ADF has been committed to a wide range of operations spanning the conflict spectrum, including deployments to East Timor (1999 to present), Bougainville (1998-2003), Iraq (2003 to present), Afghanistan (2001 to present) and the Solomon Islands (2003 to present) and a wide range of peacetime national tasks (see Annex B). These highly successful operational deployments have been central to the enviable professional reputation enjoyed by the ADF. In addition, a wide range of peace support operations including border security operations, emergency relief and anti-terrorism activities have demonstrated the unique flexibility and competence of the ADF as an instrument of the Government's broader security policy.

A Unique Organisation

1.8 The ADF shares many of the characteristics of large public and private sector organisations. However, on the basis of its role, core business, organisation and activities, the ADF is a 'business' like no other:

- It is a command-driven organisation at all levels – authority, responsibility and accountability are supported by legal sanctions.
- Although highly dependent on national and private infrastructure and support, it has a public monopoly on war-fighting capability and those people raised, trained and maintained to use it in furtherance of Australia's strategic policy.
- It is large (by Australian industrial or institutional standards) and hugely complex in its activities and its organisation.
- It is expensive in terms of personnel, technology and resources.
- It is inherently dangerous, in both peace and during armed conflict, for single Service, joint and combined exercises, training and operations.
- There are very high public expectations regarding both the personal behaviour of ADF members and the duty of care for their safety and well being whilst in the Service.

- It is unceasingly demanding of teamwork and professionalism of the highest order.
- Throughout careers, there is considerable turbulence for individuals and their families.
- Ultimately, it could demand the risk of death or serious injury should circumstances dictate, in service to the nation's security.

PART TWO: OVERVIEW OF THE MILITARY JUSTICE SYSTEM

THE LINK BETWEEN OPERATIONAL EFFECTIVENESS AND THE MILITARY JUSTICE SYSTEM

Supporting Command Authority in Peace and Armed Conflict

2.1 The ADF has a military justice system to support commanders and to ensure effective command at all levels. It is vital to the successful conduct of operations and to facilitate its activities in peacetime, including the maintenance of operational preparedness. Establishing and maintaining a high standard of discipline in both peace and on operations is essential for effective day-to-day functioning of the ADF and is applicable to all members of the ADF. The unique nature of ADF service demands a system that will work in both peace and in armed conflict. Commanders use the military justice system on a daily basis. It is an integral part of their ability to lead the people for whom they are responsible. Without an effective military justice system, the ADF would not function.

2.2 Leadership is critical to bringing military forces to full operational readiness so that ADF personnel are prepared to undertake their mission. Military leadership is founded on the values of integrity, discipline and respect for individuals. There is a vital link between command and leadership. *Command* can be defined as the authority that is lawfully exercised by virtue of a rank or assignment, whereas leadership is about influence. Commanders command organisations but lead people. In order to achieve missions, commanders influence their people using a combination of legal authority (provided through the DFDA) and moral authority (a function of an individual's leadership). In this respect, the DFDA provides the vital foundation for command in the ADF. It establishes the legal basis for the exercise of discipline, which is essential to command – a non-negotiable requirement for operational effectiveness. For this reason, the control of the exercise of discipline, through the military justice system, is an essential element of the chain of command, from the most junior leaders upwards.

2.3 ADF personnel must be prepared to put themselves at risk in the service of Australia. They are frequently required to deploy into harsh or inhospitable

environments for extended periods. Units and individuals are routinely subject to high levels of occupational hardship and personal stress. They are called upon to demonstrate high levels of professionalism, physical stamina, courage and personal resilience. The liability to danger is part of service in the ADF, whether it emanates from a hostile force or from the high-risk working environment associated with the operation of Defence platforms or equipment, on operations and in training.

2.4 In this environment, discipline is much more an aid to ADF personnel to enable them to meet the challenges of military service than it is a management tool for commanders to correct or punish unacceptable behaviour that could undermine effective command and control in the ADF. Teamwork and mutual support of the highest order are essential to success. Obedience to lawful direction is an intrinsic requirement expected from the most junior to the most senior members of the ADF.

Common Standards of Discipline for Peace and on Operations

2.5 Discipline is integral to the effectiveness and efficiency of professional fighting forces. In preparing for armed conflict during times of peace, members of the ADF must behave to those same exacting high standards which will be demanded in the event of armed conflict. Military discipline in individuals takes considerable time to develop and importantly, a high standard of discipline must apply to all members of the ADF. In both peace and during armed conflict, in terms of accidents or misdirected force, the margin for error or omission without tragic consequences may often depend upon inculcated habits of discipline to instantly obey lawful directions and orders. Peacetime presents its own demands on units and individuals, particularly when the focussing effect of impending conflict is absent. High standards of discipline are integral to military service during peacetime, particularly for a realistic training environment. Disciplinary standards cannot be dependent upon the level of readiness at which a particular unit may be held.

Additional and Separate Standards Beyond the Community Norm

2.6 The community sets the ADF apart as an institution of which it has the highest expectations. Unlike many civilian occupations, parents feel they have 'entrusted' their children into the care of the ADF, even when those children are adult volunteers for military service. At the same time, the public expects ADF members, as individuals, to adhere to rigorous standards of behaviour, even when some community standards

of behaviour may seem to be changing in the wider society from which those members are drawn. Through the Parliament, a discipline code that is *additional to* the ordinary civilian law governing the community is provided. Adherence to these higher standards is something that all ADF members accept when they join the military:

Those who join the services make a professional commitment quite unlike any other. They undertake to maintain the security, values and standards of the nation against external threat. They train for the application of extreme violence in a controlled and humane fashion whilst accepting the risk of death or serious injury in achievement of the mission. They agree to accept the lawful direction of authority without equivocation, and to forgo the right to withdraw labour or refuse to undertake a (lawful) task. In short, they undertake to train for and, if required undertake duty beyond the normal bounds of human behaviour.⁷

2.7 Along with their fellow citizens, members of the ADF are subject to the laws of the land that peaceably govern a civil society. However, it is also worthy of note that a significant number of civilian professions and occupations also apply additional codes and sanctions to ensure compliance with required standards in the public interest.

Adequate and Appropriate Disciplinary Jurisdiction to Support the ADF Role

2.8 The ability to deal with discipline and criminal conduct under a military code of justice is particularly necessary during operational deployments outside Australia. It can provide a 'stand alone' code where a civilian jurisdiction may either not apply or does not exist. It also provides a means to deal with misconduct that might otherwise be subject to the jurisdiction of foreign countries or the International Criminal Court. Members of the ADF do not yield their legal responsibilities and safeguards as citizens under the civilian law when undertaking to serve their country. However, they do render themselves accountable under an additional disciplinary code – the DFDA.

2.9 Because of the nature and demands of its business, the ADF goes well beyond the level of additional regulation encountered in other forms of employment and demands behaviour which is consistent with its role as an armed force. Proscribed behaviour under the provisions of the DFDA includes not only matters of a criminal nature applicable to the wider community, but a range of Service disciplinary matters

⁷ 'Serving Australia: The Australian Defence Force in the Twenty First Century' 1995, p. 61.

which are not necessarily crimes in the civilian environment, but which nevertheless amount to significant failings in the context of a disciplined armed force. Issues such as punctuality, attendance and obedience to lawful directions are examples of special and omnipresent requirements that underpin military discipline. While they may, in peacetime, appear to be issues of routine day-to-day personnel administration, these underlying issues take on far greater significance in an operational environment. For that reason, an important function of the military justice system is to ensure that discipline is integral to ADF culture and to the values and habits of its members.

Adequate, Appropriate and Timely Standards of Justice

2.10 It is incumbent upon the ADF to ensure that the procedures within the military justice system conform with applicable national legal standards to afford members of the ADF protection from what in the past has been termed 'rough justice'⁸. The standards of the military justice system and the procedures that accompany it must be demonstrably reasonable and fair to the ADF members of today, and be seen to be so by the community of today. This principle applies equally to all elements of the military justice system, whether it is in connection with police investigations, disciplinary action under the DFDA, administrative inquiries or adverse administrative action, as it does to the associated review and complaint mechanisms.

2.11 When elements of the ADF deploy on exercises and operations in Australia or overseas, they take their military justice procedures with them. It is designed to be a robust and portable system, to provide swift administration of justice when in an operational environment. For example, courts martial were conducted during operations in East Timor and, more recently, Defence Force Magistrate trials have been conducted in Iraq. The consequences of an unresponsive system to the cohesion and operational availability of a unit in combat would be most serious.

2.12 Much of the disciplinary activity in the ADF concerns minor violations – frequently admitted to. These are properly dealt with at the appropriate level of seniority within the command chain. The safeguards of justice for Service disciplinary proceedings are provided through a process of automatic review and the facility to petition for further review. More senior and experienced command authorities review

⁸ For example, illegal punishments, the avoidance or abuse of process, the use of violence and peer correction by force.

proceedings to ensure that a conviction is correct at law and that any punishments are both correct at law and appropriate in all circumstances, aided by advice provided by legal officers. The protection available for ADF members through these procedures is appropriate and adequate.

SCOPE AND FUNCTION OF THE MILITARY JUSTICE SYSTEM

2.13 The military justice system exists to enable commanders in the ADF to command and control the ADF and to assist in the maintenance of discipline, and consequently achieve appropriate levels of operational effectiveness. Because these terms encompass a wide breadth of issues, the components of the military justice system are equally as wide. For convenience, the military justice system can be split into two distinct but related systems – the discipline system and the administrative system⁹. Looked at this way, the military justice system encompasses matters associated with:

- first, disciplinary action under the DFDA, including the investigation of such matters, and the right of review and appeal; and
- second, the conduct of administrative inquiries, adverse administrative action and the right to seek the redress of grievances or the review of decisions.

2.14 An important tool in the maintenance of discipline is the DFDA, which provides a mechanism for the investigation and prosecution of disciplinary offences. Indeed, the DFDA creates a self-contained criminal justice system that applies in all military circumstances, including on overseas deployments. The DFDA is used where alleged conduct gives rise to a suspicion that an offence under the Act may have been committed. The operation of the DFDA is most easily compared to the way the ordinary civilian criminal law operates. Investigations are conducted (often by Service police) and evidence is considered, charges are laid, a trial occurs, and for guilty findings, a punishment may be imposed from the scale of punishments provided by legislation. The procedures for a trial are based on civilian criminal trials. If a member has been found guilty of a Service offence, the consequences can range from a conviction without punishment to the imposition of a reprimand, fines, reduction in

⁹ See Annex C for a diagrammatic outline of the military justice system.

rank, detention (in a military detention centre), dismissal from the ADF to imprisonment (in a civilian jail).

2.15 Equally important is the ability to manage the day-to-day functions of the ADF. An essential tool for this activity is the administrative system, which deals with the decisions and processes associated with control and administration of the ADF. The administrative system's primary functions are related to:

- the inquiry as a fact finding process for determining what has happened in any given circumstance;
- an 'employee'¹⁰ management process; and
- a complaint process for members, including a system for the review of decisions.

2.16 The military justice system is underpinned by commonwealth law. For example, the principal sources of commonwealth legislation that regulate the discipline component are the DFDA and the *Evidence Act*. In the administrative area, the *Administrative Decision (Judicial Review) Act* provides overview of conduct and decisions of an administrative character, in particular to ensure the legal requirements are satisfied, such as the requirements for procedural fairness. Other commonwealth legislation such as the *Privacy Act* also has application. In particular, there is legislation to protect the rights of ADF personnel to make complaints, provided under the Defence Force Regulations. The military justice system applies to all ADF members regardless of rank. Finally, ADF members, as Australian citizens, also remain subject to the same laws that apply to fellow Australians.

MILITARY DISCIPLINE SYSTEM

2.17 The military discipline system is concerned with investigating and prosecuting disciplinary and criminal offences for the purpose of maintaining and enforcing service discipline. The most obvious component of the discipline system is the DFDA and other associated commonwealth legislation. This discipline legislation covers the investigation of disciplinary offences, the types of offences, the available

¹⁰ Strictly speaking, members are not employed in the ADF, but are enlisted or appointed under the *Defence Act* and the regulations thereto.

punishments, the creation of Service tribunals, trial procedures before those Service tribunals, and rights of review and appeal.

Discipline Offences

2.18 The DFDA provides for three categories of offences:

- uniquely military discipline offences, such as absence without leave, insubordinate conduct, disobedience of a command and prejudicial conduct, for which there are no civilian criminal counterparts;
- offences with a close, but not exact, civilian criminal law counterpart, such as assault on a superior or subordinate, and falsification of a Service document; and
- the importation of the civilian criminal law applicable in the Jervis Bay Territory, which includes serious criminal offences, such as murder and sexual assault, and a broad range of other offences such as falsifying a statutory declaration.

2.19 The importation of a range of civilian criminal law offences as disciplinary offences is of particular utility and importance when forces are deployed overseas, where ADF members may otherwise either not be subject to any criminal law or to host country law – neither of which may be desirable.

2.20 High Court decisions and the DFDA itself have resolved this apparent overlap in jurisdiction between the DFDA and the ordinary civilian criminal law. Jurisdiction under the DFDA in Australia in peacetime may be exercised only where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline. Furthermore, section 63 of the DFDA excludes military jurisdiction in Australia for dealing with serious offences including murder, manslaughter and certain sexual offences (eg. rape, sexual assaults involving harm and child sexual offences) without the consent of the Commonwealth Director of Public Prosecutions.

2.21 The High Court has clearly deferred to the prerogative of the Parliament to assess the needs of the ADF and to legislate accordingly:

It follows that, if offences against military law can extend no further than is thought necessary for the regularity and discipline of the Defence Forces (see *Groves v The Commonwealth* (1982) 150 CLR 113 at 125), this limitation would not preclude Parliament from making it an offence against military law for a defence member to engage in conduct which amounts to a civilian offence. It is open to Parliament to provide that any conduct which constitutes a civilian offence shall constitute a service offence, if committed by a defence member. As already explained the proscription of that conduct is relevant to the maintenance of good order and discipline in the defence forces. The power to proscribe such conduct on the part of the defence members is but an instance of Parliament's power to regulate the defence forces and the conduct of the members of those forces. In exercising that power it is for Parliament to decide what it considers necessary and appropriate for the maintenance of good order and discipline in those forces. And Parliament's decision will prevail so long at any rate as the rule which it prescribes is sufficiently connected with the regulation of the forces and the good order and discipline of defence members.¹¹

2.22 This statement by the High Court neatly encapsulates the basis on which the maximum reach of military law can be extended, through Parliament's prerogative to legislate for the jurisdiction of military law and tribunals under the Defence power of the Constitution. The question is one of determining what the role of the ADF calls for in both peace and armed conflict – recalling the previously-stated requirement for the ADF to have one set of procedures for both peace and armed conflict to enable a seamless transition in response to changing strategic circumstances. The DFDA adequately defines the scope and application of military jurisdiction, in terms of both:

- the location of where offences may be committed and tried; and
- the division of jurisdiction between state and federal authorities and the ADF with respect to a range of serious civilian criminal, as against offences of a uniquely military character.

¹¹ *Re Tracey; ex parte Ryan* (1989) CLR 518 at 545 per Mason C.J., Wilson and Dawson J.J.

Service Tribunals

2.23 The DFDA creates Service tribunals with power to try ADF members on charges of Service offences against the Act. These are:

- courts martial (general and restricted)¹²;
- Defence Force Magistrates¹³; and
- summary authorities (superior summary authorities, commanding officers, and subordinate summary authorities).

2.24 A Discipline Officer Scheme also exists to deal with minor disciplinary infractions by members below non-commissioned rank and officer cadets. The scheme applies only to certain DFDA offences where the member admits the misconduct and there is no dispute as to the facts. It is similar to, but slightly different from, an 'on the spot' fine. A unit record of the infringement is kept for 12 months on a special register, which is separate from the member's usual conduct record.¹⁴

Statistics

2.25 Since its inception in July 1985, the DFDA has been used extensively in the maintenance of discipline in the ADF. For example, during the period 1998 to 2002, there were 37 courts martial, 220 Defence Force Magistrate trials, 16,175 trials by summary authorities and 10,455 infringement notices were dealt with by discipline officers¹⁵.

¹² A General Court Martial comprises a President, who is not below the rank of Colonel or equivalent, and not less than four other members. A Restricted Court Martial comprises a President, who is not below the rank of Lieutenant Colonel, and not less than two other members. Only military officers can be members of either general or restricted courts martial. Such courts always include a legal officer acting as Judge Advocate.

¹³ Only military legal officers can be appointed as Defence Force Magistrates. Defence Force Magistrates are appointed by the Judge Advocate General from the members of the Judge Advocates Panel.

¹⁴ The scheme applies to members below non-commissioned rank and officer cadets. A commanding officer may appoint officers or warrant officers to be discipline officers. The range of punishments is: fine of one day's pay, restriction of privileges for a period not exceeding two days, stoppage of leave for a period not exceeding three days, extra duties for a period not exceeding three days, extra drill for not more than two sessions of 30 minutes each per day for a period not exceeding three days, reprimand.

¹⁵ The table of statistics from which this information is summarised is at Annex D.

Safeguards and Legal Rights

2.26 The maintenance and enforcement of discipline relies on the principles of fairness and transparency. Accordingly, the DFDA provides a strict set of rules and procedures for the investigation and trying of offences that safeguard standards of justice and fairness. For example, neither witnesses nor a suspect can be made to answer questions in an investigation, and suspects have access to free legal advice at Commonwealth expense. The ADF policy on prosecution of offences under the DFDA is similar to that used in the civilian criminal jurisdiction by the various Directors of Public Prosecutions. Additionally, the ADF recently created position of Director of Military Prosecutions ensures greater transparency and consistency in the decision to prosecute offences.

2.27 In accordance with legislation and as with civilian criminal law, the general rule is that the prosecution must prove a DFDA offence 'beyond reasonable doubt'. The usual rules of evidence in a criminal trial apply. Legal advice at Commonwealth expense is available to members who are being investigated or are charged with an offence under the DFDA. To ensure timeliness, the case management of trials is overseen by the Registrar of Military Justice. The Discipline Tracking and Case Flow Management database used by the Registrar is also available to commanders to assist them with the management and monitoring of their disciplinary matters.

Reviews and Appeals

2.28 The DFDA creates a system of internal reviews of convictions and punishments and a right of petition (a form of appeal). All convictions must be automatically reviewed, and that review must include a report by a legal officer. A member may seek further review by lodging a petition with a reviewing authority, who must obtain a legal report from senior Reserve legal officers as part of the higher review process.

2.29 Additionally, in the case of convictions by courts martial and Defence Force Magistrates, a member can lodge an external appeal to the Defence Force Discipline Appeals Tribunal, which is composed of Federal, State and Territory judges who are appointed to the Tribunal by the Governor-General. Subsequent appeals may be lodged with the Federal Court and, ultimately, the High Court.

2.30 Also, IGADF has the independent authority to review disciplinary processes. The review role of the Office of the IGADF is discussed more fully later in this Part.

Guidance, Training and Education

2.31 The ADF is a large and complex organisation with unique requirements for discipline and a requirement to investigate a wide variety of incidents. It must have at its disposal a set of rules and procedures that will fulfil these requirements but, at the same time, be fair and protect the individual members who are subject to it. While the Parliament exerts overall control, an effective discipline system in any military force must be implemented and managed from within the organisation itself. The complexity of the legislation, rules and procedures requires that those responsible for their implementation possess a good knowledge of them, and experience in their use.

2.32 The development and maintenance of policy most appropriately remains a centralised function within the ADF, while the application of both the DFDA and the administrative system will continue to be a command responsibility. This represents a significant challenge for those tasked with its implementation.

2.33 An effective education and training program is an essential ingredient of the entire system of discipline in the ADF. This point has been a recurrent theme in inquiries and reports in recent years. Currently, ADF commanders receive instruction on the military justice system as part of their pre-command education. The content of these courses is always under review. However, commanders cannot be trained lawyers. Rather, they should know when and where to look for legal advice as the circumstances demand. As a by-product, initiatives such as the recently introduced Director of Military Prosecutions can complement enhanced education and training regimes with improved expert support and advice, to supplement the wide range of military legal support already available.

Applicability of Civilian Criminal Law and Procedures

2.34 ADF members remain subject to the civilian criminal law. The application of the DFDA does not exclude the operation of the civilian criminal and judicial system. However, where a member is dealt with in the civilian court system, then the member is not subjected to the DFDA for the same or similar offence. Additionally, there are rights of appeal from DFDA convictions by courts martial and Defence Force

Magistrate trials to the Defence Force Discipline Appeals Tribunal and thereafter the Federal Court and, ultimately, the High Court.

KEY MILITARY JUSTICE APPOINTMENTS AND AGENCIES

2.35 This section provides a brief description of the range of appointments and institutions that have key roles in the exercise of the military justice system, especially in the more formal exercise of the discipline system. Many have been introduced only recently as part of the ongoing reform of military justice procedures.

Office of the Inspector-General of the ADF

2.36 The CDF appointed the inaugural IGADF on 13 January 2003 and the Office of the IGADF was opened on 24 September 2003. Its purpose is to provide review and audit of the military justice system that is independent of the ordinary chain of command. It provides an avenue by which failures of military justice may be exposed or examined so that the cause of any injustice may be remedied. The IGADF reports directly to CDF.

2.37 The IGADF might simply be described as combining some features of a traditional ombudsman with those of an internal affairs bureau. The objective is to establish a new and independent capability for scrutiny of the military justice system with a view to improving its health and effectiveness. With its exclusive focus on military justice in its widest sense, the Office of the IGADF has a watchdog role that is without precedent in the ADF.

2.38 The concept of an independent "Military Inspector-General" was raised in the wake of the brutality allegations within the Army and the associated JSCFADT Rough Justice inquiry in 2001.

2.39 In December 2000, as a concurrent response to these issues, Mr James Burchett QC, a former justice of the Federal Court, was appointed to conduct an inquiry into the ADF military justice system with particular emphasis on determining whether systemic weaknesses existed in the military justice system. Mr Burchett was also asked to identify the role and functions of an IGADF. His recommendations concerning the position's role and functions were presented in July 2001 and accepted in full. The concept of the IGADF as proposed by Mr Burchett having been accepted

in full, the position was established by contract for reasons of expediency. It remains open to convert the appointment to one that is legislatively based in the future.

2.40 The legal powers and responsibilities of the IGADF are contained in Defence Instruction (General) Administration 61-1 and in Part 7 of the *Defence (Inquiry) Regulations*. Importantly, the latter provides the legal authority for the IGADF to conduct inquiries into military justice matters without the necessity for further case-by-case appointment and to appoint investigating officers on the IGADF's own initiative, further underlining the independence of the office from the chain of command.

2.41 The role of the IGADF is to provide the CDF with internal audit and review of the military justice system independent of the ordinary chain of command. This includes both ADF discipline and the Defence inquiries system. The IGADF provides an avenue by which any failure of military justice may be examined and exposed. It does not supplant the existing processes of review by the provision of individual remedies, but ensures that review and remedy are available and that systemic causes of injustice (if they arise) are eliminated.

2.42 The role is supported by 13 functions that fall broadly into four main groupings:

- *Investigative Functions.* Investigation of matters referred by the CDF or Service Chiefs or complaints made by individuals for whom the normal chain of command avenues may have failed or are otherwise inappropriate; for example, where the chain of command itself is the problem. This includes an 'own motion' investigative function.
- *Audit or Performance Review Functions.* Includes monitoring of key indicators, which indicate the health and effectiveness of the military justice system on a regular basis and conducting on-site checks of military justice arrangements at unit level.
- *Advisory Functions.* Includes maintaining a Register of Inquiry Officers (officers deemed suitable by training and experience to conduct or be part of an administrative inquiry) and being available to discuss methods of

handling incidents (to supplement, rather than to substitute for legal advice provided by The Defence Legal Service).

- *Development Functions.* Includes the promotion of military justice values; making recommendations concerning improvements to policy; maintaining awareness of best practice in similar forces overseas; and sponsorship of periodic focus groups of military justice practitioners to seek feedback on health and effectiveness of the system.

2.43 The establishment of the office of IGADF and the creation of the independent Director of Military Prosecutions represent major improvements to the military justice system that, over time, will significantly further improve the quality of military justice in the ADF. During the first year since its establishment the IGADF has considered some 80 submissions concerning military justice issues. Work is well advanced on the development of processes for ongoing performance review of the military justice system.

Director of Military Prosecutions

2.44 The creation of the Director of Military Prosecutions was foreshadowed by an internal Defence report in 1997 (the Abadee study) and the JSCFADT Report into Rough Justice in 2001. The establishment of the position emerged as one of the major recommendations of the Burchett Report in 2001 and was accepted in full. Legislative amendments to the DFDA are required to formally establish the position of Director of Military Prosecutions as a statutory appointment. Pending this, a Defence Instruction (General) was issued by CDF and the Secretary in July 2003 to establish the appointment as an adviser to convening authorities. It is anticipated that legislation formally establishing the appointment will pass through parliament in 2004, at which stage it will formally replace the convening authority as the prosecution decision-maker.

2.45 In the interim, the functions of the Director of Military Prosecutions include providing pre-trial advice to convening authorities, the conduct of prosecutions at courts martial and Defence Force Magistrate trials and the representation of the ADF

at appellate tribunals and courts¹⁶. On request, the Director can also provide legal advice to commanders to assist them in determining whether charges under the DFDA should be preferred, to supplement the advice already provided by regionally based Defence legal officers¹⁷. The establishment of the Director of Military Prosecutions further enhances the transparency, impartiality and independence of the prosecutorial decision-making process. The position will be a statutory appointment and separate from the chain of command¹⁸. However, it is important to note that the independence of the Director of Military Prosecutions will complement, rather than detract from, the exercise of disciplinary powers by commanders, who continue to be responsible for the maintenance of discipline in the ADF. Generally, it will be the more serious offences under the DFDA that will be referred to the Director for decisions over whether to prosecute.

Registrar of Military Justice

2.46 The Registrar of Military Justice deals with the case management of disciplinary justice trials and closely monitors the timeliness of major prosecutions under the DFDA to assist in reducing delays in the military discipline system. Procedures for the improvement of the administration of courts and related matters are ongoing. When the Director of Military Prosecutions formally replaces convening authorities as the prosecution decision-maker, the Registrar will also formally take over the convening authorities' functions of appointing court martial panels, administering and conducting trials. The registrar will convene courts martial and Defence Force magistrate trials, and attend to all related issues, such as substitution in the event of bias and warrants to appear. This will provide a function that is independent from the chain of command and is conducted in a timely manner by a dedicated appointment and office. Even though the ADF does not have standing courts and creates them when required to do so, the Registrar of Military Justice will undertake a function similar to a civilian registrar or court administrator.

¹⁶ Such prosecutions have previously been prosecuted at the formation or unit level by regionally based Defence legal officers.

¹⁷ Defence Instruction (General) 45-6 – *Director of Military Prosecutions – Interim Implementation Arrangements*, issued on 15 August 2003, specifies the role and functions of the office (see Annex F).

¹⁸ During the interim period, until full legislative cover has been implemented, the Director will be part of The Defence Legal Service and will be technically responsible to its Director General.

Judge Advocate General

2.47 The Judge Advocate General has oversight and control over the operation of the judicial aspects of the discipline system. In accordance with the DFDA, a Judge Advocate General must be, or have been, a Justice or Judge of a Federal Court or of a Supreme Court of a State or Territory. The functions of the Judge Advocate General include:

- making procedural rules for Service tribunals;
- providing the final legal review of proceedings within the ADF;
- participating in the appointment of Judge Advocates, Defence Force Magistrates and legal officers for various purposes; and
- reporting upon the operation of laws relating to the discipline of the ADF.

2.48 The office and its function are indicative of Parliament's desire for an appropriate oversight of the operation of the DFDA. As required under the DFDA, the Judge Advocate General provides an annual report on the operation of the DFDA to the Minister Assisting the Minister for Defence, which is tabled in both Houses of Parliament. The annual reports of the Judge Advocate General provide some useful tracking of developments in the administration and implementation of changes in the military justice system. Summaries of some key points from reports tabled since the 1998 Joint Standing Committee Inquiry are provided at Annex D.

Chief Judge Advocate

2.49 To assist the Judge Advocate General, a statutory position known as the Chief Judge Advocate was created by an amendment to the DFDA in 2003. The office was created to provide administrative assistance to the Judge Advocate General and to permit him to delegate his administrative powers. The Chief Judge Advocate must be a member of the Judge Advocates panel established under the DFDA. In practice, the Chief Judge Advocate will be the senior permanent officer of the panel, and will sit as a Judge Advocate at courts martial and as a Defence Force Magistrate.

2.50 The position has institutional independence with provision for the appointment of the Chief Judge Advocate by the Judge Advocate General. The appointment is for a renewable term of up to three years. In legislation to be introduced into the Parliament in 2004, the term will be extended to five years and provision made for the salary and

entitlements of the position to be independently fixed by the Remuneration Tribunal, thereby further guaranteeing the independence of the office.

2.51 The Chief Judge Advocate is the successor to a previous administratively created position known as the Judge Advocate Administrator, a position that was mentioned in a number of the recommendations in the 1997 Abadee study.

The Defence Legal Service

2.52 The Defence Legal Service provides legal support to the Defence Organisation as a whole. Part of that role is to provide legal and related policy advice to commanders on the operation of the ADF's military justice system. In practice, the application of the military justice system is a command, not a legal, responsibility. Legal officers will advise on whether a disciplinary investigation has resulted in sufficient evidence for charges to be laid, and also on the type and wording of those charges. However, it is then a command decision whether or not to proceed and lay charges. Importantly, the operation of the military justice system is controlled through the chain of command, with legal officers providing advice and assistance to commanders.

Service Police

2.53 The three Service police organisations report to the Provosts-Marshal of the Navy, Army and Air Force, and remain under the ultimate command of the respective Chiefs of Service. Their members hold recognised qualifications, including Certificate IV in investigations as a minimum standard¹⁹. The Service police have powers to investigate offences allegedly committed under the DFDA or the ordinary criminal law of the Commonwealth, States and Territories.

2.54 The Service police are generally responsible for the prevention, detection, and investigation of DFDA offences, including fraud, by ADF members. During overseas deployments, they may be responsible for the prevention, detection, and investigation of *all* offences by ADF members.

¹⁹ *Defence Instruction (General) Administration 45-2 Reporting and Investigation of Alleged Offences within the Australian Defence Organisation (see Annex F)* describes the role of the Service police, together with the other Defence investigative authorities. In addition to the Service police, the investigative arm within Inspector-General Division, the Fraud Investigation and Recovery Directorate and the Defence Security Agency have investigative roles.

2.55 Service police are responsible for making decisions about whether or not to investigate an incident that is notified to them. Where it is decided not to investigate (for example, where a matter is considered too minor), the matter is referred back to the commander or manager, who then deals with it.

2.56 The various Service police organisations regularly review their training and establishments – especially their investigative capabilities. This process has been given recent added impetus as a result (in part) of findings from the Burchett and ‘Rough Justice’ reports. For example, Army took steps to increase the number of investigators available review in late 2002. Army, which is the lead joint authority for the training of Service police investigators, followed this up by conducting a review into the policies, practices and training for investigations conducted by the Military Police. This has culminated in the contracting of an outside consultancy to review the area, which is due to report back to Army in May 2004²⁰. It is CDF's intent that an outcome of the review will be to increase the quality of investigative services available within all the Service police organisations.

ADMINISTRATIVE SYSTEM

2.57 The administrative system has a number of components, the major components being an inquiry system (a fact-finding process), a procedure for administrative action against members in response to unacceptable behaviour or poor professional conduct, and internal and external review processes. It is essential to keep in mind that, the administrative system serves a different purpose from the discipline system. The purpose of an administrative inquiry is not to investigate whether ADF members have committed an offence under the DFDA or civilian criminal laws. Adverse findings or recommendations about a member that are of an administrative character are incidental to the primary purpose of an inquiry – that is, to find the facts as to why an incident occurred.

2.58 It is important to note that the entire administrative system is subject to administrative law principles, especially the fundamental principles comprising natural justice (also called procedural fairness). Administrative conduct and decisions

²⁰ Further details are provided in Part Four of this submission – Army Aspects.

are also subject to various commonwealth legislation, including the *Administrative Decisions (Judicial Review) Act*, the *Privacy Act* and *Freedom of Information Act*, the Defence Force Regulations (eg. redress of grievance) and the Defence (Inquiry) Regulations.

Natural Justice

2.59 Natural justice (also known as procedural fairness) embodies the rules and procedures to be followed by those in authority when proposing adverse administrative decisions about others, such as a formal warning or discharge from the Service. While the application of the rules may vary according to circumstances²¹, a person facing proposed adverse administrative action or an administrative inquiry is entitled to:

- be informed of the substance of the allegations or complaints made against them,
- be informed in a timely manner of a proposed adverse action;
- full and timely disclosure of material facts and evidence;
- a reasonable opportunity for a fair hearing;
- have a decision made by a person who is free from bias and gives genuine and proper consideration to the response from the member; and
- be notified of the decision and the reasons for the decision.

2.60 These administrative law principles ensure not only that decisions are impartial and independent, but also any decision that may adversely affect a person is open and transparent to the person involved. In the ADF, the requirements for natural justice are usually reflected in the Notice to Show Cause process. Internal and external review processes discussed later in this brief further ensure openness in decision making with both high level and civilian oversight of inquiries and decisions.

²¹ In urgent circumstances, or where command or operational imperatives apply, the application of procedural fairness may be temporarily waived. An example could be the prompt removal of a member from an operational theatre due to exigent circumstances. Members should be afforded procedural fairness on the matter as soon as the circumstances permit (for instance, on being evacuated from an operational theatre).

Administrative Inquiries

2.61 Administrative inquiries are fact-finding missions to assist decision-making by commanders in response to incidents that may impact on the ADF. They are instigated by commanders in response to military incidents and for the purpose of determining what happened and why, generally so that appropriate action can be taken, such as to prevent re-occurrence or to make policy and systemic improvements. Administrative inquiries are conducted into matters or incidents that impact on the command and control of the ADF – they are used to serve a military purpose. The following are the more common types of administrative inquiries in the ADF:

- *Quick Assessment.* A quick assessment is an initial look at a matter to determine the way ahead, such as whether there is a need for a further inquiry or other action, or referral to Service or civilian police for a discipline investigation. The authority for this assessment is derived from the general command powers under section 9 of the *Defence Act* and ADF policy in the *Administrative Inquiries Manual*.
- *Routine Inquiry.* Routine inquiries are conducted into less complex matters, such as minor loss or damage to service property, harassment or personnel management issues. This type of inquiry is frequently used in response to unit level Redress of Grievance processes. The authority for this assessment is derived from the general command powers under section 9 of the *Defence Act* and ADF policy in the *Administrative Inquiries Manual*.
- *Inquiries under the Defence (Inquiry) Regulations.* The types of inquiry under the regulations are:
 - *General Court of Inquiry.* This inquiry process, which is chaired by a judge or senior lawyer, would be appropriate in cases of national significance. The appointing authority is the Minister for Defence. To date, there has been no appointment of a General Court of Inquiry.
 - *Combined Board of Inquiry.* These inquiries are established to inquire into matters concerning the ADF and the armed forces of another country. The Minister for Defence or his delegate is the appointing authority. This form of inquiry has not been used to-date.

- *Board of Inquiry.* These inquiries may be appointed to inquire into any matters concerning the administration or aspects of the command and control of the ADF. The CDF, Secretary and the Service Chiefs or their delegates appoint boards of inquiry²². Civilians may be appointed as board members, when appropriate²³.
- *Investigating Officer.* These inquiries are commonly used by commanders to investigate a wide range of significant matters concerning the ADF which arise under their command or control, but do not require a board of inquiry. Depending on the circumstances, a member of the ADF or civilian can be appointed as an investigating officer. There is also the option of appointing one or more officers to act as inquiry assistants to the investigating officer.

2.62 In addition, recent amendments to the Defence (Inquiry) Regulations authorise the IGADF to act as an investigating officer for the conduct of inquiries.

2.63 The subject of an administrative inquiry need not be, of itself, a military justice issue. For instance, an administrative inquiry dealing with the failure of a piece of equipment would not ordinarily be regarded as raising military justice issues in terms of its subject matter. On the other hand, the process by which an administrative inquiry is conducted can, and often will, raise military justice issues, because of its potential to affect the rights, reputation and future of individuals and agencies whose conduct in relation to a particular incident is examined.

2.64 The consequences of adverse findings being made against particular individuals can include possible referral for disciplinary action or further adverse administrative action, either of which could have significant financial or career implications for those affected. It is important therefore that administrative inquiries are conducted in accordance with the law and with due regard to procedural fairness.

²² Boards of inquiry might, for example, be appointed for some types of aircraft accidents or for accidental deaths during military activities.

²³ A recent example was the appointment of Mr Christopher Filor PSM, (Inspector Marine Accidents) and Assistant Chief Officer Lindsay Cuneo (Fire and Rescue Service of WA) on the board of inquiry into the fire on HMAS *Westralia*.

For this reason, the *process* by which administrative inquiries are conducted falls within the broader military justice system.

Safeguards and Rights

2.65 All forms of inquiry are required by either legislation or policy to follow administrative law principles, including affording natural justice to members about whom there may be adverse findings. ADF members likely to be adversely identified will have access to legal advice (at Commonwealth expense). In accordance with Defence (Inquiry) Regulations, the ‘evidence’ collected during an inquiry cannot be used for disciplinary or criminal proceedings, with a statutory exception in relation to offences against the Defence (Inquiry) Regulations (eg. a charge of giving ‘false evidence’ to an inquiry)²⁴.

2.66 When an inquiry report is submitted to the commander who appointed the inquiry, a procedure is available for a legal review of the report to be conducted²⁵. Issues the legal review will address are as follows:

- Was the inquiry in accordance with the terms of reference?
- Was there sufficient evidence to support the findings and recommendations?
- Any other relevant legal issue, such as any significant procedural irregularities.

2.67 In the course of the fact-finding process about the cause or circumstances of an incident that has military implications, an administrative inquiry may also make factual findings and recommendations about the professional conduct of a member. For example, there may be factual findings about the conduct of a member and recommendations for further action, such as counselling; more formal action such as a warning or censure; or the unsuitability of a member to hold a particular appointment or to continue to serve in the ADF. If the appointing authority accepts the facts and recommendations, but before a decision on the matter is made, any proposed adverse administrative action against a member must be preceded by a notice to show cause

²⁴ This statutory protection only applies to inquiries appointed under the D(I)Rs (eg ‘Routine Inquiries’ under the *Administrative Inquiries Manual* are not covered). However, the ADF policy position is intended to have the same effect. Evidence laws would also usually prevent the admission of such material by the Prosecutor.

²⁵ *Administrative Inquiries Manual*, Chapter 5.

process. This affords the member natural justice before a final decision is made on the issue and means that the member will have the right to respond to a proposed adverse decision, and the alleged facts being relied upon. There is also opportunity to seek a review of any decisions made.

2.68 If, in the course of an administrative inquiry, it appears that a member may have committed a military or civilian offence, all or part of the administrative inquiry may be suspended, pending a decision on whether the matter ought to be referred for investigation by Service police under the DFDA or to the civilian police for investigation. In some cases, a referral may occur after the administrative inquiry is completed, if an inquiry report includes facts or recommendations that suggest a disciplinary or other criminal offence may have been committed. The action taken depends on the circumstances of each case. The key point is that the purpose of discipline investigations (determining whether an offence is committed) and administrative inquiries (determining facts about an incident for operational and command purposes) are different and have different consequences. Nonetheless, both operate within the military justice system.

Primacy of Civilian Authorities

2.69 All injuries to and deaths of ADF personnel in Australia may be subject to criminal investigation by civilian police and to coronial inquiry, irrespective of whether the ADF has conducted a disciplinary investigation or administrative inquiry of its own²⁶. Where an ADF member dies in Australia, other than by natural causes or in operations, the relevant State or Territory Coroner is notified, as are the civilian police²⁷.

2.70 As a matter of practice, if the ADF has conducted a disciplinary investigation or administrative inquiry then, to the extent permitted by law, the report of the investigation or inquiry will be made available to the civilian police or coroner and Comcare.

²⁶ For example, the recent coronial inquiry by the West Australian coroner into the 1998 HMAS *Westralia* fire.

²⁷ *Administrative Inquiries Manual, Chapter 2*; Defence Instruction (General) Personnel 20-6 *Deaths within and outside Australia of Australian Defence personnel* (especially paragraphs 56 and 57); and Defence Instruction (General) Personnel 11-2 *Notification of Service and Non-Australian Defence Force casualties* provide more specific policy direction on notification of deaths etc.

Policy Guidance

2.71 The *Administrative Inquiries Manual*, which was developed after the 1998 JSCFADT Inquiry and issued in May 2000, provides detailed practical guidance on administrative inquiries conducted under the inherent authority of commanders and those conducted under the Defence (Inquiry) Regulations. It provides general guidance and practical advice on the methodology for the successful conduct of inquiries and includes procedures to ensure that natural justice is afforded to members. As part of the usual process of continual review, amendment of the manual is proposed, taking into account reviews, feedback from experiences and lessons learned.

Adverse Administrative Action

2.72 Adverse administrative action is a part of the administrative system. The word 'adverse' is used to highlight that this type of administrative action may have unfavourable career consequences for the member involved, such as formal warning, removal from a duty or appointment, or even discharge from the Service. It is action taken in response to a particular aspect of a member's conduct or military performance.

2.73 Adverse administrative action can follow from a DFDA matter, a civilian criminal charge or an administrative inquiry. As this administrative action is different in character and result to disciplinary action, which deals with the prosecution of an offence under the DFDA, it does not amount to 'double jeopardy'. For example, warnings and censures are part of a process for identifying and/or notifying (warning) members that their conduct does not meet the professional standards expected of an ADF member. In some cases, adverse administrative action such as censure or discharge from the Service may follow a conviction for a Service or civilian offence.

2.74 For example, the Defence (Personnel) Regulations 2002 provide that a conviction for a Service or civilian offence may be grounds for discharge from the Service. It may also be initiated where there is no criminal conviction but the alleged or proven facts demonstrate that conduct has occurred which is unacceptable for a member of the ADF. In that event, the requirements of natural justice precede administrative decisions regarding the proposed adverse action. Administrative action is a management tool to correct or deal with unacceptable or unprofessional behaviour

in the work place. As such, adverse administrative action operates in much the same way for the ADF as in the civilian sector.

2.75 *Policy Guidance.* There are a number of Defence instructions and policies on the application of adverse administrative action, such as those relating to formal warnings, censures and discharge from the service. The *Guide to Administrative Decision-Making* (see Annex F) is a recently promulgated manual developed partly in response to previous inquiries into the military justice system. It provides both generic and practical guidance to commanders and other ADF personnel who make administrative decisions. It encourages good administrative decision-making practices in the ADF and improves the quality of administrative decisions.

Internal and External Review

2.76 The review of administrative decisions is a basic administrative law principle. The ADF has a comprehensive internal review system, which is subject to external review and appeals. Internal review of adverse administrative action includes:

- the redress of grievance system (which is legally protected under the Defence Force Regulations); and
- the IGADF.

2.77 External review of adverse administrative action includes the following:

- complaints to the Defence Force Ombudsman;
- applications to the Human Rights and Equal Opportunities Commission;
- Ministerial representations; and
- appeals to the Federal Court.

The Right to State a Complaint and the Military Justice System

2.78 The right to make a complaint about their service or treatment is an entitlement of ADF members that has been long recognised. In earlier times, the entitlement was enshrined in the Articles of War, which also prescribed the then extant disciplinary arrangements. The existence of a recognised avenue of complaint provided a counterbalance to the often-rigorous disciplinary regimes that were prevalent in the armed services.

2.79 Nowadays, the right to make a complaint is provided for under the redress of grievance system. The purpose, however, remains the same – to provide the Service member with a legal entitlement to bring his or her grievance to attention and have it dealt with. The DFDA provides for a system of petitions and appeals against the convictions or punishments of Service disciplinary tribunals. In respect of administrative conduct or decisions, the redress of grievance system remains a primary means by which complaints may be heard.

2.80 In relation to military justice issues, in particular, the right to make a complaint is an important means of ensuring those decisions affecting members' rights and careers are made fairly and according to law.

2.81 The right to make a complaint is part of the military justice system.

RECENT REVIEWS, CHANGES AND IMPROVEMENTS – OVERVIEW

Discipline System - Legislative Action

2.82 The military justice system is constantly under review, both internally and externally, with a process of continuous improvement²⁸. Relevant Defence portfolio legislation is always under review – Defence regularly sponsors a 'Defence Legislation Amendment Bill'. For example, some recent significant legislative changes include:

- the IGADF standing power and authority to conduct 'own motion' inquiries; and
- increased impartiality and independence in the selection of courts martial panels, Judge Advocates and Defence Force Magistrates, through the enhanced role of the Judge Advocate General under the DFDA.

2.83 Further enhancements to the DFDA proposed for 2004 include the creation of statutory appointments for the Director of Military Prosecutions and the Registrar of Military Justice. These will ensure that the decision to prosecute matters at the court martial and Defence Force Magistrate level are completely removed from the chain of command. Additionally, it is proposed that the Director of Military Prosecutions will

²⁸ Annex E lists recent reviews and inquiries and provides a brief description of their scope.

be able to initiate prosecutions to ensure there is no allegation of matters being covered up. The second improvement will enable the administration of courts martial and Defence Force Magistrate trials to be transferred from the chain of command to the Registrar of Military Justice. The Registrar of Military Justice will convene courts martial and Defence Force Magistrate trials, and attend to all related issues. This will not only ensure greater efficiency, but also that the administration of the court process itself is demonstrably impartial.

Monitoring International Developments

2.84 In the last ten years or so, there have been very significant international changes to the court martial aspect of military discipline systems. This has been particularly evident in the United Kingdom, the United States and Canada. The ADF actively monitors these developments and reviews its military justice system, ensuring that it can continue to operate effectively and serve the purpose for which it exists.

Administrative System

2.85 In the administrative area, publications such the *Administrative Inquiries Manual*, and more recently, the *Guide to Administrative Decision-Making* have provided further guidance to personnel on the administrative component of the military justice system. Changes to the Defence (Inquiry) Regulations also reinforce the authority of the IGADF to carry out independent inquiries.

EXAMPLES OF THE MILITARY JUSTICE SYSTEM IN PRACTICE

2.86 The following examples illustrate some hypothetical circumstances under which the various options available under the military justice system could be exercised.

2.87 If an ADF vehicle is seriously damaged, an administrative inquiry will usually follow to determine the cause of the damage and, where appropriate, ways to prevent or reduce the likelihood of future similar incidents. If that inquiry concludes in its report that a previously unknown and undetectable mechanical error was the cause, then the appointing authority (the senior commander who instigated the inquiry) would accept that conclusion and implement engineering and other work practices to

reduce the likelihood of future occurrences. No adverse administrative action against a member arises.

2.88 Should the administrative inquiry reveal that a Road Movements Section had not maintained a Service vehicle in accordance with good fleet management practice, unknown to the driver of that vehicle, the appointing authority *may* choose to have adverse administrative action (eg. a censure) initiated against the Road Movements Officer. Of course, natural justice principles (reflected in the 'show cause' process) would be followed and the member would, among other things, be given the opportunity to refute the report's findings and/or argue why a censure should not be imposed.

2.89 Then again, an administrative inquiry may reveal initial evidence that an ADF driver was under the influence of alcohol whilst driving a service vehicle. In such circumstances, *this aspect* of the inquiry would not be pursued and the matter would be referred for disciplinary investigation. As a part of that disciplinary investigation, it may be considered appropriate to consult with civilian police to see if they wish to exercise jurisdiction over the matter, even though offences under the DFDA may be available. Once the disciplinary or civilian criminal action had concluded, and especially if the ADF member was tried and found guilty of an alcohol-related driving offence, the member's commander may then initiate adverse administrative action. Depending upon the type of administrative action taken, the administrative action would be initiated so that the member is on a warning that if any similar incidents occur in the future, the member may be discharged from the Service. This is the personnel management aspect of the adverse administrative action procedure. An 'employee' (an ADF member in this case) is entitled to natural justice as part of any potential future dismissal or other employment-related action. Once again, the principles of natural justice would be followed.

2.90 To use a different example, a member may be suspected of stealing. As the initial evidence indicates that an offence may have been committed, an administrative inquiry would not be conducted. Instead, depending on whether the property belonged to the Commonwealth, another ADF member or a civilian, then either an ADF disciplinary investigation or a civilian police investigation may ensue. If the theft was relatively minor, the ADF member may be tried and, if convicted (either by a Service

tribunal or a civilian court), fined – though that may not be the end of the matter. It may be considered appropriate to initiate adverse administrative action. For example, under the Defence (Personnel) Regulations a Service or civilian conviction may also be grounds for discharge from the Service. Whatever type of adverse administrative action is proposed, the member would still have an opportunity to be heard before a final decision is made and internal and external review options would apply.

PART THREE: ADF POLICIES AND PROCESSES

INTRODUCTION

3.1 The terms of reference for the Inquiry raise questions concerning the handling by the ADF of inquiries and allegations covering a number of policy areas, in addition to the five cases specifically cited. This Part provides information on the policy settings for the issues raised in the terms of reference and background to assist the Committee in its assessment of how the military justice system supports the enforcement of those policies. The relevant policy processes are described briefly below. Supporting documents are cited and, where applicable, attached at Annex F.

Scope

3.2 This Part addresses the following matters:

- The process of continuous review and improvement of ADF personnel policy in general.
- Extant policies and recent developments in the following areas:
 - Management of the use of illegal drugs and drug testing.
 - Management of alcohol abuse and alcohol testing.
 - Suicide prevention and management strategies.
 - Accidental deaths on duty.
 - Harassment – sexual and other.
 - The Australian Defence Force Cadets.
- Mechanisms for handling complaints and grievances:
 - *Internal.* The Complaints Resolution Agency, the Directorate of Alternative Dispute Resolution and Conflict Management, and the Defence Equity Organisation.
 - *External.* The Defence Force Ombudsman, the Human Rights and Equal Opportunity Commissioner and ministerial representations.

Continuous Review and Improvement

3.3 The Head, Defence Personnel Executive is responsible for the development and maintenance of non-financial personnel policy for ADF members. The need to develop or review a policy may arise in many ways. It may be created by external factors, such as legislative changes and changing social trends, by ministerial or senior management direction, or by the identification of an unresolved issue or problem.

3.4 Following any policy implementation, evaluation and review is undertaken. A rolling review of non-financial personnel policy is generally conducted over a three-year cycle. Nevertheless, some personnel policy is updated on a more regular basis. After the review process is complete, an amended policy is then redrafted, cleared and re-promulgated. Policy which is found to be no longer appropriate or redundant is cancelled.

USE OF ILLEGAL DRUGS

Policy

3.5 Defence Instruction (General) Personnel 15-2 – *Involvement by Members of the ADF with Illegal Drugs* (see Annex F) states the overall ADF policy on the use of illegal drugs. It details procedures and requirements for drug education, detection, administrative and disciplinary action and rehabilitation.

Management

3.6 The ADF Drug and Alcohol Program provides advice, drug education and training and treatment for ADF members who use illegal drugs (as well as those who abuse alcohol).

Testing

3.7 The three Services have the following policies and processes in place for the implementation of random and targeted drug testing:

- **Navy.** Defence Instruction (Naval) Personnel 13-1 – *Illegal Use of Drugs and Drug Education in the Royal Australian Navy* (see Annex F) provides supplementary policy guidance for the Navy. It was amended in December 2003, when the Chief of Navy authorised the introduction of the Navy's

random urinalysis program. Testing commenced in January 2004. The determination of numbers of personnel to be tested is at commanding officers' discretion (to a maximum of 10 per cent). The Navy intends that testing frequency will increase substantially in 2004.

- **Army.** The Army Defence Instruction (Army) Personnel 66-5 – *Army's Random and Targeted Urinalysis Drug Testing Program* (see Annex F), was authorised by the Chief of Army on 27 November 2003, with testing commencing on that date. Eleven Army Headquarters personnel were tested with no positive results. The Army plans to commence its testing program in 2004 and then maintain an ongoing annual test rate of 10 per cent.
- **Air Force.** Defence Instruction (Air Force) Personnel 4-26 – *Illicit Drug Testing in the Air Force* (see Annex F) was issued by the Chief of Air Force on 24 December 2003. Testing commenced in December, with the initial group of 31 members of the Air Force Senior Leadership Team yielding no positive results. The Air Force's capacity for the conduct of testing will be progressively increased as personnel are trained in drug testing procedures.

3.8 The Defence Personnel Executive is developing tri-Service policy for random and targeted drug testing to replace current arrangements. This work will entail the drafting and clearance of regulations to support current legislation. These regulations will form the basis of a Defence Instruction that is expected to be in place by late 2004.

ALCOHOL ABUSE

Policy

3.9 Defence Instruction (General) Personnel 15-1 – *Misuse of Alcohol in the Defence Force* (see Annex F) sets out administrative procedures and requirements for the management of alcohol misuse in the ADF. The three Services have issued instructions covering the sale, storage and consumption of alcohol and guidelines for education, prevention strategies and management of members who regularly misuse alcohol.

Management

3.10 Following recommendations in the paper *Sobering Facts*²⁹, the ADF Alcohol Management Program was launched in May 2002. The program is administered by the Directorate of Mental Health under the auspices of the *ADF Mental Health Strategy*³⁰. It has since been expanded to include the use of illegal drugs and is now known as the ADF Drug and Alcohol Program.

3.11 The objectives of the drug and alcohol program include education and training, provision of information and specialist advice to commanders and health professionals and clinical interventions for ADF members who misuse alcohol and use illegal drugs.

Testing

3.12 Defence Instruction (General) Personnel 15-4 – *Alcohol Testing in the ADF* (see Annex F) was promulgated by the Defence Personnel Executive in November 2003. This instruction outlines alcohol testing principles, legal considerations, administrative aspects and testing procedures. Alcohol testing is to be administered by the each Service, as follows:

- The Navy released Defence Instruction (Naval) Personnel 31-51 – *Alcohol Testing in the Royal Australian Navy* (see Annex F) on 12 December 2003. Random breath testing trials have been successfully completed in shore establishments and fleet units. Formal testing has commenced. However, due to operational commitments, not all units have received all the necessary training.
- The Army is due to issue its policy and commence testing by April 2004, with 10 per cent of members to be tested during the year.
- Defence Instruction (Air Force) Personnel 4-25 – *Alcohol Testing in Air Force* (see Annex F) was promulgated on 26 November 2003 with testing beginning in December last year. Seventeen Air Force members have been

²⁹ *Sobering Facts: Options for an ADF Alcohol Management Program*, Tri-Service Working Party Report, April 2000.

³⁰ The *ADF Mental Health Strategy* was officially launched on 21 May 02. It recognises that mental health is not just related to diagnosable mental disorders, but encompasses a broad range of lifestyle, mental wellbeing and job performance factors. The Strategy has a primary focus on prevention and evidence-based treatment to maximise retention and quality of life for Defence personnel.

tested to-date. It is anticipated that approximately 10 per cent of members will be tested in 2004.

SUICIDE PREVENTION AND MANAGEMENT STRATEGIES

Suicide Prevention Strategies

3.13 The Defence Health Service released Health Policy Directive 209: *Suicide – Management of Suicide Attempts and Gestures by ADF Personnel* (see Annex F) in October 1991. This directive serves as a guide for medical officers on the administrative and clinical management of ADF members who make a suicide attempt or gesture and includes implementation instructions for the Army and the Air Force. Navy policy on suicide was promulgated through Defence Instruction (Naval) Personnel 40-5 – *Management of Threatened, Attempted or Completed Suicide Within the RAN* (see Annex F)³¹.

3.14 Critical incident mental health support is provided to members directly affected by the suicide of a colleague, such as those tasked with the recovery of the body. Psychological and chaplaincy support is also available to members who are affected by the suicide of a work mate, but not directly involved.

3.15 Suicide prevention is one of the initiatives of the *ADF Mental Health Strategy* and is managed by the Directorate of Mental Health. Services include the All Hours Support Line, launched on 20 October 2003. The support line is a confidential 24-hour telephone service and is designed to assist ADF members and their families in accessing the appropriate mental health services.

3.16 Psychological support sections also provide information and advice on suicide awareness and prevention and offer a 24-hour emergency service that can be accessed through a member's local duty officer or officer of the day.

³¹ A range of information pamphlets for ADF members is also included in the accompanying submission.

ACCIDENTAL DEATHS

Reporting to Civilian Police and Coroners

3.17 The accidental deaths of ADF members on duty are reported immediately to the civilian police and the relevant state or territory coroner. Supplementary arrangements are normally made for deaths occurring on overseas deployments. Any subsequent civilian investigation by the police and/or coroner is at their discretion. A coroner or civilian police may request the results of any ADF inquiry or investigation³², and each may decide either to wait for ADF inquiries to be completed or proceed directly with their own action. The specific arrangements for each case are determined through liaison between the military and civilian authorities. Work is progressing on a memorandum of understanding to facilitate closer relations between the ADF and state and territory coroners in the event of the deaths of ADF members arising within or outside Australia.

Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees (Comcare) Reporting

3.18 Defence Instruction (General) Personnel 11-2 – *Notification of Service and Non-Australian Defence Force Casualties* details internal Defence procedures to be undertaken in the event of casualties, including fatal casualties. Defence is legally required³³ to notify Comcare of any accident or incident that occurs as a consequence of an activity conducted by Defence which results in serious injury or death, unless the circumstances are specifically exempted, as described below.

3.19 Under subsection 7(2) of the OHS Act, the CDF may, after consulting the Minister for Employment and Workplace Relations, by notice in writing, declare that specified provisions of the Act do not apply to specified classes of members of the ADF where an act might be prejudicial to Australia's defence. On 10 April 1995, the CDF declared an exemption in relation to ADF members who are involved in:

- ADF operational deployments;
- ADF deployments in support of the United Nations; or

³² For example, as in the case of the board of inquiry into the fire on HMAS *Westralia*.

³³ By the *Occupational Health and Safety (Commonwealth Employment) Act 1991 (OHS Act)* and associated Regulations.

- organised ADF sporting activities.

Internal Reporting and Inquiry Action

3.20 In addition to internal reporting procedures for fatal casualties, ADF policies also require notification with state and territory coroners and police. These policy procedures are reflected in Defence Instruction (General) Personnel 11-2 – *Notification of Service and Non-Australian Defence Force Casualties* and Defence Instruction (General) Personnel 20 - 6 – *Deaths within and outside Australia of Australian Defence personnel*. The Defence Safety Manual also contains procedures on reporting obligations to Comcare under the *Occupational Health and Safety (Commonwealth Employment) Act 1991*. In addition to any action taken by civilian police, coroners or Comcare, consideration will also be given as to whether any military aspects, impacting on command and control, arise from the incident. If so, these may require further investigation, such as the appointment of a board of inquiry or an investigating officer. In cases where there is an accidental death during a military activity, there will also be ministerial consultation as to what form of military administrative inquiry should be conducted in the circumstances.

3.21 Defence Instruction (General) Personnel 11-2 – *Notification of Service and Non-Australian Defence Force Casualties* also sets out the procedure for advising next-of-kin, taking into account privacy issues, for contacting the National Welfare Coordination Centre and for dealing with news media inquiries.

SUPPORT TO NEXT OF KIN OF ADF MEMBERS WHO DIE ON DUTY

3.22 In addition to any financial entitlements that may arise, Defence offers a comprehensive range of non-financial supports to the next of kin on the death of an ADF member. The Defence Community Organisation contacts the next of kin, advising of the appointment of a case manager and outlining their responsibilities to the next of kin. This advice explains that the case manager is primarily a supportive link: a facilitator, rather than a subject matter expert.

3.23 The support offered to the next of kin includes family support, grief counselling, organising funeral arrangements, assistance in relation to Service estate issues, the release of personal effects held on Commonwealth land at the time of

death, payment of bereavement payments if applicable and payment of outstanding recreation leave and long service leave entitlements. The case manager may also assist by interacting with other Government agencies like the Department of Veterans Affairs and community support groups, for example, Community Health Centres, that can provide services to the next of kin as applicable.

3.24 The case manager remains in contact with the family as long as the family requires ongoing support. As part of the case management process, Defence social workers provide support to all members of the family, including parents and siblings, as long as there is an identified need. The type and level of support provided by Defence social workers is based on their professional assessment, in consultation with the family. On request, the case manager can assist the next of kin to access other departments, should they be experiencing any administrative difficulties. No mandatory time limit has been set for the case management process: the Defence Community Organisation will continue to provide all necessary support to the next of kin for as long as required.

3.25 Often the next of kin will nominate another person to act as the main spokesperson on their behalf. Defence Community Organisation case managers will liaise with any nominated family representative on all issues, to ensure that the next of kin remain abreast of all issues and receive appropriate support. A different case manager can be appointed if requested by the next of kin.

3.26 If a deceased member is married or is in a recognised defacto relationship, the spouse is the main focal point of Defence Community Organisation's attention as the primary next of kin. However, the parents are not excluded in respect to ongoing support and all necessary non-financial assistance will be offered upon request and provided it is not at odds with the wishes of the spouse/partner.

HARASSMENT – SEXUAL AND OTHER

3.27 Harassment is offensive, abusive, belittling or threatening behaviour directed at an individual or group that may be based on a real or perceived characteristic such as race, age, sex, sexual orientation, health, religion, physical appearance or work

capability. Rumour-spreading, derogatory statements, persistent teasing, exclusion and interference with an individual's workspace constitute harassment.

3.28 Sexual harassment consists of unwanted sexual attention directed against existing and prospective employees and other participants in the workplace. Acts not directed towards a particular individual such as the display of offensive materials and other forms of behaviour unacceptable in a workplace setting but may be normal in a social context are also considered to be sexual harassment.

3.29 Sexual and other harassment and other forms of unacceptable behaviour have a negative affect on the individual being subjected to such behaviour, the workplace and the Department as a whole. Consequences include reduced performance levels, job satisfaction and morale, absenteeism, and health issues such as stress, depression and substance abuse.

3.30 The *Sex Discrimination Act 1984* provides the legislative basis for the prevention, management and elimination of sexual harassment in the workplace. The Department of Defence has a zero tolerance policy on all forms of unacceptable behaviour. It is a large organisation and, unfortunately, incidences of sexual and other forms of harassment still occur. The primary policy documents that address these issues are Defence Instruction (General) Personnel 35-3 – *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the ADF* (see Annex F) and Departmental Personnel Instruction No 399 – *Preventing, Managing and Eliminating Discrimination, Harassment and Unacceptable Behaviour in the Department of Defence*. Defence Instruction (General) Personnel 35-3 has recently been reviewed and updated to cover both ADF and Australian Public Service members. The new instruction will be promulgated in the near future.

3.31 Defence is committed to Australian multiculturalism and requires that all personnel demonstrate a respect for other cultures. Defence acknowledges the significance of cultural requirements, the impact of culture on a person's attitudes and behaviours, and the requirement to create an inclusive workplace free from racial discrimination and racist behaviour.

3.32 All ADF and Australian Public Service members are required to attend equity and diversity awareness training sessions. Any complaints of unacceptable behaviour

are to be treated respectfully, confidentially and efficiently and are to be resolved at the lowest possible level appropriate to the circumstances. Supervisors are to ensure that victimisation of complainants, respondents and witnesses does not occur and that all parties are treated fairly.

3.33 Mechanisms for advice and support for Defence personnel include the Defence Equity Advisers Network and toll-free Defence Equity Advice Lines.

3.34 Defence was recently named runner-up in the open category of the Australian Public Service Commission's 2003 Workplace Diversity Awards for its 'Creating a Bully-free Workplace' program. This is the latest of a number of equity and diversity awards that the Department has received.

3.35 Annex F contains policy documents on the management and prevention of sexual harassment and other unacceptable behaviour in Defence, together with statistics, research papers, media releases and ministerial material on the incidence of sexual harassment in Defence.

AUSTRALIAN DEFENCE FORCE CADETS

Role and Organisation

3.36 The Australian Defence Force Cadets was formed in April 2001 in response to the *Cadets: The Future Review* (also known as the Topley Report, released in December 2000). The ADF Cadets comprise the Australian Navy Cadets, Australian Army Cadets and Australian Air Force Cadets, and is supported with overarching policy and program services by the Directorate of Defence Force Cadets. The Service Chiefs are responsible for the administration of the respective Service cadet corps. The primary focus of the ADF Cadets is youth development within a military-style setting. The ADF Cadets is jointly sponsored and supported by the individual parent Service as well as local communities.

3.37 Notwithstanding the fact that the three Service cadet corps were established early last century, and are grounded in Defence legislation, they are community-based organisations. They provide opportunities for young Australians to obtain leadership skills, experience personal challenges, grow in self-esteem and self-discipline, and be exposed to adventurous activities in a military-style setting.

3.38 However, the ADF Cadets are *not* members of the ADF (although some members of the ADF may be ADF Cadet instructors or officers), nor are they connected with the Australian Defence Force Academy. ADF Cadets are therefore not subject to the DFDA. Adult staff of the ADF Cadets are community-based volunteers who are not subject to the DFDA and are not required to demonstrate fitness for military duty or be available for deployment or postings, although they naturally remain subject to the full range of federal and applicable state or territory laws. Before progressing to a selection interview, officers of cadets are required to undergo psychological testing and police checks that comply with the relevant state or territory requirements for those working with minors. Because the cadets and staff wear the uniform of their sponsoring Service (with distinguishing badges) and take part in ceremonial and commemorative activities and experience various aspects of military life, they are sometimes incorrectly identified as being members of the ADF.

Locations and Numbers

3.39 The ADF Cadets has over 27,000 young people participating as cadets and over 2,600 adult volunteers who lead and supervise cadet activities. Cadet units are located in more than 480 urban and rural communities throughout Australia. All units receive direct support and funding from their parent Service, Defence organisations such as Corporate Services and Infrastructure Group, the Defence Materiel Organisation and their local community.

Policy and Program Priorities

3.40 The Directorate of Defence Force Cadets is responsible for the following tasks in support of the development and implementation of cadet policy and programs:

- Develop and implement human resource strategies and associated training to improve the quality of cadet staff leadership and its performance in providing appropriate, safe and adventurous activities for young people.
- Improve pathways for cadets to gain entry to the ADF and the wider Defence organisation.
- Implement effective national electronic communications and information management processes.
- Increase indigenous participation in the ADF Cadets.

- Improve connectivity between the cadet world and Defence, including increasing the amount of exposure to military-like experiences for cadets and improving access to services and support for the cadet organisations.
- Develop and implement effective governance processes, including effective resource management and risk management, across the ADF Cadets.

COMPLAINT AND GRIEVANCE HANDLING MECHANISMS

Complaint Resolution and the Redress of Grievances

3.41 The Complaint Resolution Agency was created as part of the Defence Personnel Executive in 1997, following the Defence Efficiency Review. The agency was established to ensure independence in the investigation, review and handling of complaints both from ADF members and Defence civilians. The agency is responsible for the ADF's redress of grievance system, which (as mentioned earlier in Part Two of this submission) is an integral part of the wider military justice system. All applications for redress must be dealt with, in the first instance, by the member's commanding officer. If the commanding officer decides not to grant the redress sought, or if he or she does not have the authority to grant it, the member can request that the complaint be referred to their Service Chief for review.

3.42 To improve the system in recent years, the Complaint Resolution Agency has taken on the role of monitoring unit-level redress of grievance investigations to reduce delays. The agency is proactive in offering advice to unit commanders on how to deal with complaints, and is also consulted regularly by unit staff who may be unsure of the process and its requirements. The agency also provides a program of awareness training to commanders and other key personnel in units, headquarters and bases around Australia.

3.43 The agency reviews unit-level investigations and decisions, gathers additional information if necessary, and prepares decision briefs for the Service Chiefs or their delegates. This involves a review both of the merits of the decision and the processes followed to determine whether an appropriate outcome has been achieved. Officers and Warrant Officers then have a further level of review available by the CDF. Once this process is exhausted, a member of any rank who remains dissatisfied can request the Defence Force Ombudsman to assist.

3.44 The Complaint Resolution Agency is the Department's point of contact for the Human Rights and Equal Opportunity Commissioner. Many, although not all, complaints received by the Commissioner have previously been through the redress of grievance process. When they have not, the agency works with the Services to ensure that an appropriate investigation of the complaint is carried out, and comprehensive information is provided to the Commissioner to allow resolution of the complaint.

3.45 The agency also works very closely with other elements within Defence that have responsibilities for appeals, disputes or complaints processes. This includes those elements that offer advice, counselling, mediation, conciliation, and workplace conferencing services. Defence always seeks resolution of complaints at the lowest possible appropriate level, as this clearly provides the best possible outcomes by limiting delays and damage to working relationships.

Alternative Dispute Resolution and Conflict Management

3.46 The Directorate of Alternative Dispute Resolution and Conflict Management is responsible for facilitating the provision of dispute resolution services across Defence. These services assist in the resolution of workplace disputes, and grievances between employees and the organisation. The directorate provides its services through mediators who are employees of the Department as well as through external service providers.

3.47 The directorate is an integral part of the mechanisms within Defence that have been established to deal with complaints and grievances. Defence Instruction (General) Personnel 34-4 – *Use and Management of Alternative Dispute Resolution in Defence*, issued in June 2003 (see Annex F), outlines the procedures and processes associated with the directorate's work. Matters are referred as early and at the lowest level possible to deliver effective dispute resolution. Requests for the provision of dispute resolution services are made via the Complaint Resolution Agency, the Defence Equity Organisation, Commands, commanders and line managers at all levels, and personnel managers.

3.48 In addition to the provision of these services, the Directorate delivers skills and awareness training in conflict management and negotiation skills to a wide cross-section of Defence. It also provides advice to other agencies, both internal and

external to Defence, on matters involving the inception of dispute resolution programs as an effective mechanism for dealing with complaints and grievances.

Ministerial Representations

3.49 Apart from the Defence Force Ombudsman and the Human Rights and Equal Opportunity Commissioner, further external scrutiny of ADF and departmental administrative decision-making and complaint resolution processes is provided through Ministerial representations.

PART FOUR: SINGLE SERVICE ASPECTS

Introduction

4.1 Parts One to Three of this submission provide a broad overview of the ADF, the military justice system, and the policies and processes used by the ADF that apply directly or by implication to the terms of reference. This Part consists of three sections, addressing the single Service aspects in regard to the terms of reference. These sections provide a Service perspective on their particular characteristics and requirements and their interaction with the military justice system. They also contain information on the handling of the specific cases referred to in the terms of reference for which each of the Services are responsible. These concern the death of Private Williams; the fatal fire aboard HMAS *Westralia*; the death of Cadet Sergeant Tibble; allegations concerning the actions of Special Air Service Regiment members in East Timor; and the disappearance of Acting Leading Seaman Gurr.

ROYAL AUSTRALIAN NAVY

4.2 The operation of the military justice system in the Royal Australian Navy needs to be seen in the context of the environment in which it operates. The Navy's command structure, the divisional system within which sailors and officers are supported, Navy's culture and values, naval training and even the physical environment within which Navy operates, all influence the way it deals with administration, discipline and justice issues.

4.3 The context, the environment is also not static. Clearly there has been both evolution in the way the Navy handles these issues. In describing the Navy's implementation of military justice, and the Navy specific investigations of the HMAS *Westralia* deaths and the disappearance of Acting Leading Seaman Gurr, reference will also be made to how the Navy's practices and policies have changed over time.

Command in the Royal Australian Navy

4.4 The Navy is a command-driven organisation, where effective command, leadership, training and discipline are necessary for the fulfillment of the Navy's role to fight and win at sea. Discipline, training and leadership are linked within a command framework. Navy's professional, operational and mariner skills are

developed and applied in a command framework. Navy's effectiveness in fighting and winning at sea requires all these aspects to be present; any breakdown of command, discipline, leadership, training or professional skill undermines the Navy's mission effectiveness.

4.5 The Chief of Navy is a statutory appointment made by Government. His responsibilities are contained in legislation and a charter signed by both the CDF and the Secretary. The Chief of Navy:

- commands the Navy and its people,
- is the senior adviser to the Minister of Defence, the CDF and the Secretary on all matters to do with the Navy, and
- is accountable for the delivery of the output Navy Capability. This requires the management and provision of advice on current capabilities and their suitability for achieving required operational outcomes, and advice on the likelihood that planned capabilities will meet operational needs in the future.

4.6 As the professional head of the Royal Australian Navy, the Chief of Navy also has a responsibility for ensuring that its traditions and culture are maintained in the manner most appropriate to the outcomes and behaviour expected by the nation, and that its reputation is enhanced. This is articulated in several documents, including:

- *Navy Plan Green*, updated annually;
- the *Chief of Navy Strategic Intent*, last published on 29 April 2002;
- the *Serving in Australia's Navy* booklet, first published as a pilot draft in November 2003, and now being revised for reissue;
- the *Divisional Staff Handbook 2003*, published in April 2003; and
- Defence Instructions (Navy), including Defence Instruction (Navy) Administration 30-1 – *Command* and Defence Instruction (Navy) Administration 30-3 – *Instructions to Commanding Officers*.

Exercising Naval Command

4.7 The way command is exercised in the Navy today is shaped by the physical environment of ships, the practicalities of living and working in a ship and the nature of life at sea.

4.8 Put simply, when ships go to sea, they are on their own in an inherently unstable, demanding and hazardous environment. They remain at sea for long periods, far from families and support. Ships' companies are expected to conduct demanding tasks using their onboard resources. Remoteness from the higher levels of command, the intimacy and physical privations of life in the confined space of a ship, the constant proximity to and reliance on equipment and technology, and a sailor's permanent membership of a number of specialist and non-specialist teams (e.g. mess, part of ship, watch, ship's company, task group, category and branch) all influence the exercise of command and the achievement of missions and objectives.

4.9 The Navy defines command as:

'The authority exercised by all members of the Naval Forces by virtue of their relative ranks and seniority over their subordinates regardless of branch'.

4.10 Command is, in the technical legal sense, the lawful authority granted to an officer of the Navy to issue orders to a subordinate in the execution of their delegated duties. Such authority is given to enable a officers to discharge their responsibilities. An officer's authority should not exceed their responsibilities, nor should it be less than that needed to fulfil their assigned responsibilities.

4.11 Authority in the context of command is derived from appointment and rank. Authority derived from an appointment is specific in nature, and is related to the responsibilities of a particular posting. Authority due to rank is accorded to each member of the Navy based on their level within the rank structure and the duties of the particular position within Defence being occupied.

4.12 Command brings responsibility and accountability. The exercise of command authority brings to the commander the responsibility for the consequences of actions required to discharge an order.

4.13 Command includes the authority and responsibility for effectively using all available resources and for training, organising, directing, coordinating, controlling, and planning the employment of personnel, for the accomplishment of assigned missions or tasks in accordance with stated policies, directives and operational orders. Command also includes responsibility for the health, welfare, morale, and discipline of personnel posted to their ship or establishment. The Commanding Officer must therefore ensure the welfare, morale, good order and discipline of all people under his command whilst continuing to achieve assigned missions and tasks, at sea, alongside or ashore. This is totally unlike most working environments, where the administration of justice and welfare can be separated from working imperatives.

4.14 Command therefore brings very demanding professional, mission, personal, pastoral and moral obligations that must be simultaneously balanced. Selection of the right people for command is therefore a very important task, which attracts the close personal attention of Chief of Navy and his senior advisers.

4.15 Both a Commanding Officer and the second in command, the Executive Officer, are required to undertake extensive training each time they are appointed to these positions. This occurs through the Commanding Officer and Executive Officer Designate Course, which operates for major fleet units, minor war vessels and establishments. This supplements many layers of leadership and management education training provided to officers and sailors during their careers, throughout the Navy leadership and management training continuum. Commanding Officers' conferences are also held regularly to update them on issues of concern to Navy senior officers, as well as changes in the command and management environment.

The Divisional System

4.16 A critical component of naval command is the existence of 'divisions', the grouping of officers and sailors along departmental lines for the purposes of command, leadership and management. Commanding officers use the Divisional System as an integral part of the chain of command and as a tool for managing the wellbeing of their personnel. Commanding officers are expected to take full responsibility and accountability for the day-to-day welfare of their sailors and officers, and to ensure that the Divisional System in their units operates effectively.

4.17 Divisions are a means of aligning a sailor's working and living environment with his/her training and welfare needs and they form part of the wider Navy Divisional System. Commanding officers appoint a Divisional Officer for each Division. Each Division has at least one Divisional Coordinator, who is directly responsible to the Divisional Officer.

4.18 The divisional system is, wherever possible, aligned to particular professional groupings, categories of sailors, or 'parts of ship'. For example, marine engineer officers will usually act as divisional officers for marine engineering sailors, seaman officers for bosun sailors, weapons engineer officers for radar system maintainers and electrical systems sailors, and so on. This professional alignment usually leads to improved understanding of the work demands and specialist issues that impact upon the sailors' and officers' lives.

4.19 Where sailors have no naval officer responsible for their work, for example, because they are outside the Navy Group, an officer from the parent naval establishment is allocated. When there is need for continuity in cases of sailors who are liable to change their jobs frequently, they may be allocated permanently to one Divisional Officer for the duration of their posting to that ship or establishment.

4.20 Divisional responsibility requires the acceptance of a duty of care and responsibility for the training and advancement, personal standards and conduct, health and physical fitness of all personnel, and to be concerned with the welfare, wellbeing and development of all personnel in the widest sense.

4.21 It is worth remembering that the Divisional System has evolved over many years to meet the changing needs of the Navy and Navy people. It has existed in one form or another since Nelson's day – and will exist far into the future. It underpins the entire professional and social structure, the relationships and mutual dependencies of people working and living at sea. *It is therefore far more than an administrative construct.* It reinforces the command system, the way people are trained and disciplined, the way Navy develops professional skills and manages operations. The Divisional System is also embedded in the way Navy operates ashore; the same responsibilities and social linkages are applied in bases and establishments.

Accountability

4.22 A strong sense of individual responsibility and accountability is inherent in the notion of command. In the military sense, the commander is where 'the buck stops'. It is the commander who must be prepared to lead, to make decisions, encourage, mentor, enforce discipline, direct, control and care for those under his or her command and be accountable for their actions.

4.23 Divisional Officers are also accountable to the Commanding Officer for their actions and decisions, their attention to welfare, support, cohesion and morale, and the professional outputs of their people. Effectiveness in the welfare and management of personnel is a principal measure of an officer's or senior sailor's individual performance effectiveness.

Navy's Implementation of the Military Justice System

4.24 Navy operates within the DFDA and in accordance with related ADF policies. All Navy people receive training in the Navy disciplinary system and the DFDA, through recruit schools, leadership and management training, specialist training for some categories, and command and head-of-department training for officers.

4.25 Navy's specialist expertise in the law and military justice is embedded in Navy legal officers within The Defence Legal Service and Navy Commands, Naval Police Coxswain category sailors, and senior Navy officers in the command chain. The Naval Investigative Service is a small group of Naval Police Coxswains who are trained in investigative procedures. It operates under the oversight of the Naval Provost-Marshal. The Naval Police Coxswain category structure is being expanded to better meet Navy's future requirements for their specialist services. These changes also encompass changes to coxswain training and career progression.

4.26 When incidents of a disciplinary nature occur in ships, bases or establishments, investigations are normally conducted by the Coxswain, or Officer of the Day, or by an officer appointed by the Commanding Officer. Incidents ashore are usually left to civil authorities, but some may warrant a Navy investigation or may result in further, administrative consequences arising from civil processes. Minor disciplinary infractions where the facts are not contested are dealt with by a discipline

officer, who is appointed by the Commanding Officer. This allows for swift justice, maintenance of good order and minimal disruption to normal operations.

4.27 Contested issues, or more serious incidents, may be subject to investigation by a higher authority outside of the command. If a prima facie case exists the matter will be referred for a trial by a service tribunal. For example, the Maritime Commander or Navy Systems Commander may direct either a formal Commanding Officer's Investigation, or appoint an external investigating officer for a specified investigation. Where particularly serious or complex incidents occur, which require multidisciplinary investigation by a group of experts, a board of inquiry may be convened.

4.28 Boards of inquiry are convened to determine the facts of the case. They do not in themselves have any right to direct disciplinary action or award punishments. They may, however, recommend further actions or disciplinary processes where appropriate. If a board of inquiry finds a prima facie case may exist for disciplinary or administrative action to be taken, it may recommend to the convening authority that these processes be instigated. The normal presumption of innocence and laws of evidence apply in any subsequent proceedings.

4.29 In many cases, disciplinary action and tribunals must await the provision of evidence by civil authorities, including police, coroners and civil courts. Navy administrative consequences for civil offences must similarly await the outcome of civil legal proceedings.

4.30 It is important to note that the appearance of slow justice is often a consequence of due legal processes in both the Navy and civil systems, rules of evidence, respect for other jurisdictions, investigative processes and the obligations to investigate late disclosure issues. It is misleading to infer the Navy justice operates separately from civil justice. They are often interdependent.

4.31 This is not meant to infer that Navy investigations are always timely. The high relative priority of some investigations means that others are delayed or protracted. There is also some evidence to suggest that cultural changes are also affecting the throughput of investigations. For example, Navy's successes in education, awareness and enforcing more stringent equity and diversity guidelines, and fostering a culture

of open reporting, have seen a significant increase in the reporting of complaints and offences, with consequent stresses on the workloads of Navy investigative services, commanding officers and divisional officers.

4.32 Notwithstanding this, Navy places high value on achieving swift and fair justice, particularly in the seagoing environment. This is one reason why serious offenders on deployments overseas, or at sea for extended periods, may be landed ashore to enable speedier investigation and judicial processes. Operational relief personnel are posted in lieu. If found innocent, that individual may be returned to the ship. If guilty, their removal from that ship may be part of the administrative consequences of that offence.

Alcohol and Drugs

4.33 The sale, purchase, consumption, and possession of intoxicating liquor are governed by section 123A of the *Defence Act 1903*, which allows authorised persons to sell, purchase, supply, consume or possess intoxicating liquor in accordance with conditions determined by Chief of Navy, notwithstanding any provision of a law of a State or Territory. In ships access to alcohol is generally limited to two cans of full strength beer a day, per person over the age of 18, at set times when they are off duty. This is the Navy 'beer issue'. Beer issues at sea are tightly controlled, far more than in venues or messes ashore. In shore messes, alcoholic beverages may be purchased much like in a civilian bar, but in a supervised environment. Alcohol consumption is not specifically limited in these circumstances, but is moderated by supervision.

4.34 The Navy recognises the right of an individual member to use alcohol in a responsible manner. It is a normal part of Australian life and culture, and so long as operations and safety permit and individuals respect the trust placed in them to consume alcohol responsibly, Navy allows commanding officers to approve beer issues and sailors to partake.

4.35 After the investigations into the disappearance of Acting Leading Seaman Gurr from HMAS *Darwin*, Navy's practices in managing beer issues were thoroughly reviewed. It was found that the problems relating to the loss of the sailor did not lie with the consumption of alcohol in accordance with the existing rules. Rather, problems lay in the *illegal* consumption of *illicit* alcohol, and in occasional lax

practices which supported the concealment of alcohol for later consumption *outside of approved procedures*.

4.36 In reviewing the risks associated with beer issues, Navy's judgement was that risks associated with illicit consumption of alcohol far outweighed those from supervised and legal consumption. The 'dry ships' argument was not seen as viable *in the Australian cultural context*, given Australian norms, the lower risks of controlled legal access, as well as the US Navy's experience with illicit 'underground' consumption problems. Navy's administrative and management processes for beer issues and alcohol access were also overhauled, and compliance is closely monitored by Commands.

4.37 The Navy recognises that alcohol dependency is treatable, with treatment and rehabilitation available from Service sources or appropriate civilian agencies. The success of the treatment requires the goodwill and complete cooperation of the member and full support will be continued so long as this positive attitude remains and the member is physically fit. However, if a member's behaviour or performance of duty suffers because of alcohol abuse, the commanding officer is required to take disciplinary action and refer the individual for drug and alcohol counselling or treatment as appropriate.

4.38 Involvement by ADF personnel with illegal drugs is not compatible with an effective and efficient military force. Drug involvement leads to reduced performance, health impairment, presents a security risk, and has the potential to put an individual and/or other personnel in unnecessary danger. Such behaviour is unacceptable in the ADF, and no form of participation in illegal drugs is tolerated.

4.39 Importantly, the Navy has a responsibility towards its younger members, to protect them from undesirable pressures which may lead to involvement with illegal drugs or alcohol abuse. Given the community expectation that members of the Navy maintain a high standard of responsibility and readiness to properly perform their duties, involvement with an illegal drug can also adversely affect the Navy's public image. Navy employs procedures and active education programs which have been effective in minimising involvement by Navy people with illegal drugs or alcohol. All

personnel found to be involved with illegal drugs will be considered for administrative discharge.

Random Alcohol and Other Drug Testing

4.40 Arrangements for random alcohol testing are known in Navy as the *Safe Spirit Program*, which is designed to stop people with alcohol in their systems going on duty or endangering the safety of themselves and others.

4.41 The motivation for random testing for alcohol and illegal drugs is one of occupational health and safety, although the need for all ADF personnel to be fit and healthy to deploy for operations is also an important consideration. ADF personnel work with sensitive information, highly complex and potentially lethal equipment. This means they are placed in position of considerable trust and responsibility. By the nature of the work skills required and the equipment used, the ADF cannot afford to have people who might be impaired by alcohol or other drugs. Importantly, the ADF cannot afford to have people whose activities leave them open to compromise by foreign or criminal interests.

4.42 Random drug testing will continue to be implemented in step with approved ADF policies.

Culture and Values

4.43 When the military justice system is activated, it reflects a command decision to investigate an accident or unacceptable or illegal behaviour. Unacceptable or illegal behaviour is in conflict with Navy culture and values.

4.44 Considerable effort has been devoted to articulating and promulgating Navy's values. These originally appeared in *Chief of Navy's Strategic Intent* and were expanded in the booklet *Serving in Australia's Navy*, published on 30 September 2003.

4.45 As a direct result of the loss of Acting Leading Seaman Gurr and the leadership and cultural problems in HMAS *Darwin*, it was recognised that a Navy-wide approach was needed to address Navy culture and values underpinning the behaviour of Navy people. *Serving in Australia's Navy* is a program of activities coordinated by a steering group chaired by the Deputy Chief of Navy.

4.46 Navy culture is a sum of values, behaviour and performance. It is how Navy sees itself and how others see Navy. It defines what is acceptable behaviour and what is not. It establishes how Navy compares itself to others, what is rewarded and what is punished.

4.47 These values guide how members of the Navy will behave, how they will treat each other, and define what is important. Values are a source of strength and they are a source of moral courage to take action. The importance of these values is such that if individual Navy people cannot accept them and consistently apply them, then they have no place serving in the Navy.

4.48 Honour is the fundamental value on which the Navy and each person's reputation depends. To demonstrate honour demands the constant application of honesty, courage, integrity and loyalty.

- Honesty is always being truthful, knowing and doing what is right for the Navy and ourselves.
- Courage is the strength of character to do what is right in the face of personal adversity, danger or threat.
- Integrity is the display of truth, honesty and fairness that gains respect and trust from others.
- Loyalty is being committed to each other and to our duty of service to Australia.

The HMAS *Westralia* Fire

4.49 On 5 May 1998 a fire in the main machinery space of HMAS *Westralia* led to the tragic deaths of four of the ship's company, with another five casualties evacuated from the ship.

Incident

4.50 On 5 May 1998 HMAS *Westralia* was approximately eight miles north north-west of Fremantle conducting shakedown and trials after completion of an assisted maintenance period. HMA Ships *Sydney*, *Darwin* and *Adelaide* were positioned approximately 15 miles to the west of *Westralia*.

4.51 At approximately 1040 (local) a fire was reported in the main machinery space. A standing sea fire brigade was dispatched to fight the fire, but was unable to extinguish the fire or find any personnel. The tug *Tamar*, diving launch *Seal*, civilian tug *Wambiri* and a Sea King helicopter with a ships medical emergency team and a medical officer were dispatched to provide assistance.

4.52 At approximately 1100 the Commanding Officer ordered that the CO2 drench be activated in the machinery space. Once the spaces had sufficiently cooled, a hose team entered and was able to confirm that the CO2 drench was unsuccessful. The fire team with assistance provided by a team from HMAS *Adelaide* continued to fight the fire until it was extinguished at 1235.

4.53 In the process of normal emergency mustering in response to the fire, it was discovered that four personnel were unaccounted for.

4.54 Five casualties were treated by the Medical Officer and stabilised before being flown to St John of God Hospital.

4.55 The four personnel reported as missing were: Petty Officer Marine Technician Shaun Damian Smith, Midshipman Megan Anne Pelly, Able Seaman Marine Technician Phillip John Carroll and Leading Seaman Marine Technician Bradley John Meek. The next of kin of all personnel missing or evacuated were informed where possible. At approximately 1530 four bodies were removed from the machinery spaces. Those bodies were confirmed as the four reported missing personnel and their next of kin were informed. Additionally, the status of all remaining ships company was communicated to their respective next of kin. A Navy critical incident stress team was assembled at HMAS Stirling and flown to *Westralia* to counsel all crew members.

Board of Inquiry

4.56 On 7 May 1998 the Maritime Commander appointed a board of inquiry for the purpose of inquiring into the circumstances surrounding a fire in the engine room onboard HMAS *Westralia*, the death of personnel in that fire and the injury of other members of the ship's company. Its terms of reference included but were not limited to:

- The cause of the fire and the manner in which it was fought.
- All the circumstances relevant to the death and injury of personnel.
- The involvement of ship's company including their training and competence.
- The materiel state of HMAS *Westralia* at the time of the fire.
- The involvement of other naval units and external agencies.

4.57 The board comprised five members:

- Commodore Richard Lamacraft, RAN (President)

He was an outstanding marine engineer officer, who later became ANZAC Ship Project Director, Chief of Naval Materiel and a Rear Admiral. His professional understanding of the engineering issues was vital to exploring the causes of the fire.

- Christopher William Filor, PSM, Inspector Marine Accidents

This was the first time Navy had invited civilian members to sit as part of a public Navy board of inquiry. As a leading expert in maritime accident investigation in the Australian Maritime Safety Authority (AMSA), his inclusion allowed civil benchmarks and practices to be applied to the investigation.

- Captain Russell Bryan Schedlich, RAN

A Doctor and the Fleet Medical Officer, his inclusion was pivotal to assessing the medical and treatment issues

- Assistant Chief Officer Lindsay Cuneo, Fire and Rescue Service of WA

He was another civilian expert, well versed in fire investigations for the WA coroner and police

- Commander Edward George Walsh, CSC RANR

He was the foremost expert in ship damage control and safety in the Navy. As a Sea Training Group trainer and examiner, no officer was more qualified to take an objective and informed view of the firefighting measures used.

Two of these members were from outside the Navy, being appointed for both their technical expertise and independence.

4.58 The board of inquiry commenced its sittings on 11 May 1998 and was open to the public. Two extensions of time were granted to allow the board to thoroughly consider evidence from 93 witnesses, resulting in 4477 pages of transcript, as well as over 481 items as exhibits.

4.59 The board formally reported to the Maritime Commander on 28 August 1998. On 20 November 1998, the Chief of Navy advised the Minister for Defence on the board of inquiry report. The Chief of Navy was aware he was in a potential conflict of interest situation when considering the Report, given the findings of systemic failure within the Navy. While he decided that he was the appropriate authority to consider the report, he advised both the CDF and Minister of this concern. On 4 December 1998, the CDF provided advice to the Minister for Defence on Chief of Navy's recommendations concerning the board of inquiry report. *The sensitivity of issues raised in the board of inquiry report was recognised by Chief of Navy and CDF, with the Minister kept fully informed.*

Release of the Board of Inquiry Report

4.60 On 15 December 1998, the Minister for Defence authorised the public release of Volume 1 of the board of inquiry report (this volume is also accessible on the Navy internet website). Copies were also provided to the next of kin, with the remaining volumes (with some privacy deletions) provided to them on 23 April 1999. The board of inquiry was also provided to the WA Coroner when requested.

Board of Inquiry Recommendations

4.61 The board of inquiry made 114 recommendations. The most important relating specifically to *Westralia* were associated with: the main engine fuel supply, the fixed fire fighting system, escape routes from the main machinery space and training of personnel. On a Navy-wide basis, the recommendations of major significance were those relating to configuration management (design change), the use of fixed firefighting systems and the training and selection of personnel for key positions. Three recommendations were not accepted. All the others have been implemented, except for a fleet-wide fit of bridge equipment, which is being implemented.

Disciplinary Investigations

4.62 Two issues were considered for possible action under the DFDA – safe navigation/ship handling issues relating to control of the ship during the fire and whether she might run aground; and the supply of flexible fuel hoses. As agreed by the Minister, an external legal opinion was sought from Michael Slattery, QC RANR. He determined there was no *prima facie* case to answer on the safe navigation issues, while on the flexible fuel hose issue, the assessment was that the prospects of establishing guilt beyond a reasonable doubt were negligible. The Chief of Navy and the CDF agreed that further disciplinary charges would be inappropriate in those circumstances. The Minister was advised of that intent.

Investigation of Systemic Failures

4.63 The Chief of Navy instigated an investigation into the systemic failures identified by the board of inquiry. A senior retired naval engineer, Commodore Bob Trotter RANR examined the areas of change management, quality assurance, selection and appointment of personnel to technical management positions, the Navy technical regulatory framework, configuration and safety management.

4.64 There were 27 Trotter recommendations, which are being progressively implemented. Given the systemic nature of the problems and the complexity involved in identifying and implementing acceptable solutions, full implementation will take some time³⁴. Fundamental changes to Navy's engineering standards, practices and policies have been implemented through the Navy Technical Regulatory System Project, managed by the Chief Naval Engineer, as well as through implementation of Defence Instruction (Navy) Logistics 63-5 *Quality Assurance of Procured Supplies and Services* through Navy and the Defence Materiel Organisation.

4.65 In 2000, as a direct result of the recognised *Westralia* systemic failures, Navy established the Navy Certification Safety and Acceptance Agency as an independent, whole of Navy regulatory authority. This branch now supports Chief of Navy in meeting his duty of care obligations under the *Occupational Health and Safety (Commonwealth Employees) Act 1991*, as well as managing the Navy's certification regime and processes for acceptance of materiel and project deliverables from

³⁴ More detail is provided in response to Question No 2328, tabled on 27 March 2001.

Defence Materiel Organisation. This group also works closely with Comcare in responding to emergent safety issues. The Chief Naval Engineer's technical regulatory system comes under a holistic regulatory framework being developed by Director General Navy Certification Safety and Acceptance Agency.

Coronial Inquest

4.66 The Western Australian (WA) Coroner was provided with a copy of the *Westralia* board of inquiry report and conducted an Inquest into the HMAS *Westralia* fire during 2003, releasing his report on 19 December 2003. During the Inquest, allegations of coercing witnesses and of a 'cover up' were made against the Navy. The Coroner concluded that there had been no attempt to suborn witnesses at either the board of inquiry or the coroner's inquest.

4.67 The Coroner took a strong view that Navy's contracting out of services and maintenance should not result in a failure to supervise work or ensure safety. The Coroner was also of the view that the board of inquiry was constituted too early after the accident, when the families of the deceased were emotionally not ready to effectively participate. Importantly, with respect to the WA Coroner's opinion, a board of inquiry is held to determine the cause of an event as quickly as possible, without respect to culpability; this is to identify causes and prevent recurrence as soon as possible. An improved balance between the investigative fact-finding imperative, and the effects of investigations upon families and affected parties must be reached.

4.68 It is worth noting that the Coroner found that the Navy's board of inquiry contained an excellent analysis of the safety issues. The Coroner's observations substantially reinforced those of the Navy board of inquiry.

4.69 The Coroner's primary recommendations related to Navy's oversight of contracts and the suitable qualification and education of people involved in contract oversight. These issues have been addressed in Navy's response to the board of inquiry recommendations. Navy has improved the requirements and standards to be applied to Defence Materiel Organisation and other Defence groups providing support to Navy platforms, facilities, equipment and people.

After-Care of HMAS Westralia Personnel

4.70 After the *Westralia* fire, the crew and personnel involved in firefighting, rescue and support were debriefed and provided counselling. Critical Incident Stress Management support, medical treatment and follow-up specialist or psychiatric care were also provided as requested by individuals or recommended by health professionals. Those suffering Post-Traumatic Stress Disorder received particular attention. Navy has continued to monitor the well being of these people.

4.71 A Navy psychologist has been undertaking mental health screening of those Navy personnel who served in *Westralia* at the time of the fire who are still in the Navy. Where psychological distress has been evident, he has referred personnel for further treatment. That service has now been extended to retired Navy people who were involved in the fire and its aftermath.

4.72 The families of the deceased have been provided with ongoing legal support, at Commonwealth expense, since the fire. This included provision of legal counsel during the WA Coroner's Inquest.

4.73 Ex-*Westralia* personnel who have left the Navy, have had their particulars advised to the Department of Veteran's Affairs for follow-up treatment, support and monitoring.

4.74 One such person was ex-Able-Seaman Mathew Liddell, whose life tragically ended in November 2003 while in civilian psychiatric care in Queensland. He was a member of *Westralia's* crew who had been involved in the firefighting and handling of deceased personnel. After immediate medical treatment at HMAS *Stirling*, he was given treatment for post-traumatic stress disorder. This continued during his Navy service until discharge in May 2000. After discharge, he received ongoing treatment at the same institution, through support provided by the Department of Veteran's Affairs.

4.75 After Mr Liddell's suicide in November 2003, at the family's request, Navy met the cost of his funeral. A full review of his medical and posting history was also conducted.

The Disappearance of Acting Leading Seaman Gurr

4.76 Acting Leading Seaman Cameron Gurr was reported missing from HMAS *Darwin* on 4 May 2002. His body was never found.

Incident

4.77 HMAS *Darwin* was north of Christmas Island as part of Operation Relex II when on the morning of 4 May 2002, Acting Leading Seaman Cameron Gurr was reported missing. The Commanding Officer instituted thorough searches of the ship and surrounding ocean. This included the ship's helicopter and boats and RAAF Orion maritime patrol aircraft. Other Navy, Air Force and Coastwatch assets subsequently joined the search. The search and rescue plan was endorsed by both Maritime Headquarters and the National Rescue Coordination Centre Australia. The search of the surrounding ocean (until 10 May) failed to locate Acting Leading Seaman Gurr.

Board of Inquiry

4.78 On 13 May 2002 the Maritime Commander appointed a board of inquiry to ascertain the circumstances surrounding the disappearance of Acting Leading Seaman Gurr and to collect evidence, submit a written report and make findings upon those circumstances and subsequent actions. Comcare were consulted with respect to the draft terms of reference and they requested a number of issues be addressed, which the board did.

4.79 The board of inquiry comprised four members:

- Captain Greg Yorke, RAN (President)
- Commander Philip Orchard, RAN
- Mr James O'Sullivan (former Queensland Police Commissioner)
- Lieutenant Commander Sarah Sharkey, RAN

4.80 Commander Peter Bastion, RANR was appointed as counsel assisting for the provision of legal advice to the board. Legal counsel was provided for nine Navy members determined to be affected persons and for the deceased.

4.81 Two extensions of time were granted due to the extent of the evidence received and the requirement to collate and assess that evidence, and to produce an executive summary. The board of inquiry report was submitted to the Maritime Commander on 5 July 2002.

Independent Legal Review of Processes

4.82 Lieutenant Commander Alexander Street, SC RANR conducted a legal review of the board of inquiry and on 11 July 2002 concluded that it was conducted lawfully, the terms of reference had been complied with, the evidence supported the findings, and that there was no reason to re-open it. On 26 August 2002, the Chief of Navy requested the Maritime Commander re-open the inquiry to enable the board to prepare an amended executive summary, as he considered the original executive summary was not suitable for release to the public for the following reasons:

- use of acronyms and Navy specific terms;
- the need for better definition of measures implemented by the Commanding Officer of HMAS *Darwin* to deal with alcohol consumption and possession onboard;
- the need to expand on the question of configuration changes to HMAS *Darwin*; and
- the need to provide for a complete narrative (without the need for deletions) of the essential elements of the report.

This was an example demonstrating the need for greater transparency of reporting to enable better public understanding of Navy practices.

Release of the Board of Inquiry Report

4.83 During September to November 2002 the Minister Assisting the Minister for Defence authorised the release of the board of inquiry report to affected members, the next of kin of Acting Leading Seaman Gurr, the WA Coroner and Comcare.

Board of Inquiry Recommendations

4.84 The board made 71 recommendations, of which seven were not agreed. Of the 64 recommendations agreed, they were generally in eight main areas, namely: disciplinary/administrative action against individuals; amendments to defence legislation; revised fleet alcohol management policy; alcohol/drug sampling and powers of search on HMA Ships; augmented leadership training; enhanced search and

rescue training; improved search and rescue measures; and safety reviews of deck spaces on HMA Ships. Fifty-five recommendations have now been implemented. Actions to implement the remaining nine recommendations are progressing although a completion date is yet to be determined.

Disciplinary Investigations

4.85 The Naval Investigative Service undertook DFDA investigations against nine members, relating to the illegal consumption of alcohol and failure to report such consumption. In January 2003, they concluded there was insufficient admissible evidence to support DFDA action.

4.86 Seven Administrative Censures were imposed by the Maritime Commander. A Notice to Show Cause for a Chief of Navy Censure was issued to another member of the ship's company, however in light of their response and other matters relating to evidence, it was decided not to impose a censure or take other adverse administrative action.

4.87 Upon review of the Naval Investigation Service investigation, Navy referred one case to the Director of Military Prosecutions, who is considering possible disciplinary actions against another member of the ship's company. A response is anticipated in March 2004. Administrative action may also be considered following completion of the DFDA review.

WA Coroner

4.88 The WA Coroner was provided with a copy of the board of inquiry terms of reference and was subsequently provided with an edited copy of the report (with privacy deletions only made). The Coroner's office has advised that they do not intend to undertake any investigation in relation to Acting Leading Seaman Gurr's disappearance unless specifically requested to do so by his family.

Support to Acting Leading Seaman Gurr's Shipmates

4.89 A Critical Incident Stress Management team consisting of a Navy psychologist and peer support member was sent to the ship while the search for Acting Leading Seaman Gurr was still underway. The team provided several group debriefings and sessions for individuals as required. The Critical Incident Stress Management team

advised *Darwin* members at that time that they could access further follow-up through the psychology section if they required it.

4.90 HMAS *Darwin* was in port in the city of Darwin at the time of the board of inquiry, and a memorial service for ship's company was held at that time.

Support to the Gurr Family

4.91 The Chief of Staff, Maritime Command, has maintained regular personal contact with Mrs Gurr since the loss of her son. She has been provided every support and has expressed her appreciation of Navy's care and attention.

4.92 During the search for her son, arrangements were made for Mrs Gurr and a close friend to travel to Christmas Island and then on to HMAS *Darwin*. This allowed her to meet with her son's shipmates and to be briefed personally on the conduct and scale of the search operation being conducted. She was also provided with updates of progress on the search operation and was contacted prior to any media statements being issued or interviews being conducted.

4.93 The Chief of Staff telephoned her on the anniversary of Acting Leading Seaman Gurr's disappearance and over the following three days as her distress was very evident. He has also been in regular contact with her in relation to plans for a memorial to be erected on Christmas Island. He accompanied Mrs Gurr to Christmas Island for the Gurr Memorial unveiling in Flying Fish Cove on 9 September 2003.

Changes to Policies and Procedures

4.94 In the past Navy has sometimes not sufficiently recognised the complexity of some investigations, with short timeframes set for completion. This factor is now considered when commissioning a board of inquiry.

4.95 In order to ensure transparency, boards of inquiry increasingly have independent members to negate concerns that Navy is investigating itself. Civilian experts are now employed on boards if required.

4.96 There have been delays in completing some DFDA and administrative actions. These delays, where they have occurred, have been to ensure that matters were comprehensively reviewed to provide the fairest outcome for the member in all circumstances. Revised management and training arrangements for the Naval Police

Coxswain category are being implemented, along with improved prioritisation of investigations, to reduce in-house investigation delays.

4.97 For occupational health and safety reasons, the Navy does not tolerate its people being under the influence of alcohol or drugs in the work place. Navy has revised its alcohol policy and has introduced random breath testing across the Navy.

THE AUSTRALIAN ARMY

4.98 This contribution to the ADF submission from the Army addresses issues raised by the terms of reference and the ADF response, as they relate to Army.

4.99 The Army submission will commence by reinforcing aspects of the ADF position, then identifying areas where the Army has, in recent years, taken action to improve the way it manages the complex interactions involved in the application of military justice. It then addresses specific items identified by the terms of reference.

Army and the Military Justice System

4.100 On 2 March 1998 the ADF provided a submission to the Defence Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade that described the ADF as a large, complex, command driven organisation that is structured for war and adapted for peace. That description remains relevant today. Army, as a key element of the ADF, is distinctive because of its high numbers of personnel relative to the other services, its numerous and widely distributed bases and units, and its integration and reliance on the broader Australian community for its Reserve component. Army units are located in almost every area of Australia, from the large cities in the eastern seaboard to some of the most remote communities in our far north and north-west.

4.101 Coupled with this broad reach into the Australian community, are the operational demands placed on the Army for contributions to a range of operations around the globe. The recent high profile deployments to Iraq, Afghanistan, the Solomon Islands, and East Timor have increased public awareness of the Army and the quality of its people. Equally important have been a number of lesser operations and deployments that have not attracted the same degree of public awareness, yet have nevertheless demanded high levels of discipline, commitment, and

professionalism from the fine Australian men and women who make up the Army. These activities have included Army members deploying to Bosnia-Herzegovina, the Middle East, Ethiopia and Eritrea, and a range of Defence Cooperation activities in our region. During 2004 the Army anticipates rotating approximately 2,000 personnel through ten operations, comprising three offshore tasks, in around 15 countries.

4.102 Underpinning the high level of performance of members of the Australian Army has been a foundation of military discipline that provides for the command and control of forces on operations and in peace at home. Military discipline also contributes to the development of military values and ethics that are indispensable to the successful employment of armed force in the service of our nation. The military justice system provides the Army the ability to command our forces, and makes commanders personally responsible and accountable for those personnel, assets, and activities assigned under command. It also makes individuals in the Army accountable for their actions.

4.103 The Army can be justifiably proud of its long record of success and the high quality of its people. However, as with any large and complex organisation, there are times when failures occur. No organisation can escape the realities of human nature, and the occasional lapses of judgement or failure of systems to deliver the results intended; the Australian Army is no different. The Army must acknowledge failures when they occur, and set about minimising their impact by taking quick and decisive action to prevent a recurrence.

4.104 At the same time the Army must also be aware of the importance of individual rights, the principles of natural justice and the need to ensure our people's welfare is protected. Unfortunately there are times when there is a clash between individual needs, the respect for due process, the need to manage incidents while maintaining high levels of training and operational readiness, available resources, trained personnel, and the demands of the organisation to deliver armed forces available to meet government requirements. The environment in which this occurs is seldom simple, and usually comprises a range of events, situations, emotions, processes and serendipity that preclude simple apportionment of blame and responsibility. This is not to suggest that errors can be hidden or responsibility and accountability avoided.

Rather it speaks to the challenges the Army faces in promoting the optimum performance of its people and systems.

Army Initiatives to Improve Military Justice

4.105 Army policy is zero tolerance of unacceptable behaviour, with visible accountability. If allegations of unacceptable behaviour are found to be valid after proper investigation, visible action will be taken. All commanders, whatever their rank, in Army are expected to lead by example, to set and maintain standards and to adhere to the fair go rules. They must ensure that soldiers can serve the Army and the nation in an atmosphere of positive support, free from harassment. To support this Army has introduced a number of initiatives such as the "Plan for a Fair Go"; the establishment of a Directorate of Personnel Operations; have conducted a Military Police Review; introduced a program titled "Room to Move" to allow units to investigate a broader range of administrative and disciplinary issues; have improved support to members who are the subject of investigations; and introduced new protocols for the management of sudden death. Each of these will be discussed separately.

Plan for a Fair Go

4.106 Events in 2000 that ultimately led to the Burchett Review and the Rough Justice Inquiry highlighted some unacceptable behaviour that damaged Army's standing both in the Australian community and within the Army itself. Army needed to find out the extent of these behaviours, address them in a balanced, objective way and provide solutions. The Plan for a Fair Go was introduced in November 2000 as a direct response to managing this unacceptable behaviour.

4.107 The Plan reinforced that courage, initiative and teamwork are the essential values of service in the Australian Army, not fear or obedience brought about by unacceptable behaviour. The Plan was about focussing people on ensuring that Army provides a fair, equitable and just environment built on the team and supportive of the chain of command. The Plan was underpinned by the principles of zero tolerance of unacceptable behaviour and visible accountability. It contained both short and long term initiatives to deal with unacceptable behaviour.

4.108 Short term measures included:

- an Army Equity Baseline report to cover the last two years which identified outstanding action on incidents and advised details of non-reported incidents, including assault;
- the design and issue of a set of Rules for a Fair Go;
- implementation of an internal communication plan by the Chief of Army, Regimental Sergeant Major of the Army and senior commanders;
- the embedding of equity competencies and rules into command and leadership training;
- the establishment of an Army hotline to identify the extent of those people unwilling to report incidents in a supportive and confidential environment; and
- further integration of the reporting system with the Army chain of command and strengthening the link between the Army chain of command and the equity adviser network.

4.109 Long term measures included:

- the development of an annual report by commanding officers on unacceptable behaviour in their units;
- the strengthened use of the chain of command in the reporting and management process;
- guidance on the use and selection of equity advisers within Army;
- evaluation of changes in training and education; and
- continued monitoring through the expansion and use of ADF surveys.

4.110 The Plan was fully implemented and is now integrated into Army's way of doing business. The Rules for a Fair Go continue to guide behaviour, reminding people that while they have responsibilities to the team, they also have a right to a fair go. The Fair Go Hotline remains in operation as it has proved to be a useful 'pressure valve' for members of the Army.

Establishment of the Directorate of Personnel Operations

4.111 In 2001 Army established a new Directorate within its Personnel Branch to manage strategically sensitive personnel matters. This Directorate coordinates the reporting and investigation of unacceptable behaviour within Army, manages Army's response to all sudden deaths, operates Army's Fair Go Hotline, and develops initiatives to better educate our commanders on their administrative and disciplinary responsibilities. While a small Directorate, its establishment and its on-going development is enabling a focused effort on the management of unacceptable behaviour in the Australian Army.

Military Police Review

4.112 As a result of observations made about the Military Police case load in the Rough Justice Inquiry into the 3rd Battalion, Royal Australian Regiment and the subsequent Command Climate Investigation conducted by Major General Roger Powell, Chief of Army undertook to conduct a review of the Military Police investigative capability. This review commenced in 2002 with a review of the structure and manning of the 1st Military Police Battalion. Immediate changes increasing the number of investigators in the Battalion were made in late 2002.

4.113 In mid 2003, a separate study to address the 'quality' aspects of the Military Police investigative capability commenced. The aim of the study was to review policies, practices and training in order to improve the quality of investigations conducted by the Military Police Special Investigations Branch. Consultants are conducting this study. The initial scoping phase was conducted by Fulcrum Risk Services, an organisation with the expertise for this type of work that includes a number of senior ex-NSW Policemen. Ernst and Young won the contract to conduct the principal study and commenced its work in November 2003. The study is scheduled for completion in May 2004.

Room to Move

4.114 In recent years there has been a steadily increasing Military Police caseload. As previously mentioned, this observation was noted in the Rough Justice Inquiry. The increasing caseload has generated inordinate delays and frustration amongst commanders and those who are the subject of the investigations. In 2003, the Directorate of Personnel Operations was tasked to investigate options to alleviate the

pressure until the results of the independent Military Police Review are known and resulting improvements to the capability implemented.

4.115 A review of the Military Police caseload revealed that they spent a great deal of their time investigating minor DFDA matters. This was being done to meet mandatory reporting requirements and gather mandatory statistics, rather than using their investigative skills in areas of greater need. As a result, Chief of Army implemented an initiative in late 2003 called 'Room to Move'. This has allowed unit commanding officers to investigate minor DFDA matters. The Military Police determine whether a unit or Military Police investigation is appropriate using a number of guiding principles. If the decision is that a unit investigates a matter, the Military Police will provide a 'consulting' service to assist the unit investigating officer if needed.

4.116 It is expected that this initiative will reduce significantly the time it takes for DFDA investigations to be completed.

Supporting Members Subject to Investigations

4.117 The Military Police caseload and the resultant delays in completing investigations added to the stress experienced by personnel under investigation. Until recently it was standard Military Police practice not to inform the subject of the investigation that they were under investigation until the last possible moment. In some cases the affected member became aware of the investigation informally through third parties. Chief of Army has directed that this practice cease. Since early 2003, all personnel who are the subject of an investigation are informed of that fact through their chain of command at the commencement of the investigation. Also, the investigation does not commence until adequate support services for the affected member are put in place. These support services are provided through the chain of command and delivered at unit level. On occasion there are special circumstances that prevent affected members being informed they are the subject of an investigation until much later in the process, but these are the exception.

Sudden Death Protocols

4.118 Recent tragic deaths within Army have highlighted the need for more prescriptive guidance to govern a uniform response to the management of sudden

deaths. Recent experience has shown that it is necessary to appoint a single point of contact within Army for the next of kin. Army also offers the opportunity to include the next of kin in the drafting of the terms of reference for the investigation and to involve other interested parties such as Comcare and the relevant state coroner early in our investigation into the circumstances surrounding the death. As a result, Army has developed a protocol to be followed for the management of all sudden deaths. This protocol was implemented in late 2003 and is being formally embedded into Army policy.

4.119 Overall Army has taken very seriously the need to improve the management of incidents and issues relating to military justice. This continues to be of high importance to the Chief of the Army and to all members. Processes and policies continue to be reviewed with a view to enhancing our performance, improving the support the Army provides individuals, while also maintaining and improving our standards of discipline and military professionalism.

Specific Items relating to the Terms of Reference

4.120 The terms of reference for the Inquiry specifically sought information regarding the death of Private Jeremy Williams and allegations about conduct by members of the Special Air Service Regiment in East Timor in 1999. This submission will discuss each of those issues in turn.

The Death of Private Jeremy Williams

4.121 Private Jeremy Williams committed suicide at the School of Infantry on 2 February 2003 while undertaking Initial Employment Training. Mr Charles Williams, Jeremy's father, contacted Chief of Army in early April 2003 and made serious allegations concerning a culture of bullying at the School of Infantry and expressed the view that Army had failed in its duty of care with respect to his son.

4.122 Chief of Army initiated a quick assessment into these allegations and subsequently commenced, through the Commander Training Command – Army, a wide-ranging, formal inquiry into the circumstances surrounding Private Williams' death. Mr Williams was engaged in the drafting of the terms of reference for the inquiry, which were amended as a result of his input. The inquiry commenced on 28 April 2003 and was completed on 4 July 2003. The report was referred to a senior

counsel for subsequent legal review before the appointing authority, Major General Ian Gordon, decided on its recommendations. The report was delivered to the Williams family on 16 August 2003. The Army continues to assist the Williams' understanding of the report.

4.123 The investigating officer found that a number of factors contributed to Private Williams' death. These included alcohol, the physical problems experienced by Private Williams and the associated change in self esteem, an inappropriate culture and environment at the School of Infantry and certain stressful events in the days leading to his death.

4.124 A detailed whole-of-Army plan to deal with recommendations made by the investigating officer was produced and is being implemented. Army has been providing regular updates to the Williams family and the Australian public on this implementation.

4.125 The plan aims to create an enduring climate of support, positive reinforcement and encouragement at the School of Infantry and all our other training establishments. It addresses such things as the creation of a separate rehabilitation centre for injured soldiers and improving instructor training and performance in adhering to Army's Rules for a Fair Go. It also involves restructuring the School of Infantry with increased staffing to better manage the welfare of trainees, and reducing the workload on key commanders so they can devote more time to leadership and welfare issues.

4.126 It is an issue of major concern to Army that organisational failures, unacceptable conduct and inappropriate attitudes of a small but disappointing number of staff and trainees toward other trainees at the School of Infantry, particularly injured trainees, contributed to a sense of despair and depression in Private Williams. Army has accepted wholeheartedly that it must do everything it can to ensure that circumstances such as these do not occur again.

4.127 Chief of Army, with other senior Army commanders is working to ensure that these types of behaviour, conduct or attitudes have no place within the Australian Army. The whole Army is committed to ensuring that all people are treated fairly and with respect, providing them with the opportunity to excel. As part of this a senior officer was appointed to investigate why the recommendations of an earlier

investigation into unacceptable behaviour at the School of Infantry were not implemented. This investigation was completed in December 2003. The investigation found that the recommendations were implemented but did not endure. The reason for this was that the investigation outcomes were not formalised in unit procedures.

4.128 Army staff have been directed to develop and implement an Army wide database of personnel investigations that outlines their conduct, progress, decisions and implementation. This database will be maintained and monitored at the strategic level. The Chief of Army has also directed the development of policy for the promulgation of lessons and observations from personnel investigations.

Allegations about misconduct by members of the Special Air Service Regiment in East Timor

4.129 In September 2000, the Chief of Army was informed through the chain of command of a number of allegations of misconduct by Australian INTERFET troops in East Timor in late 1999. The allegations were serious and warranted investigation. Army subsequently announced in September 2000 that a joint investigation team would examine alleged activities by Australian troops as part of INTERFET in 1999. The investigation team consisted of senior military investigators from each of the Services and a legal officer, with advice being provided by the Australian Federal Police.

4.130 The investigation was comprehensive and involved extensive investigation in Australia, New Zealand, United Kingdom and East Timor. As the investigation progressed, additional allegations of misconduct were revealed and they too were investigated thoroughly. In total, 19 matters were investigated. Independent legal counsel in Queensland, New South Wales and Victoria reviewed the results of the investigation and confirmed various findings. The Director of Military Justice³⁵ also confirmed the findings and recommendations. Chief of Army formally released the findings of the investigation at a Press Conference in Canberra on 16 April 2003.

4.131 The focus of the inquiry was the application of the military justice system with respect to two of the allegations. These centred on a member of the Special Forces and his conduct following the ambush of members of INTERFET by militia in the

³⁵ A military staff appointment within The Defence Legal Service.

vicinity of Suai on 6 October 1999. Two suspected militia were killed-in-action as a result of the ambush. The allegations investigated were that an Australian soldier may have unlawfully killed one of the suspected militia and abused the deceased bodies.

4.132 The allegation with respect to the abuse of the dead bodies was found to have sufficient substance to warrant a formal charge. A member of the Special Forces was charged on 3 February 2003 with kicking each of two dead bodies with an alternative charge of prejudicial behaviour in each instance.

4.133 On 14 March 2003 a Summary Authority referred the matter to a Convening Authority who decided a Defence Force Magistrate should deal with the matter. The Defence Force Magistrate found the member not guilty on all charges after the prosecution presented no evidence. The prosecution case was reliant on a number of witnesses from the New Zealand Special Forces who declined to appear as their identity could not be protected to the extent required by the New Zealand Defence Force.

4.134 The Special Forces member was subsequently issued a Notice to Show Cause why he should not be Censured for unacceptable behaviour. On 30 September 2003, Special Operations Commander Australia found there was insufficient evidence to establish that there was an abuse of the bodies to constitute such a breach of military standards to warrant the issue of a Censure.

4.135 The investigation into these two allegations clearly took too long. The delay was generated by:

- the need for a thorough investigation,
- the fact that additional allegations were discovered and investigated after the joint Service Police investigation had commenced,
- the need to obtain the support of the NZ and UK Defence Forces and then subsequently interview members from these two Armies,
- the need to interview a large number of witnesses, some of whom were not readily available,

- the need for support from a number of external agencies such as the Federal Police, the United Nations Serious Crimes Investigation Unit and the Department of Forensic Medicine at Westmead Hospital in Sydney, and
- the need for independent legal review of all findings from the investigation.

4.136 At the completion of the Defence Force Discipline proceedings, the affected Special Forces member submitted a formal complaint to the IGADF. The CDF directed an investigation be conducted and appointed a Navy Reserve senior counsel to investigate the complaint. The findings were substantially in the soldier's favour. The inquiry concluded that the advice provided by prosecutors that charges be laid in respect of the treatment of the corpses was found to be premature, and based on acceptance, without reservation, of the content of the statements of witnesses. The inquiry also criticised the Service police investigation, particularly its duration, the superficial content of the statements of principal witnesses, and the inclusion of inadmissible, emotive material in such statements. In effect, the inquiry concluded that the soldier charged had no case to answer and the prosecution should not have proceeded.

4.137 The Chief of Army has accepted responsibility for the mistakes revealed in the inquiry report and has held discussions with the affected member about the redress he seeks. During these discussions Chief of Army acknowledged that there were errors in the process and provided an unreserved apology to the soldier involved. Army expects that the establishment of the Directorate of Military Prosecutions will prevent similar problems arising in the future and will assist greatly in providing a source of quality, independent advice.

ROYAL AUSTRALIAN AIR FORCE

Air Force Heritage

4.138 The Royal Australian Air Force is the second oldest independent air force in the world and prides itself on the professionalism, motivation and dedication of its people. During a relatively short history, Air Force men and women have served with distinction in many theatres of war, in peacekeeping roles, and by providing humanitarian assistance in times of natural and man made disasters. The Air Force draws on the inspirational values its predecessors have provided by way of their

service and sacrifice. While doing this the Air Force acknowledges that it is currently operating in a very different social and geo-political setting to that which existed in the past. The Air Force also acknowledges that the environment and challenges facing our successors will be different to those that are faced today and the Air Force must be structured to adapt to a changing world environment.

Air Force Today

4.139 The operations carried out by the Air Force are often tasked at very short notice. The Air Force relies on a timely and effective response from the Air Force team. Personnel must know exactly what their roles are and how they fit into the broader mission. The timeliness of the Air Force response to Government requests is underpinned by the strong sense of duty of its people, their commitment to the Air Force and their professional obligations. In 2004, over 2,000 Air Force people will participate in operations, primarily in the Middle East and the Solomon Islands.

4.140 Operational achievements have been significant, with the mission success rates for our aircrew and aircraft publicly praised by Coalition partners in the Middle East. The combat support elements have provided, and are continuing to provide, around the clock air base support including security, communications, health and welfare, administration and logistics, with maintenance teams achieving near perfect aircraft availability.

4.141 The Air Force's operational and humanitarian successes, the ongoing respect of the Australian community, and continuing positive engagement with friends and allies, could not be achieved, and sustained, without a focussed and committed team, without strong discipline, without clear and unambiguous adherence to a military concept of command and duty, and without a military justice system that is respected by our people and in which they have confidence.

Culture and Values

4.142 The Air Force of today emphasises a values based leadership culture that places people first. What does this mean in practice? It means that for all decisions taken, all changes implemented, and at all levels of the organisation, the potential impacts on Air Force people are considered first. If there is a problem, it is addressed. Commanders are keenly aware of their responsibilities to their people. For example,

commanders have to ensure the provision of a safe workplace, and they have to observe the laws of natural justice when dealing with individuals under the military justice system. Our aircraft are useless without the people who operate, service and support them. In short, our capability IS our people.

4.143 The Air Force values were developed by its people. They were not imposed on them by senior leadership. Key values are:

- to be fair to, and respect the rights of others;
- to develop and support our people; and
- to provide a safe and equitable place to work.

4.144 In essence, these values reflect the Australian belief in a 'fair go'. These values underpin the effectiveness of the Air Force and have their genesis in its earliest days, especially World War Two, when the commitment to service and sacrifice were rigorously tested. In short, unless all the elements of the Air Force function together and effectively under the overall umbrella of these values, the Air Force Vision - 'To be a balanced expeditionary Air Force capable of achieving the Government's objectives through the swift and decisive application of air and space power in joint operations or as a part of a larger coalition force' - will not be realised.

4.145 The Air Force has an obligation to its people to ensure a safe working environment, within the limits of operational imperatives; and to ensure that their health and welfare are not compromised. For these reasons it is imperative that the Air Force does not tolerate drug and alcohol abuse among its people. Impaired people in the workplace are a danger to their colleagues, to the achievement of Air Force objectives and, importantly, to themselves. Therefore, testing for illegal drugs, and alcohol abuse supports the Air Force Values of developing, supporting and protecting its people, as well as providing them with a safe and equitable workplace.

Command and Leadership

4.146 Popular culture often displays military leadership as harsh, sometimes even brutal. In today's Air Force nothing could be further from the truth. Coercive leadership and bullying are not tolerated. You do not achieve commitment and dedication by brutalising your people. Air Force leadership emphasises getting the

best from its people, by harnessing the power of their ideas and expertise, in a values-based environment.

4.147 Nonetheless, that does not preclude a leader being strong and decisive – in fact, these are essential qualities. Leadership can sometimes be difficult, with tough decisions needing to be made. But those decisions must be made within a framework of values and justice.

4.148 Air Force leaders are required to act with respect for those they command. Respect for human dignity and human rights, and the laws of natural justice and the concepts of procedural fairness are the cornerstone of Air Force ethos and culture.

4.149 All Air Force unit commanders are selected personally by the Chief of Air Force. Before they take up their posts he interviews each person and impresses upon them the need to foster the right culture within their units – to approach their leadership responsibilities with compassion and strength, and to have the courage to make the hard decisions. But in doing so, they are at all times to remember the importance of due process and natural justice.

4.150 On appointment to their command, Chief of Air Force issues a certificate to all officers that outlines their responsibilities in that role. The certificate reminds commanders that Air Force Values are to be the guiding principles of their command decisions and that they are charged with developing within their team an understanding and pride in those values. The Chief of Air Force stresses that commanders are to nurture and value the relationships necessary to build their teams. They must maintain their self-control and discipline at all times and ensure their integrity is beyond reproach. Chief of Air Force specifically asks that his commanders work tirelessly to ensure the health, welfare and safety of their people, and to address allegations of harassment or prejudice swiftly.

4.151 Chief of Air Force also regularly issues directives that reinforce his expectations of commanders.

4.152 The Burchett Report of the Inquiry into Military Justice in the Australian Defence Force of 2001 specifically addressed command prerogative and removal from command. The Report supported the concept of command prerogative and the

power of a commander to remove a subordinate commander should they lose confidence in the ability of the subordinate to perform their duties. However, it reaffirmed that procedural fairness and natural justice remain essential elements of the process. Chief of Air Force has firmly stated that he will not accept 'firings' or 'summary dismissals'.

4.153 To reinforce this position, Chief of Air Force wrote to all Air Force commanders, senior officers and executive personnel in June 2002 advising them that he requires natural justice and procedural fairness be accorded to individuals in all situations. The decision maker must ensure that he or she has the authority to make the decision, consider all relevant facts, be impartial and provide reasons for the decision. Chief of Air Force reinforced his expectation that there is a separation between the person initiating adverse action and the decision maker.

4.154 The military justice system is an important element in the support framework for command in the Air Force. Therefore, as part of assuming command of an Air Force element, all commanders undergo specialised training in the roles and responsibilities of command. This training includes detailed instruction on the military justice system, its procedures and its application to their personnel. To support them in their command, Air Force commanders are provided specialist administrative and legal support at all levels to ensure they carry out their command responsibilities within the framework of both discipline and administrative law. In particular, the administrative support to commanders at all levels has been significantly enhanced in recent years to ensure that the more difficult personnel cases can be dealt with. The establishment of senior specialist administrative staff on each major Air Force base ensures professional administrative and personnel support is always on hand for commanders. In addition the Directorate of Military Administration has been set up to ensure a consistent, effective and efficient level of personnel support and administration is provided.

Other Initiatives

4.155 Not all change that has occurred in the Air Force has been the result of an inquiry, or review or as a consequence of a breakdown in procedures and processes. Response to changing expectations in society continues to prompt decisions to move

forward and to evolve. As the Australian society norms have changed, so too has the Air Force adapted to these changes in the broader community.

4.156 The introduction of an alcohol rehabilitation program was an early effort to guarantee the health and welfare of Air Force people, and to recognise that capability could be undermined by a workforce impaired by alcohol. For over two decades this program has achieved outstanding results and it is expected to continue to do so. Based on its early success with alcohol rehabilitation, the program has been expanded and it can now deal in a limited way with other substance abuse. This program is a clear demonstration of the value the Air Force places on its people.

4.157 Acknowledging that disagreement cannot be completely eliminated in a large, layered organisation like Air Force, an internal review department was established to support higher level decision making on cases where personnel believe that they have been treated unfairly. The Directorate of Personnel Executive Review provides an internal independent review of decisions and provides advice directly to the Director-General Personnel – Air Force. Its structure is such that it is staffed with highly experienced Reserve officers who provide frank and fearless advice on the decisions under review. Since the establishment of Directorate of Personnel Executive Review there has been a significant reduction in the number of personnel seeing the need to resort to the more formal redress of grievance system. The Director also regularly visits all Air Force bases to ensure that all commanders and their advisers are kept informed of the current trends, the proper process, including how to conduct inquiries, and the concepts of procedural fairness.

4.158 Directorate of Personnel Executive Review's role will be expanded this year. The Directorate will monitor complaints, administrative inquiries, security police investigations, discipline action and other adverse administrative actions, Air Force wide. It will also provide assistance to commanders to ensure timely and appropriate resolution of issues, as well as enabling Chief of Air Force to remain informed of these matters.

Military Justice System and the Air Force

4.159 The military justice system underpins the manner in which the Air Force handles all matters relating to discipline, command responsibilities, the management

of misconduct and the application of justice. While the military justice system provides important tools for Air Force commanders to fulfil their command responsibilities, it must be supported, and accepted, by all levels within the organisation.

4.160 The value of the military justice system to the Air Force of today is reflected in the inclusion of relevant training in all stages of the Professional and Military Education and Training continuum that Air Force personnel undergo throughout their careers. This training is designed to provide awareness and/or skills in aspects of the military justice system, suitable to the needs of each rank level and/or role.

4.161 Over the years, the Air Force has pursued improved transparency, natural justice, procedural fairness and protection of the rights of the individual, consistent with meeting Service requirements. Some changes have been the result of the Government of the day responding to developments in society. Others have arisen through increased community emphasis on the rights of the individual.

4.162 While the Air Force accepts and understands it is part of the community it serves, it also knows that at times it is asked to undertake a role for which there is no comparison in the civilian community. For this reason, Air Force people also accept and understand that they will be held to a higher personal and professional standard than their civilian counterparts.

4.163 The consequences of a breakdown in discipline, or a failure to comply with orders and regulations are potentially more serious when they happen within the ADF than if they occurred in an ordinary civilian workplace. The Air Force will fail in its obligations to the Australian public, the Government and its own people, if it does not ensure that it can act decisively, appropriately, and without dissent, when required to do so to protect Australia's national interest.

4.164 Turning now to the effectiveness of the military justice system, from a command perspective it is continuing to meet the demands of the Air Force today. Further, from the perspective of those who are subject to the system, a recent survey by the Directorate of Strategic Personnel Planning and Research into perceptions of military justice found that about two thirds of ADF respondents agree or strongly agree that the DFDA is an effective and efficient tool for the maintenance of

discipline, noting of course that DFDA action is merely one element of the military justice system. The same survey found that approximately two thirds of respondents thought that discipline was 'about right' in response to the question 'Discipline in my Service is too harsh/about right/too soft'.

4.165 The Air Force is a relatively small team and negativity, disillusionment, doubts about the effective management of misconduct and mistreatment, can very quickly spread throughout the organisation and undermine its ability to meet Government objectives. A strong and fair military justice system is essential to the Air Force's ability to control or prevent anything that will be to the detriment of the achievement of its mission.

4.166 A military justice system, that draws on the Australian legal framework and international conventions, is an essential, and defining, aspect of the ADF, and therefore, the Royal Australian Air Force. To achieve what is expected of it, the Air Force must have a robust system of discipline and justice that will work in peacetime, and in armed conflict, and that has the confidence of its people.

Air Force Tomorrow

4.167 The Air Force of the future will draw on the junior members of the Air Force today and the current youth of Australia. An important part of the approach to youth development is the Australian Air Force Cadets. The legal authority and responsibility of the Chief of Air Force over the Cadets is grounded in Defence legislation, specifically Section 8 of the Air Force Act 1923. While the legislation remains extant, the name of the organisation was changed with the formation of the ADF Cadets in April 2001, in response to the Cadets: The Future Review (Topley Report). The Australian Air Force Cadets therefore forms part of the wider ADF cadet organisation. It consists of eight wings under the control of officers commanding, who are Australian Air Force Cadets officers. Wings are organised on a geographic basis, with No 5 Wing located in Tasmania. Before becoming the Australian Air Force Cadets, the Air Force cadet program was known as the Air Training Corps and had been in existence since early last century.

4.168 Sub-section 8(9) of the Air Force Act 1923 provides that the Chief of Air Force shall administer the Australian Air Force Cadets, subject to regulations,

determinations under the Defence Act and Ministerial directions. Cadets, their officers and instructors, are not members of the Air Force, therefore they are not subject to the Defence Force Discipline Act 1982 and the relationship between the Chief of Air Force and the Cadet corps is different from Chief of Air Force's relationship with members of the permanent or reserve Air Force. Further, although the Australian Air Force Cadets volunteer staff is a dedicated group of people who bring a range of skills to the organisation, they are not subject to the same training regime as permanent Air Force personnel.

4.169 The Air Force provides assistance to the Cadets by allowing use of facilities, limited funding, uniforms and similar assistance. While the Australian Air Force Cadets is a community based organisation, staffed by volunteers, they nonetheless wear the uniform of the Royal Australian Air Force, with Cadet insignia and are identified as such by the general public. The Chief of Air Force takes his responsibility to these young people, their families and their communities, very seriously and he expects that the officers and instructors of the Australian Air Force Cadets share these responsibilities. The cadet organisation provides an opportunity for the Air Force to reach the broader community and engage in a positive manner. The skills offered to young people through the cadets are valuable and contribute positively to their development into adulthood – no matter what career path they choose.

4.170 One of the attractions for many young people with the Cadets is the association with the military and military aviation. The Air Force needs to ensure it gets the right balance between offering personal development opportunities for young people and fostering the Air Force culture and values, while ensuring their physical, emotional and intellectual welfare.

4.171 Many of the young men and women in the Cadets today will go on to join the Air Force of tomorrow. The Air Force they will join will be one that continues to be underpinned by sound values, by a people-first approach to leadership, and that learns from its mistakes.

Cadet Sergeant Eleanor Tibble

4.172 Cadet Sergeant Eleanore Tibble was a 15 year old Air Cadet who had been a member of the Australian Air Force Cadets for nearly three years when she took her own life on 27 November 2000. Immediately prior to that, she was the subject of administrative action by staff of No 5 Wing for allegedly fraternising with an adult cadet instructor. At the time of her death, Cadet Sergeant Tibble believed that she faced the prospect of being discharged from the Cadets as a consequence of these allegations. However, unknown to Cadet Sergeant Tibble, the Deputy Director Reserve Personnel Cadets had given a direction to the Officer Commanding some two weeks earlier that she was to be retained in the Cadets. This direction was not carried out. Air Force conducted an Inquiry, in accordance with Chapter 4 of the *Administrative Inquiries Manual*, into the processes and procedures surrounding the suspension of Cadet Sergeant Tibble from cadet activities.

4.173 The Tasmanian Coroner investigated the death of Cadet Sergeant Tibble.

4.174 Air Force deeply regrets the tragic death of Cadet Sergeant Tibble and acknowledges that there were significant shortcomings in the manner in which this matter was handled. These shortcomings included inadequate record-keeping, deficiencies in policy in relation to the requirement to involve parents and guardians during counselling and interviews with cadets, and deficiencies in training for Australian Air Force Cadets staff in personnel management and in particular in managing and developing adolescents.

4.175 The report of the inquiry was referred to the then Director-General Personnel – Air Force, who at that time had oversight of the Australian Air Force Cadets organisation. He accepted all but one recommendation that related to administrative action against an Australian Air Force Cadets staff member. Action in relation to that matter is ongoing and is currently subject to further review.

4.176 All other recommendations arising from the Inquiry, including the counselling of the two junior officers, have been implemented. Australian Air Force Cadets Instructions have been strengthened to provide specific guidance to adult volunteer staff in the management of adolescents. The Australian Air Force Cadets Policy Manual has been revised and now include Codes of Behaviour for staff that clearly

detail the administrative procedures and practices to be followed when dealing with minors, including mandating occasions when communication is required with parents or guardians.

4.177 Air Force moved quickly to implement a training program for Australian Air Force Cadets officers and instructors that places particular emphasis on developing their skills to work effectively with adolescents. Modules have been developed in the subject areas of: equity and diversity; legal principles and implications for Australian Air Force Cadets members; psychology of adolescent behaviour; management of behaviour modification; management of due process; and occupational health and safety. Existing staff members are receiving instruction in these subjects and the modules have been incorporated into the initial training program that all staff undergo on joining the Australian Air Force Cadets. This training is also now included in cadet recruit, promotion and command courses to ensure ongoing awareness at all stages of the training and development continuum.

4.178 Air Force provided support for Ms Campbell following the death of Cadet Sergeant Tibble. The investigation that was conducted by Air Force took into account Ms Campbell's concerns regarding the handling of the allegations of fraternisation and the subsequent suspension of her daughter. Ms Campbell was provided with a full and uncensored copy of the final report of the inquiry and with various forms of support. Ms Campbell also assisted Air Force staff by reviewing the proposed changes in policy and training from a parental perspective. In particular, Ms Campbell asked that cadets be allowed access to the Defence Community Organisation staff in circumstances where they felt that they could not raise issues with their instructors. Air Force agreed with Ms Campbell and this change was incorporated into Australian Air Force Cadets policy.

4.179 The loss of any life is always a tragedy and, regrettably, mistakes were made in this matter. Importantly, the Air Force has learned the lessons of this unfortunate incident and has put in place policies and training to ensure, as far as humanly possible, that such an incident cannot happen again.

Conclusion

4.180 Over recent years, where shortcomings have been identified, such as in the case of Cadet Sergeant Tibble, the Air Force has accepted responsibility and implemented processes and procedures to redress these deficiencies and to work towards ensuring any shortcomings are not repeated. Development of a culture that supports continuing review of practices and systems is encouraged in the Air Force of today. Where individuals have felt aggrieved by aspects of their service in the Air Force, and have made their grievances known, all practical and reasonable efforts have been made to address these concerns.

4.181 The military justice system is currently serving all elements of the Air Force well. Provided it continues to evolve as both the Air Force and Australia change over time, then it will continue to be an effective system for the Air Force.

4.182 By learning from mistakes, remedying identified shortcomings and implementing changes as Australian society evolves, the Air Force will remain one of the finest air forces in the world and, more importantly, remain capable of responding at short notice to the needs of the Australian people, their Government and in Australia's national interests.

PART FIVE: CONCLUSION

5.1 The ADF must be prepared to fight and win when called upon to do so by the Government. To ensure that the ADF remains an effective force able to fulfil its obligations, it is essential that it retains effective command at all levels. The military justice system supports the command function while protecting the rights of the individual and is essential for the day-to-day functioning of the ADF and when engaged in armed conflict. Commanders use the military justice system on a daily basis and without an effective military justice system, the ADF would not function.

5.2 Issues and questions inevitably arise relating to past developments and the real or perceived failings of the military justice system, the present state of the system and its future prospects. This submission concentrates on the current system and supporting personnel policies and processes. It highlights some of the significant recent developments in the military justice system, especially those that have occurred since the last major Parliamentary review of the wider system in 1998 and a range of subsequent Parliamentary, external and internal reviews and inquiries since that time.

5.3 The military justice system is robust, effective and highly accountable to the public. Its procedures are now more open and transparent than they have ever been, as a result of broad ranging reforms in recent years. It must continue to be able to apply both in Australia and overseas, during peace-time and on operations, and in the face of the ultimate test of armed conflict. The military justice system is essential to the exercise of command and is vital for the operational effectiveness of the ADF, while providing for a fair go for all ADF members, regardless of rank.

5.4 Specifically, recent structural changes have introduced three important new offices within the military justice system. First, the office of the IGADF provides review and audit of the military justice system that is independent of the ordinary chain of command. It provides an avenue by which failures of military justice may be exposed or examined so that the cause of any injustice may be remedied. Second, the establishment of the Director of Military Prosecutions further enhances the impartiality and independence of the prosecutorial decision-making process. Third, the office of Chief Judge Advocate was created to provide administrative assistance to the Judge Advocate General and to permit him to delegate his administrative powers.

Each of these institutions provide improved internal scrutiny and lend additional specialist legal expertise to the military justice system. Each is deliberately independent of the normal chain of command, to provide a further level of independence.

5.5 Sitting beside these new key offices within the military justice system is a range of existing or recently introduced Defence agencies that also have important review functions. These range from the The Defence Legal Service and the Judge Advocate General, to the Complaint Resolution Agency, the Defence Equity Organisation, the recently introduced Directorate of Alternative Dispute Resolution and Complaint Management and the Defence Whistleblowers Scheme.

5.6 While there may be, from time to time, failures concerning the handling of cases in either the disciplinary code or the conduct of administrative decision-making, these can most commonly be attributed to human shortcomings, not systemic failure of the military justice system. This is so in any justice system: in such cases, it is the appeal and review processes that seek to safeguard the integrity of the system and the rights of those subject to it. If these institutions and processes are strong, open and fair, then the system can be trusted to deliver the best possible results. It is the position of Defence that, on the whole, the military justice system as it currently stands satisfies those requirements.

5.7 Nonetheless, an important part of the military justice system is the acknowledgment of problems when they are identified and the capacity for continuous improvement. This applies not only to the justice system and administration of discipline, as summarised above, but also to the lessons learned as a result of the inquiries and investigations conducted under its auspices, in supporting the command and control of the ADF. The three Services have each applied lessons learned from incidents and inquiries to formulate policies and processes and introduce initiatives that support the more general reforms to the military justice system and personnel policy by the ADF.

5.8 For example, in Part Four the Navy has described how it has recently used independent civilian members, where applicable, to increase the transparency of the inquiry process. Where wider problems have been identified, systemic issues have

been have been further investigated and addressed. Following on from the inquiry into the HMAS *Westralia* fire, a number of fleet technical procedures have been reviewed and recommended changes are being implemented. The Navy has reinforced to its members that it does not condone its personnel being under the influence of alcohol in the work place. The Navy's alcohol policy has been revised and it has introduced random testing to detect the abuse of alcohol and drugs, complemented by education programs, additional leadership training and provisions for on-board searches. A wider reinforcement of the Navy's culture and values and the rejection of unacceptable and illegal behaviour, including harassment of any kind, have complemented this message.

5.9 The Army highlighted its Plan For a Fair Go to help combat harassment and unacceptable behaviour; the creation of a Directorate of Personnel Operations to assist with the strategic control of key personnel policies and their enforcement; the establishment of an external Military Police Review and the Room to Move initiative to improve investigative capabilities and streamline procedures; greater support and transparency of process for members who find themselves under investigation; and the enhancement of the Army's sudden death protocols.

5.10 The Air Force has highlighted that not all change that has occurred in the Air Force has been the result of an inquiry or review. For example, the Air Force's alcohol rehabilitation program has achieved outstanding results and it is expected to continue to do so in the future. It has been expanded to deal in a limited way with other substance abuse and to complement other new policies on drug and alcohol abuse. An internal review of career management and reporting processes has encouraged a more open, transparent and honest subordinate/superior relationship. Internal review has been enhanced within the Air Force, through the establishment of the Directorate of Personnel Executive Review, to support higher-level decision making on cases where personnel believe that they have been treated unfairly. Air Force has made it clear that, where shortcomings have been identified, such as in the unfortunate case of Cadet Sergeant Tibble, the Air Force has accepted responsibility for those deficiencies, implementing processes and procedures to redress them and to work towards ensuring they are not repeated.

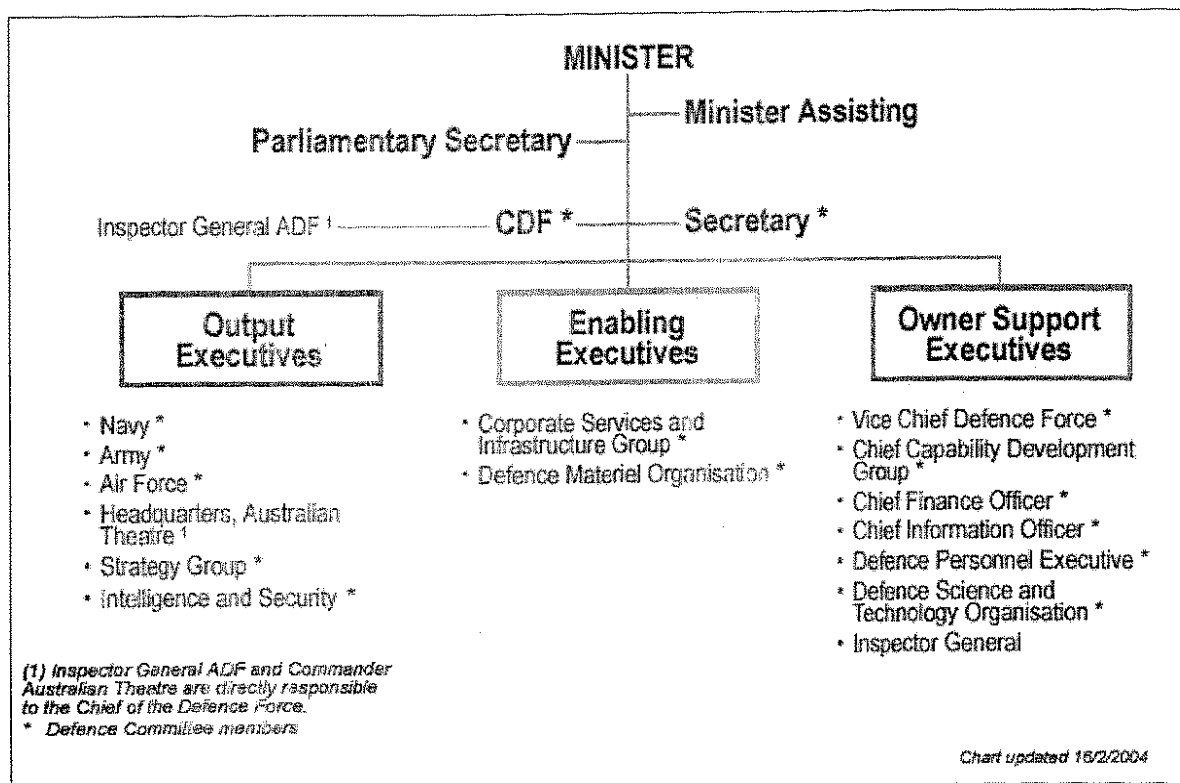
5.11 Defence remains keenly aware of its direct accountability to external bodies and institutions with the power to review, scrutinise and question the workings of the military justice system. Parliamentary and ministerial scrutiny apply, including through inquiries such as this. The High Court, Federal Court and the Administrative Appeals Tribunal can review various aspects of the military justice system. ADF members are subject to civilian legal jurisdictions, whether in regard to alleged criminal offences committed in Australia under federal, state or territory jurisdictions. Similarly, incidents involving the death of ADF members are subject to police and coronial investigation. Agencies such as the Defence Force Ombudsman, the Human Rights and Equal Opportunities Commission and the Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees also provide an additional layer of external scrutiny of various ADF activities and working environments, as well as aspects of the military justice system and administrative decision making processes. In many cases, they review the work and decisions of the internal review agencies.

5.12 Defence continues to effectively employ the military justice system while noting the requirement for vigilance concerning its control and improvement. The occasional lapses of judgement or failure of systems that do occur are regretted, but is a fact of life that no organisation as large and complex as the ADF can completely escape. These imperfections are a feature of human nature. Most importantly, failures must be acknowledged when they occur, their impact diminished and the likelihood of their recurrence minimised through taking quick and decisive action.

ANNEX A TO
DEFENCE SUBMISSION
DATED 23 FEBRUARY 2004

ANNEX A – ADF ORGANISATION AND GOVERNANCE

1. Defence's governance arrangements are based on a results-focused, values-based philosophy. This approach informed the development of the Ministerial Directive between the Minister of Defence and the CDF and the Secretary, and then in turn to the Charters between the CDF and the Secretary and those who report directly to them. Defence Groups have been classified with respect to the Group's relationships with each other and the Government. These classifications are as either Owner Support, Enabling or Output Executives, as reflected in the diagram below:



ANNEX B – ADF ACTIVITIES

1. Defence conducts a range of activities to satisfy the Government's strategic interests and objectives. These activities include the conduct of military campaigns and operations, the provision of emergency and non-emergency support to the Government and the Australian community, overseas deployments and representations, and various joint and combined exercises involving the three Services and allied or regional military forces³⁶.

2. Recently, the ADF has been involved in a range of operations across a wide geographic area. Significant ADF commitment for these operations was required and sustained over an extended period. This high rate of effort placed pressure upon the availability of Defence personnel and assets, and is unlikely to be relieved in the near future as the demands of the high operational and personnel tempo and competing priorities continue. The recent focus has been on Operations Slipper (war on terror), Bastille (deployment of forces to the Middle East), Falconer (the ADF contribution to US coalition operations in Iraq), Citadel (East Timor), Bel Isi II (Peace Monitoring Group in Bougainville) and Relex II (protecting Australia's northern borders).

3. While the focus remained upon high priority operational commitments, the ADF conducted other operations and activities during the year 2002-03, as follows:

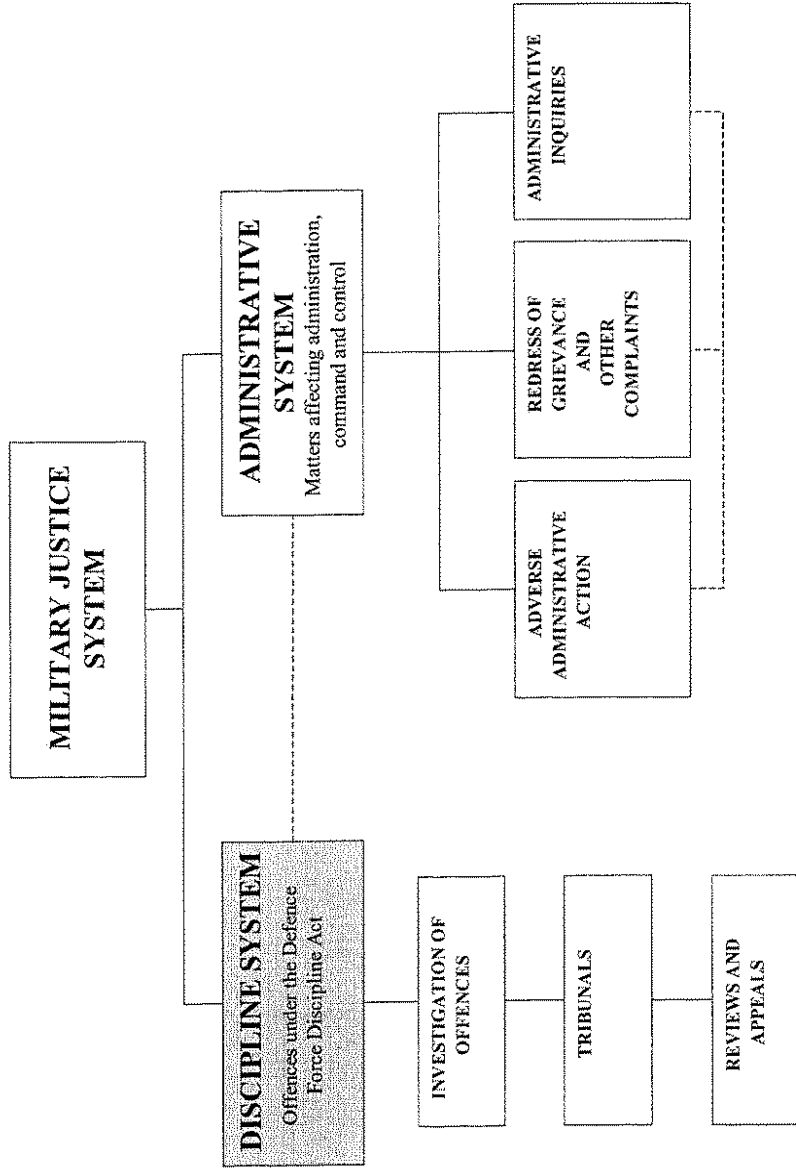
- Operation Bali Assist provided aeromedical evacuation, logistic and personnel support for Australians and approved foreign nationals in the aftermath of the Bali bombing.
- Operation Tartan provided support to Coastwatch to track, intercept, board and apprehend the Korean-flagged merchant vessel Pong Su, the subject of a combined Australian Federal Police and Australian Customs Service operation.

³⁶ The source for the information in this Annex is the Defence Annual Report 2002-03.

- Emergency assistance was provided to civilian firefighting for bushfires in the Australian Capital Territory, Victoria and New South Wales from October 2002 to February 2003.
 - Aeromedical evacuation and search and rescue tasks were provided when necessary.
 - Assistance was also provided to State authorities/agencies under Defence Assistance to the Civil Community guidelines.
4. The latest Defence Annual Report 2002-03 lists the full range of operations and major joint and combined exercises undertaken in accordance with the Government's strategic objectives.
5. Operations conducted included:
- four operations contributing to the security of the immediate neighbourhood;
 - nine operations supporting wider interests; and
 - twelve operations supporting peacetime national tasks.
6. Joint and combined training exercise were conducted in 2002-03 in the following areas (not including programmed activities cancelled due to operational commitments or other programming considerations, including the availability of overseas forces):
- nine ADF joint exercises;
 - twelve combined ADF/United States exercises;
 - three combined ADF/Five Power Defence Arrangement exercises;
 - four combined ADF/New Zealand exercises; and
 - thirty-two other combined exercises.

ANNEX C – MILITARY JUSTICE SYSTEM – DIAGRAM

This diagram outlines the structure of the military justice system and its components. The solid lines on this diagram represent the framework of the military justice system. However, all parts of the system may interact together, this interaction is represented by the dotted lines.



**ANNEX D – RECENT JUDGE ADVOCATE GENERAL ANNUAL
REPORTS: SUMMARIES AND STATISTICS**

1. *1998 Report.* The report dealt with the submissions made by the Judge Advocate General to the Defence Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade on military justice. Also mentioned, and a further result of the Abadee Report, was the drafting of ADF Prosecution Guidelines for promulgation throughout the ADF. A further matter addressed was the impending entry into force of the Criminal Code Act 1995 (Cth), and the impact that this would have on the Defence Force Discipline Act 1982 (Cth). The final matter dealt with related to the creation of the office of Judge Advocate Administrator, an outcome of the Abadee Report, enhancing the independence of the military justice system.
2. *1999 Report.* The Defence Sub-Committee report was tabled in Parliament in the middle of 1999, a comprehensive inquiry into military justice procedures that included 59 recommendations. A result of the recommendations that related to military justice, and the extant recommendations of the Abadee Report, was substantial need for legislative reform, a process that was under way at this time. The ADF Prosecution Guideline was also in the process of finalisation. The Judge Advocate General's review of summary proceedings was also concluded, with two main concerns arising from it relating to the level of training provided to Summary Authorities and the delay experienced by some in the course of Summary Authority proceedings. The role of ADF Legal Officers in East Timor was also lauded. A further issue addressed was the degree of ongoing legal education provided to ADF legal officers, and the collaborative effort being undertaken by the Military Law Centre and the Law Faculty of the University of Melbourne to correct this issue.
3. *2000 Report.* Both the legislative changes and Prosecution Guideline foreshadowed by the 1998 and 1999 Judge Advocate General Reports were in the final phases of implementation. The continuing sterling service of ADF Legal Officers deployed to East Timor was highlighted. The implementation of continuing legal education and the development of a specialist career structure for ADF Legal

Officers were also important issues in this year. An ongoing issue was that of case flow management. One possible solution to this problem, endorsed by the Judge Advocate General, was the establishment of the Director of Military Prosecutions.

4. *2001 Report.* Legislative changes, especially relating to the implementation of the Commonwealth Criminal Code Act, were at the forefront of the business occupying the Judge Advocate General's office in this year. The investigation of alleged brutality and extra-judicial punishment in the ADF by the Joint Standing Committee on Foreign Affairs, Defence and Trade was also causing changes to the military justice system, predominantly in the form of the CDF indicating the imminent appointment of a Director of Military Prosecutions. Furthermore, the Burchett Inquiry concluded in the middle of the year, with 55 recommendations being made by Mr Burchett to the CDF. These recommendations were largely in the process of being implemented. Case flow management was still a live concern, with the creation of the role of Registrar of Military Justice, and the modification of the Judge Advocate Administrator to the Chief Judge Advocate, actions taken to resolve the apparent problems. Extraterritorial operations were still affecting the ADF, such as Australia's presence in East Timor, the policing of violations of Australia's EEZ by fishing vessels, and Maritime Border Protection in the form of Operation Relex. An obvious area of extensive legal work was seen in the aftermath of the September 11 attacks. Legal education for both ADF Legal Officers and paralegals employed by the Defence Legal Service was still in the process of being fine-tuned.

5. *2002 Report.* Legislative change continued to be a live concern in 2002. Also, the harmonisation of the operation of the Registrar of Military Justice was under way. The role of paralegals was further enforced and procedures were in place for the continued enhancement of these positions. An ongoing project was the collation and dissemination of the seminal reports made under s.154 of the DFDA, in the hope of creating a body of useful legal precedent. The operational tempo of the ADF continued the need for capable legal services.

6. *Disciplinary Statistics.* Overleaf is a table summarising ADF discipline statistics for the period 1998-2002. The figures have been compiled by The Defence Legal Service using figures provided in the Annual Reports of the Judge Advocate General.

ADF DISCIPLINE STATISTICS FOR THE PERIOD 1998-2002

	Courts Martial				Defence Force		Summary Authorities				Discipline			
	General		Restricted		Magistrates		Superior		Commanding Officer		Subordinate		Officers	
1998	Army	0	Army	3	Army	32	Army	9	Army	794	Army	1142	Army	925
	Navy	0	Navy	0	Navy	6	Navy	0	Navy	422	Navy	909	Navy	464
	Air Force	0	Air Force	3	Air Force	2	Air Force	0	Air Force	82	Air Force	71	Air Force	220
	ADF	0	ADF	6	ADF	40	ADF	9	ADF	1298	ADF	2122	ADF	1609
1999	Army	0	Army	3	Army	33	Army	8	Army	815	Army	1027	Army	665
	Navy	0	Navy	2	Navy	9	Navy	0	Navy	329	Navy	592	Navy	455
	Air Force	0	Air Force	0	Air Force	7	Air Force	0	Air Force	62	Air Force	88	Air Force	238
	ADF	0	ADF	5	ADF	49	ADF	5	ADF	1206	ADF	1707	ADF	1358
2000	Army	1	Army	8	Army	34	Army	8	Army	760	Army	1000	Army	831
	Navy	0	Navy	5	Navy	9	Navy	0	Navy	399	Navy	662	Navy	707
	Air Force	1	Air Force	1	Air Force	4	Air Force	2	Air Force	138	Air Force	131	Air Force	425
	ADF	2	ADF	14	ADF	47	ADF	10	ADF	1297	ADF	1793	ADF	1963
2001	Army	2	Army	4	Army	22	Army	5	Army	807	Army	1442	Army	997
	Navy	0	Navy	1	Navy	9	Navy	0	Navy	393	Navy	541	Navy	947
	Air Force	0	Air Force	0	Air Force	7	Air Force	0	Air Force	87	Air Force	131	Air Force	385
	ADF	2	ADF	5	ADF	38	ADF	5	ADF	1287	ADF	2114	ADF	2329
2002	Army	0	Army	1	Army	31	Army	7	Army	757	Army	1226	Army	1701
	Navy	0	Navy	1	Navy	10	Navy	0	Navy	484	Navy	661	Navy	1013
	Air Force	0	Air Force	1	Air Force	5	Air Force	0	Air Force	80	Air Force	104	Air Force	482
	ADF	0	ADF	3	ADF	46	ADF	7	ADF	1321	ADF	1991	ADF	3196
Five Year ADF Totals:	4		33		220		39		6409		9727		10455	

ANNEX E TO
DEFENCE SUBMISSION
DATED 23 FEBRUARY 2004

ANNEX E – RECENT MAJOR INQUIRIES AND REVIEWS OF THE MILITARY JUSTICE SYSTEM

A Study into Judicial System under the Defence Force Discipline Act, Brigadier The Honourable A.R. Abadee, 1997

1. In 1995 CDF appointed Brigadier the Honourable A.R. Abadee, one of the Deputy Judge Advocates General and a Justice of the Supreme Court of NSW, to conduct a review of the judicial system under the DFDA. The focus was on whether the trial arrangements under the DFDA satisfied current standards of judicial independence and impartiality. It took into account High Court decisions relating to the constitutional validity of the DFDA, developments in the European Court of Human Rights, and the independence and impartiality of military jurisdictions in Canada, the United States and the United Kingdom.

2. **Status.** Of the 48 recommendations, 35 agreed or partially agreed recommendations have been implemented, most of which are reflected in changes to policy. The implementation of some recommendations, such those relating to DFDA training, continues to progress and is constantly under review to take into account changes to the DFDA, and training needs analysis. Of the nine recommendations that were not agreed, two have since been implemented, for example, policy for interim arrangements for the appointment of the Director of Military Prosecutions, which will be reflected in future legislative changes. New legislation dealing with procedures for appointments of Judge Advocates; the creation of the position of Chief Judge Advocate; and the elimination of multiple roles of convening authorities, came into effect on 14 January 2004.

Own Motion Investigation into how the ADF responds to allegations of serious incidents and offences – Review of Practice and Procedures, Defence Force Ombudsman, 1998

3. In 1995, CDF asked the Defence Force Ombudsman to conduct an 'own motion' investigation into how the ADF responds to allegations of serious incidents and offences. In particular, CDF was interested in obtaining recommendations on the handling of such investigations in the future, and what administrative measures and/or

management processes might need to be put in place for the ADF. The review addressed systemic issues and the quality of inquiry procedures. It made various recommendations to improve policy and guidance on the conduct and monitoring of administrative inquiries.

4. **Status.** Of the 15 groups of recommendations, 13 have been implemented. More than half are reflected in ADFP 06.1.4, Administrative Inquiries Manual, which was published in May 2000, while their recommendations have been implemented through the development of new policies. For example, during 1999 to 2001, the Defence Equity Organisation and the Complaints Resolution Agency revised ADF policy to improve procedures regarding the management of unacceptable behaviour and the redress of grievance system. The Directorate of Alternative Dispute Resolution and Conflict Management also published new policies and techniques. Implementation on two recommendations is incomplete but continuing - the development of training for officers conducting administrative inquiries (now with oversight from IGADF), and a trend analysis system for administrative inquiries through the ADF Administrative Inquiry Tracking System.

Military Justice Procedures in the ADF, JSCFADT, 1999

5. The JSCFADT inquiry into Military Justice Procedures in the ADF arose from significant public attention and criticism surrounding a number of military inquiries and disciplinary matters conducted by the ADF in the years prior to the inquiry. The inquiry addressed concerns about the appropriateness and quality of both the discipline and administrative aspects of the military justice system, and the scope for the external review of internal ADF proceedings. The Government's response to the recommendations was tabled in Parliament in March 2001. Of the 57 recommendations, two, which related to the appointment of courts of inquiry in cases of accidental death and to matters of State and Territory coronial jurisdiction, were not supported. The remainder were either supported, supported in principle, or supported subject to the review of outcomes arising from the implementation of other recommendations. The Government also proposed the establishment of a Military Inspector General (now the IGADF).

6. **Status.** Of the 57 recommendations that were supported, 46 have been fully implemented, six have been partially implemented. Action is being taken to follow

up and complete the implementation of the other five recommendations, most of which require legislative amendments. The majority of changes are reflected in the Administrative Inquiries Manual, providing improved guidance on the types and conduct of administrative inquiries, the appointment of inquiry officers, terms of reference, procedural fairness, monitoring, and decision-making processes. There have also been recent changes to the Defence (Inquiry) Regulations relating to extending immunity for evidence given at boards of inquiry or investigating officer inquiries. Further review and update of the Manual is now proposed.

Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion, JSCFADT, 2001

7. The inquiry addressed two main issues arising out of the treatment of personnel at 3rd Battalion, Royal Australian Regiment (3RAR). These were brutality and the use of illegal punishments; and the time taken to investigate and act on allegations, which suggested systemic problems and a lack of transparency. The report made eight recommendations. Five related to Army and the appointment of equity officers, the review of the training and use of military police and the establishment of a central pool of investigating officers. The other three recommendations applied to legal services. They included adjustments of rank for transfers of officers to legal specialisation commensurate with their legal skills, the appointment of legal officers on selection boards, and a review of legal services. The dissenting report made one recommendation for the statutory appointment of a Director of Military Prosecutions. The Government responded to the report on 22 March 2002. There was either agreement or agreement in principle to all the recommendations, except that relating to establishing a central pool of investigators.

8. **Status.** Implementation of all the recommendations accepted has either been completed or is in progress. The Army has initiated a comprehensive review of the military police capability, utilising external consultants, which is expected to report in May 2004. There has been further equity training for permanent and reserve Army officers and soldiers, and improved guidance to equity advisers on potential conflicts of interest, the improved management of the transfer and selection of legal officers, and a review of legal services. A Director of Military Prosecutions has been appointed, with full powers for the statutory appointment awaiting the passage of legislation.

Inquiry into Military Justice in the ADF, Mr J.C.S. Burchett, QC, 2001

9. In December 2000, CDF appointed Mr Burchett to inquire into military justice in the ADF, concurrent with the JSCFADT inquiry into 'rough justice' in 3RAR. Mr Burchett was supported by five inquiry officers and others including legal, police and administrative support. The inquiry was not confined to 3RAR events, addressing whether there was a culture of avoidance of the use of proper disciplinary processes or irregularities in the administration of military justice throughout the ADF. Over 2,350 members of the ADF were involved in the inquiry process and there were over 480 submissions. The report was completed on 12 July 2001. There were 55 recommendations, which included the appointment of a Director of Military Prosecutions and an Inspector General of the ADF. On 16 August 2001, CDF advised that all the recommendations would be implemented.

10. **Status.** Substantial progress has been made. Of the 55 recommendations, 21 involve further reviews. Implementation of recommendations addressing transparency, impartiality and independence (the Director of Military Prosecutions, Registrar of Military Justice and IGADF) were given the highest priority. The IGADF recommendation has been fully implemented. The Director of Military Prosecutions and Registrar of Military Justice have been provisionally implemented through Defence Instructions and policy, with full implementation subject to changes to defence legislation, which may take up to two years. Recommendations concerning military discipline processes and procedures have been completed or are well progressed. Some recommendations have not yet been pursued to a significant level of progress, because a number of the recommendations are inter-linked and require significant and, in some cases, sequential activity to implement. A dedicated Burchett Implementation Team is working on continued implementation of the recommendations.

Board of Inquiry Management Audit, Acumen Alliance Report, 2003

11. In May 2003, the Director General of The Defence Legal Service appointed Acumen Alliance to carry out a management audit of the effectiveness of the board of inquiry process. The audit focused on a strategic level review of the policy, governance, risk management and the structure of boards of inquiry. It also examined their cost-effectiveness of the board of inquiry process. The report, completed in

October 2003, concluded that the board of inquiry process was generally sound and the purpose for which it was created. The audit made 26 recommendations relating to appointments, monitoring, guidance and support.

12. **Status.** The Director General of The Defence Legal Service is reviewing the report with a view to making a decision on the findings, recommendations and subsequent implementation action.

Own Motion Investigation into matters of administration relating to Defence's dealing with people under the age of 18 years, Defence Force Ombudsman, 2003

13. The review commenced in November 2003 and is investigating the treatment of ADF personnel aged under 18 years, as well as members of the ADF Cadets. In relation to ADF personnel, the investigation will focus on the legal status of the relationship of members under 18 years with the ADF, such as *'in loco parentis'* and duty-of-care obligations. It will also include a review of the advice available to young members on how to deal with their concerns, living arrangements and the involvement of parents where problems arise. In relation to ADF Cadets, the investigation will focus on the legal arrangements and the ADF's obligations, policies for appointing and monitoring the performance of officers of cadets and processes for dealing with complaints and inappropriate behaviour.

14. **Status.** The review is due to report in 2004, at a time to be confirmed by the Ombudsman.

ANNEX F TO
DEFENCE SUBMISSION
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ANNEX F – SUPPORTING MATERIALS

1. The documents attached in this annex provide additional material to support the main Defence submission. Appendix 1 largely supports Part Two of the submission, which provided an overview of the military justice system, while Appendix 2 supports the information on ADF personnel policies provided in Part Three.

Appendices:

1. The Military Justice System
2. ADF Personnel Policies

APPENDIX 1 TO
ANNEX F TO
DEFENCE SUBMISSION
DATED 23 FEBRUARY 2004

THE MILITARY JUSTICE SYSTEM

Enclosures:

1. ADF Publication 06.1.3 – *The Guide to Administrative Decision Making*
2. ADF Publication 06.1.4 – *Administrative Inquiries Manual* (also referred to as ADF Publication 202 under the old numbering system)
3. Defence Instruction (General) Personnel 34-1 – *Redress of Grievance – Tri-Service procedures*
4. Defence Instruction (General) Personnel 35-6 – *Formal Warning and Censures in the ADF*
5. Defence Instruction (General) Personnel 45-1 – *Jurisdiction Under the Defence Force Discipline Act – Guidance for Military Commanders*
6. Defence Instruction (General) Administration 45-2 – *Reporting and Investigation of Alleged Offences within the Australian Defence Organisation*
7. Defence Instruction (General) Personnel 45-4 – *ADF Prosecution Policy*
8. Defence Instruction (General) Personnel 45-6 – *Director of Military Prosecutions – interim implementation arrangements*
9. Defence Instruction (General) Administration 61-1 – *Inspector-General of the ADF – role, functions and responsibilities*

ADF PERSONNEL POLICIES**Illegal Drugs and Testing Policies - Enclosures**

1. Defence Act 1903 – Part VIII – *Urinalysis testing of members of the Defence Force who undertake combat-related duties*
2. Defence Instruction (General) Personnel 15-2 – *Involvement by Members of the ADF with Illegal Drugs*
3. Defence Instruction (Naval) Personnel 13-1 – *Illegal Use of Drugs and Drug Education in the Royal Australian Navy*
4. Defence Instruction (Army) Personnel 66-5 – *Army's Random and targeted Urinalysis Drug Testing Program*
5. Defence Instruction (Air Force) Personnel 4-26 – *Illicit Drug Testing in the Air Force*

Alcohol Abuse and Testing Policies - Enclosures

6. Defence Instruction (General) Personnel 15-1 – *Misuse of Alcohol in the Defence Force*
7. Defence Instruction (Navy) Personnel 31-9 – *Management of Alcohol and the Prevention and Management of Alcohol Abuse in the Royal Australian Navy*
8. Defence Instruction (Army) Personnel 66-1 – *Alcohol Use and the Management of Alcohol Misuse in the Army*
9. Chief of Air Force Directive 04/03 – *Implementation of the Air Force Interim Random and Targeted Urinalysis Testing Program*
10. Defence Instruction (General) Personnel 15-4 – *Alcohol Testing in the ADF*
11. Defence Instruction (Navy) Personnel 31-51 – *Alcohol Testing in the Royal Australian Navy.*
12. Defence Instruction (Air Force) Personnel 4-25 – *Alcohol Testing in Air Force.*
13. ADF Mental Health Strategy – Alcohol (Fact Sheet)

Policy relating to accidental deaths and suicides - Enclosures

14. Defence Safety Manual (SAFETYMAN) Vols 1 & 2

15. Defence Instruction (General) Personnel 11-2 – *Notification of Service and Non-ADF Casualties*
16. Defence Instruction (General) Personnel 20-6 – *Deaths Within and Outside Australia of Australian Defence Personnel*
17. Health Policy Directive 209: Suicide – *Management of Suicide Attempts and Gestures by ADF Personnel*
18. Defence Instruction (Navy) Personnel 5-2 – *Casualties – Injuries, Deaths, Boards of Inquiry, Inquests and Post-Mortems*
19. Defence Instruction (Navy) Personnel 40-5 – *Management of Threatened, attempted or Completed Suicide Within the RAN*
20. Chief of Army Directive 14/03: *The Administration of Incidents of Sudden Death*
21. ADF Mental Health Strategy – Suicide (Fact Sheet)
22. ADF Mental Health Strategy – Post-traumatic Stress Disorder (Fact Sheet)

Other Policy Issues - Enclosures

23. Defence Instruction (General) Personnel 34-4 – *Use and Management of Alternative Dispute Resolution in Defence*
24. Defence Instruction (General) Personnel 35-3 – *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the ADF*
25. The ADF Mental Health Strategy (Pamphlet)
26. A Guide for Commanders – ADF Mental Health Strategy (Pamphlet)
27. Serving in Australia's Navy, 2003 (Booklet)
28. Divisional Staff Handbook – Serving in Australia's Navy, 2003 (Booklet)