Senate Foreign Affairs, Defence and Trade References Committee

SUBMISSION COVER SHEET

Inquiry Title: Effectiveness of Australia's Military Justice System

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Foreign Affairs, Defence and Trade References Committee

SUBMISSION

into

The Effectiveness of Australia's Military Justice System

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Inquiry

On 30 October 2003 the Senate referred the following matters to the Senate Foreign Affairs, Defence and Trade References Committee (including amendment of 12 February 2004):

Terms of reference

(1) The following matters be referred to the Foreign Affairs, Defence and Trade References Committee for inquiry and report:

(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 Tibble;

(d) allegations about misconduct by members of the Special Air Service 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.

Slater & Gordon Lawyers

Slater & Gordon Lawyers are the largest Plaintiff/Applicant law firm in Australia with offices in Canberra, Melbourne, Dandenong, Ballarat, Footscray, Geelong, Morwell, Werribee, Sydney, Central Coast, Parramatta, Perth, Brisbane and Adelaide. Slater & Gordon Lawyers have the largest Applicant military compensation client base in Australia.

Author

David Richards is the Commonwealth Compensation Partner of Slater & Gordon Lawyers and is responsible for the management and conduct of the national military practice.

Background

Slater & Gordon Lawyers represent serving and non-serving military persons and their families throughout Australia.

Slater & Gordon are presently acting for more than 25 persons who have expressed an interest in the outcome of the Inquiry.

The author acknowledges the assistance of Rachael James (Partner, Sydney), Ben Mason (Solicitor, Melbourne), Paul Hampsey (Solicitor, Brisbane), Vicki Dean (Solicitor, Canberra) and Damien Kelly (Solicitor, Canberra).

Submission Content

The emphasis of this submission is on Term 1 (a) of the Terms of Reference dated 30 October 2003:

> (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.

Executive Summary

This is a private submission prepared by David Richards, Commonwealth Compensation Partner, Slater & Lawyers Canberra.

This submission is an attempt to define and identify the requirements, process and independence of the military justice system in Australia as it presently stands. The difficulty with drafting a submission on military justice in Australia is that military justice is presently under the sole authority and control of the military and information relating to the law and process is not readily available to the public. This in itself evidences the perception of the military justice system as a non-independent process. The author apologizes in advance for any errors in process or structure that may be outlined in this submission and would welcome comment from the Australian Defence Force (ADF) or any other authority on any errors of law and process in this submission.

This submission discusses previous Inquiries and reports relating to military justice in Australia and goes on to discuss the appointment of the newly appointed Director of Military Prosecutions.

The Chief of the Defence Force (CDF) has publicly identified the ADF"s opposition to change and a policy of retaining control and operation of the military justice system. This opposition continues notwithstanding that military justice systems in other countries are increasingly being amended to reflect independence from the commanders of the military. This world wide trend towards judicial independence appears to be partly as a result of public awareness due to high profile cases, and partly from Inquiries and reports recommending independence, and following several decisions of the European Court of Human Rights.

This submission further discusses the common law principles of natural justice, due process, unlawful command influence, inadmissible evidence and the perception of bias in a military controlled judicial system.

Finally, the author details recommendations for change to Australia's military justice system, and recommends a total restructure of the present system based in part on the 1999 amendments to the Canadian military justice system.

As an alternative to a total restructure, the author identifies changes to the current legislation which attempts to introduce independence and proper judicial process in order to afford military persons with similar rights to civilians.

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Submission

A major issue before this Senate Inquiry is whether the Australian Military Justice System provides an accused person with basic rights by providing impartial, rigorous and fair outcomes. This submission discusses legislative change required to improve the transparency and public accountability of military justice procedures.

1. The Present Legislative Framework

1.1 Defence Force Discipline Act 1982 and Defence Force Discipline Rules 1985

The *Defence Force Discipline Act 1982* ('the Act') creates a number of offences and establishes a process for dealing with accused members of the Defence Force through a series of tribunals and appeals.[1]

Supporting the Act are two pieces of subordinate legislation: the *Defence Force Discipline Regulations 1985* ('the Regulations') and the *Defence Force Discipline Rules 1985* ('the Rules'). The Regulations deal in large part with detainees and detention centres and are not directly relevant to this submission. The Rules mainly relate to procedural matters including the manner in which summary hearings and hearings before an examining officer are conducted. The Rules also deal with the composition of the courts, functions of judicial officers and the manner in which witnesses are heard at hearings.

An outline of the Act and the Rules relating to procedural fairness is set out below. This outline is not intended to be a comprehensive discussion of legislation and procedures.

[1] Section 10 of the *Defence Force Discipline Act 1982* applies Chapter 2 of the Criminal Code to all service offences.

1.1.1 The Investigation of Service Offences

Part VI of the Act deals with the investigation of service offences and sets out some basic rights that persons being questioned and investigated have in relation to these investigations.

An investigating officer means a police member or an officer, warrant officer or non-commissioned officer engaged in the investigation of an offence.[2]

An investigating officer who is investigating a service offence is permitted to ask relevant questions of any person he or she believes may be able to assist in the investigation. The person being interrogated, however, is not required to answer such questions.[3]

An investigating officer who is interviewing a person in relation to an offence, or a person charged with an offence, is not permitted to ask any question unless the interviewing officer has cautioned the person that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence.[4]

Before questioning a person in custody, an interviewing officer must inform that person that they are permitted to have a legal practitioner present during questioning.[5]

A person who is being held in custody must be treated with humanity and with respect for human dignity and not be subjected to cruel, inhumane or degrading treatment. The accused person must be provided with reasonable refreshments,

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[2] *Defence Force Discipline Act 1982*, s 101.
[3] Ibid, s 101B.
[4] Ibid, ss 101C & 101D.
[5] Ibid, s 101E.

reasonable access to toilet facilities and medical treatment if it is requested by the person in custody and considered reasonable by the investigating officer.[6]

Confessions made by an accused person in the presence of an investigating officer are not admissible unless made voluntarily (i.e. without the threat or use of physical violence and without the making of any threat, promise or inducement).[7]

If an investigating officer believes it is necessary to do so, he or she may search a person who is taken into custody.[8]

1.2 Service Tribunals

'Service tribunal' means a court martial, a Defence Force magistrate or a summary authority.[9] 'Summary authority' means a superior summary authority, a commanding officer, or a subordinate summary authority.[10] 'Court martial' and 'Defence Force Magistrate' are not defined any further in the Act.

Where a charge is referred to a convening authority, the authority may direct that the charge not proceed, refer the charge to the superior summary authority or the commanding officer for trial (if it has jurisdiction), refer the charge to a Defence Force magistrate for trial or convene a general court martial or a restricted court martial to try the charge.[11]

The Chief of the Defence Force (CDF) or a service chief may also appoint an officer, or each officer included in a class of officer to be a superior summary authority.[12] A superior summary authority to whom a charge is referred may make a decision to try the charge or refer the charge to a convening authority.[13] In respect of a service offence that is not a prescribed offence, a superior summary

[6] Ibid, s 101H.
[7] Ibid, s 101J.
[8] Ibid, s 101P.
[9] Ibid, s 3.
[10] Ibid.
[11] Ibid, s 103.
[12] Ibid, s 105.
[13] Ibid, s 109.

authority has jurisdiction to try a charge against an officer who is two or more ranks junior to him or her (being an officer of or below the rank of lieutenant-commander, major or squadron-leader), a warrant officer, or a person who is not a member of the Defence Force.[14] A commanding officer may appoint an officer, or each officer included in a class of officers, to be a subordinate summary authority.[15] With regard to a service offence that is not a prescribed offence, a commanding officer has jurisdiction to try a charge against a member of the Defence Force who is two or more ranks junior to him or her (being a member of or below the naval rank of lieutenant, the military rank of captain or the rank of flight lieutenant) or a person who is not a member of the Defence Force.[16]

In dealing with a charge, a commanding officer may either try the charge (if it is within his or her jurisdiction to do so), direct that the charge not be proceeded with (if there is insufficient evidence), refer the charge to a superior summary authority (where the charge is within the authority's jurisdiction) or refer the charge to a convening authority.[17]

In dealing with a charge, a subordinate summary authority may try the charge (if it is within his or her jurisdiction to do so), direct that the charge not proceed (if there is insufficient evidence) or refer the charge to the commanding officer of the authority or to another subordinate summary authority.[18]

A person is eligible to be a member, or a reserve member, of a court martial if the person is an officer, the person has been an officer for a continuous period of not less than three years or for periods amounting in total to not less than three years, and the person holds a rank that is not lower than the rank held by the accused person.[19]

[14] Ibid, s 106.
[15] Ibid, s 105.
[16] Ibid, s 107.
[17] Ibid, s 110.
[18] Ibid, s 111.
[19] Ibid, s 116.

An officer is eligible to be President of a court martial if the officer holds a rank that is not lower than the naval rank of captain or the rank of colonel or group captain (in the case of a general court martial) or the rank of commander, lieutenant-colonel or wing commander (in the case of a restricted court martial.

Courts martial can be created by a convening authority and in order to do so a convening authority must appoint the President and the other members, an adequate number of reserve members and a judge advocate.[20]

1.2.1 Comment

As the convening authority is a military service member appointed by the CDF, the CDF has control over which forum and under what rules an accused will stand charged. This is inconsistent with independence in a judicial system.

The appointment by the CDF of a convening authority means that there is a perceived lack of independence in the military justice system due to conflict for the following reasons:

(a) The service Tribunal has a conflict of duties as it may make a finding adverse to the CDF;
(b) The CDF has a real conflict as he or she is the ultimate authority for appointment to the service Tribunal, noting that the service Tribunal may make adverse findings against the CDF;
(c) Notwithstanding the responsibilities of the CDF, the military by adjudicating the military raises perceived conflict.

[20] Ibid, s 115.

1.3 Summary Hearings

A summary hearing is conducted by a superior summary authority, a commanding officer or a subordinate summary authority, all military persons appointed by the CDF.[21]

A summary authority must duly administer justice according to law without fear or favour, affection or ill-will and, in particular, must ensure that any hearing of a charge before the authority is conducted in accordance with the Act and the Rules and in a manner befitting a court of justice. A summary authority must also ensure that, at any hearing of a charge before the authority, the accused person does not suffer any undue disadvantage in consequence of the person's position, the person's ignorance or the person's incapacity to adequately examine or cross-examine witnesses or to make the person's own evidence clear and intelligible, or otherwise. The summary authority must also try the accused person according to the evidence and must ensure that an adequate record of the proceedings before the authority is made.[22] The prosecutor shall commence the proceedings by reading the charge to the accused person. Where, at any time after the charge is read, the summary authority requires further information before the authority decides where the charge is within the authority's jurisdiction to try — whether the authority should try the charge; where the charge is not within the authority's jurisdiction to try — whether the authority should direct that the charge not be further proceeded with.[23]

1.4 Representation at a Hearing

An accused person is entitled to be represented at the hearing of a proceeding by a summary authority, but not by a legal officer if the hearing is before a subordinate summary authority.[24]

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[21] Ibid , s 3
[22] *Defence Force Discipline Rules 1985*, r 22
[23] Ibid, r 23
[24] Ibid, r 23

An accused person may request the services of a specified member of the Defence Force to defend the accused person at the hearing of a proceeding before a summary authority. If such a request is made, the person whose services are requested must be permitted to defend the accused person unless the services of the person are not reasonably available or the hearing is before a subordinate summary authority and the person requested is a legal officer. If an accused person makes a request for representation by a legal officer at a hearing before a commanding officer or superior summary authority, the legal officer whose services are requested must be permitted to defend the accused if leave is given by that commanding officer or superior summary authority and the services of the legal officer are reasonably available. Where the services of a person are not reasonably available, the summary authority will, with the consent of the accused person, direct a defence member to defend the accused person.[25]

1.4.1 Comment

Rule 24 is ambiguous but appears to require leave by a commanding officer or superior summary authority before specific legal representation is granted. Presumably the commanding officer or the superior summary authority where leave is sought is also the adjudicator for the charge laid against the accused which would create a conflict of interest. The denial of legal representation in any criminal or quasi-criminal proceedings is a denial of justice and unfair and inequitable in law.

1.5 Hearing Before an Examining Officer

An examining officer, being a military legal officer may conduct the hearing of an accused. A hearing before an examining officer must be conducted in the following manner:

[25] Ibid, r 24.

(a) The examining officer must call and examine witnesses for the prosecution, the accused person may cross-examine any such witness and the officer may, on conclusion of any such cross-examination, re-examine the witness on matters arising out of the cross-examination.

(b) After the conclusion of the hearing of evidence for the prosecution the accused person may give evidence or may call witnesses to give evidence on the accused person's behalf and, in the event of any such evidence being given, the examining officer may cross-examine the accused person or the witness and the accused person may give further evidence or re-examine the witness on matters arising out of the cross-examination.

(c) Where the officer certifies, in writing, that the attendance of a person who is a witness for the prosecution or the defence cannot be procured, a written statement of that witness's evidence, signed by the witness, may be read to the accused person and be included in the record of the proceedings.[26]

1.5.1 Comment

Rule 24 also applies to Hearings before an examining officer. As such, an accused person is denied legal representation of choice except with leave of the commanding officer. The denial of legal representation in any criminal or quasi-criminal proceedings is a denial of justice and unfair and inequitable in law.

1.6 Courts Martial

A court martial consists of a judge advocate, a President of the court martial and members, all of which are military servicemembers.

[26] Ibid, r 26.

1.6.1 Judge Advocate

The duties of a judge advocate include:

(a) To be present at all sittings of the court martial;

(b) To ensure that all hearings conducted before a judge advocate are conducted in accordance with the Act and the Rules and in a manner befitting a court of justice;

(c) To ensure that an accused person who is not represented does not in consequence of that fact suffer any undue disadvantage; and

(d) To ensure that a proper record of the proceedings is made and that the record of proceedings and the exhibits (if any) are properly safeguarded.[27]

The judge advocate general, appointed by the Governor-General,[28] nominates officers as judge advocates who are then appointed by the CDF.[29]

1.6.1.1 Comment

It is unfortunate that the legislation requires the CDF to appoint a judge advocate after nomination, as this lacks perceived judicial independence of the judge advocate. Judicial independence of a judge advocate would require total independence from the military.

1.6.2 President of the Court Martial

The duties of a President of a court martial include:

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[27] Ibid, r 32.
[28] *Defence Force Discipline Act 1982*, s 179.
[29] Ibid, s 196.

(a) When presiding over a sitting of the court martial — to ensure that the proceedings are conducted in accordance with the Act and the Rules and in a manner befitting a court of justice;
(b) To speak on behalf of the court martial in announcing a finding or sentence or any other decision taken by the court martial; and
(c) To speak on behalf of the members of the court martial in conferring with, or requesting advice from, the judge advocate on any question of law or procedure.[30]

The President of a court martial is appointed pursuant to section 116 of the Act and must be a high ranking military service member. The President is appointed by the CDF by issuing a convening order.[31]

1.6.3 Members of the Court Martial

Before the members of the court martial are sworn, their names are read to the accused person and that person is be asked whether he or she objects to be tried by any of them. This rule applies in relation to a reserve member or new member who is appointed to a court martial in place of another member.[32]

Rule 33 requires that on any question to be determined by the court martial, the members of the court martial vote orally, in order of seniority commencing with the junior in rank.[33] In *Hembury v. Chief of the General Staff*[34] the High Court of Australia held that a misdirection under the order of voting by members of the court martial was a substantial miscarriage of justice and quashed the conviction under section 23 of the *Defence Force Discipline Appeals Act*.

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[30] *Defence Force Discipline Rules 1985*, r 31.
[31] *Defence Force Discipline Act 1982*, ss 199, 3 and 102.
[32] *Defence Force Discipline Rules 1985*, r 34.
[33] Ibid , r 33.
[34] (1998) 155 A.L.R. 514

A member of a court martial is appointed pursuant to section 116 of the Act and must be a high ranking military service member.

1.6.3.1 Comment

The appointment of both the President and the members of a court martial by the CDF lacks perceived judicial independence.

1.6.4 Defence Force Magistrate

In addition to any functions conferred on the Defence Force magistrate by the Act, the regulations or any other rule, the functions of the magistrate at any proceedings before the magistrate are to ensure:

(a) That the proceedings are conducted in accordance with the Act and the Rules and in a manner befitting a court of justice;
(b) That an accused person who is not represented does not in consequence of that fact suffer any undue disadvantage; and
(c) That a proper record of the proceedings is made and that the record of proceedings and the exhibits (if any) are properly safeguarded.[35]

1.6.4.1 Comment

The judge advocate general appoints defence force magistrates from the panel of judge advocates.[36] As the panel of judge advocates are appointed by the CDF in the first instance, the appointment of a defence force magistrate lacks the perception of judicial independence.

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[35] Ibid, r 36.
[36] *Defence Force Discipline Act 1982*, s 127.

1.7 Trial Provisions

Before the first prosecution witness is called to give evidence at a trial, the prosecutor may, and at a trial by a court martial or a Defence Force magistrate must, make an opening address to the tribunal, stating briefly the elements of the offence charged which have to be proved before the accused person can be convicted, the alleged facts upon which the prosecutor will rely to support the charge and the nature of the evidence which the prosecutor proposes to adduce to prove the alleged facts.[37]

Where at any time during a trial it appears to the service tribunal or, in the case of a trial by court martial, the judge advocate, that an accused person who has pleaded guilty does not understand the effect of that plea, the service tribunal must substitute a plea of not guilty and proceed accordingly.[38]

At the close of the case for the prosecution, the accused person may submit to the service tribunal in respect of a charge that the evidence adduced is insufficient to support the charge.[39]

Where the accused person intends to call a witness to give evidence as to the facts of the case (other than himself), the person may, before he calls the first such witness, make an opening address to the service tribunal stating the nature and general effect of the evidence which the person proposes to adduce in the person's defence.[40]

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[37] *Defence Force Discipline Rules*, r 42.
[38] Ibid, r 43.
[39] Ibid, r 44.
[40] Ibid, r 45.

After all the evidence has been given, the accused person and the prosecutor may each make a closing address to the service tribunal.[41]

After the closing addresses (if any) at a trial by court martial, the judge advocate will sum up the evidence and direct the court martial on the law relating to the case.[42]

After the conviction of a person by a service tribunal, the prosecutor must cause evidence to be adduced as to:

(a) if the convicted person is a defence member or was a defence member at the time of commission of the offence, relevant particulars of his service in the Defence Force;

(b) particulars of any previous convictions of the convicted person for service offences, civil court offences and overseas offences; and

(c) such other matters relevant to determining action under Part IV of the Act, which deals with punishments and orders.[43]

The convicted person may give evidence, and call witnesses to give evidence, as to the convicted person's character and in mitigation of punishment and address the service tribunal in mitigation of punishment.[44]

The proceedings before a court martial or a Defence Force magistrate must, if practicable, be recorded *verbatim*. Where the proceedings before a court martial or a Defence Force magistrate are not recorded *verbatim*, they must be recorded in sufficient detail to enable the course of the proceedings to be followed, and the merits of the case to be judged, from the record.[45]

[41] Ibid, r 47.
[42] Ibid, r 48.
[43] Ibid, r 50.
[44] Ibid.
[45] Ibid, r 54.

The record of proceedings of a hearing before a summary authority shall contain the substance of the evidence of the witnesses and such additional matter (if any) as is necessary to enable the merits of the case to be judged.[46]

1.7 Witnesses

At the hearing of a proceeding before a service tribunal, the appropriate authority must secure the appearance of all persons reasonably required by the accused person to appear to give evidence on that person's behalf.[47]

The appropriate authority in relation to a court martial means a convening authority or the President of the court martial.[48] The appropriate authority in relation to proceedings before the Defence Force Magistrate means a convening authority or the Defence Force Magistrate.[49] The appropriate authority in relation to summary proceedings means the summary authority which may be a superior summary authority (appointed by the CDF) a commanding officer or a subordinate summary authority (appointed by the CDF). [50]

During proceedings before a service tribunal, a witness must not be in court while not under examination unless leave has been granted by the service tribunal.[51]

The service tribunal may direct a witness to withdraw from the court until the service tribunal makes a decision on an objection that relates to the allowing of a question or the evidence given, or about to be given, by the witness.[52]

A witness appearing before a service tribunal may be examined by the person who called the witness and cross-examined by the opposite party to the proceedings or by a co-accused. On conclusion of any cross-examination, a witness may be re-

[46] Ibid, r 55
[47] Ibid, r 14.
[48] Ibid, r 3.
[49] Ibid.
[50] Ibid.
[51] Ibid, r 17
[52] Ibid

examined by a person who called the witness on matters arising out of the cross-examination.[53]

The service tribunal may allow the cross-examination or re-examination of a witness to be postponed if, in the opinion of the service tribunal or, in the case of a trial by court martial, the judge advocate, it is in the interests of justice to do so.[54]

A service tribunal or, in the case of a trial by court martial, the judge advocate, may put questions to a witness.[55]

During a trial by court martial, members of the court martial are entitled to question a witness, if in the opinion of the judge advocate, the question is relevant and admissible and the question is put to the witness by the judge advocate. Upon such a question being answered, the accused person and the prosecutor may put to the witness such questions arising from the answer as seem proper to the service tribunal or, in the case of a court martial, the judge advocate.[56]

The prosecutor and the accused person may at any time before the judge advocate begins to sum up (if at a trial by court martial) or the service tribunal makes a finding on the charge (in any other case) recall a witness by leave of the service tribunal.[57]

After the witnesses for the defence have given their evidence, the prosecutor or the accused may, by leave of the service tribunal, call a witness to give evidence on any matter raised by the accused person in his defence in respect of which evidence could not properly have been adduced, or which could not reasonably

[53] Ibid, r 18.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid, r 19.

have been foreseen, by the prosecution before the accused person presented his defence.[58]

The service tribunal may, at any time before the judge advocate begins to sum up (if at a trial by court martial) or the service tribunal makes a finding on the charge (in any other case) call or recall a witness if, in the opinion of the service tribunal, or, in the case of a court martial, the judge advocate, it is in the interests of justice to do so.[59] When a witness is called or recalled, the accused person and the prosecutor may put such questions to the witness as seem proper to the service tribunal or, in the case of a court martial, the judge advocate.[60]

1.7.1 Comment

The decision of the Tribunal of which witnesses are reasonably required by the accused indicates a clear lack of fairness in the judicial process. Further, by allowing the Tribunal to question witnesses the Tribunal appears to be conducting more of a inquisitorial hearing than a trial of an accused.

1.8 Statements

Where an authorized member of the Defence Force or a commanding officer causes a person to be given a copy of a charge or to be served with a summons, that member or officer must cause the person to be given, before the person appears before a summary authority for a purpose relating to the charge, a copy of each statement in writing obtained by the prosecution from material witnesses to the alleged offence.[61]

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[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid, r 15.

1.9 Evidence

Before proceedings commence, the prosecutor must give to the accused person a notice setting out particulars of evidence that the prosecutor intends to present at the trial and any other evidence known to the prosecutor that is relevant to the accused person's defence. Where the prosecutor decides not to call a witness to give evidence and that witness' evidence is contained in a written statement furnished to the accused person, the prosecutor must inform the accused person before the trial that the prosecutor does not intend to call the witness to give evidence and that the accused person may call the witness as a witness for the defence. In the alternative, the prosecutor may inform the accused person at the trial that the prosecutor does not intend to call the witness to give evidence but will tender the witness for cross-examination by the accused person. This does not apply in relation to trials by summary authorities.[62]

1.9.1 Comment

The exclusion relating to the availability of a brief of evidence (including statements) to an accused person defending a charge in a hearing before a summary authority is unfair and inequitable and denies the accused the right to know what case is being presented by the prosecution prior to a hearing.

1.10 Findings of Service Tribunals

Part VIII of the Act sets out the procedure for trying an accused person under a summary authority.

If after hearing the evidence on the charge adduced by the prosecution, the summary authority is of the opinion that that evidence is insufficient to support the charge, the authority shall dismiss the charge. If, however, after hearing the

[62] Ibid, r 16.

evidence the authority is of the opinion that the evidence is sufficient to support the charge, the authority shall proceed with the trial.[63]

If the authority finds that the charge is not proved, the authority must dismiss the charge. Inversely, if the authority finds the charge proved, the authority shall convict the accused person. The authority must then take action under Part IV of the Act, which deals with punishments and orders.[64]

Where a summary authority convicts a person at the trial of a charge, and the authority is likely to impose an elective punishment[65], the convicted person must be given the opportunity to elect to be tried by a court martial or by a Defence Force Magistrate.[66]

Division 2 of Part VIII of the Act sets out the procedure for trying an accused person under a court martial or a Defence Force Magistrate.

During a trial by court martial, if the judge advocate after hearing the evidence on the charge adduced by the prosecution, rules that that evidence is insufficient to support the charge, the court martial must dismiss the charge.[67]

If the judge advocate, after hearing the evidence on the charge adduced by the prosecution, rules that that evidence is sufficient to support the charge, the court martial will proceed with the trial.[68]

An accused person will be acquitted if the court martial finds the accused person not guilty. Inversely, if the court martial finds the accused person to be guilty, that person will be convicted. Action will then be taken under Part IV of the Act, which deals with punishments and orders.

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[63] *Defence Force Discipline Act 1982*, s 130.
[64] Ibid.
[65] Elective punishments are set out in Schedule 3 of the *Defence Force Discipline Act 1985*.
[66] Ibid, s 131.
[67] Ibid, s 132.
[68] Ibid.

If after hearing the evidence on the charge adduced by the prosecution, a Defence Force magistrate is of the opinion that that evidence is insufficient to support the charge, the Defence Force magistrate must dismiss the charge. If after hearing the evidence, however, the Defence Force magistrate is of the opinion that the evidence is sufficient to support the charge, the Defence Force magistrate will proceed with the trial.[69]

If the Defence Force magistrate finds that the charge is not proved, the Defence Force magistrate will dismiss the charge. Inversely, if the Defence Force magistrate finds the charge proved, he or she shall convict the accused person. The Defence Force magistrate must then take action under Part IV of the Act, which deals with punishments and orders.[70]

1.11 Review of Proceedings of Service Tribunals

The Chief of the Defence Force or a service chief may appoint an officer, or each officer included in a class of officers, to be a reviewing authority for the purpose of reviewing proceedings of service tribunals.[71] A reviewing authority is considered to be a 'competent reviewing authority' for the purposes of reviewing proceedings of a tribunal relating to a charge only if the reviewing authority did not exercise any of the powers or perform any of the functions of a convening authority in relation to that charge.[72]

After a subordinate summary authority convicts a person of a service offence, the authority must transmit the record of the proceedings to the commanding officer of the authority who must then review the proceedings. The commanding officer is deemed to be a reviewing authority.[73]

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[69] Ibid, s 135.
[70] Ibid.
[71] Ibid, s 150.
[72] Ibid, s 150A.
[73] Ibid, s 151.

After completing a review of the proceedings, the commanding officer must then transmit the record of the proceedings and a report of the results of that review to a legal officer. The legal officer must then consider the record and report and may transmit that record and report to a reviewing authority.[74]

After a service tribunal (other than a subordinate summary authority) convicts a person of a service offence the service tribunal must transmit the record of the proceedings to a reviewing authority who must then review the proceedings. The reviewing authority must then provide written notice of the results of the review to the person who was convicted of the service offence.[75]

Where a service tribunal convicts a person of a service offence, the person may petition for a review of the proceedings concerned with a reviewing authority.[76]

A review by a reviewing authority does not prevent a further review being conducted by the CDF or a service chief (who are deemed to be reviewing authorities) if it appears that there are sufficient grounds for a further review. In conducting a review, the Chief of the Defence Force or a service chief is bound by any opinion on a question of law set out in a report.[77]

A conviction must be quashed if the reviewing authority considers it to be unreasonable, unsupportable or wrong in law (with a miscarriage of justice occurring). The reviewing authority can also quash a conviction on the basis of unsoundness of mind.[78]

However, where a conviction is quashed, a reviewing authority may determine that it is in the interests of justice that the person should be tried again for the offence.[79]

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[74] Ibid.
[75] Ibid, s 152.
[76] Ibid. s 153.
[77] Ibid, s 155.
[78] Ibid, s 158.
[79] Ibid, s 160.

1.11.1 Comment

The review is conducted by the commanding officer or a military legal officer, which by definition lacks independence from the military. The requirement for review of a decision, when review appears to be little more than an administrative action taken by the military, appears to be of little value.

1.11.2 Defence Force Appeal System

The *Defence Force Discipline Appeals Act 1982* creates a forum of appeal called the Defence Force Discipline Appeal Tribunal.[80] The Act is supported by the *Defence Force Discipline Appeals Regulations*, which deal mainly with procedural rules relating to the manner in which an appeal is conducted.

The *Defence Force Discipline Appeals Act* allows a person who has been convicted under the *Defence Force Discipline Act* by a court martial or a Defence Force magistrate to appeal his or her conviction to the Tribunal.[81] The appeal must deal with a question of law unless leave has otherwise been granted by the Tribunal.[82]

The Tribunal consists of a President, a Deputy President and can also consist of other members appointed under the Act. The President, Deputy President and other members of the Tribunal are appointed by the Governor-General. A member of the Tribunal is appointed for such period as the Governor-General determines, and is eligible for re-appointment.[83] A person can not qualify to be appointed as President or Deputy President unless he or she is a Justice or Judge of a federal court or of the Supreme Court of a State or Territory.[84]

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[80] *Defence Force Discipline Appeals Act 1982*, s 6.
[81] Ibid, s 20.
[82] Ibid.
[83] Ibid, s 7.
[84] Ibid, s 8.

At the sitting of the Tribunal, the President presides unless he or she is not present, in which case the Deputy President presides.[85] The powers of the Tribunal can not be exercised except by an uneven number of members (and not less than three) and unless at least one of those members is the President, Deputy President or a member eligible to be appointed President.[86]

Proceedings of the Tribunal are public, except where the Tribunal is dealing with a matter of procedure or is deliberating. In addition, if it is considered that it is necessary in the interests of the defence of Australia, the proper administration of justice or public morals, a member presiding at a sitting may order that some or all of the members of the public be excluded from all or part of the sitting. The member may also order that no report relating to such proceedings be published.[87]

Section 23 of the *Defence Discipline Appeals Act* allows the Tribunal, *inter alia*, to quash a conviction where a substantial miscarriage of justice has occurred.

Where in an appeal it appears to the Tribunal that there is evidence that was not reasonably available during the proceedings before the court martial or the Defence Force magistrate, is likely to be credible, and would have been admissible in the proceedings before the court martial or the Defence Force magistrate, the Tribunal will receive and consider that evidence and, if it appears to the Tribunal that the conviction or the prescribed acquittal cannot be supported having regard to that evidence, must allow the appeal and quash the conviction. The Tribunal may also quash a conviction if it is determined that the appellant was of unsound mind at the time of the act or omission the subject of the charge.[88]

[85] Ibid, s 14.
[86] Ibid, s 15.
[87] Ibid, s 18.
[88] Ibid.

Where the Tribunal quashes a conviction of a person for a service offence, the Tribunal may, if it considers that in the interests of justice the person should be tried again, order a new trial of the person for the offence.[89]

The Tribunal may, of its own motion or at the request of the appellant or the Chief of the Defence Force or a service chief, refer a question of law arising in a proceeding before the Tribunal, not being a proceeding before a single member, to the Federal Court of Australia for decision. The Federal Court of Australia has jurisdiction to hear and determine a question of law referred to it under the *Defence Force Discipline Appeals Act*, however, that jurisdiction must be exercised by the Federal Court sitting as the Full Court.[90]

1.12.1 Comment

As all Australian courts martial include a judge advocate appointed by the CDF the ratio decidendi in *Grieves v. United Kingdom*[91] may allow an applicant to succeed in an appeal to the Full Court of the Federal Court to quash a court martial conviction on the basis of a lack of impartiality and independence. See the discussion below on judicial independence below in paragraph 7.4.

1.13 The Defence Force Ombudsman

The Defence Force Ombudsman is established under the *Ombudsman Act 1976*. The office of Defence Force Ombudsman is held by the person who holds the office of Commonwealth Ombudsman.[92]

The functions of the Defence Force Ombudsman are to investigate complaints made to him or her with regard to the service of a member or former member of the Defence Force. The Defence Force Ombudsman may, however, take

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[89] Ibid, s 24.
[90] Ibid, s 52.
[91] European Court of Human Rights (Application no. 57067/00) Strasbourg 16 December 2003.
[92] *Ombudsman Act 1976*, s 19B.

investigative action on his or her own motion. Action taken by the Defence Force Ombudsman may include that relating to an allowance, pension or benefit that is payable to a member of the Defence Force as a result of their service.[93]

The legislative provisions relating to the Defence Force Ombudsman require that an investigation of a complaint by a serving member of the Australian Defence Force is not commenced unless and until the person has first sought redress through the Australian Defence Force grievance system.[94]

The Defence Force Ombudsman is not authorised to action taken in connection with proceedings against a member of the Defence Force for an offence arising under any law relating to the discipline of the Defence Force or of an arm or part of the Defence Force.[95] Thus, the Defence Force Ombudsman does not have any role in examining complaints in relation to proceedings under the *Defence Force Discipline Act 1982*.[96]

Where a member of the Defence Force who has complained to the Defence Force Ombudsman is able to seek, but has not sought, in the manner provided by or under the *Defence Act 1903*, redress in respect of the action to which the complaint relates from a member of the Defence Force authorized by or under that Act to grant redress, the Defence Force Ombudsman shall not investigate the complaint unless he or she is of the opinion that the member was, by reason of special circumstances, justified in refraining from seeking redress.[97]

1.13.1 Comment

The role of the Defence Force Ombudsman in investigating complaints in relation to the Australian Defence Force is severely circumscribed by not allowing

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[93] Ibid, s 19C.
[94] *Commonwealth Ombudsman Annual Report 2002-2003*, 77.
[95] Ibid.
[96] Ibid, 81.
[97] *Ombudsman Act 1976*, s 19E.

complaints to be investigated until after the Defence Forces grievance process has been exhausted and also not in relation to complaints relating to discipline.

1.14 General Courts of Inquiry

The Minister of Defence may appoint a General Court of Inquiry to inquire into matters concerning the Defence Force as specified by the Minister and to furnish a report on those matters.[98]

A General Court of Inquiry may be constituted by an eligible person or by two or more persons who include at least one eligible person. An eligible person is interpreted to mean a person who is or has been a Judge of a court created by Parliament or of a Court of a State, or a person who has been a legal practitioner for not less than five years.[99]

Where a General Court of Inquiry is constituted by one person, that person may exercise all the powers and perform all the functions of, and be considered as, the President of the Court. [100]

An inquiry conducted by a General Court of Inquiry must be in public. However, if the President considers that it is necessary in the interests of the defence of the Commonwealth or of fairness to a person who the President considers may be affected by the inquiry, the President may direct that all or part of the inquiry be conducted in private.[101]

Where the President of a General Court of Inquiry considers that a person may be affected by the inquiry conducted by the Court, the President may authorize that

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[98] *Defence (Inquiry) Regulations 1985*, r 5.
[99] Ibid, r 6.
[100] Ibid, r 7.
[101] Ibid, r 11.

person to appear before the Court. A person authorized to appear before a General Court of Inquiry may appoint another person to represent them.[102]

Once the President of a General Court of Inquiry is satisfied that all information relevant to the inquiry that it is practicable to obtain has been obtained, he or she must prepare a document setting out the findings of the Court and any observations and recommendations arising from those findings that the President thinks fit to make.[103]

Where an assessor has been appointed to assist a General Court of Inquiry, he or she must be given a reasonable opportunity to examine a copy of the report before it is furnished to the Minister. Where an assessor disagrees with a finding, observation or recommendation in the report of the Court, the assessor may make a statement in writing of the reasons for that disagreement and provide the statement to the President.[104]

The report of the General Court of Inquiry is then furnished to the Minister. When provided to the Minister, the report must be accompanied by any statement made by an assessor, the transcript of any oral evidence taken and any documents received by the Court as evidence.[105]

A Court of Inquiry must conduct its inquiry without regard to legal forms, is not bound by the rules of evidence and may inform itself on any matter relevant to its inquiry.[106] A legal practitioner may be appointed to assist a Court of Inquiry.[107]

The President of a Court of Inquiry must grant to a person who the President considers may be affected by the inquiry leave to submit to the Court any written statement of that person relevant to the inquiry.[108]

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[102] Ibid, r 15.
[103] Ibid, r 18.
[104] Ibid, r 19.
[105] Ibid, r 20.
[106] Ibid, r 50.
[107] Ibid, r 51.

1.15 Boards of Inquiry

A Board of Inquiry may be appointed by the Chief of the Defence Force (or the Chief of the Defence Force and the Secretary acting concurrently) to inquire into such matters concerning the administration of the Defence Force. A Board of Inquiry may also be appointed by the Chief of Navy, the Chief of Army or the Chief of Air Force, to inquire into matters concerning the Navy, Army or Air Force, respectively.[109]

The instrument appointing a Board of Inquiry will indicate whether or not the Board is empowered to make recommendations arising from its findings.[110]

A Board of Inquiry must be constituted by at least two persons, including at least one officer.[111] One of the members must be appointed as the President of the Board of Inquiry. To be eligible to be President, that person must be an officer.[112]

A person authorized to appear before a Board of Inquiry may appoint another person to represent him or her, however, the Board of Inquiry shall not appoint a legal practitioner to represent that person for the purposes of the inquiry except with the approval of the President (if the Inquiry has commenced) or, in any other case, the appointing authority.[113]

Prima facie, a Board of Inquiry must not conduct its inquiry in public. However, the appointing authority may direct that a Board of Inquiry conduct all or parts of its inquiry in public. In addition, if the President considers that it is necessary in the interests of the defence of the Commonwealth or of fairness to a person who

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[108] Ibid, r 52.
[109] Ibid, r 23.
[110] Ibid, r 25.
[111] Ibid, r 26.
[112] Ibid, r 27.
[113] Ibid, r 33.

the President considers may be affected by the inquiry, the President may direct that all or part of the inquiry be conducted in private.[114]

Once the President of a Board of Inquiry is satisfied that all information relevant to the inquiry that is practicable to obtain has been obtained, the President must prepare a report, setting out the findings of the Board and, if the Board is empowered to make recommendations, any recommendations arising from those findings that the Board thinks fit to make. Where the members of a Board of Inquiry cannot agree on a report, each member of the Board must make a statement in writing of the findings made by that member and, if the Board is empowered to make recommendations, any recommendations arising from those findings that that member thinks fit to make. Those statements will then constitute the report of the Board.[115]

1.15.1 Comment

A Board of Inquiry was convened to investigate the fire and deaths that occurred on the naval ship *HMAS Westralia* on 5 May 1998.[116] Criticism has since been directed against Defence for not convening a General Inquiry given the serious nature of this incident. Given that four sailors died on *Westralia* it is difficult to understand why a General Court of Inquiry was not held. A judge of a Supreme Court of a State or Territory adjudicates in a General Court of Inquiry, while the constitution of a Board of Inquiry must include an appointed military officer. As such a Board of Inquiry clearly lacks that judicial independence of a General Court of Inquiry. Given the issues raised against Navy procedure in purchasing fuel hoses, and a subsequent finding of the Western Australian Coroner as to the cause of the fire,[117] the need for public acceptance of independence in the *Westralia* Inquiry clearly warranted a General Inquiry. It is noted that since

[114] Ibid, r 29.
[115] Ibid, r 36.
[116] Royal Australian Navy, *Report of the Board Of Inquiry into the Fire in HMAS Westralia on 5 May 1998*, 1998.
[117] Coroner's Court of Western Australia, *Record of Investigation into Death*, December 2003.

inception of the legislation in 1985 a General Court of Inquiry has never been undertaken.

1.16 Combined Boards of Inquiry

The Minister may appoint a Combined Board of Inquiry to inquire into a matter concerning the Defence Force that involves the armed forces of another country or of other countries.[118]

In appointing a Combined Board of Inquiry the Minister must specify the matter in relation to which the Board has been appointed and specify the country or countries other than Australia that are involved in the inquiry.[119]

The Minister may empower a Combined Board of Inquiry to make recommendations arising from its findings.[120]

1.17 Investigating Officers and Inquiry Assistants

The Inspector-General may inquire into a matter personally or by appointing an Investigating Officer to inquire into the matter or by directing an Assistant IGADF to inquire into the matter.[121]

The Inspector-General may appoint a person to be an Investigating Officer, an Inquiry Assistant or an Assistant IGADF.[122] To be eligible for either of these appointments the relevant person must be either a member of the Defence Force, an APS employee (of any classification) or any other person who has agreed in writing to the appointment.[123]

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[118] *Defence (Inquiry) Regulations 1985*, r 38.
[119] Ibid.
[120] Ibid, r 41.
[121] Ibid, r 88.
[122] Ibid, r 82.
[123] Ibid, r 83.

An Investigating Officer must inquire into the matter for which he or she is appointed and report to the Inspector-General about the matter. The Inspector-General may authorise an Investigating Officer to make recommendations resulting from his or her findings.[124]

An Assistant IGADF must help the Inspector-General, on an ongoing basis, to carry out the Inspector-General's functions.[125] An Inquiry Assistant must help the Inspector-General, an Investigating Officer or an Assistant IGADF to inquire into the matter for which the Inquiry Assistant was appointed.[126]

An Investigating Officer may be appointed to inquire into a matter concerning a part of the Defence Force. One or more inquiry assistants may be appointed to assist an Investigating Officer to assist in his or her inquries.[127]

An Investigating Officer or an inquiry assistant may be appointed by a commanding officer in the Defence Force, an officer who has the powers of a formation commander under the *Australian Military Regulations 1927*, or any officer who holds an appointment superior to that of a commanding officer and a formation commander.[128]

Once an Investigating Officer has inquired into a matter and is satisfied that all information relevant to the inquiry that is practicable to obtain has been obtained, the Investigating Officer must prepare a report setting out the findings of the Investigating Officer in relation to the inquiry and, if the Investigating Officer is authorised to make recommendations, any recommendations that the Investigating Officer thinks appropriate to make.[129]

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[124] Ibid, r 84.
[125] Ibid, r 85.
[126] Ibid, r 86.
[127] Ibid, r 69.
[128] Ibid, r 70A.
[129] Ibid, r 100.

1.17.1 Comments

There is a lack of perceived independence in investigations assisting Inquiries as Investigating officers are appointed from the military.

2. Military Justice Systems in Other Countries

2.1 United States of America

The foundation of military law in the USA is the Constitution.[130] Article I of the Constitution allocates to the United States Congress the power to regulate and govern the armed forces.[131]

Judicial Proceedings conducted by the armed forces are called courts martial.[132] Until 1920, a commander in the field or the President generally reviewed courts-martial convictions.

The United States congress enacted the Uniform Code of Military Justice ("the UCMJ") in 1950.[133] Significant changes to the UCMJ were made in 1968 and 1983.[134]

The UCMJ is a comprehensive set of criminal laws.[135] The UCMJ includes crimes which are punishable in civilian law such as rape, assault and murder but also includes unique military crimes such as disrespect towards superiors, failure to obey orders, and drinking while on duty.[136] The UCMJ also covers offences of misbehaviour before the enemy such as aiding the enemy, spying and espionage.[137]

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[130] The Military Justice System, *The Uniform Code of Military Justice and Manual for Courts-Martial*, http://sja.hqmc.usmc.mil/JAM/MJFACTSSHTS.htm, p 1, at 17 February 2004
[131] *U.S. Air Force Court of Criminal Appeals History (AFCCA)*
https://afcca.law.af.mil/history.html, p 2, at 17 February 2004.
[132] *Establishment of the United States Court of Appeals for the Armed Forces*
http://www.armfor.uscourts.gov/Establis.htm, p 1, at 17 February 2004.
[133] The Military Justice System, above, 2.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Ibid.

The UCMJ established one or more Boards of Review for each of the armed forces. The Boards of Review's function is to review court martial records of trial, determine questions of law and fact, weigh evidence, and reduce sentences.[138] The UCMJ also established the Court of Military Appeals, which is comprised of civilian judges to hear appeals from decisions of the Boards of Review.[139]

2.1.1 An overview of the USA system

Unlike civilian communities, military commanders exercise discretion in deciding whether an offense should be charged and how the offenders should be punished. The disposition decision is one of the most important and difficult decisions facing a commander. The commander has a number of options available for the resolution of disciplinary problems. Briefly summarised, they are as follows:

(a) The commander may choose to take no action. The circumstances surrounding an event actually may warrant that no adverse action be taken. The preliminary inquiry might indicate that the accused is innocent of the crime, that the only evidence is inadmissible, or the commander may decide that other valid reasons exist not to prosecute.

(b) The commander may initiate administrative action against a soldier. The commander might determine that the best disposition for this offense and this offender is to take administrative rather than punitive action. Administrative action is not punitive in character; instead, it is meant to be corrective and rehabilitative. Administrative actions

[138] U.S. Air Force Court of Criminal Appeals History, above, 1.
[139] Ibid.

include measures ranging from counseling or a reprimand to involuntary separation.

(c) The commander may dispose of the offense with non-judicial punishment. Article 15, UCMJ, is a means of handling minor offenses requiring immediate corrective action. Non-judicial punishment hearings are non-adversarial. They are not a "mini-trial" with questioning by opposing sides. The commander conducts the hearing. The service member may request an open or closed hearing, speak with an attorney about his case, have someone speak on his behalf, and present witnesses who are reasonably available. The rules of evidence do not apply. In order to find the service member guilty, the commander must be convinced beyond a reasonable doubt that the service member committed the offence. The maximum punishment depends on the rank of the commander imposing punishment and the rank of the service member being punished. The service member has a right to appeal the imposing commander's decision to the next higher commander.

(d) The commander may dispose of the offences by court-martial. If the commander decides that the offence is serious enough to warrant trial by court martial, the commander may exercise the fourth option, preferring and forwarding charges. The commander may chose from three potential levels of court martial: summary, special, or general court martial. These courts martial differ in the procedures, rights, and possible punishment that can be adjudged. A summary court-martial is designed to dispose of minor offenses. Only enlisted soldiers may be tried by summary court martial. A single

> officer presides over the hearing. The accused has no right to counsel but may hire an attorney to represent him. A special court-martial is an intermediate level composed of either a military judge alone, or at least three members and a judge. An enlisted service member may ask that at least one-third of the court members be enlisted. There is both a prosecutor, commonly referred to as the trial counsel, and a defense counsel. In addition, the accused may be represented by civilian counsel, at no expense to the government, or by an individually requested military counsel.[140]

It is clear from the above that the United States system lacks perceived independence. Decisions relating to prosecution rest solely with the Commander.

2.1.2 Report of the United States National Military Justice Commission

A report dated May 2001 of the United States National Institute of Military Justice Commission on the 50th Anniversary of the Uniform Code of Military[141] notes the following:

> *The Uniform Code of Military Justice (USA) has failed to keep up with the standards of procedural justice adhered to not only in the United States, but in a growing number of Countries around the world. ... In recent years, countries around the world have modernized their military justice systems, moving well beyond the framework created by the Uniform Military Code fifty years ago.*

In its report the Commission goes on to state that '[t]his modernization has focused on both increasing the impartiality of court-martial procedures and respecting the human rights of service members.'

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[140] *www.defenselink.mil/vwac/military.html* at 24 February 2004.
[141] www.militaryinjustice.org/Documents/CoxReport.PDF at 24 February 2004.

The Commission acknowledged that during hostilities and emergencies, it is axiomatic that commanders must enjoy full and immediate disciplinary authority over those placed in their command.

The Commission in its executive summary of its report recommended, *inter alia*, immediate action to address problem areas of court martial practice and procedure including:

1. Modify the pretrial role of the convening authority in both selecting court martial members and making other pre-trial legal decisions that rest within the purview of the sitting military judge; and

2. Increase independence, availability, and responsibilities of military judges.

The Commission went on to find that the far reaching role of commanding officers in the court martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces. The Commission found that commanders have a significant role in the prosecution of crime at court martial but that their role must not be permitted to undermine the standard of due process to which service members are entitled. The Commission stated:

> *There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection. The current practice is an invitation to mischief. It permits-indeed, requires-a convening authority to choose the persons responsible for determining the guilt or innocence of a service member who has been investigated and prosecuted at the order of the same authority.*

The Commission report recommend the creation of judicial circuits, composed of tenured judges with fixed term offices as military judges. The Commission believes that increased judicial independence is critical, given the central role of judges in upholding the standards of due process, preserving confidence in the fairness of courts martial, and bringing the United States military justice closer to the standards being set by other military criminal justice systems around the world.

The President of the National Military Institute for Justice in Washington, DC, Mr Eugene Fidell, in a letter to the Right Honorable Antomio Lamer P.C., C.C., C.D. the author of the First Independent Review of the Canadian Military system states:

> *As you are know, military justice practitioners and scholars in the United States are taking an increasing interest in developments in other countries' systems, and Canadian developments have been at the top of the list. Canada has much to be proud of in this area.*

2.2 Canada

The federal government in Canada derives exclusive jurisdiction over the armed forces from section 91(7) of the *Constitution Act 1867.*

A review of the statutes covering military law in Canada led to the enactment of the *National Defence Act* (NDA) in 1950.[142] The NDA contains the Code of Service Discipline (the CSD) which is a complete code of military law applicable to persons under service jurisdiction. The term 'service jurisdiction' includes civilians accompanying a unit of the armed forces and alleged spies for the enemy.[143]

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[142] Ibid.
[143] Ibid.

The Canadian Armed Forces operate a separate system of military tribunals to fulfil the disciplinary requirements of the Canadian military.[144]

2.2.1 An Overview of the Canadian System

The Canadian military justice system utilizes an independent Director of Military Prosecutions (DMP). The independence of the DMP is outlined at http://www.forces.gc.ca.[145] The statutory position of DMP comes under the supervision of the Judge Advocate General.

2.2.2 Director of Military Prosecution

The Canadian DMP's duties, function and independence include:

(a) The Canadian Military Prosecution Service (CMPS) comprises the Director of Military Prosecutions (DMP), the Deputy Director of Military Prosecutions and the legal officers appointed to assist and represent the DMP. The DMP holds office upon appointment by the Minister for a period not to exceed four years, and may be removed from office only by the Minister, for cause, on the recommendation of an Inquiry Committee.

(b) The primary statutory duties of the DMP and of the legal officers who assist the DMP are:

(i) the referral of charges to be tried by court martial;

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[144] Canadian Military Justice System http://www.forces.gc.ca/jag/military_justice/can_mil_just_syst/default_e.asp, p 1, at 24 February 2004.

[145] Ibid..

(ii) the subsequent co-ordination and conduct of prosecutions at courts martial; and

(iii) to act as appellate counsel for the Minister in respect of appeals before the Court Martial Appeal Court of Canada.

In addition to the above duties, the DMP is the legal adviser to the Canadian Forces National Investigation Service (NIS) in the conduct of investigations. The DMP has officers employed in four regions across Canada.

In exercising prosecutorial discretion in relation to the referral of charges and the conduct of prosecutions, the DMP's independence is protected by the institutional structures in both legislation and common law. In this, the DMP's situation is analogous to that of a Director of Public Prosecutions in the civilian criminal justice system. The legislation also explicitly empowers the DMP to withdraw charges that have been referred.

The DMP is under the 'general supervision of the Judge Advocate General', (JAG) who may issue general instructions or guidelines in writing in respect of prosecutions or in respect of a particular prosecution.

Except in limited cases, the DMP must ensure that such instructions are made available to the public, and the JAG must give the Minister a copy of every such instruction and guideline.[146]

[146] Ibid.

2.2.3 Canadian Legislative Framework

The independence in the Canadian military justice system came about through Bill C-25, enacted in 1999.[147]

In the first independent review of changes made in 1999 of Bill C-25, an Act to amend the *Canadian Defence Act*, the Right Honourable Antonio Lamer P.C., C.C., C.D, noted the following:

(1) That an Independent military judiciary is the hallmark of a fair military justice system;
(2) That Bill C-25 enhanced the independence of military judges by including provisions outlining the appointment, terms and functions of military judges; and
(3) His recommendation to further ensure judicial independence, by creating a permanent trial level court, with judges appointed until retirement.

Bill C-25 created the Military Complaints Commission, a very important oversight body responsible for ensuring that complaints as to military police conduct and interference with military investigations are dealt with fairly and impartially.

Changes made by Bill C-25 created a more fair and impartial system and introduced safeguards to protect the right of an accused.[148]

2.2.4 Comment

It is important to note the distinction between the Canadian DMP and the recently appointed Australian DMP. Unlike the Canadian DMP, the Australian DMP is

[147] Bill C-25 (An Act to Amend the *National Defence Act*) *1999.*
[148] The First Independent Report of the Right Honourable Antonio Lamer P.C., C.C.,C.D. of the Provisions of Bill C-25 *An Act to Amend the National Defence Act and to make Consequential Amendments to other Acts* as required under section 96 of the Statutes of Canada 1998, c.35.

not a statutory appointment of the Minister, therefore lacking true judicial independence. The Australian DMP reports to the CDF, not an independent judicial officer as is the case with the Canadian DMP. A lack of perceived independence of the Australian DMP by reporting to the CDF also raises issues of conflict, particularly in situations where the prosecution may raise issues about misconduct of the Defence force itself.

2.3 United Kingdom

In 1996 the United Kingdom passed a significant piece of legislation, the *Armed Forces Act 1996* which, *inter alia,* introduced independent prosecuting authorities, abolished confirmation and the role of confirming officer and set up the court-martial administration office as the focal point for trial administration and issuing of a convening order.[149]

2.3.1 Explanatory Memorandum of the Armed Forces Act 1996[150]

The United Kingdom Armed Forces Discipline Bill 1996 explanatory notes states, *inter alia*:

> *The Bill alters certain aspects of the system for administering discipline in the armed forces. It introduces a provision for a judicial authority to determine whether a suspect or accused should be held in custody. The Bill also gives the accused an earlier opportunity to elect to be tried by court-martial and it establishes an appeals procedure for those whose cases have been dealt with summarily. The system for administering discipline in the armed forces is kept under review, with the principal vehicle for any legislative changes that may be necessary being the five-yearly Armed Forces Acts. The Armed Forces Act 1996 made substantial changes, reinforcing the independence of courts-martial, to reflect the European Convention*

[149] The Armed Forces Act 1996 United Kingdom.
[150] United Kingdom Armed Forces Discipline Bill [H.L.] 1996

on Human Rights. The 1996 Act also extended the right to choose trial by court-martial described in paragraph 6 above.

2.3.3 UK Judge Advocate - Civilian Lawyer

A judge advocate is a civilian lawyer appointed by the Judge Advocate General, who is responsible to the Lord Chancellor, to be a member of an Army or Royal Air Force court-martial. The Royal Navy have uniformed judge advocates (who are naval barristers of at least five years standing) appointed by the Chief Naval Judge Advocate to be members of naval courts-martial.

These reforms were largely as a result of a series of cases in the European Court of Human Rights.[151]

2.3.4 Comments

The need for independence in the military judicial system has brought about necessary change in Canada and in the United Kingdom.

With such substantive change in Canada to its military justice system, with changes to the United Kingdom military justice system arising out of issues raised at the European Court of Human Rights, and with a real interest in outcomes achieved in Canada by the United States National Military Justice Institute, Australia needs to look very closely at its military justice system. The Australian system continues to maintain control of the justice system by its military leaders, and lacks perceived independence in its military due process. Until the issues of fairness, equity and perceived independence are addressed with military justice inquiries and prosecutions, the Australian public will have difficulty maintaining

[151] *Findlay v. United Kingdom*, (1997)24 E.H.R.R. 221 (British Army); *Coyne v. United Kingdom* (1997) N0. 124/1996 E.H.R.R; and *Lane v. United Kingdom* (1999) No 27347/95 (Comm. Of Ministers, Council of Eur. June 9, 1999) (interim resolution) (Royal Navy). See A World-Wide Perspective on Change in Military Justice Eugene R. Fiddell at Aspels Legal Pages - Aspels.com

confidence in the Australian Military system, particularly when seen in the light of substantive and beneficial change in other over seas jurisdictions.

3. Previous Inquiries and Recommendations for Change

3.1 The Abadee Report

3.1.1 Origins and Scope of Inquiry

In November 1995, the Chief of Defence Force commissioned Deputy Judge Advocate General, Brigadier the Honourable A.R. Abadee, to conduct a study into arrangements for the conduct of military trials, with a view to determining whether these arrangements satisfied current tests of judicial independence and impartiality.

3.1.2 Conclusions and Recommendations

On 11 August 1997, Brigadier Abadee presented his comprehensive report, *A Study into Judicial System under the Defence Force Discipline Act*, in which he provided 48 recommendations for change, 39 of which were agreed to by the Chief of the Defence Force.

One significant matter arising from the Abadee Report was the recommendation to create an independent Director of Military Prosecutions (DMP). Justice Abadee recommended that 'careful consideration should be given to examining the question of the appointment of the "independent" Director of Military Prosecutions upon a tri-service basis' as one of a number of measures to rectify any perception of lack of independence in the system of military discipline employed by the ADF.

This recommendation was not accepted by the ADF at that time but the issue was again examined by the Joint Standing Committee on Foreign Affairs, Defence and

Trade in its report on the *Inquiry into Military Justice in the Australian Defence Force,*[152] which was tabled on 21 June 1999.

The position of Director of Military Prosecutions has since been created.

3.2 Ombudsman's 1998 Review of Practices and Procedures

3.2.1 Origins and Scope of Inquiry

On 14 July 1995, the Chief of the Defence Force (CDF) asked the Commonwealth Ombudsman to conduct an 'own motion' investigation into matters surrounding an allegation of sexual assault on a Defence base.[153]

The parties concerned had made a number of complaints regarding their treatment by the Service, both at the time of the incident and subsequently, to the Minister, the Service and the Commonwealth Ombudsman. The allegations had also been the subject of two successive Service investigations, a hearing in a Tribunal presided over by a Supreme Court Judge, a complaint to the Police, a referral to the Director of Public Prosecutions, and two Federal Court actions. One of the parties had also taken their complaint to the Human Rights and Equal Opportunity Commission (HREOC).[154]

In one Federal Court action, the Judge found that the report of the second Service investigation was 'vitiated by fundamental errors of law' and he severely criticised the investigator's pursuit, assessment and presentation of the evidence.[155]

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[152] Joint Standing Committee on Foreign Affairs, Defence and Trade. *Completed Inquiry: Military Justice in the Australian Defence Force* http://www.aph.gov.au/house/committee/jfadt/military/reptindex.htm at 24 February 2004.

[153] Report of the Commonwealth Ombudsman, *The ADF, Own motion investigation into how the ADF responds to allegations of serious incidents and offences, Review of Practices and Procedures. Report of the Commonwealth Defence Force Ombudsman under section 35A of the Ombudsman Act 1976* , January 1998, <http://www.comb.gov.au/publications_information/Special_Reports/Defence-Own-Motion.pdf at 24 February 2004.

[154] Ibid, paragraphs 1.2-1.3.

[155] Ibid, paragraph 1.4.

3.2.2 Focus of the Inquiry

The inquiry and subsequent report addressed both systemic issues, arising from the way the ADF responds to serious personnel incidents and offences, as well as the comprehensiveness and quality of the ADF's inquiry procedures and how they might be improved.

3.2.3 Overview

Where an allegation of a serious incident or offence is made, there are a number of mechanisms for investigating and dealing with it:

(a) The *Defence Force Discipline Act 1982* (the Act);

(b) The referral of charges for investigation by civilian authorities;

(c) The *Defence Inquiry Regulations* (the Regulations);

(d) External administrative review bodies; and

(e) Other dispute resolution strategies.[156]

Prosecution under the Act requires adherence to the rules of evidence and proof beyond reasonable doubt. This is not the case with the Regulations and self-incriminating evidence given in an investigation under the Regulations cannot be used against a person in proceedings before a Service Tribunal.[157]

The Ombudsman expressed the view that Investigating Officers conducting administrative investigations under the Regulations should not be entitled to find that a criminal offence has been committed.[158]

The Inquiry found that there were inconsistencies in the manner in which complaints were handled, with some matters being investigated by a Board of

[156] Ibid, paragraph 5.
[157] Ibid, paragraph 9.
[158] Ibid, paragraph 10.

Inquiry (BOI) and very similar matters being investigated by an Investigating Officer with significantly lesser powers.[159] It also found that, with the exception of the Army guidelines, there is very little guidance on the rules for the conduct of 'informal investigations'.[160]

The main source of guidance for Investigating Officers under the Act is the Discipline Law Manual. For investigations under the Regulations, the main source of guidance is the Instruction on Inquiries into matters affecting the Defence Force. The ADF has also produced a video and handbook for officers appointed to investigate allegations of harassment and/or discrimination.[161] There is currently no comprehensive manual on how to conduct an investigation.

The Inquiry identified the following problems experienced during investigations:

(a) Inadequate planning of investigations;

(b) Failure to interview all relevant witnesses and assumptions made about the credibility of witnesses interviewed;

(c) Pursuit of irrelevant issues in witness interviews, use of inappropriate questioning techniques and failure to put contradictory evidence to witnesses for response;

(d) Failure to record evidence properly, and possibly, preparation of witnesses and unauthorised questioning of witnesses;

(e) Failure to analyse evidence objectively, and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made; and

(f) Inadequate record keeping.[162]

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[159] Ibid, paragraphs 12-13.
[160] Ibid, paragraph 17.
[161] Ibid, paragraph 35.
[162] Ibid, paragraph 37.

There is no guidance in the Defence Inquiry Regulations Instruction to investigating bodies on how to develop recommendations, despite the fact that their power to make recommendations is unfettered.[163]

The Inquiry found that, under the DFDA, the principles of procedural fairness and rights of review are built into the processes for charging a member with an offence, hearing of the charges and the orders of the hearing authority, and they are also covered in various instructions. However, they are not fully spelt out in the Regulations or the related Instruction.[164]

The Ombudsman questioned whether the ADF pays sufficient attention to the need for confidentiality and privacy to be respected when dealing with member's complaints.[165]

3.2.4 Conclusions and Recommendations

In January 1998, after extensive consultation with the ADF, the Ombudsman presented her report, *The ADF, Own motion investigation into how the ADF responds to allegations of serious incidents and offences, Review of Practices and Procedures. Report of the Commonwealth Defence Force Ombudsman under section 35A of the Ombudsman Act 1976.*

Some areas of current ADF policy and procedure were identified as requiring further attention including establishment of an appropriate framework for preliminary inquiries, selection of investigators, development of terms of reference, training of investigators, monitoring and supervision of investigations, support services where personnel incidents are being investigated, procedural fairness and privacy.

The Inquiry noted that the Services have established a network of contact officers who can advise on the use of alternative dispute resolution techniques but found that this was not part of routine training.

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[163] Ibid, paragraph 38.
[164] Ibid, paragraph 60.
[165] Ibid, paragraph 61.

The Ombudsman expressed the view that 'informal inquiries' should be called 'preliminary inquiries' and the Defence Instructions should provide clear guidance on the purpose of preliminary inquiries and the extent to which they can be used, as well as providing accountability requirements for preliminary inquiries.[166]

The Inquiry recommended that the ADF revise its Instructions on the handling of complaints and grievances and on the conduct of investigations, noting that the terms of reference should be outcome focussed.[167]

The Inquiry identified a need to provide better training to officers investigating matters under the Regulations, finding that lack of experienced investigators and the inadequacy of training meant that investigators do not always grasp the real issues.[168] The Inquiry recommended that the ADF develop a training strategy for officers who conduct investigations and that officers should not be appointed to conduct investigations under the Regulations unless they have received the training or have other suitable experience or expertise.[169]

The Inquiry recommended that the ADF implement a process whereby investigating bodies report periodically on the progress of their investigation (if the investigation is to take more than one month), and which allows for an assessment of whether the investigation is being conducted appropriately. The Inquiry further recommended that the ADF amend the present guidance to investigators to provide advice on the development of investigations reports and recommendations, and the limits of their authority in this respect.[170]

The inquiry also recommended that the ADF extend its monitoring of trends in the incidence of sexual harassment and offences to include comparisons among the

[166] Ibid, paragraphs 19-20.
[167] Ibid, paragraph 29.
[168] Ibid, paragraph 30.
[169] Ibid, paragraph 34.
[170] Ibid, paragraph 48.

Services, undertake regular trend analysis of investigations, and ensure that information and expertise can be readily shared among the Services.[171]

One outcome of the Ombudsman's report was a new manual, Australian Defence Force Publication (ADFP) 202, titled *Administrative Inquiries and Investigations in the ADF*, which was prepared in consultation with the Ombudsman.

Another principal outcome of the Ombudsman's report is the establishment of an independent Complaints Resolution Agency, to assist the process of managing inquiries. While the director of the agency looks to the head of the Defence Personnel Executive for administrative support, the agency is otherwise directly responsible to the CDF and the Secretary and thus independent of any command chain that applies to the matters in which it deals. The Complaints Resolution Agency is currently available to provide advice on settling terms of reference for all general courts of inquiry and boards of inquiry.

3.3 Inquiry into Military Justice in the Australian Defence Force

3.3.1 Origin of the Inquiry

In recent years, a number of military inquiries and disciplinary matters conducted by the ADF have become the subject of considerable public interest and media comment. Predominantly these cases involved the loss of lives of Service personnel or perceived injustices to members of the ADF in their dealings with the military disciplinary system and raised questions regarding the application of natural justice and human rights within military discipline, the efficacy of the current military inquiry system and demands for external reviews of internal ADF proceedings intended to deal with the matter.

Parliament referred the matter to the Joint Standing Committee on Foreign Affairs, Defence and Trade for inquiry and report on 25 November 1997 (38th Parliament and re-referred the matter 10 March 1999 (39th Parliament)). The

[171] Ibid, paragraph 8.69.

Joint Committee charged its Defence Sub-Committee with the conduct of the inquiry.

3.3.2 Terms of Reference

The Terms of Reference for the inquiry authorised the Committee to examine the adequacy and appropriateness of the existing legislative framework and procedures for the conduct of military inquiries and Australian Defence Force (ADF) disciplinary processes.

3.3.3 Focus of the Inquiry

The Committee identified three distinct components of the military justice system employed within the ADF:

(a) military inquiries, conducted under the Regulations, which provide a framework to expeditiously and properly investigate any matter affecting the Defence Force;
(b) military discipline, under the Act, which applies to members of the military in addition to the common and criminal laws of Australia; and
(c) administrative action.

Throughout the inquiry the Committee adhered closely to the Terms of Reference and sought to examine the avenues for investigative and punitive action within the ADF to determine if extant procedures are unfair, inappropriate or open to misuse. The Committee restricted its investigations to the legislative framework and procedures for military inquiries and disciplinary processes and did not attempt to re-hear specific cases.[172]

The Committee's Chairman, Senator D.J. MacGibbon, stated that it was not within the Terms of Reference nor within the powers of the Committee to review individual cases. He noted that, where the Committee touched on individual

[172] Ibid, paragraph 1.14

cases, it did so solely to examine the procedures employed and the effectiveness of the military justice system.[173]

3.3.4 Overview of Military Inquiries

Military inquiries are conducted under the Regulations. The Regulations are implemented through a Defence Instruction,[174] which provides the outline of the legislative framework for the conduct of three levels of inquiry:

(a) *General Court of Inquiry* - used to inquire into matters of exceptional gravity which may have major ramifications to the Defence Force, it removes the Department of Defence from the investigative process;

(b) *Board of Inquiry* - used to inquire into matters of significance to the ADF which do not warrant a General Court of Inquiry, it is usually employed in circumstances of serious injury, death or substantial loss of Commonwealth property and it provides a means to identify weaknesses in the operational, technical and procedural methods of the ADF; or

(c) *Investigating Officer* - used for inquiries into minor matters or the facts of a particular incident.

The Regulations also provide for the Minister or a delegate to appoint a combined board of inquiry for a matter that involves the armed forces of both Australia and another country.

Under the Regulations, legal representation for persons likely to be affected by military inquiries is not a right.

Persons likely to be affected by a General Court of Inquiry may be represented by a legal practitioner.[175]

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[173] Ibid.

[174] Defence Instruction (General) 34-1 *Inquiries into Matters Affecting the Defence Force*, introduced on 22 August 1986 and last revised on 22 July 1997

For a Board of Inquiry (BOI), the Regulations stipulate that legal representation may be approved by the Appointing Authority before the commencement of the Inquiry and by the President of the BOI during the conduct of the inquiry.[176]

In the case of inquiries conducted by an Investigating Officer, the Defence Instruction states that 'a witness is not entitled to legal representation'[177] however Sheppard J in *'X' v McDermott*[178] suggests that, in such an inquiry, the matter of allowing witnesses legal representation is entirely at the discretion of the Investigating Officer.[179]

Regardless of the level of inquiry, where legal representation is approved for an ADF member, a Service legal officer (either Regular or Reserve) may be provided at no cost to the member or the member may choose to be represented by a private legal practitioner at the member's own expense.

Under current legislative provisions,[180] the ADF have the authority to conduct a military inquiry, sanctioned under the Regulations, into any incident an appointing authority deems worthy of an investigation. Military inquiries investigate facts associated with a particular incident and inform the decision maker of the findings and recommendations. They are not employed to investigate disciplinary or criminal matters nor empowered to impose punishment, merely providing an internal management tool to enable corrective action to be taken by the commander.

A military inquiry is not bound by the rules of evidence and any evidence given by a witness before a military inquiry is not admissible in evidence against the witness in any civil, criminal or disciplinary proceedings.

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[175] *Defence (Inquiry) Regulations 1985*, r 15(3).
[176] Ibid, r 33.
[177] Defence Instruction (General) 34-1 *Inquiries into Matters Affecting the Defence Force*, p.3
[178] (1994) 51 FCR 1
[179] Ibid at 27 per Shepherd J.
[180] *Defence (Inquiry) Regulations 1985.*

The product of the inquiry will be a report which, depending on the Instrument of Appointment, may include recommendations regarding subsequent disciplinary investigation.

The appointing authority may, after considering the report of the inquiry, decide that a separate investigation under the Act is necessary. A military inquiry can be conducted concurrent with an investigation under the Act, provided that one does not prejudice the other.

3.3.5 Committee Findings

The Committee considered that an alternative to the current internal conduct of military inquiries would be to charge an external authority with responsibility for the conduct of the inquiry, which they thought would address perceptions of the lack of independence of the current process, but felt that it is unlikely any external authority could provide the responsiveness necessary to meet the ADF's operational need. The Committee also felt that the decision to call in an external inquiry authority would not be an option willingly embraced by commanders, particularly during times of conflict.[181]

The Committee also suggested that, on issues of significant gravity the need to demonstrate the independence of the inquiry may outweigh all other concerns and, in such cases, the jurisdiction of external authorities could be mandated to remove the decision to defer to external inquiry authorities from the ADF.[182]

The Committee noted that the principle factors militating against the use of an external authority to conduct a military inquiry are the need for timeliness and understanding of the military culture, with evidence presented to the Committee suggesting that where a military matter is dealt with by an external authority,

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[181] Australia. Joint Standing Committee on Foreign Affairs, Defence and Trade. *Completed Inquiry: Military Justice in the Australian Defence Force* <http://www.aph.gov.au/house/committee/jfadt/military/reptindex.htm> Chapter 3 at paragraph 3.8, at 24 February 2004.

[182] Ibid, paragraph 3.9.

military nuances may not be appreciated or significant time may be lost in familiarisation with both military and technical matters.[183]

The Committee concluded that the current arrangements for conduct of internal inquiries meet the needs of the ADF for a rapid review of potential hazards. Moreover, the Committee accepted that the factors militating against use of an external authority to conduct a military inquiry are sufficient to justify the retention of the current practice for matters not involving loss of life.

However, in cases involving the accidental death of an ADF member the Committee was of the view that the need to demonstrate the independence of the inquiry outweighs concerns about the conduct of the inquiry by an external authority.[184]

The Committee further concluded that a General Court of Inquiry, convened under the Regulations, which then removes the Department of Defence from the investigative process, would provide a suitable mechanism to conduct inquiries into matters involving the accidental death of an ADF member.

Moreover, the Committee recommended that during peacetime, the convening of a General Court of Inquiry by the Minister of Defence should be mandatory for all inquiries into matters involving the accidental death of an ADF member.[185]

The option to appoint a General Court of Inquiry has not been taken since its creation under the Regulations in 1985.[186]

3.3.6 Overview of Defence Discipline

Military discipline is implemented and managed within the ADF under the provisions of the Act. This Act provides a formal discipline system that gives the ADF a legal basis for investigating, hearing, and awarding punishment for

[183] Ibid, paragraph 3.10.
[184] Ibid, paragraph 3.12.
[185] Ibid, paragraph 3.14.
[186] Ibid, paragraph 2.21.

offences committed by permanent ADF members and, in limited circumstances, by Reservists and Defence civilians. The Act creates a wide variety of service offences that range from prejudicial behaviour to mutiny and aiding the enemy.

The procedures under the Act import common law principles of criminal liability, which correlate closely with procedures applying in civilian courts, enabling the offender to seek legal representation. The Defence members continue to be subject to the civilian justice system in addition to the military discipline system.

The Act is supported by the *Defence Force Discipline Regulations,* the *Defence Force Discipline Rules,* and the *Defence Force Discipline (Consequences of Punishment) Rules*. Also applying is Part VIII of the *Defence Act 1903*, the *Evidence Act 1995*, the *Evidence Regulations* and the *Defence Force Discipline Appeals Act 1955*.

In addition, the *Discipline Law Manual* provides a comprehensive guide to the military discipline system and copies of the legislation that underpins the military discipline system.

The policy for jurisdiction is detailed in Defence Instruction (General) PERS 45-1 titled *Jurisdiction Under the DFDA Guidance for Military Commanders*.

Under the provisions of the Act, there are two classes of service tribunals that are authorised to try service offences:

(1) Summary authorities are at the lower level, having defined limits on who and what offences may be tried and limited powers of punishment - they operate at three levels, namely subordinate summary authorities, commanding officers and superior summary authorities; and

(2) Courts Martial, including General Court Martial and Restricted Court Martial, and Defence Force Magistrates are at the higher level and have the most extensive powers of punishment.

Also, the Act provides for the imposition of limited means of dealing with a minor disciplinary breach via the Discipline Officer system.

The majority of disciplinary cases are heard by summary authorities.

Under the DFA, the procedure starts with an incident, then an investigation is conducted, followed by a decision to charge, a trial, punishment and review.

The rules of evidence that apply in the Act apply to proceedings before service tribunals and the Act imports common law principles of criminal liability, that is the burden of proof lies on the prosecution and the offences must be proven beyond reasonable doubt.

An accused person has the right to testify or remain silent, the right to call witnesses in his or her defence, and the right to cross-examine the prosecution witnesses. An accused member also has the right to be represented before a service tribunal by another defence member, including a legal officer, and, before one of the higher tribunals, the accused person will normally be legally represented.

A wide range of punishments is available to service tribunals. The scale of punishment ranges from conviction without punishment to life imprisonment and includes a significant number of punishments which are unique to the military, such as restriction of privileges, stoppage of leave and extra duties.

Under the Act, all convictions and punishments awarded by service tribunals are subject to automatic review including legal examination of the proceedings by a Service lawyer.[187] In addition, a member convicted of a service offence has access to two levels of review on petition, namely access to a reviewing officer appointed by the Service Chief and then there may be a further review by the Service Chief. A person convicted by a court martial or by a DFM may be able to pursue an appeal against the conviction, but not the punishment, to the Defence Force Discipline Appeals Tribunal.

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[187] *Defence Force Discipline Act 1982*, ss 151 – 152.

When an ADF member seeks legal advice from a Service legal officer on a matter relating to action under the Act, that advice is provided at no cost to the member. Similarly, when an accused is represented by a Service legal officer in an action under the Act, that representation is provided at no cost to the member. Where an accused chooses, in an action, to be represented by a civilian legal practitioner, that representation is at the member's expense.

In regard to defence discipline, the Committee accepted that the establishment of a Director of Military Prosecutions (DMP) would serve to add to the perception of independence, provide consistency of approach and assist to ensure that, as far as possible, the prosecution component of the trial process is impartial. However, the Committee acknowledged that the introduction of a DMP to operate at the summary level would be impractical and currently the number of Courts Martial and DFM trails conducted each year could not justify an argument for the establishment of a DMP.[188]

3.3.7 Committee Findings

(1) After the proposed post-Abadee arrangements have been in operation for three years, the issue of institutional independence in relation to prosecution in Courts Martial and DFM trials be reviewed;

(2) Consideration should be given to reviewing current arrangements to allow the ADF to deal with all cases involving straightforward acts of indecency without requiring the consent of the Director of Public Prosecutions;

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[188] Australia. Joint Standing Committee on Foreign Affairs, Defence and Trade. *Completed Inquiry: Military Justice in the Australian Defence Force* http://www.aph.gov.au/house/committee/jfadt/military/reptindex.htm , p 135 at paragraph 4.63 at 24 February 2004.

(3) The ADF ensure that existing guidelines on the right to privacy are adhered to in the conduct of action under the Act;

The report on the operation of the Act should be tabled in a more timely way.

3.3.8 Overview of Administrative Action

Although not formally a measure under the Act, the ADF may use administrative action as an alternative means to institute punitive measures against individuals.

Administrative action may also follow a civil conviction or formal disciplinary proceedings, where the criminal or a conviction under the Act has not in itself resulted in the termination of a member's service.

Administrative action against a member may have a serious impact on his or her future career prospects within the ADF and administrative action for professional failure may include discharge from the ADF where individuals are found to be unsuitable for further service in the military.

The ADF has the capacity to take adverse administrative action against its members in a number of ways, including:

(a) discharge from the Service,
(b) reversion in rank,
(c) censure;
(d) removal of a member from an appointment or locality;
(e) denying or delaying promotion;
(f) change of employment category; and
(g) removal of security category (which could limit employment opportunities).

The procedures for administrative censure are different for all three Services. Procedures for administrative censure within the Navy and Army are only applicable to officers while the Air Force has a formal warning process that is applicable to all members of the Service.

For all forms of administrative action a member is, throughout the process, afforded every opportunity to make representation and to be heard. In addition, a member may appeal the decision through the internal ADF redress of the grievance system[189] or though external agencies, such as the Defence Force Ombudsman, the Human Rights and Equal Opportunity Commission, and the civil courts.

Legal advice is available to any member of the ADF subject to administrative action. When an ADF member seeks legal advice from a Service legal officer on a matter relating to administrative action, that advice is provided at no cost to the member. Where a member chooses to seek advice from a civilian practitioner, that advice is at the member's expense.

The Committee acknowledged that the Act was framed to deal with breaches of discipline and that administrative action provides a suitable avenue for a commander to deal with matters of professional failure. Moreover, the formality of the system allows certain safeguards 'to ensure that the procedural fairness provisions of administrative law are met'.[190]

The Committee noted the significant impact that censure action can have on a member's future employment and promotion and concluded that current policy did not provide adequate guidance for the imposition of administrative censure within the ADF. The Committee also noted that current policy does not require the individual affected by a censure or formal warning to be advised of his or her rights of appeal.[191]

3.3.9 Recommendations

(a) The ADF consider the implementation of a revised framework for administrative censure and formal warning that makes the process

[189] Defence Instruction (General) Personnel 34-1

[190] Joint Standing Committee on Foreign Affairs, Defence and Trade. *Completed Inquiry: Military Justice in the Australian Defence Force* <http://www.aph.gov.au/house/committee/jfadt/military/reptindex.htm > Chapter 5, at paragraph 5.9 at 24 February 2004.

[191] Ibid, paragraph 5.52.

applicable to all members of the ADF and incorporates a separation between the roles of initiating officer and decision-maker;

(b) The ADF prepare and issue revised policy for the imposition of administrative censure and formal warning; and

(c) The ADF incorporate specific guidance in the revised policy which requires that an individual affected by censure or formal warning be advised of his or her rights of appeal.

3.3.10 Conclusion

The Committee acknowledged that considerable changes have been made by the ADF in addressing the recommendations of the Abadee report[192] and the Ombudsman's 1998 review of practices and procedures.[193]

However, the Committee was of the view that ADF initiated changes to the military justice system would not fully address both the perceived and actual independence and impartiality of the system. To redress this, the Committee has proposed that a latent power within the Regulations be used in some circumstances.

The Committee made 59 recommendations for change.

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[192] *A Study into Judicial System under the Defence Force Discipline Act*, Report of the Deputy Judge Advocate General, Brigadier the Honourable A R Abadee, presented on 11 August 1997, referred to as the Abadee Report

[193] Report of the Commonwealth Ombudsman, *The ADF, Own motion investigation into how the ADF responds to allegations of serious incidents and offences, Review of Practices and Procedures. Report of the Commonwealth Defence Force Ombudsman under section 35A of the Ombudsman Act 1976* , Report of The Commonwealth Ombudsman, presented in January 1998 <http://www.comb.gov.au/publications_information/Special_Reports/Defence-Own-Motion.pdf

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

3.4.1 Origins of the Inquiry

On 28 August 2000, the Joint Standing Committee decided to examine a range of issues arising out of the Annual Reports of the Department of Defence. Among these was a specific reference to the conduct of military justice and alleged events which occurred in 3rd Battalion, Royal Australian Regiment (3 RAR) during the period 1996-1999 and which had to come to public attention as a result of media exposure.[194]

In June 1999, the Committee had tabled a report on military justice[195] and made its recommendations without knowledge of the alleged criminal behaviour occurring within 3 RAR. The Committee was concerned that information may have been withheld that may have materially affected the recommendations.[196]

3.4.2 Focus of the Inquiry

The allegations surrounding 3 RAR centred on the military justice system and inquiry process and included that fact that a Minister was advised of a potential problem in 3 RAR well before the issue came to light. These allegations formed the basis for the inquiry and report.

The Committee's focus were the issues of systemic concern, including the law, regulation, policy and training systems that may have contributed to the alleged events.

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[194] Australia. Joint Standing Committee on Foreign Affairs, Defence and Trade. *Rough Justice? An investigation into Allegations of Brutality in the Army's Parachute Battalion* <http://www.aph.gov.au/house/committee/jfadt/DOD_Rept/MJindex.htm > Chapter 1, p. 1 at paragraph 1.2

[195] Report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice Procedures in the Australian Defence Force*, , June 1999, AGPS, Canberra.

[196] Joint Standing Committee on Foreign Affairs, Defence and Trade. *Rough Justice? An investigation into Allegations of Brutality in the Army's Parachute Battalion* <http://www.aph.gov.au/house/committee/jfadt/DOD_Rept/MJindex.htm > Chapter 1, at paragraph 1.4 at 24 February 2004.

The Committee asked the following questions:

(1) What evidence exists to support or refute the allegations?
(2) To what extent does the evidence identify weaknesses within the ADF justice and inquiry system?
(3) What conclusions and recommendations can be made about the ADF justice and inquiry system?[197]

While investigating the allegations within 3 RAR the Committee was constrained by concurrent legal proceedings and they could not conduct hearings in public where evidence might impinge on individual cases being dealt with before the courts.[198]

3.4.3 Overview

The Committee determined from the evidence that extra-judicial procedures and illegal punishments were employed within 3 RAR.

3.4.4 Committee Findings:

(a) The Culture of Silence - the failure of soldiers, despite victimisation, to use the various available means for initiating a formal complaint;

(b) The Culture of Ignorance - the failure of commanders to detect what was happening and to act upon it;

(c) Inadequacies within the Military Police Force; and

(d) Inadequacies within the Military Justice System.[199]

The Committee found that some of the individual allegations were shocking and had caused deep and lasting physical and emotional damage to the individuals

[197]Ibid, paragraph 1.7.
[198]Ibid, paragraph 1.8.
[199]Ibid, paragraph 4.2.

concerned with many of the cases having as their central core a breakdown in management processes or individual failings on behalf of responsible officers.[200]

3.4.5 Conclusion

The Committee released its report on 11 April 2001.

The Committee concluded that the allegations did point to systemic weaknesses within the Army's system of military justice and equity,[201] finding that:

(a) There was a system of extra judicial punishment taking place at 3 RAR over the period 1996-1999;
(b) The punishment primarily took the form of illegal bashings, involving at least two perpetrators;
(c) There was a system in place that inhibited soldiers from speaking out in relation to the bashings;
(d) There was strong evidence that the Company Sergeant Major not only condoned the illegal system but was key to its implementation;
(e) The Department of Defence may have kept knowledge of these incidents quiet for a period of over 16 months.

However, the Committee stated that there was no evidence to show that the system of illegal justice found to exist at 3 RAR occurred in the wider Army or Defence Force.[202]

The Committee made eight recommendations for change.

[200] Ibid, paragraph 5.21.
[201] Ibid, paragraph 3.52.
[202] Ibid, paragraph 6.16.

The Committee felt 'relatively comfortable' that pressure by them and subsequent action by Chief of the Defence Force and Chief of Army had put a process in place to correct the situation.[203]

The Committee further noted that the ADF is looking at how this type of incident was allowed to happen and that investigative and justice processes have already been amended as a result of lessons learned but concluded that more reform is needed.[204]

In the report, the Committee noted their intention to reconsider aspects of this inquiry in twelve months time to determine whether the lessons from incidents have been learned. They recommended that, in responding to this report, the Government should make a detailed statement to Parliament.[205]

The Committee noted that it did not investigate counselling services and compensation for victims of brutality in this inquiry but stated that they will further address these two issues in any future review of military justice procedures.[206]

3.5 Inquiry into Military Justice in the Australian Defence Force

3.5.1 Origins of Inquiry

On 15 December 2000, under the Regulations, the Chief of the Defence Force appointed Mr J.C.S. Burchett, QC, as an Investigating Officer to conduct an audit of military justice in the Australian Defence Force. The Regulations were

[203] Ibid, paragraph 6.37.
[204] Ibid, paragraph 6.39.
[205] Ibid, paragraph 6.2 .
[206] Ibid, paragraph 6.3.

amended to permit Mr Burchett to be appointed as it was considered essential that the 'Investigating Officer' be quite independent of the military.[207]

3.5.2 Terms of Reference

The Terms of Reference for the inquiry authorised the Investigating Officer to inquire into and report upon any evidence of a culture of systemic avoidance of due disciplinary processes in the ADF and any irregularities in the administration of military justice within the ADF which may require corrective action.

The Investigating Officer was also tasked with determining if there was sufficient reason to review the management of allegations arising in connection with 3 RAR, while limiting the scope of his inquiries to matters which have occurred since the introduction of the Act in 1985.

3.5.3 Review of Events at 3 RAR

The Inquiry looked at certain events in A Company 3 RAR, in the years 1997 and 1998. Not all of the events fell within the terms of the Inquiry however it was found that some three privates and one corporal did individually commit assaults in the guise of disciplinary measures.

The Inquiry found no evidence to show a prevalence of assaults of a particular kind that would amount to a culture or a general practice. The evidence did not suggest that any officer or non-commissioned officer above the rank of corporal condoned any of the assaults.[208] The Inquiry found no serious fault in the management of the investigation and prosecutions and nothing in the nature of a cover-up.[209]

3.5.4 Conclusion

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[207] *Report of an Inquiry into Military Justice in the Australian Defence Force*, Report of Mr J.C.S. Burchett, QC http://www.defence.gov.au/media, paragraph 1 at 24 February 2004.
[208] Ibid, paragraph 5.
[209] Ibid, paragraph 6.

The Inquiry concluded that, in the past, bastardisation practices had existed at some military institutions and 'discipline by the fist' had been practised by some but, while there may be some exceptions, these practices had not been followed in the Defence Force for a number of years.[210]

The Inquiry found nothing pointing to the existence in the Australian Defence Force of any *systemic* substitution of violence in any form for the due processes of lawful discipline, which was in accord with the conclusions of the Joint Standing Committee on Foreign Affairs, Defence and Trade in its report published in April 2001 entitled *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion.*

3.5.5 Recommendations

The Inquiry made 55 recommendations[211] for change, the most significant of which were:

(a) Consideration should be given to making the appointment of a Discipline Officer mandatory in all units;

(b) Complete and accurate statistics concerning prosecutions under the Act and administrative action having punitive effect be compiled on a common basis for all three services and be made available to legal and administrative agencies of the ADF;

(c) Ways of achieving fair and effective transparency of military justice outcomes (in relation both to prosecutions and administrative actions) be investigated and appropriate steps be taken;

(d) The Rules be amended to provide that a member who desires to be legally represented at a summary trial must first obtain from the proposed Registrar of Courts Martial a certificate that, for a special reason, legal representation is appropriate;

[210] Ibid, paragraph 8.
[211] Ibid, pp 24-29.

(e) The training of prosecutors in summary proceedings should emphasise the principle, which civilian prosecutors are required to observe scrupulously, that a prosecutor does not seek a conviction at any price, but with a degree of restraint to as to ensure fairness;

(f) An independent Australian Defence Force Director of Military Prosecutions, with discretion to prosecute, be established;

(g) General policy guidance be developed as to the exercise of the command prerogative, and as to the extent and nature of the observance of the dictates of natural justice which is required in connection therewith;

(h) A Military Inspector General be appointed to represent the CDF in providing a constant scrutiny, independent of the ordinary chain of command, over the military justice system in the ADF in order to ensure its health and effectiveness; and to provide an avenue by which any failure of military justice may be examined and exposed, not so as to supplant the existing processes of review by the provision of individual remedies, but in order to make sure that review and remedy are available, and that systemic causes of injustice (if they arise) are eliminated.

4. Opposition and the Unwillingness to change

It has been recently reported that the Minister assisting the Minister for Defence, the Hon Mal Brough and the CDF, General Peter Cosgrove, will oppose any change to the current military justice system.[212]

The article states that General Cosgrove has 'emphasised' the need for two strategic outcomes from the Inquiry. These include the 'preservation of the Australian military justice system in its current form, including its control by the ADF'.

Mr Brough has portfolio responsibility for military law, discipline and high level Board of Inquiry/Investigations into personnel matters.[213]

The role and responsibilities of General Cosgrove include primary responsibility for the command of the ADF. This role arises directly from section 9(2) of the *Defence Act 1903*, whereby the CDF commands the ADF under direction of the Minister for Defence. The CDF is also the principal military adviser to the Minister and provides advice on matters that relate to military activity, including military operations.[214]

In August 2003, General Cosgrove spoke in an address to eight Universities where he stated:

> *Leaders never act alone; they represent and motivate a team. Leaders must invest emotionally in and train their team. Once having selected a team encourage, monitor, guide, re-task or, very rarely, remove them according to individual performance. ... Additionally, I have always*

[212] Steve Lewis, *Cosgrove Battles for Justice*, The Australian, 16 February 2004.
[213] The Hon Mal Brough MP: http://www.minister.defence.gov.au/brough/index.htm at 24 February 2004.
[214] The Chief of the Defence Force: http://www.defence.gov.au/cdf/role.cfm at 24 February 2004.

regarded mistakes—even the expensive ones—as significant learning opportunities for members of my team. A bad mistake made once should not necessarily be reason enough to dismiss someone—the same educative lenience should not perhaps be extended to those who repeat the same expensive mistakes.[215]

General Cosgrove went on to state that '[a]ll leaders must accept the human resource bottom line—that they are responsible—full stop—for both the good and bad which occurs within their organisation.'[216]

In October 2003, the General Cosgrove spoke of balancing the future and present needs of the ADF. When considering the need to optimise force structure in light of an obscure future, he stated that '[e]ffectiveness versus efficiency is one of the internal battles we must win. A defence force must be able to do the job when called on...'[217]

4.1 Unique and Specialised Military Knowledge

A common theme from Defence Forces opposing change and fearing losing control of their own military justice system is that the military has specialised expertise. A non military person does not know the nuances of the military and therefore can not properly investigate or adjudicate a military justice issue. The European Court of Human Rights discussed this issue in the case of *Grieves v. United Kingdom*[218] and stated at paragraph 88:

They also relied upon the knowledge a navy officer would have of the unique language, customs and environment of the Royal Navy. However,

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[215] Cosgrove, P., CDF, address to the group of Eight Universities, HR/IR Conference, "*Leadership Challenges — Lessons Learnt*", Friday 22 August 2003: http://www.defence.gov.au/cdf/speeches/speech220803.cfm

[216] Ibid.

[217] Cosgrove, P., CDF, address to the Royal United Services Institute International Seminar "*The Australian Defence Force in the New Millennium: Balancing the Present and Future Needs*", Friday 10 October 2003: http://www.defence.gov.au/cdf/speeches/speech101003.cfm

[218] *Grieves v. United Kingdom* (2003) European Court of Human Rights Strasbourg 16 December 2003.

since the essential function of the judge advocate in to ensure the lawfulness and fairness of the court martial and to direct the Court on points of law, it is difficult to understand why a detailed knowledge of the way of life and language of the navy should be called for, particularly where, as in the present case, the offence with which the applicant was charged was the ordinary criminal offence of malicious wounding. In any event, the Court is not persuaded that a civilian judge advocate would have more difficulty in following naval language or customs than a trial judge would have with complex expert evidence in a civilian case.

4.1 Comment

Performance-based testing of leaders of the ADF ignores systemic problems. Reliance on this indicator alone appears to justify the means to an end. Although the ADF may seek to defend its position with reference to efficiency and its overriding priority for our national interests, the systemic problems identified by previous Inquiries and by those people who have already made submissions to this Committee, are preserved.

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

It is incumbent on the ADF to provide an efficient and effective defence force. However, in the light of numerous reported incidents regarding current and former members of the ADF, both during and outside of its peacekeeping and anti-terrorist activities, it may be that the primary focus in military justice matters is on efficiency rather than effectiveness or independence.

The *Grieves*[219] decision indicates that a superior court in an appeal may not be persuaded that the requirement for military knowledge outweighs an accused right to an independent and impartial hearing.

[219] Ibid.

5. The Appointment of Colonel Gary B. Hevey R.F.D., L.L.M. as Independent Director of Military Prosecutions

5.1 The creation of the position

The 1997 Abadee report, discussed in detail above, recommended the appointment of an Independent Director of Military Prosecutions (DMP). The report stated that 'careful consideration should be given to examining the question of the appointment of the "independent" Director of Military Prosecutions upon a tri-service basis'.[220]

The creation of the DMP was the result of a study conducted by Justice Abadee into the arrangements for the conduct of military trials.[221] Justice Abadee noted that the convening authority in Australian Defence Force (ADF) disciplinary proceedings had the power to:

(a) Determine whether there should be a trial;
(b) Determine the nature of the tribunal and the charges;
(c) Select the trial judge and jury;
(d) Select the prosecutor; and
(e) Review the proceedings.

Justice Abadee ultimately considered that such an arrangement might engender a perception of unfairness regardless of the actual fairness of the particular proceedings. The introduction of the DMP was thought to be the answer to this problem, as it would remove any bias that may beset the convening authority who could be seen to have an interest in the outcome of the case, given that it had initiated it.

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[220] Abadee, Brigadier Hon A R, *A Study into Judicial System under the DFDA,* 1997, Recommendation 4.
[221] Ibid.

On 30 June 2003, the Minister Assisting the Minister for Defence, Ms Dana Vale announced the appointment of Col Gary Hevey as Australia's first Director of Military Prosecutions. The position is said to be similar to the corresponding Director of Public Prosecutions in State and Federal criminal jurisdictions in Australia. Once the necessary legislation has been enacted, the DMP will decide whether or not serious matters should be referred to Courts Martial or Defence Force Magistrates for trial and prosecute those cases. In the interim, the DMP is appointed with the task of providing advice to commanders to assist them in determining how to proceed with serious charges and conduct prosecutions at Courts Martial and trials by Defence Force Magistrates. It was hoped that the creation of such a position will enhance the independence and transparency of disciplinary procedures.

5.2 Appointment of Colonel Gary B Hevey, R.F.D, L.L.M.

Col Gary Hevey served in the Australian Regular Army as a legal officer between 1977 and 1982. He became Acting Chief Legal officer for Victoria and Southern NSW between 1979 and 1981 and Chief Legal Officer for South Australia in 1981. Col Hevey has experience with Courts Martial, prosecuting and defending, Board of Inquires, Operational Law and providing advice to Commanders on a number of wide ranging issues. Since leaving the Army, he has remained an active member of the Army Reserve and was appointed as a Judge Advocate and Defence Force Magistrate in October 2000, resigning from that position in 2003.

Aside from his military experience, Col Hevey also has extensive civilian experience, particular in relation to criminal law (he was Assistant Crown prosecutor in South Australia from 1983 to 1985), commercial litigation (in-House-Counsel for Foster Hart Lawyers in Melbourne in 2002) personal injury and professional negligence.

5.3 Opposition to Independence

The Joint Standing Committee on Foreign Affairs, Defence and Trade noted that the nature of military service demanded compliance with orders and authority. Commentators claimed that military personnel operate in a high-risk working environment that demands teamwork, mutual support and personal reliability and that discipline, both individual and collective, provides the basis for these characteristics and underpins the effectiveness of the ADF. In order to enforce compliance or to punish unacceptable behaviour, however, the ADF claims that commanders must have access to a strict disciplinary system.[222]

It is for these reasons that the ADF has consistently argued that a paramount requirement for an effective military discipline system is that it must be implemented and managed from within the organisation itself. Indeed, as recently as 16 February 2004, Major General Cosgrove was reported as emphasising the need for the 'preservation of the Australian military justice system in its current form, including its control by the ADF'.[223]

Despite this constant denunciation, the DMP was appointed as a means of rectifying the perceived lack of independence.

5.4 Comment

Military personnel are taught to follow orders and accept that which is put to them by superior personnel. Lower ranking members may be more inclined to accept propositions put to them by a superior officer simply because of rank rather than whether they are in fact true or whether they were truly the will of the accused. While the DMP and his staff remain military servicemen and women true and transparent independence will not be obtained.

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[222] Joint Standing Committee on Foreign Affairs, Defence and Trade, *Report on Military Justice Procedures in the Australian Defence Force*, Ch 4.
[223] Steve Lewis, above, 16 February 2004.

6. Common Law Principles of Equity

6.1 Unlawful Command Influence

Unlawful Command Influence has been described as the 'mortal enemy of military justice'.[224]

In 1997, the European Court of Human Rights made finding on the issue of the issue of independence in a military court martial.[225] Mr Alexander Findlay, a member of the United Kingdom armed forces, alleged that his court martial should be set aside. Mr Findlay made a number of complaints about the lack of independence of his court martial. His complaints included, *inter alia*, that he had been denied a fair hearing before a court martial and that it was not an independent and impartial tribunal. Mr Findlay had been charged and court martialed arising out of an incident where he had threatened a number of his colleagues with a gun and then threatened suicide. Mr Findlay had previously suffered post traumatic stress syndrome arising out of his deployment during the Falklands War.

In written reasons the European Court of Human Rights stated:

> *The Commission found that although the convening officer played a central role in the prosecution of the case, all of the members of the court-martial board were subordinate in rank to him and under his overall command. He also acted as confirming officer, and the court martial's findings had no effect until confirmed by him. These circumstances gave serious cause to doubt the independence of the tribunal from the prosecuting authority. The judge advocate's involvement was not*

[224] *United States v. Thomas* (1986) 22 M.J. 388, 399 and *World-Wide Perspective on Change in Military Justice*, Eugene R. Fiddell at Aspels Legal Pages - Aspels.com
[225] *Findlay v. United Kingdom*, (1997) 24 E.H.R.R. 221 (British Army)

sufficient to dispel this doubt, since he was not a member of the court martial, did not take part in its deliberations and gave his advice on sentencing in private.

In addition, it noted that Mr Findlay's court-martial board contained no judicial members, no legally qualified members and no civilians, that it was set up on an ad hoc basis and that the convening officer had the power to dissolve it either before or during the trial.

The European Court of Human Rights also found that the requirement to take an oath was not a sufficient guarantee of independence.

In 1998 the High Court of Australia, in *Hembury v. Chief of the General Staff*[226] looked at the issue of a chain of command in the judicial decision making process.

In this case the appellant, as a sergeant in the Royal Australian Army, was tried before a restricted court-martial on six charges. The court-martial acquitted him of two charges, convicted him of three charges and was not required to give a verdict on the remaining charge, which was an alternative charge to one of those on which he was convicted. The members of the court-martial were a Lieutenant Colonel, a Major and a Captain. The Judge Advocate directed the court-martial that '[w]hen you come to voting on the questions of guilt, you should vote orally, in order of seniority.'

This direction was clearly a breach of the Rules of the *Defence Force Discipline Appeals Act 1955*. McHugh J stated: 'I do not share the view of the Tribunal that the breach of r 33 could not have affected the votes of the junior officers.'

McHugh J was clearly inferring from this statement that a Junior Officer could be influenced in his decision making by hearing a decision first of a more senior officer. Having said this McHugh J states that this finding was a finding of an error of fact not law.

[226] (1998) 155 A.L.R. 514

McHugh J went on to state:

> *I can see no ground for concluding that the jurisprudence concerning miscarriage of justice arising from the common form criminal appeal statutes is not applicable to s 23. For all practical purposes, the Tribunal is a court of criminal appeal. Its members are serving judges. In that context, there can only be a remote and insubstantial possibility that the drafter of s 23 used the term "substantial miscarriage of justice" in ignorance of or dismissive of the jurisprudence on that term in the common form criminal appeal statutes. That being so, the Parliament must be taken to have used the term in the sense that courts of criminal appeal have used the term.*

At paragraph 27 McHugh J stated:

> *Status and authority may not have the influence in decision making that they once had. But no one can doubt, judges least of all, that status and authority remain influential factors in decision making. Human nature being what it is, it must often be the case that a person, favouring one view then another, is ultimately influenced by the prior vote of a person of superior status or authority.*

Kirby J in *Hembury*[227] at paragraph 72 stated:

> *A court martial has large powers. The present case is an illustration. The imposition of a punishment (although in this case suspended) of military detention may deprive a citizen of liberty. Rules of procedure have been enacted, or made, both to reduce the risks of unreasonable, irregular or unsafe convictions of the accused and to enhance the confidence of serving officers and of the community more generally in the integrity of military*

[227] Ibid.

justice. Whereas a greater measure of flexibility might be accorded to a judge exercising the judicial power of the Commonwealth in the ordering of procedures of the court (because by training and experience the judge could ordinarily be expected to protect the essential rights of the accused) the same may not necessarily follow in relation to a non-judicial administrative body with large powers to convict an accused person and to order that he or she be detained, fined and otherwise compulsorily dealt with.

The majority decision in *Hembury*[228] found that there was a substantial miscarriage of justice arising out of a misdirection which may have influenced voting as a result of command influence and ordered that the conviction be quashed.

6.1.1 Comment

The court in *Findlay*[229] held that the applicant's fears about the independence of the court martial could be regarded as objectively justified, particularly in view of the nature and extent of the convening officer's roles, the composition of the court martial and its *ad hoc* nature.

This decision is clear authority, under European human rights law, that independence is paramount to a fair and impartial hearing. It is also authority for the proposition that the chain of command can be perceived as influencing the outcome of a non-independent inquiry.

Also supporting this principal is the *Hembury* decision in which any conviction where influence in the court martial process has resulted in a substantial miscarriage of justice, such as undue influence from a person in a position of

[228] Ibid.
[229] *Findlay v. United Kingdom*, above.

authority, may be quashed under section 23 of the *Defence Force Discipline Appeals Act*.

6.2 Statements and Records of Interview that may be Inadmissible

A further issue that may arise in an appeal under section 23 of the *Defence Force Discipline Act 1982* is whether a substantial miscarriage of justice may also include a statement or record of interview accepted in evidence in a court martial taken from a superior officer and being taken under a threat, promise or inducement. To be admissible at common law, a confession or statement must be voluntary. A conviction which is made at a court martial using inadmissible evidence, such as an inadmissible statement or record of interview, may arguably be quashed under section 23 of the Act.

At common law a statement is not voluntary if it is preceded by an inducement, such as a threat or promise, held out by a person in authority: *R v Lee*.[230]

'A person in authority'- includes 'officers of police and the like, the prosecutor, and others concerned in preferring the charge': per Dixon J in *McDermott v The King*.[231]

The English Criminal Law Revision Committee, Report No 11 (1972; Cmnd 4991) states that 'anyone who has authority or control over the accused or over the proceedings or the prosecution against him'.

This definition was approved in *R v Schofield* [232] and *Jonkers v Police*.[233]

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[230](1950) 82 CLR 133 at 144.
[231] [1948] 76 CLR 501 at 511
[232] (1988) A Crim R 197
[233] (1996) 67 SASR 401

The NSW Court of Appeal in *R v Dixon*[234] defined the term 'person in authority' to be a subjective test from the point of view of the accused. The Court found that:

> *a person in authority includes any person concerned in the arrest, detention or examination of the accused, or has an interest in respect of the offence, or who otherwise is seen by the accused by virtue of his position, as capable of influencing the course of the prosecution, or the manner in which he is treated in respect of it.*

In this case an Aboriginal Community Liaison Officer was seen to be a person of authority by a young aborigine being held in custody.

This common law doctrine, particularly subsection 101J (2) (b), has been enacted into the Act. Section 101J states:

> *Admissibility of confessional evidence*
>
> *(1) Evidence of a confession made by a person in the presence of an investigating officer is not admissible in proceedings against the person for a service offence unless the service tribunal, or, in the case of a court martial, the judge advocate of the court martial, is satisfied that the confession was made voluntarily.*
>
> *(2) For the purposes of subsection (1), a confession that is obtained from a person in consequence of:*
>
> *(a) the use of physical violence, or a threat of physical violence, to any person; or*

[234] (1992) 28 NSWLR 215

(b) the making of a promise, threat or other inducement (not being physical violence or a threat of physical violence) likely to cause the person to make a confession that is untrue;

shall be deemed not to be made voluntarily.

6.2.1 Comment

It is trite law to say that inadmissible evidence would mean that a conviction is unsafe. It follows that a conviction at a court martial from inadmissible evidence may be a substantial miscarriage of justice.[235] Common law clearly excludes evidence obtained where the evidence was obtained by a person who otherwise is seen by the accused by virtue of his position, as capable of influencing the course of the prosecution, or the manner in which he is treated in respect of it.[236] It therefore follows that evidence obtained from an accused military person from a person of a higher rank would be inadmissible at common law and therefore any conviction based on this inadmissible evidence at a court martial could be quashed in the Federal Court under section 23.

The same argument, although to a lesser extent, could be put forward in a court martial where a military person of a higher rank is examining or cross examining a witness, or where the accused because of the superior ranking military person adjudicating the court martial is under influence or threat as to how the court martial is conducted.

6.3 The Perception of Bias

Section 196 of the Act provides for appointment by the CDF a panel of judge advocates. Judge advocates are serving military personnel with legal qualifications sufficient to satisfy certain criteria in section 196. Section 122 of the Act requires a member, or reserve member or a judge advocate of a court

[235] *Defence Force Discipline Act 1982,* s 23.
[236] *R v Dixon* (1992), above.

martial who believes himself or herself to be biased, likely to be biased or thought on reasonable grounds to be biased, to notify the convening authority. The convening authority is merely the name given to the members of the court martial. The convening authority for a court martial is established by instrument by the CDF.[237] Section 129B of the *Defence Force Discipline Act* prohibits the nomination of a person for the position of judge advocate if the person is biased or likely to be biased, or likely thought on reasonable grounds to be biased.

Disqualification as an adjudicator in a Tribunal of law has been long established as a legal requirement for fairness and due process under common law. The common law on disqualification for bias or suspicion of bias was discussed by the majority of the High Court, Barwick CJ, Gibbs, Stephen and Mason JJ in *R v Mr Justice Watson; Ex parte Armstrong*.[238] The Court stated:

> *Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the question arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views of inclination of mind upon or with respect to it.*

In *Builders' Registration Board of Queensland and Another v Rauber*[239] the High Court also stated that the test for bias was that as set out in *R v Mr Justice Watson:*

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[237] *Defence Force Discipline Act 1982*, s 102.
[238] (1976) 9 ALR 551 at 564; 50 ALJR 778 at 784–5, quoting from *R v Commonwealth Conciliation and Arbitration Commission* (1969) 122 CLR 546 at 553–4.
[239] (1983) 47 ALR 55.

Its application to this case requires the court to determine whether the circumstances were such that Mr Rauber or the public might reasonably suspect that the Board, constituted by members including those involved in the insurance decision, would not be unprejudiced and impartial in making a decision in the disciplinary proceedings under ss 44 and 45. Natural justice requires that the exercise by a tribunal of disciplinary power which may have a serious effect on the rights and livelihood of a person whose conduct is called in question be free from bias of that kind unless an intention to exclude the principles of natural justice plainly appears in the statutory or other provisions.

6.3.1 Comment

Using the above legal authorities in the context of an Australian court martial, the danger in the appointment of a non-independent military judge advocate, as in the present system in convening a court martial, is the perception of bias by the appointment of a person who may not have a fair and unprejudiced mind.

Further, the appointment of a non-independent person must by definition establish a suspicion that would be reasonably engendered in the minds of persons coming before the court martial and in the minds of the public. Given the effect of the outcome of a court martial on the rights and livelihood of the accused the judge advocate must be free from bias unless there is a clear intention to exclude natural justice in the *Defence Force Discipline Act 1982.*

6.4 Lack of Independence as Defined in Grieves

A further and even more compelling legal authority for the lack of perceived independence of a serving military judge advocate in a court martial was outlined in the decision of case of *Grieves v. United Kingdom*[240] handed down by the European Court of Human Rights on 16 December 2003. This decision is a useful

[240] *Grieves v. United Kingdom*, above.

discussion of the current law and procedure for United Kingdom courts martial. The application to the European Court of Human Rights by Mr Grieves arose out of his court martial pursuant to section 42 of the *Naval Discipline Act 1957*. Mr Grieves complaint to the European Court of Human Rights included, *inter alia*, the lack of independence and impartiality of the court martial. At paragraph 78 the court stated the following that '[the] Court considers it plain that the involvement of a civilian in a service court martial process contributes to its independence and impartiality.'

At paragraph 87 the court held:

> *For these reasons, the Court considers that, even if the naval judge advocate appointed to the applicant's court martial could be considered to be independent despite the reporting matters highlighted in the preceding paragraph, the position of naval judge advocates cannot be considered to constitutes a strong guarantee of the independence of a naval court martial.*

The Court went on at paragraph 89:

> *Accordingly, the lack of a civilian in the pivotal role of judge advocate deprives a naval court martial of one of the most significant guarantees of independence enjoyed by other services' courts martial (army and air-force court martial systems being the same for all relevant purposes – the Cooper judgment, S 107), for the absence of which the Government have offered no convincing explanation.*

The Court concluded at paragraph 91:

> *... are such that the present applicant's misgivings about the independence and impartiality of the naval court martial, convened under*

the 1996 Act, can be considered to be objectively justified. His court martial proceedings were consequently unfair ...

Australia is not a contracting state to the European Court of Human Rights. However, there are presently forty-four contracting states to the Court and the decision of *Grieves v. the United Kingdom* was a decision of the Grand Chamber of the European Court of Human Rights. The Grand Chamber of the Court is composed of seventeen judges, who include, as ex officio members, the President, Vice-Presidents and Section Presidents.[241] Although not binding, the decision of *Grieves v. the United Kingdom* is highly persuasive.

The case of *Grieves v. the United Kingdom* is compelling authority that the present Australian courts martial system of military justice is outdated and does not comply with modern principles of judicial independence, natural justice and fairness to an accused.

[241] Information Document issued by the Registrar of the European Court of Human Rights; The European Court Of Human Rights, Historical Background, Organization and Procedure September 2003. www.Echr.coe.int accessed 20 February 2004

7. Recommendations

7.1 Summary - The Need for Change

The military justice system has been under increasing scrutiny for its lack of procedural safeguards including a lack of fairness and equity for the accused person. The military justice system provides an accused person with less rights than an accused person under the civilian criminal justice system. With so few Australians in operational service over recent years, and any involvement in a major conflict which would require a substantial number of Australians to be in operational service unlikely in the foreseeable future, the need to maintain such a disparity in treatment between a civilian and a military person is no longer justified. If an alleged offence occurs in operational service, on board a naval ship or in an overseas posting, proceedings as to the guilt or innocence of the offender can be delayed until the accused returns to Australia. Until the accused returns to Australia to face an independent hearing, the accused can be dealt with summarily by a military commander in any way the commander sees fit to maintain discipline and readiness for service of his or her command. In these circumstances the justification for the military being the complainant, the prosecutor, the defence counsel, the judge and the jury even where the accused is in operational service can not be justified.

The present military justice system can result in a reduction of rank, detention and a criminal record going to heart of an accused's right to justice and procedural fairness.

Inquiries and reports into issues concerning military justice such as the Rough Justice Senate Inquiry in 2000, and high profile cases such as the *Westralia* Board of Inquiry have been at the forefront of public awareness in recent times.

Changes to international law and human rights for judicial process such as that decided in the European Court of Human Rights decisions of *Findlay v United*

Kingdom [242] and the *Grieves v. United Kingdom* [243] have accelerated the need for Australia to keep up with best world practice for issues relating to human rights and natural justice.

Common law principles of equity and justice such as the admissibility of statements, bias and the need for independence in the judiciary have developed and become entrenched in the civilian criminal justice system creating further disparity between the civilian and the military justice systems. As certain civilian criminal offences may be heard under present military law there is no longer any compelling reason in prolonged peace time to distinguish between a persons rights based solely of whether the person is a civilian or a military person.

The Australian Defence Forces today consists of 51,000 uniformed men and women—both full and part time with an annual budget of over 18 billion dollars in accrual terms.[244] The requirement for public accountability and independence of Australia's military justice system, together with the size in staff terms along with the annual budget of the combined forces, justifies the establishment of new independent statutory offices and an independent judiciary and courts system.

This submission offers two alternatives for change in the military justice system. The first and preferable solution is for a complete restructure of the military justice system to bring our system into line with best world practice such as the Canadian system. If such a change is not acceptable, then this submission offers, as an alternative, a range of amendments to the present legislation in an attempt to afford persons subject to the present military justice system natural justice and procedural fairness.

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[242] *Findlay v. United Kingdom*, above.
[243] *Grieves v. United Kingdom*, above.
[244] Cosgrove, P., CDF, address to the group of Eight Universities, HR/IR Conference, *Leadership Challenges — Lessons Learnt*, Friday 22 August 2003: http://www.defence.gov.au/cdf/speeches/speech220803.cfm

7.2 First Alternative – A Total Restructure of the Military Justice System

It is recommended that amendment to the Australian military justice system, being the *Defence Force Discipline Act 1982*, the *Defence Force Discipline Rules 1985*, the *Defence Force Discipline Regulations 1985*, the *Defence Force Discipline Appeals Act 1982*, the *Defence (Inquiry) Regulations 1985* and the *Ombudsman Act 1976*, and to make consequential amendments to other Acts, be made to bring Australia's military justice into line with best world practice. It is recommended that amendments be based in part of the current Canadian military system taking into account the recommendations made by the Right Honourable Antonio Lamer P.C, C.C.,C.D. in his report of the first independent review of the Canadian military justice system. [245]

7.2.1 Principles of an Independent Military Justice System

(a) The creation of the independent office of the Director of Military Prosecutions (DMP) as an independent statutory office appointed by and responsible to the Commonwealth Attorney General;

(b) The abolition of military responsibility and decision making for all military offences which may result in the detention of the accused, the criminal conviction of an accused or the reduction of rank or pay of an accused. All such proposed charges to be referred to the DMP by a commanding officer;

(c) The creation of the independent office of the Australian Defence Force Grievance Board to advise the chain of command on the disposition of grievances;

[245] The First Independent Report of the Right Honourable Antonio Lamer P.C.,C.C.,C.D. of the Provisions of Bill C-25 *An Act to Amend the National Defence Act and to make Consequential Amendments to other Acts as required* under section 96 of the Statutes of Canada 1998, c35.

(d) The creation of the independent office of Military Complaints Commission to hear complaints about the conduct of the military police and about interference in military police investigations;

(e) The creation of the independent office of Director of Defence Counsel Services who is responsible for the provision of legal services to an accused person. This office will establish independence between prosecutions by the DMP and the Defence Counsel of the accused;

(f) The creation of a new military court using the Judicial power of section 71 of the Australian Constitution;

(g) The creation and appointment of independent military judges with fixed appointment until retirement;

(h) A change in the structure of military hearings. Military judges would preside at all courts martial and defence force magistrate hearings, and who at these courts martial and defence force magistrate hearings, would make all decisions of law and fact in the preceding. This will remove the ultimate decision making power from the President and members of the courts martial and abolish the position of defence force magistrate;

(i) A restatement in law that the *Evidence Act 1995* and common law principles relating to criminal prosecutions and criminal hearings will apply to all military prosecutions; and

(j) To create a review and report on the provisions and operation the military justice system every five years.

7.2.1 In the Alternative – Changes to the Present Legislation

Detailed below are recommended changes to the current military justice legislation which, if implemented, will bring Australia's military justice system

closer to worlds best practice. These changes will not result in a fully independent military justice system, but would go a long way towards providing military persons with natural justice and procedural fairness when dealt with under the military justice system.

7.2.1 Amendments to the Present System

(a) Convening Authority 1.2.1

The convening authority is responsible for which charges will be laid and for the forum in which the charges will be heard. As such it is recommended that the convening authority have actual independence from the CDF and the military.

(b) Rule 24 Legal Representation 1.4.1

It is recommended that legal representation be available to an accused at a hearing before a superior summary authority.

(c) Rule 24 Legal Representation 1.5.1

It is recommended that legal representation to be available to an accused at a hearing before an examining officer.

(d) Appointment of Judge Advocate 1.6.1.1

It is recommended that a non-military person body or authority be responsible for the appointment of a judge advocate.

(e) Appointment of a President/ Member of Courts Martial 1.6.3.1

It is recommended that a non-military person body or authority be responsible for the appointment of the President and or Member of a court martial.

(f) Appointment of a Defence Force Magistrate 1.6.4.1

It is recommended that a non-military person body or authority be responsible for the appointment of a defence force magistrate.

(g) Witnesses Permitted at a Tribunal 1.7.1

It is recommended that the accused be given full discretion to call witnesses required for the hearing of the matter.

(h) Availability of a Brief at a Summary Authority Hearing 1.9.1

It is recommended that a brief of evidence including any statements to be used by the prosecution be made available to the accused prior to a hearing before a summary authority.

(i) Automatic Review of a Decision 1.11.1

It is recommended that the requirement for this review be abolished as it serves no real purpose and adds a further administrative requirement to the judicial system.

(j) Defence Force Ombudsman 1.13.1

It is recommended that military discipline matters be included as matters within the jurisdiction of the Defence Ombudsman.

(k) General Inquiry and Board of Inquiry 1.15.1

It is recommended that all matters involving injury, loss of life, or destruction of property be determined by a General Inquiry unless there are compelling reasons against this.

(l) Inquiry Investigators 1.17.1

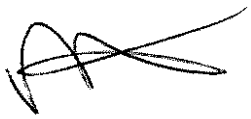
It is recommended that investigators appointed to assist Inquiries be independent of the military.

(m) Independence of Military Justice System 3.4

It is recommended that Investigations, Prosecutions and Hearings in military justice matters be made independent of the CDF and the armed forces.

(n) Director Military Prosecutions (DMP) 6.4

It is recommended that a non-military person body or authority be responsible for the appointment of the DMP and the DMP staff. It is recommended that the DMP answer directly to a non-military authority, independent of the military.



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