Chapter 2

ADF discipline system

Australian military court

2.1 In 2005, the committee recommended that the government establish an independent permanent military court that would extend and protect a Service member's inherent rights and freedoms and produce impartial, rigorous and fair outcomes.[1] The court was to be staffed by independently appointed judges possessing extensive civilian and military experience.

2.2 The government supported the committee's main recommendation to create a permanent military court. It was aware of the criticism that the location of judge advocates and Defence Force Magistrates (DFMs) within the military chain of command had serious implications for their actual and perceived independence.[2]

2.3 On 14 September 2006, the then Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, introduced the Defence Legislation Amendment Bill 2006 into the House of Representatives. The bill proposed to replace the existing system of trials by Courts Martial and DFMs with an 'Australian Military Court' (AMC). In its consideration of the bill, the committee recognised that the intention of the legislation was to improve Service tribunals. It was disappointed, however, that the government did not go further in strengthening the independence of the proposed court and in guarding it against possible influence from the chain of command. The committee identified what it regarded as a number of serious failings in the legislation, in particular:

- the 5-year fixed terms for Military Judges;
- the requirement for them to retire from the ADF after serving their 5-year term;
- providing for the minister to terminate, under specified circumstances, a Military Judge's appointment; and
- the composition of military juries especially for serious offences.

2.4 In light of the committee's grave concerns, the government moved a number of amendments to the bill. They included:

- extending the term of appointment of the CMJ and MJs from a 5-year to a fixed ten-year period;

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1 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system,* June 2005, p. xxii.

2 Defence Legislation Amendment Bill 2006, *Explanatory Memorandum*, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraph 2.

- the automatic promotion of the CMJ at the mid-point of his or her 10-year appointment;[3]
- the Governor-General, not the Minister, to appoint the CMJ and MJs;
- the Governor-General, not the Minister, to have the authority to terminate the appointment of the Chief Military Judge and Military Judges;[4]
- removing the requirement for the automatic retirement of a member from the ADF following his or her tenure as the CMJ or a MJ;[5]
- a jury of 12 members required for class 1 offences (the more serious offences);[6]
- a decision of a military jury to be unanimous or alternatively, by a five-sixths majority but only in the following circumstances:
  - where it had deliberated for at least 8 hours and unanimous agreement had not been reached but a five-sixths majority agreement had; and
  - the court was satisfied that the deliberation time was reasonable, having regard to the nature and complexity of the case; and
  - after examining one or more jurors (on oath or affirmation) it was unlikely that the jurors would reach unanimous agreement following further deliberation;[7]
- according the AMC the status of a court of record but with a provision that would limit the publication of proceedings in the interests of the security and defence of Australia, the proper administration of justice or public morals or any other matter the court considers relevant.[8]

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3 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum,* Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraph 24.

4 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum,* Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraphs 19, 20, 24, 26, 29, 31, 39 and 41.

5 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum,* Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraphs 27 and 42.

6 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum,* Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraph 15.

7 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum,* Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraph 16.

8 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum,* Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraphs 12 and 13.

2.5 Although the amendments did not go as far as the committee would have wished, the committee acknowledged that they were a positive step toward providing members of the AMC with security of tenure and judicial independence.[9] The amended bill was passed by parliament and received assent on 11 December 2006.

2.6 Following the enactment of this amended bill, however, the former JAG, Justice Leonard Roberts-Smith, commented in detail on the legislation and the AMC. He wrote that as finally enacted the *Defence Legislation Amendment Act 2006* (DLAA 2006):

> …does not fully address the concerns that I have raised in my Annual Report for 2005 and my submissions to the Senate Foreign Affairs, Defence and Trade Legislation Committee…In my view, the legislation does not achieve 'world's best practice' for the AMC, and in some instances, significantly adds to the risk involved in moving from the current arrangements to the new. The intention is that CMJ and the military judges will enjoy appropriate independence from the chain of command. I do not believe that this has been achieved.[10]

2.7 The JAG concluded his remarks on DLAA 2006 by recognising that while the legislation introduced desirable reform, it 'has proceeded on the basis of according the bare minimum so far as issues of fundamental importance are concerned such as the guarantees of independence'.[11]

Committee view

2.8 The committee recognises that the DLAA 2006 went a long way to secure the independence of the AMC. Even though it shares the JAG's view that more could have been done to strengthen the court's independence, it accepts that the establishment of the AMC is a significant and positive initiative. The committee strongly supports the establishment of the AMC.

Jurisdiction of the AMC

2.9 Notwithstanding this support, the committee remains concerned about the jurisdiction of the AMC extending, under certain circumstances, to civilian criminal offences.

2.10 The now amended *Defence Force Discipline Act 1982* (DFDA) makes clear that the newly established AMC 'is not a court for the purposes of Chapter III of the Constitution'. It is 'a service tribunal'.[12] There is no requirement for the Chief Military

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9 House of Representatives, *Hansard*, 29 November 2006, p. 125.

10 Judge Advocate General, *Defence Force Discipline Act 1982, Report for the period 1 January to 31 December 2006,* paragraph 29.

11 Judge Advocate General *Defence Force Discipline Act 1982, Report for the period 1 January to 31 December 2006,*, paragraph 104.

12 Section 114, *Defence Force Discipline Act 1982*.

Judge or Military Judges to have civilian judicial experience. Yet, in some cases the court will hear cases of a civilian criminal nature.

2.11 Numerous witnesses and submitters to the committee's 2005 inquiry recognised the important role of Service tribunals in maintaining Service discipline. They emphasised the need for the ADF to have the ability to maintain Service discipline as a means to enhance the operational effectiveness of the military. Former CDF, General Peter Cosgrove; Mr Neil James of the Australian Defence Association; and the former JAG, Justice Roberts-Smith, endorsed the principle of ADF control over the discipline system.[13] Referring to the discipline system, the then JAG stated:

> The first and fundamental point is that we are not talking about an exercise of the ordinary criminal law—although in some areas…they overlap. It is a military discipline system. The object is to maintain military discipline within the ADF by a system which is, and is seen to be, fair and just and which serves the purpose of military discipline, which is, ultimately, success in battle. The historical need for a discipline system internal to the military force has been recognised by the High Court of Australia in a number of cases… So that need, as I would see it, is beyond debate in terms of principle.[14]

2.12 Even so, some witnesses raised concerns about the jurisdiction of military tribunals extending to civilian criminal offences committed by ADF personnel overseas. After considering the evidence, the committee formed the view in 2005 that all criminal offences committed by ADF personnel, including those overseas, should come under the jurisdiction of the civilian criminal justice system. It recommended *inter alia*, that 'all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities'.[15]

2.13 The government did not accept this or related recommendations.

2.14 The jurisdiction of the AMC was again considered during the committee's inquiry into DLAB 2006. At that time, the JAG questioned the conduct of criminal trials by service tribunals. He noted a view that such tribunals were 'not established under Chapter III of the Constitution, and might not be thought to afford the protections provided by those courts'.[16] He mentioned the possibility of the most serious charges being laid against ADF members and the doubts about the proposed AMC having jurisdiction over crimes such as rape and murder.[17] The Law Council of

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13 General Peter Cosgrove, Chief of Defence Force, *Submission P16F,* Foreign Affairs, Defence and Trade Reference Committee, *Committee Hansard,* 9 June 2004, p. 20.

14 Foreign Affairs Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, p. 100.

15 See also recommendations 1–4 and 8–9 in Foreign Affairs Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005.

16 *Submission 3* to committee's inquiry into DLAB 2006 [provisions], p. 1.

17 *Submission 3* to committee's inquiry into DLAB 2006 [provisions], paragraphs 10 and 11.

Australia also noted the potential for the AMC to be involved in 'very serious matters'.[18]

2.15 In response to the JAG's concerns about the possibility of charges of the most serious offences against members of the ADF being dealt with by the AMC, Defence stated that should one occur:

> …it would not be unusual for a serious offence committed outside Australian jurisdiction to be dealt with by a Service tribunal. This has been the case ever since the Australian Naval and Military Forces were established following Federation. There are many types of tribunal established under Commonwealth legislation. Service tribunals are established under the DFDA for a specific purpose, that is, to control the forces and thereby maintain discipline.[19]

Committee view

2.16 The committee recognises that discipline within the Australian Defence Force (ADF) is essential to command and operational effectiveness. It supports the requirement that any offence which can reasonably be regarded as 'substantially serving the purpose of maintaining or enforcing Service discipline' should come under the jurisdiction of the AMC. The committee understands, however, that ADF personnel serving overseas may be accused of serious criminal offences such as rape or murder and may come under the jurisdiction of the AMC. The committee is not convinced that the AMC is the appropriate body to deal with serious criminal charges and still has misgivings, as it did in 2005 and 2006, about the extent of the court's jurisdiction.

2.17 The committee notes the establishment of a review team of Former Chief Justice of New South Wales, Sir Laurence Street, and a former Chief of the Air Force, Air Marshal Leslie Fisher (Retd). They were appointed to assess the effectiveness of the current reform program and are to report to the CDF by 10 February 2009.[20] The committee believes that the team would be ideally placed to consider the circumstances under which it would be appropriate for the AMC to deal with criminal civilian matters including the competency of the AMC as now constituted to hear such matters.

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18 *Submission 5* to committee's inquiry into DLAB 2006 [provisions], p. 4.

19 Department of Defence, answers to written questions on notice during the committee's inquiry into the Defence Legislation Amendment Bill 2006 [provisions], contained in Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill [provisions],* October 2006, appendix 5, paragraph 5.

20 *Committee Hansard*, 20 June 2008, p. 22.

AMC—further refinements

2.18 In his 2007 Annual Report, the Chief Military Judge drew attention to a number of problems encountered with the operation of the AMC including matters associated with handling multiple charges, the commencement and enforcement of punishments and orders and the custody of a prisoner before sentence.[21] The DMP also mentioned in evidence a number of concerns including class three offences and inconsistent elections. A number of these matters have since been resolved including:

- the commencement of the punishment of dismissal from the Defence Force which can now be ordered to take effect 30 days post the imposition of that punishment;[22]
- charges involving more than one co-accused and different classes of offences;[23] and
- class three offences.

2.19 The DMP noted, however, that schedule 7, which lists class 1, 2 and 3 offences, still needs consideration:

> …which is just a change in relation to certain matters. As you would appreciate, prejudicial conduct has not really been classified as a class of offence. Predominantly, of course, prejudicial behaviour is dealt with at the summary level, but that is not to say it is not dealt with before the AMC on a number of occasions.[24]

2.20 Other matters still requiring legislative consideration include:

- providing military judges with the authority to have a prisoner detained in custody prior to his sentence; and
- enforcement of reconnaissance release orders.[25]

2.21 The committee draws these observations to the government's attention for its consideration. More important matters dealing with the constitution, conduct and protection of military juries and rules of evidence for summary proceedings are dealt with below.

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21 Chief Military Judge, *Australian Military Court: Report for the period 1 October to 31 December 2007,* paragraphs 49–55.

22 *Committee Hansard*, 20 June 2008, p. 3.

23 *Committee Hansard*, 26 June 2008, p. 10.

24 *Committee Hansard*, 26 June 2008, p. 10.

25 *Committee Hansard*, 20 June 2008, p. 3.

Military juries

Selection process

2.22 Defence's June 2008 progress report on reforms to Australia's military justice system noted that an issue had arisen with regard to the validity of the constitution of military juries. A trial was adjourned after the Military Judge upheld the Defending Officer's objection that the military jury had not been arrayed according to law. This matter has now been resolved by amending the AMC rules so that the panelling of military juries is on a fully random and tri-service basis.[26]

2.23 The Chief Military Judge, however, would prefer the requirement for a tri-service random selection be set out in legislation.[27] Even so, the CMJ agreed that legislative intervention should be delayed until after Sir Laurence Street's review.[28]

Committee view

2.24 To avoid doubt, the committee supports the Chief Miliary Judge's view that the DFDA specify that military juries are to be selected on a fully random and tri-service basis. It also agrees that this is a matter that should be referred to Sir Laurence Street.

Code of conduct for jurors

2.25 Under existing arrangements, the AMC operates without the equivalent of a civilian jury code.

2.26 In 2006, the former JAG noted that the existing legislation did not provide any safeguards to protect military jurors from command influence concerning the performance of their military duties nor protection from reporting on their performance as a military juror.[29] For the government's consideration, he noted the desirability of incorporating provisions similar to those in the *New South Wales Jury Act 1977*—sections 68, 68A, 68B, 68C and 69.[30]

2.27 In his annual report, the Chief Military Judge also stated his belief that:

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26 *Committee Hansard*, 20 June 2008, p. 3.

27 *Committee Hansard*, 20 June 2008, p. 9.

28 Committee Hansard, 20 June 2008, p. 3.

29 Judge Advocate General, *Defence Force Discipline Act 1982, Report for the period 1 January to 31 December 2006*, paragraph 75.

30 Judge Advocate General. *Defence Force Discipline Act 1982, Report for the period 1 January to 31 December 2006,* paragraph 75.

> …it would be highly desirable for the legislation to address issues of juror protection and to create offences concerning interference with jurors or misconduct by military jurors in the discharge of their duties.[31]

2.28 Captain Paul Willee from the Law Council of Australia reinforced this view:

> It would…be much better if these sorts of protection were in place in the same way as they are in the civilian arena. They are probably particularly needed to protect people from their colleagues, who, in the mess, will say: 'Tell us what happened. How on earth could you have come to that conclusion? You idiot! You've got the work boat, and your leave's cancelled for three months for that decision.' I do not think it is as prevalent as it used to be, but it is better that nobody sees it as a situation that is not properly covered.[32]

2.29 According to the Registrar of the AMC, such a code would cover issues such as offences that may be committed by jurors in terms of disclosure of information and offences committed on jurors—for example trying to extract information from them.[33] Mr Mark Cunliffe, Head Defence Legal, informed the committee about existing legislation that may afford protection to military jurors. He explained that the ADF operates 'within a command and control environment where there is a Defence Force discipline set of rules in place already and where there are protections which potentially can be pointed to in that body of law'.[34] He then indicated, however, that:

> We are at this stage, I think, positing that there would be amendment in the first part of 2009 that would encompass provisions that would deal with this in more detail. I think that gives us two things: first, it is a real date that is attainable and, second, it gives us the time to actually study the issue and to see whether some of these concerns are actually real manifestations. It also gives us the time to decide how they might be dealt with in a resourcing sense, in a numbers sense and in terms of protections and other mechanisms that the jury legislation might cover.[35]

Committee view

2.30 Even though there is a Defence Force discipline set of rules that could apply to the conduct and protection of military jurors, the committee is of the view that provisions governing the conduct and protection of jurors should be contained in the DFDA. The provisions would cover matters such as soliciting information from or harassing jurors or former jurors, disclosure of information by jurors, inquiries by

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31 Chief Military Judge, *Australian Military Court: Report for the period 1 October to 31 December 2007,* paragraph 46.

32 *Committee Hansard*, 20 June 2008, pp. 45–6.

33 *Committee Hansard*, 20 June 2008, pp. 5 and 9.

34 *Committee Hansard*, 20 June 2008, pp. 33–34.

35 *Committee Hansard*, 20 June 2008, p. 34.

juror about trial matters and prejudice to ADF personnel summoned for jury service. As suggested by the JAG, the *New South Wales Jury Act 1977* provides a model.

Recommendation 1

2.31 The committee recommends that the DFDA be amended to include provisions governing the conduct and protection of military jurors.

Summary proceedings

2.32 The vast majority of disciplinary matters in the ADF are dealt with on a daily basis at the summary level. The CDF told the committee that a summary system must 'operate quickly, be as simple as possible and it must be capable of proper, fair and correct application by commanding officers while providing an appropriate level of protection for individual members'.[36] In 2005, the committee found that reform was needed to impart greater independence and impartiality into summary proceedings. It found that the current system for prosecuting summary offences suffered from 'a greater lack of independence than courts martial and Defence Force Magistrate processes'.[37]

2.33 The committee recommended an expansion of the right to elect trial by court martial before its proposed permanent military court, and the introduction of the right to appeal summary decisions before this court.[38]

2.34 In August 2007, the government introduced legislation to amend the Defence Act and DFDA in order to streamline and restructure summary discipline procedures. The new system was to operate under simplified rules of evidence, provide a right of appeal from a summary authority to the new AMC and a right to elect trial by the new AMC instead of a summary authority.

2.35 The CDF informed the committee of his confidence that the new summary arrangements would 'not only update and simplify the current system for the benefit of commanders and those who administer military justice, but will also substantially enhance the rights of those who find themselves subject to the disciplinary system'.[39]

2.36 In 2007, Defence indicated that two important matters would be dealt with in legislation proposed for 2008—the detention and release of people found unfit to stand trial or not guilty of an offence on the grounds of mental impairment and the extension of the Discipline Officer scheme to non-commissioned officers.

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36 *Committee Hansard*, 20 June 2008, p. 21.

37 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system,* June 2005, pp. 102–3.

38 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system,* June 2005, p. xxii.

39 Department of Defence, *Report on the Progress of Reforms to the Military Justice System*, 5 June 2008, p. 2.

2.37 The committee noted, and was assured by, Defence's stated intention to rectify in the near future some of these omissions in the legislation. The committee, however, remains unsure about the consideration that has been given to the provisions governing people found unfit to stand trial or not guilty of an offence on the grounds of mental impairment. In an answer to a question on notice, Defence informed the committee in September 2007 that:

> The currency of the existing provisions for dealing with mental impairment became apparent during drafting of the Bill [DLAB 2007]. As a result, Defence looked to bringing the provisions up to contemporary standards in this legislation, if it was feasible. However, it became evident during the course of drafting that there were a number of significant practical and policy matters to be resolved to avoid disadvantaging ADF members. A particular matter requiring further detailed consideration is whether a person would be able to appeal to the Defence Force Discipline Appeal Tribunal against a finding that he or she was unfit to stand trial. This right of appeal, and a number of other complex matters requiring further policy consideration, precluded drafting being completed for inclusion in this Bill.[40]

2.38 In the committee's view, Sir Laurence Street's review team would be ideally placed to examine, in light of contemporary developments, the provisions in DFDA governing people on trial before the AMC who are deemed to suffering from mental impairment.

Rules of evidence

2.39 In its report on DLAB 2007, the committee also expressed reservations about the provisions governing the evidence in proceedings before a summary authority. It recommended that, before passing the bill, the legislation provide clear statutory guidance that summary authority rules were not to depart from the fundamental principles of the rules of evidence.

2.40 The bill lapsed with the prorogation of parliament and was re-introduced in February 2008.

2.41 Although amended along the lines suggested by the committee, the provisions in DLAA 2008 governing the rules of evidence continued to cause some concern. In April and June 2008, the Law Council of Australia wrote to the committee raising doubts about 'the workability and effectiveness' of the provisions in the legislation, notably the rules of evidence. It stated:

> In order to ensure the ADF's summary discipline procedure is perceived as fair, independent and not subject to interference by the Defence chain-of-command, the fundamental principles referred…should be listed within

40 Department of Defence, Response to written question no. 6, Appendix 4, in Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2007 [Provisions]*, September 2007.

> provisions of the legislation, not simply referred to in notes or in subordinate regulations or guidelines because notes of this sort in legislation have no binding effect in the way that legislative words do.[41]

2.42 Until 20 September 2008, summary trials were conducted in accordance with the full requirements of the Evidence Act. Under the new system introduced by DLAA 2008, 'the full panoply of the rules of evidence will not apply'.[42] This change means that the summary authorities will no longer be subject to the same formal rules of evidence that apply to the AMC.[43] The CDF informed the committee:

> The simplification of the rules of evidence before summary tribunals will address a long standing criticism of the current system that the requirement to apply the full law of evidence in summary proceedings was an unnecessary complexity. The simplified rules will however preserve members' rights by requiring summary authorities to have regard to basic evidentiary principles including relevance, reliability, weight, probative value and procedural fairness.[44]

2.43 The JAG acknowledged that the new rules would water down the civil standards of evidence, but explained:

> …it was never realistic to impose the full rules of evidence on service officers who had no legal training. They are going to get a set of rules which are, as I understand it, a work in progress so I have not seen them and, indeed, there is no requirement that I be consulted in relation to them. They will get a set of rules that will bind them to procedural fairness on core issues but not the periphery of the rules of evidence. Until I see those rules, I really cannot venture a comment as to the extent to which it will involve a departure from what, until now, has applied.[45]

2.44 The Law Council was of the view that the provision in the act stipulating that the Summary Authority Rules may be simplified but not depart from the fundamental principles underpinning the rules of evidence was 'very nebulous'. Captain Willee argued:

> The system ought to be able to identify which fundamental principles need to be addressed and what they are so that at least those who are framing the rules have some indication of where they are going, what the rules are going to address. At least, we submit, the fundamental principles that need to be addressed ought to be set out in the legislation. [46]

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41 Law Council of Australia to Committee, *submission*, 17 June 2008, p. 3.

42 *Committee Hansard*, 20 June 2008, p. 18.

43 *Committee Hansard*, 20 June 2008, p. 22.

44 Department of Defence, *Report on the Progress of Reforms to the Military Justice System*, 5 June 2008, p. 2.

45 *Committee Hansard*, 20 June 2008, p. 16.

46 *Committee Hansard*, 20 June 2008, p. 41.

2.45 The JAG explained:

> One way of determining what distillation of those rules should obtain at summary level would be for them to be set out in the rules that are promulgated under the act. They would have the force of law that would bind the military commanders exercising those powers, but they could also be put in the statute, in the Defence Force Discipline Act, if that were thought appropriate. I do not have a preference for one over the other, save that if something needs to be changed quickly there is more flexibility if they are in the rules than if they are in the act.[47]

2.46 During the public hearing on 20 June 2008, Captain Willee agreed with the JAG that 'it does not matter where it [specifying the rules of evidence] is done, as long as it has proper parliamentary scrutiny and it has proper scrutiny before it is put into place'.[48] Section 149 of the DLAA 2008 provides for the Chief Military Judge, by legislative instrument, to make rules governing the practice and procedures to be followed by summary authorities.[49] At this time, the rules were still being developed in readiness to take effect in September 2008. In the JAG's view the rules must have 'sufficient detail and clarity that can be understood by those who have to implement them'.[50]

2.47 The rules have now been promulgated and were registered as a Federal instrument on 18 September 2008.

Promulgation of rules of evidence

2.48 In June 2008, the Law Council expressed concern that the Summary Authority Rules were currently being drafted but that no draft copies had been issued or, if they had been issued, supplied to the Law Council.[51] The CDF stated that much work was still to be done in the lead-up to summary trials. He noted tasks such as 'rewriting relevant manuals, instructions and guidance, revising military justice training course content, providing appropriate conversion training to practitioners and administrators, as well as general familiarity training to ADF members'. He was satisfied that summary hearings would 'in future be fair, efficient and timely as a result of these changes'.[52] Group Captain Paul Cronan, Defence Legal Services, informed the committee in June that there was an early draft of those rules but that they still required significant work. He explained further:

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47 *Committee Hansard*, 20 June 2008, p. 18. See also p. 19 where the JAG stated 'Between the two possibilities, the one virtue of having them in the rules is that if some problem emerges it can be fixed up much quicker than if they were in the act.'

48 *Committee Hansard*, 20 June 2008, p. 41.

49 Because this provision is yet to come into force, it is currently appended in notes to the DFDA.

50 *Committee Hansard*, 20 June 2008, p. 19.

51 *Submission,* 17 June 2008, p. 3.

52 *Committee Hansard*, 20 June 2008, p. 22.

> The writing of the training process…is dependent on the production of those rules and the way in which they are constructed… The training packages are quite large. There is a lot of new material to cover. We are making large changes to the summary disciplinary system. In terms of the training packages, we are covering those issues upfront that we have clear guidance on and that there is not too much doubt about. The summary rules process will come, I guess, at the end of the development stages for those training packages.[53]

2.49 Captain Paul Willee noted that there must be at least 30 or 40 fundamental principles of rules of evidence—'they fill volumes of books of evidence'.[54] He was concerned that when deadlines are so tight, 'they almost invite error' and that it 'is time to move towards more acceptable deadlines…'[55] In this regard, he stressed the importance of allowing ample time for ADF personnel to familiarise themselves with the new rules. He argued strongly that 'people's courses of action in relation to summary proceedings depend on their understanding of the process'. He added:

> If there is to be a simplified procedure, then one would hope that they would be able to understand the process and be better informed as to whether they ought to plead guilty or not in relation to the evidence against them. Certainly those advising them would be in a better position to do so. That might result in a much fuller exploitation of the summary proceeding systems. It might not. But it needs to be done properly if it is going to be done at all.[56]

2.50 The DMP explained that the CMJ has an ad hoc rules committee meeting and that a meeting had been held with regard to the summary rules. She is a member of the committee. The DMP did observe, however, that 'we do not seem to lift our eyes to the future and start the planning process in a timely way. We always seem to be behind the eight ball.'[57] The JAG expressed a willingness to look at, and comment on, the new rules currently being drafted.[58]

2.51 Since taking evidence at its public hearings in June 2008, the committee received further advice from the Law Council of Australia on the need to have certain fundamental evidentiary matters addressed in the simplified rules. On 29 August 2008, the Council informed the committee that their representatives had met the CMJ and officers at Defence Legal to discuss a preliminary draft of the simplified rules. The Council provided comprehensive comments on this draft indicating clearly areas

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53 *Committee Hansard*, 20 June 2008, p. 29.

54 *Committee Hansard*, 20 June 2008, p. 42.

55 *Committee Hansard*, 20 June 2008, p. 44.

56 *Committee Hansard*, 20 June 2008, p. 41.

57 *Committee Hansard*, 26 June 2008, p. 11.

58 *Committee Hansard*, 20 June 2008, p. 17.

of concern including a number of matters that 'do not appear to be addressed' in the rules.[59]

Committee view

2.52 The committee is firmly of the view that formulating the simplified rules of evidence was no easy task especially given the limited time available to have them ready. It takes particular note of Captain Willee's concern that when deadlines are so tight, 'they almost invite error'.[60] The committee believes that an expeditious promulgation of the modified rules of evidence was desirable but not at the expense of sound and considered deliberation. At this late stage in the committee's consideration of the evidence, it has not been able to examine in detail these rules of evidence or to be satisfied that the concerns raised by the Law Council in August have been adequately addressed. As noted previously, the rules were registered on 18 September to come into operation on 20 September. In chapter 5, the committee considers the importance of consultation in drafting legislation, including subordinate legislation.

2.53 The committee endorses the JAG's view that these rules must provide sufficient detail and 'clarity that can be understood by those who have to implement them'. The difficulty distilling such a large and comprehensive body of legislation into clear and concise rules in a short timeframe underlines the need for them to undergo scrutiny. Sir Laurence Street's review team could examine these rules to determine whether they are appropriate and 'provide sufficient detail and clarity'.

Rules of evidence on appeal from summary proceedings to AMC

2.54 The Law Council of Australia was of the view that the legislation fails to make clear that 'the application of the ordinary rules of evidence should be restored upon appeal to the AMC from the decision of the summary authority'. Mr Willee sought clarification on:

> What rules are going to apply when the appellate jurisdiction of the Military Court is invoked? Are they going to be the summary rules or are they going to be the rules that apply in that court, which are the full rules of evidence, and how is that going to affect the proceedings? Nobody has decided that situation yet.[61]

2.55 He stated further:

> The point of principle is that the cut-down, streamlined rules…are just that…They are going to be second best. If you have to resort to an appeal, why aren't you entitled to the best venue in which to conduct it? The best

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59 Secretary-General, Law Council of Australia to Senator Mark Bishop, Committee Chair, 29 August 2008, Attachment A.

60 *Committee Hansard*, 20 June 2008, p. 44.

61 *Committee Hansard*, 20 June 2008, pp. 41–2.

> venue is the one that has all the rules of evidence applied at the level of a court that understands those rules…[62]

2.56 He was unsure whether legislation was required to specify that those are the rules that are to be applied in appeal. He explained:

> …they are clearly the ones that apply in first instance trials in the Military Court. That would simply regularise what is already happening. It may be that my analysis of the legislation is not sufficient to enable that to be concluded. If I am wrong about that, perhaps the Chief Military Judge simply needs to promulgate that that is what the court is doing, but there is always the risk, of course, that somebody will challenge it.[63]

2.57 Recently the Law Council repeated its argument that the ordinary rules of evidence should be restored on appeal to the AMC from a decision by a summary authority. It was concerned about the possibility for injustice to be done by the application of the simplified rules of evidence. It advised the committee, however, that following discussions with the CMJ and Defence Legal, it is now 'reasonably satisfied with the application of the simplified rules on appeal from decisions of a summary authority'.[64]

Committee view

2.58 The committee is of the view that the legislation should make clear that the ordinary rules of evidence are to be restored upon appeal to the AMC. It notes that the Law Council is now satisfied with the arrangements governing the application of the ordinary rules of evidence for appeals to the AMC from decisions of a summary authority.

Appeals on interlocutory points

2.59 During the committee's inquiry into the provisions of DLAB 2007, Mr Willee raised the Law Council's concern about the omission of the right of the DMP to appeal to the Defence Force Discipline Appeals Tribunal against an interlocutory judgment or order given or made in proceedings in an Australian Military Court. He referred to the Council's proposal that s.5F provisions of the NSW *Criminal Appeal Act,* which he indicated had 'stood the test of time', should be included in the bill. He advised the committee:

> When a ruling is made which in itself will be so fundamental to the way in which the proceedings will or will not go on, there ought to be a provision similar to the provision that we have extracted from the New South Wales act. That provision ought to enable those issues to be dealt with in appropriate cases to prevent unfairness, a miscarriage of justice and,

62 *Committee Hansard*, 20 June 2008, p. 45.

63 *Committee Hansard*, 20 June 2008, p. 45.

64 Secretary-General, Law Council of Australia to Chair of Committee, 29 August 2008.

> perhaps equally important, a colossal waste of time by people trying to go through the same process using the prerogative writs.[65]

2.60 Mr Willee was of the view that there was 'nothing complex about this proposal': that it was 'a simple thing'.[66] At that time, Defence did not discount for future consideration the Law Council's proposal. Rear Admiral Bonser advised the committee that the appeal of matters raised in interlocutory points by the prosecution was a complex issue subject to two differing points of view. Defence believed that such a proposal required 'considerable deliberation and policy development before being considered for inclusion' in the DFDA in the context of an amendment to the bill.[67] Rear Admiral Bonser told the committee that 'Defence is clearly keen to consider it as a possible provision in legislation to be brought forward in future years'.[68]

2.61 The DMP also commented on the Law Council's proposal. She indicated that members of her unit and those involved with Defence legal, have 'struggled long and hard for some time in relation to how the DMP should have an appeal to resolve matters, whether they should be done on interlocutory basis or indeed after the event'.[69] She outlined some of the matters that needed to be considered including the Defence Force Tribunal being ad hoc, whether a duty judge would be available, and how quickly matters could be heard. She supported Rear Admiral Bonser's observation that: 'there is more debate…and more consultation to be had as to whether or not it would ultimately be beneficial to our proceedings to have the capacity to take matters at an interlocutory stage'.[70] She added:

> …we were content at this point in time, given that our court is yet to stand up and given also that we do not have a standing appeals tribunal that still remains ad hoc. The concern was about delays and the fragmentation…It is just a question of time. Ultimately, down the track, it may well be that those amendments will be sought.[71]

2.62 Although Defence suggested that it was considering the right of the DMP to appeal against an interlocutory decision, it has not yet produced any concrete proposals. At the committee's most recent hearing, Mr Willee again argued for the

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

66 *Committee Hansard*, 5 September 2007, pp. 2 and 7.

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

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

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

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

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

right of the DMP to appeal interlocutory points.[72] He provided one example to illustrate the importance of allowing the DMP to make such an appeal:

> The classic case is always a confessional statement by an accused person that is ruled to be inadmissible. That is a complex area—admissibility. If the prosecution loses that confession, in whatever form it may be, then very often it loses the whole basis of its prosecution and it simply has to discontinue. If it is questionable or arguable that the court, in ruling on that issue, in some interlocutory proceedings went wrong, then, in fairness, the prosecution ought to be able to test that sort of thing in the appropriate case so that the issue can be decided. That is only one example.[73]

Committee view

2.63 In September 2007, the committee urged the government and Defence to give serious consideration to the Law Council's proposal regarding the right of the DMP to appeal interlocutory points. It again suggests that the government and Defence consider the proposal. This matter may well be one that Sir Laurence Street's review team could consider.

Director of Military Prosecutions

ODMP—staffing and resources

2.64 In 2005, the committee was of the view that:

> …a well-resourced, statutorily independent Director of Military Prosecutions is a vital element of an impartial, rigorous and fair military justice system.[74]

2.65 The government agreed with this view and on 12 June 2006, the DMP was created as a statutory office. The DMP is to hold the rank of Brigadier and the appointment is for a term of five years.[75] Section 196B of the DFDA clearly states that the DMP must as soon as practicable after each 31 December, prepare and give to the Minister, for presentation to the Parliament, a report relating to the operations of the DMP during the year ending on that 31 December.

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72 *Committee Hansard*, 20 June 2008, p. 42. He indicated that the Director of Military Prosecutions had informed him that morning that she was in complete agreement with the Law Council's proposals, 'except for the last paragraph, which she thought it would be imprudent for her to go into—that is, the quality of the judges'.

73 *Committee Hansard*, 20 June 2008, p. 43.

74 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system,* June 2005, p. xxii.

75 The Hon. Bruce Billson, MP, Minister Assisting the Minister for Defence, Media Release, MINASSIST 024/06, 5 July 2006. See also *Committee Hansard*, 19 June 2006, p. 13.

Independence of the DMP

2.66 In her first annual report, the DMP referred to the perception of the independence of her office. She cited the involvement of the Acting Secretary of Defence in the case of *DMP V Registrar of Military Justice*:

> I am of the view that the interruption of the litigation by the Acting Secretary of the Department of Defence has the potential to affect perceptions of my independence.
>
> and
>
> Significantly, the Acting Secretary also directed that 'no further expenditure on legal expenses is to be incurred before commencing or maintaining litigation involving other Commonwealth officeholders without my prior approval'. This could be perceived as affecting my and the Registrar's independence.[76]

2.67 The CDF informed the committee that a 'practical and sensible way' to deal with disagreements such as the one that occurred between the Registrar and the DMP, was under consideration. He indicated that they would be resolved through a mechanism or procedure that would be retained within the bureaucracy within government'.[77] He assured the committee that:

> …we have taken the circumstances of the case and we have come up with a way of dealing with it so that it will never happen again and a way which will not require a resort to the Federal Court.[78]

2.68 In response to the matter of curtailing funding for litigation by the DMP, the CDF explained:

> …at the end of the day, all of us are constrained by money. I am constrained in what I might want to do operationally, and of course her activities are also constrained. I think that obtaining sufficient funding to do something does not necessarily interfere with her independence to do the job as the DMP.[79]

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76 Director of Military Prosecutions, *Report for the period 12 June 2006 to 31 December 2007,* paragraphs 50 and 63.

77 *Committee Hansard*, 20 June 2008, p. 37.

78 *Committee Hansard*, 20 June 2008, p. 38.

79 *Committee Hansard*, 20 June 2008, p. 37. See also comments by Dr Lloyd, who said, 'Two obligations are of particular importance under those directions—they certainly informed us. The first is the obligation, as a model litigant, not to resort to litigation where there are other means for resolving a dispute. The second element of the legal services directions is that it says that, where there is a dispute between two Commonwealth agencies—and this is not precisely two Commonwealth agencies, but it is a reasonable equivalent—it suggests that the appropriate mechanism is referral to the Solicitor-General to get an opinion, essentially because it is not a particularly seemly or efficient use of resources to be airing a dispute between two elements of the Commonwealth in the courts when there is the opportunity to seek a view from the Solicitor-General'. *Committee Hansard*, 20 June 2008, p. 38.

2.69 The DMP took the view that the direction issued to her by the Deputy Secretary regarding the need for his approval to fund litigation involving other Commonwealth office holders is extant. She argued that while it retains its currency, the directive has the potential to affect perceptions of the DMP's independence. She explained further:

> To a large extent, I am over it, and things have moved on. I do have a right of appeal in relation to matters that I did not have at the time of the Nicholas matter. There are other ways that I can resolve it without necessarily having to take on statutory appointees to get a resolution, but, notwithstanding all those changes and given that time has moved on, I do not see any reason why it should be extant.[80]

2.70 The committee only became aware of the DMP's concerns about this incident and how the Acting Secretary's involvement may affect her perceived independence through her annual report.

Committee view

2.71 The committee notes that both the CDF and the DMP believe that other ways now exist to resolve disputes between statutory appointments. This case, however, demonstrates the value of the DMP's annual report which provided an opportunity for the DMP to speak frankly and openly about her concerns regarding her perceived independence. Without commenting on the rights or wrongs of the dispute between the Registrar of the AMC and the DMP or the involvement of the Acting Secretary, the DMP was clearly able, in a pubic forum, to voice her concerns about what she believed was inappropriate interference in the work of her office. The committee strongly supports this reporting regime.

Audit of legal officers in the ADF

2.72 The DMP informed the committee that she had long advocated an audit of all the legal officer positions in all the services. The intention would be to:

> …see how we are utilising and deploying them because I think there are some areas where we do not need as many as we have, and they should be redeployed to areas such as my office, the inspector-general and the MLC.[81]

Committee view

2.73 The committee supports the DMP's suggestion for an audit of all legal officers in the ADF.

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80 *Committee Hansard*, 26 June 2008, p. 14.

81 *Committee Hansard*, 26 June 2008, p. 15.

Recommendation 2

2.74 The committee recommends that Defence undertake an audit of all legal officers in the ADF with a view to ensuring that the legal skills, expertise and experiences available to the ADF are being used to full advantage and to identify deficiencies that may need addressing.

Resources

2.75 The AMC commenced operations on 1 October 2007. The ADF's June 2008 progress report suggested that the number of trials referred to the AMC 'is considerably greater than might have been expected…' As at 17 June 2008, 92 matters had been referred by the DMP to the court for trial: 36 matters had been finalised; 13 were currently listed for trial; four matters had been withdrawn; and six were not being actioned for reasons such as deployment of members.[82] Thirty-three matters were undergoing preliminary action, including case management, prior to any listing action before the court.[83]

2.76 The number of matters proceeding to trial by the AMC represents a significant increase from those under the old regime. The Registrar of the AMC, Colonel Geoff Cameron, explained that 'there were about 40 to 50 matters in each of the preceding years. He stated further:

> The key issue that arises from those sorts of figures is the volume of work that is currently before the court, and that excludes the new summary appeals regime which will commence later this year on 20 September and the new election regime as well. That volume of work is considerably greater than might have been anticipated based on those historical figures. How many other matters are going to come before the court after that new regime commences is still unknown.[84]

2.77 In addition, according to Colonel Cameron, a much larger proportion of matters are proceeding to trial by military judge and jury than had been dealt with by court martial under the previous trial system. The AMC had 17 matters intended to proceed to trial by judge and jury in contrast to seven courts martial in 2007, one in 2006, six in 2005 and two in 2004.[85]

2.78 The Registrar noted further that, 'the administrative and financial burden in assembling military jurors at various trial locations throughout Australia and conceivably in overseas locations is very significant'. For example, he indicated that about 30 to 40 persons are required in order to screen for a straight six-person jury

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82 *Committee Hansard,* 20 June 2008, p. 2. See also Department of Defence, *Report on the Progress of Reforms to the Military Justice System*, 5 June 2008, p. 6 at appendix 5.

83 *Committee Hansard*, 20 June 2008, p. 2.

84 *Committee Hansard*, 20 June 2008, p. 2.

85 *Committee Hansard*, 20 June 2008, p. 2.

which would 'expand quite significantly' for a 12-person jury.[86] The trial of a class one offence requires 12 members.[87]

2.79 The Military Judge's Annual Report also records that the number of jury trials is 'likely to considerably exceed the number of matters proceeding to a court martial in recent years'.[88] It similarly noted that 'jury trials are considerably more resource intensive both in terms of the administrative effort required to run the trial and in terms of the personnel taken from other duties for the trial itself'. The JAG explained why juries are resource intensive:

> …in civilian courts there are rules that govern matters such as who jurors may interact with during the period of the trial, and, in particular, after they have been charged and have gone out to consider their verdict. They are kept apart from everyone until they have come back and reported their verdict. They are looked after by a jury keeper, who is an officer of the court experienced in assisting jurors without getting involved in the merits of the case that they are debating with a view to providing a verdict, and so on.[89]

2.80 He noted that significant difficulties emerge when that civilian model is transferred into the military. Although a purpose built court is to be built in Canberra, he observed:

> …the moment the court sits with a jury on a military base that has no facilities for a jury trial, then there is a considerable risk, in my view, that things could miscarry quite inadvertently. The jury will have to resort to the mess to eat their meals, and it is not easy to keep them separate from everybody else in a large mess. The risk is that they will be seen talking to somebody by defence counsel, there will be a complaint and the trial could miscarry. To me, there seems to be a need for some dedicated facilities, and I am conscious that this is going to take time.[90]

2.81 A number of witnesses put forward practical suggestions that, in their view, would help to alleviate the demand on resources. The DMP proposed that:

> …given that we brought all the assets to Canberra—all the prosecutors and judges are here, a significant portion of the officers of the Defence Force are in Canberra, we are building an AMC here in Canberra and we do not

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86 *Committee Hansard*, 20 June 2008, pp. 3 and 5.

87 Section 122*, Defence Force Discipline Act 1982*. For class 1 offences see Schedule 7 and, for example, sections 15, 16, 20, 21 and 59. There are three classes of offence, class 1 offences are the most serious offences dealing with, for example, abandoning a post, aiding the enemy, mutiny, desertion or selling or dealing in narcotic goods.

88 Chief Military Judge, *Australian Military Court: Report for the period 1 October to 31 December 2007,* paragraph 24 and footnote 16.

89 *Committee Hansard*, 20 June 2008, p. 19.

90 *Committee Hansard*, 20 June 2008, p. 19.

> have facilities in the regions that currently exist—we should have all the trials here, particularly the contested matters, the trials by jury.[91]

2.82 She stated further:

> I think that we are stretching ourselves far too much by attempting to do them in the regions. There is the logistical difficulty of having a 12-man jury, for instance, in Perth. Flying officers to Perth, where they could be for a week and a half, keeping them separate and accommodating them, and the burden on the unit of the accused—which currently has to bear that administrative burden of providing the clerk and all the orderlies, getting the room together and the like— starts to add up. If we had a structure in Canberra with a court staff, we could have that running on a regular basis—a weekly basis or even a daily basis. I think we would get through matters much more effectively than we are now. Equally, I would not lose prosecutors for two weeks. They have other matters to attend to, yet they are taken to Perth, to Melbourne, to Adelaide or to Townsville. It is a lot of flying; it is quite tiring.[92]

2.83 She suggested further that if trials are to be held outside Canberra then existing facilities could be used—let us not worry about trying to convert tearooms into courtrooms'.[93] The JAG also acknowledged that arrangements could be made between the Commonwealth and states to allow the AMC to use the courthouses that exist throughout Australia.[94]

Committee view

2.84 The committee notes the significant increase in matters being referred to the AMC, as opposed to the old regime, and the demands that this increase is placing on ADF resources. The committee is firmly of the view that such considerations have no bearing on decisions regarding the establishment of the AMC or of allowing an accused to elect trial by the AMC. Cost and resource considerations should in no way compromise or erode the principles underpinning the operation of the AMC as now enshrined in legislation. They should not diminish support for the AMC.

2.85 Even so, the committee is of the view that the AMC should seek to adopt efficient and cost effective ways to conduct its business. The DMP and the JAG have proposed what appear to be practical and sensible ways to address some of these resource issues.

2.86 The committee is concerned, however, about the slowness in developing the infrastructure and finalising other organisational matters necessary for the effective

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91 *Committee Hansard*, 26 June 2008, p. 17.

92 *Committee Hansard*, 26 June 2008, p. 17.

93 *Committee Hansard*, 26 June 2008, p. 17.

94 *Committee Hansard*, 20 June 2008, p. 20.

operation of the court. It believes that the speedy establishment of the AMC as a working organisation is critical to an effective military justice system. The committee is of the view that the CMJ must take urgent steps to ensure that the appropriate organisational structures are in place and fully functional so that the business of the court can proceed without delay or impediment. The committee requests that the CMJ keeps the committee fully informed about progress on the establishment of the AMC.

Staffing for the ODMP

2.87 On the matter of resources, the July 2006 audit of the ADF investigative capability noted that the ODMP was understaffed.[95] In her 2006–2007 annual report, the DMP recorded that a number of officers in her office were transferred out, including two officers deployed overseas which resulted in the office carrying their 'extended absence'. With regard to Navy, she indicated that it was unable to meet its obligations to provide two prosecutors of lieutenant commander rank throughout 2007.'[96]

2.88 In evidence before the committee, she stated that for the first time all the service positions would be filled as of January 2009.[97] She noted that, while to date she had not been able to have all the positions filled, the operations of the office had not been adversely affected due in large part to the high calibre of the officers assigned to the ODMP.[98]

Committee view

2.89 The committee notes that the DMP is a statutorily independent appointment and requires adequate resources to carry out her functions effectively. Her annual report, which clearly raised concerns about staffing matters, is a clear indication of the value that the current reporting regime has in supporting the independence of the office of the DMP.

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95 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability,* July 2-006, paragraph 2.28 (1).

96 Director of Military Prosecutions, *Report for the period 12 June 2006 to 31 December 2007,* paragraphs 19–21.

97 *Committee Hansard*, 26 June 2008, p. 15.

98 *Committee Hansard*, 26 June 2008, p. 16.