

TRANSCRIPT OF PROCEEDINGS
UNCLASSIFIED

AUSTRALIAN DEFENCE FORCE

AUSTRALIAN ARMY, VICTORIA BARRACKS, NSW

INQUIRY INTO THE DEATH OF
PTE JACOB BRUCE KOVCO

PRESIDING:

GPCAPT W COOK, President
COL M CHARLES, Board Member
MR J O'SULLIVAN, Board Member

COL M GRIFFIN, Senior Counsel Assisting
MAJ E JOLLY, Counsel Assisting
MAJ J HYDE, Counsel Assisting
MAJ A BELKIN, Counsel Assisting

LTCOL P WILKINSON, representing Soldier 2
LTCOL B GREEN, representing Soldier 14
LTCOL T BERKLEY, representing Next of Kin
LTCOL F HOLLES, representing PTE Kovco's Parents
COL L YOUNG, representing PTE Kovco

1021 WEDNESDAY 16 AUGUST 2006
DAY 22

The transcript has been checked and cleared for operational security issues.

TRANSCRIPT VERIFICATION

I hereby certify that the following transcript was made from the sound recording of the above stated case and is true and correct

Signed.....  Date16/08/06.....(President)

Signed.....  Date 16/08/06.....(Recorder)

Signed.....  Date 16/08/06.....(Transcriber)

Signed.....  Date 16/08/06.....(Transcriber)

WITNESS LIST

Name Of Witness	Page No.
MAJ MICHAEL GUY PEMBERTON, sworn [1023]	1114
EXAMINATION BY COL GRIFFIN	1114
EXAMINATION BY LTCOL BERKLEY` [1202].....	1134
EXAMINATION BY COL YOUNG [1229].....	1141
EXAMINATION BY COL GRIFFIN [1244].....	1145
WITNESS WITHDREW [1246].....	1146
LTCOL CHERYL ANN PEARCE, sworn [1402].....	1147
EXAMINATION BY COL GRIFFIN	1147
EXAMINATION BY LTCOL WILKINSON [1501].....	1162
EXAMINATION BY LTCOL BERKLEY [1506].....	1164
EXAMINATION BY COL YOUNG [1521].....	1169
WITNESS WITHDREW [1534].....	1173

EXHIBIT LIST

Number	Description	Page No.
	EXHIBIT 142 - MAJ PEMBERTON'S STATEMENT IN REDACTED AND CLASSIFIED VERSIONS	1115
	EXHIBIT 143 - REDACTED AND CLASSIFIED VERSIONS OF LTCOL PEARCE'S STATEMENT	1148
	EXHIBIT 144 - DEFENCE INSTRUCTION	1154

RESUMED

[1021]

5 PRESIDENT: Good morning, Colonel, our first witness.

COL GRIFFIN: Mr President, I call MAJ Pemberton.

10 <MAJ MICHAEL GUY PEMBERTON, sworn

[1023]

<EXAMINATION BY COL GRIFFIN

15

COL GRIFFIN: Good morning, MAJ Pemberton?---Good morning, sir.

I'm COL Griffin, Counsel Assisting the Board of Inquiry. Would you
state your full regimental particulars for the record, please?---8248867,
20 MAJ Michael Guy Pemberton.

Would you indicate whether or not you've read Annex F to ADFB 06.1.4
which sets out the rights and obligations of a witness appearing before the
Board of Inquiry?---I have, sir.

25

Thank you, MAJ Pemberton. What's your present posting?---Sir, I'm the
Officer Commanding the 5th Military Police Company Special
Investigation Branch.

30 How long have you been in that role?---Since January '05, sir.

Have you had an involvement in the investigation of the death of PTE
Jacob Kovco in that capacity?---I have, sir.

35 I show you two documents. Major, on occasions we've had some
difficulty with the audio on that particular microphone. So could I ask you
to speak up a little more than you otherwise normally would just so we can
catch it for the recording?---Yes, sir.

40 Now, the two documents that I've shown you, do you recognise those
documents?---I do, sir.

One of them has been redacted, that is, matters of operational security have
been blacked out. But is the other one, the one that's non-redacted, which
45 contains the annexures, your statement of evidence for this Board of
Inquiry?---It is, sir.

Is there anything about it that you wish to change or alter?---Only I seem to have left off the last sentence in my statement. It ends “occasions up until”.

5 That’s at paragraph 14 on page 4?---That’s correct, sir.

What amendment would you make to that?---That would have been “up until Detective Hayes deployed”.

10 “Up until Detective Inspector Hayes of the New South Wales Police deployed”?---That’s correct, sir.

15 Thank you. Do you have a pen with you to make that amendment? We’ll have one provided to you. Thank you, Madam Secretary. So the rest of us can follow, would you just say those words again, “up until”?
---“Detective Inspector Hayes of the New South Wales Police deployed”.

20 Having made that amendment, are you now satisfied that your statement with the annexures attached is a true and accurate record of your evidence for this Board of Inquiry?---I am, sir.

25 Sir, I tender the original statement as the classified exhibit and the redacted version which does not have the annexures to it, just the four-page covering statement.

PRESIDENT: Is there any opposition to that approach?

COUNSEL REPRESENTING: No, sir.

30 **#EXHIBIT 142 - MAJ PEMBERTON'S STATEMENT IN REDACTED AND CLASSIFIED VERSIONS**

35 COL GRIFFIN: MAJ Pemberton, Exhibit 5 in these proceedings is a matrix call sign that appears on the table in front of you that sets out persons who are deployed in the Middle East Area of Operations and identifies them by a number next to their name and rank. Do you see that?---I do, sir.

40 Where you have occasion to name any individual who is in theatre, would you do so by reference to that matrix referring to the number, please?
---Yes, sir.

45 Would you, firstly, tell the Board about the structure of the Military Police within Army in terms of the policing role and that particular area that you described before, which is your posting, being the Special Investigation

Branch?---Yes, sir. Currently the Military Police, being the 1st Military Police Battalion, is a land command unit and as such it comprises five companies. Two of those - sorry, four of those are general duties companies and the fifth company, my company, is the Special Investigation Branch. We are deployed in 16 locations across Australia and subsequently come into my command as far as criminal investigations are conducted on behalf of Army.

10 What is the principal role of those investigators under your command?
---Criminal investigation, sir.

15 In that capacity are they double-hatted to undertake other general police duties or other Army-related tasks or solely for the purpose of criminal and disciplinary investigative procedures?---Their major posting or appointments are as investigators. They don't undertake general duty military policing roles unless there's a specific requirement, and that is probably highly unlikely. However, they are required to be soldiers as well and undergo normal Army training.

20 What is your background in criminal investigation?---I joined the Military Police in 1972. In '74 I transferred to the Special Investigation Branch and I've been an investigator since that time.

25 Have you also had experience in the civilian area of criminal investigation in any way?---Yes, sir. I was a senior court investigator with the Department of Veterans Affairs for 10 years.

30 Are you able to speak to the current training processes for the investigators?---In some instances, yes, sir, however, things have changed of course since I did my courses, and I haven't attended the current courses that are in situ at present.

35 Are the investigators at the moment trained by Military within the Military or is there any external involvement?---There is a requirement currently under their papers that they have to attend external courses run by civil police agencies, those courses being scenes of crime examiners' courses. Other courses that we would like them to attend or attachments per se would be to organisations like homicide squad or sexual offences, fraud and such of those natures that we don't normally get experience on a day-to-day basis.

45 Did the Special Investigation Branch have any involvement in the criminal incident investigations, for example, in the East Timor operation where there were alleged atrocities and killings?---Yes, we did, sir.

Have there been other types of serious crime investigations that the Special Investigation Branch have been involved in in recent years?---In recent

years, last year was the inquiry into the death of WO2 Nary in the Middle East. Also a soldier who's name eludes me from 3RAR in the Solomons. And there are one or two I think fatal (inaudible) 10.32.10 in East Timor.

5 Are you able to say which civilian agencies are involved in assisting with the training of Military Police investigators and Special Investigation Branch investigators currently?---We use the New South Wales Police, however, there are courses that we attend both in Queensland and New South Wales - and, sorry, Victoria.

10 Coming now to your involvement in the investigation of the death of PTE Jacob Kovco, I want to just expand on some matters contained in Exhibit 142, that is, your statement to the Board. Again I'd ask you where names are mentioned you might just care to have regard to the redacted
15 copy of your statement as well and the matrix. You say at paragraph 2 that you are the Officer Commanding the Special Investigation Branch and you're based in Canberra. Is that right?---That's correct, sir.

20 But you have investigators spread at 16 locations, including your own, around the country?---In Australia, yes, sir.

At the time of Jacob Kovco's death did you have any investigators offshore?---No, sir.

25 None in the theatre of operations?---No, sir.

30 What is the chain of command for the Special Investigation Branch, that is, for you and your organisation?---Currently my Commanding Officer is LTCOL Pearce of the 1st Military Police Battalion, the CO of my technical control is vested in the Provost Marshall Army.

35 Two separate but parallel chains of command, one for operational and normal military functions, the other one being the technical chain for the investigations themselves. Is that right?---Yes, sir. If I could explain that the CO is responsible for the investigators whilst the Provost Marshall Army is responsible for the investigations.

40 Is that comparable, therefore, to Chief of Army's role to raise, train and sustain the land force, the Army, and the operational command through VCDF to run the operational side of the house?---Yes, I would agree with that comment, sir.

45 So LTCOL Pearce, as the CO, is your direct chain of command for administration and normal command purposes, Provost Marshall Army, and that was LTCOL Foxe?---That's correct, sir.

Is responsible as your technical chain for criminal disciplinary

investigative functions?---That's correct, sir.

I understand from your statement at paragraph 3 that you first became involved in the death of PTE Jacob Kovco, your first knowledge was at
5 about 0500 hours on 22 April?---That's correct, sir.

How did that come about?---I received a telephone call from the operations officer at 1MP battalion, WO2 Anderson.

10 That operations officer would be located at the Land Headquarters, is that right?---Currently here within Victoria Barracks at 1MP battalion.

When you say 0500 hours: Canberra time that you received that call?
---That's correct, sir.

15 What was the effect of the conversation and what did you do as a consequence of it?---I was informed of the death of PTE Kovco and at that stage our FAT element was requested to deploy. As a result of that, I then had a conversation with WO2 Anderson regarding the circumstances as to
20 what had happened.

Just before you go on, what is the "FAT element"?---It's what we call the flyaway team. Under the Chief of the Army's prepared directive, we are required to maintain a flyaway team to be deployed at seven days' notice
25 to move to anywhere external to Australia for investigation purposes.

Yes, please go on?---I inquired of WO2 Anderson as to what had happened, the circumstances. He could only supply me very vague details. I said, "What I want you to do is to make sure through the chain of
30 command that we get the message across that the body is not to be moved until the SIB get there and to be able to do their initial inquiries."

I understand that attached to your statement are a series of emails and if you could turn to them, please. The first one that appears after the last
35 page of your statement: would you just tell the Board what that is, please?
---This was an email that WO2 Anderson sent to the LHQ watchkeeper and there were a number of other individuals who were cc'd. The basis of that was we were informing them as to who the people were - the SIB people who were to be deployed.
40

This was issued as a consequence of your conversation with the watchkeeper; is that right?---With WO2 Anderson, sir.

If you just look at the date/time group on that email, you'll notice that the
45 document has a classified heading?---Yes, sir.

It's part of the reason it hasn't gone into the redacted version as an exhibit.

As I understand it, some of these personnel are now in theatre so we'll need to refer to the sheet next to you for that regard?---Yes.

5 But it was generated according to the date/time group at 0846 hours on the morning of 22 April?---That's correct, sir.

That would be Sydney time; is that right?---That's correct, sir.

10 I notice that in the third paragraph from the bottom the author has referred:

A lesson learned from the sudden death of the SAS member was that the SIB will need to view the body as part of the incident scene.

15 It then says:

Could any questions in regard to this be directed to MAJ Pemberton directly.

20 ?---Yes, sir.

That was your advice to WO2 Anderson; is that correct?---It was, sir.

25 Returning to your statement, at paragraph 3, you then described that the conversations with WO2 Anderson had occurred, and you say at a little more than halfway down in a sentence commencing:

As a result, I directed that he contact the security detachment and ensure that the body was not moved from its current location.

30 ?---That's correct, sir.

35 Why did you take that view?---Firstly, that the body itself contains vital forensic evidence and, by moving the body from its current location, it possibly either lost, destroyed or contaminated any evidence that was on the body at that particular time.

40 Would you please go on and describe what happened after that?---After this initial contact with WO2 Anderson, I then contacted Soldier 47 who was the OIC of my flyaway team and told him to stand to with his team.

Just before that, in the previous paragraph, you went on to say:

45 *I further requested that the scene of the shooting be cordoned off, secured and protected until the flyaway team arrived in the country.*

?---That's correct, sir.

Who did you make that request to?---Again, to WO2 Anderson.

5 Are you aware or whether or not he forwarded that request?---I'm not aware of whether he did or not.

10 You were describing your conversation with Soldier 47; what happened then?---I contacted him by telephone and told him to stand up the FAT. I gave him the details of what I had. We discussed intricacies and equipment issues that we probably would have, how long it would be before he would be available to move. He then rang me back some time later and told me that the three members of his team were ready for deployment.

15 Did you select him as the team leader for that flyaway team?---I did, sir.

20 Would you tell the Board the reasons for that selection and something about that particular person?---Soldier 47 is the most experienced investigator that I have, having completed over 20 years' service. He has experience in - operational experience in East Timor in sudden deaths. He was also attached to the Victoria Police Homicide Squad for a period of time as part of his training.

25 Please now take us through the statement to the events as they unfolded from there?---At paragraph 4, at around 7.30 that same day, he contacted me by telephone and stated that his team had stood up and they would congregate in Brisbane later that day. All movement was being arranged through 1MP battalion so it was understood at that particular time the team would fly out of there. It was at that stage I informed him that PTE Kovco's body was at the Baghdad International Airport Mortuary and it would be held there until he arrived in country.

35 There's one further matter contained in paragraph 3 of your statement that I'd ask you to expand on: that is the question of Direct Liaison Authority that's mentioned in the last four lines there. Please tell the Board about that?---WO2 Anderson had informed me that Land Force Headquarters had authorised direct liaison between the SECDET and myself and/or Soldier 47.

40 What did you understand that to mean?---That we were in a position where we could contact them through the senior Military Police officer that was there if there were any issues that needed to be done or requested or asked.

45 Did you see that as a means of expediting your processes, that is, that you could go directly to a point of contact rather than having to go - following a chain of command to receive permission to then go and talk every time

you wished you or your investigators to speak to someone?---That's correct, sir.

5 Would you return to your statement at about paragraph 5 and describe what happened?---Later that day I received a further phone call from WO2 Anderson informing me that my commanding officer, LTCOL Pearce, had directed that my team be stood down. That was as a result of higher authority saying we were not to go at that stage. LTCOL Pearce later
10 contacted me and I spoke with her direct. She had informed me that she'd been given a direct order by the Chief of the Army not to deploy the SIB at that time, however, that they would deploy.

They would go but it was as yet undetermined when?---That's correct, sir.

15 Did that have any effect on your arrangements at that time?---It did because Soldier 47 at that particular time was in Brisbane and two other members were in Victoria. We had to get kit together, we had to get all three together. There was to be a debrief, of course, or a briefing by
20 Soldier 47 to his other two team members. It was the fact that we were not in control of flight details so we were just sort of left out in the cold there for a while, weren't sure whether we were going or whether we weren't going.

25 Did it stop your processes or simply make them unclear?---It didn't stop our processes. I directed that Soldier 47 organise the other two team members to deploy to Brisbane, given that we may not go on the Saturday, it may be a few days later, or whatever, but just to get everybody in the one location so that we're able to deploy as soon as we get the green light to go, sir.

30 So the effect of it was not to prejudice your preparations, you were able to continue with your preparations for the deployment, you just weren't sure when it was going to happen?---That's correct, sir.

35 Yes, please go on. What happened after that?---Later that day at about 1600 hours I again was contacted by WO2 Anderson. He told me that the team was now to deploy that evening as planned originally. I then contacted Soldier 47 once again and informed him, however, at this stage it
40 appeared that all three team members, or at least two of the team members would leave from a separate location and not all leave together. Ultimately, they did deploy from both Brisbane and Melbourne respectively that day.

45 At the same time as originally planned?---Yes, sir, it was that original flight.

This was all on 22 April?---Saturday, 22 April, yes, sir.

5 You describe a further event at about 0200 hours on Sunday, 23 April, where you received a telephone call from Soldier 34, who appears on the list before you, being the movements officer situated or located in the Middle East area of operations. Is that timing again Canberra time that you received that call?---It is, sir.

10 Would you tell the Board the essence of that discussion, please?---Soldier 34 asked me via my mobile telephone, "Are you the person whose name appears on the signal directing that the body of PTE Kovco not be moved?" I said, "Yes, I am." She asked words to the effect, "I've been tasked to have the body returned to Australia as soon as possible, why can't the body not be moved?" I informed her, using the words to the effect, "I had an investigation team on its way to investigate the
15 circumstances of how PTE Kovco died and that nothing was to be touched and it may result in the loss of evidence if the body was moved." She said words to the effect, "Okay, and I'm sorry for ringing you at this hour."

20 What was the next development in that?---At 0500 hours that same morning I received another phone call.

25 It will be Soldier 39 on your list?---From Soldier 39, who identified himself as the Chief of Staff at CJTF633 in Baghdad. He said, words to the effect, "I'm the Chief of Staff at 633 and I need to have a chat with you. You had a conversation with the movements officer earlier this morning, but I am aware of the insecure means that we are talking of. Do you know what I am talking about?" I informed him that I was. He said words to the effect, "I have a message here that has your name on it and that you have directed that things not be moved." I said that was correct
30 and explaining, using the words to the effect, that "We had to ensure that things remain as they are." He said words to the effect, "I need your concurrence to move things." I said words to the effect, "I cannot give you that and that possible evidence would be lost and also contaminated if things are moved." He said, "Well, it will be risk-managed and the body has been moved already." I said, "If you have already moved the body,
35 why do you want my concurrence." He said, "So we don't bang heads at a later date," or words to that effect. I said, "Well, we will have now lost vital evidence." He said, "You need to understand the bigger picture here and why it is important to get the body home." I said, "I do understand the
40 bigger picture and that is why the body should not be moved. Where is the body now?" He said words to the effect, "Kuwait or on its way." I said, "Can the body remain there until my team gets into country to have a look at it?" He said, "It will be there for a little while." He then said he was sorry for ringing me at this time and hung up.

45 I show you a document. Would you turn to paragraph 7 of that document, please, and follow as I read it. This is a statement of evidence provided to

me by Soldier 39 which is sworn and which is yet to be tendered in these proceedings.

5 *Given the competing requirements that I was aware of from
investigative authorities and the need to repatriate the body, I
phoned an MP, that is, a military policeman, who was the
nominated point of contact in the matter, MAJ Pemberton, in
Australia at 2245 hours D time on 22 April 2006. MAJ Pemberton
gave verbal approval to move the body to Kuwait. MAJ
10 Pemberton accepted that moving PTE Kovco's body to Kuwait
provided an earlier viewing time than would otherwise have been
the case while simultaneously facilitating repatriation to
Australia.*

15 What do you say to that statement, MAJ Pemberton?---That statement is
not correct, sir.

 After that conversation what did you do?---I then telephoned Soldier 47
and left a message on his mobile phone to inform me as to where the body
20 would be and that he needed to view the body in Kuwait before travelling
to Baghdad.

 Now, did you have discussions with Soldier 47 after he departed?---It was
a couple of days before we could get telephone comms. It was about 96
25 hours between the time that we were tasked to the time that he actually got to
the incident scene.

 About 96 hours?---Yes, sir.

30 Did you have discussions with him in Kuwait when he viewed the remains
of PTE Kovco?---We had a telephone conversation to say that he had
actually viewed it. He'd taken photographs, he'd taken video at that
particular time.

35 Do you see on the list of names before you Soldier 2?---Yes, sir.

 Did Soldier 47 have any discussions with you about Soldier 2?---No, sir.

40 I note from paragraph 10 of your statement that you had as well as
telephone conversations with Soldier 47 an exchange of emails. And those
are the documents annexed to your statement as well?---That's correct, sir.

45 If you would turn to those emails and look at the third page, that is, a
message to you from Soldier 47 at 1438 hours on 26 April. Do you see
that?---Yes, sir.

 In it he states in the first paragraph:

Require AFP lab warned out.

AFP being?---The Australian Federal Police.

5

Thank you.

10

AFP lab warned out for receipt of pistol for fingerprint and ballistic examination as well as incident scene drawing. Require customs warned out for entry back into Australia with pistol.

15

Did you in fact take any action to warn out the AFP lab as described there?---This was a result of discussions that we'd had prior to the signal. We were aware that the pistol had to be examined. We were also informed that PTE Kovco's body was to go to Melbourne for a post-mortem examination. We had had discussions about we needed to ask the coroner in Victoria for certain requests on his behalf in relation to PTE Kovco's body; namely, we wanted to see if there was any GSR or gun shot residue, on his hands, powder burns to his head, and we wanted the coroner to look for the trajectory of the round as it had passed through the body. We also wanted him fingerprinted, his cadaver fingerprinted, so that we could then ask the AFP to conduct any ballistic - any, sorry, fingerprinting testing on the weapon and also for them to conduct any ballistics. We have used AFP before and at that stage we still believed that, as we have with other cases, the only thing Victorian coroners would do would be the post-mortem only.

20

25

30

Now, was there any discussion between yourself and Soldier 47 about the term "bagging the hands of the body to preserve gunshot residue" at any time?---We had spoken about a number of issues regarding the body. One of those that he informed that the body had already been washed down, which would in my opinion and in his that any possible gunshot residue would have been dissipated off the hands. However, at the particular time when he viewed the body - my understanding at that particular time was it would have been a waste of time to bag the hands at that stage.

35

40

In respect of the ballistics examination that he mentions in that email and the incident scene drawing, was there any development in that regard?---No, we had only made initial contact with the AFP to say, you know, "Would you be able to assist us in those sorts of things?" As previously as they did for the WO2 Nary death, they were more than happy to assist us where they could.

45

Now, returning to paragraph 11 of your statement where you describe conversations with the Victorian State Coroner's office and a request that the coroner examine for powder residue and burns. You state there that you understood that the Victorian authorities would conduct measurements

for the trajectory of the round and also the fingerprint side of the house?---
Yes, we had asked them - in fact Mr Sparrot, I'd asked him if he would
ensure that that was conducted.

5 In the next paragraph you talk about the pistol itself. Would you tell the
Board about that, please?---Again Soldier 47 and I had had a number of
discussions and he was being pressured in relation to his investigation and
he in fact mentioned to me that the word has it at that particular time that
10 New South Wales was going to be handed - the matter was going to be
handed over to New South Wales to investigate. He had said that he'd
been told through 633 that the weapon was to be returned back to Australia
as quickly as possible to the New South Wales Police via the coroner's
office. I directed at that time that under no circumstances was he to release
15 the pistol to anybody until we were given direct clarification as to what
was occurring. I informed him that if he received any further directions or
in fact orders, then that they were to contact me.

I just want to draw your attention to some of the email exchanges at around
this time. If you could turn to your emails and about the fourth one
20 through which is dated 27 April 2006 with a transmission time of 1806.
Do you have that?---Yes, sir.

You state in the - it's from you to Soldier 47 - that you have been informed
that the New South Wales coroner will investigate?---Yes, sir.

25 *However, I am told that the New South Wales Police homicide
squad will also be involved.*

How did you come to that knowledge?---Once again, there was a lot of
30 involvement with Headquarter JOC, not directly involved with me, but I
was being informed either by Soldier 47 in country or through the Provost
Marshall in me asking him to look at who was dealing with this matter that
these things were going to be ultimately looked after by the New South
Wales coroner. We'd had no confirmation to hand the matter over. It was
35 just I guess messages back and forth between Soldier 47 and myself and
other people outside that chain.

If you turn over the page there's an email dated 29 April 2006 at 1428
40 hours. It's from Soldier 47 to you. Do you see that?---Yes, sir.

He says:

*It's Saturday. Much better day yesterday. No harassing phone
calls.*

45 ?---Yes, sir.

Do you know what he means by that? Did he discuss that with you?---We did. Continually from 633 he was getting phone from the legal officer, from the Chief of Staff, whatever it may be, as to how the job was going, you know, what's happening, those sorts of phone calls. Ultimately it was
5 633 that told him the matter was to be handed over to the New South Wales Police - sorry, the New South Wales coroner, and that the New South Wales Police homicide squad would be involved. It was 633 that directed that he return the pistol back to Australia.

10 Did you have discussions with him about the return of the pistol, how to do it?---Yes, we did. In normal circumstances, like in Australia, the weapon no doubt would be placed into a plastic bag and just taken to the local ballistics. However, because of the type of climate in the country, that any
15 possible DNA or any fingerprinting that was on the weapon we believed that to put it into a plastic bag was probably not the right process to do. We have been taught that you can - these sorts of exhibits can certainly be tied into a box, and in fact the boxing methods of weapons is currently used right throughout the United States as a common practice. So the only
20 way we could see to secure the weapon in the box and to stop it from moving around was to tie it down, which it was done.

You decided against placing it in a plastic bag and you mentioned the climatic conditions. Are you referring there to the heat and the dust?
---Yes, sir.

25 Or principally the heat?---Principally the heat. Any fingerprint evidence, its greatest deterrent is moisture in the air.

You were concerned - am I right in saying that the moisture being that a
30 sealed bag in heat may have produced condensation?---Yes, I believe it would have sweated in the plastic bag.

Now, when did you formally become aware of the official involvement of the New South Wales coroner's office and the New South Wales Police
35 Service? Perhaps if you refer to paragraph 13 of your statement it may assist in that recall?---I had a telephone conversation at 2000 hours on that evening with a female person who identified herself as the acting head of the New South Wales Police homicide squad, Detective Superintendent
40 Linda Howlett. As a result of that conversation, I attended a meeting at 1100 hours on 28 April at the coroner's office, New South Wales, in Glebe. There I met the New South Wales coroner, Mr John Abernathy, the Assistant Commissioner of the New South Wales Police, Graham Morgan, Detective Superintendent Howlett and Detective Inspector Wayne Hayes. At this meeting I was informed that the matter of PTE Kovco's death had
45 now been handed to the New South Wales coroner and that he would exercise jurisdiction and have the matter investigated by the New South Wales Police homicide squad.

Were you made aware of the involvement of any senior military authority in the decision to hand the matter over to the state agencies?---Sir, whilst I was having the meeting with Mr John Abernathy he continually used DPE, which is MAJGEN Evans's name, that he had been in contact with him.

LTCOL BERKLEY: I'm sorry, Counsel Assisting, I just didn't hear that last part of that statement.

COL GRIFFIN: I believe that the witness said, "Head of DPE, MAJGEN Evans and that he'd been in contact with him," that is, Mr Abernathy had been in contact with MAJGEN Evans. Is that right? ---That's correct, sir.

LTCOL BERKLEY: Thank you, sir.

COL GRIFFIN: Again to return to your chain of emails, if I draw your attention to the next one in the order in which they appear that I wish to draw your attention to is 28 April 2006 at 1432 hours?---Yes, sir.

From Soldier 47 to you. Am I correct in saying that that time date time group when it's to you from Soldier 47 it would be registering in his local time in the Middle East Area of Operations or is it coming up at your receipt time? Do you happen to know?---No, I'm afraid I can't answer that, sir, I don't know.

In any event, on that particular email he set out a series of matters that had been discussed between you and he this morning in relation to the investigation. I note at the bottom of the page he says:

My only concern was yesterday's phone calls from all and sundry telling me what to do. But I kept my cool and stuck by my guns until we chatted.

What was that about?---Again it was the chain of command, namely 633, directing what was to occur.

Are you able to say as his Officer Commanding whether that was interfering in the conduct of the investigation or simply being a command interested in what was going on?---I would use the term "interference".

That was how he conveyed to you his understanding of what was happening?---Yes, sir.

Earlier I read to you a statement of Soldier 39, paragraph 7, and invited you to comment on it and you said the statement was wrong. Do you adhere to the evidence you've given in respect of the content of that

conversation which is set out in your statement?---I do, sir.

5 During the course of your investigation and your dealings with your team leader on the ground, did you have discussions about the securing of the room itself and the evidence contained therein?---Yes, we did, sir.

10 Would you tell the Board about those discussions, please?---As was indicated earlier on in my evidence, that we directed that the room be sealed. When Soldier 47 arrived in country he informed me that a number of people had gone into the room and recovered items prior to the investigation team arriving. Once they got to the area they then processed the scene, which is what the scenes crime examiner is trained to do, to detect, collect and preserve evidence.

15 Did he discuss with you the hand-back of the room?---Yes, he did, sir.

20 What was that discussion?---Once the room had been processed from our perspective, then there was no longer a requirement to hold it. We'd collected everything - well, the team believed they could have at that particular time by way of evidence. Then it was handed back to the unit simply because the space was required. At that stage we had no indication at all that any other agency was to become involved in the investigation.

25 What capacity does the military Special Investigation Branch have in respect of DNA testing?---We have no DNA testing, sir. We do not have legislation to cover it.

30 Does it follow from that that you also have no training in that area? ---That's correct, sir.

35 What capacity does the military Special Investigation Branch have in respect of swabbing for blood stains, other physical evidence of that nature?---We are trained to detect, collect and preserve. So the swabbing of areas is a normal process, however, once that swab was collected it then goes off to a further or another agency for examination.

40 What training or expertise does the Special Investigation Branch have in respect of ballistics examination and collection?---Prior to last year, other than lectures and presentations perhaps given by external agencies, that would be the only training they received. However, last year we were successful in having people attend the New South Wales Police ballistics course which was run by them. In fact, SGT Hession was one of those people who attended that course. Once again we don't have any expertise in the examination phase of ballistics. Simply again as a scenes of crime examiner we would detect, collect and preserve for somebody else to make
45 the examination.

Do you have any knowledge of the United State's military's in-theatre capacity, particularly in the area around Baghdad, for expert investigation of DNA and ballistics matters?---I don't know what their total capacity is, however, I believe from previous knowledge that they have the capacity to process that sort of information or evidence and that currently, given that we now have people deployed in the area, there has been liaison between both the US Military Police and the British SIB in relation to if there is a requirement that they may be able to assist us.

5
10 That's now?---That is now, sir, yes.

That's as a consequence of you having a permanent presence of an investigation asset in theatre. Is that right?---That's correct, sir.

15 Are you satisfied that you have sufficient numbers in that asset in theatre now to deal with similar matters of this nature?---No, sir. From my perspective as an investigator, the requirement for an incident that has occurred in the unfortunate death of PTE Kovco requires a specialist team to be able to investigate that sort of thing. Currently we have three
20 investigators deployed but they are in different locations. As you would be aware yourself, movement in that area is rather difficult and consequently is dependent upon air availability at the time. So by dispersing our resources to various locations with no corroboration, i.e. one investigator up on their own, it creates an issue from my perspective as an investigator.

25 Are you able to put a figure at the moment on the asset that you would consider to be appropriate to be in theatre for your purposes?---Again, as an investigator, I would look at a minimum of a three-man team: one as being a specialist scenes of crime examiner; and the other two as
30 investigators, one of those of course being the command element.

You do not have that at the moment because they are spread, or you do? ---No, we have currently three investigators deployed in the MEAO but they are all in separate locations.

35 Ideally, you would prefer them to be together?---Yes. However, as I said, in my belief, we should have a minimum of a three-man team in each location.

40 In each location?---Yes.

For operational reasons, we won't go into a discussion of how many locations that amounts to, but your view is a three-man team required at the operational centre for the particular locations?---Yes, sir, and then the
45 capability of a reach-back asset if it was required.

You also mentioned liaison with coalition partners and their assets and

expertise in that regard. Would you just expand on that, please?---Again, given the size of our organisation as compared with the United States and Great Britain, they have a greater capacity to process evidence, whether it be in country or external, and again, we would have the opportunity to draw on them in country for their expertise if it was required and of course if the coalition partners agreed that that would occur.

As I understand it, from the outset your intention was that the body not be moved until your investigators arrived and were able to examine the remains of PTE Jacob Kovco?---That's correct, sir.

What expectation did you have as to the movement of his remains after your investigators arrived?---Would you clarify that, please?

What did you anticipate that your investigators would do with the body after they had arrived and seen his remains at the point of where it was being held at your request?---I guess that's a bit of a two-pronged question there. Firstly, from an investigative perspective, the body becomes an exhibit so therefore it should have been handled accordingly in that context. In the purest term, it should have been controlled at all stages by the investigator or Military Police or whatever the case may be at that particular time. In this particular case, when the investigators got to Kuwait, all I was informed at that particular stage and was of the belief that the repatriation of PTE Kovco's body more important than the actual consideration of the investigation process that should have accompanied it.

What would you have expected to happen in terms of the return of the body to Australia if your investigators had been able to meet up with PTE Kovco's remains before he was moved?---They would have accompanied the body back to Australia, it would not have gone out of their possession.

Has that happened in the past?---No, simply because we have never been deployed - up until the stage of Vietnam - where we were in country when those sorts of things occurred, we've always had reach-back.

Was that your expectation that that was going to happen, that is, that one of your people would bring the body back?---No, sir.

It was never discussed?---It was never discussed.

It simply at the moment what you would like to have happened had things panned out the way you'd originally asked, that the body be kept in situ? ---That's correct.

But you didn't express that to 47 or to anyone else that one of your people would bring the body home?---No, sir.

Do you know if Soldier 47 - I'll withdraw that. If you hadn't discussed it with him then it didn't arise?---No, sir.

5 You're aware of the investigation only from what you've discussed with Soldier 47 while he was away, but have you also had meetings with him face to face?---Only one, when he came back after the inquiry prior to him deploying again to the theatre.

10 From your discussions with him both away and on that discussion on return, what is your attitude to the investigative process that he and his team undertook?---From my opinion, they had a very professional approach and they did a thorough investigation given the circumstances that have occurred.

15 Is there anything that you would like to say to the Board about this activity?---Sir, if I may, with your concurrence, I wish to make a statement for the record on the matter of the conduct of the Military Police SIB investigation team investigating the circumstances surrounding the death of PTE Kovco. As I have stated in my evidence, an SIB investigation team
20 was tasked on 22 April '06 by Headquarters JOC through the Chief of the Army to attend the MEAO some hours after the fatal shooting of PTE Kovco. The delay was the consequences of the reach-back protocols that were in existence for the on-occurrence deployments of SIB investigators to operational theatres.

25 It was not until late that evening of 22 April that the SIB investigation team was able to leave Australia. Further, it took the SIB investigation team 96 hours to finally arrive at the incident scene. During that time, PTE Kovco's body had been moved from the US Hospital, where he was
30 pronounced life extinct, to the morgue in Kuwait before the investigation team arrived in Kuwait itself. The movement of PTE Kovco's body was contrary to my request to CJTF633. In order to preserve forensic evidence, his body should not have been moved until after the SIB investigators had been afforded the opportunity to conduct their initial actions with the
35 deceased.

The two soldiers from PTE Kovco's room had been chosen by their chain of command to accompany his body before the SIB investigation team arrived. Accordingly, there was a resultant delay - I believe nine days -
40 until the SIB investigators were afforded the opportunity to interview them.

Trace material, i.e. gunshot residue, was not collected nor preserved before the SIB investigation team arrived. The incident room was preserved,
45 however, members were allowed to re-enter to collect personal possessions before the SIB investigation team arrived. Accordingly, vital forensic evidence, which included the clothing of PTE Kovco and his two

roommates, had been either destroyed, lost or washed before the SIB team arrived.

5 Up until Wednesday, 26 April 2006, my understanding was that the matter was the sole jurisdiction of Defence and that the SIB were to be the investigative agency. As a consequence, in my capacity as the officer commanding of the Military Police SIB, I established contact with the State Coroner of Victoria where I had been informed that the post mortem was to be conducted. On the evening of Thursday, 27 April 2006, I was
10 informed that the New South Wales Police Homicide Squad had been directed to investigate the incident. In addition, I was informed that as a consequence of a direction given by CJTF633 to the SIB team, PTE Kovco's pistol was to be despatched as soon as possible to the New South Wales Coroner's office.

15 About 1100 hours on Friday, 28 April, I attended a meeting at the direction of the Provost Marshall, Army, at the New South Wales Coroner's office in Sydney. Also in attendance was Detective Inspector Hayes of the New South Wales Police Squad. During this meeting I was informed by the
20 New South Wales Coroner, Mr John Abernethy, that he had been given jurisdiction by Defence to investigate the death of PTE Kovco.

25 With the benefit of hindsight, some things may have been done differently. For example, if investigators were on the ground at the time, then vital forensic evidence would not have been lost or destroyed. If the body had not been moved, then again vital evidence would not have been lost or destroyed. However, I have taken particular umbrage to the way Military Police SIB investigators have been portrayed in the media. Given the
30 circumstances that I have spelt out in my testimony, my SIB investigation team displayed a very professional approach and have conducted a thorough investigation, which is as a result of their significant civilian police training and secondments and previous operational experience.

35 To that end, I have received similar opinions from the New South Wales Police Homicide Squad detectives that they were satisfied in the main with the actions of my SIB investigation team given the litany of delays and other contributing issues that were beyond the control of the SIB investigation team. The professional integrity and credibility of my
40 investigators has been unnecessarily tainted because I do not believe that the complete story regarding this involvement has not been told until now.

45 MAJ Pemberton, the Board has been empowered by the Chief of the Defence Force to make recommendations as part of its report. Are there any matters of an investigative nature that you wish to draw to the Board's attention?---Sir, I think currently with the DICAT report before the CDF
- - -

I beg your pardon, the?---The DICAT report.

Are you able to - - -

5 PRESIDENT: Translation, please?---It's another acronym that - I'm really
going to struggle on this: Defence Investigative Capability - I can't
remember the rest of it. It's as a result of the review that was done into the
service police and also the Senate Inquiry that occurred a couple of years
10 ago or last year. There is a report before the CDF and the service chiefs
that the Provost Marshall, ADF, LTCOL Tim Grutzner, will be responsible
for all investigations if that in fact is accepted. I believe that from a
policing perspective within Defence that that is a very good step in the
right direction, however, it has always been an under-resourced
15 organisation. I use the term we are a necessary evil but, when we're
required, everybody wants to embrace us. But as soon as issues occur and
we become an issue, then we're pushed to a corner. Whilst I understand
that we belong to a fully disciplined organisation and that organisation as
such has a chain of command and we all fit in in various perspectives, we
20 are just a small cog in a big wheel. However, at the end of the day, this
sort of incident that has occurred here and other incidents in the past
highlight the fact that from an organisational perspective we don't tend to
put credence to issues such as this until after the fact. If we were better
equipped, had more manpower, which is the general catchcry of
25 everybody, then I'm sure that we would perform much better in the big
picture.

COL GRIFFIN: Do I understand you to be saying as well as the
resourcing and the training, that there is a command and control issue as
well? Are you referring there to independence from the chain of
30 command?---Yes, sir, I am.

The DICAT report that you referred to, do you understand that to be
dealing with that particular issue that you've just described?---I do, sir.

35 As I understand it, you endorse that approach in the DICAT report; is that
right?---From my personal opinion, yes, sir, I endorse it.

Sir, I have no further questions at this stage for MAJ Pemberton. I note the
hour and I wonder if you might consider it appropriate to take a short
40 adjournment before Counsel Representing embark on their questions?

PRESIDENT: Is everybody comfortable with that approach?

45 COUNSEL REPRESENTING: Yes, sir.

PRESIDENT: Ten minutes, then.

COL GRIFFIN: Thank you, sir.

ADJOURNED

[1130]

5

RESUMED

[1202]

10 PRESIDENT: Thank you, ladies and gentlemen. Any further questions of the Major, Colonel?

COL GRIFFIN: Not from me. Thank you.

15 PRESIDENT: LTCOL Wilkinson.

LTCOL WILKINSON: No, sir.

PRESIDENT: LTCOL Green.

20

LTCOL GREEN: No, sir.

PRESIDENT: LTCOL Berkley.

25 LTCOL BERKLEY: Yes, thank you, sir.

<EXAMINATION BY LTCOL BERKLEY>

[1202]

30

LTCOL BERKLEY: MAJ Pemberton, as you know, I'm LTCOL Berkley, and I represent Shelley Kovco, Jake's widow?---Yes, sir.

35 Of course you've no doubt seen and heard the family - Shelley, who instructs me, has a number of questions relating to the investigation in Jake's death and I intend to ask those questions of you such as they relate to your evidence?---Yes, sir.

40 But one thing that got me in the evidence was the risk management of the investigation. Can you think of a way that you can risk manage the loss of evidence?---No, sir, there is no way.

45 Did you understand risk management to mean that that body was to be returned to Australia by Anzac Day regardless of the loss of evidence?--- I'm not aware as to the day, but I'm certainly aware that there was a need to repatriate the body as soon as possible.

You didn't tell your CO that Soldier 39 wanted Jake's body back in Australia by Anzac Day?---No, sir.

5 Of course your CO hasn't given evidence yet, but I've been given a copy of an affidavit by your Commanding Officer which indicates this: MAJ Pemberton advised that Soldier 39 stated that HQJTF 633 had determined that the priority was for the return of the body by Anzac Day and that they would risk manage the investigation?---I had no knowledge of the term "Anzac Day", sir, at all.

10

So she might be mistaken in that. We'll get a chance to ask her of course, but you can't recall saying that?---Not Anzac Day. I certainly spoke to her in reference to the fact that I was told that the body would be risk managed, but certainly Anzac Day, as far as my recollection, never was mentioned.

15

So the risk management, as you understood it after your conversation with Soldier 39, was that regardless of the loss of evidence the body was to be returned to Australia?---That's correct, sir.

20

As an Army officer who's involved and has been involved throughout most of your career with policing, what did you do with that information other than tell your CO?---Well, I discussed it with Soldier 47. I told my CO. I told the Provost Marshall Army. At the end of the day I had no influence at all to alter the decision that had already been made.

25

Now, I suppose one of the evidentiary issues we need to get to in this Inquiry is a time line. As I understand your evidence is that you knew by 27 April 2006 that the New South Wales Police, the homicide squad, would be investigating Jake's death?---That's correct, sir.

30

Can you tell me the date that SGT Hession handed back the room to the SECDET?---No, I can't, sir, off the top of my head.

35

Obviously one of the things we want to find out about is whether SGT Hession or Soldier 47 knew or should have known that the New South Wales Police were going to investigate the matter or were coming to investigate the matter at the time of the handover. You understand that?---Yes, sir.

40

That's an actual inquiry that the family would want to know; you'd appreciate that?---Yes, sir.

45

But you just can't tell us the date of the handover?---No, I can't. All I can add is that it was not until the meeting on the Friday, which was the 28th, that the New South Wales Police, and in particular Detective Inspector Hayes said to me that they would like to probably come over and visit the

scene. Up until that stage there had been no indication to me or nothing said to me that they were definitely going over there.

5 PRESIDENT: What was that date again?---That was Friday, the 28th, sir, when I attended the New South Wales coroner's office for a meeting. It was the first time I'd spoken to Detective Inspector Hayes.

10 LTCOL BERKLEY: Do you know what time the FAT redeployed from Baghdad?---No, I'm not aware of the time.

Sorry, the date?---They deployed to Baghdad or from Baghdad?

15 Redeployed back home from Baghdad?---No, sir, off the top of my head I can't recall that date.

I just see from some email traffic that they're at least there on 29 April? ---They were informed - and there's some toing and froing here in reference to those messages regarding the New South Wales Police going into country and that they would have to undergo specific training. There was talk of an escort officer accompanying them into country. There was talk of my team coming out. However, at the end of the day we facilitated it by leaving the team in country until they actually arrived.

20 That wasn't the question. They were still there, according to the email traffic, as at 29 April 2006?---Sir.

25 So you simply can't tell us and we can ask obviously SGT Hession the date. I just couldn't find it in his statement. But that doesn't mean anything, I might have missed it. All right. You could perhaps make inquiries, could you?---I will, sir.

30 But in any event, contrary to advice from Soldier 46, the scene of the incident had been contaminated?---That's correct, sir.

35 Of course you as an experienced investigator know all about Lockhard's principle and that's what you would say was the contamination, the mere fact that there was interaction with other people being in that room?---Yes, sir, that's correct.

40 Did you contact Soldier 46 directly at any time?---No, sir, I did not.

That all came through the operations Warrant Officer at 1MP Battalion? ---That's correct, sir, and I believe Soldier 47 contacted Soldier 46.

45 But as OC5 in P Company and basically in charge of the SIB you were made aware of the contacts?---Contents of?

The contacts?---The contacts, yes, sir, I was.

5 You were aware that Soldier 46 passed on information to the Command both of SECDet <delete> that the room was to be secured and that no-one was to enter it?---Yes, I was, sir.

You were also aware that that advice was ignored?---Yes, I am, sir.

10 Soldier 47 of course features in email traffic that is attached to your statement. As at - I'll just get it - 27 April 2006 Soldier 47 sent you an email which briefly set out two possibilities as to how Jake's death may have happened?---Yes, sir.

15 He says of course that he hasn't - until the fingerprinting of the weapon was done he hadn't discounted the third, being someone else being involved?---Yes, sir.

20 The first was this: that Jake returned to his accommodation after failing to clear his pistol and basically that he noticed - whilst standing at his bed he noticed the magazine in the pistol and went to correct that. He turned his shoulders towards the holster and using his left hand he held the holster. Using his right hand he pulled the pistol from the holster. However, either the pistol didn't release smoothly or he applied too much backward force. When the pistol was free from the holster his elbow in the backward movement knocks either the bed frame or mattress and the pistol discharged and course the bullet entered his head. That was a theory discussed between you and Soldier 47, was it?---Yes, sir, that's correct.

30 You've got one of your most experienced or the most experienced investigator you've got is Soldier 47. He's over there in country looking at the scene of the incident; that's correct?---Yes, sir.

35 So you, as his boss, and he are discussing a theory as to what might have happened. Did he give you a policeman's view, an investigator's view of whether that was likely or unlikely?---When we discussed a number of scenarios, given, firstly, that we hadn't - at that stage he hadn't interviewed the two roommates and it was nine days later that he actually got to be able to interview those two. We'd discussed a number of scenarios. The first scenario was that it wasn't enemy fire. So we discounted that entirely. 40 Then from there, given that his assumption is totally made on the fact of viewing the scene and not having any witnesses to assist at that particular time, then we looked at the possibility as the scenario you explained.

45 Of course another scenario, the second possible scenario, related to the diary entry that we've heard about?---That's correct, sir.

But it wasn't ever seriously contended in Soldier 47's mind that it was a

suicide, was it?---No, sir, again it was just another scenario that was discussed given what he had found at the scene.

You know what I mean by situating the appreciation of course?---Yes, sir.

5

Are you satisfied, both through your knowledge of Soldier 47 and his work in this case, that he appreciated the situation rather than situating it? ---Most definitely, sir.

10

Now, as an experienced and trained investigator on the ground reporting back to you, did he have some concerns at any stage about the inability or the reported inability of the soldiers in the room at the time - that's Soldier 17 and 19 - to see what happened in those moments before the shot rang out?---Sorry, would you rephrase that, please?

15

Did he raise any doubts or suspicions as to the reported inability of Soldier 17 and 19 to see anything just before the shot's fired?---Yes, we had a lengthy discussion in relation to that - and I'm not quite sure whether it was Soldier 17 or Soldier 19 off the top of my head - where we pursued the thought process that maybe what had occurred had actually been put into the back of that individual's mind and they didn't want to go through it again. So that they - in other words, we thought that one of them possibly did see what occurred, but repressed the thought. It was suggested at one stage that we may even consider looking at having that soldier put through a series of hypnosis so that we could try and recall or have him recall what he did or didn't see at that particular time.

20

25

But that wasn't pursued?---No, sir.

30

Of course as a lawyer I don't know, that there's many difficulties with getting the consent for those sorts of things. But at least that was something that you thought of doing because of the proximity of those soldiers to Jake when the shot was fired?---That's correct.

35

Of course we've heard in this Board some evidence, evidence of some rather eminent psychiatrists, to say that's possible, quite possible that people will block something out and can't recall it. You were aware of that - I don't know if "syndrome" is a proper word - aware of that way that the mind stores and sometimes conceals memories?---Yes, I have come across that before, sir.

40

You sent an email on 22 April. This is after you'd been woken in the early hours about Jake's death. I'm sorry, that's not you. It was your OPSWO sent an email on 22 April 2006 at 8.46 am. Counsel Assisting has asked you about that and I note of course it's security classification. But we've gone into this part at least, that there was a lesson learned from the sudden death of WO2 Nary of the Special Air Services Regiment, that we need to

45

view the body as part of the incident scene to get some certainty, if we can, as to what happened. You'd agree with that?---Yes, sir.

5 But there was also at that stage an understanding of political pressure to bring PTE Kovco home regardless of that lesson learned. Would you agree with that?---I would agree with that, sir.

10 Tell us with political pressure what are we talking about there? Who from? Was it an expectation of political pressure, an actuality of political pressure, an apprehension of political pressure? What was it?---I guess it's best summed up in that the chain of command, given the organisation that we belong to, sees issues in a - as was described to me, in a bigger light than perhaps I look at it or my investigators on the ground look at it. From my perspective, that the chain of command - it's not intentional that it wishes to interfere with the investigation, but it does see that there are other pressures being applied externally in some instances, perhaps in this particular case, so that the body was repatriated as quick as possible. I think that the major contributing factor in this issue was that everybody believed it was an accident at the time. So consequently they'd already made up their mind that it was an accident and no matter who investigated it or how many times, it wasn't going to change.

15 Certainly your investigator, Soldier 47, came up with the same view? ---Yes, sir, he did.

25 Once again you are not immune to the press reports. None of us are and we see reports and we've had the bungled repatriation of Jake's body to Australia. We've seen press reports that didn't in my view indicate the reality of SGT Hession giving evidence. You've made a statement addressing that so that you're satisfied that your team have done as good as they can in the circumstances in which the scene had already been contaminated?---That's correct, sir.

35 The liaison, the possibility of liaison with American and British policing assets in the MEAO, is that something that you would expect their cooperation or are we left to beg and borrow that capability?---I'm sure on the ground that they would be most cooperative and assist us as we would with them. However, it's like everything - as I alluded to earlier, we are a small cog in the big wheel and there is a requirement to have all these things cleared through the chain of command. So it's not a matter of us simply saying to our coalition partners, "We need your assistance here." There has to be protocols obviously that have to be put into place. Ultimately it would have a perhaps not certainly a political implication, but there may be some policy issues in Defence that have to be squared away first.

45 But at the moment we're left with begging and borrowing?---At the

moment we have a on-the-ground liaison agreement that we need your assistance or if you need our assistance - and we have actually supplied that to a coalition partner as late as last week - that we would cooperate with each other where possible.

5

That's more comforting, that there is actually something in place now. Was it in place at the time of Jake's death?---No, sir.

So then we were begging and borrowing?---Yes, sir.

10

I don't mean that in a pejorative sense, but you know what I mean, that we don't have the asset, we have to rely on someone else. So therefore we can't with any certainty obtain that assistance; with any certainty? ---That's correct, sir.

15

People who have given evidence before this Board have spoken very highly of the cooperation and the sympathy shown by particularly the US troops in relation to the repatriation of Jake. Have you had any - say the 10 CSH, do you know whether that facility has forensic sampling kits, say, swab kits in place that would have or might have been available to your investigators as at the end of April 2006?---Personally, I have no knowledge, however, I would say that from my experience that ability would be part of the hospital function.

20

25

I just want to go back to one other part of your evidence. You said at one stage that when you need it it's come on in, and when not needed you're pushed to the side. I take it that's your experience over as many years as an investigator?---Yes, sir, that's correct.

30

I want to put that in context for Shelley so that I can - because she wants to know this. Does that mean that where another imperative is judged to be more important than the fact-finding imperative that that other imperative has in your experience been given prominence?---Yes, sir.

35

The one thing that has been raised again on instructions, we know that the SECDET IX personnel at the scene - I don't know whether it's the CSI factor or something else - but they at least knew that as much as possible the room was to be secured?---Yes, sir.

40

We also know that they took certain decisions because - not being experienced in policing they took certain decisions to recover weapons and combat gear from the room and then some personal items, which were contrary to police advice. But is there room for people at the lowest levels right down to junior NCO level for some sort of training that unless there's a - firstly, to secure any incident site, completely secure it, unless there's a need, an operational need, involving the real risk of harm if it's not done, and unless that is present that site is to be totally secured even until some

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5 people in country can arrive?---Yes, sir, from my experience that training could be incorporated. I guess it all goes to critical incident management reporting, whether it be in this instance the death of PTE Kovco or a fatal traffic accident or in fact a traffic accident or any incident that the Military comes across. Certainly at all levels some people could be educated in what action they should take.

10 Did you feel frustrated at all in the early days of this investigation?---That would be an understatement, sir.

Thank you very much. I've got no further questions, sir.

PRESIDENT: Thank you. COL Young.

15

<EXAMINATION BY COL YOUNG [1229]

20 COL YOUNG: MAJ Pemberton, my name is COL Young, I represent the interests of PTE Kovco?---Yes, sir.

25 There are a few areas I'd like to explore with you, commencing with the chain of custody of the pistol being returned to Australia. You'd be familiar with the importance of chain of custody of evidence, physical evidence?---Most definitely, sir.

30 I wonder if you could help us with that. What's your knowledge of how it was returned to Australia and who brought it back?---When we were directed to return it it was boxed and tied into the box so that it wouldn't move. The box was sealed. That box was then handed to a member of the MP SECDET who was returning to Australia for I think medical treatment, I'm not quite sure. He then retained that weapon in his possession, in his backpack. He carried it in the cabin with him. He then when he arrived in Australia - I had previously spoken to customs and had the weapon cleared to come through customs. It was then handed to one of my SIB Warrant Officers who then accompanied that weapon with the New South Wales Police to the morgue and it was officially handed over there.

40 I'm pleased to hear that. Do you recall the name of the Military Police member who brought it back?---Yes, I do, but I'm not quite sure whether he's actually back in country at this stage.

45 I raised that because the Board has heard evidence from Soldier 34 that it was in fact Soldier 33 who returned with the pistol in custody. That's not your understanding?---That is incorrect, sir.

COL GRIFFIN: Perhaps MAJ Pemberton could be provided with a piece of paper on which the name could be written and we can explore as to whether or not he's in country and make that available to COL Young and other Counsel in due course.

5

PRESIDENT: Indeed, and, if necessary, his name can be added to the matrix.

COL GRIFFIN: Precisely, sir, thank you. If I might just interrupt. I understand this to be the individual identified in the statement that has just been distributed to Counsel as the person who was also tagged to escort the correct remains of PTE Kovco after it was discovered that the incorrect body had been returned. So that it corresponds with the name in that other statement that you've just received this morning and therefore will be placed on the matrix, as you suggest, sir.

15

PRESIDENT: Thank you.

COL YOUNG: Thank you for that. MAJ Pemberton, the Board has heard evidence from a member of the New South Wales Police, I believe it was Sergeant Snow, who received the pistol from SGT Francis and SGT Francis said to him, "The pistol has been extensively handled." Do you know anything about that or how that might have come about?--I'm aware of the conversation that SGT Francis had with the Detective Sergeant. How SGT Francis came to that conclusion I am not aware, given that SGT Francis' role in this whole process was to meet the remains of PTE Kovco and attend the Glebe Coroner's Court on behalf of the SIB for the post-mortem.

20

25

Just moving to another area. A number of the statements taken by the Military Police appear to have had standard paragraphs prepared, in particular covering the buddy system. So it would appear that there were pre-prepared paragraphs before witnesses were asked to adopt that paragraph or perhaps change it. Is that something that concerned you or is that a practice that is necessary sometime?--I'll firstly answer the question by saying that that is one of the issues of my quality assurance assessment of the investigation that I am not happy with to say the least, and I've discussed that already with Soldier 47 and also SGT Hession. Formatting is normal, however, templating is now unless - and I use the term "unless" - it would be a negative statement. In other words, if people had nothing to offer but they happened to be there at the particular time and there was a requirement for us to ensure that at a later date they didn't provide any evidence, then perhaps on those occasions that would be the only case.

30

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I draw that to your attention - and thank you for that response - because the buddy system is an issue before this Board. As we're all aware, and as I'm sure you would agree, witnesses see things differently?--Yes, sir.

45

LTCOL Berkley raised with you forensic sampling kits. I just want to read to you some evidence given by SGT Hession when he gave evidence here. I'm referring to page 297 of the transcript. It's just a series of questions and answers. This was being put to SGT Hession:

You've taken a number of pictures of blood stains on the floor. Is that correct?---Correct, sir.

10 *Or what you perceived to be blood stains?---Correct, sir.*

Did you have any testing kit with you to do presumptive test on blood stains?---No, sir.

15 *Did you have any testing equipment with you to do presumptive testing for any substance at all?---No, sir.*

Now, given that SGT Hession was part of an investigating team sent there to obtain evidence and he did not have a kit even to take a sample of what was perceived to be blood, is that a concern to you?---Most definitely. Again I could probably answer that in two parts: (1) to determine if blood is present at a scene it's simply the use of a haema stick. Whilst that won't tell you whether the blood is human or animal, it does detect blood. Secondly, that I was not aware of what kit that they took before they deployed, but our normal scenes of crime equipment kit would have, and it currently does have, the ability to swab for blood.

You would have expected that should have been done?---I would have expected that should have been done.

30 Prior to 21 April this year when PTE Kovco died, there was no SIB presence in the country?---That's correct, sir.

35 There is now?---There is, sir.

40 Would you like to offer an opinion as to why there is now?---I would suggest that as a result of PTE Kovco's passing that that has instigated - the Chief of the Defence Force has directed that with every form body that is now deployed overseas that an SIB investigator, or an investigator rather, will accompany that group.

So that would appear to be a reaction to a tragic event. Would you agree with that?---In my opinion, yes, sir.

45 You've been in the Army and the Military Police for some years. Is it true to say that the SIB were disbanded some time ago?---There's been a number of occasions that we've actually been disbanded, but the most

recent was 1993 when as a result of a CSP review that the SIB that was chosen - the scenario - but the course of action was that they were to be disbanded as a separate organisation.

5 Was CSP about cost cutting?---Yes.

You were one of the casualties?---I was, sir.

10 As a result of that disbandment, did you lose a lot of senior and experienced investigators?---We did, probably 50 or 60 per cent of the organisation, which was the senior part of the organisation at state level, including myself.

15 Do you think you're back up to speed with experience as at now?---No, sir.

Would you agree with me that rank in the Australian Defence Force is important?---Most definitely, sir.

20 You must look with envy at the Defence Legal with the ranks they now have?---On a couple of occasions I've thought that way, sir.

As a professional, I take it that you give advice to assist rather than to please?---Most definitely, sir.

25 And Commanders obviously accept or reject your advice?---Most definitely, sir.

30 If the head of your corps was a Brigadier do you think Commanders might more readily listen to what he or she had to say?---I would hope so, sir.

35 Do you think that sort of rank would assist you in performing your duties?--Certainly I think, as is the current structure with the legal corps, it's outside of the chain of command and if the investigative capability was again in a similar vein, then I think that would solve some of the major issues that we have.

Thank you, MAJ Pemberton. There's no further questions.

40 PRESIDENT: How would you rate the capacity to investigate within the ADF at the moment, giving as a hundred per cent the absolute maximum best you could possibly have, the Rolls Royce system, if I can call it that, down to a zero of absolutely no capacity whatsoever? If it's not possible to answer the question, but if you can give me some sort of indication?
45 ---Currently, sir, I have a liability of 61 investigators. I have a deficiency of 17 of those. They're at the Warrant Officer and Sergeant levels. So that's the experience level. We don't have a lot of experience like Soldier 47, which is imperative not only an investigative capability but also a man-

management issue that he's able or they are able to impart knowledge. Investigators don't grow overnight. Unfortunately it takes a number of years to train an investigator. The current DICAT report which I believe - I haven't seen it, but from what I hear - will go to the stage where it will address the deficiencies that Army has by placing all three services together under one banner being with EMADF. That process has got to be better. However, again I think it's all - it's manning issue whereby which is more important? Do we need more investigators? Is crime on the rise? The bottom scenario is that we supply a service where we do over 1200 investigations currently with Army. That's the major of the three services providing that. We don't have the capacity to be timely in our reports. We don't have the capacity to mount major operations that need to be done and the fact that as a result of the Chief of Defence Force's directive to deploy investigators overseas, that now makes me another five investigators short here in Australia. So it's not a way that I can see that we're actually solving the problem.

Would it be fair to say that a Military Police officer of say 10 years experience would have less investigative experience than a New South Wales Police officer of similar service?---As far as the types of investigations, yes, that would be correct. Currently in Australia our jurisdiction deals wholly and solely with offences under the Defence Force Discipline Act. However, if there's an offence committed outside of that, if the Military is - if the civil organisation or civil authorities claim jurisdiction, then all we do is simply go along for the ride to describe in that way. So we don't have total jurisdiction in Australia. Then when you consider that the next day you could actually be deployed overseas and you are the only jurisdiction, then yes, 10 years experience as a Military Policeman certainly would not equate to three or four years as a Detective in the New South Wales Police.

So in some ways there's not enough crime within the Military for you to investigate?---Yes, I suppose.

That's not a bad thing?---No, that's a good thing. The only way over that would be - and which is what we are attempting to do - is have more secondments with civil investigative agencies so that people can get the experience so that they're attached to the homicide squads or ballistics and those sorts of organisations. But again that creates a problem within the organisation as far as manning is concerned.

Colonel.

COL GRIFFIN: Thank you, sir.

<EXAMINATION BY COL GRIFFIN

[1244]

COL GRIFFIN: MAJ Pemberton, the evidence is that the New South
Wales Police attended the incident scene and as part of their investigation
5 conducted ballistics testing and reconstruction and DNA testing. Does
your organisation have that skill set?---No, sir.

For you to perform offshore in the jurisdiction that you just described
investigating incidents such as this and serious crime matters, can you do
10 that without the skill set that I've just described or, if I can rephrase it, do
you need that skill set to do your job better for your organisation?---I guess
again to answer that, sir, it would come back to numbers. If the system
determined that they would want that capability, then we'd certainly need
to train people and have more people to do it. If we had a situation that
15 required us to maintain total jurisdiction in an offshore area for a lengthy
period of time and we had a number of incidents, yes, we would certainly
definitely need that capability.

20 Thank you, MAJ Pemberton. Thank you, sir, I have no further questions.

PRESIDENT: Anything further, gentlemen?

COUNSEL REPRESENTING: No, sir.

25 PRESIDENT: Thank you, Major, you may now stand down.

<WITNESS WITHDREW [1246]

30 COL GRIFFIN: Sir, the next witness will be available at 1400. I ask that
we adjourn until that time.

LTCOL BERKLEY: Just before we do, sir, might I - Shelley is not here at
35 the moment, she's basically gone back to Victoria. The reason is not for
any lack of interest. I'm instructed specifically by Shelley that she's had
her two infant children up with her in Sydney for all of the Inquiry to date.
She went home yesterday. They were just very unsettled and she's taken
the decision as a mother to remove the children. I just thought I'd put that
40 on the record as to why Shelley isn't in the inquiry room at that stage. She
will return at a later date.

PRESIDENT: I do understand her problem. I'm sure the Board understands the problems of young children, et cetera.

5 LTCOL BERKLEY: Thank you, sir.

LUNCHEON ADJOURNMENT [1247]

10 **RESUMED** [1401]

COL GRIFFIN: Sir, good afternoon. I call LTCOL Pearce.

15 PRESIDENT: Thank you.

<LTCOL CHERYL ANN PEARCE, sworn [1402]

20 **<EXAMINATION BY COL GRIFFIN**

25 COL GRIFFIN: Good afternoon, LTCOL Pearce. I'm COL Griffin ,
Counsel Assisting the Inquiry. Before you you'll find a matrix that sets
out people's identities with the corresponding callsign number next to it.
It's Exhibit 5 in these proceedings. If you have requirement to refer to
anyone by name who appears to - or to identify anyone who appears on
30 that list, if you'd do so, please, in respect to the number. You will
appreciate that it refers to people who are in theatre to protect their
identifies. I'll just confirm that there is a Soldier 48 on the list that's
before you. Is that the case?---No, not on that list.

35 The Secretary is always one step ahead of me and she has that for you
now. Would you state your full regimental particulars for the record,
please?---Sir, 822043, LTCOL Cheryl Ann Pearce.

40 Your current posting?---I'm the Commanding Officer of the 1st Military
Police Battalion.

45 Would you confirm that you've been provided with and have read Annex
F to the Australian Defence Force publication 06.1.4, the Administrative
Inquiries Manual that sets out the rights and obligations of a witness
before Defence inquiries?---That's correct, sir, I've read that.

Now, I show you two documents. Do you recognise them?---Yes, sir, I do.

5 One of them is a statement of evidence that you've prepared for these proceedings?---That's correct.

The other one will be a redacted version of that, that is, a document that has been amended to block out matters of operational security?---Okay, yes, I understand that, sir.

10 PRESIDENT: Is everybody comfortable with the tender?

COUNSEL REPRESENTING: Yes, sir.

15 **#EXHIBIT 143 - REDACTED AND CLASSIFIED VERSIONS OF LTCOL PEARCE'S STATEMENT**

20 COL GRIFFIN: LTCOL Pearce, can I just indicate to you we've had some difficulties with the microphone that's in front of you. So you may have to speak a little louder than you would normally do. Hopefully that will be fixed at the end of today. Could you just say again your regimental particulars and your posting, please?---Yes, sir. 8220432, LTCOL Cheryl Ann Pearce. I'm the Commanding Officer of the 1st Military Police Battalion.

25 Could you tell us how long you've been in that posting, please?---Sir, I have held that appointment since December 2003.

30 The statement that you prepared consists of four pages, that is, the redacted version consists of four pages and 17 paragraphs. Is that correct?---Yes, sir, that's correct.

35 Is there anything that you wish to change or amend contained in that statement? It's been tendered and accepted as an exhibit, but is there anything you wish to amend?---No, sir.

40 Thank you. Would you tell the Board, please, something of your service history in the area of military policing?---Yes, sir. I graduated to the Royal Australian Corps Military Police in December 1985. Throughout my career I've had both Military Police and All Corps appointments in command and staff as well as training. Recently, in the last 10 years I held the Provost Marshall Land Headquarter position and prior to my

45 current appointment I was a Commandant in the Defence Police Training

Centre.

5 Have you any experience as an investigator in matters of criminal or disciplinary investigation?---I held the appointment of the Second in Command of the special investigations unit in 1989 and also I've held the position of Provost Marshall Army in 2004. However, I'm not investigator qualified through the course conducted by the Defence Police Training Centre.

10 Would you please describe for the Board the command structure and where your position fits in the scheme of military policing?---Yes, sir. In 2004 I held the position of Commanding Officer and the Provost Marshall Army. In that I had a technical responsibility for the investigations through to the Chief of Army as well as an operational chain of command to the Land Commander. In 2005 that responsibility was split with the Provost Marshall Army with now LTCOL Mark Foxe being appointed to that position who works in Canberra and is responsive to the Chief of Army. He is responsible for the technical integrity and the technical control of all investigations. I command the investigators. They reside within 1MP Battalion within 5MP Company commanded by MAJ Mick Pemberton. My responsibility is to raise, train, sustain and to deploy that capability on operations. MAJ Mick Pemberton is responsible for the technical integrity through to the Provost Marshall Army, but, however, is under my command for all other purposes.

25 I'm going to ask you about your involvement in the investigation of the death of PTE Jacob Kovco and I'll do so by reference to the statement that you've prepared as the general guide to that questioning. I see from paragraph 3 of your statement that you essentially received your first information about this matter at about 0700 hours on 22 April 2006. Is that correct?---Yes, sir. Within 1MP Battalion headquarters we have an operational staff who - one of their responsibilities is to deploy personnel on operations. They received notification from the Land Headquarters Joint Operations room that there had been a fatality within SECDET, the security detachment, and on confirmation that it wasn't a military policeman, we then - the operations staff, MAJ Gary Vailchk and WO2 Jeremy Anderson, commenced the callout of the three investigators who were identified as a flyaway team on a current standing be prepared to task to deploy to the operational area to conduct the investigation.

40 The list that you have that indicates names, Soldier 47 was a member of that team?---Yes, sir.

45 Did you have any involvement in the establishment of the flyaway team? ---Yes, sir. From a command perspective with MAJ Mick Pemberton as

the OC, was to determine the format of the team in regards to experience and the ability for them to be able to conduct any serious or sensitive investigation within that AO. Those members were force prepped and they were then held on standby. But the selection was a command decision of those individuals.

When was that undertaken?---That was undertaken at the beginning of 2005, originally, and then 2006 was a review of the flyaway team, because it all had to be force prepared, and that was done at the commencement of each new year, and then were held on notice to move for callout if required.

What was your first action as the commanding officer after you had been notified on this particular incident?---I spoke to my op staff. They delayed telling me for three hours to ensure that they had commenced the callout. They had spoken to the OC of the company and to each individual member, had liaised and worked with JMOVGRP for them to deploy. They then advised me that the members were all aware, they all had flights and they were flying out that evening, and that my - the command CPP team - the close personal protection Military Police I had within OP CATALYST, I was advised that they had secured the incident site and I was comfortable with the course of action they had taken thus far, and they were deployed that evening.

I see at paragraph 4 of your statement you then received a number of telephone calls from senior officers in Land Headquarters?---Yes, sir. Once I had received the call from my internal - to battalion staff and I was comfortable with the course of action taken and all the procedures thus far, I then received numerous phone calls from the Colonel of operations, COL Hallinan, and Colonel, Ops Support, COL Haddad, in regards to querying the authorisation for myself for my team to deploy, as well as the authorisation for the direct liaison with the Military Police that were securing the incident site on the ground in Baghdad. I advised them that it had come from the operations room itself, from the Land Headquarters Joint Operations Room, requesting our support and requesting our members deploy, and also requesting the DIRLAUTH between the investigators, the OC of 5MP Company and the team on the ground.

So as I understand you to be saying, therefore, the actions that had been taken by the people under your command had in fact been in response to requests from the Land Headquarters duty room that you had then fulfilled?---That's correct, sir.

Or your staff had fulfilled and you had confirmed?---Yes, sir, that's correct.

5 But having done that, after what might be determined normal business hours, you then started to get queries from senior officers within the headquarters about those actions that had been undertaken?---Yes, sir, that is correct. Being a Saturday morning on the 22nd, the operations room watchkeeper had responded in a normal procedural way and my battalion headquarters had responded in procedures as we would normally do in a flyaway capacity, and it became evident later with involvement at the higher ranks of just querying the authorisation and what was actually happening, trying I think to get some situational awareness to all aspects of the deployment of the Military Police. In addition, I had a conversation, a verbal conversation, with JOC wanting to know details of individuals that were deploying and what the arrangements that had been made at that point.

15 By JOC, you mean Joint Operations Command?---Yes, sir. I spoke to WGCdr Lindsay Guerrin, the J1 within the operations command there.

20 As a result of the conversations that you had with the senior officers that you've just indicated, did you receive any directions or instructions from them about the matters that you had confirmed?---Yes, sir. I would have had numerous phone calls with COL Hallinan between 0800 and 1000 hours. At approximately 1030 I received an order from COL Hallinan to stand down the investigators and that the Chief of Army deploys the investigators or deploys all members going on operations, and that he was waiting out on invite from the theatre commander, BRIG Symons requesting the investigators to come into his area of operations. I advised that an invitation was not required, it was a mandatory requirement to investigate a death in accordance with the DIA45-2.

30 Let me just stop you there and I'll show you a document. Do you recognise the document?---Yes, sir.

35 Is that a Defence Instruction that you were about to refer to?---Yes, sir.

It's Defence Instruction (General) 45-2, which has the heading, "Reporting an investigation of alleged offences with the Australian Defence Organisation"?---Yes.

40 It was on the basis of that Defence Instruction (General) that you had a view about whether or not an invitation was required for your investigators to deploy for this incident; is that right?---That's correct, sir.

45 I've asked that this document be copied for counsel and the Board and it may be available to distribute now. It might be useful if you all have it so

that we work through the document. I've asked that this document be printed from the Defence web document materials. I note that it bears a date of 30 October 2001. Are you able to say from your knowledge, LTCOL Pearce, if this is the extant or existing standing Defence Instruction in relation to this topic?---Sir, from my experience, I've not seen a later version than that and we have been working from that version.

I note that the first page of the substantive document under the heading "Definitions," it sets out at paragraph 2G, defines "Defence Investigative Authorities" and gives the acronym DIA, and goes on to say:

Defence Investigative Authorities are the service police organisations that report to the Provost Marshall of the three services,

and it goes on also to include some other civilian aspects of the Department of Defence. So that embraces your organisation?---Yes, sir.

If we turn over the page at paragraph 6, under the heading "Application and compliance," it says:

This instruction binds both Defence and Australian Public Service members of the Defence Organisation, including DIA, in particular all commanding officers, managers and ADO personnel

- - - in particular, all commanding officers, managers and ADO personnel who conduct or are otherwise associated with investigations into alleged offences are to comply with this instruction. Do you therefore consider that binding upon you and your organisation?---Yes, sir.

Further down under the heading "Notifiable Incidents" it says to paragraph 8:

Notifiable incidents that are to be reported by ADO personnel (through the chain of command as applicable) to a DIA are listed below.

At subparagraph (d) it stipulates:

Deaths, serious injuries or disappearances of Defence members, Defence civilians or which occur on Australian Defence Organisation premises (even where there may be no reasonable suspicion of an offence having been committed.)

I understand in your evidence in the statement to be of the view that any death is a notifiable incident regardless of whether or not there is a reasonable suspicion of an offence being committed. Is that right?---
5 That's correct, sir, and paragraph 9 then says this is to occur both in Australia and on operations as well.

We'll turn to that. As you've pointed out, paragraph 9 reads:

10 *The mandatory reporting of notifiable incidents described in this instruction applies at all times including whilst on operations.*

It then goes on under the heading "Duties of Commanding Officers and Managers" at paragraph 11 to restate that proposition at paragraph 9. At
15 paragraph 15 it says:

*In an operational area or during the conduct of operations a Commanding Officer who controls an area of operations may, if necessary for mission accomplishment or for the safety of
20 personnel, restrict access by Defence investigators within such an area.*

But in the previous paragraph it says, paragraph 14 that is:

25 *CO or managers who consider that an investigation may compromise mission-critical tasks or operations are to raise these concerns with the head of the relevant DIA immediately. The head DIA only has the authority to suspend or cease investigations, if appropriate.*

30 On the next paragraph on page 4, 16, says that:

*COs and managers are to consult with and assist Defence investigators who must not be directed or obstructed in carrying
35 out their work. Interference with an investigation may constitute an offence.*

Are there any other matters contained in the Defence Instruction that were relevant to your decision?---No, sir.

40 Sir, I tender the Defence Instruction.

PRESIDENT: Any opposition to that course?

45 COUNSEL REPRESENTING: No, sir.

#EXHIBIT 144 - DEFENCE INSTRUCTION

5

COL GRIFFIN: Was it on that basis that you stated, as you recall, in paragraph 5 of your statement, the second line from the bottom:

I stated that an invitation was not required.

10

That is, for your fly-away team to go to the theatre -

as it was mandatory that the incident is investigated.

15

?---That is correct, sir. In addition, in part of the deployment order for the operation we had a task that we had to have the three man fly-away team on a notice to move and it to be available on a call forward. So that, in addition with the DI, gave me the - put me in the position that I made the statement as such and the conclusion that the authority to deploy was provided by the operations room at their request to deploy in accordance with the deployment order that had been issued, plus the DI which states that it was a notifiable and there was no evidence to - or anything coming forth to request it be suspended or held back or any other information to do other than deploy investigators as soon as possible to ensure - noting that there would be at least a five-day delay, or four to five day delay, to get the investigation underway and the minimal compromise of evidence as possible.

20

25

30

What happened after that conversation?---COL Hallinan noted my concerns, but he advised that the Chief of Army approved all deployments. I had cited a memo during the Chief of Army's mid-tour visit of the MEAO. His MA put out an email which stated that the Chief of Army would be the one who would determine the deployment of all investigators in country. I understood COL Hallinan's order. I then provided this direction back to the battalion headquarters to the battalion Warrant Officer, WO Anderson. However, I did provide additional guidance at this point not to cancel the flights and to determine the last possible moment for cancellation without incurring financial penalty. I did this as the investigators, their home locations were spread between Puckapunyal, Bandiana and Brisbane. And the ability to reschedule flights to coordinate for arrival together in Kuwait would prove difficult if we actually cancelled those flights. Subsequently I received 1550 hours from COL Hallinan the approval from the Chief of Army down through the chain of command for the deployment of the investigators. They then left on their original scheduled flights on the evening of 22 April.

35

40

45

The net result being that there was no setback to the planning that had been put in place?---Correct, sir, no additional delay.

5 You refer in paragraphs 6 and 7 to conversations that you'd had with one
of the Military Police in the close personal protection team in country,
also with MAJ Pemberton and conversations he'd had with the Chief of
Staff and aspects about the return of the body?---Yes, sir. During the day
10 of the 22nd in the deployment of the investigators conversations had been
conducted between the battalion op staff, Soldier 46 and also
MAJ Pemberton in regards to the investigation plan, what the intent was
and to assist Soldier 46 on the ground with the preparation for the arrival
of an investigation team. Soldier 46 is a military policeman but he is not
15 investigator qualified. He had basic military police skills and it was
linking in to what the investigator requirements were. During that period
of time there was email traffic that went from battalion headquarters to
JTF 633 in regards to the preparation of the incident site and of
PTE Kovco, waiting arrival of the investigation team. I did not speak to -
20 this was only in my discussions with MAJ Pemberton and as the
Commander in general - command guidance on how the battalion was
responding to the incident and the welfare and the deployment of all
members of 1MP Battalion. The conversations I had with MAJ
Pemberton were that he had - and through the battalion ops - had
25 requested through the movements that PTE Kovco's body remain in situ
until the arrival of the investigation team. We advised in that email that
MAJ Pemberton was a point of contact for the JTF 633 headquarters
should there be any concerns in our request. During the evening - no, I
actually can't say exactly when - the 23rd, early hours of 23 April, the
30 Chief of Staff had a conversation with MAJ Pemberton and advised me
that - and MAJ Pemberton advised back to me that due to competing
priorities that they would proceed as planned. The JTF plan would
proceed as originally scheduled and that PTE Kovco's body would be
available for the investigators in Kuwait.

35 Now, you say in your statement at paragraph 7 at the fourth line that the
priority was for return of the body by Anzac Day and that that had come
from the Chief of Staff at 633 as reported to you by MAJ Pemberton.
That part of your statement was put to MAJ Pemberton in evidence this
morning and his evidence is that he does not recall using the word "Anzac
40 Day" in any conversations. What do you say about that?---Sir, in regards
to the repatriation of PTE Kovco, I had a number of conversations with
WGCDR Guerrin at JOC and also with COL Hallinan regarding the
requirement for the Military Police to escort PTE Kovco back. Due to the
evidentiary nature of the investigation and the continuity of evidence, the
45 discussions I had may have - the Anzac Day may have been brought up by

5 either one of those members. But - or however, the emphasis was on the priority of the timeliness of the return and to meet - at some point someone mentioned Anzac Day to me. I thought it was - my understanding was it was MAJ Pemberton, but I acknowledge if in his statement that that was not the case. It may have come from either of the other two members. But it was based on a needs to get back, that was a priority.

10 MAJ Pemberton did talk about in his evidence the term that you have in the next part of that sentence "risk manage" the investigation. What did you understand was going on about risk managing the investigation in relationship to the return of the body?---Sir, my understanding from that statement was that we were focused on a police investigation and we were trying to establish procedures for the conduct of the investigation and the preservation of evidence for us to conduct that. But, however, I was under
15 the understanding also that the Commander 633 and his staff had competing demands in regards to their priorities and there were perhaps friction points in regards to what did take priority. As the Chief of Staff made the determination that they would continue their plan would remain
20 extant and they would continue on with the repatriation.

Did you have an expectation of Military Police involvement in any way with the actual return of PTE Kovco's remains to Australia?---Yes, sir. Initially it had been an assumption because based on investigative
25 procedures and the continuity of evidence that it would need - it has a certain amount of paperwork and that we would escort PTE Kovco back and then hand over to whatever state coroner that it was going to with the correct paperwork and then the results of any post-mortem then conducted would form part of our investigation on completion for distribution as
30 required.

You've mentioned that was an assumption. Do you recall discussing with anyone your intention or that expectation that a member of the Military Police would escort the body back?---Sir, that was advised right from that
35 first morning on the 22nd that - it was verbally advised to COL Hallinan and to COL Haddad and also to WGCDCR Guerrin that the body needed to be escorted back by Military Police.

40 Did you give that advice?---Yes, sir.

In paragraph 8 you describe in the second sentence, on 27 April in view of the range of decisions made which were not consistent with 1MP Battalion procedures and current investigative policy instructions you requested support and you directed that through your technical chain of
45 command to the Provost Marshall Army. What, if anything, came of

that?---Sir, actually I'm not aware of anything that came of it. It was concerns I had in regards to the procedures that had occurred over the last few days, the competing priorities, issues of deployment of the investigators and of the time delays of getting them in country, not -
5 MAJ Pemberton as the senior investigator, that his advice was taken, but, you know, there was no further action. My advice about the repatriation, it was a frustration that I was unable to - I felt I was unable to get results through the operational chain of command. Because we have extant - our own SOPs in regard to investigations - there's the Military Police
10 Technical Instructions or DITI, sorry, the Defence Investigative Technical Instructions as well as the DI, that I was seeking up through the technical chain through to the Provost Marshall Army to seek for him to take up some of the issues that were presenting, if not for this incident, for any future incidents that may occur.

15
Do I take it from that that you identified there was an inherent tension, indeed a conflict, in the priorities from an investigative point of view as opposed to what may have been a priority from command in terms of returning the body and that the two needed to be de-conflicted?---Sir, this was even at a later stage than that. That decision - and it didn't need de-confliction. That decision had already been made by the Commander in theatre and the investigative protocols, or the way we do business, our procedures, was overtaken by the competing priorities. And that this was purely putting it up through that this is a continual issue and for future
20 reference, that it needs to be resolved. We'd had a number of incidents over previous years of deployment of investigators that I needed to take up outside the operational chain of command.

25
Was the net effect of those previous incidents and this one that the investigative function was being constrained by command requirements in some way?---The issue, sir, is that investigators are a command asset that are there to support Commanders. We found it's been inherently difficult with the investigators being in Australia and on operations for Commanders to be receiving the advice from their senior investigators or
30 any Military Police staff on correct procedures. When we're sitting back here trying to deploy an asset into an AO that the voice of our requirements may not have as equal response to other competing demands. I believe it's a dislocation of the asset and that the Commander needs to have all that advice on the ground at the time so he can then make the decisions he needs to make to ensure, you know, that the best response
35 is provided.

40
The absence of a senior and trained investigator in close proximity to the Commander compounds that problem. Is that right?---Yes, sir, I believe it does.
45

Now, at paragraph 9 you refer to incidentally arrangements were made for an MP and that person you've identified there now appears as Soldier 48 on the matrix in front of you. Is that correct?---Yes, sir.

5

Soldier 48 who was at that time - and I read from your statement -

Currently deployed on CPP duties on OP CATALYST to escort PTE Kovco's body back on the second attempt.

10

?---Yes, sir. Soldier 48 was working under the command of Soldier 46 on a separate task within OP CATALYST. He was then made available at that point to escort PTE Kovco's body back. I would like to think that was maybe on the advice that I provided earlier in the week, but I am not privy to the information on the ground in regards to their decision at that point to have - for it to be escorted back by Military Police.

15

The Board has received evidence this morning that in fact it was Soldier 48 who returned the pistol that fired the shot in this incident and that Soldier 48 returned the pistol to Australia and handed it over to the civil authorities through his Commander on the ground here. Are you able to confirm that?---Sir, yes, that is correct in our recollection of additional responsibilities. But he did also - or was on the same flight and had that additional responsibility was my understanding.

20

25

You describe in paragraph 10 how you were informed about the New South Wales coroner's involvement in the investigation. Then you go on in paragraph 12 to describe the breaking down or division of the responsibilities that you mentioned at the outset of your evidence today. You describe there the difference in the technical and commander control arrangements. I want to ask you about that now. That was done in 2005 and you describe the current structure. How do you see that practically working at the moment, that division of responsibility?---It is working well. It provides some difficulties to Mick Pemberton, to MAJ Pemberton, in regards to that he responds to two separate Commanders. However, the division is quite clear. I don't get involved in any technical aspect of the investigations. If there are issues that are raised through from a command perspective that involve investigations, I then will discuss with LTCOL Mark Foxe on those issues. He holds responsibility of the Provost Marshall Army. But in regards to the balance, it is not ideal, however, the arrangements or the investigative capability and where it sits currently within 1MP battalion and within Army is under review and has been under review for a number of years on where it should sit on the whole investigative capability through Ernst & Young, the DICAT, the Military Justice review, that has been subject. So at the moment it is -

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40

45

that's extant, has been now for 18 months, and it is working under technical instructions and with quite clear on the division of responsibility.

5 Could you just expand on paragraph 13 in your statement, please, what
you're describing there?--Yes, sir. During my time in command and in
2004 when I was both the Provost Marshall and the commanding officer,
it became evident that there was a gap in investigative support, the reach-
back for investigators is not workable, it's delayed. Investigative support
10 is required instantly on the ground and within any area of operations, the
quickest you could get to an incident site would be 24 hours. Through
both verbal advice and also written briefs for identifying the requirement
for Military Police investigators to be embedded or force assigned to an
operation needed to occur. This has been raised on numerous occasions in
15 2004/2005 and also 2006. I am now aware that direction has been
provided through the CDF that investigators be force assigned to every
AO that we're committed to. However, the last three years has been of
some frustration in that gap of an incident occurring and the investigators
arriving, and the incident site security as well as the evidence, any
20 destruction of the evidence, has been an issue.

Are you able to speak further on your last sentence in paragraph 14 where
you describe the US Army capacity in theatre and any arrangements that
are in place for assistance amongst coalition partners?--Sir, in October
25 2004 I attended the US Army Regimental Conference and had the
opportunity to speak to the commanding officer of the CID, the
investigative element of the US Army, they had a battalion of
investigators - which was a wonderful thought - established within
Baghdad, and the arrangements if we required any support and that they
30 had full capability there of forensics, et cetera. It is a standing
arrangement that if we have a joint Provost Marshall located in any AO,
which we did in East Timor, that we establish a working relationship with
any coalition and that the support of their capability on the ground is
available to us for assistance. However, my understanding is or my belief
35 is that if we don't have a Military Police on the ground to facilitate that
arrangement, it isn't there and the specialist advice that's available to a
commander is not there to have the knowledge that this asset is available
to be utilised.

40 So it would need a trained investigator present on the ground to realise the
nature of the assistance that was required; is that the point?--Sir, it could
be a trained investigator but any Military Police officer could be sitting as
a staff adviser to the commander and would establish this liaison and
arrangements for any investigator to tap into. If you had an investigator
45 additionally on the ground, they would have a lot more intimate liaison

with individuals that they would need support from. However, in regards to - from a staff advice, it would be at the higher level.

5 Are you able to say whether or not that United States Army CID - Criminal Investigation Division - asset in Baghdad had the capacity to perform the following functions at the incident involving PTE Kovco: to undertake a crime scene examination on behalf of the Australian Defence Force?---Sir, without having been there and sighted it, I would not be able to say that conclusively. It was more that I knew that capability was there and what the CO - what they were providing and what they were doing in the area of operations, and then the ability for us to seek their support. With a separate investigation that occurred last year with WO2 Nary - can I refer to the investigation element of that?

15 Yes, you can?---The time that it took for us to get there, the Americans had commenced the investigation in that environment. We then took that investigation from them and that relationship that we have would remain extant with MEAO. We would do the same with the British and we would tap into any capability that was in country that would have assisted us in - whether it be forensics or any other detailed requirement that we had.

Do you know if anyone sought the assistance of the United States Army for your investigation?---Not that I'm aware of, sir.

25 Was it discussed with you?---No, it was not. I discussed with Soldier 47 and on his now current deployment, not at the time of PTE Kovco - because they had already left - but in his now deployment as a six months' deployment that - his requirement to establish that relationship.

30 Is that developed?---I have not had feedback. He is responsive now under the new arrangements to the Provost Marshall, ADF, LTCOL Grutzner.

Are you able to speak to the training of the Special Investigation Branch investigators?---Yes, sir. The training of the SIB investigators, the Special Investigation Branch or what is called an ECN190, a trade stream, is conducted at the Defence Police Training Centre. It is targeted at a senior corporal rank to do the investigator qual course. They are then posted out around Australia within 1MP battalion to conduct investigations as a corporal. Throughout their career it is - for them to be an ECN190 investigator, they need to do a number of attachments and/or courses to get to a pay level 5. The investigators, once they have done their qual course, that is the only technical course that they do within the military. Any other courses on top of that are opportunity courses with external agencies and - correction, they do the Scenes of Crime Officer course as well, the SOCO course, once they have done the IQC. They will do

5 attachments for experience. Over the last 10 years, that - external courses
have eroded. The trade is a critical trade within the Australian Army and
the opportunities for individuals to get away to have these attachments has
been limited. It has been both through a critical trade but also through the
10 loss of MOUs that were established with State policing agencies that this
has occurred. The Defence Police Training Centre is addressing this and
MOUs are being set up with each State policing agency. That was
identified as a result of a previous review in 1999 of that deficiency. So
we have a number of investigators that have that experience but we have a
15 number that do not have external to Army investigative experience.

Is it right that you have no legislative basis on which to conduct DNA
testing and no training for your investigators in relation to DNA testing?
---To the best of my understanding, that is correct, sir.

15 Is it the case that there is no ballistic reconstruction training for
investigators?---That's correct, sir.

Is there any fingerprint examination training?---Yes, sir, that is conducted
20 as part of the Scenes of Crime Officer course.

You mentioned the opportunity to have training with external agencies,
State and Federal Police forces I take it that refers to?---That's correct, sir.

25 Do you have any of the reverse, that is, that members of those State and
Federal Police organisations are also Reserve members of the Military
Police and the investigation branch?---We have a number of Reserves who
are police officers. I could not quote on how many are actually - like
homicide investigators or - some are fraud investigators. However, they
30 have - there are a number who have commenced RCC, RPL - the
recognition of prior learning and recognition of current competencies -
through DPEC, through a process that's conducted by them to recognise
their qualifications for employment within Military Police.

35 Am I right in saying that the technical aspects of this particular
investigation you had no involvement in?---That's correct, sir. Mick
Pemberton, as the OC of the investigative capability, was reporting to
Provost Marshall, Army. I'm not sure at what point that crossed across to
Provost Marshall of the ADF. I was aware of what was happening but at
40 no point did I scrutinise the technical element of the investigation. He had
sufficient briefing requirements on a daily basis to a number of higher
headquarters and I just was available for him if he needed it from a
command perspective and just became - I was just aware in a general
sense of what the issues were, such as the hand off from 28 April to the
45 New South Wales, concerns I had with that, and a number of issues in

regards to the welfare of the investigators.

5 This Board of Inquiry has, as part of its terms of reference, the opportunity
to make recommendations. Are there any matters that you would like to
draw the attention of the Board in respect of recommendations, or any
other matters that you would like to tell the Board as part of your
evidence?---Sir, I have two points. Sir, from my experience in both
command and staff appointments, there is a lack of Military Police staff
representation, both at the strategic and the operational level. An example
10 of this is that there is currently no service police representation at JOC and
a deployed staff adviser is only in OP ASTUTE. There are no other staff
appointments from a policing perspective in any other AO. Commanders
at all levels require immediate access to detailed policing advice. This is
not considered a reach-back capability. It needs to be co-located with the
15 Commander to give him the information he needs. In addition to any
advice provided on all policing capabilities deployed, Joint Provost
Marshall will establish liaison and technical support from any coalition
partner deployed in the same area of operations as part of their
responsibilities.

20 My second point as the Commanding Officer of the Army investigative
capability is to advise that I have the utmost confidence in the
professionalism, the integrity and the competence of all Military Police
investigators, including those involved in this investigation. The
25 investigators have readily crashed through their notice to move and
deployed from home locations within 24 hours' notice to conduct
investigations throughout the world days after incidents have occurred.
They have often received unfounded criticism, however, continually strive
to perform at the highest level providing advice to Commanders and
conducting investigations in often adverse conditions. Sir, that is all I
30 have.

I have no further questions for LTCOL Pearce at this stage, sir.

35 PRESIDENT: Thank you.

<EXAMINATION BY LTCOL WILKINSON

[1501]

40 LTCOL WILKINSON: LTCOL Pearce, I represent Soldier 2 on the list.
Soldier 2 was involved in the failed repatriation. You've just given
evidence today which interested me relating to your expectation and
indeed a fairly strong view that you held that the Military Police who had
45 been involved in the repatriation of PTE Kovco. I just wonder if you'd

perhaps expand on why the Military Police, in your opinion, are best suited for that role?---Sir, they're best suited because the repatriation of PTE Kovco or any other death on operations until - whilst under investigation is required as a continuity of evidence back to its home location to hand over to the state coroner and that preservation of the evidence and handover of all documentation from the incident site and then to allow them the integrity of that investigation should it be so required at a later date. Our experience with the continuity of evidence and our evidence handling, whether it be an investigator or a general duties Military Police, I believe that we are best placed to do that, to fulfil that responsibility.

Do the Military Police receive any training regarding repatriation?---The training they have is to do with the evidence, not with - - -

Repatriation per se?---Not with repatriation per se.

In fact I notice in paragraph 15 of your statement you talk about the mortuary services SOP in the fourth-last line and you say there - and this is referring I think to the Sea King incident, is it not?---Yes, sir.

You say that you then offered staff support to update mortuary services SOP to ensure that policing escort arrangements for deaths on operations was included. When you talk about the mortuary services SOP - I don't have it in front of me, but is the land warfare mortuary services SOP that was written by MAJ Bywater(?). Is that the one you're referring to?---Sir, I have not seen any SOPs regarding to repatriation or to any mortuary services remain extant at any level. It was an opportunity, what I believed it needed - and I wasn't - I'm not aware of JOC, Joint Operations Command's procedures. I just knew their responses to a lot of the incidents and the lack of awareness about the responsibilities from a policing perspective. Whilst I have a staff responsibility to land headquarters, I don't at JOC and it was an offer of services to provide that advice to them.

You wouldn't be alone in not knowing anything about the mortuary services Standing Operation Procedures. Very few witnesses, if any, have given evidence or know anything about them. But in effect what you're saying there is that you'd be happy to - if that particular SOP was looked at, that you'd be happy to provide some assistance so that perhaps the Military Police involvement in that process could be included in those SOPs. Is that what you're saying there?---That is correct, because besides the PTE Kovco, the Sea King, also WO2 Nary, it was one I had advised on numerous occasions for consideration. I was aware of the lack of any clear guidance available to Commanders on that area.

5 Commanders and their responsibilities to - because they provide the escort presumably in these situations and they should know a bit about it as well, shouldn't they, in terms of how the process should work?---They should have staff advice, someone to provide the advice to them.

Thank you. Nothing further.

10 PRESIDENT: LTCOL Green.

LTCOL GREEN: No, thank you, sir.

PRESIDENT: LTCOL Berkley.

15 LTCOL BERKLEY: Yes, thank you, sir.

<EXAMINATION BY LTCOL BERKLEY

[1506]

20

LTCOL BERKLEY: LTCOL Pearce, I'm LTCOL Berkley and I act for Shelley Kovco and I've got some questions. But I just want to pick up on a point LTCOL Wilkinson was making then, that if you were given - just say that the MPs actually got into country in time, would they - and were given the authority, they could have brought back Jake's body without mishap, couldn't they?---Sorry, can you say that again?

25

They could have brought Jake's body back without mishap if it was their authority to do so?---I can't make a comment on that because we did not have that task. However, the training that Military Police receive is that - and their impartiality and their removal from any involvement with either PTE Kovco may have assisted in that. But I could not give you a guarantee of that.

30

35 MAJ Pemberton told us that in his view - I think there's some great sense in it - that a body that is recovered from a critical incident is a piece of evidence and must be treated accordingly. You'd agree with that, wouldn't you?---Yes.

40

So wouldn't it be smarter that in the investigation of critical incidents when they have caused death that the MPs actually take control of the body of the deceased or until they are brought back for a proper post-mortem and other forensic procedures. That would make sense to you? ---Yes.

45

Defence Instruction (General) Admin 45-2 you refer to in your evidence and it's titled "Reporting and Investigation of Alleged Offences within the Australian Defence Organisation", and you're familiar with that document?---Yes, I am.

5

You see that it's signed by the then Secretary of the Department of Defence and the then Chief of the Defence Force?---Yes.

10 In the Australian Defence Organisation they're the two principal appointments, aren't they?---Correct.

You considered it a lawful general order applicable to all members of the Defence Force, didn't you?---Yes, that is our guidance that we work on.

15 You get a phone call or your battalion, your soldiers, get warned out to get the fly-away team ready by land headquarters and some hours later that day Colonel Operations and colonel operation support are basically put on the backburner. Is that what happened?---Through the chain of command there were - I responded in accordance with the DI and our current
20 deployment orders. The Colonel Operations had had advice through his chain of command that we were to wait out on that deployment. It was not to say that it wouldn't deploy at all, but to wait until we had received further information from the Chief of Army.

25 I'm aware of that. But it was explained to you that I think, to put it in a nutshell, that we're waiting for the Military niceties or courtesies of informing people who's coming into the AO, informing the Commander who's coming into the AO. That's what we were waiting on, wasn't it?
---I can't comment on that.

30

Did you think that that's what they were - isn't that what COL Hallinan told you?---COL Hallinan gave me a direction as a superior in land command. For myself, I put my concerns and raised up in accordance with what the direction was and what the guidance that I had been
35 provided was and what I was working under.

I thought in your affidavit you said he told you this: that he was waiting out on an invite from the theatre commander, BRIG Symons, requesting the investigators?---That is what COL Hallinan told me, yes.

40

So, in other words, we were waiting for the courtesy to be extended of telling BRIG Symons that someone was coming into his AO, this is who they are and that he was going to formally request it?---That was what I was advised through COL Hallinan.

45

There's no trick in the question and I don't want you to think there is, neither am I criticising you now. You of course said, "Well, hang on, it's a critical incident" - and you understand of course that evidence, unlike some good wine, doesn't improve with age, does it?---No, it doesn't.

5

Knowing that, you've got an order signed or a lawful general order signed by the two head appointments in the Australian Defence Organisation, yet there was a delay as to whether BRIG Symons was going to invite the MPs into the MEAO?---Correct, sir, that's a frustration - that was a real frustration I had.

10

But in the end it worked out that they caught the planned flights?---It did.

But we could have of course lost some more evidence out of courtesy? ---That is correct. The Provost Marshall Army - it was a frustration that I was now sitting under an operational chain of command and the technical element rested elsewhere.

15

I've seen that you've criticised the reach-back policy?---Yes.

20

It used to happen with lawyers. You know that. Then they finally started putting them with the Force, because you really - there's other considerations, isn't there, other than simply flying to location? There's another policy that you have to wait around about three days in Kuwait before you can actually go into Baghdad?---Yes, for Baghdad and for OP CATALYST that's the case. You've got - - -

25

That's right. I see that your staff had actually asked for that to be expedited so we don't have to wait around. Did they actually wait around for those days?---Yes, they did.

30

With a critical incident they were forced to wait around?---Yes.

Do you know why they were forced to wait around?---My understanding is that's the policy of JOC.

35

Mick Pemberton has told us I think wound - I mean no offence to anyone - wound to arrival time of the MP was saying like 92 hours.

40

PRESIDENT: 96.

LTCOL BERKLEY: 96 hours, sorry, four days. You know as a CO that you intended your people to be there a lot earlier?---Sir, the reach back is not workable. 96 hours is unacceptable.

45

5 Absolutely. The other thing that struck me and on my instructions is very important is the concept of risk managing an investigation. Was it your understanding that those at HQJTF 633 giving the directions for the return of the body clearly knew of the requirements set by your soldiers, either officers or soldiers, and communicated to them that the body wasn't to be moved from Baghdad International Airport morgue?---We were aware the advice got through and the request from the senior investigator within the 1st Military Police Battalion, being Mick Pemberton, that that advice had gone through. He was a point of contact. He verbally discussed that with the Chief of Staff and the decision process by that staff headquarters continued on their original plan.

10 It didn't make a dint in it?---Pardon?

15 It didn't make a dint in their original plan?---No.

So anyway, your soldiers then get to Kuwait before they can see Jake's body and by then it had been processed in a civilian morgue?---Yes.

20 Now, risk management, the risk managing an investigation, did you understand that to mean that Headquarters JTF 633 knew of the probability of loss of evidence and yet against your advice decided - against the advice of your staff decided to proceed with the return of the body regardless?---I think they had a lack of appreciation of what that actually meant.

25 Isn't that saying yes?---They weighed it up and their priorities were different to ours. Again without having a senior Military Police person or investigator on the ground to discuss face-to-face of, you know, what the consequences are - - -

30 We know all about that because they had an officer who we've spoken to. He seems quite a capable young officer and he was able to tell them, "Don't do this," yet they did. You understand that to be the case?---Yes.

35 So it was your understanding that they were going to proceed with the repatriation of Jake regardless of the loss of evidence that would be important to a later inquiry?---Yes.

40 I know that in response to that you went to the Provost Marshall?---Yes.

45 The response from the Provost Marshall, was that "can't help you" or "would love to help but can't" or "we'll be able to do something about it"? What was that?---Discussions with him, he agreed with me. We were on the same - we had the same outcomes and we decided - and he decided

then that he would take it up with Army Headquarters. I cannot recall on who he spoke to, but he did report back the same frustrations that he had. But I could not comment on where he took that issue to a higher level within Army Headquarters.

5

In any event, the repatriation went on ahead and poor Mr Sinanovic arrived in Australia?---Correct.

And Jake's body is still in the morgue in Kuwait?---Correct.

10

What did you understand to be the urgency in the repatriation of Jake? ---From my statement and discussions I'd had on the Saturday about risk management was discussions on trying to get PTE Kovco back in time for Anzac Day and the need for the family to repatriate him back. That was the only element I could see for the urgency.

15

What I want to know is who told you that, because the family have a completely different story. Who told you that?---My conversations were contained to three people in that 24-hour period in regards to repatriation. I could not - I thought it until presented this afternoon - I thought it was Mick Pemberton who had told me that. Other than that, it was - if it wasn't Mick, it would have either had to have been WGCDR Guerrin or COL Hallinan. But I couldn't conclusively say because to the best of my recollections I believed that it was Mick Pemberton.

25

But, in any event, you were working on the assumption that there was some pressure to bring Jake home by Anzac Day?---Yes.

Now, if of course the Military Police had have been in country prior to the movement of Jake's body we would have expected that none of the repatriation bungle - we would expect that it would not have happened? ---Correct. Continuity of evidence would not - the sign off and the sign in at any point that it left the sight of an investigator or any Military Police person, that it would be accounted for correctly on receipt back again.

30

35

Do you think if there was a critical incident that required a number of surgeons to fly in they'd be required to wait in Kuwait for three days? You don't have to answer that.

40

COL GRIFFIN: I'm not sure if it greatly assists.

LTCOL BERKLEY: You don't have to answer that.

PRESIDENT: I think it's called a rhetorical question.

45

LTCOL BERKLEY: Yes, thank you, sir. Thanks, Colonel. Sir, I've got no further questions.

PRESIDENT: Thank you.

5

<EXAMINATION BY COL YOUNG

[1521]

10 COL YOUNG: LTCOL Pearce, my name is COL Young. I appear to represent the interests of PTE Kovco. Can I just start with the reference earlier two of the Counsel referred to about your offer of support to update mortuary services. You offered that support as a CO of a Military Police Battalion?---Yes, sir. I offered it as - knowing JOC did not have any
15 Military Police staff there and again the incident involved and the requirement for the investigative process. It was an offer of support through a little frustration but also of procedural - lack of awareness of what I would consider to be correct procedure.

20 You've indicated you've heard nothing further. Did that disappoint you? ---I would say I was used to it, sir. Advice provided over the previous three years in regards to Force assigning investigators to an AO, providing a Joint Provost Marshall on staff within an AO and the investigative requirements have all been acknowledged by the chain of command and
25 numerous other personnel, but it remained at that. And reasons, whether it be manning caps or whatever, offered as an explanation of why things didn't occur very professionally unrewarding, but yes, that's - - -

30 You've probably answered my next question. I was going to ask you if during your career as a Military Police person you've found general resistance just because you're in the corps of Military Police?---I haven't been in any other corps to know how people are treated differently. But the week - I will comment that the week from 22 April through to the handover of the investigation to the New South Wales Police - knowing
35 that when we did deploy the investigators they did a very good job, they were professional, they did everything and still at the end we were required - and professionally unrewarding I would say for that period. Yes, I do have periods of that.

40 You told the Board earlier in your evidence today that you've not done the investigator's course. Is that right?---That's correct, sir.

45 Have you ever been panelled to do that course?---No, sir. When I was in the window of opportunities it was not provided to me by senior corps members at that period of time. I have when Commandant of the Defence

5 Police Training Centre sat in on particular components of it. I have read -
in my current appointment I have got intimately involved in particular
areas but in accordance with the way Army procedures are I have not
completed all the courses or the competencies and been issued a
qualification as such.

10 During that window of opportunity were you taken out to plug holes
elsewhere? Is that why you perhaps didn't get on the course?---No, sir, at
that time I was female and getting married and I didn't need to do it
anyway was the advice from senior commanders.

Prior to 21 April this year - that's the date that PTE Kovco died - there
was no SIB presence in Baghdad. Is that right?---That's correct.

15 There now is?---Yes, there is.

20 Would you like to offer an opinion as to why there now is?---Yes, as a
result of the death of PTE Kovco and the resulting actions, it was
addressed. We also had appointed a Provost Marshall ADF who took that
issue up with the Chief of the Defence Force. As a result of that, we now
have investigators deployed in every AO.

25 Do you think it was simply because the Provost Marshall ADF
approached the CDF or do you think it was because of the tragic incident,
being the death of PTE Kovco?---I believe it was as a result of the tragic
incident, yes.

30 We've talked this afternoon about the benefits of having the SIB in place,
and I appreciate you're not a trained investigator. But if I just put this to
you: that following the incident the room was secured via the key. That
key was placed in a room where two people resided. It was not secured
within the room, it was hidden and two NCOs had access to that key. So
there are four people who had access to a key to a crime scene, incident
scene, however one wants to describe that. Do you want to offer an
opinion as a Military Police person on that procedure as far as securing a
scene?---No, I actually can't with the context, sir.

40 Well, let's assume that you were on the ground, an incident occurs and
someone says to you, "Secure that room with the key," and you do that,
what would you do with the key?---I would have had Military Police, the
asset that was there, to actually secure it by person, not just by key. That
person that was securing the door by presence as well, if required, is to
hold onto that key and not have any - allow access to anyone else without
Military Police either escorting or - yes, that would be my position on that.

45

You wouldn't say to two NCOs, "Well, if you need the key, there it is and you can access it yourself. Just tell me what you're doing"?---No.

5 Whilst it's a criticism, it's probably because those people were not trained in how you secure things such as SIB are. Do you agree with that?---I agree. There's a level of training that the service police basic course affords all Military Police on that area. However, their protocols for crime scene preservation could perhaps be introduced in training provided to the wider audience.

10 You mentioned that COL Grutzner is now the Provost Marshall for the ADF?---That's correct, sir.

15 When did that come about, do you know?---I'm on the belief the appointment was in April.

April this year?---Yes.

20 So as Provost Marshall ADF, does he command service police within the three services?---At this moment he is technically responsible for the investigations conducted on operations by all tri-service - by service police, by all three services. The command I'm of the belief of those investigators with the operational commander, the OP COM.

25 I just want to try and understand this new position. Does he only have technical control for investigators. Is that what you've just told us? ---That's correct.

30 What else does he do, do you know?---Sorry, in regards to his wider terms of - his wider position is he advises the - my understanding is he advises the CDF on all policing issues. He is responsive with liaison with the IGADF, the IG Div, and at the moment he doesn't have a staff as yet and his direction has been to establish the - besides establishing a staff is the review of the Military Justice Inquiry and the investigative capability is to assist the team to conduct that review and then implement its recommendations. But I can't comment on the remainder of his duty statement.

40 I'll just ask you this, then: given that we've talked this afternoon about some resistance to Military Police giving advice, would you think that the Provost Marshall of the ADF, if he or she were of the rank of Brigadier, would have a bit more clout and a bit more influence in talking to senior commanders?---Yes, he probably would have some more clout, as you call it. The interesting - probably the biggest asset that would be is the stovepiping of investigative capability in that they weren't under

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command of an operational commander and so had impartiality in regards to the investigation of any incident that required it and reported to a separate technical chain.

5 Just to finish on a lighter note, one of the benefits, of course, would be that he would travel business class and not economy?---You're right, sir.

I don't have any further questions, thanks.

10 PRESIDENT: Thank you. I take it you have ambitions, Colonel?

COL YOUNG: No, they've finished long ago.

15 PRESIDENT: The three-day wait in Kuwait before you can get into country: have you got any thought why that's for?---My understanding is an operational safety and security measure in regards to the training <delete>.

20 Your flyby teams of previous days, obviously if they're going to deploy the chances are they're going to deploy to Iraq?---I have flyaway teams available for any area of operation but, yes, with the number of - yes.

That's the probability ?---Yes.

25 Would it be possible to have the force prep done before they fly away, have it done in country; in other words, skip the three days in Kuwait? ---They do that week force preparation training here in Australia. The arguments for the Kuwait training, I'm not abreast of the details of the - the security details of the requirement for that training to be conducted and what the risks are if it's waived and they're prepared to take those risks. 30 JOC instigate that and they would probably be in the best position to be able to advise you of what the (inaudible) for the risks of going in or out of the AO without doing that are (indistinct).

35 I think, Colonel, that might be a fertile ground for inquiry.

COL GRIFFIN: It's an operational security matter, sir, there are aspects to it and we can certainly have a specialist come and advise you of that in closed session.

40 PRESIDENT: I think we need to do just that.

COL GRIFFIN: Very well.

45 PRESIDENT: Thank you, Colonel, is there any further evidence?

COL GRIFFIN: No, nothing further, thank you, sir.

PRESIDENT: Anything further, gentlemen?

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COUNSEL REPRESENTING: No, sir.

PRESIDENT: Thank you, Colonel, the Board is most grateful to you.
You may now stand down?---Thank you, sir.

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<WITNESS WITHDREW

[1534]

15 COL GRIFFIN: That completes the evidence that I have for the Board
today, sir.

PRESIDENT: Very well, 10 o'clock tomorrow?

20 COL GRIFFIN: Not before 10, thank you, sir.

PRESIDENT: Very well, is everybody comfortable with that?

COUNSEL REPRESENTING: Yes, sir.

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PRESIDENT: 10 o'clock tomorrow.

30 **MATTER ADJOURNED AT 1535 UNTIL
THURSDAY 17 AUGUST 2006 AT 1000**