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A STUDY INTO JUDICIAL SYSTEM

UNDER THE

DEFENCE FORCE DISCIPLINE ACT

BY

BRIGADIER THE HONOURABLE A.R. ABADEE, RFD

DEPUTY JUDGE ADVOCATE GENERAL

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1. A Study into the Judicial Independence of Military Trials.



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HEADQUARTERS AUSTRALIAN DEFENCE FORCE

Department of Defence
PO Box E33
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17 November 1995

Colonel The Honourable Mr Justice A.R. Abadee, RFD
Judges' Chambers
Supreme Court
Queens Square
SYDNEY NSW 2000

TERMS OF REFERENCE FOR A STUDY INTO JUDICIAL INDEPENDENCE UNDER THE DEFENCE FORCE DISCIPLINE ACT

1. You have agreed to undertake a study into the arrangements for the conduct of trials under the Defence Force Discipline Act with a view to determining whether these arrangements satisfy current tests of judicial independence and impartiality.
2. If your study reveals the necessity or desirability for any reform of these arrangements, you are to report to me accordingly. In this event, you are to make recommendations regarding the reforms you consider necessary or desirable.
3. In conducting your study, you may seek the views of any member of the Defence Force. In particular, you are to consult:
 - a. The Chiefs of Staff of the three Services;
 - b. The Judge Advocate General - Australian Defence Force; and
 - c. The Deputy Judge Advocates General.

4. You are to keep the Director General of Defence Force Legal Services informed of the progress of your study.

s22



J/S. Baker
General
Chief of the Defence Force

CHAPTER 1

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

- 1.1 The Introduction sets out in considerable detail the forces for change and the context in which those forces arise. The study shows that it would be simplistic to assume that because of recent changes in the U.K. and in Canada, exactly the same problems exist in Australia, and that we should go down one of the courses adopted in either of those countries. The point has to be made that the forces for change in the U.K., namely Findlay in the European Court of Human Rights, based as it is on Article 6 paragraph 1 of the European Convention on Human Rights to which the U.K. is a party, has no counterpart in Australia. Similarly, the Canadian decision of Genereux based as it is on s.11(d) of the Canadian Charter of Human Rights and Freedoms, likewise has no counterpart in Australia. It should be observed that both the U.K. and Canadian provisions are generally based on Article 14 para.1 of the International Covenant on Civil and Political Rights ("ICCPR"), and, although Australia is a signatory to the ICCPR, it has not been incorporated into Australian municipal law in terms. If and when it is, and depending on the terms, different considerations may come into play.
- 1.2. It is also appropriate to observe that in the United Kingdom there has now been a movement away from the investing of multiple power roles in the convening authority (CA) in respect of the military justice system and the devolving of such powers upon different authorities. However, the separate military justice system and administered by the services has generally been maintained. In Canada not

only does Genereux itself recognise the existence of a separate military justice system which must be consistent with the Constitution and the Canadian Charter, but support for such existence, albeit subject to further innovations and changes is to be found in the recent report of the **Special Advisory Group on Military Justice and Military Police Investigation** (SAG) of March 1997. Indeed, in that report the SAG specifically recognised that the chain of command is the hierarchal structure which in Canada "as elsewhere" bore the ultimate responsibility for the preparation and execution of tasks associated with duties having the ultimate purpose of defence of the nation. As the report has also observed

"... the integrity of the chain of command can only be preserved if discipline is inculcated at each level of the military hierarchy and if there exists a system of justice which is specifically designed to respond to the unique needs of the military. Discipline is at the heart of efficient and effective military forces. This reality explains and justifies the existence of a separate military justice system, with a unique Code of Service Discipline so important that it should be embodied in a separate statute".

I agree with these sentiments and views which may be fairly applied to the position of Australia. It is appropriate, however, to observe a continuing trend in the United Kingdom both to increasing "civilianisation" of the military justice system and to its operation more in keeping with civilian court standards and procedures. A view, perhaps that the implementation of military justice, at the military trial level, is to be seen as an incident of command and hence one

essentially for a convening authority alone, whilst still accepted in the United States, is no longer the view in the United Kingdom or in Canada.

- 1.3. Before leaving the subject of what has occurred in Canada and the U.K., it is appropriate to make several further observations. Whilst s.11(d) of the Canadian Charter and Article 6 para 1 of the European Convention both reflect (in part) Article 14 of the ICCPR, there are some differences. In s.11(d) of the Canadian Charter, the words "charged with an offence" are to be found and it has been held to encompass criminal and quasi - criminal charges. In both Article 6 of the European Convention and Article 14 of the ICCPR the words "In the determination of any criminal charge against him" are to be found.
- 1.4. In Genereux the Canadian Supreme Court did not draw a distinction between a charge on the one hand and "criminal charge" on the other. Again, in Findlay the European Court of Human Rights, whilst referring to the fact that there were both "military offences" and "civil offences" charged under the Army Act before the General Court Martial (GCM) , did not appear to distinguish between the two classes of offence or suggest that a civilian offence (classified as "criminal" under domestic convention law) was a "criminal charge" within the meaning of Article 6 para. 1. The European Court did not conclude that what might be called a military offence (bearing some similarity to an offence exclusively disciplinary in character) was perhaps not an offence falling within the words "criminal charge" in Article 6 para 1. This matter is worthy of mention. The ICCPR appears in Schedule 2 of the **Human Rights and Equal Opportunity**

Act 1986 ("HREOC Act"): see s.3. However, in Re Nolan (1991) 162 CLR 460 at 481 at least Brennan and Toohey JJ (at 481) expressed the view that the **Defence Force Discipline Act 1982** (DFDA) which created service offences did not "create criminal offences". There is thus perhaps an argument available (albeit not a strong one) that since the DFDA creates service offences and not criminal offences, at least according to Brennan and Toohey JJ, the words "criminal charge" found in Article 14 para 1 of the ICCPR perhaps do not, in terms, include service offences created under the DFDA. However, the better view is probably that those service offences which have the indicia of criminal offences or offences against the general law, would probably be in the nature of a criminal charge.

- 1.5. Accordingly, the study has focussed on what is the current legal framework within which Australian military law must operate.
- 1.6. It is appropriate to observe that the Australian position appears to be closer to that recognised by the U.S. Supreme Court in Weiss than to either of the systems now applicable in Canada and the UK. The reasons of the High Court in Tyler (at p32) would suggest that not only is the decision of the Canadian Supreme Court in Genereux not applicable in determining whether the court martial (CM) under the DFDA answers the requirement of independence (and I would say impartiality), but so is the reasoning of the European Court in Findlay not applicable.

- 1.7. Further it might be thought that the position of the U.S. regime under the Uniform Code of Military Justice (UCMJ) is also quite different from that pertaining to Australia. The requirement for "due process" under the U.S. Constitution, and that "due process" operates in relation to trials under the U.S. system of military justice, also is a matter that differentiates the U.S. system from that in Australia. What the U.S. courts have said is that due process (of which there is no counterpart or analogy in the Australian Constitution) can nevertheless be guaranteed under the U.S. system of military justice. That said, there are similarities in approach of the Courts in Australia and the U.S., noting at the same time that the UCMJ contains some provisions that "strengthen" the independence of JAs and members and gives them a protection not found in the DFDA.
- 1.8. The situation in Australia is that JAs and DFMs are almost invariably reserve officers who are senior practitioners in the civilian criminal courts. They also hold military rank. These persons are appointed or nominated by the JAG, and the JAG and the DJAGs are very senior reserve officers and invariably Judges of a Federal Court or Supreme Courts of the various States of Australia. None of these situations pertained in the U.K. or in Canada. Accordingly, the civilian influence is extremely strong in the Australian military context.
- 1.9. Advocates of substantial change to the present system, appear to be basing their recommendations on the greater civilianisation of disciplinary law. In this context, there are already considerable restrictions particularly on the trying of

drug and sex offences under the DFDA, these being left to be dealt with generally in the civilian courts. It is with this background that the High Court of Australia in Tyler in 1993 expressly rejected the view that for a service tribunal to be independent the three essential conditions of independence referred to in Genereux (ie. security of tenure, financial security, and institutional independence) must be met. The Court rather tested independence by reference to the will of Parliament, as expressed in terms of the statutory provisions of the DFDA, a position somewhat akin to the approach of the U.S. Supreme Court, in determining that a JA at a CM, although not appointed for a fixed term, nevertheless satisfied the requirement of independence and met the tests of impartiality under the "due process" clause. Were the High Court to conclude that the exercise of jurisdiction, at least in respect of service offences which are in turn offences against the general law, committed in Australia in peace time and in time of civil order, involved the exercise of judicial power under Ch III of the Constitution and not the exercise of disciplinary power (as the minority views of the High Court suggest), then the service tribunal's jurisdiction in respect of dealing with such offences would fail on constitutional grounds. No question of their independence or impartiality would then strictly arise for consideration at all.

- 1.10. However, it is in the context of the applicability of the ICCPR, by virtue of the ability of the Human Rights Committee to consider communications from individuals relating to alleged violations of rights set forth in the ICCPR, that the possibility of adverse comment of the current system does exist.

Consequently, the study also addresses issues which might on a close examination, scrutiny and evaluation, possibly evoke criticism by the Commission established under s.7 of the HREOC Act. Covenants such as the ICCPR are perhaps playing an increasing role in a number of areas. There has been recent recognition of the relevance of the ICCPR in relation to appointments to judicial office in State and Territory Courts: see "Declaration of Principles on Judicial Independence" issued by the Chief Justices of Australian State and Territory Courts 13 April, 1997.

- 1.11. It is relevant to note that whatever the differing views of the High Court in relation to the exercise of jurisdiction under the DFDA, at least in relation to the matter of the independence of service tribunals (CMs / DFMs) exercising disciplinary power, such differences do not emerge in Tyler. The minority judges did not dissent, despite their views in relation to the exercise of jurisdiction by service tribunals. It would be most surprising if the Commission were to reach views on independence of CMs/DFMs inconsistent with the views of the High Court in Tyler.
- 1.12. In considering what changes ought to be made, having regard to the room for greater scrutiny which now exists, regard must be had to the size of the Defence Force, the number and types of matters in fact being dealt with by the various service tribunals exercising disciplinary power, and the cost of such proceedings. Interestingly, the statistics reveal that the number of CM/DFM trials is relatively small compared with the enormous number of matters dealt with by summary

authorities. Any question of independence and impartiality must, of necessity, deal with the summary authority position as well as the CM/DFM trial position. As yet, no court challenge has ever been made in respect of the exercise of summary disciplinary authority.

- 1.13. The study has not revealed any service desire or need to establish a Military Court. The enactment of s.169A et seq. and the implementation of the Discipline Officer Scheme has removed a considerable number of "disciplinary offences". The study reveals a need and acceptance of the widening of the s.169A provisions to deal with a greater number of personnel, including junior officers. This would have an even greater impact on the number of offences dealt with by summary tribunals as such.
- 1.14. A further matter referred to by the then JAG in his 1995 report was the lack of any formal appeal system from summary tribunals.
- 1.15. This raises the question of the legitimate concerns about the administration of justice at the summary level especially where very serious elective punishments, eg. reduction in rank, may be imposed. There is no right to full election of trial by CM/DFM as in the U.K. and in the U.S. Thus, the question of the independence and impartiality of summary tribunals is something which the study has necessarily also focused on. The question of the current extensive review provisions against a possible appeal system are dealt with later in the study. Finally, the question of sentencing arises. There is no right of appeal, nor

even a right to seek leave to appeal, to the DFDAT against sentence even when imposed by court martial or DFM. This is yet another area in which the present system could come under adverse criticism. It is also dealt with also later in the study.

1.16. The High Court of Australia has held that the constitution of a GCM pursuant to the DFDA answered the requirements of independence of a service tribunal exercising disciplinary power: Re Tyler per Brennan and Toohey JJ. at 33; Mason CJ. and Dawson J. at 27. Although in Tyler no express views were stated on the subject of impartiality, nevertheless the reasons given by Brennan and Toohey JJ. would also support the view that a GCM answered the requirements of impartiality as well. In many respects independence and impartiality are twin concepts, sometimes inseparable. Indeed, in some cases, the link between the concepts of independence and objective impartiality may be such that if a tribunal fails to offer an appropriate guarantee of independence it will not satisfy the test for objective impartiality. The independence of JAs and DFMs exists to serve the Defence Force (and public confidence) in the military justice system. An important factor in maintaining the confidence of the Defence Force members, indeed of the public generally, in JAs and DFMs (and the military justice system), is their (and its) obvious and clear impartiality. There is a clear link between judicial independence and judicial impartiality.

1.17. The cases, both in Australia and elsewhere, would suggest the concepts of independence and impartiality are not confined to actual or perceived individual

independence and impartiality but extend as well to actual or perceived institutional independence and impartiality.

- 1.18. It is to be remembered that as the case law now stands a CM under the Act does not exercise the judicial power of the Commonwealth. Thus Ch III of the Constitution has no application to a law creating or conferring the jurisdiction of a CM.
- 1.19. The reasoning of the High Court in Tyler's case would suggest that the decision applies equally to the constitution of a restricted court martial (RCM), that is to say, it satisfies the requirement of independence (and in my view impartiality as well) of a service tribunal exercising disciplinary power. Further, I consider it can be applied in relation to trial by a service tribunal constituted by a defence force magistrate. The term "service tribunal" includes a summary authority as well as a CM and DFM: s.3(1). Although the High Court did not address the issue of independence (or impartiality) of the summary authority, nevertheless, as presently advised, I consider that, to the extent that there is a requirement of independence (and impartiality) of a service tribunal constituted by a summary authority, such requirement is met by a summary authority constituted under the Act.
- 1.20. The constitution of each service tribunal within the DFDA answers the requirements of independence and impartiality of service tribunals exercising disciplinary power.

- 1.21. That said, there are legitimate and powerful concerns in relation to a number of aspects of the present system. There are legitimate concerns about appearances and perceptions. Although there is no existing imperative for change, the will for change nevertheless exists. It is appropriate that change to the system of military justice is warranted, or at the very least, consideration should be given to such.
- 1.22. Recommendations have necessarily been made which will enhance the perceptions of independence and impartiality of all service tribunals, whether they be courts martial, DFM trials or summary trials. Whilst the changes are minimal for the former two, it is the summary authority tribunal in respect of which I have made substantial recommendations.
- 1.23. It is further recommended that the newly established Military Law Centre (MLC) at ADFA be closely involved in the initial and continuing training and education of officers involved with the summary authority process. These include COs and subordinate summary authorities, as well as defending officers. Indeed, there is a good opportunity now with the implementation of the DER to collocate existing single-service training of COs etc for their "judicial" role.
- 1.24. The MLC would also have great potential in providing legal training of this nature to developing countries in the region, not only in disciplinary law, but also in international law, military operations law, law of the sea etc.

- 1.25. The MLC should be responsible to a Board which would include the JAG and/or DJAGs and senior academics.

Summary of Recommendations for change

- 1.26. It is with these considerations in mind that the following recommendations, which appear throughout the rest of the study, are made.

Standards to be applied in military trials

- 1.26.1 *The standard of military justice should not vary according to whether there is a time of peace or a time of war. Because the Defence Force must constantly train for war, there should be no different approach for the conduct of tribunals in peace time to those conducted in war, overseas, or during a period of civil disorder in Australia.*

(Para 3.20).

- 1.26.2 *There is a most powerful case for eliminating the multiple roles of the convening authority.*

(Para 5.21).

Prosecution at CMs & DFMs

- 1.26.3 *Prosecution guidelines similar to those in operation in the various States or the Commonwealth (with suitable modifications) be introduced.*

(Recommendation 1 para 6.24)

1.26.4 *That careful consideration now be given to examining the question of the appointment of an "independent" Director of Military Prosecutions upon a tri-service basis.*

(Recommendation 2 para 6.24)

1.26.5 *The matter of any such appointment, if at all, whether it should be tri-service, the role and duties of any Director and the matter of responsibility of the prosecuting authority to any other authority and to whom should be dealt with any legislative change. At the same time the matter of whether the prosecutor should be organised as an independent unit under the Act should also be addressed.*

(Recommendation 3 para 6.24)

1.26.6 *The present system of the JAG nominating officers to the JAs' panel, appointing DFMs and recommending s.154(1)(a) reporting officers be retained.*

(Recommendation 1 para 6.47).

1.26.7 *That there be no command or control (except of an administrative nature) exercised over JAs, DFMs and s.154(1)(a) reporting officers in the performance of their judicial duties. This would involve amendment to such provisions as AMR Reg. 583 and even AMR Reg. 585 (or their service equivalents, if any).*

(Recommendation 2 para 6.47).

1.26.8 *On the assumption that by convention the JAG would continue to be a military officer, the JAA should be under the command of the JAG.*

(Recommendation 3 para 6.47).

1.26.9 *There should be no reporting on JAs, DFMs and s154 (1)(a) reporting officers in respect of their judicial duties.*

(Recommendation 1 para 6.52).

1.26.10 *There should be a separate administrative authority in respect of non-judicial duties of the JAs, DFMs and s154(1)(a) reporting officers and reporting on such duties, by their respective "Head of Corps".*

(Recommendation 2 para 6.52).

1.26.11 *Duties of a judicial nature, including the appointment of JA or DFM to a particular trial, be allocated to the JAs, DFMs, or S154(1)(a) reporting officers by the JAG. This could be done through a Judge Advocate Administrator.*

(Recommendation 1 para 6.55).

1.26.12 *The JAA should be under the command of and reported on by the JAG and DGDLO.*

(Recommendation 3 para 6.52)

1.26.13 *That convening orders issued by convening authorities include a request for the JAG to appoint a JA or DFM, or alternatively, a statement (if it be the case) that a particular JA or DFM has been appointed by the JAG.*

(Recommendation 2 para 6.56)

1.26.14 *The subject of fixed tenure should be further considered. Whilst I do not consider it essential, the notion of fixed tenure (with a virtual right of extension) is not opposed. It may provide a means of ensuring that appointees perform duties and should not hold office for the sake of it, whilst remaining inactive or unavailable for one reason or another.*

(Recommendation 1 para 6.62).

1.26.15 *Subject to the constraints, inter alia, discussed, I do not see why those who are appointed as JAs, DFMs and s154(1)(a) reporting officers, should not generally be able to perform duties of a "non-judicial nature", or duties not inconsistent with the performance of the type of judicial duties or functions that they may be called upon to perform from time to time.*

(Conclusion 1 para 6.75).

1.26.16 *Consideration should be given to the establishment of equivalent of a Court Administration Unit, independent of the convening authority, and outside his chain of command or independent tri-service officer to perform the function of selecting members of a court martial. (This is said upon the assumption that there is not support for the U.K. scheme of a Court Administration Officer who has taken over many of the convening authority's powers.)*

(Recommendation 1 para 6.91).

1.26.17 *If the present system is to be retained, then:-*

1.26.17.1 *the convening authority should whenever possible appoint, subject to service exigencies, persons from outside his command and at least outside the accused's unit. The matter of some members outside of the convening authority's command being included is likewise a matter that could be considered.*

1.26.17.2 *Such selection should be from a "large pool" and, as a desirable objective, as random as possible. The matter of the tri-service "pool" situation could even be considered for the few courts martial in fact held.*

(Recommendation 2 para 6.91).

1.26.18 *Reviews of court martial proceedings and DFM trials should be conducted by an authority other than the convening authority.*

(Recommendation para 6.95).

1.26.19 *There should be a prohibition upon consideration of an officer's performance as a member of a court martial being used to determine qualifications for promotion or rate of pay or appointment. Further, that the officer reporting on efficiency of the president or members should not take into account the performance of duties of the president or members at any court martial. Section 193 protects such a member during performance of his/her duties as a member. There is a case for implementing the spirit of such a section generally.*
(Recommendation 3 para 6.91).

Sentencing at Courts Martial

1.26.20 *Whilst the matter of whether the JA should be involved in the imposition of sentence, could be the subject of further study, it is not necessary presently to recommend a change in the current system. Indeed at the service level, in serious cases where a CM is justified, that there would be considerable opposition to taking powers of sentencing away from the court itself.*
(Recommendation 1 para 6.110).

1.26.21 *Despite what I have said above, I do not consider that one should ignore the argument for the trial JA imposing sentence and giving reasons for such. I believe that support for his doing so would be strengthened were appeal rights in respect of a CM sentence to be conferred. The issue should thus be further considered.*
(Recommendation 2 para 6.110).

Appeals on sentence

1.26.22 *A good case is established for now considering the conferring of rights of appeal (by leave) in relation to sentences imposed by a court martial or DFM. There is no pressure for change from those interviewed or who had put in submissions. However, it is observed that were appellate rights to be given in relation to sentence, the justification for requiring stated reasons for particular sentence would be considerably increased. Amendments would also need to be made to s.20 of the DFD Appeals Act to deal with the rights of appeal in relation to sentence.*

(Recommendation 1 para 6.113).

1.26.23 *No case is made for a prosecution appeal as of right or by leave appeal against sentence. Whether there should be a limited right of appeal in respect of sentence would be a highly controversial issue. The situation with a disciplinary tribunal exercising disciplinary power is not quite analogous with the position of the prosecution in relation to prosecution appeals against sentence on a ground of manifest inadequacy in the ordinary criminal courts. The position in the civil courts is that the Crown may address on sentence at the trial, and does, in some cases, have a duty to do so.*

(Recommendation 2 para 6.113)

Recording of "no conviction"

126.24 *That consideration be given to the inclusion of a "no conviction" option in respect of an offence charged under the DFDA. Such would recognise that there may be good reasons for no conviction being recorded.*

(Recommendation para 6.120).

Membership of Courts Martial

1.26.25 *There is a good case for amending s.116 to make warrant officers eligible for membership of courts martial. Whether or not, after a period of time, lower ranks could/should be involved may depend upon experience involving the significant change proposed and how, if made, it works out in practice.*

(Recommendation 1 para 6.131).

1.26.26 *Specifically that non-commissioned members of the rank of Warrant Officer be eligible to serve upon a General or Restricted Court Martial provided that the non-commissioned member is equal or senior in rank to the accused.*

(Recommendation 2 para 6.131).

Appeals from Commanding Officers and other Summary Authorities

1.26.27 *That although arguments are available for a limited right of appeal in some cases from decisions of a commanding officer or other summary authorities, at the present time, no action be taken to introduce any such appeal rights.*

(Recommendation 1 para 6.170).

1.26.28 *In view of the arguments advanced during this study, the issue of conferring rights of appeal, if any, should be the subject of further consideration, particularly in the classes of cases which have been identified (eg. elective punishments involving reduction in rank).*

(Recommendation 2 para 6.170).

1.26.29 *The present review system has generally proved to be efficacious and provided appropriate protections for Defence members and benefits to the Service in the streamlining of the administration of justice.*

(Recommendation 3 para 6.170)

1.26.30 *The advantages of any system of appeal from decisions at the summary authority level are outweighed by the disadvantages. The study lends support to the views of the senior officers who opposed the introduction of an appeal system.*

(Recommendation 4 para 6.170).

1.26.31 *Concern is felt regarding submissions that suggest that some s.154(1)(b) reporting legal officers may not have sufficient experience or training properly to report for the benefit of a reviewing authority. The difficulty could be addressed by training, exposure to the criminal law eg. by way of secondment to offices of the DPP, and/or by the employment of reserve officers. The Army particularly does well in this area, frequently using reserve legal officers to do reports under s.154(1)(b). Perhaps a certificate of qualification and suitability to be s154(1)(b) reporting officer could be given by the newly-established Military Law Centre.*

(Recommendation 5 para 6.170).

1.26.32 *Subject to exigencies of service, s.154(1)(b) reporting officers should be legal officers totally independent of the prosecution process and of the reviewing authority.*

(Recommendation 6 para 6.170).

1.26.33 *To assist particularly Commanding Officers, that increased formalised training and education be furnished to them before they take up their position as Commanding Officer and exercise service tribunal jurisdiction as a summary authority. Steps be taken to ensure that they are knowledgeable about their roles in the military justice system and competent to perform them. The new Military Law Centre could play a significant "supportive" role*

in this area of education, even awarding a 'certificate' upon completion of a course.

(Recommendation 7 para 6.170)

1.26.34 *In respect of elective punishments, provision be made for the election to be in writing and for the summary authority to furnish the accused certain explanations about the election when giving him the opportunity to elect trial by DFM or court martial.*

(Recommendation 8 para 6.170).

Elective Punishments

1.26.35 *The punishment of reduction in rank should be removed as an elective punishment.*

(Recommendation 1 para 6.176).

1.26.36 *In the absence of appeal rights, the range of elective punishments presently available be reviewed.*

(Recommendation 2 para 6.176).

1.26.37 *That provisions (probably by way of regulations) be introduced requiring that an election be in writing and further dealing with the obligations upon an officer to provide explanations to the accused when giving him the opportunity to elect.*

(Recommendation 3 para 6.176).

Education and Training

1.26.38 *That a structured and in depth course of teaching and training in relation to the DFDA be implemented for all officers about to be appointed as commanding officers. That course should be the same irrespective of service.*

(Recommendation 1 para 6.184).

1.26.39 *That ongoing education and instruction be given to those who act in the capacity of a summary authority.*

(Recommendation 2 para 6.184).

1.26.40 *That sentencing statistics and guidelines in relation to summary punishment be prepared, publicised and made available from time to time.*

(Recommendation 3 para 6.184).

1.26.41 *That legal principles discussed in reports of the JAG/DJAGs (and in s.154(1)(a) reports) be the subject of reporting and dissemination to commanding officers.*

(Recommendation 4 para 6.184).

1.26.42 *See recommendation number 7 under the heading "Appeals from Commanding Officers".*

(Recommendation 5 para 6.184).

1.26.43 *That the Military Law Centre provide uniform training and education to commanding officers before such officers commence to sit as summary authorities, to ensure they are knowledgeable about their role in the military justice system, as a summary authority. The matter of certification by the Military Law Centre or some other body could be addressed.*

(Recommendation 6 para 6.184).

1.26.44 *There is a case for providing some basic legal training and work materials to those who may be called upon to participate as a prosecuting or defending officer at a summary trial.*

(Recommendation 7 para 6.184).

1.26.45 *That instructions be given, if necessary by statutory amendment, that any Summary Authority (including CO, SUPSA and SUBSA) who has been involved in the investigation or the preferring of a charge against an accused, shall not hear or deal with any such charge against that accused.*

(Recommendation 8 para 6.184).

Reporting on Commanding Officers

1.26.46 *Absent a compelling need or legal requirement, there is no need to change the present system of reporting on commanding officers in relation to the performance of duties in maintaining and enforcing service discipline.*

(Recommendation 1 para 6.192).

1.26.47 *There should be no reporting upon a commanding officer in respect of the performance of duties as a service tribunal in a particular case.*

(Recommendation 2 para 6.192).

The Discipline Officer Scheme

1.26.48 *Consideration should be given to extending the discipline officer jurisdiction (with appropriate modifications) to deal with officers holding the rank of major and below.*

(Recommendation para 6.196).

CHAPTER 2

INTRODUCTION

INTRODUCTION

Terms of Reference

- 2.1. On 17 November 1995 the Chief of the Defence Force, General J. S. Baker ("CDF") furnished me with terms of reference to undertake a **study** into the arrangements for the conduct of trials under the **Defence Force Discipline Act 1982** ("the DFDA" or "the Act") with a view to determining whether these arrangements satisfy current tests of judicial independence and impartiality [*my emphasis*]. The terms also provide that if my study revealed the necessity or desirability for any reform of these arrangements, I am required to report to the CDF accordingly. In such event, I am to make recommendations regarding the reforms that I consider necessary or desirable. As a "study", issues have needed to be fully addressed. Further, for those who may be required to consider change, I have also sought to provide a full and comprehensive background study. The length of the study is thus explicable. I have also delayed the presentation of the report to permit me to consider the effect of the European Court of Human Rights decision in **Findlay v United Kingdom** (unreported 21 January 1997) a copy of which was but recently received.
- 2.2. In the course of my carrying out the study I have consulted with the Chiefs of Staff, the Judge Advocate General ("JAG") as well as the Deputy Judge Advocates General ("DJAGs").
- 2.3. In conducting the study I have sought a spectrum of views from members of the Defence Force, indeed, from all the three services. A considerable number of submissions was received by me and I am indebted to those persons who have made contributions. Those members who have sent me written submissions and/or who were interviewed by me are listed in Appendix A. I have interviewed many of those who provided written views as well as interviewing members from across the services holding a variety of ranks.

- 2.4. The study has extended well over one year. It has been a far- ranging and comprehensive one. There has been a wide spectrum of views upon a large range of matters. Indeed, the study has turned out to be one perhaps somewhat more comprehensive than I had initially considered it would be, when it was originally undertaken. As the study has been conducted, submissions received, and conferences held, frequently new issues have emerged that have been worthy of further pursuit and investigation.

The Purpose of a Military Justice System

- 2.5. Throughout the study I have been most conscious of the need not to lose sight of the importance of discipline in the Defence Force and the purposes which it is intended to serve. Thus the general position of the CGS is that service tribunals must be capable of operating in the course of operations against the enemy and he would not support changes which would jeopardise this flexibility. As he said in his written submission of 5 March 1996 "It is my view that Army must constantly train for war and I would not support a different approach for conduct of tribunals in peace time to those conducted in war". This view is supported by case law in the U.S. but may not in terms be universally supported by all judges both in Australia and Canada. This said, the recent Canadian "Report of the Special Advisory Group on Military Justice and Military Police Investigation Services (March 1997) ("SAG Report") does not suggest that the Canadian military justice system should operate differently depending on time of peace or war. Nor for that matter does the recent **UK Armed Forces Act 1996** in terms really draws any such distinction.

2.6 The Status of Military Justice System

I have also borne in mind that the independence of the court martial system has been upheld by the High Court, and hence there is no imperative for change or urgent change. Indeed, whilst there is an acknowledged need for change, a will for change, what the nature and content of such change ought to be is a matter of lively debate. I have kept this constantly in mind. Likewise, I have kept in mind the unique needs of the military and the purpose of the system of military justice in accommodating and addressing such needs. Discipline is at the heart of an effective and efficient military force. Thus, military jurisdiction cannot be as rigid as or mirror its counterparts in, the civilian jurisdiction and, to an extent, departure from the traditional structure of the civilian system of criminal justice is unavoidable. Also I have been conscious of the fact that as the law presently stands, service tribunals have the role of ensuring that discipline is just, and the fact that service tribunals acting judicially are essential to the organisation of the three services. Again, there has been a need to remember that service tribunals exercise disciplinary power. Service tribunals acting under the DFDA do not exercise the judicial power of the Commonwealth, are not courts for the purposes of Ch III of the Constitution and Ch III has no application to a law creating or conferring the jurisdiction of service tribunals. There can be little doubt that whilst a service tribunal exercises disciplinary power and not the judicial power of the Commonwealth under Ch III of the Constitution, nevertheless, in performing its functions under the Act, it is exercising judicial power. The power to make laws with respect to the defence of the Commonwealth entails a power to enact a disciplinary code standing outside Ch III and to impose upon those administering the code a duty to act judicially. To ensure that discipline is just, tribunals acting judicially are essential to the organisation of the Defence Force.

- 2.7. I also consider it appropriate to bear in mind that military jurisdiction must be sufficiently flexible for use in war as well as in peace. Thus the administration of justice on operations or on the battlefield involves consideration of factors removed from day to day civilian life.

Independence in a Military System

- 2.8 Indeed in preparing this study and report I have also borne in mind a number of other considerations. First, what perhaps is being sought to be achieved, to the extent possible, is the insulation and protection of those participating in the administration of the military justice system from the effects of possible command influence, and to place such persons outside the normal command structure. Secondly, that the parallel system of military law and tribunals for the enforcement of military discipline is entrenched in our military traditions and supported not only by case law but also by compelling principles. Thirdly, that it may not be possible to achieve an ideal or truly perfect independent military "judiciary" because as was said by Chief Justice Lamer in the Canadian case of R v Genereux (1992) 88 DLR (4th) 110 at 295 (when agreeing with the conclusion of one military author):

"In a military organisation, such as the Canadian Forces, there cannot ever be a truly independent military judiciary: the reason is that the military officer must be involved in the administration of discipline at all levels. A major strength of the present military system rests in the use of trained military officers, who are also legal officers, to sit on courts martial in judicial roles. If this connection were to be severed (and true independence could only be achieved by such severance) the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the loss by the judge of military knowledge and experience which today helps him meet his responsibility effectively. Neither the accused nor the forces would benefit from such separation".

- 2.9 There is also a need to recognise that JAs like DFMs must be independent in the exercise of their powers. They must be independent to serve the Defence Force (and indeed the public). Confidence of the Defence Force members

(indeed public confidence) in the system of military justice also requires an appearance of manifest impartiality on their part.

- 2.10 The present system of appointment to the judge advocates' panel, ("JAs") as Defence Force magistrates ("DFMs"), and as s 154(1)(a) reporting officers ("reporting officers") (all of which have an involvement of the JAG in the "process" of appointment, ensures that only those who have achieved sufficient experience and professional standing are so appointed. The requirement that only military officers may be so appointed, satisfies the need that trained military officers with military knowledge and experience are appointed to these roles. In practice, those appointed have had appropriate military exposure, experience and generally have been Reserve officers (perhaps less ambitious for further promotion and without real concerns for rank, pay and advancement), who have had considerable experience as civil practitioners in the ordinary trial courts. Indeed, history and practice have shown that many such persons are senior civilian lawyers and in many cases Queen's Counsel, Senior Counsel or in the case of s 154(1)(a) reporting officers, even Judges of superior courts. The present system furnishes men and women who have the qualifications and experience, both civilian and military for appointment to these positions.

Full-time Military Judges

- 2.11 I make these observations at this stage because there are those who argue that a greater degree of independence and impartiality might also be achieved by appointing full time judges, in effect, to a military division of the Federal Court of Australia under Ch III of the Constitution with corresponding reduction of the role of the military in its military justice system. There is no compelling or persuasive view in support of such suggestion. Another alternative advanced is the establishment of what might be professional military judges selected from the military to become, in effect, a full time military judiciary. As to this latter view, I do not consider that, as the present

situation stands, there are those in the regular services who would be qualified or trained for such position.

- 2.12 Another consideration is the need to recognise the principle of accountability, namely, that those appointed to the position referred to are accountable to some authority. In other words, those appointed as JAs, DFMs or s 154(1)(a) reporting officers must be military officers. All military officers must be accountable. As persons eligible for appointment to one of the positions discussed must also be military officers, it is difficult to deny that they too must be accountable. There is perhaps sometimes a tension between true independence and accountability, but, as the US Supreme Court has recognised, even those who are appointed as professional military judges must, like all military officers, be accountable. The provisions of the Uniform Code of Military Justice (“UCMJ”), as that Court observed, preserves the appropriate balance. Further in considering change (and change should be considered), what ought not be overlooked are factors such as the number and frequency of trials under the Act, manpower, cost and the like, and the need to avoid any increased burdens. Further, as a goal no one can dispute is the objective of keeping military tribunals as free as possible from a perception of potential interference by the military hierarchy or of improper command influence.

A Disciplinary Tribunal

- 2.13 As mentioned above, it has been important in my study to bear in mind that a service tribunal exercising disciplinary power is not a court under Ch III. Thus, when one is speaking of judicial independence and judicial impartiality, it is important to remember that these concepts (one might call them twin concepts) have traditionally developed in relation to courts forming part of the judicial system administering the law of the land. There is now the view that the concepts involve both individual and institutional independence and impartiality. A service tribunal administering disciplinary power is not part of

that judicial system, albeit, that it exercises judicial power. Merely because a tribunal is exercising judicial power, or because a service tribunal exercising disciplinary power is bound to act judicially when exercising that power, does not make that tribunal a court in the sense that one understands it according to legal or common usage. Thus, what may be required of a court exercising judicial power of the Commonwealth under Ch III may not be required of a tribunal exercising disciplinary power under the Act. This should not be lost sight of. Further, cases on what is required of a court exercising judicial power under Ch III of the Constitution in terms of judicial independence and judicial impartiality are to be seen as decisions in relation to courts as such. A valid point also to be made is that there be some caution in seeking to uplift principles applicable to the courts in respect of civilian criminal trials and to attempt unilaterally to apply them to service tribunals exercising disciplinary power. In saying this, I am conscious of what I might refer to as the ongoing "civilianisation" of the service tribunal proceedings. This process is not surprising since in trying offences under Pt III of the Act, a service tribunal has practically all the characteristics of a court exercising judicial power. There are many similarities. The procedure to be adopted by a service tribunal is, by reason of the Act itself, modelled closely upon that of a civilian criminal court. The rules of evidence are the criminal rules of evidence (DFDA s 146).

- 2.14 A service tribunal is also prima facie required to observe the requirements of procedural fairness, albeit, that it is not a Ch III court, nor part of the ordinary hierarchical judicial structure.
- 2.15 In Australia, in a non-constitutional sense, the United States doctrine of due process is regarded as including an entitlement to a fair trial which is normally in the open: Stead v State Government Insurance Commission (1986) 161 CLR 141. The requirement that the trial of a person in the criminal law should be fair and impartial is deeply rooted in the Australian system of law. However, in Australia there has been no attempt to list exhaustively the

attributes of a fair trial in the criminal law: Dietrich v R (1992) 177 CLR
292 per Mason CJ and McHugh J at 300.

Foreign Case Law and its Relevance to Australia

- 2.16. The next matter to which I would make an introductory observation is the need for care and caution in applying and considering decisions in relation to military justice systems in other countries. What is appropriate for other countries is not necessarily appropriate in Australia. Due allowance should be made for national and cultural differences and the need to recognise different traditions found in other countries. There are different legislative requirements to be met, many of which have no counterpart or application in Australia.
- 2.17 In Canada, the decision of the Canadian Supreme Court in R v Genereux held that the Canadian general court martial ("GCM") procedure was a violation of judicial independence. The Court held that the GCM did not meet the requirement of a fair and public trial by an independent and impartial tribunal within the meaning of s 11(d) of the Canadian Charter of Human Rights and Freedoms ("the Canadian Charter"). It is therefore a decision in a particular statutory context. Section 11(d) has no counterpart in Australia. Whilst in Canada the three requirements of judicial independence required under s 11(d) for an independent tribunal, namely, security of tenure, financial security, and institutional independence, are essential conditions for a tribunal falling within the provision, they are not essential conditions for independence of a service tribunal under the DFDA. The provision has no express analogy in our Constitution. It is to be remembered that one of the reasons for the Canadian Charter's enactment was to fulfil Canada's international obligation under Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") which has language in terms slightly different from that to be found in s 11(d).
- 2.18 Likewise, the initial decision of the European Commission of Human Rights (5 September 1995) and the subsequent decision of the European Court in Findlay v The United Kingdom (21 January 1997) are decisions based on

Article 6 par 1 of the European Convention on Human Rights to which the UK is a party. Article 6 par 1 is also reflective of Article 14 of the ICCPR. However the role and the decision of the European Court in Findlay are to be seen in context. The European Court of Human Rights is not concerned directly with the validity of domestic legislation but rather whether, in relation to a particular complaint, a State has in its domestic jurisdiction infringed the rights of a complainant: Attorney General of Hong Kong v Lee Kwong - Kut (1993) AC 951 at 966-977). In Findlay, the Commission declared, and the European Court held, that Mr Findlay had not been given a fair hearing by an independent and impartial tribunal, being under British Army GCM. Significantly, as the Court found, because Findlay's hearing was concerned with serious charges classified as "criminal" under both domestic and convention law he was entitled to a first instance tribunal "which fully met the requirements of Article 6 par 1". The Court left open the question as to whether such "full requirements" were required to be met had the offence(s) been merely of a "disciplinary" nature

- 2.19 It may be also observed that in Findlay neither the European Commission (nor, later, the European Court) adopted in terms the three essential conditions of independence found in Genereux. In relation to Article 6 par 1 there is no counterpart or express analogy to be found in Australia. The point to be made is that one should be careful before one has recourse to practices in Canada or the U.K. in considering judicial independence and impartiality of service tribunals, since these countries are subject to constitutional or convention obligations as a matter of law, and for which there is no analogy under the Australian Constitution or in Australian domestic law. Indeed, in Genereux the Canadian Supreme Court found that the CM was not independent, yet it was not said to lack impartiality. Yet, applying a similar provision, the European Commission and the European Court in Findlay found that the U.K. Army CM was neither independent nor impartial. In neither case did the Court or Commission consider the position of the status of the summary authority in terms of independence or impartiality. I shall say more as to

Findlay in due course. Whilst one should approach overseas decisions with caution, nevertheless, Australia is a signatory to the ICCPR, thus the future potential for influence of decisions based on provisions similar to those found in the ICCPR cannot be overlooked, although to date, as Tyler shows, the approach in Genereux has been presently rejected. Indeed, if the views of Brennan and Toohey JJ in Nolan (at 481) correctly reflect the law that the DFDA does not create criminal offences, then a question could arise as to whether Article 14 par 1 of the ICCPR could ever apply to service offences because that Article in terms refers to the determination of any “criminal charge”. This distinction is perhaps too subtle, and at the end of day, unlikely to prevail.

2.20. The U.S. decisions in relation to service tribunals under the military justice system likewise are to be viewed in context. Nevertheless, they are relevant to independence and impartiality issues. The service tribunals are subject to the “due process” provision of the U.S. Constitution, of which there is again to be found no counterpart in the provisions of our Constitution. In Weiss v United States (1994) 510 U.S. (or 127 L Ed 2d 1) the Supreme Court considered that “due process” does not require that the JA of a CM need have a fixed term and that his/her independence is preserved and determined by the various articles of UCMJ. There are, however, provisions for protection from command influence, which are not to be found in Australia. Nevertheless, the courts have applied the due process provision in a flexible way so as to ensure that military tribunals are not bound to mirror or give effect to the civilian criminal court processes and procedures.

2.21 In some ways, the approach of the courts in Australia to the service tribunals is more comparable to the approach of the courts in the U.S., despite the absence of a “due process” clause, and some of the other provisions of the UCMJ providing protection from command influence.

However, a note of caution. Merely because other countries for a variety of reasons follow different practices and procedures, and have different precautions and safeguards, does not mean that they should be adopted or followed or that they are necessary or appropriate to be introduced into Australia. There are national, cultural, economic, social, traditional, and historical differences to be considered. Nevertheless, some of the decisions stimulate debate for change and are relevant to the DFDA. Indeed, in a number of respects there are safeguards and protections in the DFDA which do not find a place in overseas legislation, but which can be said clearly to enhance impartiality and independence in respect of Australian service tribunals. Further, in Australia it is important to bear in mind the extent of civilian control. The JAG and DJAGs, whilst holding military rank, are in fact civilian judges, (and presumably likely to remain so): s 170 DFDA. Prior to senior appointment they have traditionally, as reservists, had long exposure to the military justice system through membership of service legal panels. The entire system is also overseen by a variety of independent civilian judges at different levels either in their capacity as the JAG, DJAGs, the Defence Force Discipline Appeals Tribunal (DFDAT), with potential involvement of the Federal Court of Australia or even in some cases of the High Court of Australia (via the prerogative writ). Appointment to the JAs' panel (s 180) requires nomination by and hence involvement of, the JAG. He appoints DFMs (s 127) and nominates s 154(1)(a) reporting officers all of whom in practice are senior civilian lawyers or judges as well and who must be military officers. Those persons are clearly regarded as eligible and qualified to perform duties. They are persons who also have had long experience and exposure to the military in the sense of years of some form of military service and familiarity with military law. The civilian influence is very strong, indeed in some respects stronger than in some overseas countries. Those appointed have spent their working lives in the practice of both non military and military law. A major strength of the present military judicial system is that those appointed as JAs and DFMs are both reserve officers, and qualified and experienced lawyers in military and civilian practice, and who as such sit

comfortably in a judicial role. The employment of non military professional judges would be offset by the loss of experience and knowledge which assist in the discharge of present responsibilities.

- 2.22. When one has regard to what is occurring overseas among our major allies it is clear that there is no consistency of approach. The approach in Genereux and subsequent changes, is different in the UK. Yet both decisions are based on similar provisions having their same source, ie Article 14 of the ICCPR. The American military justice system operating under the UCMJ has a constitutional basis perhaps more closely identifiable with that of Australia, nevertheless, it is a system which is required to give effect to, and reflect as well, a “due process” clause not found in the Australian Constitution.
- 2.23. There are thus differences in approach. There is no warrant for concluding that what exists overseas, whilst different, is necessarily an improvement upon our system of military justice.

The Position in Australia

- 2.24 The position in Australia may be summarised as follows. The service tribunal exercises disciplinary power. It does not exercise the judicial power of the Commonwealth and Ch III has no application to a law conferring or creating the jurisdiction of a court martial. Those appointed as JAs or as DFMs, when sitting in such capacity, exercise judicial power, and are bound to act judicially. A JA or DFM is appointed to a trial upon an ad hoc basis. They perform trial “judicial duties” only when appointed (s 119) or a charge is referred to him/her as a DFM (s 103). There is no express counterpart in the Australian Constitution of s 11(d) of the Canadian Charter, of the “due process” clause of the US Constitution, or of Article 6 para 1 of the European Convention. In Re Tiler; Ex parte Folev (1993) 181 CLR 18 the High Court expressly rejected the view that for a service tribunal to be independent the three essential conditions of independence referred to in Genereux (ie

security of tenure, financial security and institutional independence), must be met. The Court rather tested independence by reference to Parliament's will, as expressed in terms of the statutory provisions of the Act, a position somewhat akin to the approach of the U.S. Supreme Court, in determining that a JA at a CM, not appointed for a fixed term, nevertheless satisfies the requirement of independence and meets the tests of impartiality under the due process clause: Weiss.

- 2.25. As I have said, the three tests of independence adopted in Canada have not been adopted in Australia, at least in relation to a disciplinary service tribunal: Re Tyler. Nor has it in terms been adopted as the test for independence of a Ch III court or indeed of other civilian courts. A JA or DFM is not required to have financial security or security of tenure. The situation is otherwise in relation to a judge exercising the judicial power of the Commonwealth under Ch III of the Constitution. Indeed in respect of the States and Territories the eight Chief Justices, in their recent Declaration, considered that persons appointed as Judges of the Courts of the States and Territories should be duly appointed to judicial office with security of tenure until the statutory age of retirement. A JA or DFM is and has been normally a reserve legal officer in private practice, with very few exceptions. Further, as I have said, in strict legal terms the constitutional guarantee incorporated in due process has no direct parallel in Australian law. As Tyler shows, the statutory provisions of the Act are structured to help ensure that service tribunals are independent and impartial. What I have said is, however, not the end of the matter and there are other considerations including what is occurring elsewhere, and perhaps the need to keep in step to some extent, not merely with what our major allies are doing but also with what is occurring in the international arena. I have already made reference to the Canadian, US and UK situations.

Australia and the ICCPR

2.26 In Kioa v West (1985) 159 CLR 550 Gibbs CJ held that the ICCPR did not form part of the Australian municipal law. As a general proposition under the common law, entry by the Executive into a treaty is insufficient, without legislation to implement it, to modify the domestic or municipal law, by creating or changing public rights and legal obligations. If the Executive wishes to translate international agreements into domestic law it must procure the passage of legislation to implement those agreements: see Minister for Immigration v Teoh (1995) 183 CLR 273; the cases of The States of Victoria, South Australia, Western Australia v The Commonwealth (1996) 70 ALJR 680. Where the Executive ratifies a convention, as it did with the ICCPR in 1980, which calls for action affecting powers and relationships governed by the domestic legal order, legislation is needed to implement the convention. However, Article 14(1) does not form part of the Australian law. Nor has its relevance been overlooked in recent times in connection with judicial independence; see the Declaration by the Chief Justices of Australian States and Territories. Whilst I have indicated the basic rule, treaties are nevertheless a legitimate and important influence on the development of the common law: see especially Mabo (No 2) 175 CLR 1 per Brennan J. The ICCPR may be relevant to the resolution of common law or statutory ambiguity. Nevertheless, an explicit municipal law which is inconsistent with international law will override the latter: Dietrich.

2.27 Australia is a party to the ICCPR having ratified it on 13 August 1980. Since 25 December 1991, when the First Optional Protocol entered into force, Australia has recognised the competence of the Human Rights Committee to consider communications from individuals concerning violations of rights contained in the ICCPR. The **Human Rights and Equal Opportunity Commission Act 1986** ("HREOC Act") has scheduled to it the ICCPR, dealing with human rights including Article 14: see Schedule 2. Article 14 par

1 is in similar terms to Article 6 par 1 of the European Convention. This said, the ICCPR in terms applies to the determination of criminal charges and there is the question as to whether a service offence is, in terms, a criminal offence.

- 2.28 In any event, it is generally accepted that treaties do not form part of the Australian municipal law unless enacted into domestic law. The same applies to Conventions. Thus, generally speaking a treaty/convention only becomes operative when it is transformed or enacted into domestic law by an Act of Parliament: Dietrich. In Dietrich it was held that Article 14(3) of the ICCPR, to which Australia is a party, does not form part of the Australian domestic law. However, rights under the ICCPR cannot be directly enforced in Australia. As Kirby P (as he then was) recently observed in Civil Aviation Authority v Australian Broadcasting Corporation (1995) 39 NSWLR 540 at 558, although Australia is a party to the ICCPR, such obligations are not binding on the Court as part of the law of Australia, as the Convention has not been incorporated into domestic law. Moreover, rights under the ICCPR cannot be directly enforced in Australia. In the recent decision of the High Court in Snowdon v Dondas (No 2) (1996) 70 ALJR 908, the High Court at 916 specifically held that the **HREOC Act** did not incorporate the ICCPR Covenant (which appears in Sch 2 of the **HREOC Act**) into Australian law. Further, and of significance is the Court's stated view that it was the language of the **Commonwealth Electoral Act 1918** itself and its principles which were applied to the facts in the case. A similar approach was adopted by the High Court in Tyler in determining whether a court martial was independent. It was to the provisions of the DFDA that it looked in order to determine whether a service tribunal (outside Ch III) exercising disciplinary power was independent. Whilst I do not consider that the **HREOC Act** could be used as a basis for challenging the independence and impartiality of the service tribunal (and in Tyler it was not suggested it could be), nevertheless, the possibility of collateral examination of such independence cannot be altogether excluded. In Dietrich, Mason CJ and McHugh J, whilst accepting that the ICCPR did not form part of domestic law, observed that with ratification of the

ICCPR as an executive act, Australia was exposed to the “potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the ICCPR are incorporated into domestic law”. Their Honours noted that the scheduling to the **HREOC Act** of the ICCPR assigns to the Commission it creates, the function of inquiry into and reporting on any act or practice that may be inconsistent with, or contrary to, human rights as declared in the scheduled instruments (s 11(1)(f)). Indeed, through the latter legislation Australia has recognised the competence of the Human Rights Committee to consider communications from individuals relating to alleged violations of rights set forth in the ICCPR.

2.29 That said, it would be hard to imagine if one day an inquiry of the type discussed were to produce a view of independence or impartiality inconsistent with the views of the High Court in Tyler. Nevertheless, the possibility of adverse comment of the current system exists by reference to the **HREOC Act**. One cannot ignore the fact that the enactment of the Charter was inter alia, by implementation of Canada’s obligations under the ICCPR and that s 11(d) interpreted in Genereux is in terms similar to Article 14 of the Covenant. Likewise, Article 6 par 1 of the European Covenant interpreted in Findlay is also similar in terms to Article 14 of the Covenant.

2.30. I note in passing that the effect of the ICCPR is now being recognised to a greater extent in Australia see for example s138 (3) (g) of the uniform **Evidence Acts 1995** which deals with discretion to exclude improperly or illegally obtained evidence where such impropriety or contravention is inconsistent with a right of a person recognised by ICCPR.

2.31. In a hypothetical situation, as the law now stands, were the Australian military justice system required to be consistent with a provision such as Article 14 of the ICCPR, or with such provisions as s 11(d) of the Canadian Charter of Human Rights, or Article 6 par 1 of the European Convention on Human Rights as interpreted in Findlay, the independence and impartiality of

Australian CMs (and probably the DFMs hearings), might be the subject of close examination, scrutiny, evaluation or adverse criticism. Such possibility cannot be discounted particularly since the recent European Court decision in Findlay. That decision may possibly cause there to be focussed some attention on the position of Australian service tribunals, when it is studied more closely and examined in greater depth.

- 2.32. In furnishing this report it is important also to recognise that I am not strictly concerned with the question of the limits of service jurisdiction of service tribunals, nor with the question as to the content of service offences fully within service tribunal jurisdiction, nor what should or should not be determined by service tribunals in the exercise of disciplinary power. True it is that questions relating to judicial independence and the impartiality of service tribunals would presumably disappear if the jurisdiction of service tribunals to deal with offences were limited in terms to particular classes of offences committed within Australia in time of peace. There is and has been debate in the High Court as to whether a service tribunal (unless established under Ch III of the Constitution) has jurisdiction to hear offences other than for an offence exclusively disciplinary in character or concerned with the disciplinary aspect of conduct which constitutes an offence against the general law. No useful purpose is served by further discussing these issues at great lengths save to point out that when one is speaking of judicial independence and impartiality of service tribunals, the importance of recognising that any debate in relation to the system of military justice may not be confined or restricted to attempts to limit the jurisdiction of service tribunals. If tribunals are not, or may not appear to be, or be perceived as being, independent and impartial, those critics who would seek to limit jurisdiction, may move from criticism of service jurisdiction, also to attacks on the perceived independence and impartiality of service tribunals exercising that jurisdiction.

- 2.33. The three decisions of the High Court of Australia in Re Tracey; Ex Parte Ryan (1989) 166 CLR 518; Re Nolan; Ex Parte Young (1991) 172 CLR

460 and **Tyler** are really decisions on the limits of jurisdiction, although in **Tyler** the matter of the independence of CMs was an issue that was addressed and determined. The cases also concern the occasions for exercise of jurisdiction, showing when such ought to be exercised, particularly in relation to offences which are also offences against the general law. That said, the issue of independence of a CM was addressed in **Tyler** although that case was really another military jurisdiction case.

- 2.34. Whatever may be the differing views in the High Court in relation to the exercise of jurisdiction under the DFDA, at least in relation to the matter of the independence of service tribunals exercising disciplinary power, such differences do not emerge in **Tyler**. On the issue of independence, the minority judges did not dissent despite their views in relation to the exercise of jurisdiction by service tribunals.

Considerations Relating to Current Trends and Changes

- 2.35. In considering the question of any change it is important to have regard to the size of the Defence Force, the number and types of matters in fact being dealt with by the various tribunals exercising disciplinary power, and the cost of such proceedings. Leaving aside those matters dealt with by a summary authority, the statistics are revealing. Indeed, they would suggest that most of the serious type of disciplinary offences are dealt with not by CM but rather by a DFM, sitting alone.
- 2.36 These statistics are set forth in a paper presented by Commodore The Honourable Justice Cole (DJAG) on 19 October 1994. In that paper “**A Review of Military Legal Disciplinary and Criminal Structures: A Proposal for Change**” at p 11 the following Table 2 appears:

"Table 2

	<u>CM & RCM</u>	<u>DFM</u>	<u>Summary Trials</u>
1990	36	64	8806
1991	28	49	7758
1992	18	30	6282
1993	11	18	4713"

2.37 Commodore Cole suggested that the figures might indicate that the court martial structure is not required to implement or enforce military justice. It is not a view that finds strong support in what occurs in Canada, the US or the UK. The SAG in Canada did not suggest a removal of the CM structure in Canada. The recent Armed Forces Act in the UK reiterates such a structure. In the UK, one may now see an even wider use of the CM, as there is now an election conferred under the **Armed Forces Act 1996** for a charge which might be dealt with summarily, to be dealt with by CM if the accused so elects. Officers dealing with charges summarily must offer an accused the right to elect in all cases. A similar situation exists in the US Articles 15 and 16 of the UCMJ. Despite the infrequency of the use of the CM, in my view it is an integral part of the military justice system. When it is used, the members ("the jury") play an important role in terms of guarding the liberty and rights of the accused service member. Indeed, they help provide a guarantee of sound administration of the military justice system. The figures, Commodore Cole suggests, represent a movement towards the use of DFM proceedings involving one person instead of using Restricted Court Martial ("RCMs"). Again Commodore Cole considered that the reality was that a great majority of the matters could be effectively dealt with summarily. It is appropriate perhaps to observe that an accused is unlikely to opt for a DFM or CM under s 131 presumably for fear of involving a harsher punishment (which may be an unwarranted fear, as experience might suggest), or possibly, because of the

stigma of a higher tribunal finding, or even for fear of losing an opportunity of appealing for some leniency before a commanding officer he or she knows. Nor can one ignore that there may be the attraction of having expeditious resolution in a more informal hearing environment.

- 2.38. Nevertheless, the trend referred to by Commodore Cole appears to be continuing: see the **JAG Report (1995)**. Thus for example Army statistics for 1995 show 2 GCM trials, 6 RCM trials and 27 DFM trials. The same statistics reveal summary trial charges being 1 SUPSA, 926 CO matters and 1395 SUBSA matters. The Air Force have very few courts martial or DFM trials with most matters being dealt with at summary authority level.
- 2.39. This is not the occasion to further explore a proposal of Commodore Cole in relation to the establishment of perhaps a Military Court of Australia under Ch III of the Constitution comprising of judges of Federal Court and District/County Court status, ie in effect professional military judges. It is a matter that might be the subject of a separate detailed study in itself. My study has not revealed any service wish or need to proceed in that direction. Quite the contrary.
- 2.40 I note, however, his proposal which would involve offences under the Act being in effect divided into disciplinary, operational and criminal offences. There would be established both a disciplinary and judicial stream for dealing with cases. Disciplinary offences would be dealt with summarily, whilst operational and criminal offences would be dealt with in the judicial stream (that is, in the Military Court). There would be abolition of the position of JAG and DJAG, a reduction in the role of the military in the military discipline system (with offences being dealt with in effect by Military Court justices and judges ie a judicial officer without a “jury”). The case for a “professional” military judge is thus advanced. Presumably, a judicial structure of the type postulated would mean that the present system involving JA and DFMs, with subsequent reviews and reporting, would be abolished or qualified, leaving

review and appeal rights to be considered afresh. The position of DFDAT would need to be considered

- 2.41. Dynamic forces for change are also taking place, see eg the Findlay decision. Further, one should not ignore the reality of changes that are occurring which limit or reduce the type and nature of offences dealt with under the Act. These include the referral of drug and sexual offence cases to the civil authorities. There is the dual jurisdiction agreement with civilian authorities in Australia whereby matters which are not exclusively disciplinary, or which are committed in Australia and are ordinary criminal offences under civil law in Australia, are or may be left to be prosecuted by the civil authorities in the civil courts. There is scope for other such offences including those of theft or breach of trust to be dealt with in this way. Indeed, based upon my interviews, there is a respectable body of opinion to the effect that most of such offences committed in Australia could properly be dealt with by the civil authorities, with resources savings as well to the military. There are perhaps advantages in referring even more offences under the ordinary criminal law when committed in Australia. Indeed, one very senior Air Force officer observed, offences against the ordinary criminal law committed in Australia can in fact be dealt with by civil authorities with police stations invariably nearby. Further, as the High Court cases also make clear, the proximity of the civil authorities is a factor relevant to be considered in relation to the exercise of jurisdiction. Next, service police frequently lack qualifications and experience to deal with complex and sensitive matters. There are restrictions on bringing charges without the consent of prosecuting authorities under s 63 of the DFDA. There are necessarily restricted time limits for prosecuting service offences under s 96 of the Act. There are the new provisions of s 169A relating to minor disciplinary offences now being dealt with by discipline officers, which are no longer treated as disciplinary offences under the Act. With the effluxion of time it would be reasonable to assume that the number of matters being dealt with by a summary authority will even be reduced as the disciplinary officer system is implemented and

expanded. There is scope for expansion of the disciplinary officer system (see later) to even the more senior rank such as major (or equivalent) and below. Expansion of the use of s 169A, will assist in expeditious disciplinary proceedings, and should, if properly implemented, result in a sharp decrease in the utilisation of the summary trial procedure. There should be cost and manpower savings. The point to be made is that I am conscious of evolutionary changes touching upon and reducing the volume and type of work that is or will be done under the Act by service tribunals which in peace time in Australia will perhaps be more disciplinary type offences etc. Likewise I am conscious of the cost of such proceedings under the DFDA and of the wasted manpower hours and costs associated with the bringing of the proceedings under the DFDA, without compromising the need to maintain and enforce service discipline. Indeed, figures given to me suggest that the cost of a 5 day DFM trial could, excluding witness costs, but including defending officer, prosecution officer and the DFM be in the order of \$18,000 or so but higher if a QC is involved. Before summary authorities, legal officers are paid half sessional rates. In a defended matter in front of a summary authority in excess of half a day there is also a court recording cost. Further, speaking generally, there is some concern that minor matters dealt with under the Act may reflect more management than disciplinary problems.

Summary Service Tribunals

- 2.42. As has been indicated the great majority of matters are dealt with by a service tribunal constituted by a summary authority. Again, in his report for 1995 the then JAG expressed some concern about summary proceedings and the adequacy of the present system for review of such. He said as follows:

“d. Hearings before commanding officers provide the vast bulk of cases determined under the Act. As well as the range of classical military disciplinary offences such as absence, neglect and insubordination, these officers also determine cases such as assault and theft, that is, cases with elements of violence and dishonesty. There is no formal structure for appeal in such

cases though complaints may be made to a higher authority. In peacetime, within Australia, a case exists for a formal appeal system, perhaps to a Defence Force Magistrate. It may be desirable for that officer to view the record after an appeal is made, before determining whether or not a rehearing is justified.”

This issue is also one addressed in this study.

- 2.43. The matter of independence and impartiality of the summary authority has not been considered in Australia by the High Court, nor has the position of its equivalent in Canada been considered by the Canadian courts. This said, concerns over the constitutional validity of the summary trial process in Canada have been recently aired in the SAG report of March 1997. The SAG reported that it was imperative that summary trials be kept as an instrument to maintain discipline within the units. The SAG considered that the concerns aired could be met by changes including reduction in the levels of punishment, with rights of accused members to legal assistance being enhanced, and with the legal knowledge and training of those who are called upon to preside, or assist an accused, at a summary trial to be increased. It is appropriate to digress and mention that the SAG’s approach is not reflected in the approach of the UK **Armed Forces Act 1996**. Further, in Canada, the SAG reported that there was no effective review or appeal from summary trial convictions and/or punishments, but interestingly enough, recommends a review by the next level of command. There is an election to opt for CM rather than summary trial. By way of contrast the SAG recommended abolition of review of CM proceedings since full rights of appeal on convictions and sentence existed from CM findings. Further, no question arose as to the independence or impartiality of the summary authority in the recent proceedings in Findlay. Indeed, when actually hearing the case, the European Court also expressly declined to express a view as to the compatibility of the provisions of legislation with the Convention. However, as will be seen the UK **Armed Forces Act 1996** has introduced significant changes even at the summary level touching upon both election entitlements and review rights. The UK will

be discussed in greater detail. Thus pursuant to s 115 Army Act 1955 an accused may at any time request a review of a finding or any punishment awarded, in which event there will be a review. A finding or punishment may also be reviewed at any time.

- 2.44. Not only is the summary authority at the “coalface” of military justice but it is also its “work horse” as the statistics show. However, it is to be remembered that a summary authority is generally not constituted by persons with either formal legal qualifications or practical legal training (or even adequate training) yet such authority is required to comply with the Act and Rules “in a manner befitting a court of justice”. Thus is an onerous responsibility: see **Defence Force Discipline Rules** (“DFDR”) r 22. It is the application of this Rule which in significant respects also assists in ensuring the independence and impartiality, indeed the integrity of the summary authority proceedings.
- 2.45 One would assume that a CO who has been involved who has been involved in the investigation or the laying of a charge would, in the ordinary course of events, seriously consider not hearing the charge of a service offence. This would reflect the spirit of s118 (bias) which applies to members of a CM and a JA and especially the spirit of DFDR r22.
- 2.46 Understandably, the summary authority is frequently asked to apply rules of evidence of a technical and complex nature, of difficulty even to experienced lawyers. The summary authority is expected to comply with the provisions of the Act frequently with little or no assistance and with limited or variable education in it. What has been revealed in my study is the more frequent use of lawyers at the summary authority level in the Air Force both in defending and prosecuting. There is nothing to prevent an accused requesting the services of a an officer who is a legal officer to defend him/her at a summary hearing: see DFDR 24. The specified members under that rule may include a lawyer. This is an additional protection for the service person. In the Air Force, the defending officer is frequently a legal officer, resulting a legal

officer also being appointed as the prosecuting officer. Perhaps the explanation is that because more matters are dealt with in the Air Force at the summary level, there is corresponding greater legal representation.

- 2.47. The potential for the summary hearing to become a technical hearing thus exists. There are legitimate concerns about the administration of justice at that level where very serious elective punishments, eg reduction in rank may be imposed. There is no right to full election as in the UK and in the US. The election is a qualified one fixed by reference to whether an elective punishment is likely to be imposed. The implementation of election is not “guaranteed”: see eg s 131(2)(b) and s 103(1)(b). There is no appeal as such in respect of a summary authority decision on finding or sentence. However, there are automatic reviews and a right of petition in respect of a conviction or punishment: ss 151 to 155. Upon review, the reviewing authority is bound by opinions on a question of law: s 154 DFDA. There is another matter that should be mentioned. The right to quash a conviction under s 158 by a reviewing authority is not a quashing on a question of fact per se. It is, inter alia, confined to a wrong decision on a question of law or of mixed fact and law. There has been some significant concern expressed about the level of elective punishment that may be imposed, particularly involving a rank reduction: see s 131 and Schedule 3. There is no requirement for the provision of legal advice before an election is made. The SAG has now recommended that whenever an election is given to the accused he be afforded the right to consult with legal counsel to ensure that the election is made of the basis of full and complete information, and that the election be made in writing. On the other hand, in the UK recent changes by Army Regulation nor provide that before an accused is asked whether he wishes to exercise his right to elect trial, the officer dealing with the matter summarily must explain to him that

- a. if he chooses to elect, the prosecuting authority may refer any charge for CM (whether more or less than the charge dealt with summarily, even one that could not be dealt with summarily);
- b. if he is found guilty by CM, the court's powers of punishment could be greater than those available on summary dealing;
- c. that he has the absolute right to withdraw his election; for trial within 48 hours of making it. There is evidence to suggest that in many instances an elective punishment is imposed in excess of that which would be imposed if an election were implemented and the matter then dealt with by a DFM.

2.48. In Canada, the SAG has recommended that increased training and education be introduced for all commanding and delegated officers to ensure that they are knowledgeable about their roles in the military justice system and competent to perform them. Indeed, it is also recommended that, but for exceptional circumstances, officers not be permitted to preside at a summary trial unless "certified to do so by the JAG". Further, sufficient training and simple work instruments be provided to those officers who may be called upon to perform a defending role to assist the accused in order to render adequate assistance is likewise recommended.

Appeals against Sentence

2.49. There is no appeal provision in respect of a sentence imposed by any service tribunal. There is no right of appeal or right to seek leave to appeal to the DFDAT even against a sentence imposed by a CM or DFM: s 20 of the **Defence Force Discipline Appeals Act 1955** ("DFD Appeals Act"). In Canada there is a right also to seek leave to appeal against sentence imposed by a CM. In Findlay the absence of a right to seek leave to appeal against sentence was a factor considered in determining that there was an absence of

independence and impartiality in the U.K. court martial. This is a matter now addressed by the UK **Armed Forces Act 1996**. In the UK there are now rights of appeal in relation to both conviction and sentence. The accused now has the right to apply for leave to appeal to the Courts Martial Appeals Tribunal ("CMAT") in relation to findings and sentence. This too is a matter that my study has addressed.

Conclusion

- 2.50. My view is that CMs meet the requirements of independence (and indeed, of impartiality). So much is established by the decision of the High Court in Tyler. The reasoning of the High Court would support the view that a DFM is likewise also independent and impartial.
- 2.51. The position of the summary authority as a service tribunal in terms of independence and impartiality has not been the subject of judicial decision. As presently advised, it appears to me that much of the reasoning of the High Court, in holding that a service tribunal such as a CM is independent (and impartial) would support a view that a summary authority under the Act is likewise independent and impartial. Rule 22 of the DFDR also seeks to achieve this objective. In some ways this rule goes very much to the heart of summary justice. It is one of the safeguards specifically provided to protect against improper command influence. However, in respect of independence and impartiality of such proceedings one should not overlook the particular importance of the review provisions of the Act. There is the right to petition for review to a chief of staff with involvement of the JAG or DJAG (civilian judges) under s 155 of the DFDA. There is thus some further demonstration of vigilance in checking that proceedings at the summary level involve both impartiality and independence.
- 2.52. However, for reasons that will appear, I propose recommending change. My study and interviews would suggest that there are good and valid reasons for

changes and improvements in our system of military justice which I believe should be considered. Such would also improve the appearance or perception of independence and impartiality. There is particular concern addressed as to the width of the role of the convening authority (“CA”) in a number of respects.

- 2.53. It is appropriate to observe that were Australia to incorporate the ICCPR into Australian law, then perhaps serious questions could, despite the decision of the High Court in Tyler, arise for further consideration or reconsideration as to the independence and impartiality of at least our CMs and DFM tribunals: see Genereux and Findlay.
- 2.54. As I have said the constitution of each service tribunal pursuant to the Act answers the requirements of independence and impartiality of service tribunals exercising disciplinary power under the Act. This is, however, not the end of the matter. Despite the stated legal position, it is quite clear from my extensive study, and indeed, it is my own view, that certain features of the DFDA do not sit altogether comfortably with concepts of impartiality and independence, and that there is legitimate scope, indeed justification, for change and improvement to be considered in the appearances of impartiality and independence. There is a strong case for some change. There is support for some change. The will for change is present. There is, however, legitimate debate about what changes should be made.
- 2.55. Were the High Court to conclude that the exercise of jurisdiction in relation to service offences, which are also offences against the general law and committed in Australia in peacetime and during general civil order, involved the exercise of judicial power under Ch III and not disciplinary power pursuant to the defence power (being the minority view of the High Court judges) then issues of independence and impartiality would not strictly arise as the jurisdiction to deal with those offences would fail on constitutional grounds.

- 2.56. A number of collateral issues have also emerged to be considered by my study. These too have been addressed and considered.

Defence Reform Programme ("DRP")

- 2.57. I note the DRP recommendation concerning the provision of an integrated Legal Services.
- 2.58 Perhaps it is appropriate to observe that some of the recommendations made in this study should, in terms of implementation or otherwise, be considered as part of a programme for the provision of such a Service.
- 2.59 It is also appropriate for me to observe that my recommendations and studies would not only suggest, but indeed perhaps point to, the desirability of a tri-service arrangement in respect of many aspects of the military justice system and the administration of the DFDA. The study also strongly suggests, indeed points to, the desirability of a tri-service organisation being headed by a tri-service Director-General who should be both a senior one (or two) star military officer as well being legally qualified. I believe that what is set out in detail in this study, clearly points to such a view. Such is consistent with what occurs overseas.
- 2.60 The study has, inter alia, strictly addressed the issue of the position of the prosecution in the military justice system and to a lesser extent the defence position. It has also addressed directly or indirectly the situation of lawyers in relation to these aspects of the military justice system. At present, prosecution and defence roles are essentially performed by Reserve legal officers. Not only do Reserve officers play a significant role in terms of appointment as JAs,

DFMs or s 154(1)(a) reporting officers, but they bring a wealth of experience to the task of prosecuting and defending cases under the DFDA. Further, by virtue of their training and skills they also provide a pool of “expert” talent providing at reasonable cost (compared to what would be charged by civil lawyers) specialist advice in extensive areas of law including ordinary civil law falling outside of the discipline areas. The Defence Force is fortunate to have such a pool of “reasonably priced lawyers available to serve”. Indeed, the Reserve in many cases provides expert specialist legal advice of the kind that may not, at reasonable cost, be matched elsewhere. Further, what ought not be overlooked, is that the Reserve meets the requirement of providing the legal spectrum of general and specialist legal services of the type provided by, for example, the large JAG Corps to be found in the US.

- 2.61 In terms of lawyers’ abilities, it cannot be seriously disputed that a breadth of experience also contributes to making lawyers better “all round lawyers”, indeed, perhaps even more skilled in specific tasks including such as prosecuting or defending under the Act. This observation applies not only to Reserve legal officers but to Regular legal officers as well. The opportunity of performing a spectrum of legal work, and of being exposed to different experiences, is for them, as for Reservists, an incentive to join the Defence Force Legal Services in a career capacity. Likewise, so is the attraction of doing specialist work.

CHAPTER 3

DEFENCE FORCE DISCIPLINE ACT

DEFENCE FORCE DISCIPLINE ACT

Introduction

- 3.1 *"The Defence Force is under pressure to meet community expectations about personal freedoms and equality of opportunity. This poses particular challenges for traditionally organised and disciplined services, but these expectations must be accommodated as the Defence Force cannot be at odds with the community".*

Defending Australia, Defence White Paper, 1994, p 70

- 3.2. "The ADF prepares for war in times of peace". **Serving Australia. The Australian Defence Force in the Twenty-First Century 1995 ("The Glenn Report")** p 67. A similar point is made by the CGS in his written submission~~ve~~ punishment that 996. In time of peace the highest professional standards are required to be exercised for an eventuality or contingency that may never occur. In time of peace, the special nature of military service is not always apparent or clear to everyone. Discipline is essential if the combat force is to be effective. However, the ultimate objective of the military in time of peace is to prepare for war, and to support the policies of civil government. The military organisation to meet this objective requires, as does no other system, the highest standards of discipline to permit it to function under the most adverse conditions. At least in general terms there would not be many

who would contest the view that standards of military justice in peace time should be equally applicable in time of war, deployment overseas and in time of national emergency. At least such is a legitimate objective.

- 3.3 As Principle 8 of the **Glenn Report** (p 67) makes clear “[p]ersonnel policy seeks a balance between the organisational requirements of the ADF and the individual interests and personal freedoms of its people”. Determining that balance is not easy, recognising on the one hand the need to preserve the core identity of a force capable of defending Australia and of being deployed on international tasks whilst having due regard for the personal freedom and occupational affiliations of its members. The report, whilst recognising that service in the ADF is unlike any other occupation, also emphasises the care that is needed to ensure that there is not too narrow a focus on the special nature of military service.

- 3.4. In Chapter 3 of the **Glenn Report** at pages 61-62 the following passage appears under the heading **Special Nature of Military Service**:

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

A social compact prevails between armed forces and the societies it is their duty to protect. In time of national peril, or when forces are displayed on international tasks, the special nature of military service is ostensible to everyone. However, in periods of prolonged peace this is not so; the lives of ADF members become contingent. They may never be called upon to defend their country but in order to maintain the highest professional standards they are required to spend their working lives in readiness for that eventuality - a considerable physical and psychological achievement”.

- 3.5. Much the same point is made in the **Report of the Defence Force Discipline Legislation Board of Review** (May 1989) (“the Board of Review”) where it was acknowledged that members of the Defence Force are required to live and work under a system of command which demands obedience, to accept a regulated way of life, to stand ready to defend Australia's interests, to undertake tasks which could involve high risk and extreme demands, and to observe a code of discipline which subjects them to laws, regulations and rules over those imposed by civilian law.
- 3.6. Nevertheless in striking the right balance one should not overlook the views of the Chief of Air Staff (“CAS”) in his submission of 13 February 1996 when he said:

“8. I do not believe that the ADF can or should continue to resist the tide of change on an issue as fundamental as judicial independence. No discipline system can survive that does not evince the basic tenets of being just and fair. The plethora of recent legislation enshrining the rights of the individual in law such as the Human Rights and Equal Opportunity Act, the Sex Discrimination Act, the Privacy Act and the Freedom of Information Act clearly point the way. The actions of the ADF are publicly scrutinised more closely today than they ever have before. We not only have to be doing the right thing (which I believe we have been) but be seen to be doing the right thing.”

3.7. My investigation would suggest that in practice the “right thing” is being done, with procedures and practices in place to ensure it is done. However, perceptions may not always accord with actualities.

3.8. Establishing the proper relationship between the legitimate needs and requirements of the military and the rights of the individual service person nevertheless presents a complex problem for which there is no easy solution. That it requires such a delicate balance might in itself suggest that its resolution is best left to Parliament rather than the courts. This balance also involves reconciling conflicting social values inherent in maintaining standing forces in a democracy. In the US, the Supreme Court has recognised that Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military - see Weiss v United States (1994) 510 U.S. 1 at 15. This principle has already been applied in the joint judgment of Mason CJ, Wilson and Dawson JJ in Tracey at 545 where they said:

“It follows that, if offences against military law can extend no further than is thought necessary for the regularity and discipline of the defence forces [see Groves v The Commonwealth (1982) 150 CLR 113 at 125], this limitation would not preclude Parliament from making it an offence against military law for a defence member to engage in conduct which amounts to a civil offence. It is open to Parliament to provide that any conduct which constitutes a civil offence shall constitute a service offence, if committed by a defence member. As already explained, the proscription of that conduct is relevant to the maintenance of good order and discipline in the defence forces. The power to proscribe such conduct on the part of the defence members is but an instance of Parliament’s power to regulate the defence forces and the power it is for Parliament to decide what it considers necessary and appropriate for the maintenance of good order and discipline in

those forces. And Parliament's decision will prevail so long at any rate as the rule which it prescribes is sufficiently connected with the regulation of the forces and the good order and discipline of defence members".

- 3.9. This passage relating to judicial deference in many ways is similar to the view of the courts in the US where it has been said:

"Judicial deference is at the apogee when reviewing Congressional decision-making in this area". See Weiss at 15.

- 3.10. I am not, in citing this passage, suggesting this is a test in Australia in the sense expressed. However, the spirit of such an approach is to be found in some of the Australian High Court judgments.

The Purpose of a System of Military Tribunals

- 3.11. As the service person by joining the ADF undertakes many obligations in addition to the duties incumbent upon an ordinary citizen, the purpose of the DFDA is to create a disciplinary code for the promotion of the efficiency, good order and military discipline of the Defence Force. The military code is cumulative upon, and not exclusive of, the ordinary criminal law. The DFDA contemplates parallel systems of military and ordinary criminal law. Military law is seen as additional rather than as a replacement set of rights and duties. The co-existence of military law and the ordinary criminal law in different parts of Australia is thus seen as a parallel system. Indeed, military tribunals have been accepted as standing apart from the ordinary judicial system.

- 3.12. The law provides that men and women do not leave their legal "safeguards" behind when they enter military service. Likewise, it can be said that by enacting the DFDA Parliament has changed the system of military justice so that it has come to resemble more closely the civilian system, while at the same time recognising its organisational requirements, purpose and needs. Nevertheless, the unique disciplinary concerns of the military are different from society's general concerns with social order. Further, the unique circumstances and needs of the military justify a departure from civil legal standards.
- 3.13. In the Anglo-Canadian-American-Australian tradition the civil courts have recognised the parallel systems of justice and the reason for such.
- 3.14. In Canada, the traditional military doctrine has been expressed in terms which require discipline as a critical element of command and control. Command efficiency, it is said, promotes combat effectiveness. As a result, the military has its own code of discipline to allow it to meet its own particular needs with no distinction really being made between war-time and peace-time. There is thus a need for separate tribunals to enforce disciplinary standards. As to the Canadian situation Lamer, CJC in the Canadian Supreme Court in Genereux has observed (at 135):

"The purpose of a separate system of military tribunals is to allow the armed forces to deal with matters that pertain directly

to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and frequently punished more severely than would be the case if a civilian engaged in such conduct. As a result the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military".

3.15. In the US it has been observed that the fundamental function of the armed forces "is to fight or be ready to fight wars": United States ex rel Toth v Quarles 350 US 11 and referred to in Weiss. Obedience, discipline, leadership and control, including the ability to mobilise forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to those needs for all branches of the service, at home and abroad, in time of peace and in time of war. It must be practical, efficient and flexible: Curry v Secretary of Army 595 F 2d 1979. Reflecting this approach, the UCMJ really seeks to make no distinction between the needs of the military either in times of war or in times of peace, or whether at home or abroad.

3.16. In Australia, it has been said that the traditional jurisdiction to discipline military personnel has two aspects. The first is an authority to compel military

personnel to conduct themselves in a manner which is conducive to the efficiency and morale of the services; the second is authority to control persons who transgress the ordinary law of the land while acting or purporting to act in the capacity of military personnel: Tracey at 564 per Brennan and Toohey JJ. As both those judges also said in Nolan at 489

"Service discipline is not merely punishment for wrong doing. It embraces the maintenance of standards and morale in the service community of which the offender is a member, the preservation of respect for, and the habit of obedience to lawful service authority and the enhancing of efficiency in the performance of service functions".

- 3.17. The point made in Nolan, that service discipline is not merely punishment for wrong doing, is it not merely the point of view of the courts. A similar point was made by Major General P. R. Phillips, AO MC, quoted in the **Board of Review Report** at para 3.04 of its 1989 Report. Indeed, much of what is quoted is in complete harmony with the views of the civil courts in relation to the role of, and the need for, discipline, which ought not to be compromised.
- 3.18. As to the place and purposes of discipline in the services it is worth repeating some observations of Major General Phillips (supra). The passage makes the point that an essential feature of the military effectiveness of a force is its discipline. Discipline is an element of combat power, as well as playing a significant part in the life of every individual service person. Discipline depends on leadership and disciplinary rules are simply one of the tools of management available to the leader.

“The disciplinary rules must be placed in the context of the responsibility of leaders and the means available to them to promote a discipline centred on the individual soldier”.

- 3.19. In the services, tradition and training alike continue to emphasise the notion of instant obedience. In order to achieve a higher standard of obedience in the services, disciplinary measures must be taken which would be out of place in civil life. They have nothing to do with criminality.

“In the services, punishment is directed towards the discipline and training of the defence member as well as towards the traditional objects of punishment in the civil criminal system”. Para 3.07, op. cit.

- 3.20. I have said enough to indicate the general arguments for standards of military justice not varying according to whether there is a time of peace or a time of war. Those same arguments are legitimately advanced in support of the view that because the Defence Force must constantly train for war there should be no different approach for the conduct of tribunals in peace time to those conducted in war, overseas or during a period of civil disorder in Australia. Such a view is not universally held in Australia with judicial opinion in some respects divided.

The Jurisdiction of Service Tribunals

- 3.21. Concerns over state of readiness, and preparation for war in time of peace are telling arguments. They are also equally telling in support of the argument as

to why there are military needs warranting a departure from civil legal standards whilst accommodating such in any balancing exercise.

3.22. In his written submission to me of 5 March 1996 CGS expressed legitimate concern that service tribunals must be capable of operating in the course of operations against the enemy and he could not agree to changes which would compromise the flexibilities. He “would not support a different approach for the conduct of tribunals in peace to those conducted in war”.

3.33. The terms of reference strictly do not require me to consider this question. I am concerned with the matter of independence and impartiality of such tribunals and not their jurisdiction. However, reference should be made to jurisdiction since it is important to understand the constitutional basis for their existence and to emphasise that service tribunals are not courts under Chapter III, exercising judicial power of the Commonwealth, but are service tribunals exercising disciplinary power and having as their constitutional foundation the provisions of the Defence power as found in section 51 (vi) of the Constitution. It is these differences that are relevant to considering the distinction between the independence and impartiality of service tribunals and the independence of courts under Ch III exercising the judicial power of the Commonwealth.

3.34. In Tracey three different opinions were expressed as to the extent to which the Commonwealth Parliament, in the exercise of the legislative power

conferred by s 51(vi) of the Constitution, could enact a disciplinary code binding upon members of the Defence Forces standing outside Ch III of the Constitution. The majority held that s 51(vi) of the Constitution authorised Parliament to invest the DFM with jurisdiction, although he had not been appointed in accordance with Chapter III. The basic point of division did not relate to the content of civil offences which s 61(1) of the DFDA translates into service offences, but rather to the jurisdiction to try them, or rather perhaps, as to the limits of jurisdiction to try service offences.

3.35. Mason CJ, Dawson and Wilson JJ expressed the view that the jurisdiction to hear and determine charges of offences against laws of the Commonwealth can be vested only as prescribed by Ch III and the only apparent exception permits the vesting in military tribunals of jurisdiction to hear and determine charges of service offences: see also Nolan per Brennan and Toohey JJ at 479. The decisions in Tracey and Nolan are, however, confined to the special position of the Defence Force and also give effect to the tradition that has existed in Australia since the earliest days: see Tyler per McHugh J at 40. This last matter, ie of tradition, also has been regarded of particular significance by the US courts when considering the UCMJ: see Weiss where it was considered as a relevant matter.

3.36. In Tracey the reasoning, even of the majority, differed in fundamental respects. Mason CJ, Wilson and Dawson JJ were of the view that the power under s 51(vi) of the Constitution to make laws with respect to the naval and

military defence of the Commonwealth necessarily included a power to provide for the discipline of the Defence Force because naval and military defence demands the provision of a disciplined force or forces. The system of discipline required for the proper organisation of the Defence Force could be administered judicially, not as part of the judicature enacted under Ch III but as part of the organisation of the Defence Force itself. They concluded that the power to make laws with respect to defence contains within it the power to enact a disciplinary code standing outside Ch III and to impose on those administering that code the duty to act judicially.

3.37. Their Honours also held that a service tribunal need not be constituted in accordance with Ch III if the charge is sufficiently connected with the regulation of the Defence Force, its order and discipline.

3.38. In Tracey Brennan and Toohey JJ held that jurisdiction could only be validly conferred on a service tribunal not appointed in accordance with Ch III as follows:

"Proceedings may be brought against a defence member or defence civilian for a service offence if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline".

3.39. Their Honours held that in assessing whether the substantial purpose of prosecution is reasonably able to be regarded as for the maintenance and

enforcement of service discipline, factors of convenience, accessibility and appropriateness of hearing the charge in civilian courts loom large.

3.40. Deane J held in Tracey that in so far as offences committed within an Australian State or Territory are concerned, the comprehensive jurisdiction conferred upon service tribunals which are not Ch III Courts, at least in time of peace and civil order and in respect of local offences, is to deal only with exclusively or essentially disciplinary offences. His Honour discussed the three classes of service offence found in the Act concluding that some of the offences created by the DFDA (service offences) are exclusively disciplinary in their nature. The offences specified in Part III Div 1 ("Offences relating to operations against the enemy") and Div 2 ("Offences relating to mutiny, desertion and unauthorised absence") and some of the offences specified in Pt III Div 3 ("Offences relating to insubordination and violence") were said to provide obvious examples. He held that service tribunal jurisdiction only extended to the extent that the offences were not exclusively criminal offences or offences which did not involve conduct of a type which was commonly an offence under the ordinary criminal law.

3.41. Gaudron J was of the view that jurisdiction could only be validly conferred on a service tribunal to the extent that it related to charges in respect of conduct outside of Australia, and to charges (within Australia) of service offences which are not substantially the same as civil court offences. So far as conduct, whether or not it offends the general law, has an aspect which determinatively

affects command, military efficiency, the relationships of defence members with each other, or the reputation of the forces, that aspect of conduct is more readily seen as appropriately the subject matter of military judicial power.

3.42. In Nolan McHugh J adopted the views of Deane J namely that unless a service tribunal is established under Ch III it has jurisdiction to deal only with an offence exclusively disciplinary in character, or an offence concerned with the disciplinary aspect of conduct which constitutes an offence against the general law, eg assault on a superior or inferior, falsification of service documents, etc.

3.43. The High Court has not been able to agree upon the extent to which military requirements should be considered in determining the constitutional legitimacy and the extent of such service tribunals. The division of opinion is indicative of the controversial nature of military judicial proceedings which are intended to provide command authorities with a means of instituting disciplinary action. Some members of the Court have questioned the legitimacy of various Defence Force provisions which structure a disciplinary process governing service personnel as separate and distinct members from the rest of the population. The High Court decisions reflect the tension between the majority and minority differing views as to the validity of traditional military attitudes, and in particular as to when, if at all, jurisdiction should be exercised in respect of that class of service offence which is a civil offence when committed in peace time in Australia. Many military offences are uniquely

associated with the military context and do not fall within the scope of civilian criminal jurisdiction. The Courts are not concerned with this. The division of opinion is in relation to offences falling also within the scope of civilian criminal jurisdiction.

The System under the DFDA

- 3.44. The DFDA establishes an internal disciplinary system regulating the conduct of members of the Defence Force. It is fundamentally different from the ordinary criminal law regulating the community generally. Service tribunals are established under the DFDA. They are to try offences under the DFDA on an ad hoc basis. None of the service tribunals are standing bodies having a permanent existence. Proceedings before service tribunals are conducted in a general way according to the standards and safeguards of the criminal law. Under s 10 of the DFDA the principles of the common law with respect to criminal liability apply in relation to service offences. The onus and standard of proof in proceedings before a service tribunal are generally the same as in a criminal court: s 12. The term "service tribunal" includes a summary authority as well as a CM and DFM: s 3(1). A court martial conducts itself in most respects in the same way as civilian criminal proceedings are conducted. The presumption of innocence, the onus of proof on the prosecution and the standard of proof beyond reasonable doubt apply. The rules of evidence applying to criminal trials in the ACT apply to CMs: s 146. The directions on the law given by the JA are binding on CM boards the same as a judge's

direction to a jury. The ~~trinit~~^{before} a CM is a public trial open to any member of the public. A significant difference is the absence of no universality of membership of tribunal, but in the case of a CM a tribunal of officers not junior in rank to the accused replaces a jury drawn from the wider community. There are some differences in appeal rights (review rights) of the accused. Unlike civil courts, there are automatic review rights. The fact that a charge has been dealt with by, say, a CM does not prevent a person making a complaint about the same circumstances to the HREOC whether the accused has been found guilty or not.

- 3.45. It should not be overlooked that a decision to try a “criminal” charge as a service offence before a service tribunal has serious implications for the accused. Some implications are unfavourable. For example, there is no preliminary inquiry (committal) to test the strength of the prosecution’s witnesses before trial. There is no trial by a jury of twelve. There is no provision for the recording of no conviction (s 556A **Crimes Act, NSW**). There is, unlike Canada (and soon to be in the United Kingdom), no provision for even seeking leave to appeal under the DFDA against sentence.

Comparisons - Service Tribunals with Courts

- 3.46. The system established by the DFDA would probably be inconsistent with the requirements of judicial independence, if constituted in the context of a civilian criminal court established in accordance with Ch III. However, it does

not have to be. The needs of the Services, the system of justice to enforce such needs, renders in part permissible that which would be impermissible if the service tribunal was a Ch III court. The service tribunal probably can never be constituted in such a way that it can have the same kind of qualifications of independence that are required of a Ch III court, the fundamental distinction being that the service tribunal is exercising disciplinary power and not the judicial power of the Commonwealth under Ch III.

3.47. The DFDA and regulations which create service offences prescribe rules of conduct which appear to the legislature to be appropriate to the maintenance and enforcement of service discipline, but they do not in technical terms create criminal offences as such: Re Nolan at 481. The provisions constituting the code apply without distinction in time of peace and in time of war and to all defence members.

3.48. The procedure to be adopted by a service tribunal (CM/DFM) is modelled closely upon that of a civil court. Whilst the functions of a service tribunal do not involve the exercise of civil power under Ch III, nevertheless, in trying offences under Part III of the DFDA, a service tribunal has practically all the characteristics of a court exercising judicial power. No relevant distinction can be drawn between the power exercised by a service tribunal and the judicial power exercised by a court. A service tribunal does not form part of the judicial system administering the law of the land. Service tribunals have

been accepted as standing apart from the ordinary judicial system. Nor is it possible to “admit the appearance of judicial power and yet deny its existence by regarding the function of a court-martial as merely administrative or disciplinary”: **Tracey** per Mason CJ Wilson and Dawson JJ at 537. To ensure that discipline is just, tribunals acting judicially are essential to the organisation of Army, Navy or Air Force: see **R v Cox: Ex Parte Smith** (1945) 71 CLR 1 at 23.

- 3.49. As I have earlier indicated there has never been any real dispute that a service tribunal (CM/DFM) in performing its functions under the Act is exercising judicial power, but it is not exercising the judicial power of the Commonwealth under Ch III of the Constitution. The service tribunal is not a court within Ch III. Section 51(vi) provides the power to discipline the Defence Force. The system of discipline required for the proper organisation of the Defence Force may be administered judicially, not as part of the judicature under Ch III, but as part of the organisation of the force, by service tribunals exercising disciplinary power under s 51(vi) of the Constitution: **Tracey, Nolan, Tyler.**

The Institutional Background of Service Tribunals

Generally

- 3.50. It will assist in understanding the terms of reference to briefly review the contours of the military justice system and the roles of the different persons in such.
- 3.51. The DFDA contains a number of provisions relating to the making of charges against defence members. Under the Act a person who commits an offence may be charged and ordered to appear before a "summary authority" or summonsed to appear before a commanding officer (s 87). He may be arrested under warrant (s 90) or (in some circumstances) without warrant: s 89. Summary authorities are of three kinds - superior summary authority ("SUPSA"), being an officer appointed by a chief of staff; commanding officer; and subordinate summary authority ("SUBSA") being appointed by a commanding officer (ss 3(1), 105). Pursuant to s 3 service tribunal means a CM, a DFM or a summary authority. DFD Rules have been made in relation to implementing the provisions of the DFDA.
- 3.52. There is no appeal from a decision of a summary authority, with the rights of the offender being dealt with by way of review or petition under ss 151 to 156. Such review is not an appeal. Under s 154 the legal officer's report is only

binding on a question of law. Section 150 provides for appointment of reviewing authorities again by a Chief of Staff. The section does not prevent a CA from being appointed a reviewing authority.

3.53. By definition a summary authority is as much a service tribunal as is a CM or DFM. This is a matter to which I shall return in greater detail. Each summary authority has different powers: ss 106-111. Among the powers of a summary authority and a commanding officer is the power to refer a charge to a CA (ss 109(b) and 110(1)(d)), an officer appointed by a Chief of Staff: s 102. A SUBSA has no power to refer a charge to a CA but may refer a charge to the commanding officer: s 111(2)(c). There is no appeal as such from a decision of a summary authority with rights of the offender being limited to rights by way of review or petition: see ss 151 to 156. Among the powers of a CA are the powers to convene a CM to try a charge; to refer a charge to a DFM for trial or to refer a charge to a SUPSA or to a commanding officer for trial: s 103(1). A CA may dissolve a CM (s 125) or terminate a reference to a DFM (s 129A).

3.54. Under s 129(1) of the Act, a DFM has the same jurisdiction and powers as a RCM. (Summary authorities have more limited jurisdiction). A DFM is appointed by the JAG: s 127. An officer is not eligible to be a DFM unless he is a member of the JAs' panel: s 127. On appointment, the DFM is required to take an oath: s 128. Eligibility for appointment as a member of JAs' panel involves being an officer, enrolled as a legal practitioner and enrolled for not

less than 5 years: s 196. Appointment to the panel is by a Chief of Staff “nominated” by the JAG: s 196(1). On appointment to the JAs’ panel the officer is required to take an oath: s 196(4). It will be observed that a Chief of Staff appoints a person to the JAs’ panel. However, mere appointment to the panel does not make such a person a DFM. Another separate appointment is required, this time by the JAG acting under s 127. Power to appoint to the JAs’ panel presumably confers a right also to remove, although this is not stated. When a DFM (regular or reserve officer) deals with a matter he does so on an ad hoc basis, as and when required. The DFM (and the JA when sitting at a CM) does not have any inherent authority separate from the trial to which they have been appointed. Until appointed to a particular trial they have no independent authority or power to act. In relation to a reporting officer appointed under s 154(1)(a), the appointment is done by a Chief of Staff acting on the recommendation of the JAG. The JAG is involved in the three appointments, but has a different role in relation to each. Why is not clear. Further, in relation to DFMs he appoints such officers from the panel. This is in contradistinction with the appointment of the ordinary civil judge who is normally appointed by the Executive.

- 3.55. I have already made general observations on appointments. In relation to a person who is appointed to the JAs’ panel or, for that matter, in respect of a person appointed from that panel as a DFM, there are no provisions as to the term of appointment, ie tenure, nor are terms or conditions of appointment

dealt with. There are no provisions for removal or termination of appointment (on one view it may be thought by some that this may enhance security of tenure). The situation may be contrasted with that of the JAG and DJAGs. Provision is made for the appointment of a JAG and DJAG (s 179). No similar provision exists in respect of persons appointed to the JAs' panel or as DFMs. An officer appointed to the panel may be a regular or a reservist. As I have observed the power to appoint usually includes a power to remove a person. In the case of an appointment to the panel presumably a Chief of Staff could remove for good and valid reason after giving the officer a fair hearing in accordance with principles of procedural fairness. The provisions of s 186, as to termination of appointment as a JAG, do not apply to JAs, DFMs, s 154(1)(a) reporting officers. As the Act stands a removal from the JAs' panel would not be by the JAG. Removal of a DFM by the JAG would presumably involve a similar procedure. The removal of a person from the JAs' panel would also presumably involve his ceasing to be entitled to be a DFM. This is not clearly stated however, see s 127(2). The basis for cessation of appointment as a DFM or as a member of the JAs' panel is not spelt out, unlike the provisions dealing with termination of appointments as JAG or a DJAG. Absent removal (which in some cases might be difficult), it would seem to me that a person would cease to be entitled to be a member of the JAs' panel (and also a DFM) once he/she ceases to be an officer, ie by retirement, resignation, or by cessation of being enrolled as a legal practitioner: see the definition of "legal officer" in s 3 of the Act.

- 3.56. There is no prohibition on a member of the JAs' panel performing any particular duties. He/she serves as and when required for a particular trial. There is no statutory provision for remuneration of a JA or DFM. There is no fixed term of appointment nor other special conditions of appointment for either position.
- 3.57. It should not be overlooked that the DFDA also makes separate provision for the appointment of reporting officers under s 154 of the DFDA. That person need not be on the JAs' panel under s 196. However, appointment as a s 154 reporting officer is, like the appointment of a person to the JAs' panel, by a Chief of Staff on the recommendation of the JAG. There are again no provisions as to fixed tenure, or as to removal.
- 3.58. It is clear that a DFM or a person appointed to the JAs' panel, or a person appointed from the panel to be a JA at a CM is not appointed in accordance with s 72 of the Constitution and is therefore not qualified to exercise the judicial power of the Commonwealth. The power to establish military service tribunals lies not in Ch III of the Constitution but under s 51(vi) of the Constitution. Tribunals established under the defence power form no part of the judicial establishment under Ch III and do not exercise the judicial power of the Commonwealth.
- 3.59. There are two levels of CMs - GCMs and RCMs. Each type of CM is different in terms of offenders who are subject to its jurisdiction and the

punishment which it is authorised to impose. The GCM has jurisdiction over the most serious offences and has the power to impose the most serious penalties. The difference between a GCM on the one hand and a RCM on the other hand lies in the composition of each body and the penalties which it may impose. By s 114 a CM shall either be a GCM or a RCM and both have power under s 115, with certain qualifications to try any service charges (as defined in s 3) against any member. A GCM consists of a President and not less than four other members. A RCM consists of a President and not less than two other members: s 114. Under s 67 a CM or a DFM may not impose a punishment except in accordance with Schedule 2 and under that Schedule a RCM and a DFM are denied the power given to a GCM to impose imprisonment for life, or imprisonment or detention for a period exceeding six months.

- 3.60. Eligibility for membership of a CM under the DFDA is in effect confined to an officer of not less than three years standing (s 116). On this point, the Australian eligibility situation is not as wide as the eligibility situation in the US. There is no eligibility for non-commissioned officer membership. Whilst such eligibility is not found in the (UK) **Armed Forces Act**, it is to be noted that the Canadian SAG has now recommended that non-commissioned members of the rank of Warrant Officer and above be eligible to serve on Disciplinary and GCMs provided that the non-commissioned member is equal, or senior, in rank to the accused. Members of the CM, as well as the JA are chosen by the CA on an ad hoc basis but historically this has always been the

pattern according to which CMs have been appointed, and necessarily so, given the exigencies of war: Tyler at 33. (see the like situation in the US: Curry and Weiss). The members and president are selected by the CA. He/she is not constrained to select from his/her chain of command nor is required to select from outside the command of the accused. Certain persons are prohibited from sitting or are ineligible to sit. The prosecutor is selected from the service although s 119 does not specifically provide for his/her appointment in the convening order. In practice under the existing arrangements a CA initiates the prosecution, appoints the judge (JA), the jury (the court members), the foreman (the President) and the prosecutor. The CA may in some cases also be a reviewing authority. The Act does not forbid the reviewing authority appointed under s 150 to be the CA appointed under s 102, although both are appointed by a chief of staff. A CM is convened by a CA who is an officer, or an officer included in a class of officers appointed by a chief of staff to be a CA. A CA shall not appoint as a member, or as a reserve member, or as JA of a CM an officer whom he believes to be biased (s 118). A CA shall in the order convening a CM appoint the President and members, appoint an adequate number of reserve members, appoint the JA, fix the time and place of assembling the CM (s 119), and forward a copy of the convening order to the accused (s 120). He appoints the prosecuting officer, determines the charge and its nature, appoints the JA, President and members, and may have a reviewing function. This is the type of situation criticised in Genereux upon the basis that under normal circumstances it ought not be necessary to try alleged military offenders before a tribunal in which the judge,

prosecutor and triers of fact are all chosen by the CA to serve at that particular trial. Such a situation has also been adversely and unfavourably criticised in Findlay, with the result that the (U.K.) **Armed Forces Act** has significantly reduced the powers of a CA. On the other hand the multiple roles position of the CA have been held not to infringe the due process provision in the U.S. Curry and have not been held in Australia to be inconsistent with service tribunal independence in Tyler. There is in the cases to be found no consistency of approach in relation to the question of multiple roles of the CA. The position of multiple roles in the US and Australia is nevertheless as stated and has not been adversely criticised by either the US Supreme Court or the High Court of Australia. The situation of multiple roles has been found to be objectionable in Findlay and has now been criticised by the SAG as recently as March 1997.

- 3.61. The accused may object to a member of the CM or to the JA on the ground of ineligibility or bias (s 121). There is imposed upon a member or a JA who believes himself biased or likely to be thought on reasonable grounds to be biased, (the test for which is stated in Webb v The Queen (1994) 181 CLR 1) an obligation to notify the CA (s 122). At any time before a CM is sworn or affirmed the CA may revoke the appointment of an officer to be a member or the JA and replace a member or the JA (s 123). Provision is made for replacement of a member by the JA (s 124). The CA may dissolve the CM before it is sworn because of exigencies of the service or for any other good

reason (s 125(1)). After it has been sworn the CA may dissolve the CM in the interests of justice (s 125(3)).

- 3.62. Protection is given to a member of a CM, a JA, a DFM, a summary authority or a reviewing authority in the "performance of his duties". He/she has the same protection and immunity as a Justice of the High Court (s 193). Likewise, provision is made for the protection and immunity of a legal practitioner appearing for a party before a service tribunal (s 193).

Judge Advocates

- 3.63. A person is eligible to be a DFM if appointed by the JAG (s 127(1)). He must be on the JAs' panel (s 127(2)). A person is eligible to be a JA of a CM, if and only if, he is a member of the JAs' panel (s 117). The panel is constituted by officers appointed by a Chief of Staff on the nomination of the JAG (s 196(2)). An officer is not eligible for appointment unless enrolled as a legal practitioner for not less than five years (s 196(3)). The JA fulfils the function performed by a judge, in a trial by jury (s 134). He has no tenure, nor a fixed term of appointment. There are, as I have said, no terms and conditions prescribed for appointment or for remuneration. (They draw rank or prescribed payment or special allowances as the case may be as military officers when serving). There is no provision for termination of appointment as a member of the JAs' panel or as a DFM. There is no provision in terms for resignation. There would be a termination as a matter of law on ceasing to be an officer, or a legal

practitioner (or removal or revocation of appointment or retirement). In one sense, it might be thought that absent fixed tenure, once a person is appointed to the JAs' panel, as a DFM or s 154(1)(a) reporting officer, he/she is effectively granted complete security of tenure absent grounds for removal for good reason or proper cause.

- 3.64. A matter of some concern is the situation of the officer appointed to the JAs' panel, as a DFM or as a s 154(1)(a) reporting officer. In the Army, all are reservists, save for one regular officer who holds the rank of colonel. In the Navy, DNLS is also a member of the panel and a DFM. A person so appointed is not in terms of command, placed under the authority or independent command, for example, of the JAG. Yet as earlier stated, by nature of their status as serving military officers they are necessarily subject to command, control and authority of military superiors, leaving the question open who should such be and in respect of what duties. Indeed, in the Army there is some legitimate room for concern. **Australian Military Regulations** ("AMR") reg 583 places all legal officers (which would therefore include those who are on the JAs' panel, who are DFMs and s 154 reporting officers) under the control and command of DALS, save in the circumstances stated in AMR reg 583: see also AMR reg 581. As I understand it, all JAs in the Army are "posted" to Pers Div AHQ which is a formation commanded by ACPERS-A. Presumably this is an attempt to ensure such officers operate within a discrete command structure. If this is so, then, under the qualification to be found AMR reg 583, such persons would presumably come under his

command. Nevertheless, it is the DALs under AMR reg 583 who is required to report on the efficiency of all officers including the above. As I understand it, the JAA is reported upon by ACPERS. He is a regular officer who is a person appointed to the JAs' Panel as well as a DFM. Next, in the Army, appointment or promotion of JAs and DFMs is in the hands of DALs and he would presumably be required to report on their efficiency, even if such officers are under the command of another. Indeed in practice, as I understand the position, the DALs or the JAA does the annual EDRO in respect of those who are JAs or DFMs if below the rank of colonel. There apparently is a problem with reporting on those of the rank of colonel, because of difficulty in finding someone senior enough to perform such a role. I shall return in due course to the matter of reporting including the question of whether performance of judicial duties by a JA or DFM or even a s 154(1)(a) reporting officer should be the subject of reporting at all, and if so by whom. The possibility of dual reporting by perhaps two persons might arise were JAs, DFMs or s 154(1)(a) reporting officers to perform duties outside of their actual appointment and not inconsistent with performance of duties in any of these positions.

- 3.65. As I understand the situation in the Navy, DNLS commands all JAs and reports upon them. In the Air Force, the CO of Reserve Squadron commands reserve legal officers including JAs. Air Force however does not raise reports on JAs. Promotion to SQNLDR occurs after six years and WGCDR are promoted when selected for panel leader or JA. All JAs are thus WGCDRs. I

mention the matter since some of those consulted during the study raised the question whether, after an appointment, there should be any promotion in rank at all.

- 3.66. Returning to the Army position, one should not overlook the fact that DALs may be an adviser to a CA in relation to charges being, inter alia, required to advise and settle a form of charges, referred to him.
- 3.67. Some of the concerns mentioned could perhaps be addressed on the implementation of the DRP (11 April 1997) when considering the provision of an integrated joint legal service including provision as to command structure of such service.

Judge Advocate General

- 3.68. The position of JAG is dealt with in Pt IX of the Act. The appointment is made by the Governor-General and may be made on a full time or part time basis (s 179(1)), for a term not exceeding seven years (s 183(1)). A person shall not be appointed as JAG unless he is or has been a Justice or Judge of a federal court or of a Supreme Court of a State or Territory (s 180(1)). He/she may hold office on a part time basis. In fact all presently do so perform judicial duties as State Supreme Court Judges. (This is itself perhaps an argument in favour of JAs and DFMs also performing what might be loosely called "non judicial duties"). The JAG ceases to hold office if he no longer

holds office as a Justice or Judge. There is provision for the JAG resigning (s 187). As I earlier observed provision is made for termination of appointment of the JAG or a DJAG by the Governor-General for misbehaviour, physical or mental incapacity, or bankruptcy (s 186). The JAG to this extent is in a similar or like position to that of a civil judge. He may be remunerated but not whilst receiving judicial salary. In practice the JAG and the DJAG are given military rank. This is not required. Nevertheless, a number of things should be borne in mind. His and the DJAG's power and duties are stated in s 179 (3) and (4). In the case of the JAG they include powers of nomination to the JAs' panel (s 117) but not of the JA's appointment to a trial (s 119), appointment of a DFM (s 127), nomination of a reporting officer under s 154(1)(a), and reporting to the Minister (s 196A). He/she may make rules of procedure (s 149). He/she does not in fact act as a general legal adviser to the ADF "as such would be inconsistent with judicial office": **JAG Report 1995**. Indeed, I mention in passing that under the **Armed Forces Act** in the UK, the JAG will no longer provide general legal advice to the Secretary of State for Defence.

- 3.69. In practice the JAG and DJAGs are civilian judges, but with rank (albeit not a requirement), they have been experienced reserve legal officers in a particular service and have thus considerable familiarity with a service, and the administration of military justice. As he/she is usually a civilian judge the JAG has had considerable experience in the practice of the law generally. In practice he/she has qualified for appointment by reference to his/her military

and civil experience. However, the fact is that the JAG's eligibility for appointment is by reference to his being a civilian judge (or former civil judge) whilst the DJAGs are likewise appointed in a civil capacity.

3.70. Part IX of the Act contains provisions for the review of a decision of a CM.

The reporting officers under s 154(1)(a) are in fact both highly experienced military and civil lawyers, QCs, SCs or even judges. Similarly, those appointed to the JAs' panel are appointed by a Chief of Staff on the recommendation of the JAG.

3.71. In Australia the JAG does not appoint a person to be a JA or act as a DFM at a particular trial.

Appeals

3.72. The **DFD Appeals Act** provides a right of appeal to the DFDAT (which consists of civilian judges normally with military background). A person convicted by a DFM or CM (but not by a summary authority) may appeal against conviction, though only by leave in some cases: s 20. Thus where there is an election situation in relation to a summary matter, a service member may only elect trial by CM or DFM (with right of appeal against conviction) but where he fails to elect, and is given a significant and elective punishment (sometimes more severe than that which might be awarded by a DFM) there are review rights but no appeal rights to the DFDAT. By way of contrast,

there is no provision for seeking leave to appeal from a sentence imposed by a DFM or CM unlike Canada, and now the UK. There are also provisions in relation to appeals from the DFDAT to the Federal Court of Australia. The judges of the DFDAT are civilian judges (although many have been service legal officers, JAs, DFMs or s 154 reporting officers) and the judges of the Federal Court of Australia as civilian judges are removed from military influence or persuasion. Thus controls are in place to protect against actual or perceived unfairness. There is also in existence the right to seek prerogative relief, were it necessary in cases of claimed excess of jurisdiction or where there are other grounds for claiming such relief: eg Re Tracey; Re Nolan; Re Tyler.

Conclusions as to the Independence and Impartiality generally of Courts Martial and Defence Force Magistrate proceedings

- 3.73. The provisions to which I have made reference (and to which I have added some additional ones) were relied upon by the High Court in Tyler for the purpose of determining that the constitution of a GCM pursuant to the DFDA “answers the requirement of independence of a service tribunal exercising disciplinary power”: per Brennan and Toohey JJ. As their Honours said (at 34):

“The provisions of the Act to which we have referred establish an independence on the part of courts martial commensurate with the system of service tribunals for discipline of the Defence Force”.

3.74. However, to these provisions it is also appropriate to add another provision which seeks to enhance and protect impartiality and independence and which applies to all service tribunals. Section 193 provides for the protection of the members of a CM, a JA, a DFM, a summary or reviewing authority in the performance of his/her duties as such member, JA, DFM or authority. There is no provision dealing in terms with his/her position after he/she has performed his/her duties. Protections also are given to legal practitioners for the parties. The protections are not as extensive as those found in Articles 26, 37, 98 of the UCMJ which provide additional protections in terms of "insulation" from command influence. There is scope for change to assist in providing further protection. Some provisions of like nature to those found in the UCMJ, and now to be found in Canada, do not exist. The UK system has now introduced radical changes.

3.75. Although I have discussed the position of the summary authority in general terms it is appropriate to deal with this separate service tribunal in greater detail.

The Summary Authority as a Service Tribunal

3.76. The summary authority is fundamental to the military system and its operation. It involves the most common application of military law and very much is the means whereby the required prompt, immediate discipline is administered. It is crucial to the structure upon which discipline of the Defence Force is based. It has been said to be of great importance to the governance of military society.

- 3.77. With the advent of the DFDA the more informal disciplinary hearings became codified. By virtue of s 3 a service tribunal is defined to include a summary authority. Part VIII - Procedure of Service Tribunals - Division 1 deals with trial by summary authority. Proceedings have become more formal. Section 130 provides that a summary authority shall try a charge in accordance with the provisions stated therein. Section 131 provides for election of trial or punishment (a further means of protecting the accused) and is in some ways a contributor to independence and impartiality of the summary authority. Section 138 deals with certain procedural powers of a service tribunal and thus a summary authority. The service tribunal may take evidence on oath or affirmation, adjourn the hearing, and summon a person to give evidence: s138. The accused person is to be present: s 139. Unlike a hearing before a CM or DFM, the hearing need not be in public: s 140. Section 141 provides that an accused person may make applications and objections before being asked to plead, including to a summary authority, and also including seeking an adjournment. Nothing in s 141 authorises by implication a trial by a summary authority who is, or is likely to be, biased, or is likely to be thought on reasonable grounds to be biased: s 141(4),(6). Section 146 provides that a service tribunal, which includes a summary authority, shall apply the rules of evidence: (s 146) and keep a record of proceedings (s 148) which shall be certified after the hearing as true and correct (DFDR r 55). In determining a sentence a service tribunal shall take into account sentencing principles applied by the civil courts from time to time (s 70) and the need to maintain discipline in the Defence Force.
- 3.78. The independence and impartiality of a summary authority is assisted by provisions such as s 193 which also provides that a summary authority in the performance of his/her duties as such, has the same protection and immunity as a Justice of the High Court. A legal practitioner or other person appearing before a summary authority is also entitled to the same protection and immunity as a Justice of the High Court.

3.79. Extensive provisions are made under the Rules Part IV - Summary Hearings. DFDR r 22 provides that the summary authority shall administer justice according to law without fear or favour, affection or ill will, and in particular shall ensure that any hearing of a charge before the authority is conducted in accordance with the Act and the Rules and in a manner befitting a court of justice. This Rule goes very much to the core of preserving the independence and impartiality of the summary authority. The same rule requires a keeping of a record, a trial according to the evidence to ensure an accused suffers no undue disadvantage arising from his position or ignorance or incapacity etc. Rule 24 permits an accused to request the services of a specific member (this could include a member who is a legal officer) to defend the accused person at the hearing of a proceeding before a summary authority. If that person is not available the summary authority, with the consent of the accused, may direct another member to defend the accused (this could be another legal officer): DFDR r 24. Thus the accused may be defended at a summary authority trial by a legal officer. As I understand it, this is frequently the case in the Air Force, and where the accused is represented by a legal officer so is the prosecution.

3.80. Although there is no appeal as such from a decision of the summary authority, there are provisions for automatic and other reviews: s 151. However, as I have indicated, power to quash a conviction of a service tribunal including that of a summary authority under s 158(b) is not a power to quash on a question of fact. Thus a wrong decision on a question of fact may not of itself lead to quashing of the conviction. I have already commented about the matter of giving of reasons in some cases by a summary authority in arriving at its decision: see my DJAG Report: **Re Heap** (1996). There is a provision for a petition to the reviewing authority: s 153 and provision for reports by a legal officer under s 154(1)(b). A reviewing authority may refer a legal officer's report to the JAG or DJAG for the purpose of an opinion on matters of law. A further review by a Chief of Staff under s 155 is provided for. He/she must

first obtain a report from the JAG/DJAG whose opinion on a matter of law (but not a matter of fact) is binding. In one sense there is an "overseeing" of summary authority proceedings by experienced civilian judges of military experience (holding military rank) independent of the military authority in consequence of appointment and holding office pursuant to ss 179 to 186.

- 3.81. Section 158 provides for a reviewing authority to quash a conviction of a service tribunal, including a summary authority, and for a review of sentence (wrong or excessive): s 162. The Act provides for action on review of certain punishments and orders subject to approval of the reviewing authority.
- 3.82. In s 172(2), provision is made that certain punishments when imposed by a summary authority (including detention, reduction in rank, forfeiture of seniority, a fine exceeding 14 days pay) do not take effect until approved by a reviewing authority.
- 3.83. The system dealing with minor offences thus grants an accused service person procedural rights to assist in promoting a sense of justice and of obtaining a fair and impartial trial by an independent tribunal.
- 3.84. However, as I have said, there is no appeal from a decision of a summary authority even in relation to a serious elective punishment that has been imposed. There can be no doubt that a summary punishment carries with it consequences that extend beyond immediate punishment. Provisions such as s 70(2)(d) require a service tribunal to take a service record into account in relation to a punishment. There is the stigma, potential injury to career, increased punishments for future offences and the potential hardship. A conviction is recorded for ten years. In relation to elective penalties they are frequently higher than DFM penalties. There is no unqualified election for CM or DFM.

- 3.85. In the UK an election for CM now exists in all cases, and is not one fixed by reference to likelihood of a particular type of punishment: see **Armed Forces Act** and eg s 76 of the **Army Act**. Nevertheless, this too is against a background that, absent a request for review, there is no automatic review of a summary finding or award: **Armed Forces Act** and eg s 115 of the **Army Act**.
- 3.86. The accused may elect trial by CM when faced with an Article 15 punishment (non judicial punishment by commanding officer). Further, in a case involving trial by summary CM presided over under Article 16(3) by one military officer. Under the UCMJ the accused has the option of trial by a special CM usually consisting of a military judge and three CM members. The Code permits members to sit without a judge or even elect trial by judge alone: Article 16(2).
- 3.87. Where a commanding officer tries a charge and convicts the accused he may impose a punishment or punishments in accordance with Table B to Schedule 3 of the Act. Two scales of punishments are available to a CO, namely "Elective punishments" (Column 2) and "Other punishments" (Column 3).
- 3.88. Elective punishments are available where an accused pleads guilty to a charge, or is convicted after a plea of not guilty, and elects punishment by a CO rather than by a CM or DFM. A right of election is qualified (unlike the US and now in the UK) the right being conditioned by reference to whether an elective punishment is likely to be imposed. Where the accused elects to be tried or punished by a CM or DFM, a CO is required, subject to the exigencies of service, to refer the charge to a CA: s 131(1). Nevertheless, the election may be defeated in some cases: s 131 and s 103(1)(b). If action is taken by a CA under the latter provision, presumably in practice no elective punishment would be imposed, although the Act permits an elective punishment to be awarded.

Conclusions as to Independence and Impartiality of the Summary Authority

- 3.89. The summary authority (adopting the approach in **Tyler** and in **Weiss**) would then probably appear to meet current requirements of independence and impartiality of a service tribunal exercising disciplinary power pursuant to s 51(vi) of the Constitution. Nevertheless, the study has revealed matters that justifiably need to be addressed and considered and these are dealt with in the study.
- 3.90. In Australia the decisions in **Nolan** and **Tracey** apply to all DFDA service tribunals including summary authorities exercising disciplinary powers. Such decisions do not distinguish between one class of service tribunal exercising disciplinary power and another. However, the Canadian Court Martial Appeal Court in the case of **R v Robertson** (1983) 9 CCC (3d) 404 (CMAC) considered the application of s 10(b) of the Charter to the right to civil counsel. The court regarded the summary trial in the more traditional way as a “disciplinary” procedure rather than a “criminal” one. It was held that 10(b) of the Charter was not applicable to summary trial proceedings. This indicated, the SAG has made recommendations for changes to the summary process which it believes will provide renewed confidence that the summary trial process is fair to the accused and legally defensible. In any event in Australia under DFDR r 24 the accused is in perhaps a stronger position than in Canada or the US. He/she can ask for a particular defending officer and such may be a legal officer. DFDR r 24 permits a legal officer to be nominated as defending officer.
- 3.91. Summary authorities in Australia are statutory service tribunals exercising disciplinary power. They are different from the summary CM in the US which is not an adversary procedure and is designed to exercise justice promptly for relatively minor offences being informal proceedings (not like that required in Australia under DFDR r 22) where a single non-commissioned officer acts as

judge, fact finder, prosecutor and defence counsel: Middendorf v Sec of Navy 425 US at 25. It is different from the non-judicial punishment proceedings under Article 15 of the UCMJ. Summary authority procedures in other countries provide limited assistance in terms of determining the independence and impartiality of summary authority proceedings in Australia.

CHAPTER 4

THE INTERNATIONAL SITUATION - UNITED KINGDOM, CANADA, USA

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- 4.1. It is appropriate to examine what is occurring abroad, so that one may consider to what extent, if at all, the Australian system is or is not out of step with our major allies, as well as to examine the extent to which international standards or practices are in fact being reflected.

The United Kingdom position

- 4.2. The UK is bound by Article 6 par 1 of the European Convention on Human Rights. The **Armed Forces Act 1996**, which came into force on 1 April 1997, is an Act very much in response to the decisions of the European Commission on Human Rights ("the Commission") and later the European Court of Human Rights in **Findlay**.
- 4.3. In **Findlay**, the Commission (and later the European Court) expressed the view that there had been a violation of Article 6 par 1 in that the complainant had not been given a fair hearing by an independent and impartial tribunal. He had been charged with a number of civilian and military offences before a GCM. Then current CM system was particularly criticised for the multiple roles of the CA. The members were army officers of ranks subordinate to that of the convening officer and serving in units commanded by him. The President was on the convening officer's staff. The JA was a barrister. The

prosecuting and defending officers had the same reporting chain as the members.

- 4.4. The Commission expressed the opinion that there had been a violation of Article 6 par 1 in that the complainant had not been given a fair hearing by an independent and impartial tribunal (ie it lacked institutional independence and impartiality). No suggestion in terms was made that the JA was not independent because he was not a full time military judge with tenure. No suggestion was made that he was not impartial. The Commission considered that in certain cases the links between the concepts of independence and impartiality are such that if the tribunal of fact offers the requisite guarantees of independence then it will not satisfy the test of objective impartiality. Thus the same reasons may make a tribunal both lacking in independence and impartiality. It did not adopt in terms the three condition test of judicial independence of the type discussed in Genereux under a similar provision to Article 6 para 1, that is s 11(d) of the Canadian Charter. Further, no observations were made on the question of the independence or impartiality of the summary authority acting under the **Army Act**.

- 4.5. The Findlay Commission judgment also made a number of points in relation to the then position of the Army CM. First, the CA, if not technically the prosecuting authority, was nevertheless to be seen to be “central” to the prosecution of a case by CM. Second, the dual role of convening and confirming authority cast doubt upon the independence of a CM from the

prosecuting authority. Third, there was a difficulty in relation to the independence of members from the CA. The CA was empowered to appoint members of the CM who could be under his command, in the chain of command, or on his own staff, or might even be officers upon whom he reports in their confidential reports, so as to be in a position of command influence and power, whether or not in practice such power and influence was exercised. Fourth, the oath, although important, did not dispel doubts as to the lack of independence of a CM. Fifth, the CM convened on an ad hoc basis was inconsistent with the view that an established term of office is an important guarantee of a tribunal's independence. Thus the CM lacked independence from the prosecuting authority in view of the nature and extent of the convening officer's role and the composition of the CM. Sixth, the JAG was a legal adviser to the Ministry of Defence and because the JA was answerable to the JAG, he was closely linked with the Ministry. Seventh, the CA appointed the prosecutor and controlled the prosecution so that, for example, his concurrence was required. Eighth, the court's finding and sentence were conditional on his approving them as a confirming officer.

- 4.6. It is appropriate here to observe that since the hearing by the European Commission, the **Findlay** matter has been heard by the European Court and judgment recently given. In the interim the British Government has passed the **Armed Forces Act 1996**.

4.7. In relation to the decision of the European Court a number of points may be made. First, the Court declined to express the view as to the compatibility of the provisions of the new legislation with the Convention. Second, before the Court the British Government did not challenge the conclusion of the Commission that the complainant had not been given a fair hearing by an independent and impartial tribunal. Third, the Government had no observations to make upon the Commission's conclusion that there had been a violation of Article 6 par 1 of the Convention by reason of the "width of the role of the convening authority and his command links with members of the tribunal" (par 71). Fourth, doubts were cast upon the independence of the tribunal from the prosecuting authority (the JA's involvement being not sufficient to dispel this doubt "since he was not a member of the court-martial, did not take part in its deliberations and gave his advice on sentencing in private". (Indeed, it was noted that a CM board contained no judicial or legally qualified members). I would add in passing that it is by no means clear why the JA should be a member, perhaps it is the European influence! That he/she is not a member of such a CM in Australia or the U.S (the Anglo-Australian American tradition) has traditionally always been the case. He is not a member in Canada and the SAG does not recommend that he should be. In Genereux the Canadian Supreme Court did not suggest he should be. The **Armed Forces Act 1996** provides that he shall be a member without a vote on finding, but with a vote on sentence. Fifth, there were considerable doubts as to whether members of the CM were sufficiently independent of the CA and whether the organisation of the trial offered adequate guarantees of

impartiality. Sixth, in particular the central role played by the CA in the organisation of the CM provided support for the view that the CM was not objectively independent or impartial. Seventh, the European Court also found it significant that the CA also acted as confirming officer and that the decision of the CM was not effective until ratified by him and he had the power to vary the sentence imposed as he saw fit (this was said to be contrary to Article 6 par 1 because it contravened the principle that the power to give a binding decision which may not be altered by a “non-judicial authority”, was inherent in the very notion of a tribunal and was a component of independence). I note in this respect that in the U.S. it has not been suggested that, eg because no sentence imposed becomes final until it is approved by the officer who convened the CM, this contravened the due process clause: see Article 60 and Weiss at 9. Nor did the High Court in Tyler consider that provisions such as s 172 of the DFDA (punishments and orders subject to approval) compromised independence and impartiality of service tribunals. Eighth, not to be overlooked is the fact that Findlay’s hearing was in fact concerned with serious charges classified as “criminal” under both domestic and Convention Law, and thus he was entitled to a first instance tribunal which fully met the requirements of Article 6 par 1.

- 4.8. I would observe in passing that in Australia the orthodox view is that the service tribunal when exercising jurisdiction is doing so in exercising disciplinary power. Next, the decision of the European Court (par 7a) perhaps leaves open the question as to whether the “full” requirements of Article 6 par

1 are perhaps required to be satisfied only when the offences may be classified as being criminal in the sense of being offences against the general law and not merely exclusively disciplinary offences as such (as to the distinction in Australia see Tyler; Tracey; and Nolan).

4.9. Subsequent to the decision of the Commission in Findlay and prior to the introduction of the 1996 Act, without legislative change members of service CMs were appointed wherever possible from a different chain of command from the convening officer and from his confidential reporting chain. It is contemplated that this practice will continue so that court members will not be appointed if they are in the chain of command or in that higher authority's confidential reporting chain. In Canada, following Genereux, changes were introduced to provide for random selection of the president and members of a Canadian CM.

4.10. The **Armed Forces Act 1996** now makes a number of very significant changes which should be noted. An independent court administration unit will be responsible for making administrative arrangements for the convening of CMs, subpoenaing of witnesses, and appointing the court. There is to be a significantly reduced role for the Convening Officer/Higher Authority. Convening officers will no longer convene CMs once a decision to try an accused is made. An allegation that a person has committed a service offence shall be reported in the form of a charge to his CO for investigation. He shall investigate the charge and may after investigating the charge do a number of

things. A CO will, if he considers that a charge should be tried by a CM, pass it to his higher authority in disciplinary matters. Where the charge is referred to higher authority, the higher authority, unless he considers the case should not be tried by CM, refer the case to the prosecuting authority. There is to be established a separate service prosecuting authority. The prosecuting authority will be the service's legal branches and will be independent of the convening officer and of the higher authority. Under the Act an officer may be appointed by the Queen (presumably to enhance independence). In the case of the Army, DALS will be appointed as the prosecuting authority, although one is bound to comment that at first blush, it might be thought strange that DALS should have "two hats", even if a separate prosecuting section within his office is established to be the prosecuting authority. He/she will need to have 10 years' experience as a solicitor or barrister. DALS in turn will be able to appoint prosecuting officers from the Army Legal Services Branch. The requirement to have an independent prosecuting service has necessitated that Army Legal Services be split into different prosecuting and advisory branches with the prosecuting authority separately located. Command will continue to be advised by Army Legal Advisory Branches: see "A Short Unit Guide to the Changes to the Court Martial System as a Result of the Armed Forces Act 1996". In effect, the prosecuting authority takes over from the CA the effective control of the prosecution. Where a case is referred to the prosecuting authority, if he or she considers CM proceedings should be instituted the prosecuting authority will determine the charge to be preferred and whether the charge is to be dealt with by GCM or DCM. Amendments have been made eg to the (UK) Army

Act by the 1996 legislation. In effect the higher authority, who will be a senior officer, will decide whether any cases referred to him by the accused's CO should be dealt with summarily, referred to the new prosecuting authority or not proceeded with. Once the higher authority has taken such action he/she will have no further involvement in the case.

4.11. Following the higher authority's decision to refer a case to the service prosecuting authority, the prosecuting authority shall have the conduct of the proceedings under the Act and may amend, substitute or lay extra charges and discontinue proceedings. In effect the prosecuting authority has the sole power to make an independent decision as to what cases should be taken to trial, the type of CM and the nature of the charge. Thus, he/she will have absolute discretion, applying similar criteria to those applied in civilian cases by civil prosecuting authorities as to whether or not to prosecute, the type of CM charges and conduct of the prosecution. A point to be made is that the higher authority still retains powers not to proceed or refer the matter to summary authority or to the new prosecuting authority, but after reference he/she ceases to play a role.

4.12. Other provisions will ensure that convening officers are no longer to convene CMs once a decision to try an accused is made. There will no longer be a requirement that the findings of a CM will be subject to confirmation and revision at the direction of the confirming authority. A right of appeal by leave on sentence (in addition to a right of appeal on finding) to the Court

Martial Appeals Court is to be introduced. All accused dealt with summarily before a CO or appropriate superior authority will have a right to elect trial by CM in all cases and not just where it involves a custodial or financial penalty.

- 4.13. The Act makes provision for a court administration officer (“CAO”) to be appointed by the Defence Council to convene (assemble) GCMs and DCMs and appoint their members. The CAO in each service will be independent of both higher and prosecuting authorities. The officer who will select the members of the CM will not be under the command of higher authority. On being notified by the prosecuting authority of the charge and the description of the CM (ie general or district) the CAO shall by order convene a CM of that description. The order shall state the date, time and place, the officers to be members, which of the officers is to be president and state that a JA appointed “by or on behalf of the JAG” is a “member” of the CM. (In the U.S the service JAG “selects” the JA for a GCM, whilst in Canada this is presently done by the Chief Military Judge in the JA’s office. The SAG has recommended that the office of the Chief Military Trial Judge be organised as an independent unit of the Canadian Forces and that the relevant responsibility of the Chief Military Trial Judge be set out in the National Defence Act. The point to be made here is that overseas a CA does not appoint the JA to a trial). A CAO may, before the trial commences, amend or withdraw the assembling order for the CM. The CAO may before trial dissolve the CM. The Act provides that a JA in relation to a CM appointed by or on behalf of the JAG is to be a “member” of a CM [my emphasis]. A JA will continue to be

appointed by or "on behalf of the Judge Advocate General" who will no longer provide general legal advice to the Minister of Defence. He is also now to be a member of the CM. I would note that prior to the **Armed Forces Act 1996** the JA did not take part in the CM deliberations on conviction or acquittal. He could advise on sentencing principles in private. He was not a member of the CM having no vote on conviction or sentence. Now the JA will have a vote on sentence (but not on conviction). The casting vote, if needed, will be with the President who will also give reasons for the sentence in open court. I would add that in the US, Australia and formerly in the UK, the members decide guilt or otherwise and impose sentence, unless (as in the US) trial is by judge alone. No person is to be appointed as the JA eg of an army CM unless he/she is a lawyer of five years standing (s 84B of the **Army Act**). There is no provision for election for trial by the JA alone. This is the situation in Australia, but not in the US where the right of election has a constitutional background including the presence of the due process clause.

- 4.14. In the UK, the JAG (of the Air Force and Army) is appointed by the Queen for a fixed term, and may be removed by her for incapacity or misbehaviour. He/she is a civilian usually a judge, ie a civilian judge, who does not hold military rank. There are a number of assistant and deputy JAs (usually civilian lawyers), appointed to the JAG's office by the Lord Chancellor, of five or seven years experience. The JA is removable by the Lord Chancellor in certain circumstances. The JAG and the JAs receive remuneration out of money provided by Parliament, this being fixed by the Lord Chancellor.

Pension provisions are provided for those persons. As at the time of the Findlay decision the JA was appointed to a CM either by the JAG's office or by the CA.

- 4.15. The **Armed Forces Act** provides for the appointment of a reviewing authority who on review may do certain things in relation to a finding or sentence by a CM including substituting a finding or sentence. The existing confirmation procedure by confirming officer and/or separate review is abolished with there being one confirmation and review procedure unconnected with the CA and command chain. Findings and sentences of CMs will in the case of the Army be reviewed by the Army Board or officers appointed by them. There will be an Army Reviewing Authority with the JAG or one of his staff giving legal advice to the Reviewing Authority. An accused may petition the Reviewing Authority, with a review taking place whether the accused petitions or not. In respect of summary findings and awards, an accused may at any time request a review of a finding or punishment awarded or both, and where he does so the finding or punishment shall be reviewed. A finding or punishment may however be reviewed "at any other" time even if not requested by the accused.
- 4.16. Thus findings by a CM will no longer be subject to confirmation or revision by a confirming officer whose role is to be abolished. A reviewing authority will be established in each service to do a single review, with reasons for decision of the reviewing authority.

- 4.17. The accused will now have the right to apply for leave to appeal to the Courts Martial Appeal Court against CM sentence as well as against conviction against CM.
- 4.18. The right of an accused to elect trial by CM is now a wide one: s 76B **Army Act 1955**. If a CO determines a charge has been proved, before recording a finding to that effect, an opportunity to elect CM is to be afforded to the accused. However, new regulations require that the officer dealing summarily must explain to the accused that if he chooses to elect, the prosecution may prefer any charge for CM including one more or less serious than the one dealt with summarily, or even one that could not be dealt with summarily; that if found guilty by a CM, the court's powers of punishment could be greater than those available on summary dealing; that he will have an absolute right to withdraw his election for trial within 48 hours of making it, but thereafter subject to qualifications. The election is not determined by reference to the nature of the punishment likely to be imposed (as in Australia). In some ways the situation becomes closer to that in the US where elections are given in relation not only to Article 15 situations, but also between a summary CM and a special CM. All accused dealt with summarily before a CO or appropriate superior authority will have a right to elect CM not just in cases involving custodial or financial penalty.

- 4.19. The European Court in Findlay declined to rule on the **Armed Forces Act** and declined to express a view as to the compatibility of the provisions with Article 6 par 1 of the Convention.
- 4.20. Changes in the UK, as indeed in Canada, in order to achieve independence and impartiality of CM, have been against the background of Article 6 par 1 of the European Convention and s 11(d) of the Canadian Charter, which have no counterparts in Australia.

The Canadian Position

- 4.21. I have already made some detailed reference to the military justice system as it operates in Canada particularly in the light of the Supreme Court's decision in Genereux. Further reference has been already made to some of the recent recommendations contained in the report of the SAG.
- 4.22. The SAG has reported that there is a need for significant adjustments to the system of military justice and that what is necessary to restore confidence in the military justice system is increased transparency, accountability and equality in the application of justice among all ranks. The report, inter alia, reflects a view that the changes to the Queen's Regulations prior to the appeal in Genereux, and recognised by that Court, as establishing institutional independence of the CM system, have not in themselves gone far enough in terms of improving the military justice system. The other view may be that

the decision in Genereux and changes made in consequence thereof, caused some disquiet and some loss of confidence in the military justice system.

- 4.23. However, this said, the SAG has recognised that because discipline is at the heart of an efficient and effective military force, this reality explains and justifies the existence of a separate military justice system with its own unique code of discipline embodied in a separate statute. To this extent, Canada is “behind” Australia and those who look to Canada as a source of enlightenment for a system of military justice should recognise this. Another matter that may be mentioned at this stage is the recognition of a number of distinct and fundamental principles by the SAG. These may be stated as follows: first, that a distinct military justice system be maintained subject to innovations and changes as recommended by its report; second, that ^{the} existing Code of Discipline continue to be administered primarily by the “chain of command in time of conflict or peace, in Canada, or abroad”(my emphasis), subject to recommended changes; third, that it be a fundamental principle of Canada’s military justice system that every person subject to the Code of Service is “entitled to equal and uniform application without regard to rank”; fourth, that the Code be enacted as a separate federal statute. I should add that the SAG has made no recommendations in relation to the removal or non-exercise of jurisdiction in respect of service offences which are offences against the general law, ie “civil offences” committed in peacetime in Canada.

4.24. In relation to the JAG's "office", the SAG considered that in order to achieve independence, the differing roles and functions of the JAG be separated. To achieve this it was recommended that there be "institutional" separation of the roles of giving legal advice to Canadian Force members and the JAG's prosecution and judicial function. Further, a recommendation is made that there be an appointment of an independent Director of Prosecutions "responsible" to the JAG.

4.25. Indeed, it is recommended that there be provisions for the JAG's duties in respect of its separate defence, prosecution and judicial functions. Recommendations include that whenever a Canadian Forces member is entitled to legal advice under the Code, eg. an election for CM, it be furnished in a way independent of the JAG's prosecuting and judicial function. Perhaps what is contemplated is that the Office of JAG in effect have institutionally separate units in respect of separate defence, prosecution and judicial functions. What is involved in the concept of the appointment of an independent Director of Prosecutions responsible to the JAG is not, however, clear. The approach adopted under the (UK) **Armed Forces Act** makes the respective service Director of Legal Service the prosecuting authority, with independence of the advisory and prosecuting branches being achieved by having separate distinct units in the Director's office, working from different geographical locations.

- 4.26. The Canadian Supreme Court in Genereux has recognised that judicial independence and impartiality are fundamental to public confidence in the administration of justice and military justice. It also recognised that there could never be a “truly independent military judiciary the reason being that the military officer is involved in the administering of discipline at all levels”.
- 4.27. In Canada, the Supreme Court in Genereux has held that the GCM as constituted at the time, violated the requirement of an “independent and impartial tribunal” under s 11(d) of the Charter. The Court held that an accused’s right to a fair hearing must be interpreted in the light of the fact that military justice is deeply entrenched in Canadian history and its existence supported by compelling principles. It also held that the right to a fair trial before an independent and impartial tribunal must be interpreted in a military context, and that such a right may well be different in the military justice situation as compared to a civilian situation. The acceptance of a parallel or alternative system of military justice coupled with alternative standards, however, had to take this into account, but that said, the system had to accommodate three essential conditions of independence. The Court accepted that a separate military system of justice was consistent with the Canadian Constitution and the Canadian Charter.
- 4.28. The three essential conditions of independence were security of tenure, financial security and institutional independence with respect to matters of

administration bearing directly on the exercise of its judicial function.

Subsequently, amendments were made to redress the concerns.

4.29. It was held that the military justice system, in order to meet the criteria of an independent, and impartial tribunal had to have tenure, financial security and institutional independence. Such could be complied with in a manner different than one would accept in the civil courts. It was critical of the multiple roles performed by the CA.

4.30. In Genereux, the Court held that the ad hoc GCM “did not enjoy sufficient security of tenure” to satisfy s 11(d). The selection of the presiding military judge on a case by case basis did not amount to sufficient independence. However, the court accepted that the pre-appeal modification to the **Queen’s Regulations and Orders** (“QR & O”) for the Canadian Forces, brought in before the appeal, which stipulated that a hearing take place before a military judge appointed for a two to four year term, addressed the primary deficiency of the JA’s security of tenure (as well as defects in the institutional independence of the system). Indeed, the Court suggested that the appointment of the JA to the tribunal by the JAG, who was considered to be part of the “Executive”, breached the institutional independence of the tribunal. I do not really see why this is so. It is not a view consistent with the approach of the High Court in Tyler or with the situation in the UK, where the JAG was appointed by the Queen, and still is, post Findlay. In Canada, the JAG is a barrister of ten years standing appointed by the Governor in

Council. He is not required to be a senior judge or have been a senior judge as is the case under s179 of the DFDA. The Canadian Defence legislation does not require him to be a member of the Armed Forces, although in practice he/she is chosen from military ranks. He is responsible for the provision of a military judiciary to take the judicial role in the military justice system. Members of the legal branch of the Forces who have undergone special training to qualify as military judges may be appointed by the JAG to positions in the Chief Judge Advocate's Division within the Office of the JAG. Length of posting to that Division is controlled by the JAG. To also address the problems adverted to, after the Genereux trial, the amended QR & O's, in addition to providing for fixed terms of appointment, provide that the person appointed to act as JA of a GCM is to be chosen by the Chief Military Trial Judge from the persons appointed for two to four years. Further, it concluded that there was insufficient financial security in that the executive's opinion of an officer's performance as a military judge may be a factor in the final determination of his or her salary. An opportunity to interfere with salaries and promotional opportunities of the JA and members of the GCM were sufficient to violate judicial independence. There was no provision for financial security other than that the military judge continues to receive his or her salary at a level commensurate with rank held. Such was not considered to furnish sufficient protection to allow a military judge to arrive at his decision, although it was accepted that in fact there was no evidence that a JA or members had been rewarded or punished for their performance at a CM. The test was, however, an objective one. A guarantee of maintenance of

remuneration throughout the term of the appointment was required. New provisions in the QR & O relating to financial security are based on promotional security and fixed term of office: QR & O 26.10 and 26.11 have addressed this concern. Further amendments provide that an officer's performance as a member of a GCM or as a military judge is precluded from being used to determine his or her qualifications for promotion or rate of pay (a provision not dissimilar to Article 37(b) of the UCMJ in the USA) [my emphasis]. This provision appeared to be one accepted by the Court as going some way to addressing the issue of security of tenure. There is now a system for more random selection of the president and members of the Canadian Defence Forces CM. In Genereux the Court observed that it was not acceptable that the CA who was responsible for appointing the prosecutor should also have the authority to appoint the President and members. As I have said, the CA does not appoint the trial JA, this is now done by a Chief Military Judge in the JAG's office and not by the JAG, although why this may be said to overcome objection to the JAG doing the actual appointment is not clear since the JAG appoints military judges.

- 4.31. It is appropriate to observe that the changes in 1991 to the QR & O's were held in Genereux to go some distance in insulating military judges and members of CMs and also assist in preserving impartiality and independence.
- 4.32. It is appropriate here to repeat that whilst the Canadian CM system, in terms of institutional independence as it existed at the time of the appeal in Genereux,

was held to be independent, despite the absence of an independent prosecutor, the SAG's report now goes much further recommending that the duties of the tri-service JAG (whose duties are perhaps much closer to the duties of the service JAG in the US or a service director of legal services in Australia) be "institutionally" separated with the requisite degree of independence to avoid conflicting roles. To this end not only is it recommended that an "independent" Director of Prosecutions responsible to the JAG be appointed, but that there be legislation dealing with the JAG's duties "in respect of its separate defence, prosecution, and judicial functions". Further, it is recommended that whenever an accused is entitled to legal advice under the Code of Discipline, the JAG is to provide such advice in a manner "independent to the JAG's prosecuting and judicial functions".

4.33. These recommendations, if implemented, would to an extent presumably involve "institutionally" separating within the JAG's Office the prosecuting, defending and judicial functions perhaps into more or less separate branches of the one office. That Office could be further subject to the qualification that the office of Chief Military Trial Judge be organised as "an independent unit of the Canadian Forces" with responsibilities laid down by statute.

4.34. Whilst in Genereux the Court expressed no views on the constitutionality of the summary authority, the SAG has now addressed and recommended changes to "renew confidence" that the summary trial process is fair to the accused and legally defensible. The SAG acknowledged constitutional

concerns over the process, at the same time recognising the imperative that summary trial be kept as an instrument to maintain discipline within the units. The SAG has recommended that where an election is given to the accused to be tried by CM, the accused be afforded a right to consult with counsel to ensure the election is based on full information and that the election be set out in writing.

4.35. Recommendations are made in relation to a number of punishment reductions or increases for offences tried summarily, including retention of reduction in rank but limited to one rank below that of the accused. Further, increased training and education is recommended for all COs and delegated officers to ensure that they are knowledgeable about their roles in the military justice system and that they be competent to perform them. Indeed, it is recommended that, absent exceptional circumstances, no officer should sit at summary trial unless certified by the JAG. Appropriate legal training should also be provided to persons who may be called upon to defend the accused. Next, it is recommended that an officer not sit at a summary trial if he has been involved in the “investigation or laying of the charge”. Uniform records of summary trials being prepared and regularly publicised is also recommended.

4.36. Despite the Canadian Supreme Court’s decision in Genereux, the SAG has made a number of recommendations for changes in the CM system to improve the independence of the system. The first is that the institutional independence of the Chief Military Judge (who appoints the judge and members of the CM)

be enhanced by making the “office of the Chief Military Judge” an independent unit of the Canadian Forces with the responsibilities of the Chief Judge being set forth by statute. Second, it is recommended that the respective roles of the court members and trial judge be revised so that the sentencing function at a CM be given to the trial judge presiding at the CM, upon the basis that the military trial judge “is more likely to have the requisite experience rather than court members to sentence an accused following a determination of guilt” (this is not the situation under the (UK) **Armed Forces Act**) . A third significant recommendation is that senior non-commissioned officers (“rank of warrant officer”) should be permitted to serve on CMs when a non-commissioned member is being tried. The recommended provision is mere alteration of eligibility. It does not go so far as the provisions of Article 25 of the US UCMJ which provides eligibility for “enlisted members” to sit on the trial of an enlisted accused if the accused makes a request in writing that enlisted members sit. If such a request is made, absent physical conditions or military exigencies, it requires membership of a GCM (five members) or a SCM (three members) to include enlisted members comprising at least one third of total membership of the court.

- 4.37. What the Canadian recommendations and the (UK) **Armed Forces Act** have in common is a recognition that prosecutions before CMs and prosecution powers, in respect of such, should not be in the hands of the CA (unlike the US situation). However, institutional independence of the prosecuting authority in the UK is perhaps somewhat curiously sought to be achieved by the Crown

appointing, in the case of the Army, the Director of Army Legal Services as the prosecuting authority, with his appointing the prosecuting officers from his Service Branch, and further with the creation of an independent prosecuting service branch separate from the advisory branch, operating from different geographical locations but within the Service Branch. Thus, whilst the independence of the prosecutor in relation to the CMs is regarded as a common goal in Canada and the UK, different means have been adopted to achieve such.

4.38. A number of concerns in relation to the matter of review and independent oversight have now been also recommended. These include a recommendation that, in all cases where an accused has elected to be tried by summary trial, if convicted, he have the right to request that the appropriateness of the conviction and / or sentence be reviewed by the next level of command. It has also been recommended that the obligation of the JAG to review CM proceedings be removed where the appeal period has expired and there is no appeal. This is upon the basis that an accused has full appeal rights in relation to conviction as well as sentence.

4.39. Finally, it has been suggested that an independent office of complaint or review and system oversight be established within the Canadian Forces reporting directly to the Minister of National Defence.

The U.S. situation

4.40. Congress, in drafting the UCMJ, appears to have been aware of the potential for unfairness in the system and the UCMJ was created to respond to the needs of military justice and to avoid, inter alia, the problem of actual or potential command influence.

4.41 The US Supreme Court has recognised that the trial of soldiers to maintain discipline is merely incidental to an army's fighting purpose. There is a recognition that the military is a specialised society apart from civilian society and that the military has again by necessity developed laws and traditions of its own over a long history. Concerns for discipline and obedience justify imposing restrictions on the military that would be unconstitutional in a civilian context. The peculiar nature of military service is regarded as being such that CMs can never be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed fair to trials in civilian courts. That said, a person convicted by a CM is entitled to due process under the "due process" provision. However, the tests and limitations of due process may differ "because of the military context". Due process is flexible and does not require civilian standards to be uplifted and automatically applied to and in the military justice system. Toth v Quarles 350 U.S. 11, 17 (1955); Parker v Levy 417 US 733, 743 (1974); Weiss v US (1994) 510 US 1. In the latter decision the US Supreme Court held that a

fixed term of office for the military judge was not required by the due process clause. The Court observed that, like all military officers, Congress had made all military judges accountable to a superior officer for the performance of their duties, in that they are “under the control of the Judge Advocates General who have no particular interest in the outcome of a particular court-martial”. Military judges are appointed to trials on an ad hoc basis. As in Australia they have no inherent judicial authority separate from the CM to which they are appointed. In concluding that the military judge did not require tenure, the Court in Weiss did so by reference to a number of specific points. First, a fixed term of office as a traditional component of the Anglo-American civilian jurisdiction had never been part of the U.S. military justice system and this was a factor to be weighed. Second, due weight would be given to military history and military tradition in the military justice system. Third, in determining what is due process in the military justice system, courts would give particular deference to the determination of Congress made under its constitutional authority to regulate the forces. Congress is regarded by the courts as having the primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. Fourth, it is elementary that a fair trial in a fair tribunal is a basic requirement of due process. A necessary component of a fair trial is an impartial judge. Fifth, a fixed term of office is not an end in itself. It is a means of promoting judicial independence which in turn helps to ensure judicial impartiality. Sixth, significantly there are particular provisions of the UCMJ (this is a matter that will need to be explored further) which insulate military judges from the

effects of command influence sufficient to perceive judicial impartiality so as to satisfy the due process clause. They are in particular Articles 26, 37 and 98 (I will return to these). Seventh, there is a Court of Military Review. Eighth, the entire system is overseen by the Court of Military Appeals (civilian) with judges having fixed terms, and not being slow to intervene if necessary.

4.42 There are thus a number of safeguards in place to achieve judicial impartiality essentially by reference to the statutory provisions of the Code, and the system of appeal. The High Court in Tyler adopted a similar approach to determining independence (and impartiality) particularly by reference to the provisions of the DFDA. In the same case McHugh J also referred to the matters of tradition and history as relevant considerations.

4.43. Provisions guarding against improper command influence include Article 34 which requires that before directing the trial of any charge by GCM the CA must refer the charge to a staff JA for consideration and advice. In the US the legal advice is not binding on the CA. It is there to advise him that he may legally proceed if so desired. It has been held that an accused facing possible trial by GCM is entitled to have an independent and impartial pre-trial advice letter submitted to the CA. However, the advice is not required for the CA in order to decide not to proceed. Congress has in Article 34 also provided that the CA may not refer a charge to GCM unless he has found “that the charge alleges an offence ... and is warranted by evidence indicated in the report of investigation”. In one sense it is almost a statutory prosecutorial guideline.

4.44. In its decision in Weiss the US Supreme Court in laying emphasis upon the UCMJ as insulating military judges from the effects of command influence and provisions ensuring impartiality said as follows:

“Article 26 places military judges under the authority of the appropriate JAG rather than under the authority of the convening officer. 10 USC par 826 [10 USCS par 826]. Rather than exacerbating the alleged problems relating to judicial independence, as petitioners suggest, we believe this structure helps protect that independence. Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of JAs General, who have no interest in the outcome of a particular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability.

Article 26 also protects against command influence by precluding a convening officer or any commanding officer from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge relating to his judicial duties. *Ibid.* Article 37 prohibits convening officers (as well as any commanding officer) from censuring, reprimanding, or admonishing a military judge “with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings.” 10 USC par 837 [10 USCS par 837]. Any officer who “knowingly and intentionally fails to enforce or comply” with Article 37 “shall be punished as a court-martial may direct.” Art 98, UCMJ, 10 USC par 898 [10 USCS par 898]. The Code also provides that a military judge, either trial or appellate, must refrain from adjudicating a case in which he has previously participated, Arts 26(c), 66(h), UCMJ, 10 USC pars 826(c), 866(h) [10 USCS pars 826(c), 866(h)], and the Code allows a defendant to challenge both a court-martial member and a court-martial judge for cause, Art 41, UCMJ, 10 USC par 841 [10 USCS par 841]. The Code also allows a defendant to learn the identity of the military judge before choosing whether to be tried by the judge alone, or by the judge and court-martial members. Art 16, UCMJ, 10 USC par 816 [10 USCS par 816].”

4.45. Thus under Article 26(c) a military judge certified to be qualified for duty as a military judge of a GCM may only perform such duties when he is assigned, and directly responsible to the JAG. He may perform duties of a judicial or non-judicial nature other than those relating to his primary duty as a military judge of GCM when such duties are assigned to him with the approval of the JAG or his designee. The performance of non-judicial duty by a military judge is not said to be in breach of the due process clause. I specifically mention this matter, since my study addresses the issue of JAs, DFMs and s154(1)(a) reporting officers performing duties other than those specific duties relating to such appointments.

4.46. The added limitation on the JAGs found in Article 98 negatives a suggestion that a JAG has an unfettered discretion to appoint and remove military judges.

4.47 It should be noted that Article 37, in dealing with unlawfully influencing a court, applies as well to any member of the court or counsel, the prohibition operating in relation to a military judge. It also provides that in the preparation of an effectiveness, fitness or efficiency report in relation to the purposes of determining advancement or assignment or transfer of a member, no person shall consider or evaluate the performance of duty of any such members as a member of a CM, or give a less favourable report for zeal in representing an accused.

48. The service JAG is the principal legal officer for each service (the equivalent of the Australian service directors of legal services) and is appointed by the President (the Executive) with advice and consent of the US Senate. There are provisions for the JAG of the relevant branch to select as a military judge any commissioned military officer who possesses certain qualifications going to legal knowledge and experience. I make this point since I find it difficult to understand the Canadian Supreme Court's approach in Genereux that institutional independence was breached because the appointment of the trial JA was by the JAG: Indeed the UK situation is again different.

4.49. A military judge must be a commissioned officer and a member of a State or Federal Court bar. He is selected and certified as qualified by the JAG (as in effect done in Canada). The military judge presides at general and special CMs (similar to Canada): Article 26. The military judges do not serve for fixed terms and may perform judicial duties when assigned to do so. The military judge of a GCM must be "detailed" by the CA and may be "detailed to any SCM". A military judge must be "designated" for any GCM by the JAG or his designee. An accused may request and with the consent of a military judge may have trial by military judge alone at either of these CMs: Article 16. This is a provision not found in Canada or the UK. There are perhaps constitutional provisions in the US explaining its presence. In relation to civil criminal offences an accused has in the US a right to elect trial by judge alone. In Australia in some States in respect of criminal indictments there is in some cases provision for trial by judge alone with the consent of the

prosecutor. However, no provision exists for trial of a Commonwealth offence charged on indictment to be dealt with without a jury.

- 4.50. Again in the US it has been observed in one court decision, that the requirement for taking an oath is regarded as an important consideration with respect to independence and impartiality. In Australia an appointment to the JAs' panel and as a DFM requires an oath to be taken: ss 196(4) and 128(2) of the DFDA.
- 4.51. The matter of assigning multiple roles to CAs has been considered. In the US attack has been made on the fairness and impartiality of the CM upon the basis that the CA initiates, prosecutes and conducts reviews of CMs. Such review is of the record on facts and law: Article 64 (my emphasis).
- 4.52. However, unlike in Genereux and Findlay, in Curry v Secretary of Army 595 F 2d 873 (1979) 88, the US Court of Appeals (District of Columbia) rejected arguments advanced that the system of assigning multiple roles allegedly places the CA in the position of grand jury (which in the US decides whether there be a trial, and a role performed in Australia by committing magistrates), selector of the trial judge, jury and counsel, and that having "initiated" the prosecution he/she therefore had an interest in the result of the case and was therefore constitutionally incapable of ensuring that the accused received a fair and impartial trial. It was also argued that the prior interest of the CA in the outcome of the case coupled with the spectre of his/her influence over those in command excluded the possibility of a fair and impartial trial in accordance with the due process amendment. The court rejected these submissions that the structure of the CM system was

fundamentally incompatible with due process requirements. In doing so the Court of Appeals observed that Congress has responded to the problem of possible unlawful command influence by a number of precautions to prevent its improper exercise. One such provision is the requirement that the convening officer must, before bringing an accused to trial by GCM, obtain legal advice. The convening officer also may not refer charges to GCM unless he has found that the charge alleges an offence and is warranted by evidence indicated in the report of investigation: Article 25. That there was ultimately a right of review by the US Court of Military Appeals (a court completely removed from all military influence and persuasion) was regarded as a significant precaution. At a GCM in Curry the Court also noted the provisions relating to procedural rights to guard against command influence including that the accused may request that a CM include at least one third enlisted members:(subject to physical conditions or exigencies) Article 25, which also provides that a warrant officer is eligible to serve on CMs other than for officers. Another safeguard is a right to elect to be tried by judge alone with the approval of the "military judge". UCMJ statutory provisions are said to generally ensure that the military judge is insulated from command influence and prohibits the improper use of command influence: see also Weiss.

- 4.53. Again as was said in Curry, obedience, discipline and centralised leadership and control, including the ability to mobilise forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to those needs for all branches of the service, home and abroad, in time of peace and in time of war ("it must be workable in time of both"). The standards of military justice in peace time must be equally applicable in time of war and national emergency. It must be practical, efficient and flexible.
- 4.54. In Curry it was considered and held that the need to maintain multiple roles in the CA is based upon a need to marshal resources, cost, speed of trial, posting problems and witness availability. It was also considered that the

power of a CA to refer charges to CMs was justifiable upon the grounds that prosecutorial discretion could be essential to efficient use of limited supplies and manpower and on the ground that maintenance of discipline and order was imperative to successful functioning of the military. The Court of Appeals accepted that the right of a CA to select members of a CM responded to unique military need, with his being well situated to determine whether various needs of service would be best served by selection and participation of particular individuals in CM proceedings.

- 4.55. Before leaving the UCMJ it is appropriate to also mention in greater detail Article 26(c). A commissioned officer certified to be qualified for duty as a military judge of a GCM may only perform such duties when directly responsible to the JAG or his designee and may "perform duties of a judicial or non-judicial nature" other than those relating to his primary function of military judge of a GCM when such duties are assigned to him or with the approval of the JAG. It has not been suggested that this provision (including the participation in non-judicial duties) may compromise independence or impartiality of military judges. It is relevant to consider this provision in the context of the Australian situation as there is some debate as to whether members of the JAs' panel or whether those appointed as DFMs or s 154 reporting officers should perform other duties of a judicial or non-judicial nature, and if so what duties. To the extent that I have not already made this point it is appropriate if I here state that throughout this study in referring to the performance of judicial duties by those on the JAs' panel by DFMs or as a s154(1)(a) reporting officer, I am using the expression judicial duties in a general way to describe the actual duties performed by a JA when sitting at a

CM. by a DFM when conducting a DFM trial or by a s 154(1) reporting legal officer in preparing a report under that provision. [my emphasis].

CHAPTER 5

JUDICIAL INDEPENDENCE AND IMPARTIALITY
IN THE COURTS AND UNDER THE DFDA

JUDICIAL INDEPENDENCE AND IMPARTIALITY
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- 5.1. Against the background of what I have said I now turn to this subject matter.
- 5.2. In Australia there is debate as to whether “judicial” independence and impartiality are strictly separate and distinct concepts. There is a clear linkage between the two concepts. It is frequently difficult to dissociate the two concepts with some arguing that they are inseparable. As was said in one Canadian case:

“Judicial independence is critical to the public perception of impartiality. Independence is the cornerstone, a necessary cornerstone, a necessary pre-requisite for judicial impartiality”.

- 5.3. The distinction on one view is semantic with some arguing that each is encompassed within the principle of judicial independence. In many ways the essence of judicial independence is really in the attainment of impartiality in the judicial branch of government. Nevertheless it is clear that judicial independence and impartiality are regarded as fundamental to public confidence in the administration of justice. The independence of the judiciary exists to serve the public. Confidence in the judiciary is maintained by its clear or manifest impartiality.

5.4. In the words of a former Chief Justice of Tasmania judicial independence is:

"... the capacity of the courts to perform their constitutional function free from actual interference by and to the extent that is constitutionally possible, free from actual dependence upon any person or institutions including in particular the executive arm of government over which they do not exercise direct control."

5.5. The appearance of independence preserves confidence in the judicial branch.

The legitimacy of the judicial branch depends on its reputation for impartiality and non-partisanship.

5.6. It is said that public confidence in the independence of the judiciary is achieved by the separation of judges from those exercising the political or executive functions of government.

5.7. In many respects impartiality and the appearance of impartiality are the defining features of judicial power. Although in Australia there is no constitutional guarantee of due process as in America, in a non-constitutional sense due process is regarded as an entitlement to a fair trial normally in an open court. The requirement of a fair trial according to law is deeply rooted in the criminal law and is a fundamental element of the criminal justice system.

5.8. When one is speaking of the judiciary it is to be remembered that one of the basic principles which underlies Ch III of the Constitution and to which it

gives effect, is that judges appointed thereunder must be independent of the legislature and of executive government. Public confidence in the judiciary is achieved by the separation of judges from those exercising political functions. The legitimacy of the judiciary depends upon its reputation for impartiality and non-partisanship, and its ability to do its duty openly in accordance with proper judicial procedures. Views have been expressed that the judge's impartiality and the appearance of impartiality are defining features of judicial power: see Wilson v The Minister for Aboriginal & Torres Strait Islander Affairs (1996) 70 ALJR 443. Indeed, a bastion of impartiality is independence from the centre of power: see also Kable v Director of Public Prosecutions (1996) 70 ALJR 814 (functions incompatible with the exercise of federal judicial power are unable to be conferred on State courts). However, I again repeat that a service tribunal is exercising disciplinary power and not federal judicial power under Ch III.

- 5.9. In the present day and age, public opinion, whilst supporting independence of the judiciary, nevertheless seeks to remove it from the legislature and executive branches of government accountability. Views have been expressed that the traditional form of accountability applying to judicial decision making is that it occurs openly in public and that judges are obliged to give reasons for their decisions. It is appropriate to observe that although CMs and DFM trials are not Ch III court proceedings, and are service tribunals exercising disciplinary power, nevertheless, to the extent that open accountability is involved, in the sense explained, the requirements of accountability are met.

Section 140 of the DFDA requires proceedings before a CM or DFM (but not a summary authority) to be in public. There is no statutory requirement to give reasons but that requirement is satisfied by the common law obligation of a DFM to give reasons. At a CM the JA sums up on the finding (and on sentence) and such summing up is recorded. The rulings during trials are recorded. I have already expressed concerns in relation to the requirement for reasons to be given in some cases at the summary authority level: see my ruling as DJAG in Re Heap (5 June 1996).

- 5.10. In the ordinary judicial system there are mechanisms for ensuring judicial independence and the impartiality of judges, such as security of tenure, remuneration and separation from the legislature and the executive. The essentials of independence of a tribunal under s 11(d) of the Canadian Charter ie security of tenure, financial security and institutional independence, have not in express terms been adopted as the essential conditions of judicial independence for judges under Ch III of the Constitution, although their significance cannot be doubted. Nor are they requirements for a CM (or DFM) exercising jurisdiction under the DFDA. Section 11(d) has no counterpart or express analogy in our Constitution. Indeed, a CM under the Act does not exercise the judicial power of the Commonwealth and Ch III has no application to a law creating or conferring the jurisdiction of a CM: see Tyler at 32-33, and I would add, conferring the jurisdiction of a DFM or summary authority. What is to be understood and cannot be overemphasised is that a service tribunal is exercising disciplinary power.

- 5.11. It is appropriate to refer to the subject of impartiality. In the civil area there can be no doubt that the administration of justice must appear impartial.
- 5.12. The High Court in Webb v The Queen (1994) 181 CLR 45 has formulated the test to be applied in determining whether a judicial officer is disqualified by reason of the appearance of bias, as distinct from actual proved bias. It is a test applicable to those entrusted with the administration of justice, and hence is a test applicable not only to judges, but also to jurors, to members of a quasi-judicial tribunal and those exercising quasi-judicial functions, including statutory officers other than judges. This approach would apply to the JA and members of a CM as well. There can be no doubt that the test of bias in relation to a judge, ie whether fair minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudice the case, applies to service tribunals exercising disciplinary powers under the DFDA. Indeed, there are specific provisions dealing with avoiding the DFDA: see for example, ss 118, 121 and 122. In respect of the summary authority there is also the very important DFDR r 22. The test for disqualification is one of appearance by reference to the hypothetical fair-minded and informed lay observer.
- 5.13. It may be difficult to draw a distinction between the two concepts of independence and impartiality and that they are really in some ways inseparable. Even the European Court in its recent judgment in Findlay

recognised that they are closely linked (par 73). It is appropriate to record its views:

“The Court recalls that in order to establish whether a tribunal can be considered “independent” regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question as to whether the body presents an appearance of independence.

As to the question of “impartiality” there are two aspects to their requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect”.

5.14. Indeed, in a sense at least in the area of criminal law, it is difficult to see how a tribunal in a criminal case could at the same time lack independence and yet be impartial. The same observation might be thought to apply in relation to a service tribunal exercising disciplinary power under the Act. In Tyler, the High Court when speaking of the independence of the service tribunal, and in holding that a CM was independent, also referred to the provisions in the DFDA dealing with the matter of bias.

5.15. In the US in the case of Weiss, the Supreme Court, in rejecting the requirement of a fixed term of office for military judges, held that a fixed term of office was a “means of promoting judicial independence which in turn helps to ensure judicial impartiality”. The European Commission of Human Rights in the case of Findlay stated that the links between the concepts of independence and impartiality are such that if a tribunal fails to offer the

requisite guarantees of independence it will not satisfy the test for objective impartiality. The European Commission also considered that the same reasons may make a tribunal neither independent nor impartial. However, the same reasons may also show that the tribunal is both independent and impartial: see Tyler.

- 5.16. In the Canadian case of Valente (1985) 2 SCR 673 Le Dain J drew a distinction between independence and impartiality under s 11(d) of the Charter whilst conceding there was a close relationship between the two. He suggested that despite this close relationship they were, nevertheless, separate and distinct values and requirements. To Le Dain J “impartiality” refers to a state of mind or attitude of the tribunal in relation to the issues and parties in the particular case. The word “independent” however:

“Connotes not merely a state of mind or attitude in the actual exercise of judicial functions but a status or relationship to others particularly to the Executive Branch of the government that rests on objective conditions or guarantees.”

- 5.17. He adopted as the test for independence the same test for impartiality or bias “whether the tribunal may be reasonably perceived as independent”.
- 5.18. Having made these general observations about concepts of independence and impartiality in relation to the ordinary courts, I now look at the situation in the military context. There are problems of independence and impartiality inherent in the very nature of military tribunals. Even in Canada it has been

recognised that in the necessary association between the military hierarchy and military tribunals, the fact that members of the military serve as tribunals, detracts from “absolute” independence and impartiality of such tribunals, but that this is unavoidable: Genereux.

5.19. In Australia any discussion of judicial independence and judicial impartiality under the DFDA must commence with and involve a recognition that the tribunals enforcing the DFDA and dealing with offences under the Act are not courts under Ch III of the Constitution. They are not exercising the judicial power of the Commonwealth under Ch III. They are not part of the judicial hierarchy of the courts of the land and are not courts as such. The standards of judicial independence and impartiality applicable in the civilian system of justice are not necessarily appropriate or applicable to measure standards for a service tribunal exercising disciplinary power: see Tyler. It has been accepted that the mechanisms suitable and necessary to achieve the judicial independence and judicial impartiality of civilian courts may not be applicable in the context of different tribunals including service tribunals exercising disciplinary power. Thus a standard appropriate to one tribunal may be inappropriate to another: see Genereux; Weiss.

5.20. Again as I have earlier stated, nor is it appropriate to automatically uplift civilian court standards and then unilaterally apply them to service tribunals (not courts) exercising disciplinary power. This is not legally required. This said, there are international trends of “civilianisation” and seeking to mirror

such standards. This is despite the fact that the DFDA itself changed the system of military justice so that it has come to perhaps more closely resemble the civilian system: **Tracey**.

- 5.21. However, I have already observed and now re-emphasise the need to be careful about overseas trends. Developments in the law in such countries as Canada, the US and the UK as regards the independence and impartiality of service tribunals are to be seen in context having regard, inter alia, to the local “domestic” legislation. The counterparts of such do not exist in Australia and this point must be clearly understood when examining overseas developments. As I have indicated, even those countries such as Canada with provisions such as s 11(d) of the Charter, or as in Europe, with Article 6 par 1 of the European Convention on Human Rights, do not require that standards applicable to the civilian courts be wholly applicable to tribunals including military justice tribunals. Indeed, in Canada and the US it has been said that the standards and criteria of independence for tribunals are generally flexible enough as to vary from one tribunal to another. In Australia even in cases where one is concerned with requirements of natural justice such as (and the notion of impartiality is reflective of such) in tribunals, the requirements of natural justice are not fixed and immutable, but are dependent on and will vary with the circumstances of the case, the nature of inquiry, the subject matter and the rules under which the decision maker is acting.

22. Thus even in the US, where the person is entitled to due process of law under the Fifth Amendment, what is due process depends upon an "analysis of the interest of the individual and the regime to which he is subject": Middendorf. Further, what is required by due process may vary from tribunal to tribunal. This is an approach not dissimilar to that of the Canadian courts to the application of the Charter to different tribunals. The US Supreme Court observed that a fair trial in a fair tribunal was a basic requirement of due process and that a necessary component of a fair trial is an impartial judge. Indeed, that which is seen to promote judicial independence is regarded as helping to ensure judicial impartiality.

5.23. Indeed in the US, it has been held that due process varies from tribunal to tribunal. The courts do not require that civilian court standards required by due process in the ordinary civilian courts apply to CMs under the UCMJ. Non-compliance with procedures normally applicable in ordinary court proceedings do not alter this situation.

5.24. The Australian legislation contemplates the existence of a military tribunal and that CMs as such military tribunals be staffed by officers of the armed forces in exercising the functions entrusted to those tribunals. Indeed, in contrast to civilian society, it is contemplated that non-legal military officers play a significant part in the administration of military justice. Even in Canada, the US and the UK a parallel system of military tribunals staffed by members of the military who are aware of and sensitive to military concerns, is not

considered to be by its very nature inconsistent in Canada with s 11(d) of the Charter, in Europe with Article 6 par 1 of the European Convention and in the US with the due process clause. In the US it is considered that the unique disciplinary concerns of the military, which differ from society's general concerns with social order and discipline, necessitates a separate and parallel system of military justice. Again in Canada, it has been fully recognised that in a military organisation such as the Canadian Forces, there cannot ever be a truly independent military judiciary in that the military officer must be involved in the administration of discipline at all levels: R v Genereux per Lamer CJ at 295. Even the more radical system now introduced in the UK still recognises such involvement of the military officer. The SAG's recently recommended reforms of the Canadian system of military justice are to similar effect.

- 5.25. There are further reasons for being cautious about overseas developments. In respect of the twin concepts of judicial impartiality, as will be shown, in a number of significant respects there is a lack of consistent approach. Thus the approach of the European Court (and European Commission) in Findlay is not the same as the approach of the Canadian Supreme Court in Gen'eux, yet both Article 6 par 1 of the European Convention and s 11(d) of the Canadian Charter are similar in terms to the provisions of Article 14 of the United Nations sponsored ICCPR ie have a common origin. Yet the decisions do not in terms apply the same reasoning. Next, the UK response to the European Commission's declaration in Findlay, namely the **Armed Forces Act**, is a

response dissimilar to the response in Canada to the pre-appeal situation in Genereux. Further, the US approach, against the background of a constitutional due process clause, is an approach different in a number of significant respects from the Canadian and European approaches. In some ways the Australian approach is closer to the US view: see Tyler.

- 5.26. In my view, the constitution or structure of each service tribunal pursuant to the Act presently answers the requirements of independence and impartiality of service tribunals exercising disciplinary power: see Tyler.
- 5.27. Despite what I have said in the previous paragraph it is quite clear that despite the legal position there are powerful and legitimate concerns in relation to a number of aspects of the present system. There are many who are concerned with aspects of perception and appearances and who consider changes should be carefully contemplated.

CHAPTER 6

THE FUTURE - ISSUES CONCERNING CHANGE

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Reform and Innovation

- 6.1. Despite the stated legal position in relation to independence and impartiality, there are good and valid reasons for addressing the issue of change. There is legitimate concern which I share in relation to a number of issues. There is an acceptance of a need for change in order to improve appearances and perceptions of impartiality and independence. There is an acceptance of greater judicial and public scrutiny of the military justice system and an acknowledgment of changes and reforms occurring elsewhere. A number of collateral issues have emerged for discussion in the course of the study and are considered and addressed.
- 6.2. However, whilst there is a recognition that change should or could take place, there is legitimate difference of opinion in relation to the nature and content of such changes, how and the extent to which they should be addressed. There are differences in the individual views of contributions to this study both on a service and seniority level.
- 6.3. There is a particular view, indeed almost a consensus view, that provisions of the DFDA in allocating multiple roles to the CA, including the initiation of prosecution, and review of CM (and DFM) proceedings, do raise legitimate concerns as to the appearance of fairness and impartiality of such trials, despite the specific precautions to protect against the improper or unlawful use of command influence and the wide range of procedural rights to guard against command influence. There can be little doubt (as the decision of the European Court in Findlay illustrates) that, in order to maintain confidence in the independence and impartiality of the CM, appearances are important. Further, there can be little doubt that the central role played by the CA in the organisation of the CM, indeed, his multiple roles, raises valid concerns.

There is an acceptance that the system may be perceived to place the CA (in the Army frequently a commanding officer) in the position of determining whether there be a trial, the nature of the tribunal and charges, and selecting the trial judge, "jury" and prosecutor, as well as reviewing the proceedings. There are acknowledged concerns about the possibility of unfairness (perhaps a perception and not a reality) that the CA having initiated the prosecution has an interest in the result of the case. There is the perception of unfairness because individuals selected by the CA, may be or are under his command, are subject to the CA for promotion, and efficiency reporting or postings. These matters, it is said, raise the possibility of a perception of unfairness, and of particular susceptibility to his influence. In addition, the particular trial JA (or DFM), is also appointed by the CA.

- 6.4. There is a most powerful case for eliminating the multiple roles of the CA although views differ as to how, by what means and to what extent. Nevertheless, despite what I have said, my study suggests that the CAs do not in fact feel any actual disquiet or discomfort in continuing to perform multiple roles. Nor have the legal officers interviewed and who are experienced in trial work in various roles, suggested that they have actually experienced problems associated with the present system or experienced a case of a CA having used his various powers or influence. This said, there is an acceptance or recognition that the importance of perceptions and appearances, could point to the desirability for some change. Indeed, impetus for change and debate may be stimulated when, firstly, the ramifications of **Findlay** and of the **Armed Forces Act** have been more fully considered, and secondly, when the recommendations of the Canadian SAG report (March 1997) are more closely considered.
- 6.5. However, it is probably correct to observe that in fact those CAs consulted feel comfortable in performing their various multiple roles. This said, there are other views at the more junior level that the multiple roles situation is

inconsistent with perceptions and appearances of independence and impartiality and there is a need for change.

Prosecution at CMs or before a DFM

- 6.6. The statistics reveal that few CMs are in fact convened. Despite there being a significant case made out for perhaps an independent military officer to be a tri-service Director of Military Prosecutions, this is clearly not wanted by those at the senior levels of the services. Nevertheless, there are those who argue the case to the contrary. Whether such may one day be imposed by Parliament, as in the UK, is perhaps a moot point. Perhaps there is an alternative view that I consider is available to be considered and which could accommodate the competing views. That said, the statistics show few CMs are in fact held.
- 6.7. The Chiefs of Staff, (as supported by the preponderance of CA viewpoint), wish to retain the present system whereby it is for the CA to continue to determine whether a prosecution should be instituted, and the nature of the tribunal, without being bound by legal advice. Indeed there are CAs who seek to retain the discretion to prosecute upon a further basis that prosecution is a matter that should be kept within the command structure (because discipline is a command problem, or because as one senior officer observed, “a bigger picture” may need to be considered).
- 6.8. Some senior officers (for example, the immediate past JAG, RADM Rowlands and DJAG Commodore Cole) are of the view that there is a case for the establishment of an independent Director of Military Prosecutions. In the UK this route has been followed with, in effect, full powers of a statutory Director of Public Prosecutions being conferred upon a service military officer independently appointed by the Queen. As I have observed, this has been achieved not by the establishment of an independent service Director of Public Prosecutions as such, but rather by the appointment, for example in the case of

the Army, of the Director of Army Legal Services, who in turn will be able to appoint prosecuting officers from Army Legal Services. The matter of an independent prosecuting service is addressed by splitting the Army Legal Services into different advisory and prosecuting branches operating from different geographical locations.

- 6.9. However, in Canada, the SAG has recommended legislation dealing with “institutional” separation of the JAG’s duties in respect of “its separate defence, prosecution and judicial functions” as well as the appointment of an independent Director of Prosecutions responsible to the JAG. One is bound to observe that having such a responsibility to the JAG might be thought to be inconsistent with true independence. That there is a substantial case that can be argued for appointing an independent Director of Military Prosecutions cannot be denied. However, the law does not presently require such an appointment: Tyler. Nevertheless, the establishment of such an authority would help to ensure a high degree of independence in the vital task of making prosecution decisions (including during a trial) and exercising prosecution discretions, and objectively assist in avoiding suspicions that prosecutorial discretions will be exercised save upon entirely “neutral grounds”.
- 6.10. In addition to carefully considering the question of whether there should be prosecution guidelines implemented, I have also given careful consideration to the question as to whether I should recommend the appointment of an independent tri-service Director of Military Prosecutions or whether that issue should at least be considered. Despite the opposition of the senior service officers, it should be seriously entertained.
- 6.11. At the present time the law does not require such appointment. There is no present demand or pressure for such appointment. There is opposition at the service level to an appointment. Were an appointment to be considered, perhaps along the lines as in the UK (an independent military officer appointed by the Crown on a service basis), it would, as in the UK, involve a further

reduction in the powers of the CA, indeed, a step towards the dismantling of such. Indeed, other consequential reductions such as implemented in the UK might well fall for consideration. The appointment of an independent Director of Military Prosecutions would involve, in effect, a transfer of the power to prosecute from the CA (command) but still retaining that decision in a person who is a military officer, ie a Director. On this approach the matter of prosecution would still remain a matter for the military and kept within the Defence Force. The approach in the **Armed Forces Act** and the recommendation in Canada is consistent with such an appointment, were it to be contemplated.

- 6.12. Nevertheless, I do raise a question as to the present practical need for such a prosecutor. The number of CMs and DFM trials is becoming fewer. Even overseas it has not been suggested that an independent Director of Prosecutions would be involved in the prosecuting of summary trials. In Australia, it is at the summary tribunal level that offences under the Act are essentially dealt with. More and more serious offences against the civil criminal law are being passed over to the civil authorities to be dealt with. The service tribunal trial jurisdiction being exercised is increasingly becoming associated with exclusively disciplinary matters and minor "criminal" offences (which would not normally be dealt with by independent Director of Public Prosecutions ("DPP") in the civil area). This may be a continuing pattern in peace time. Yet one must acknowledge that serious criminal type offences (of the kind dealt with by civil DPPs) are from time to time tried by CMs or DFMs as well as those committed outside of Australia. However, they are few in number, although that may not always remain the case.
- 6.13. As to whether the CA's powers to prosecute should be removed and vested in an independent prosecuting authority is a matter that should be considered. At the end of the day I also consider that the issue of the appointment of an independent tri-service Director of Prosecutions at least should nevertheless be seriously considered and addressed. Such an appointment, were one to take

place, would enhance changes in perceptions and appearances of independence and impartiality. This said, there are good arguments to the contrary, inter alia, based upon cost and real necessity questions, and opposition from within the Services. As to the latter, such opposition has not carried. Other arguments against an appointment of an independent Director of Military Prosecutions are also based in U.S. case law and the present situation which is endorsed in Tyler.

- 6.14. Of course, were there to be such an appointment, there would still be the question of what work should be done by the Director. Would it, for example, include decisions also to refer matters to civil authorities, to automatically implement elections and to prosecute or be involved in the prosecution of summary authority matters as well, and if so what type? For example, in a case where an Air Force legal officer is chosen to defend (DFDR r 24), would a Director represent the prosecution? These are some questions raised for consideration.
- 6.15. Another view urged by a number of less senior officers is to the effect that before a decision is made by a CA to convene a CM or refer a charge to a DFM he/she should not only take legal advice but be bound by it and be responsible to the Director. I do not agree with such an approach.
- 6.16. The present position is reflected in s 103 of the DFDA which deals with courses open to the CA where a charge is referred under the Act.
- 6.17. On the evidence available there is as yet no strong service support for the establishment of an independent Director of Military Prosecutions either in terms of appointing either tri-service or for each service, or to perform the role perhaps similar to that of the Director for Public Prosecutions under the (NSW) **Director of Public Prosecutions Act 1986**. Under that Act, to ensure and assist independence, the Director is appointed by the State Governor (s 4). That Act saw the establishment in New South Wales of an independent

professional service for the prosecution on indictment of serious criminal offences. There is no real or significant support for the approach now followed (in the light of Findlay) under the **Armed Forces Act** namely of appointment of a statutory prosecuting authority by the Queen, who, in the case of the Army, will also be the Director of Army Legal Services who will have the power to appoint prosecuting officers from his Service to an independent prosecuting branch. The functions of the prosecuting authority in general terms will be similar to the independent prosecuting functions similar to those given to independent statutory Directors of Public Prosecution in the general civil law areas. Although appointed by the Crown he/she must nevertheless be a legally qualified officer belonging to the military forces. The prosecuting officer is both a military officer and a legally qualified person. As I have said, in the US, the CA is in effect the prosecutor and though, before directing a trial by a GCM, the CA shall refer the charge to a legal officer for advice and consideration (to advise referral authority whether he may legally proceed if he so desires) it is not binding. Nevertheless, in the US, an accused facing possible trial by GCM (where a military judge must be appointed), is entitled to have an independent and impartial pre-trial advice letter submitted to the CA. Whilst the advice is not binding nor offered on the accused's innocence entirely or whether the CA may legally proceed, Article 26 of UCMJ itself contains a requirement that the CA may not refer the charge to a GCM unless he has found that the charge alleges an offence and is warranted by evidence indicated in the report of the investigation. In my view, there is no case made that such a provision should in terms be implemented under the DFDA. In the US, it is a provision that imposes a statutory obligation not to proceed, save in the circumstances stated.

- 6.18. However, statutory provisions aside, in situations where there are independent DPPs, they have seen fit to publish **"Prosecution Policy and Prosecution Guidelines"** and dealing with the exercise of professional functions by way of published guidelines. The point made is that absent a wish (and that is the present feeling) to appoint an independent Director of Military Prosecutions,

an independent prosecuting authority to take over from CAs, the decision to prosecute, the determination of the charges, and powers under s 103 and other prosecutorial functions, but at the same time enhancing the appearance of independence and impartiality in making prosecuting decisions, it might be of value to have guidelines similar to those in place, say, in New South Wales. Such would not remove the powers, or circumscribe them, but would reflect the spirit of such provisions as Article 26 of UCMJ and the new s 83B of the (UK) **Army Act**. They would give effect to the public and military interests, matters of considerable concern and could enhance the better administration of military justice. Perceptions of impartiality and independence of the CA would be enhanced. There would be preservation of the CA's discretion not to prosecute or pursue inappropriate cases, as well as the conservation of resources. Again such guidelines, if implemented, could also provide protection for the CA from any possible claims of unfounded prosecution, save for neutral reasons relating to the evidence. They would provide further protection to the accused from prosecution again save for reasons stated in the guidelines.

6.19. In New South Wales the primary question is whether or not the public interest requires that a matter be prosecuted. That question is resolved by determining:

- “1. whether or not the evidence available is capable of establishing each element of the offence;
2. whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury properly instructed; and
3. if not, whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.”

6.20. It should be observed that at least since the (UK) **Armed Forces Act**, the Army prosecuting authority, in directing that charges be tried, will have to make decisions in accordance with similar guidelines applied by the Crown Prosecution Service in civil criminal cases subject to the further consideration

as to whether it is in the public and service interest to bring the matter to trial. For the military to prosecute a service offence before a CM (leaving aside arrangements with the civil authority if such be also an offence against the general law) it would seem to me to be also desirable that it be in the service interest as well to prosecute the offence before a CM. Thus guideline 3 *supra* could be amended by adding after “public interest” the words “and / or service interest” in order to accommodate a service interest which may not match a public interest. There are Commonwealth prosecution guidelines to similar effect.”

- 6.21. In my view, it is now appropriate to address the issue of an independent (probably tri-service Director of Military Prosecutions), or independent service or tri-service prosecuting authority military officer, who would need for independence purposes, perhaps to be appointed by the Governor General with other consequential issues to be also dealt with. The decision in Tyler does not require it. There is at present no legal imperative. That said, there are non-US trends strongly supporting consideration of such. The Chiefs of Staff and senior CAs do not support such a view. Despite such, one cannot ignore the forceful arguments advanced by the supporters of an independent Director. The main arguments advanced rather address the issue of dual or multiple roles of CAs and the need to reduce such and see that such are also performed with the required degree of independence. Nevertheless, concerns have been raised in relation to the CA’s prosecution powers (particularly overseas) and to ignore the issue would be wrong. I should add that the High Court’s decision in Tyler does not mandate the appointment of an independent Director of Military Prosecution or an equivalent, despite the argument for such. Further, the same or similar guidelines to which I have referred, could, with suitable modification, also be applicable to proceedings before a summary authority service tribunal. Such a view has the merit of consistency throughout the ADF in relation to all prosecutions under the DFDA before the service tribunals established under the Act.

22. If a CA is to retain present prosecution powers, it seems to me that a case for the introduction and publication of prosecution guidelines (appropriately modified) and along the lines of those found in New South Wales to exist but with some modifications. What is recommended is consistent with maintaining the existing provisions of s 103. Indeed the (UK) **Armed Forces Act**, in setting up service prosecuting authorities, provides that they have discretion to prosecute applying similar criteria to those applied in civilian cases.

Note: Implementation of guidelines, if considered appropriate, could probably be achieved by either subordinate legislation or even by way of CDF instruction. Indeed, non-compliance with such CDF instruction would be a breach of that instruction with the consequences flowing.

- 6.23. As regards the matter of achieving institutional independence in relation to prosecution and the divesting of the CA of his prosecuting role, assuming such is desirable and appropriate, such could perhaps be carried out at the same time as the issue of integration of the legal services is addressed in accordance with the recent DRP (11 April 1997). A tri-service prosecuting authority would seem to be an appropriate way of dealing with the matter. Because the CA is the prosecutor, or is central to the prosecution, it is important to ensure a high degree of manifest independence in the vital task of making decisions to prosecute and in the exercise of prosecution discretions. The decision to prosecute must be exercised on entirely neutral grounds to avoid the suspicion that it might otherwise be biased. I accept that the CA should not be bound by legal advice as to whether to prosecute or not, s 103(1) confers a statutory right not to proceed with the charge without stating upon what principles there need not be a prosecution. There are good arguments for such a course, including those relating to matters of resources, finances, manpower and the efficient use of such. Even under the general law whilst the prosecution process is usually initiated by a suspicious allegation or confession of an offence, it has never been a rule that suspected criminal offences must automatically be the subject

of prosecution. There is still the “public interest” test. In a sense, the discretion to direct that a charge not be proceeded with under s 103(1)(a), reflects a similar policy under the DFDA. Factors such as the military interest and the better administration of justice and military justice would also be pertinent. However, the concern is not so much with the decision not to prosecute, a decision which is based on the existence of prosecutorial discretion. Even in the US legal advice is not required in relation to a decision not to prosecute. My recommendation would address any allegation that may be made that a prosecution was not instituted for the “right reasons”. The concern is to ensure that the decision to act under s 103(1)(c) or (d) is a decision properly founded.

6.24. Recommendation

1. That prosecution guidelines (as suitably modified), similar to those in operation in the various States or the Commonwealth, be introduced.
2. That careful consideration now be given to examining the question of the appointment of an “independent” Director of Military Prosecutions upon a tri-service basis..
3. The matter of any such appointment, if at all, whether it should be tri-service, the role and duties of any Director and the matter of responsibility of the prosecuting authority to any authority and to whom, should be dealt with by legislative charge. At the same time the matter of whether the prosecutor should be organised as an independent unit under the Act should also be addressed.

Prosecutors’ discretions

- 6.25. Consistent with the view that the decision to prosecute should remain with the CA, is the view expressed that likewise so should the discretions that might

normally be vested in an independent civil prosecutor. Nevertheless CGS accepts that in cases where the CA cannot be contacted, and pre-trial authority has not been given, a case for the prosecutor acting on his own authority exists.

- 6.26. Nevertheless, were an independent prosecuting authority to be established, and discretionary powers given to such authority, presumably the discretionary powers would perhaps need to be of the same kind as those held by prosecutors in the civil area or for eg of the type now to be found in s 83B of the (UK) **Army Act**. Such would include decisions not only as to whether to prosecute or not, but also the type of CM or DFM and what charges should be brought.

Appointment of JAs, DFMs and s 154(1)(a) Reporting Officers

- 6.27 There is a strong body of opinion to the effect that appointment of the JA to a CM (or of a DFM) should not be by a CA. There is the further question as to who should have command authority and control, if anyone, over such persons, particularly if they are, in addition to performing ad hoc judicial duties, to perform non-judicial type work. The solution is not easy.
- 6.28. Further, the matter of control and authority in relation to legal officers who are also on the JAs' panel, who are DFMs or s154 (1)(a) reporting officers (appointed by a Chief of Staff) in turn appointed under s 151(3) and who are not required to be on the JAs' panel at all, is not without some difficulty.
- 6.29. It is appropriate for me to again refer briefly to some of the matters touched upon in the first part of the study. The JAG must be (or have been) a civilian judge of a court specified under s 180. Being a defence member is not a condition for appointment by the Governor General. A DJAG must be of the same qualification, and have been a legal practitioner of five years. They are not by the nature of their statutory appointments required to be subject to military authority or command.
- 6.30. History and practice under the DFDA (and there is no suggestion that change will take place or is warranted) reveals that the JAG and DJAGs are and have been judicial officers. They have had considerable reserve military legal background in practice. They need not be military officers as a condition of appointment, although by tradition they are and hold senior rank. Under the Act the JAG/DJAG is not put in any position of legal command or authority over persons who perform duties as JAs, DFMs or s 154(1)(a) reporting officers. Indeed, in the Army the position is otherwise and DALs has command: AMR regs 583-585. The JAG's powers are fixed by statute, include powers under ss 154 and 155, furnishing a report (s 196A), fixing rules

of procedure (s 149), nominating persons to the JAs' panel (s 196); appointing DFMs (s 127) and recommending persons to be s 154(1)(a) reporting officers.

- 6.31. I have already adverted to the fact that there is no significant service support for an independent or separate military judiciary, for the U.K. system or its counterpart of "civilianisation" of the military judiciary. The number of trials (and the prospect of their numbers diminishing for reasons that appear earlier) does not suggest a need for full-time military judges whether under the authority or command of the JAG or even, for example, part of some separate office of the relevant service Director of Legal Services. I do not believe that there are regular officers sufficiently trained yet to perform such duties in any event.
- 6.32. The present system has proved efficacious, workable and capable of being implemented efficiently and expeditiously both in operational areas and in Australia. Save for the few senior regular officers who are appointed to the JAs' panel or as DFMs, the remainder are not only military officers of senior rank and many had long experience as members of a service legal section, but they (and indeed s 154(1)(a) officers) are senior practitioners in the civil legal community. It is difficult to perceive of the JAs' nominating a person to the JA's panel (s 196), appointing a person as a DFM (s 127) or recommending appointment of a person as a s 154(1)(a) reporting officer, who has not proved to be of requisite experience and training to be fitted for such a position. For reasons that are by no means clear, the role of the JAG is a different one depending upon the nature of the appointment to be made. Whilst the existing structure does not place the JAG (or DJAG) in any position of command or authority over persons so appointed, the combination of both high judicial office and military experience on the part of the JAG is itself a safeguard or militates against appointment of persons not qualified by experience or training for appointment. Such persons would not be nominated, appointed or recommended by him.

33. The CAS considers that the command and control structure be altered to place all JAs, DFMs and s 154 reporting officers under the direct control of the JAG-ADF. The CGS position is that JAs/ DFMs could perhaps be appointed by the JAG on the recommendation of the Service Chief of Staff but that the JAG or DJAG should only have “control” over JAs/DFMs when they are performing judicial functions. This latter suggestion is one associated with some difficulties, in terms of implementation and otherwise.
- 6.34. On the one hand to the extent that it might be suggested that the JAG holds a position somewhat analogous to that of a judge in the civil system, ordinarily the judiciary does not involve itself in the appointment, or removal (or, for that matter, supervision) of judicial officers. Appointments and removals are a matter for the Executive with the convention being that a member of the judiciary be not compulsorily removed from office save on the ground of incapacity or proved misbehaviour: Attorney General v Quin (1989-1990) 170 CLR 1. That convention does not apply to JAs, DFMs or s 154(1)(a) reporting officers. They are not judicial officers exercising the judicial power of the Commonwealth. On the other hand, however, the JAG is also not a judicial officer nor are the JAs, DFMs (or s 154(1)(a) reporting officers) members of the judiciary or exercising Commonwealth judicial power. Indeed, the JAG is perhaps closer to being in a sense a member of the Executive. He is also a statutory officer whose remuneration may be determined by the Remuneration Tribunal (s 185).
- 6.35. Leaving aside questions of desirability, practicality and workload, there would seem to be no strict legal impediment (with some qualifications) to the JAG making such appointments, or having control and authority and command. Indeed, in Canada and the US, the JAG appoints military judges. In the UK he does not.
- 6.36. Absent adopting the present U.K. system under the **Armed Forces Act**, in effect a system of civilian JAs, and absent appointing military judges under Ch

III of the Constitution, (or having, for example, a military division of the Federal Court) there are perhaps practical problems in the JAG making all of the appointments (as opposed to the present system of s 127 appointments) to the various positions. In addition, there are adverse arguments that might be available by reference to suggested civilian analogies.

6.37. Whilst I am disposed to the view that the present system should be kept intact in terms of appointment, the matter of control and authority over JAs, DFMs and s 154(1)(a) reporting officers is another matter altogether.

6.38. There are problems, I believe, in relation to control, authority and command. Generally, every military officer (JAG and DJAG as statutory exceptions, albeit holding military rank in the Reserve) on the one hand, by the nature of being an officer, is subject to military control and authority. Such is needed to meet the requirement for accountability by all military officers including those appointed as military judges. The fact that the military officer may also have an appointment as JA/DFM or s 154(1)(a) reporting officer (in effect a part time military judge) presents difficulty because of the need to preserve the appearance of judicial independence on the part of that military officer in the exercise of his judicial functions and duties. There is some tension which needs to be addressed, absent adopting a similar civilian situation found in the UK (for which there is no support) or appointing persons under Ch III (and they would not be military officers) or by disbanding the dual qualifications of being both a military officer and a legal practitioner, or even establishing a separate judicial branch under the JAG, or of DALs and this gives rise to some legitimate debate. Assuming minimum change is desirable, and there is a respectable body of support for minimal change, for reasons that will appear it may be that the problems can be accommodated in the manner I propose to recommend. The proposed recommendation would also accommodate the view that those who are appointed as "part time" JAs or DFMs can perform duties other than those not inconsistent with the performance of what might be described as the judicial type duties that they are called upon to perform from

time to time on an ad hoc basis, whilst being the subject of efficient reporting in the performance of those duties.

- 6.39. There is precedent for accommodating the need for preserving judicial independence and impartiality to be found, as I have referred to, in Canada and the US. In Canada, the JAG appoints persons to be military judges to positions in the Chief JA's Division within the office of the JAG for a fixed period. That person is appointed by the Chief Military Trial Judge to be the "trial judge" at GCM. This requirement has been "rationalised" in Genereux upon the basis that the JAG, being a member of the Executive, should not appoint a JA to a particular trial, with such being done by the Chief Military Judge. The reason for such is not clear. I do not perceive the Genereux approach to be applicable to the Australian situation. In any event, the appointment of the trial JA by the JAG (and this is by statute now to be in a convening order in relation to the UK CM), I believe would of itself help convey an appropriate and valid message, in terms of supporting the independence of the JA.
- 6.40. Next, consideration could be given to adopting a provision of the type found in Canada where the QR & O's provide that an officer's performance as a member or as a military judge is not to be used to determine his or her qualifications, promotion or rate of pay. Interestingly enough in the US to like effect, is Article 37(b) as well also Article 98 of the UCMJ. Thus the implementation of provisions reflecting the Canadian and US situations should, in my view, be given due weight.
- 6.41. I believe that a case can therefore be properly made for appointment of a trial JA or DFM by the JAG with the involvement of even perhaps a tri-service JAA under his control, command and authority. That person would perform the administrative work.

2. I have given consideration to one line of argument advanced to the effect that officers who are appointed should agree that whilst appointed as JAs, DFMs, s 154(1)(a) reporting officers, they should forego promotion. In my view, this argument should be rejected for several reasons. Firstly, it could be unfair and represent a career detriment, particularly where the present system involves appointment not only of reserve officers but also regular officers. Secondly, it is not required in the US or Canada where there are built-in protections to preserve and protect careers. Thirdly, it could affect the capacity of officers to perform "non-judicial" duties. Finally, it is an argument that does not find significant support.
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- 6.43. Next, it seems that a means of protecting the independence and impartiality of those who are appointed as JAs, DFMs or s 154(1)(a) reporting officers (putting to one side the question of command or authority over such persons) could be the introduction of provisions of the kind discussed and which ensures that actual performance of duties as a JA, DFM or reporting officer could not be taken into account either in terms of promotion, rate of pay or even in terms of their annual efficiency report.
 - 6.44. Again, in relation to the subject of control and authority in greater detail, I might observe that were such a view to be adopted, then such could be achieved, for example, in the case of the Army by changes to AMRs.
 - 6.45. This brings me to the matter of control and authority and who should have it. CGS suggests that the JAG or DJAG have such over JAs and DFMs whilst performing judicial functions whereas the officer in "normal chain of command" would report on the performance apart from judicial functions. In one sense the notion of perhaps dual control and authority is to be considered in the event that JAs and DFMs may also perform non-judicial functions not inconsistent with their position or what might be called their judicial duties. CAS supports the view that all JAs, DFMs and s 154 reporting officers be placed under the "direct control of the JAG-ADF". In the case of the Army,

AMR reg 583 does not distinguish between officers in the Legal Corps generally and Corps officers who are also further appointed as JAs, DFMs or even as s 154(1)(a) reporting officers. In the present position, the latter class of officer, unless within s 153(3), ie under a formation or other command, is under the command of DALs. This is a problem since DALs' duties under AMR reg 585A, particularly under (c) and (e), that is, advising on charges and matters referred to him, might put the independence and impartiality of those appointed as JAs, DFMs or s 154 (1) (a) reporting officers into the dispute arena and present conflict for DALs. Even if those persons (and/or the JAA) were brought under the command of ACPERS pursuant to AMR reg 584, this would probably not solve the difficulty. The test of independence and impartiality is objective. Even though DALs would/could have responsibilities to a CA (or even a reviewing authority) under AMR reg 585A, nevertheless, DALs is responsible for appointment or promotion of such persons because they are also members of the Legal Corps: AMR reg 585(2). Reference should be made to the requirement of yearly efficiency classifications: AMR reg 585. It seems to me that the matter of reporting, the extent to which, if at all, it should be done, and indeed the matter of authority and command, can presumably be further addressed in the implementation of the DRP (11 April 1997) and as part of the provision of an integrated legal service discussion. I say this because some of the AMRs to which reference has been made will presumably be looked at with consideration being given to change and/or their repeal as part of the DRP in relation to the Legal Services.

- 6.46. As I have indicated, whilst CGS considers that the JAG or DJAG should only have control or authority over JAs, DFMs and s 154 officers when performing judicial functions, CAS considers that control and command structures for them should be placed under the direct control of JAG-ADF.

6.47 Recommendation

1. That the present system of the JAG nominating officers to the JAs' panel, appointing DFMs, and recommending s154(1)(a) reporting officers, be retained.
2. That there be no command or control (except of an administrative nature) exercised over JAs, DFMs and s 154(1)(a) reporting officers in the performance of their judicial duties. This would involve amendment to such provisions as AMR reg 583 and even AMR reg 585 (or their other service equivalents, if any).
3. On the assumption that by convention, the JAG would continue to be a military officer, the JAA should be under the command of the JAG.

Reporting on JAs, DFMs and s 154(1)(a) Reporting Officers

- 6.48. The need for reporting arises, inter alia, from the fact that the JA, DFM, or s 154(1)(a) reporting officer (who need not be a member of the JA's panel) must be a military officer. Because he/she is a military officer as well not only is there an issue of authority, control and command, there is the matter of military efficiency. Reporting in part goes hand in hand with the requirement of efficiency. In order to permit of promotion (a legitimate objective for military officers) there is an expectation for efficiency reports. Yet there is no analogy with the position of the civilian judge in civil judicial life. Upon appointment, whilst there is no expectation of higher judicial appointment, nevertheless, ambition for further appointment raises a different issue and is not precluded for a civil judge. Next, there is no reporting on a judge in civilian life. His/her professional accountability is measured by reference to the conduct of proceedings in open court, the appropriate publication of proceedings, and the appeal process. For judicial misbehaviour there are

statutory provisions for investigation by Judicial Commissions and for ultimate removal for misbehaviour by Parliament.

- 6.49. On the other hand, to the extent that one is speaking of “accountability” as a concept in so far as it relates to JAs, DFMs and s 154(1)(a) reporting officers under the Act, proceedings (save in certain cases) are conducted in open court, and there may be publication of proceedings. This is a form of accountability in itself. Next, in relation to the reporting requirements under provisions such as AMR reg 585, provided that there is excluded from being brought into account the performance of judicial duties, and provided there is not to be brought into account the performance of judicial duties for the purposes of promotion, pay or posting, reporting could be done by a person other than the JAG.
- 6.50. As I have said, the notion of reporting is one associated with a person being a military officer as a military officer. However, such a concept is alien in relation to civilian judges. It would be inconsistent with independence and impartiality that a judge should be the subject of any reporting, especially in relation to the performance of his/her judicial duties. It would be difficult to reconcile the permitting of a reporting system which has regard to the mode and manner of performance of judicial duties with there being provisions excluding performance of such being taken into account for the purposes of promotion, pay or other appointment. These matters suggest that the JAG could have the authority and command but no reporting obligations (since there would be little to report on if reporting on performance of judicial duties is excluded!).
- 6.51. This leaves extant the question of who should report in respect of the performance of non judicial legal duties. In respect of the Regular officers who are appointed as JAs, DFMs and s 154(1)(a) reporting officers, I see a similar problem. Reporting on the performance from time to time of judicial duties would likewise be excluded from being brought into account. What I

have said in relation to excluding reporting on performance of “judicial duties” also accords with the spirit of s 193. That provision provides protection in the performance of duties of a JA / DFM.

6.52. Recommendations

1. There should be no reporting on JAs, DFMs and s154 (1) (a) reporting officers in respect of their judicial duties.
2. There should be a separate administrative authority in respect of non-judicial duties of JAs, DFMs and s154 (1)(a) reporting officers; and reporting on such duties, by their respective “Head of Corps”.
3. The JAA should be under the command of, and reported on by, the JAG and DGDFLS.

Appointment of JA/DFM to a particular trial

- 6.53. There is a strong consensus of opinion supporting the view that the actual appointment should be done by the JAG or DJAG. The position of CGS is that the DJAG (or even the Judge Advocate Administrator) as opposed to the CA should appoint the JA or DFM for a trial. CAS considered that JAG-ADF (or presumably DJAG) should have the responsibility for allocating judicial officers to individual trials. Indeed, CAS even suggested perhaps that a tri-service central point of contact for the appointment of all JAs would hasten the appointment and facilitate administrative procedures. I again note in passing that now in the UK the order convening of a CM shall state that a judge advocate is appointed by or on behalf of the JAG. Whilst referring to what I regard as a strong consensus nevertheless CNS rather was of the opinion that perhaps the appointment of a trial JA/DFM could in the Navy be done by a separate Judicial Unit established under the direction of DCNS who should also be responsible for the appointment of members of the CM as well. CNS

suggestion would thus remove in effect the selection of the “judge/jury” from the CA, a distinct benefit in terms of appearance. Nevertheless, it would place the both types of appointments still in the hands of the one “body”. Even those who would support the idea for eg a court administration officer system as it now exists in the UK (and where such persons are appointed by the Defence Council to convene general and district CM and other prescribed functions: s 84A **Army Act**) would not support the view that the JA and members of a CM should be appointed by the one body. In the UK the JA is appointed by the JAG, in Canada by the Chief Military Judge attached to JAG’s office, in the US by the JAG. He/she is not appointed by the CA, although the High Court in Tyler did not criticise the system presently prevailing under the DFDA, ie. where the CA also makes such appointment..

6.54. There is no strong opinion yet supporting the establishment of the equivalent of a court administration officer system, despite the case that exists for it. However, the CNS view, if implemented, could be a step in that direction. The case for considering such a system or similar one tri-service should therefore be considered. The view is consistent with a valid approach that the CA who is at least central to the prosecution, if not the prosecutor, should not appoint the President and members and/or the JA (or in the case of a DFM trial the DFM). I shall return to the question of who should appoint members under a separate heading.

6.55 Recommendation

1. That duties of a judicial nature, including the appointment of a JA or DFM to a particular trial, be allocated to JAs, DFMs and s154 (1) (a) reporting officers by the JAG. This could be done through a tri-service Judge Advocate Administrator.

2. That convening orders issued by CAs include a request for the JAG to appoint a JA or DFM, or alternatively, a statement (if it be the case) that a particular JA or DFM has been appointed by the JAG.

Tenure of JAs, DFMs and s 154(1)(a) reporting officers

- 6.56. The Canadians under their system require tenure for military judges:
Genereux. In the US the courts have held that the constitutional provision for due process does not require tenure for military judges. The Europeans have observed the importance of tenure for military judges. In the UK the JAG and other JAs are generally civilians and have tenure. In Australia the High Court in Tyler has, inter alia, indirectly held that the Canadian requirement of tenure for military judges, does not apply to JAs (and I would add, in my view, to DFMs). This is because the service tribunals are exercising disciplinary power whilst being required to act judicially. They are not exercising the judicial power of the Commonwealth. Security of tenure, whilst required for judges, is not required of persons exercising disciplinary power. Thus the law as it stands does not require tenure for JAs, DFMs or even, in my view, s154(1)(a) reporting officers: Tyler.
- 6.57. Whilst the JAG and DJAGs have tenure, nevertheless the duties they perform are defined by statute. Their appointments are terminable for misbehaviour, physical or mental incapacity, bankruptcy etc.
- 6.58. I have already discussed the position of both appointment and removal of JAs, DFMs and s 154(1)(a) reporting officers. On one view it might be thought that the absence of a fixed term might even enhance, or assist in enhancing, the independence and impartiality of such persons. Next, even absent tenure, it would be difficult to see why it could be said that there is an unfettered discretion in a Chief of Staff (who appoints persons to the JAs' panel and as s 154(1)(a) reporting officers), and in the JAG (who appoints a person from the JAs' panel to be a DFM), to remove such a person. Indeed, it could well be

thought otherwise, and that there is de facto tenure. Clearly, any attempted removal by a chief of staff (or JAG in case of a DFM) would need to accord with rules of natural justice, be for good cause with a right of fair hearing to be performed and in accordance with procedural fairness. Of course any attempted possible removal in any way associated with the performance of judicial duties, is in effect prohibited in Canada and the US, and in my view would run into difficulties under the present law in Australia. As to removal there are a number of grounds available in any event eg cessation as a legal practitioner and/or cessation as a military officer. If grounds are otherwise validly available for removal of the person as a military officer, eg. incapacity (health), misbehaviour (not in performance of judicial duties) etc, then that officer may be removed, with such removal in effect meaning appointments as JAs, DFMs, s 154(1)(a) reporting officers would cease. Presumably those officers who are not actually performing duties of their appointments (as opposed to the manner of performance of such) could also be "invited" (care would need to be exercised) to resign or retire or even "invited" to "reconsider" their positions!

- 6.59. Nevertheless, fixed tenure for JAs/DFMs is not opposed for example by CGS. However, there are justifiable reservations for the need for such. I would observe in passing that provisions such as AMR reg 581(2) providing that an officer shall not, without the approval of DALs, hold the same appointment for more than four years, has, in my view, no application to a person appointed as a JA, DFM or a s 154(1)(a) reporting officer.
- 6.60. Indeed, as I would understand the present legal position, I do not see the need for tenure. Parliament has chosen not to give it. The historical fact is it has never been given in Australia. A fixed term is not an end in itself - "it is a means of promoting independence which in turn preserve judicial impartiality": Weiss. If the statutory provisions insulate JAs, DFMs and s 154(1)(a) reporting officers from the effects of command influence, then

judicial impartiality is and would be preserved. Nor am I satisfied that the arguments in favour of tenure as espoused particularly in Canada (Genereux) and in the European Commission or European Court (Findlay) (but not accepted in the US (Weiss) or in Australia (Tyler)) are yet to be regarded as highly persuasive. My study reveals that there is no strong body of support for such tenure in Australia. That said, I see the analogy arguments supportive of tenure by reference of appointments in the civil area and even by reference to the tenure situation of the JAG/DJAG. Tenure may enhance the appearance of independence and impartiality but in my view is not essential for JAs and DFMs who participate in, or may be, the service tribunal exercising disciplinary power. Further, what should not be lost sight of is that JAs/DFMs are appointed to conduct trials on an ad hoc basis, and have no inherent judicial or other authority separate from the CM or DFM trial to which he/she is appointed. Mere appointment to the JAs' panel or as a DFM confers no general judicial authority separate from trial situations.

- 6.61. The issue of tenure is an important one upon which views may legitimately differ. An important issue perhaps is ensuring that promotion, transfer, pay etc are not affected by performance of what I might refer to as judicial functions or judicial duties or duties as such by a reporting officer under s 154(1)(a).

6.62 Recommendation

1. The subject of fixed tenure should be further considered. Whilst I do not consider that it is essential, the notion of fixed tenure (with a virtual right of extension) is not opposed. It may provide a means of ensuring that appointees perform duties and should not hold office for the sake of it, whilst remaining inactive or unavailable for one reason or another.

Employment of individual JAs or DFMs on “non-judicial duties”

- 6.63. I have already indicated my general meaning of judicial duties ie duties actually performed by a JA at a trial, by a DFM at a DFM trial or by a s 154(1)(a) when actually preparing a report under s 154 as opposed to other duties of a kind falling outside of such specific duties.
- 6.64. The CGS position is that such officers should be able to be employed on other military duties not inconsistent with their “judicial” function. The view of CAS is that persons appointed as JAs, DFMs and s 154 officers should be prohibited from undertaking duties inconsistent with their “judicial” functions.
- 6.65. Judges in civil life, and especially part-time judges, do in fact perform other duties not associated with judicial office.
- 6.66. Nevertheless, one should bear in mind a number of points. First, there is no constitutional or legal bar to performance of what I might refer to as non-judicial functions. A service tribunal exercises disciplinary power whilst being required to act judicially. It is not exercising judicial power of the Commonwealth. Next, a JA or DFM is appointed to trials on an ad hoc basis. He/she is not a permanent, full-time military JA or DFM nor even performing full-time judicial functions. Such persons are not professional judges. He/she does not have inherent judicial or other authority separate from a CM or DFM trial to which he/she has been appointed. When he/she acts, it is in the specific, appointed role at a trial. Mere appointment to the JAs’ panel, or as a DFM, confers no general judicial authority separate from trial situations. Indeed, even in the US, the military judge (at least one certified to be qualified for duty as a military judge of a GCM) may perform duties of a non-judicial nature other than those of a military judge at a GCM when such duties are assigned pursuant to Article 26(c) UCMJ, by or with the approval of the JAG

or his designees: Article 26(c). Such is not regarded as being inconsistent with the due process clause: Weiss.

- 6.67. Next, the situation in Australia lacks similarity to that in Canada and the US where there is already a cadre, in effect, of full-time professional military judges in a separate branch of the JAG's office, and who have been appointed careers in the JAG's offices.
- 6.68. Whilst the matter is one of perception, there is stated no constitutional or legal impediment to a person who is not a judge under Ch III or otherwise performing work of a non-judicial nature. One should be careful about a status or title argument. Even officers upon whom the title of Justice is conferred by statute, who are not appointed as a Justice of the High Court or of another court created by Parliament, eg **Grants Commission Act** are not justices for the purpose of Ch III and there is no restriction under the Constitution on their availability to perform non-judicial duties: Wilson & Ors v Minister for Aboriginal Affairs (1996) 70 ALJR 743. See also Kable v DPP (1996) 70 ALJR 814.
- 6.69. Next, in relation to ordinary judges and members of the judiciary, the performance of non-judicial functions is not denied. As such cases as Grollo v Palmer (1995) 184 CLR 348 at 364-365 (a case concerned not with jurisdiction or powers of a court but with powers that may be conferred on persons who are Ch III judges of a Ch III court) and Wilson show, the principles involve the notion of compatibility and are essentially that no non-judicial function that is not incidental to a judicial function can be conferred without the judge's consent, and secondly, no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power. The concept of incompatibility is derived from the separation of powers in the Constitution and has no life of its own independent of that doctrine: Kable. In my view, that concept has no

application to a service tribunal exercising disciplinary power under DFDA. The principles of incompatibility do not, in my view, apply to those who are appointed as JAs, DFMs or s 154(1)(a) reporting officers.

- 6.70 Further, there can be no doubt that even in the ordinary civil and criminal courts there are persons appointed to act as part-time judges. Whilst many oppose this upon the basis that it compromises the independence of the judiciary, because of lack of secure tenure or that those appointed may succumb to some perceived pressure or may become beholden or ambitious for permanent appointment, it is common-place for there to be part-time or acting judges appointed, whatever may be thought to be the theoretical desirability of such or the ideal. The subject is often a controversial and difficult one when one is speaking of appointments, eg in New South Wales, as acting judges of the District or Supreme Courts. The fact that there are acting or part-time appointments to the judiciary has not been successfully challenged on the basis that public confidence in the independence of the judiciary has been shown to be diminished or otherwise suggest an unacceptable relationship between the judiciary and other branches of government. Nor does it mean that those performing part-time judicial duties are not seen to be acting independently in accordance with the judicial process, ie acting judicially, openly, impartially, with fair and proper procedure applied to determine the matter in issue. Further, civil judges do non-judicial work, eg sit as Royal Commissioner, on Remuneration Tribunals and the like. A State Industrial Court judge is head of the Civil Aviation Safety Authority ("CASA"). A State District Court judge in New South Wales sits part time on disciplinary tribunals such as the Medical and Veterinary Tribunals. In the UK, busy barristers and solicitors sit as part-time judges and recorders at the same time as carrying on practice. Similar situations occur in the Australian States and in Canada. The JAG and DJAGs are all Supreme Court judges. The fact is that in New South Wales and in England barristers and solicitors sit as part-time judges. In Canada it has been specifically held that the appointment of part-time judges of Municipal Courts doing minor criminal cases is not in breach of s 11(d) of the Charter ("the

independent and impartial provisions”): see R v Lippe (1991) 2 SCR 114 applied by the Chief Justice in Genereux at 335. In Lippe, the Chief Justice held that part-time municipal judges being permitted to continue to practice as lawyers was not constitutionally invalid observing at 142 “I admit that a system which allows for a part-time judge is not the ideal system”, nevertheless, still holding that it did not breach any constitutional guarantees. Why mere appointment to the JAs’ panel as a DFM or s 154 officer of itself and without more, or even where such person acts in such appointment on an ad hoc basis from time to time, might carry with it the consequence of lack of public or military confidence in the military justice system or cause the reputation of the person appointed or the service tribunal into question in terms of independence or impartiality, is not clear. Were those appointed to be disqualified, by mere appointment from performing non-judicial functions, much talent and services would be lost; indeed those not acting at all for one reason or another, or acting but rarely would find their legal abilities and skills not only under-utilised, yet still remain on the JAs’ panel or in other appointments. There would be an impact upon the full use of resources. Subject to qualifications on the type of work that may be performed, absent a system of full-time professional military judges doing nothing but full-time military judicial work, I do not see why independence or impartiality is of itself compromised by persons appointed to the JAs’ panel, as DFMs or as s 154(1)(a) reporting officers. This is subject to caveat.

- 6.71. However, my study reveals that there is a very strong and respectable body of opinion among the service lawyers to the effect that those appointed as JAs, DFMs or s 154 (1) (a) reporting officers should not be asked to perform work associated with or under the DFDA, ie as prosecuting officers, defending officers, advisers in relation to whether proceedings should be brought and the like. In other words, they generally ought not to be involved in work associated with disciplinary proceedings under the Act. I believe that their views should be both respected and, carefully weighed, and accepted. Indeed I would venture the view that really there is a strong general view among legal

officers that such persons ought not to be involved in performance of actual duties that could/would be inconsistent with the performance of their judicial functions or "duties", or might appear to be so inconsistent with such.

- 6.72. Perhaps a more controversial issue involves the question as to whether persons appointed members of the JAs' panel or as DFMs should be members of the regular forces upon, inter alia, the basis of sufficiency of experience in court work. To deny, as I have said, regular officers the opportunity of appointment, however, might be regarded as unfair and indeed impractical and undesirable. There is, however, a potential for conflict, particularly in the case of regular officers. For example, DALS may be called upon to frame charges or even tender other advice: see AMR reg 585. See also his other obligations under AMR regs 583 and 585. The matter may be somewhat academic, since in the exercise of his powers under s 196 of the DFDA, the JAG is unlikely to nominate a person for appointment to the panel, (or appoint a person from the panel as a DFM in accordance with s 127) absent sufficient practical and legal experience and qualifications to perform the work. Perhaps at the end of the day that is what is important, ie people be qualified for the position. Generally, the position may be that appointing suitable military officers with both military and civil legal experience essentially in the Reserve at least contributes to the appointment of those who are fitted for the task to which he/she is appointed. An officer with some years of military legal experience, who has gained some familiarity with what service life entails and of the need for military order and discipline, who at the same time has acquired experience as an advocate in the civil courts, appears to be more suitable for appointment than either the regular service legal officer or indeed the person who has spent his working life wholly in the practice of non-military law. This, however, is a matter upon which views may differ and do. My study reveals that reserve legal officers have "views" on the appointment of regular officers and to an extent strong opposite views to the contrary are expressed by some regular legal officers. One matter of concern touched upon by me is that perhaps

regular officers appointed to the JAs' panel or as DFMs should be called upon to advise in relation to prosecutions or proceedings under the Act.

- 6.73. The important point, I believe, is that appearances and perceptions be maintained. Whatever be the arguments as to Regulars and Reservists being appointed, it seems to me that what is important is that generally speaking they not be called upon to perform duties inconsistent with the performance of their duties under the Act, but with the caveat that they may perform other duties which do not conflict with the performance of such duties. One particular objection is that in individual cases the view of a JA, DFM or s 154(1)(a) reporting officer might be cited for precedent reasons. It might be embarrassing, for a defending officer cannot be asked to cite his own "judgments". These are but only some matters of relevance, but they go to the issue of appearances. Thus for any appointed to the JAs' panel, as a DFM, or as a s 154(1)(a) reporting officer to be ordinarily required to deal with, or to advise in respect of, matters or proceedings under the Act or to prosecute or defend, to review and the like, might create unfavourable perceptions, and be inappropriately viewed.
- 6.74. A question of reporting upon those who perform duties apart from those of a "judicial" nature needs to be considered. Whilst I have indicated there should be no reporting on the performance of judicial functions of an officer appointed as a JA, DFM or s154 (1)(a) reporting officer in the performance of their duties as such, nor should they be taken into account for the purposes of promotion, rank, further appointment, transfer etc., it would seem to me that such would not preclude the reporting on performance apart from those actual judicial functions carried out and associated with the respective appointments held.

6.75. Conclusion

1. Subject to the constraints, inter alia, discussed, I do not see why those who are appointed as JAs, DFMs and s154 (1)(a) reporting officers should not be able to perform duties of a “non-judicial nature” or duties not inconsistent with the performance of the type of judicial duties or functions that they may be called upon to perform from time to time.

Appointment of the President and Members of a CM

- 6.76. There is valid argument that, despite the decision in **Tyler**, the central role played by the CA in the organising of a CM gives rise to misgivings about the institutional independence and impartiality of a CM. There are misgivings that in effect the prosecutor selects the members of the jury who are subordinates in rank to him and generally fall within his chain of command. Indeed, concern was expressed as to the width of his role and command links with the members of the tribunal. Valid views were expressed as regards his appointing the trial JA as well: s 119. I have observed that such appointment is not made in Canada, UK or the US by the CA.
- 6.77. The members of the CM are effectively the triers of fact. They determine the guilt or innocence of the accused. Unlike a jury in the ordinary court of law, they determine the sentence in the event of a person being found guilty. The CA appoints the President and other members (s 119). Eligibility is fixed by reference to the provisions of s 116. There are provisions for objections on the grounds of ineligibility, or bias and for notification of bias. There are provisions for substitution and replacement of members.
- 6.78. I propose to deal with the matter of eligibility of others for membership under a separate heading.

6.79. There is no provision, as in Canada, for example, requiring that the members should not be selected from the unit to which the accused belongs unless the demands of the military require otherwise. Following the decision in Genereux (where the convening officer's multiple roles position was "criticised") albeit that he did not select the trial JA, changes were introduced to provide for a more random selection of the President and members of the Canadian Defence Force CMs. The SAG in its Executive Report has not recommended statutory changes in relation to selection of members. In the US, the CA (albeit "the prosecutor") also selects the members who must possess certain qualifications: Article 25 and particularly Article 25(c) of UCMJ. The US courts have held that the multiple roles of the CA (including as prosecutor and selector of the jury) are not inconsistent with the due process clause and are justified and reflect the requirements of limited resources, supplies and manpower, the need for speedy judicial action and the imperative of the maintenance of discipline and order: Curry. The multiple roles position, though not the point in dispute, was not said by the Supreme Court to be constitutionally invalid in Weiss. However, in Findlay the European Court of Human Rights considered that the multiple roles position of the CA in the British Army CM (including appointment of members) was inconsistent with institutional independence and impartiality of the army CM. In Findlay, the JA to the GCM was nevertheless appointed by the JAG. He was also a barrister and assistant JA with the JAG's office. Again in Findlay, the European Court was especially critical that all members of the CM which decided Findlay's case "were subordinate in rank to the CA and fell within his chain of command", a matter that went to the question of both its independence and impartiality (par 76) and of the width of the role of the CA and his command links with members of the tribunal. After Findlay, but prior to the **Armed Forces Act 1996** the services introduced (without a requirement of legislation or subordinate legislation) procedures whereby members of CMs were appointed from different commands from that of the accused. The matter of the CA appointing the President and members has

been now dealt with by legislation. He/she does not appoint them since the **Armed Forces Act 1996**. This is now done by a court administration officer: see s 84B of the **Army Act**. Indeed since 1 January 1996 members of an Army CM held under the Army Act have been chosen from officers both outside the chain of command of the CA and of his confidential reporting chain. That practice will continue. It is not, however, the practice in the US.

- 6.80. In Australia, it has not been suggested that the multiple roles of the CA, as in the US, including selection of the members, has affected the independence of the CM as a service tribunal exercising disciplinary power: Tyler.
- 6.81. All this said, the objections to the CA also appointing the President and members (in terms of perception) is an obvious one. It is essentially that the present system places the CA in a position where, because he initiates the prosecution, selects the prosecutor and charges, he should not select the jury to try them, especially where, in many instances, the members are usually under his command. I say nothing as to the fact that he also appoints the JA, a matter which can be addressed, and also conducts the review, a matter that can also be addressed. Thus it has been argued without success (in the US) that for the CA to select the President and members particularly from his or her command raises the spectre of possible command influence of selection of particular persons who may be familiar with the circumstances of the offence, and dependent upon the CA for promotion, appointment and the like.
- 6.82. The ultimate position of the CGS was that the CA should appoint the President and members of a CM. CNS position in respect of such appointment has been mentioned, ie by a Judicial Administration Cell independent of the CA (or the reviewing authority) and under the direction of DCNS. This is a step in part in the direction of that taken in the UK which involves a very essential reduced role for the CA. Were there to be such a Cell, then presumably there would be no objection to it being a tri-service one. Whilst there is little present support "yet" for adopting the UK approach and for the setting up of a service "courts

administration officer” system with similar powers to that of such a body in the UK, there is certainly a case for such being properly considered. The position of CNS reflects an acceptance of possibly a similar body but with lesser and specific powers.

- 6.83. Those who propound the present system forcefully argue that keeping as much “control” within the command structure is a valid ground, upon the basis that discipline and all facets of such are essentially a command problem to be dealt with from within command and therefore by persons appointed essentially from within command. That said, as developments in the UK reveal, similar argument, indeed argument by reference to the need to maintain discipline has been lost, and will be lost in Canada if the SAG recommendations are accepted.
- 6.84. In Canada, the position of the member is also further protected so that an officer’s performance as a member of a GCM is not to be used to determine qualifications for promotion or rate of pay. To similar effect are the provisions of Article 37 and Article 98 of UCMJ. These and provisions such as s 122 of the DFDA (notification of belief of bias) provide some “protection” for members but not solutions to perceptions associated with the possessing of multiple roles on the part of a CA.
- 6.85. Assuming that it is considered desirable to retain the present system whereby the CA also selects the President and members of a CM (and there are valid arguments both for and against such course), then changes could perhaps be made without even legislation. Were the decision to prosecute to remain with the CA, despite the arguments against such a situation, there would be even stronger argument for removing the selection of the President and members of a CM from the CA. This said, I still consider that such selection really ought not be made by the CA. These could include, subject to military exigencies, a requirement of a more “random” selection of the President and members, including (exigencies of service aside) even selection from outside of the CA’s

chain of command (and of the command of the accused). The matter of selection tri-service could also be considered. This would widen the "pool" of potential members of a CM. Such would assist in enhancing a more objective view of the process and perhaps militate against any suggestion that particular person(s) are or may be selected. The fact that, as in the Army, the names of members of a CM are requested by the supporting legal officer of the CA's staff, in a practical administrative sense, does not alter the fact that it is the CA that does the appointment: s 119. It is also fair to observe, as one command legal officer observed, namely, that he was not aware of any cases where a CA had specifically requested a particular member other than perhaps suggesting in a general way a balance between corps and rank having regard to the nature of the charge, its seriousness and the rank of the accused. Nevertheless, whilst understanding the argument for balance, there is still scope for concern that selection and balance might suggest that having regard to the offence charged, selection would not necessarily be random from those eligible and available, but might take into account extraneous considerations, where selection is influenced by the nature of the offence. Save perhaps in respect of particular types of offences eg. involving professional misconduct disciplinary offences (and even then there may be some problems), there are questions as to why, if at all, the selection of an officer should be linked with any particular type of offence. The analogy to this extent with the civil jury system is valid. Eligible citizens are included in the jury pool and hear all classes of offence. I say no more on this point save to emphasise the primary need that it is desirable that there be a wide "pool" and significant random selection, exigencies of service aside, outside the command of the accused and of the convening officer.

- 6.86. As to the CA selecting outside of his actual command, as I also understand it, this is done in the Air Force (where there are few CMs). The source of membership involves a system that requires approaches to the Manning Directorate in Canberra, with advice as to what ranks are required. The type of offence is not mentioned. In the Navy, whilst members are chosen from units under the control of the CA, if insufficient officers are available, the CA will

look outside of the command. Again in the Navy, choice of the members involves issues of availability. Again in the Navy, a primary consideration in Fleet is the fleet programme. As to membership, it is suggested that perhaps CA "may" direct a class of membership for a particular type of offence.

Generally, membership of a CM is taken from the computer of a Chief Staff Officer to the CA. The potential members of Navy CMs are also reminded of the provisions of s 118 DFDA and asked whether there is a possibility of bias.

- 6.87. Next, in terms of present system selection, there can be no doubt of the significance of the bias provisions in law and in fact. They are designed to eliminate improper command influence and the selection of personnel who may be biased. Nevertheless, that said, such provisions do not completely answer the argument that the one person initiates the prosecution and selects the "jury" (and under present arrangements) also the JA!
- 6.88. That there is scope for a more random selection system even from within command is also supported by what has been done in the past, for example in the Army. In the past, at least in one command, members of a CM were selected from standing lists advised by the commands. For example, HQ Training Command were required to sit during a period January-March in the year, with Land Command and Logistics Command to do similar in other periods. Further, there also appears to be scope for the establishment of panel lists from which a CA (assuming the present system is to be maintained) could appoint the members of the court. No good reasons have been advanced against such a course.
- 6.89. In making recommendations I do not overlook the statistics that show or reveal fewer CMs in peace time. They presumably will even become fewer, at least in peace time.
- 6.90. The decision in Tyler does not require change of the system of dual roles. Nor do the US cases.

6.91. Recommendations

1. Consideration should be given to the establishment of the equivalent of a Court Administration Unit, independent of the CA, outside of his chain of command and confidential reporting chain, by the appointment of an independent tri-service officer who will also perform the functions of selecting members of a CM. This is said upon the assumption that there is not yet support for the UK scheme of a Court Administration Officer who has taken over many of the CA's powers.
2. If the present system is to be retained then:
 - (a) The CA should wherever possible appoint, subject to exigencies of service, persons from outside his command, outside of his confidential reporting chain, and outside of the accused's unit.
 - (b) The selection of CM members should be from a "large pool", and as a desirable objective be as random as possible. If appropriate, the matter of the establishment of a tri-service "pool" situation could even be the subject of consideration, to accommodate the few CMs held, and meet, if necessary exigencies of service.
3. That there be a prohibition upon consideration of an officer's performance as a member of a CM being used to determine qualifications for promotion or rate of pay or appointment. Further, that the officer reporting on efficiency of the President or members should not take into account the performance of duties of the President or members at any CM. Section 193 protects such a member during performance of his/her duties as a member. There is a case for

implementing the spirit of such section "generally", to embrace a situation of post the performance of actual CM duties.

Review of CM / DFM trials by Authority other than CA

- 6.92. There appears to be consensus among the Chiefs of Staff that reviews of CMs and DFM trials could be carried out by an Authority other than the CA. A CA is appointed under s 102. A reviewing authority is appointed under s 150. They may or may not be in fact the same person. A review under s 152 may be carried out by a person who is not a CA. This is presently the position in the Navy and is carried out by the Assistant Chief of Naval Staff-Personnel, with transcript delivered to Navy Headquarters, Canberra. DNLS is involved in this process as well. Navy has not apparently encountered difficulties with this system. The CGS position is that a review of a CM could be conducted by an authority other than the CA. As the figures reveal, there are very few CMs or DFM trials in the Air Force, and the matter is not one of real significance in that service.
- 6.93. I would note in passing that the (UK) **Armed Forces Act** provides for the establishment of a separate service reviewing authority to conduct a review of each case. In the UK, findings and sentence of CMs will now be reviewed by the Army Reviewing Authority or the Army Board with advice to the reviewing authority from the JAG or one of his staff. An accused may petition the reviewing authority but there will be automatic reviews of CMs whether there is a petition or not. This said, in the UK an accused has a right to apply for leave to appeal against findings and a new right to seek leave to appeal to the Courts Martial Appeals Court against sentence. Appellate rights are exercisable post review. Nevertheless, views have been expressed, at the CA level, that there are few difficulties encountered in reviewing proceedings of trials which have been convened since there are the requirements for binding legal advice which protects rights. Indeed, argument is advanced that reviews should be done by the CA on the basis that the commander has

responsibility for command of all persons within his/her command. However, despite these views, the requirement that review be carried out by an authority other than the CA would assist in neutralising objections to multiple roles being performed by a CA and help meet objection that a prosecuting authority and a reviewing authority may be the same authority.

- 6.94. It is appropriate to state that in Canada, the SAG has recommended that because there are appeal rights against conviction and sentence, there should be repeal of the sections providing for review of proceedings of a CM by the JAG where the appeal period has expired and no appeal has been made. In Australia, there is an appeal against conviction by a CM or a DFM yet such does not preclude review of a finding of guilt. I see no reason to change this situation, which is an additional protection to the accused. This said, the matter of abolition of the review of CM proceedings might be considered justified if an appeal against sentence be also permitted.

6.95 Recommendation

1. That reviews of CM proceedings and DFM trials be conducted by an authority other than the CA.

Sentencing

Who should sentence at a CM?

- 6.96. There is ongoing debate in relation to the existing system of sentencing by a CM. The position of CGS is clear that sentencing should continue to be carried out by the President and members of the CM.
- 6.97. This is a question that has been also considered by me. There are different views. There is debate (but not agreement) as to who should sentence, and

whether in fact reasons should be given for the sentence. There is some acceptance that the present system of sentencing is time-consuming, since it is not performed by the JA alone. There are also questions as to its cost-effectiveness. However, in respect of civilian disciplinary tribunals eg for lawyers, accountants and the like, the professional tribunal sentences as well as giving reasons for such sentence.

- 6.98. In the UK, under the **Armed Forces Act**, the JA, whilst a member of the CM, does not vote on the findings but votes on sentence. Sentencing (in the US) is done by the CM members. Significantly, in Canada, the SAG has now recommended that the military trial judge "who is more likely to have the requisite experience" rather than the court members, perform the sentencing function.
- 6.99. Under the present situation at a CM, the JA sums up on principles of sentencing in open court. Such a summing up is required because of the complex provisions of s 70 and the need for such to be explained to, and implemented at a CM by, its members, (absent the JA doing the sentencing itself). Indeed, all of his/her actions are in open court, which is not only consistent with independence and impartiality but also reflects principles of accountability in the sense that a hearing is in open court and his/her rulings and reasons are publicly given.
- 6.100 The present system requires that the tribunal do their sentencing following directions on sentencing principles given in open court by the JA. In the same way as it is assumed that a civil criminal jury acts in accordance with directions in relation to considering their verdict of guilt or otherwise, one would assume that the CM also acts in accordance with not only the JA's directions in relation to verdict but also in relation to sentencing. There is no reason in terms of experience to suggest that a CM does otherwise. An area of some possible concern is the absence of reasons given for the sentence. This is true, save that, as I have said, the summing-up on sentence is recorded and

available to be seen, and one would assume that the sentence reflects the reasons given in the summing-up on sentence. It seems if the JA is to sum up on sentence it would be surplusage to require the President to give reasons for sentencing. I would observe that in the UK (albeit against a background where the JA is not only a member of the CM but a voting member on sentence), the President is to now give reasons for sentence in open court. This presumably is required because there is no summing up on sentence in open court by the JA. The giving of reasons would indicate that the principles have been applied/understood, assist in a review, or if there were to be an appeal to DFDAT, assist in the appeal.

- 6.101. There can be no doubt that, in relation to sentencing, what occurs at CM is totally different from what occurs in the ordinary criminal courts where, after verdict, sentencing is for the judge alone. However, the CM is a service tribunal exercising disciplinary power and hence there is a strong argument that members of a disciplinary tribunal exercising disciplinary power should do the sentencing. Parliament has seen fit to leave sentencing to it.
- 6.102. There are those who have advocated views varying from leaving sentencing wholly to the JA (and this is the recommendation in Canada) to having the JA retire, as once was the case, with the members when they considered sentence. Others argue that reasons for sentence should, on any view, be given. As I have said, in the UK, under the provisions of the **Armed Forces Act**, the JA retires with the court (of which he is now a member) and has a vote on sentence. Under that Act, the casting vote, if needed, will rest with the President of the CM who will also give reasons for the sentence in open court.
- 6.103. In relation to retiring with the tribunal, it seems to me that there is a fundamental objection to a JA retiring at any time with the tribunal to deliberate on any matter. As one officer observed "It would smack of things being said and done behind closed doors". Likewise, I see objection to the JA being a member of the court, as is now required in the U.K. I would have

strong objections to his having a vote on sentence. Perhaps the changes in the UK and the views of the European Court of Human Rights reflect strong European influences. I do not see how the U.K. situation reflects independence and impartiality, in the sentencing process, perhaps another example of over-reaction to Findlay. In the UK, US, Australian and Canadian traditions, “judges” are not members of the court nor give rulings in private. Under the DFDA, JAs are not members of a CM (nor should they be). In my view, it would compromise the perception of independence and impartiality for the JA to be discussing sentence in the absence of the prosecution or accused, and other than in open court.

6.104. There is a case for the JA doing the sentencing, since he presumably is an “experienced” person who is particularly able to implement the spirit and letter of s 70. That section creates some tension between the need to maintain military discipline and the implementation of principles of sentencing applied by the civil courts. A criticism of the present system is that there are no guidelines as to the sentencing range, or statistics that might assist in determining what is the sentencing range, for a particular type of offence. Further, civil sentencing principles involving, for example, parity of sentencing ie similar sentences for co-offenders or like offenders, may be difficult to implement where the tribunal and not the JA does the sentencing. Unlike a judge in civil life, a service tribunal does not build up a store or reservoir of knowledge of sentencing ranges. Equally, it might be said that, having regard to the relatively few DFMs and even fewer CMs, there is a lack of general materials concerning a range of sentences for particular offences, although such could be redressed by producing from time to time such sentencing schedules dealing with sentences for particular offences by both CMs and DFMs.

6.105. With a JA doing the sentence (as does a DFM), such advantages include marshalling of manpower resources, time and cost savings and perhaps more

- efficient use of resources. The case advanced in Canada, based upon the requisite experience of the military judge, has considerable force.
- 6.106. However, these things said, I believe there would be considerable objection to taking away from the members of the CM the power and right of sentencing or having the JA sit in on sentence as a member, including having a vote on sentence but not on conviction, as is now the situation in the U.K. The decision in Findlay, indeed in Genereux, both based upon either convention or legislation, do not mandate that sentencing be carried out by the trial JA or military judge. The Services would oppose removal of sentence unless required by law.
- 6.107. The absence of reasons for sentencing, however, may create difficulties. In the civil courts, a judge gives reasons for sentence which can be considered on appeal, and if error is shown the sentence may be corrected. The CM system requires that there be a summing-up on sentence but no reasons for sentence are required. It is rather presumed that the sentence has been in accordance with the summing-up and directions given by the JA on sentencing, in the same way as the decision on conviction reflects the JA's summing-up to the members. There are reviews of sentence of CMs and DFMs but no appeal rights in respect of sentence to the DFDAT. The lack of reasons for sentence may theoretically inhibit a proper review in some cases. Experience has not suggested any practical difficulty.
- 6.108. I am not yet persuaded that the present system needs changing (perhaps since CM trials are so few). This said, were the situation to be changed, with there being no summing-up on sentence, then at least reasons for sentence would need to be given in open court by the President, or sentencing left wholly to the JA. Under the present system, the tribunal when sentencing, is exercising disciplinary power and is bound to act judicially in doing so. The giving of reasons even by a non-ordinary court, eg a disciplinary tribunal exercising judicial power, can be seen as being not only an example of due process of

procedural fairness but also as an incident of the exercise of judicial power. These matters would need to be considered were sentencing not to be dealt with by the court after a summing up by a trial JA.

6.109. It is appropriate to conclude this point by observing that the decision in Tyler does not cast doubt upon independence or impartiality because a CM sentencing failed to give reasons for sentence or because the court rather the JA does the sentencing. The European Court of Human Rights in Findlay appears to have considered the absence of reasons for sentence as being an undesirable one, noting that there was no provision for giving reasons by the CM, for its decision (see pars 24 and 46). This situation has now been addressed by the new legislation.

6.110. Recommendation

1. Whilst the matter could be the subject of further study, it is not necessary presently to recommend a change in the current system.
2. Indeed at the service level, in serious cases where a CM is justified, I believe that there would be considerable opposition to taking powers of sentencing away from the court itself.
3. Despite what I have said in 2 above, I do not consider that one should ignore the argument for the trial JA imposing sentence and giving reasons for such. I believe that support for his doing so would be strengthened were appeal rights in respect of a CM sentence to be conferred. The issue should thus be further considered.

Appeals on sentence of a CM or DFM

6.111. There are no appeals on sentence, or rights to seek leave to appeal against sentence, under the Act even from a CM or DFM trial. Whilst there are

provisions for review, there are no provisions for appeals from CMs or DFM trials in relation to sentence, as I have said, to the DFDAT. The position is otherwise in relation to CM sentence proceedings in Canada (where there are also appeal rights on sentence) and now is otherwise in the UK in consequence of the **Armed Forces Act 1996**. As I have observed, the legislation does not require the CM to give sentencing reasons and permits the JA to sit (but not vote) with the court (in private) when sentence is being considered. In Findlay, the Commission specifically adverted to the absence of appellate rights in relation to sentence, as a factor relevant to whether the Army GCM was institutionally independent. Subsequently in the European Court, it also regarded the absence of appeal rights in relation to sentence as being an adverse factor militating against independence and impartiality generally of a CM under the **Army Act**. In the UK, there are now conferred appellate rights in relation to sentence of a CM to the civil Courts Martial Appeals Court conferred by the **Armed Forces Act**: s 17 and Sch V. The accused now has a right to apply for leave to appeal to that Court. Rights of appeal are exerciseable after a petition to the reviewing authority, but there still will be an automatic review in relation to findings and sentence. As noted, the SAG in Canada has now recommended that sections relating to review of proceedings of CMs by the JAG, where the appeal period has expired and no appeal has been made, should be repealed, on the basis that there are full appeal rights.

6.112. It has not been suggested by the High Court in Tyler that the absence of appellate rights to the DFDAT, in relation to sentence, adversely reflects on the independence of a CM or DFM trial.

6.113 Recommendation

1. A good case is established for now considering the conferring of rights of appeal (by leave) in relation to sentences imposed by a CM or DFM. There is no pressure for change from those interviewed or who have put submissions to me. However, I would also observe that, were

appellate rights to be given in relation to sentence, the justification for requiring stated reasons for particular sentences would be considerably increased. Amendments would also need to be made to s 20 of the **Defence Force Discipline Appeals Act** to deal with rights of appeal in relation to sentence.

2. No case is made for a prosecution appeal or seeking leave to appeal against sentence. Whether the ADF should also have a limited right of appeal in respect of sentence would be a highly controversial issue. The situation with a disciplinary tribunal exercising disciplinary power is not quite analogous with the position of the prosecution in relation to prosecution appeals against sentence on a ground of manifest inadequacy in the ordinary criminal courts. The position in the civil courts is that the Crown may address on sentence at the trial, and does, in some cases, have a duty to do so.

The recording of "no conviction" by a CM, DFM or Summary Authority

- 6.114. This is an issue that was addressed by some who made contributions to the study. It may be that it is a matter that has greater significance at the summary trial level. However, the issue is by no means so limited.
- 6.115. In ordinary sentencing for civilian offences, there is limited scope for finding that facts have been proved, but providing that no conviction be recorded. There is no provision for such a situation in the DFDA. There is, however, provision for conviction but without punishment: s 75. That is a different matter. However, there is some force in the argument that it might be thought that the discipline officer provisions of s 169A (which could be perhaps expanded for use in cases involving officers) could be a factor militating against the introduction of such a provision. There is a body of valid opinion, at least in relation to summary authority proceedings, that a "no conviction" provision would not only be a useful option but would also assist in upholding

military discipline. Indeed, it was suggested by some that the fact that a conviction remaining on a conduct record for 10 years may even, in some cases, influence the non-charging of an offence under the Act. Others assert that this new discipline officer scheme has the effect of permitting matters of a minor nature not to be dealt with at all under the Act, and that that sufficiently addresses the matter. Again there are those who are content that whether or not there may be a conviction is a matter factored into the decision to charge.

- 6.116. I am bound to say that, at least at the CO summary authority level, there is perhaps stronger support for a power to record no conviction than at the more senior levels where views are to the contrary. The CGS position was that it was unnecessary to introduce the ability to “find the facts proved” but not record a conviction. Those performing summary authority jurisdiction would support it for a variety of reasons ranging from it being a useful disciplinary “option” (merely to charge under the Act and bring an offender to trial is a salutary lesson in itself) or on the basis that it has merit in particular types of cases, eg particularly those involving a lawful command and there might be an “explanation” for non-obedience. Others justify it to meet situations where an offence may be charged under the Act which may in truth be an offence arising from “poor management”. They assert that the fact of a trial having taken place and proving the offence may in itself be a sufficient lesson and an incentive to good behaviour.
- 6.117. That a conviction of itself (with record), albeit without punishment, may have more severe potential detrimental consequences than any punishment, is clearly recognised by a body of opinion in the services. I believe the option is not inconsistent with discipline needs, nor with the maintenance of discipline. It may provide morale benefits in appropriate cases.
- 6.118. The arguments (and there are good ones) for and against are nicely balanced. That said, the issue is not strictly an issue really of independence or of impartiality.

6.119. There is no legal requirement for such a provision. The cases do not support such a requirement. The issue is perhaps rather a collateral one that has arisen in the course of my study. Hence my raising and addressing the matter.

6.120 Recommendation

1. That consideration be given to the inclusion of a “no conviction” option in respect of an offence charged under the Act. Such option would recognise that there may be good reasons for no conviction being recorded by a service tribunal.

Membership of Courts Martial

Eligibility

- 6.121. A question examined by me is whether perhaps a point has been reached whereby the matter of eligibility for membership of a CM should be reconsidered. The present position is dealt with by s 116 of the Act. In effect, persons to be eligible must be officers, and have been for a period of no less than three years, and must not be of lower rank than the accused.
- 6.122. It is true that decisions such as Genereux in Canada and Findlay do not suggest that CM independence or impartiality requires that persons other than officers should be eligible for membership of a CM. In the UK, following the decision in Findlay, the House of Commons Armed Forces Committee considering the **Armed Forces Bill** did explore the question of eligibility of warrant officers, sergeants and the like for membership of CMs. In the result, however, as the **Armed Forces Act** reveals, officer eligibility still remains the test: see eg s 84D of the **Army Act**. In Findlay, the European Court did not suggest that the absence of members other than officers cast doubt upon the

independence or impartiality of the tribunal. In the US, it has not been suggested, nor has experience dictated, that eligibility should be confined to officers only. Indeed, Article 25(b) makes specific provision for warrant officers "on active duty" to be eligible to serve on GCMs and SCMs for any person other than a commissioned officer. A similar recommendation is now being made for change in the eligibility situation in Canada. Further, provision is made for "enlisted members" (not being members of the same unit as the accused) being eligible for membership of such CMs if the accused person has made such request in writing, in which event the membership of the CM shall be not less than one third of the total membership (subject to "physical conditions or military exigencies"): Article 25(c)(2). I am not recommending the eligibility of the equivalent class of person. Perhaps one significant step at a time. Again in the US, no person can be tried by a CM, a member of which is junior to him/her in rank or grade: Article 25 (d) (1). The point to be made is that in the US it has not been demonstrated that such provisions as to eligibility undermine the authority of tribunals, or discipline, or even make such less efficient, competent or workable. A further point to be made is that in the US, an argument relied upon to support the view that general and special CMs meet the requirements of the due process clause is, inter alia, because of the presence of Article 25: see Weiss.

6.123. However, the Canadian SAG has recently recommended that non-commissioned officers of the rank of warrant officer, rather than only officers, should be eligible to serve on Disciplinary and General CMs provided that the non-commissioned member is equal or senior in rank to the accused. This provision reflects Article 25 (b) of the US UCMJ. No recommendation has been made that the eligibility should depend upon any written request by the accused, or that if he so requests, there be a quota of membership.

6.124. The High Court in Tyler did not suggest that independence of the CM required in law provisions such as Article 25 or that the existing eligibility provisions of s 116 DFDA were not adequate to preserve independence.

Indeed, the section was referred to as being relevant to the independence of the CM.

- 6.125. I believe that there is a very strong case for change based upon a number of factors. I would commend for consideration a change so as to make eligible for membership on a CM those persons who at least are also eligible for appointment as discipline officers under s 169B. Were such a case for change to be implemented, s 116 would need to be amended. If change is to be considered, perhaps such could reflect the provisions of Article 25 (b) of the US UCMJ in turn now being recommended by the SAG as being introduced in Canada. Article 25 (b) specifically refers to warrant officers being eligible. The enlisted members provisions and qualifications in Article 25 (c) (1) UCMJ do not apply to the eligibility provisions relating to a warrant officer referred to in Article 25 (b) of the UCMJ. The SAG has not recommended that the equivalent of the "enlisted man" provisions of Article 25(c)(1) be introduced. Nor do I.
- 6.126. The factors emerging from the study in support of such an approach may be summarised as follows. First, if the services are prepared to entrust certain duties under s 169B to warrant officers, it is difficult to see why they should not be entrusted to perform duties in a CM of persons of lower rank. Second, there is the analogy with the jury system, ie "trial by peers"! At least the class of "peers" would be expanded. Third, the bringing of a wealth of "other rank" experience to the judgment exercise. Indeed, many suffiofficers may have what might be called wider "coal face" experience than junior officers of only 3 years' standing. Fourth, many of such officers (particularly in specialised technical units) are highly educated despite not being officers. Fifth, the fact is that warrant officers are seen as middle managers (as are majors or their equivalent). The services are attracting perhaps a higher educated class of service members. It is difficult to see why warrant officers at least could not perform membership duties since generally they have a wealth of practical experience and knowledge of military affairs and as one senior officer

observed "a capacity to speak forcefully". Sixth, there are matters of perception, as well as the impact on matters of morale. There are those who have contributed to this study who have suggested that officers are perhaps dealt with more leniently by CMs than other ranks. Seventh, many disciplinary tribunals (dealing with professional conduct) have "equal" peer representation. Indeed, industrial disciplinary appeal boards under public service type legislation have an employee representative. Eighth, by making warrant officers eligible, an election for a DFM/CM trial under s 131 may become even more meaningful at least in terms of appearances. Ninth, as one senior officer said "it would be a good opportunity to bring military justice into the twenty-first century". Tenth, it would perhaps even strengthen public community support for the system. Eleventh, there is the avoidance of perceptions of different standards for officers. Twelfth, there is now the recommendation for change in Canada and the adopting of a similar eligibility provision to that found in Article 25(b). Long experience in the US has not suggested adverse impact on command, authority or discipline by a provision such as Article 25(b) relating to eligibility of warrant officers. My conclusion in relation to eligibility of a warrant officer or equivalent is not dependent upon the twelfth factor, indeed it is a view arrived at long before becoming aware of the Canadian SAG recommendations.

- 6.127. It is appropriate if I here indicate the position of the Chiefs of Staff on this matter. As I would understand the position of CNS he would have no fundamental objection to warrant officers being eligible to serve. The CGS position is that a "soldier" could be a member of a CM if only to determine guilt but should not be involved in punishment. In view of his position that sentencing should remain with the President and members, CGS believed that "soldiers" should not be members at CMs. Another argument advanced to support the status quo that only officers should sit because the "whole system was based on command", appears to have been clearly rejected in the US where there are numerous CMs. I do not believe it is a valid argument. The experience and knowledge of military personnel of warrant officer rank I

believe would be of considerable value when it comes to issues relating to conviction in many cases, and even going to mitigation of punishment and in relation to sentencing generally.

- 6.128. In addition to the views of Chiefs of Staff I have considered a number of very strong views advanced by senior officers in supporting eligibility of at least warrant officers. However, equally, there is opposition by some CAs and by senior officers based on lack of education, analytical skills or capacity to fully articulate on the part of warrant officers. With respect, I do not accept the force of the contrary views.
- 6.129. It is appropriate to observe that support of senior CAs appears to be perhaps divided along service lines with Air Force supporting eligibility upon the basis of strengthening command and morale. There is Navy support extending even to those who hold the rank of Chief Petty Officer. Below this person there would not be enough experience. As among the senior Warrant Officers of the Navy and Air Force, both supported such eligibility in principle at the level discussed.
- 6.130. No significant objection was voiced in principle by the many others who put submissions to me and/or were interviewed.
- 6.131 Recommendation
1. There is a good case for amending s 116 to make warrant officers eligible for membership of CMs. Whether or not, after a period of time, lower ranks could/should be involved may depend upon experience involving the significant change proposed and how, if made, it works out in practice.

2. Specifically that non-commissioned members of the rank of warrant officer be eligible to serve upon a GCM or RCM provided that the non-commissioned member is equal or senior in rank to the accused.

Appeals from Commanding Officers Trials

Generally

- 6.132. As has been indicated, the majority of the work under the Act is done at the summary authority level. There can be no dispute that summary authority service tribunal trials are essential to maintaining discipline within the units. The work at the summary trial level is either performed by a SUBSA appointed by a CO under s105(2), by a SUPSA or by a CO. It is only in respect of a trial by a summary authority that the matter of an elective punishment arises. Indeed, in the Air Force, there are few CMs and DFM trials. Proceedings under the Act are normally at this level, frequently with Air Force legal officers involved. The CO is a service tribunal under s 3 of the DFDA and has significant obligations when acting, imposed upon him by DFDR r 22. Again it ought not be overlooked that whilst the summary authority is exercising disciplinary power under the Act, it is bound to act judicially. Next, it is clear that conviction carries with it serious consequences. Significant punishments, including elective punishments, can be imposed, with long term adverse consequences for the member convicted and sentenced.
- 6.133. It is appropriate for me here to repeat that neither the Canadian decision in Genereux, nor the European Court's decision in Findlay dealt with the position of the summary authority in relation to the exercise of military justice in terms of independence or impartiality. This said, the recent SAG report in Canada has now made a number of recommendations to address what were perceived to be some constitutional concerns over the validity of the summary trial and to improve the system, including making it favour the accused. In the

UK, the major change introduced by the **Armed Forces Act** concerns the right to elect trial by CM. Officers dealing with charges summarily must offer the accused an election in all cases. Nor in **Tyler** did the High Court deal with these issues in the summary authority context.

- 6.134. Concerns have been addressed in relation to the position of summary authorities by service members and legal officers in the course of this study. The decisions of a summary authority are subject to review, but not by the next superior officer to the summary authority (save in cases of convictions by a subordinate summary authority: s 151). In his **1994 Report** the then JAG observed that:

“In peacetime within Australia it is difficult to deny the prospect of a rehearing before a DFM: certainly if, on the record, matters appeared which suggested to such an officer a rehearing was appropriate”.

- 6.135. A similar point was made by him in his **1995 Report** when the then JAG observed:

“In peacetime within Australia a case exists for a formal appeal system, perhaps to a DFM. It may be desirable for that officer to view the record after an appeal is made, before determining whether or not a rehearing is justified”.

- 6.136. I note here the reference to “in peacetime within Australia”. I recognise the problems associated with allowing an appeal or rehearing in respect of the exercise of summary authority jurisdiction either in peacetime outside of Australia or on operations. That said, nevertheless, there exists a right of appeal to the DFDAT in respect of CM and DFM convictions also for offences committed outside of Australia: s 20, which is of general application. The second observation I would make perhaps reflects what has been said earlier that there should not be different “standards” of justice according to whether the offence is committed abroad or in peacetime Australia. In the Defence Efficiency Review (DER) it was stated “we must structure for war and adapt

for peace”. That said, at the summary authority level, where discipline may demand an immediate response, a good case can be made for there being either no appeals or restricted appeals. Indeed, within the Act itself there are provisions that recognise that the exigencies of service may demand different responses: eg s 131(2)(b) (where the right of an election may be denied). There is a case for exigencies of service to be accommodated in any appeal type situation.

- 6.137. Nevertheless, it is difficult to see why necessarily a distinction should be made between permitting an appeal from a summary authority when sitting within Australia, and one when the summary authority has sat outside Australia. First, the review process already in place makes no such distinction. Second, the consequences of being found guilty of a service offence and being sentenced (whether tried in Australia or overseas) is the same.
- 6.138. The next observation that I would make is in respect of the suggestion that a case exists for a formal appeal system to a DFM, qualified by perhaps the DFM “viewing the record after an appeal is made before determining whether a rehearing is justified”. It is not clear whether such an appeal postulated is one against conviction or sentence or both. As at the present time there is a qualified right of appeal in respect of a CM or DFM conviction but not against sentence. That appeal is circumscribed by the requirement that “an appeal on a ground that is not a question of law may not be brought except by leave of the Tribunal” s 20 **DFD Appeals Act**. Section 22 purports to prevent frivolous or vexatious appeals, whilst a quashing of a conviction is upon similar grounds to those found in s 158 of the DFDA (dealing with grounds for quashing a conviction by a reviewing authority): see s 23. It is to be observed that as in the case of s 158(1)(c), s 23 does not in terms provide for the quashing of a conviction as the result of a wrong decision on a question of **fact** (my emphasis).

- 6.139. However, as I understand it, the type of appeal postulated by the former JAG is a qualified one, and in effect would confer appeal rights (in some cases) in respect of summary authority convictions (but not including subordinate summary authority convictions) in the same way as some appeal rights are conferred in relation to CM or DFM convictions.
- 6.140. To confer any appeal rights to a DFM in respect of any summary authority conviction (or sentence) would involve a significant change in thinking as regards the administration of discipline at the CO level. It raises questions as to “when, where, in what circumstances, and why” the need. I would also raise questions as to whether the present elaborate and comprehensive review system (ss 151-155 of the DFDA) should be retained, or qualified, in cases where an appeal was exercised in relation to a summary authority decision. To introduce a system of appeals could have unsettling and far-reaching consequences, not merely in terms of cost and administrative burdens, but also in terms of “opening the flood gates”. Thus, even if appeals were to be considered appropriate in respect of specific classes of offences, then a sense of injustice might be generated, in that service members convicted of other classes of offences would have no appeal rights. Alternatively, limited appeals in a particular class of offence might result in alternative offences not so included being charged. Again, as has been suggested, were appeals to be allowed in respect of the elective punishment type of case, such might even in some cases result in punishments of a non-elective type being awarded to avoid appeals.
- 6.141. The introduction of any appeal system would need considerable legislative change. Conferring of rights of appeal to a DFM, even limited rights, would require the jurisdiction of a DFM to be expanded. His jurisdiction is now fixed by s 129. Specific appeal rights would need to be conferred. Jurisdiction is presently invoked by a reference from a CA under s 103(1)(c). The stay of execution of punishment provisions (s 176) would need to be amended. These are some legislative changes that immediately come to mind.

- 6.142. Another matter to be mentioned touching upon the proposal in the **JAG's Report 1995** is whether in an appeal of the type postulated, procedural fairness would enable an accused to put written (or oral) submissions to a DFM in relation to the record. The right to put further evidence before a DFM would also arise for consideration and would need to be accommodated. The right of a reviewing authority to receive further evidence is accommodated by s 158(2) of the DFDA. The right of the DFDAT to receive further evidence is provided by s 23(2) of the **DFD Appeals Act**.
- 6.143. Thus, to permit of any appeal from a summary authority decision would involve considerable change, consequences and ramifications, much of which may not even be recognisable. Indeed, another question would arise: should there be a further "appeal", for example, by case stated, on a question of law in respect of a decision on any summary authority appeal by a DFM to the DFDAT?
- 6.146. Against this background it is appropriate to observe that there is in place an elaborate review system in respect of summary authority decisions. In making this observation, even in the case of a SUBSA (whose jurisdiction may further diminish as the effects of the s 169A Discipline Officer provision has greater impact), there is an automatic review by a CO of convictions and punishments by SUBSA in the command. Indeed, a commanding officer may transmit the record to a reviewing authority. A CO may obtain a report of a legal officer under s 154(1)(a). In the case of the decision of a CO /summary authority there are elaborate review rights: ss 153 to 155 including by a Chief of Staff. Such review is of conviction and sentence. Where legal opinions are expressed by the JAG/DJAG (who are presently all State Supreme Court judges), they are binding. Thus, a comprehensive system of review is in place. Indeed, that the system works is also supported by the fact that despite the number of summary authority proceedings, there are few reviews that ultimately involve a Chief of Staff under s 155. Such in itself could suggest

that the system of review operates in a highly satisfactory manner. It is to be observed that in Canada, the SAG, when noting that there was no effective review as appeal from summary trial convictions and /or punishments, recommended a review process at least in cases where the accused has been provided with an election to opt for CM rather than summary trial, since those are instances which are at the upper end of the scale of punishment in the summary jurisdiction. Australia has long had in place such a review system, indeed a general review process in relation to summary trials.

6.147 In the light of the reference by the former JAG to a "rehearing", it is appropriate to note that in the civil area, there are essentially three kinds of appeal: (i) an appeal "de novo" (one starts again, ie a fresh hearing); (ii) appeals both on fact and law but upon the basis that the appeal of fact is dealt with upon the material which was before the court appealed from; and (iii) an appeal on a question of law: see Victoria Stevedoring & General Contracting Pty Limited v Dignan (1931) CLR 73 per Dixon J at 106-108. Of course, the legislature may provide for an appeal of a different kind.

6.148. In New South Wales, appeals to the District Court from summary decisions of magistrates are by way of a hearing de novo. There are also appeals from Local Courts (Magistrate's Courts) exercising summary jurisdiction for all offences including even those where an accused (or in some cases the prosecutor) has elected to have certain types of indictable offences dealt with summarily. Such appeals to the District Court are to a judge sitting alone. Having made this comparison, were appeals to a DFM under the Act to be contemplated even in a restricted class, from decisions of a summary authority, one would be loath to recommend a fresh de novo hearing. It would be wholly impracticable in the military context, given need for speed, exigencies of service, logistics, dispersal of witnesses, manpower requirements and cost. However, these objections would not apply were a rehearing to be contemplated under the Act, whether on fact or law. Such should be confined to the factual material presented before the summary authority, but with

further evidence being admitted in circumstances contemplated by a provision such as s 158(2) of the DFDA, appropriately modified. Exigencies and service demands and needs, in a practical sense, would make it almost impossible to justify appeals from SUBSAs. On the other hand, a right of limited appeal could be validly argued also in relation to SUPSA proceedings.

- 6.149 Were there to be a limited right of appeal, other requirements for rehearing would involve the availability of documentary evidence and at least an audio tape of the oral evidence (which could be transcribed if required).
- 6.150. However, whilst objection to a right of appeal from a summary authority might be raised by reference to arguments like the "opening of the floodgate" argument, or might create problems were there to be an appeal in respect of a matter dealt with overseas, it is hard to see why such would be valid arguments, given the limitations, and the paucity of the number of petitions for review currently under the Act. Secondly, a rehearing in a case where an appeal might be justified would be limited to the type of rehearing discussed above and obviate the need for reviews.
- 6.151. Senior officers have expressed views that the present system as it operates is highly satisfactory, and that nothing should be done that makes a CO's role unworkable, more difficult, or which might even undermine his responsibility for command discipline. Concern has also been expressed that nothing be done to undermine his/her authority particularly bearing in mind that the CO determines, for example in the Army, all aspects of battalion life, including discipline, which is essentially a command matter. Thus, some very senior officers are opposed to any appeal system at all on the basis that they have never seen excessive CO punishments (if anything, it is suggested some are too lenient), that the present system is adequate and that if punishments are too excessive, "the system will correct them"!

- 6.152 There has been some debate whether, if there be a further hearing, it should be by review, not by way of appeal, with reviews, for example, to a SUPSA. The argument is that matters should be kept within the chain of command. With respect, I cannot see the point of having a review by a SUPSA.
- 6.153. My study also reveals that some officers are of the view that there should be no reviews at all. In the UK, there is no longer even an automatic review system (against a background of an unqualified right of election between summary trial and CM). I see no reason for recommending such an approach. In Australia, there are both review and appeal rights in respect of CM and DFM convictions. Secondly, the DFD Board of Review (at 164) in 1989 rejected the abolition of the automatic review, observing that the review process protected defence members from injustice and harsh treatment and enabled commanders to exercise effective supervision of the disciplinary process in their command. I have no reason to differ from these views. The automatic review system (of which there is no civil counterpart) exists for the benefit of the accused. My study suggests it works well.
- 6.154. Again in the course of my study, views were expressed to me that Regular legal officers do perhaps, lack sufficient practical experience properly to report to a reviewing authority in accordance with s 154(1)(b). The point made was that the qualifications and experience for "Base" legal officers to advise upon reviews was questionable having regard to their lack of adequate experience in the general criminal law. However, even assuming such point to have validity, the problem could be addressed by referring matters to trained reserve legal officers. A further point made is that Base legal officers may have even been involved or consulted in relation to the preparation or the presentation of charges before a summary authority or even been consulted by a CO during the course of a summary trial (itself an undesirable practice). Absent exigencies of service, a s 154(1)(b) reporting officer should generally also be independent of the prosecution process and independent of the reviewing authority.

- 6.155. Again some views were expressed to the effect that whilst summary authorities were happy to retain elective punishments, there were others who expressed views that the power to impose elective punishments could be removed or at least reduced. There were particular concerns addressed in relation to the availability of elective punishments particularly involving that of reduction in rank. Nevertheless, there were other views to the effect that the very presence of elective punishment rights supported the adequacy of the present review system and militated against any further appeal rights.
- 6.156. Were rights of appeal to be conferred, and there are some valid arguments to support such in some cases, then perhaps there might need to be an identification of a class of case where such appeals could be brought to, perhaps, a DFM. The proposal in the **JAG Report 1995** might in terms not be "limited" at all, subject to a DFM viewing the record after appeal is made to see whether a case for a rehearing is made out.
- 6.157. There is a case not to restrict a right of appeal, for example, merely to the elective punishment situation, but apply it to all cases where, for example, there has been a 'not guilty' plea. Indeed, in the past, during the currency of the Manual of Naval Law (between 1970 and the commencement of the 1982 Act), Navy required a transcript where there was a 'not guilty' plea and conducted a full review on the transcript. A similar practice could be adopted in relation to an "appeal", subject to the further evidence issue being also borne in mind.
- 6.158. Another case might be where there was an elective punishment imposed or where one could have been imposed.
- 6.159. I acknowledge the difficulty of determining upon criteria for permitting an appeal, lest the flood gates be potentially opened. Indeed, if one were to have it fixed by reference to an elective punishment case, then there might be a

deterrent to the proper imposition at CO level of an elective punishment in the appropriate case. It is difficult to identify a threshold for conferring an appeal.

6.160. Another possibility is to restrict an appeal to cases where the convictions are for serious offences or even for offences not purely of a disciplinary nature, leaving the latter to be subject of review under the current provisions. Next, in relation to the matter of any appeal from a CO, one cannot ignore the election provision situation. There is, I believe, some relationship between the two. I have already referred to the U.K. situation. There are no appeal rights in respect of summary authority proceedings. Review rights are limited. However, there is a full right of election for CM trial, which is not a situation that exists in Australia. Indeed, even in the US, there is a full right of election for trial by CM even in cases where Article 15 (CO's non-judicial punishment) or Article 16(3) (summary CM) proceedings are involved. The elections in the U.K. and U.S. are not qualified by reference to likely punishment.

6.161. However, it may be that some of the concerns in relation to the matter of whether there should be appeals (as opposed to reviews) from summary authority decisions, perhaps relate to cases where an elective punishment is likely to be imposed by the summary authority in the event of conviction: s 131(1)(b). In Canada, the SAG has recommended that this problem be addressed by a requirement that whenever an accused is given an election to be tried by CM, the accused must be afforded a right to consult with legal counsel to ensure that the election is made on the basis of "full knowledge and complete information and that the election be set out in writing". This approach is not dissimilar to that given in the US in relation to Article 15 proceedings and where an accused is required to be advised by counsel before deciding whether to demand trial by CM, as opposed to accepting an Article 15 CO's "non-judicial" punishment. This latter provision presumably reflects a constitutional due process clause background.

6.162 I do not consider that in Australia one should follow the Canadian route. The DFDR r 24 provides that an accused may request the services of a "specified member" to defend him before a summary authority. As I have said, a "specified member" or member referred to in Rule 24, is on any view, capable of including a member who is a legal officer. The Air Force practice at summary level frequently involved the defending officer being in fact a legal officer. The point to be made is that the accused already has a right to be defended by a legal officer if he chooses at a summary authority level. In fact, he is not, in any event, otherwise precluded from seeking advice from a legal officer and may do so. Thus, he already has "rights" of the kind now recommended or postulated in Canada, perhaps even stronger rights, ie of being represented at a summary level by a legal officer. Whilst the Canadian situation may be considered, I do not believe it is essential. This said, there is perhaps some merit in considering what is now required in an election type situation at the summary level under the (UK) **Army Act** not so much in terms of introducing a system of requiring that cases that officers dealing with charges summarily must offer an accused the right to elect in all cases, which I oppose, but rather as a guide to what is required by way of explanation of the election rights. Thus, the right of election must be offered once the officer dealing summarily has decided that the charge has been proved but before recording a finding to that effect. In a sense, that procedure reflects the philosophy of s 131(1)(b) of the **DFDA**. However, Regulations have been introduced whereby, before the accused is asked whether he wishes to exercise his right to elect trial, the officer dealing summarily must explain to him that if he chooses to elect, then: (a) the prosecuting authority may prefer any charge at CM; that it may be more or less serious than the charge being dealt with summarily, and that it might be a charge which could not have been dealt with summarily, (b) if he is found guilty by a CM, the court's powers of punishment could be greater than those available on summary trial; and (c) that he will have an absolute right to withdraw his election within 48 hours of making it, but thereafter, subject to other qualifications, with the agreement of the officer dealing with the charge. There is no requirement for legal advice.

- 6.163. The argument for appeal rights in relation to the summary authority trial would be neutralised were similar requirements introduced by Regulation (as suitably modified to meet the Australian situation of holding DFM trials) to implement s 131 (1)(b). Such, in part, would address an argument for an appeal procedure at least in relation to elective punishment situations. However, I do not consider that there should be an absolute right to withdraw, fixed by reference to a specific period absent reference to a qualifying "exigencies of service" situation. Nor do I consider that an election should require the advice of counsel before being exercised. It would further make technical and increasingly "legalise" the summary authority service tribunal system. But there is good argument for the view that any election should be in writing.
- 6.164. The election dealt with under s 131 of the DFDA is an election in relation to a situation where an "elective punishment" (which may be a significant one, eg reduction in rank with serious consequences perhaps more serious than just a conviction, which might in turn be serious enough), is likely to be imposed. There is no election where the summary authority decides that an elective punishment is not likely to be involved. The right of election is a serious one and where conviction carries with it adverse career consequences, it is not an "absolute" one. It is qualified by reference to where "elective punishment" is likely to be imposed. Indeed, even when made, it may not necessarily be implemented: see s 131(2)(b); s 103(1)(b). Thus, if a CA acting under s 103(1)(b), referred a charge back to a summary authority, presumably upon conviction no elective punishment would be imposed at the CO level. However, equally the accused would be denied a DFM or CM hearing with consequential appeal rights to the DFDAT. Such would be a serious detriment to the accused. I would also note in this connection that where a summary authority denies an election because of exigencies of service under s 131(2)(b), an elective punishment can still be imposed: s 131(7). Although there is no right of appeal against conviction, if on review it appears to a reviewing authority that exigencies would have permitted trial by CM or DFM, the

elective punishment must be quashed, but not the conviction: s 162(3). Thus, the exercise of the power under s 162 does not alter the conviction situation. The service member has still, in effect, been denied his election and appeal rights in respect of that conviction.

- 6.165. Other arguments advanced in support of an appeal are that there is some perception that results are pre-ordained (the person is not charged unless guilty!), that other ranks are dealt with more harshly than officers, that a prosecutor has no power to withdraw charges, and that summary authorities frequently impose higher punishments than DFMs.
- 6.166. To summarise, I can see the force of the argument for a limited right of appeal in cases where an election has been made and not implemented under s 103(1)(b) or s 131(2)(b). In such a case, the accused is denied a trial by CM or DFM and hence denied a right of appeal against conviction to the DFDAT. Apart from this, absent a petition for review by a Chief of Staff, in which event there is a report on proceedings by a JAG or DJAG, the report on proceedings would be by a more junior reporting officer under s 154(1)(b) and not by a more senior reporting officer appointed under s 154(1)(a).
- 6.167. Another option is to allow appeals, in effect, by appropriate leave in cases where a 'not guilty' plea is followed by conviction; or in a case where an elective punishment was imposed or could have been imposed (which is the equivalent of granting appeal rights depending upon the maximum penalty for the offence). This latter suggestion would accommodate an objective test of availability of the elective punishment, even though not imposed. Such an approach would assist in preventing lesser penalties being imposed to circumvent an election. It would not, however, prevent a CO from charging a lesser offence.
- 6.168. Nevertheless, despite the arguments, I do not consider that appeal rights should, on balance, be conferred in relation to summary trials. There are legal,

practical, administrative and financial burdens associated with the introduction of a right of appeal. The present system of review appears to be working well; as illustrated by the few petitions for review by a Chief of Staff, contrasted with the number of matters dealt with at summary level. In a practical sense, if there is a real problem, no doubt a petition will be put in by the accused ultimately leading to it being possibly the subject of report by the JAG or DJAG who are senior civilian judges as well as highly experienced military legal officers.

6.169. I repeat my views that independence and impartiality do not yet demand appeal rights be given from a decision of a CO. The issue of such in the context of independence and impartiality has not yet been addressed in Canada or the U.K. The new **Armed Forces Act** confers no appeal rights (even no automatic review rights, but unqualified rights of election between a CM and summary authority trial). The issue has not been addressed in Australia or adverted to by the High Court in Tyler.

6.170 Recommendation

1. That although arguments are available for a limited right of appeal in some cases from decisions of a CO or SUPSA, at the present time no action be taken to introduce any such appeal rights.
2. In view of the arguments advanced during this study, the issue of conferring rights of appeal, if any, should be the subject of further consideration, particularly in the classes of cases which I have identified.
3. That the present review system has generally proved to be efficacious and provided appropriate protections for defence members, and benefits to the Service, in the streamlining of the administration of justice.

4. That the advantages of any system of appeal from decisions at the summary authority level are outweighed by the disadvantages. The study lends support to the views of the senior officers who oppose the introduction of an appeal system.
5. I am, however, concerned with the submissions that suggest that some s 154(1)(b) reporting officers may not have sufficient experience or training properly to report for the benefit of a reviewing authority. The difficulty could be addressed by training, exposure to the criminal law eg by way of secondment to offices of the DPP, and/or by the employment of reserve officers. The Army particularly does well in this area, frequently using reserve legal officers to do reports under s 154(1)(b). Perhaps a certificate of qualification and suitability to be a s 154 (1) (b) reporting officer could be given by the newly-established Military Law Centre.
6. Subject to exigencies of service, the s 154(1)(b) reporting officer should be a legal officer totally independent of the prosecution process and of the reviewing authority.
7. To assist particularly COs, that increased formalised training and education be furnished to them before they take up the position as a CO and exercise service tribunal jurisdiction as a summary authority. Steps be taken to ensure that they are knowledgeable about their roles in the military justice system and competent to perform them. The new Military Law Centre could play a significant "supportive" role in this area of education, even awarding a "certificate" upon completion of a course.
8. In respect of elective punishments, provision be made for the election to be in writing and for the summary authority to furnish the accused

certain explanations about the election when giving him the opportunity to elect trial by DFM or CM.

Elective Punishments and Commanding Officer Punishments

6.171. This part should also be considered and read with the section dealing with appeals from COs. Firstly, some commanders have expressed concern particularly about having the power to impose any elective punishment at all, and particularly, an elective punishment such as reduction in rank. Some maintain that retention of such powers is essential for command discipline. There are others who assert that elective punishments are required in war zone or operational areas for discipline purposes. There is a strong body of opinion that, at least outside of an operations area, reduction in rank is a punishment that many commanders would like to see eliminated as an elective punishment. Its financial and other consequences are regarded as being so significant, that it is the type of punishment that generally ought not to be imposed at the summary level. What has emerged in the study is that many recognise that reduction in rank, carrying long term adverse financial consequences, is of more concern than either the conviction itself, or the loss of prestige associated with such reduction in rank. As one officer observed "one person takes away" whereas "more than one person" is involved in the promotion process.

6.172. There is support, as I have indicated at least from some, at CO level for a number of alternatives, ranging from there being a right of appeal from a summary authority (at least in some cases) to a DFM, a right of appeal in cases where an elective punishment is imposed, and particularly in cases where there is an elective punishment of reduction of rank. There are those who expound the view that because of the nature of an elective punishment (it may be a serious, significant one) that the election should not be made without legal advice. However, in many instances at present, advice is given by a RSM or equivalent (who is "close" to the CO and may be responsible for discipline and the very institution of the prosecution). There is some education in relation to

rights, including election rights, given during basic training of recruits. The matter of advice upon an election is not a problem in the Air Force where most DFDA matters are dealt with at summary authority level, with legal representation for the accused (DFDR r 24) and with legal representation of the prosecution. Perhaps the matter of independent legal advice for an election has the merit that it might, in part, meet an argument against even limited appeals or limited appeal rights, eg to a DFM. Nevertheless, I am not recommending that an election only be available on the basis of legal advice. What is important is that there be full knowledge of the election right and its implications, in order for an election to be meaningful. I should emphasise that in relation to the election between summary trial and CM, legal advice is not required in the US or U.K. It is also not required in Australia.

6.173. Next, the presence and concern about some of the harsh elective punishments, particularly of reduction in rank, has been said to affect discipline, in that CO's err on the side of leniency, and operates to deter the imposition of the elective type punishment even in an appropriate case. On the other hand, there are many senior officers and CO's who do not accept that there should be any lowering or reduction of the elective punishments, and that their presence serves a useful disciplinary purpose or need.

6.174. There is equally the perception that many DFM penalties are lighter than CO penalties. Yet, if this were true, there presumably would be more "elections". Perhaps one explanation for the absence of more elections is that accused wish to avoid the stigma of CM or DFM conviction, fear the unknown, or that people do not elect because they know they are guilty or want finality as soon as possible, or even elect CO summary trial, as has been also said, because the "accused know the CO".

6.175. It is appropriate to record that in Canada the SAG has, however, recommended the retention of reduction in rank following a summary trial, noting at the same time the recommendation that an accused who is sentenced to detention

following a summary trial, should suffer reduction in rank and salary to "private" during detention, but with full reinstatement of salary and rank upon completion of sentence. In the UK, reduction in rank as a summary punishment has been retained despite the amendments made by the **Armed Forces Act**.

6.176 Recommendation

1. That the elective punishment of reduction in rank be removed as an elective punishment.
2. That, in the absence of appeal rights, the range of elective punishments presently available be reviewed.
3. That provisions (probably by way of regulation) be introduced requiring that an election be in writing and further dealing with the obligations to be imposed upon an officer to provide explanations to the accused when giving him the opportunity to elect.

Training and Education of Summary Authorities

6.177. My study would suggest concerns as to the level of education and training of summary authorities in relation to their obligations under the Act. What should not be overlooked is that the COs are at the coalface of military justice. It is they who administer it and really do most of the work under the Act. The summary authority is a service tribunal like a CM or DFM: s 3 DFDA. It has onerous statutory obligations and responsibilities: see also DFDR r 22. As I have said, in the Air Force there are few CMs or DFM trials, however, there are many summary authority proceedings. The work under the Act is performed by non-legally qualified COs involving matters that would at times perplex even civilian judges. Indeed, COs are often required quickly to apply complex rules of evidence and procedure which could present difficulties even

for the most experienced judge. It is also apparent that lawyers are appearing more frequently in CO summary authority proceedings, particularly in the Air Force, since that is where much of the DFDA work is performed. An accused has a right to be represented by a lawyer if he/she answers the description of being a “specified member”: DFDR r 24 (supra). Where there is such representation the prosecution is likewise normally represented. The CO frequently is given conflicting assistance when there is legal representation (sometimes even inadequate or unhelpful assistance) yet as a service tribunal is bound by the DFDA and by subordinate legislation such as DFDR r 22.

6.178. One would assume that a CO who has been involved who has been involved in the investigation or the laying of a charge would, in the ordinary course of events, seriously consider not hearing the charge of a service offence. This would reflect the spirit of s118 (bias) which applies to members of a CM and a JA, and especially the spirit of DFDR r 22. However, the situation could be improved or made clearer by explicitly providing that, absent exigencies of service, a CO or other officer should not sit as a summary authority if he has been involved in the investigation or the laying of the charge.

6.179. The present punishments capable of being imposed (including elective punishments) are significant. The right of election is not an unqualified, general one but fixed by reference to the likely imposition of an elective punishment. A summary authority may in fact not implement an election in some cases: s 131(2)(b) (“exigencies of service”). The convictions may be for serious offences and have long term consequences. There are at present no appeals from such convictions. The summary authority convictions are subject to review, but not to appeal, although under s 158, findings on questions of fact, may stand in a special position on review.

6.180. The need for a high level of structured instruction and education in relation to the Act, in my view, is obvious. Such has been recommended by the SAG in Canada.

6.181. Further, it is appropriate to observe that a complaint that appears to concern many, is the lack of consistency in sentencing at the CO level, and the lack of available statistics and guidelines to assist in such. Complaint is made that there are some cases where COs turn to “others” for advice on appropriate punishment to be imposed at summary level! There is a significant complaint about lack of parity of sentence in some cases. This is a particular problem in situations where COs have limited powers of punishment, are removed from community standards of punishment for similar types of civil offences (if relevant), and are also required to apply civil principles of sentencing: s 70 DFDA. Further, it is said that one Service may regard a particular offence in a more or less serious manner than other Services, a matter often reflected in Service sentencing, but which may also prove to be a difficulty where the offender is under bi or tri-service command. The matter of the need for short reasons for decisions in some cases has been addressed by me in **Re Heap (1996)**(DJAG advice supra).

6.182. The level of instruction of those who are to be appointed as COs in relation to knowledge of the provisions of the Act, and obligations under the Act and Rules, varies from Service to Service. The content and duration of such instruction also varies. Strong views have been expressed by many COs as to the inadequacy of education or training in respect of the DFDA, and comment may suggest that knowledge and experience is gained not in training, but rather “on the job”. Some make the valid, even good, suggestion that not only should training be more extensive but also that there should be training opportunities involving junior officers under instruction attending at CO summary trial proceedings.

6.183. I am satisfied there is a warrant for change. As presently advised the Air Force
— has a one week course of legal training in place for new COs.

6.184 Recommendations

1. That a structured and in-depth course of teaching and training in relation to the DFDA be implemented for all officers about to be appointed as COs. That course should be the same irrespective of Service.
2. That ongoing education and instruction be given to those who act in the capacity of a summary authority.
3. That sentencing statistics and guidelines in relation to summary punishments be prepared, publicised and made available from time to time.
4. That legal principles discussed in reports of the JAG/DJAGs (and in s 154(1)(a) reports) should be the subject of reporting and dissemination to COs.
5. See recommendation number 7 under the heading “Appeals from Commanding Officers Trials”.
6. That the Military Law Centre provide uniform training and education to COs, before such officers commence to sit as summary authorities, to ensure they are knowledgeable about their role in the military justice system, as a summary authority. The matter of certification by the Military Law Centre or some other body could be addressed.
7. There is a case for providing some basic legal training and work materials to those who may be called upon to participate as a prosecuting or defending officer at a summary trial.

8. That instructions be given, if necessary by statutory amendment, that any Summary Authority (including CO, SUPSA and SUBSA) who have been involved in the investigation or the preferring of a charge against an accused, shall not hear or deal with any such charge against that accused.

Reporting on Commanding Officers in relation to maintaining and enforcing Service discipline

6.185. A matter also of concern is whether, if at all, and by what means, there should be reporting upon summary authorities in relation to their performance of duties as a service tribunal exercising disciplinary power under the Act but in circumstances where such must be exercised judicially. He/she must act in a particular way and has onerous obligations and responsibilities - see DFDR r 22. Neither the role of the summary authority as a service tribunal nor the independence and impartiality of summary authorities has been dealt with by the Australian cases, particularly that of **Tyler**. Nor has the position of the summary authority under s 11(d) of the Canadian Charter been explored by the Canadian Courts particularly in the Supreme Court decision of **Genereux**. It was not considered by the European Court in **Findlay** in relation to Article 6 par 1 of the European Convention. The US Courts have not really been required to address the position. Under Article 15 (which is an administrative method of dealing with offences), a CO may impose "non-judicial punishments", being a means of enhancing discipline, without resort to trial by CM (of which there are three types- general, special and summary). Article 37 (in respect of which Article 98 creates an offence) extends to a military commissioned officer constituting a summary CM. He/she cannot be censured, reprimanded or admonished with respect to any finding or sentence or exercise of his/her functions in the conduct of proceedings. Nor in the preparation of an effectiveness, fitness or efficiency report, or report on such an officer for purposes of determining qualification for advancement, assignment or transfer.

- 6.186. Thus in the US, protection is also given to the summary (CM) authority commissioned officer against command influence. The offence provision Article 98 underpins such a provision.
- 6.187. The only provision in actual terms of furnishing protection and immunity to a summary authority in the performance of his duties is s 193 of the DFDA. That said, there is no provision that furnishes protection for such a person after he/she has performed such duties. Normally it would not be necessary or appropriate for reporting officers to comment upon the performance of a President or member in an individual trial. As regards the JA or DFM, they are accountable since there are appeal rights to the DFDAT in respect of trials in which they are involved. Indeed, there are petition rights. In this sense there is some "open" (ie public) reporting on the performance and discharge of that officer's trial findings/directions of law.
- 6.188. Fortunately, my study has revealed but one case where assessment of performance as a CO sitting as a service tribunal was allegedly contained in an evaluation report. This is the only isolated instance brought to my attention. As I understand it the matter was rectified by a redress. It should not have happened; the fact that it did, however, provides a warning and the need for care to avoid a similar future occurrence.
- 6.189. Despite this episode, I consider that it is proper to observe that many senior officers, including CGS, are of the view that commanders must retain the right to comment on COs/OCs in all aspects of their duties including their performance in maintaining and enforcing service discipline. With respect, one can see the strong force of such a requirement. Indeed, it is a very compelling one. A person must be qualified and fit to do all OC jobs including maintaining and enforcing discipline. The CO must be fit to perform all duties of his command and be judged accordingly on how he performs all his duties including sitting as a summary authority. The performance of duties as a summary authority whether good, bad, or

indifferent is also relevant to subsequent appointment or promotion. He/she must be qualified for different duties (including perhaps, duties of a superior summary authority or even higher role). I believe that on balance at least in relation to COs there should be reporting on how a CO performs his job, so that he may be qualified for positions. The view is supported upon the basis that if there is good performance of a CO, eg in acting as a service tribunal, such may affect a decision to appoint that CO to another or higher rank or position. The opposite may also be true.

6.190. Views have also been expressed that there is scope for perhaps two types of report, ie one report relating to a CO's performance of his duties generally and a separate report for his role as a service tribunal. I am not sure that this is an appropriate answer. Both reports would be seen by those higher in command. There would be administrative burdens, costs and manpower problems in maintaining a dual system of reporting.

6.191. All this said, I believe a balance can be achieved that there should be no reporting on a CO in relation to the performance of his/her duties as a service tribunal. This approach has the merit of maintaining internal consistency in the sense of treating the CO in the same way as the President and members of a CM.

6.192. Recommendation

1. Absent compelling need or legal requirement, I do not commend changing the present system of reporting on COs in relation to the performance of duties in maintaining and enforcing service discipline.
2. There should be no reporting upon a CO in respect of the performance of duties as a service tribunal in a particular case.

The Discipline Officer Jurisdiction. A case for extension to Officers

- 6.193. Although, strictly speaking, the issue of the Discipline Officer jurisdiction does not arise for consideration in terms, nevertheless it is clearly one about which it is appropriate to make, as ots have done, observations.
- 6.194. The matter of such a system in relation to service members other than officers was addressed and considered in the **Board of Review Report of the Defence Force Discipline Legislation May 1989**. Many of the arguments advanced in Ch 4 of that Report in favour of such a system could equally support its extension (with appropriate modifications) to officers of perhaps major and below with discipline officers of higher rank being appointed to deal with such officers. I believe that consideration of the benefits of the scheme support its application to officers in appropriate circumstances, including the message of equality of treatment, cost and manpower savings. In relation to any extension, it is interesting to observe that, based upon my studies, there is strong support for extending the system to at least middle- ranking officers as well. One senior CA was in favour of such extension. Many have not addressed the issue of extension to junior officers because of the newness of the system. The matter has not been the subject of specific comment by the Chiefs of Staff since the issue substantially developed during the course of my extensive study. Nevertheless, for much the same reasons advanced in support of a discipline officer system, and its justification, including reduction of administration burdens, better use of manpower and resources and, I believe, financial savings, there is no significant reason why the discipline officer system could not be extended in such a way as to deal with officers up to, say, the rank of major or his/her service equivalent. In some respects it would reflect the spirit of the Act which now permits even a summary trial for junior officers. There would be the perception of more equal treatment. The extension of the system could assist discipline in that junior officers could be dealt with other than under the Act, but within a structured system of the type

already applicable to other ranks. It would mean, as some officers submitted to me, that instead of officers perhaps not being dealt with at all in circumstances where discipline is called for, such officers would be disciplined. Thus by this means discipline would be enhanced. Further, others have argued that “management” would be improved by extending the discipline officer system to junior officers.

6.195. As another experienced person observed, it could be extended to officers to avoid a perception that they “get away with things”. Other arguments suggest that such a system would, if implemented, permit swift action and could be of particular value in an operational fighting unit. There would also be occasion for its use where there is a situation not calling for involving the DFDA against an officer, or where the circumstances are such that there was no more than a situation where proceedings involving the Act were being but merely contemplated. It would, according to some, be a useful option, with potential for the saving of “costs” and wasted manpower resources associated with bringing of proceedings under the DFDA. It also would have the benefit of producing no “conviction” under the Act, with all the consequences that flow from a conviction. Formalities would be reduced to a minimum with no permanent record of minor infringements being kept. For command there would be no requirement for the technical requirements of a service tribunal to be complied with. There would be savings of time in the implementation of such procedure.

6.196. To extend the disciplinary jurisdiction to officers would involve appropriate legislative amendment.

6.197 Recommendation

1. That consideration be given to extending the discipline officer jurisdiction (with appropriate modifications) to deal with officers holding the rank of major and below.

APPENDIX A

LIST OF SUBMISSIONS RECEIVED
AND
LIST OF ORAL DISCUSSIONS

LIST OF PERSONNEL INTERVIEWED

RANK/NAME

POSITION/UNIT

S47F



s47F



s47F



LIST OF WRITTEN SUBMISSIONS RECEIVED

s22



APPENDIX B

LIST OF ABBREVIATIONS

LIST OF ABBREVIATIONS

ADF	Australian Defence Force
AMR	Australian Military Regulations
CA(s)	Convening Authority(ies)
CASA	Civil Aviation Safety Authority
CM(s)	Courts Martial
CAO	Court Administration Officer
CDF	Chief of Defence Force
CNS	Chief of Naval Staff
CGS	Chief of General Staff
CAS	Chief of Air Staff
DAFLS	Director of Air Force Legal Services
DALS	Director Of ^{ARMY} Naval Legal Services
DCM	District Court Martial
DER	Defence Efficiency Review
DFDAT	Defence Force Discipline Appeals Tribunal
DFDA	Defence Force Discipline Act 1982
DFM(s)	Defence Force Magistrate(s)
DJAG(s)	Deputy Judge Advocate(s) General
DNLS	Director of Naval Legal Services
DRP	Defence Review Program
EDRO	Evaluation & Development Report Officers (PR19)
GCM	General Court Martial
HREOC	Human Rights & Equal Opportunities Commission
JA(s)	Judge Advocates
JAA	Judge Advocate Administrator
JAG	Judge Advocate General
QC	Queen's Counsel
RCM	Restricted Court Martial

SAG	Special Advisory Group on Military Justice and Military Police Investigation Services (Canada) March 1997
SC	Senior Counsel
SUBSA	Subordinate Summary Authority
SUPSA	Superior Summary Authority
UCMJ	(US) Uniform Code of Military Justice
US	United States of America
UK	United Kingdom

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List of Submissions Received & Oral Discussions

Appendix A

List of Personnel Interviewed

List of Written Submissions Received

List of Abbreviations

Appendix B

AR 18
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SUGGESTED TITLE

A Study into the Judicial System under the
Defence Force Discipline Act by Brigadier
the Honourable A.R. Abadee, RFD Deputy
Judge Advocate General

SUGGESTED INDEX TERMS (Include detail on persons/organisations or subject description not included in title)

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