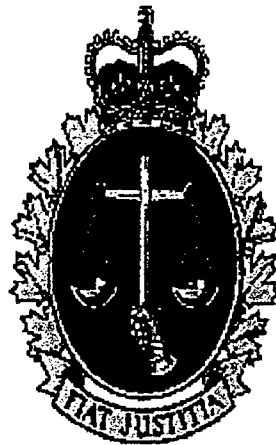


National
Defence



PROVISION OF DEFENCE COUNSEL SERVICES IN THE CANADIAN FORCES

Report of the
Defence Counsel Study Team

15 August, 1997

KF
7307
D44
1997

DEFENCE COUNSEL STUDY TEAM
REPORT
15 August 1997

TABLE OF CONTENTS	PAGE
Acknowledgements	ii
Executive Summary	iii
Chapter 1 - Introduction	1
- Essential Requirements for a Military Defence Counsel System	2
- Meaning of Independent	3
Chapter 2 - Existing Systems	5
Chapter 3 - Evaluation Standards	
- Legal Considerations	21
- Defence Counsel Organization and Roles	28
- Practical Considerations	32
Chapter 4 - Options	
- Regular Force Defence Team	34
- Reserve Force Defence Team	44
- Provincial Legal Aid Inside Canada	49
- Canadian Forces Legal Aid Service (Private Counsel)	53
- Canadian Forces Legal Aid Service (Staff Lawyers)	59
- Employee Takeover	63
- Retention of Civilian Law Firms	66
- Field Reaction to Options	70
- Comparison of Options	71
Chapter 5 - List of Recommendations	74
- Conclusion	78
 Annexes	
Annex "A" - JAG Study Directive	A-1
Annex "B" - List of Consultations	B-1
Annex "C" - Court Martial Statistics	C-1
Annex "D" - Option Costs	D-1
Annex "E" - Option Consultation Results	E-1
Annex "F" - Bibliography	F-1

ACKNOWLEDGEMENTS

In order to develop a reasonably comprehensive report, the Study Team has consulted a considerable number of sources for both background information and suggestions. The Team wishes to thank all of those who made contributions either on the part of their organizations or as individuals. In addition, the Team wishes to acknowledge the excellent support provided by Mr. Shawn Goudge in the development of research statistics and the administrative assistance of Ms. Dianne Tessier and Ms. Nicole Martial.

EXECUTIVE SUMMARY

Introduction

1. The Special Advisory Group on Military Justice and Military Police Investigation Services established by the Minister of National Defence in January, 1997 submitted its report to the Minister on 14 March. Recommendation 7 of that report states that:

"... whenever a Canadian Forces member is entitled to legal advice under the Code of Service Discipline, the Judge Advocate General provide such advice in a manner that is independent of the Judge Advocate General's prosecution and judicial functions."

To help implement this recommendation, the Judge Advocate General (JAG) established the Defence Counsel Study Team with a mandate to obtain background information, develop options, and make recommendations. The Study Team consulted with military and civilian sources on a national scale, including the Canadian Bar Association and the provincial and territorial legal aid societies. It also consulted with the military forces of the United States, Great Britain, Australia, New Zealand and South Africa to determine how other allied forces provide defence counsel services. (see Annex "B" for a list of consultations). In this report, the Study Team establishes standards for evaluating options, develops and analyzes options in accordance with the Study Directive, and makes recommendations.

Essential Requirements

2. The Study Team also developed a list of essential requirements for an independent defence counsel system. In the Study Team's opinion, the system must:
- a. meet the requirements of Canadian law for the provision of such services;
 - b. be, and be seen by Canadian Forces (CF) members as, independent and acting at all times in their best interests;
 - c. be able to provide services in the official language of choice of the member wherever the need for legal advice arises;
 - d. meet the military need for a just, speedy, and efficient disciplinary system;
 - e. be portable, i.e., be usable in all circumstances in which the CF may find itself both in Canada and outside Canada, including in circumstances of peace, peacekeeping, peacemaking and war; and
 - f. be practical and affordable.

Meaning of Independent

3. Based on the legal standards applicable to defence counsel, the Study Team developed a definition of "independent" in the defence counsel context. It is a system

under which:

- a. a defence counsel is free of inappropriate organizational influences that could create, or reasonably be seen to create, a conflict of interest between the defence of the individual client and the counsel's personal interests in maintaining a beneficial relationship with the organization or its hierarchy; and
- b. defence counsel are protected from organizational relationships that could, or could reasonably be seen to, endanger solicitor/client confidences.

Existing Systems

4. The examination of the provision of defence counsel for Canadian disciplinary systems included a review of the CF, Royal Canadian Mounted Police (RCMP), Correctional Services Canada, and Treasury Board policies. The CF provides regular force and reserve force legal officers as defending officers at courts martial. Legal officers also provide advice to accused on elections for trial by court martial and duty legal aid counsel for members arrested or detained. The RCMP do not have the extent of disciplinary powers of the CF. They provide free legally trained member representatives for hearings on the more-serious offences under the RCMP Code of Conduct. Correctional Services Canada does not provide free legal counsel to inmates involved with the internal discipline system. Treasury Board Guidelines do authorize representation for public servants and members of the CF in certain circumstances, but not internal disciplinary hearings.

5. The information from foreign military forces shows that the United States Armed Forces have developed defence counsel systems using military legal officers assigned to defence counsel duties and having a separate chain of command. Except for the Marines, they are still within the Judge Advocate General's organization for the service to which they belong. The British Armed Forces use a legal aid system under which civilian lawyers provide defence counsel services both in Britain and overseas. There are also arrangements for a military legal officer to provide the defence for a court martial being conducted by another service, usually overseas. The Royal Air Force and the Army do not permit their legal officers to act as defence counsel before their own courts martial. In Australia, the accused is entitled to representation by a legal officer at a court martial. The legal officer is almost always a member of the reserves. New Zealand permits legal officers to act as defence counsel at courts martial, but almost all cases are defended under a legal aid system in which counsel are selected from a panel of qualified lawyers. In South Africa, military legal officers provide the defence counsel services. In all of these systems, the accused has the right to retain civilian counsel at his or her own expense.

Evaluation Considerations

6. Before developing options, it was necessary to review legal standards, discuss the defence counsel roles, and look at the practical considerations. The legal standards indicate that the Canadian Forces would only be required to provide funded legal counsel where the accused would otherwise be unable to obtain a fair trial or hearing on an appeal. If a funded counsel system exists, a person arrested or detained must be informed of the system and given a reasonable opportunity to retain and instruct counsel. Any waiver of counsel must be clear and made with sufficient information to make an informed and appropriate decision. If no system exists and the person arrested or detained wishes to contact counsel, investigators would have to refrain from obtaining incriminating evidence from the detainee through lineups or other means until the person had a reasonable opportunity to contact counsel. Any counsel funded by the Canadian Forces must be, and be seen as, sufficiently independent of conflicting interests to provide services with undivided loyalty to the accused and must adequately protect solicitor/client confidences. The accused has a right to counsel of choice within the availability limits set by the courts and the financial and selection limits of a funded counsel system. Any counsel provided must be competent to conduct the defence in the official language of choice of the accused.

Defence Counsel Organization and Roles

7. To enhance real and perceived independence, the Study Team concluded that the defence counsel organization should not share offices with the JAG directorates, the prosecution organization, or the military judges. These counsel should be providing defences at courts martial, acting as counsel on appeals initiated by the Crown or the defence, providing advice on elections for court martial, providing training to assisting officers for summary trials, and providing duty legal aid services for members arrested or detained. In addition, to promote trust of defence counsel as acting in the interests of the member, defence counsel should be providing assistance with respect to applications for redress of grievance and responses to notices of intent to recommend release, and performing such other duties as are authorized in guidelines from the JAG where the member is in conflict with CF or DND authorities.

Practical Considerations

8. The practical considerations relate mainly to trials outside Canada. Problems are likely to arise for civilian counsel operating in a theatre where there is a significant risk of hostilities, such as Bosnia in the recent past. These problems include difficulty in obtaining insurance while in theatre and problems with recognition of counsel's status by authorities of the parties involved. As civilian counsel cannot be compelled by law to provide services in theatre, there is also the practical problem of ensuring representation is available when needed.

9. The reduced number of courts martial over the years also raises practical considerations with respect to the size of any defence counsel system, maintaining counsel trial skills, and the development of military judges. The need for rapid expansion in times of emergency, such as mobilization, is also a relevant factor.

Options

10. In reviewing options, the possibility of the Forces not providing defence counsel at all in Canada was quickly discarded. It would be perceived in the current climate as one more indication that the leadership is not interested in the members' welfare. It would also require an inefficient organization to be established to provide counsel outside Canada or in circumstances where the accused could not get a fair trial without funded counsel. Furthermore, it has not been recommended by any review group and was not one of the options listed in the terms of reference for the study.

11. In light of the research and terms of reference, seven options were evaluated, six of which were also costed. These were:

- a. use of a regular force defence team augmented by reserve force members;
- b. use of a reserve force defence team augmented by regular force members;
- c. use of provincial legal aid inside Canada and private civilian lawyers outside Canada;
- d. the establishment of a CF Legal Aid Service using private civilian lawyers;
- e. the establishment of a CF Legal Aid Service with staff civilian lawyers;
- f. an employee takeover where former legal officers would establish a firm to conduct defences; and
- g. retaining civilian law firms in locations across Canada to conduct defences.

All options would maintain the right of the accused to retain civilian counsel at his or her own expense.

Regular Force Defence Team

12. This option would establish a number of regular force legal officer positions in an Office of Military Defence Counsel (OMDC) augmented by a number of reserve force officers in the regions. It would be provided for in the National Defence Act (NDA), have its own budget as a line item in the National Defence budget, and have the head and the defence counsel appointed for specific terms. Special provisions would apply with respect to performance evaluations and pay. Though the OMDC would inform the JAG of its operations and receive JAG personnel and administrative support, the JAG role would be restricted in the NDA. Only administrative support and general guidance could be given and any guidance would have to be made public.

13. Besides meeting the essential requirements for a defence counsel system, this option has the additional major advantages of flexibility, portability, minimal disruption in implementation, maximum military justice knowledge, ready counsel availability, development of legal officers and military judges, the ability to provide all recommended defence counsel services, and good financial control. Its disadvantages include a potential for perceived lack of change, continued distrust with respect to loyalty to the officer corps or CF rather than the client, the need for an extensive information campaign, continuing psychological pressures on counsel re career impact, small size, potential arguments on the CF universality of service principle, and cost.

Reserve Force Defence Team

14. This option would establish an OMDC as in the regular force option. However, the system would mainly involve the use of reserve force defence counsel based in the regions. Once again, the system would be established in the NDA, have its own budget as a line item in the National Defence budget, and have the head and defence counsel appointed for a specific term. The support and limitations with respect to the JAG would be the same as for the earlier option. The reserve force legal officers would be paid at a per diem rate as are other reserve force members.

15. This option's advantages include a limited amount of disruption in implementation, a high level of military justice knowledge, an enhanced perception of independence over the regular force model, legal officer career flow and the development of military judges, the provision of the full range of recommended defence counsel services, and, if no changes are made to the pay levels, cost. Its main disadvantages include the potential for continuing perception problems, potential arguments on the universality of service principle, potential rank differential between the prosecutor and defence counsel at trial, and serious questions of availability at present pay rates.

Provincial Legal Aid Inside Canada

16. Under this option, the CF would enter into agreements with each of the provincial and territorial legal aid societies to have them provide counsel for courts martial in Canada. The societies would charge back the counsel costs plus an administrative fee. For trials outside Canada, a CF defence counsel system administrator would develop a list of counsel willing to perform defence counsel duties in such circumstances that could be provided to the accused. The choice of counsel would be up to the accused.

17. The advantages of this system include the clear perception of independence, relatively simple administration once in place, no potential arguments on the universality of service principle, and no rank differential between the prosecutor and defence counsel at trial. Its main disadvantages include complexity in establishing the system, the probable need for provincial legislative change, lengthy implementation requirements, philosophical impediments re the purpose of provincial legal aid,

availability problems, and the failure to provide all recommended services.

18. While this system would improve the perception of independence over the military models and probably ease the administrative burden once in place, it is not practical. Implementation would likely require provincial legislative amendments, a change in philosophy on the role of legal aid societies, developing differing agreements with at least 12 jurisdictions, and lengthy delays due to the negotiation and legislative requirements. In addition, while some provinces are interested in further discussions, Nova Scotia has specifically stated that such an agreement is not feasible. Other problems also exist but need not be discussed here in light of the above roadblocks. As a result of the difficulties, this option was not considered viable and was not costed.

CF Legal Aid Service (Private Counsel)

19. This option would establish a CF Legal Aid Service in the NDA composed of a three person Board of Directors, an Executive Director, administrative support and funding for private civilian counsel to be retained by the accused. The Board would be composed of a person experienced with the concerns of CF members, a person familiar with the requirements of the government, and a person knowledgeable about the functioning of legal aid systems in Canada. The Service would be a separate employer. It would have its own budget as a separate line item in the National Defence budget. Civilian counsel would be paid at Department of Justice agent rates for prosecutors. The Executive Director would be responsible for developing a list of counsel willing to provide services outside Canada. Training for assisting officers would not be provided (military knowledge requirement) nor would assistance be provided for grievances or releases (cost control problems).

20. The main advantages of this option include flexibility, maximum perception of independence, wide choice of counsel, relatively straightforward administration, lack of rank differential at trial between the prosecutor and defence counsel, and local service. As to the main disadvantages, it does not develop military judges, likely decreases the knowledge level of the military justice system, fails to provide all of the recommended defence counsel services, creates uncertainties about availability for in-theatre trials, and creates greater budgetary uncertainty as to costs.

CF Legal Aid Service (Staff Counsel)

21. This option would establish the same Board of Directors and Executive Director as for the previous option. However, defence counsel services would be provided mainly by staff lawyers. It would still require NDA amendments to establish it, a separate line item in the National Defence budget, and separate employer status. The Executive Director would have discretion to retain private civilian counsel to provide regional assistance and in cases of conflict of interest or in circumstances where staff counsel cannot be provided.

22. This option has the advantages of a greater perception of independence than the military legal officer options, flexibility, portability, a high level of military justice knowledge, ready counsel availability, the ability to provide all recommended defence counsel services, good financial control, a lack of rank differential at trial between the prosecutor and defence counsel, and an absence of arguments on the universality of service principle. However, it has the disadvantages of not developing military judges without changes to the eligibility criteria, a potential for job stagnation, a reduced input into the legal branch on the defence perspective, and cost.

Employee Takeover

23. Under this option, a serving legal officer or officers would submit a proposal for the provision of defence counsel services under the Treasury Board Policy Employee Takeover Policy. If accepted, the legal officer(s) would retire and either establish a law firm or a network of civilian lawyers to provide the services. The normal contract length is three years after which the services would be open to competition. To maintain system independence and for policy direction and coordination of services, there would still be a need for a Board of Directors and an administrator. The Board would likely only meet once or twice a year. The option would also have the features of establishment under the NDA, a separate line item budget in the National Defence budget, and separate employer status. As with all non-staff or non-military models, this option would not provide grievance or release advice due to difficulties in cost control.

24. This option would have the advantages of an increased perception of independence over military options, no impact on the universality of service principle, a lack of rank differential at trial between the prosecutor and defence counsel, an initial high level of knowledge of the military justice system, and relatively straightforward administration. However, it suffers from uncertainty as to whether any legal officer would be willing to put forward an acceptable proposal, a lack of development of military judges, potential availability and in-theatre problems, instability as to contract renewal, and a failure to provide all recommended defence counsel services.

Retention of Civilian Law Firms

25. This final option would involve retaining civilian law firms near major CF military establishments to provide defence counsel services in their areas and for trials outside Canada. To maintain system independence and for policy direction and coordination of services, there would still be the need for the Board of Directors and an administrator. The Board would likely only meet once or twice a year. The system would also be established under a NDA amendment, have a separate line item budget in the National Defence budget, and be a separate employer. Training for assisting officers would not be provided (military knowledge requirement) nor would advice be provided for grievances or releases (cost control problems).

26. The main advantages of this system are local service, a maximum perception of independence, an absence of arguments on the universality of service principle, a lack of rank differential at trial between the prosecutor and defence counsel, and simplicity of administration. Its disadvantages include the failure to develop military judges, an initial low level of knowledge of the military justice system, potential in-theatre and availability problems, a failure to provide all of the recommended defence counsel services, and the necessity for multiple negotiations to reach agreements.

Field Reaction to Options

27. In late July and early August personnel from four military establishments responded to a questionnaire on the current military justice system and the options for a new system for defence counsel. The locations were CFB Halifax, BFC Valcartier, 8 Wing Trenton, and NDHQ. While the consultation was not as extensive as one would have wanted for a CF-wide survey, it did provide insight into the perceptions of members in each CF element and the national headquarters. The respondents' confidence in the fairness and efficiency of the current military justice system might be described as lukewarm at best. The results of the questionnaire are at Annex "E".

Comparison of Options

28. For both the Study Team and the respondents to the questionnaire, options "B" (reserve force defence team), "F" (employee takeover), and "G" (civilian law firms) placed at the bottom of the scale. They did not have unique advantages that would make them preferable to the other three options. Option "A" (regular force defence team) has numerous advantages in knowledge levels, availability, provision of services, portability, in theatre operations, etc. Its main disadvantage is a possible perception of potential chain of command influence if a suitable information program is not initiated with respect to the system and its protections. In the field consultation, this option was most frequently given the best ranking in all three categories (fairness, effectiveness, overall best). Options "D" (CF Legal Aid - Private Counsel) and "E" (CF Legal Aid - Staff Counsel) are both attractive. "D" provides the greatest choice of counsel while "E" provides full defence counsel services. Both have reasonable straightforward administration. Option "D" place second as overall best in the questionnaire responses.

29. In light of all of the above information, the Study Team is of the unanimous opinion that option "A" should be selected as the system for providing defence counsel in the CF. However, it is essential that accurate information on the way the system operates, the safeguards, the ethical standards, and legal qualifications of the lawyers in the system is provided to members of the CF and the public for the system to be trusted.

LIST OF RECOMMENDATIONS

- 1. We recommend that the term "defence counsel" be used when referring to military or civilian defence counsel.**
- 2. We recommend that regulations specify that defence counsel are responsible for providing:**
 - a. defence counsel services at courts martial and on appeals by either the Crown or the defence;**
 - b. duty legal aid services for persons who are arrested or detained under the Code of Service Discipline;**
 - c. advice to members who are required to make an election with respect to trial by court martial;**
 - d. training and advice to assisting officers;**
 - e. advice, as resources permit, to members with respect to applications for redress of grievance and responses to notices of intent to recommend release; and**
 - f. such other duties involving a member in conflict with CF or DND authorities as may be authorized under guidelines issued by the Judge Advocate General.**
- 3. We recommend that an Office of Military Defence Counsel (OMDC) be established in the National Defence Act.**
- 4. We recommend that the OMDC be funded by a budget that constitutes a separate line item in the National Defence budget and that the budget provide funding for all defence counsel related services.**
- 5. We recommend that the head of the OMDC be a regular force position filled by a legal officer with at least ten years at the bar of a province.**
- 6. We recommend that the head of the OMDC be appointed by the Minister of National Defence on the recommendation of the Judge Advocate General.**
- 7. We recommend that the National Defence Act be amended to provide that the Judge Advocate General is responsible for the provision of legal officers to the OMDC and administrative support of the OMDC as well as the development and issuance of general guidelines as to the structure and policies of the OMDC,**

but that the Judge Advocate General is not permitted to provide guidance or interfere in any way with the defence of individual cases.

8. We recommend that any general guidance provided by the Judge Advocate General to the OMDC be required by regulation to be made public in an appropriate manner.

9. We recommend that the head of the OMDC inform the Judge Advocate General on the administration of the Office, but not with respect to individual cases or any other matter that might endanger, or be seen to endanger, solicitor/client confidences or the independence of the OMDC.

10. We recommend that the head of the OMDC submit an annual report to the Judge Advocate General on the functioning of the OMDC which shall be included with the annual report of the Judge Advocate General.

11. We recommend that the term of office for the head of the OMDC be established by regulation at four years and the terms of the legal officers assigned to the OMDC be established by regulation at three years; such terms to be modified in individual cases only at the written request of the legal officer, at the commencement of retirement leave, on the officer's acceptance of promotion, for misconduct, or for incapacity.

12. We recommend that the procedure for removal of a defence counsel from the OMDC for misconduct, including the head of the OMDC, be the same as that for the removal of a prosecutor for misconduct.

13. We recommend that sufficient bilingual legal officers be posted to the OMDC to ensure that a member can receive defence counsel services in the official language of his or her choice.

14. We recommend that legal officers assigned to the OMDC be required to perform only those duties assigned by the head of the OMDC.

15. We recommend that legal officers assigned to the OMDC be subject only to the OMDC chain of command in the performance of their duties, not the Canadian Forces or Judge Advocate General chain of command.

16. We recommend that the head of the OMDC be paid on the same basis as a military judge of the same rank and not receive a performance evaluation report.

- 17. We recommend that legal officers in the OMDC, other than the head, have performance evaluation reports written and reviewed only by superior officers in the OMDC.**
- 18. We recommend that regular force legal officers in the OMDC be paid merit pay in accordance with their merit pay categories as determined by the head of the OMDC, but that the distribution of merit pay categories above fully satisfactory must comply with the norm for such distribution among legal officers.**
- 19. We recommend that the original establishment of the OMDC include the head, four regular force legal officers, seven reserve force legal officers, and the necessary facilities and administrative support.**
- 20. We recommend that, while the size of the OMDC can be increased at any time to meet demand, the OMDC only be reduced through attrition as posting tours are completed or legal officers depart for other reasons.**
- 21. We recommend that the facilities of the OMDC in Ottawa and in the field offices be physically located separate from the offices of the Judge Advocate General, the prosecution directorate, and the military judges.**
- 22. We recommend that the head of the OMDC be authorized to retain civilian defence counsel to provide defence counsel services where members of the OMDC would be in a conflict of interest or in other circumstances where it would either not be possible or not be appropriate for an OMDC legal officer to provide the services.**
- 23. We recommend that the head of the OMDC establish formal procedures for the application of "Chinese walls" and other appropriate systems for the protection of solicitor/client confidences involving officers of the OMDC.**
- 24. We recommend that the head of the OMDC have the discretion to initiate publicly funded appeals by the defence pursuant to guidelines issued by the Judge Advocate General, but that the member retain the right to initiate an appeal at his or her own expense or under funding authorized by the Court Martial Appeal Court.**
- 25. We recommend that the rates of pay for reserve force legal officers be examined to determine if they are sufficient to ensure that reserve force legal officers will be available to perform court martial duties when required and that they be adjusted as appropriate.**

26. We recommend that a review be conducted by the head of the OMDC of the training requirements to maintain the court room skills of defence counsel and that a program be developed to provide such training on a regular basis.

27. We recommend that an information program be developed, either separately or in conjunction with information programs relating to the military justice system as a whole, to inform members of the CF and the public about changes in the system for providing defence counsel.

28. We recommend that the changes to the way in which defence counsel services are provided in the Canadian Forces be instituted incrementally as soon as practicable.

Conclusion

29. A major difficulty with both the public and CF members is the lack of understanding of the military justice system. It is **crucial** that an innovative and accurate information program be developed, using all appropriate modern communication techniques, to interest an information-saturated audience in the functioning of the updated military justice system. In addition, there is a need for a review of the military justice system on an ongoing basis with input from both the legal and operational perspectives. The military justice system must keep up with Canadian values in both its application and its structure. The recent reviews and the current activity in relation to the system should ensure it complies with the high standards expected of Canadian justice.

Chapter 1

INTRODUCTION

1. In recent years, a number of concerns have arisen about the military justice system in Canada and the way in which military investigations have been carried out. As a result, in early January, 1997, the Minister of National Defence, the Honourable M. Douglas Young, established a Special Advisory Group on Military Justice and Military Police Investigation Services. The Group consisted of the Right Honourable Brian Dickson, former Chief Justice of the Supreme Court of Canada, retired Lieutenant General Charles H. Belzile, former Commander of Land Forces Command (i.e. the Army), and Mr. J.W. Bud Bird. After the Group held a considerable number of hearings, initiated related research and considered numerous submissions, it issued its report to the Minister on 14 March, 1997.

2. Among the issues considered by the Special Advisory Group was the independence, and perceived independence, of the defence counsel provided by the Forces to an accused subject to the Code of Service Discipline. In recommendation number 7 it states:

"We recommend that, whenever a Canadian Forces member is entitled to legal advice under the Code of Service Discipline, the Judge Advocate General provide such advice in a manner that is independent of the Judge Advocate General's prosecution and judicial functions."

3. On 25 March, 1997, the Minister of National Defence submitted a report to the Prime Minister on Leadership and Management of the Canadian Forces. In that report, the Minister recommended that the recommendations of the Special Advisory Group be implemented in full. Among other initiatives resulting from this report was the Study Directive from the Judge Advocate General at Annex "A" establishing the study team to review the provision of defence counsel services.

4. A fundamental philosophy with respect to the military discipline system has been the need for a complete system that can meet discipline needs anywhere in the world at any time. The Study Team has conducted its analysis on the assumption that this philosophy will continue as a basic principle of the discipline system in the future.

5. In conducting its study, the Team has consulted with numerous organizations and individuals. A list of those consulted is included as Annex "B". Unfortunately, not all of those consulted were able to respond in the time available for this study. However, those that did respond provided valuable insight into the ways in which other organizations deal with the requirement to provide legal counsel. The suggestions covered the spectrum from all-civilian systems to something resembling the status quo. The Team has also reviewed the Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia. Many of the ideas that form the basis for

the options discussed were obtained from these sources. Where descriptions are given of the systems of foreign military forces, the wording has sometimes been plagiarized directly from the responses received from those forces.

6. Before any decisions can be made on an appropriate model for the provision of defence counsel services, there needs to be a comprehensive understanding of the essential attributes of the system and the duties that the counsel will be expected to perform. In addition, any system adopted must meet the applicable legal standards, including those resulting from the Canadian Charter of Rights and Freedoms (the Charter). Although there may be other viable options, the ones chosen for discussion include those mandated by the Study Directive and others considered by the Study Team to be likely to meet these criteria.

7. The study reviews existing models, discusses the criteria for a new model, then analyses the options to determine which would best suit the needs of the accused and the military justice system. Before the recommendations were finalized, personnel in field units in each of the elements as well as personnel at National Defence Headquarters (NDHQ) were consulted by means of a questionnaire on their opinions of the options developed. This provided valuable insight on the views of the system's users and those views were taken into consideration when determining the recommendations.

ESSENTIAL REQUIREMENTS FOR A MILITARY DEFENCE COUNSEL SYSTEM

8. A system for the provision of defence counsel services cannot stand alone. It must be properly integrated into the overall military justice system. Otherwise, a theoretically-ideal system may bog down in the realities of military life, including administrative requirements, the need for deployment into danger zones, and other factors peculiar to the military justice system.

9. Based on the research conducted, the Study Team considers the requirements listed below to be those essential to the proper functioning of a military defence counsel system.

The system must:

- a. meet the requirements of Canadian law for the provision of such services;
- b. be, and be seen by CF members as, independent and acting at all times in their best interests;
- c. be able to provide services in the official language of choice of the member wherever the need for legal advice arises;

- d. meet the military need for a just, speedy, and efficient disciplinary system;
- e. be portable, i.e., be usable in all circumstances in which the Canadian Forces may find themselves both in Canada and outside Canada, including in circumstances of peace, peacekeeping, peacemaking and war; and
- f. be practical and affordable.

10. While there is some unavoidable overlap in the above factors, each addresses a need if the overall system is to operate successfully. These factors are discussed in more detail in the chapters that follow.

Meaning of Independent

11. "Independent" is a term used in the Study Directive, in this report, and in many of the documents on which the report is based. Due to the significant emphasis put on this term, it is desirable at the beginning of the report to discuss its meaning in the context of the issues under consideration.

12. The Concise Oxford Dictionary defines "independent" as "not depending on authority" or "not depending on something else for its validity, efficiency, etc." This provides a basic concept of an ability to carry out actions without control by others. Of course, there is no such thing as perfect independence in modern society. There is always a reliance on others to assist in some way. Even the judiciary is dependent on Parliament or the provincial legislatures to fund the justice system. Therefore, independence is a relative concept rather than an absolute.

13. In relation to the justice system, the concept of independence has most frequently been addressed in the context of judicial independence. However, the courts have maintained a distinction between the concepts of **judicial independence** and **independence of defence counsel**. In the judicial context, the emphasis has been on avoiding any actual or perceived bias and ensuring that institutional safeguards exist to avoid inappropriate influences on the conduct of the judicial function (See *The Queen v. Valente*, [1985] 2 S.C.R. 673, *R. v. Gagné*, [1992] 1 S.C.R. 673). With respect to defence counsel, the cases have concentrated more on the avoidance of conflict of interest and the protection of confidences subject to solicitor/client privilege.

14. The case law concerning defence counsel issues is discussed in detail in Chapter 3 under "Legal Standards" and will not be repeated here. However, based on that case law, the concept of an independent defence counsel system used by the

Study Team is a system under which:

- a. a defence counsel is free of inappropriate organizational influences that could create, or reasonably be seen to create, a conflict of interest between the defence of the individual client and the counsel's personal interests in maintaining a beneficial relationship with the organization or its hierarchy; and
- b. defence counsel are protected from organizational relationships that could, or could reasonably be seen to, endanger solicitor/client confidences.

15. Any reference to "independent" or "independence" in the analysis provided in this report is in the context of the above definition.

Chapter 2

EXISTING SYSTEMS

Introduction

1. In examining the systems currently in use for the provision of defence counsel services, the Study Team consulted both organizations having their own disciplinary systems and organizations that are government funded but provide an independent legal counsel service. These consultations included foreign military forces, the Royal Canadian Mounted Police, Correctional Services Canada, and provincial and territorial legal aid societies. The sections below provide an outline of the way in which those systems operate, including the occasions and manner in which defence counsel is authorized or provided. All of the foreign disciplinary systems have the same basic structure; a summary process for minor offences and a court martial system for serious offences. Therefore, little detail is provided on those systems that is unrelated to the provision of defence counsel services. Jurisdictions, procedures, and punishments may vary to a considerable degree, but the need for independent defence counsel remains. The perception of what constitutes independent counsel differs depending on the underlying military and civilian legal structures.

Canada

Canadian Forces

2. With respect to military justice, the Canadian Forces are governed by the Code of Service Discipline contained in the National Defence Act. It provides for a system of summary trial for minor offences and four levels of court martial for more serious offences and for the trial of civilians subject to the Code.

3. Accused persons subject to the Code of Service Discipline are currently entitled to free military legal counsel or civilian counsel retained at their own expense. Military defending officers are not provided to represent accused at the summary trial level, although advice may be given by a defending officer to a non-legally trained assisting officer that does represent the accused. The person conducting the summary trial has a discretion to permit civilian counsel to represent an accused at a summary trial, but this representation is the exception rather than the norm. An accused becomes entitled to free legal advice from a legal officer when arrested or detained or when he or she is to be tried by court martial. No system of legal aid currently exists in the Canadian Forces, although a very small number of members may qualify for provincial legal aid. The Canadian Forces as such do not provide counsel to represent a member charged with an offence in the civilian courts. However, in certain circumstances a member may be entitled to representation under Treasury Board policies outlined later.

4. Defending officers are most frequently drawn from a team of regular force legal officers belonging to the Directorate of Law/Defence (DLaw/D) located at National Defence Headquarters (NDHQ). They may also be appointed on an ad hoc basis from other directorates within the Office of the Judge Advocate General at NDHQ or from field offices outside the region where the court martial is taking place. Reserve force legal officers supply a surge capability for defending officers at courts martial. The use of civilian legal counsel retained by the accused is also common.

5. An accused is entitled to request a specific defending officer. The commanding officer is required to endeavour to have that officer made available to defend the accused. If the particular officer is not available or no specific officer has been requested, the commanding officer is required to ensure that a suitable officer is appointed.

6. The chain of command for a defending officer varies depending on whether the officer is part of the defence team or is appointed from a region or the reserve force. If part of the defence team, the defending officer reports to the Director of Law/Defence who, in turn, reports to the Deputy Judge Advocate General/Advisory & Legislation. That DJAG then reports to the Judge Advocate General. In practice, neither the DJAG nor the JAG become involved in the defence of individual cases. In the regions, the defending officer would normally report to the Assistant Judge Advocate General in charge of that region, although defending officers are not subject to the direction of the local AJAG with respect to the way in which they conduct their defending officer duties. The reserve force defending officers also report through the regional AJAG, but not with respect to the way in which they conduct their defending officer duties.

7. Performance evaluations on members of the defence team are prepared by the Director and reviewed by the DJAG and JAG. The Director's evaluation is written by the DJAG and reviewed by the JAG. In the regions, legal officer's performance evaluations are prepared by the AJAG and reviewed by the JAG. Pay and promotions for legal officers are governed by their performance evaluations in the regular force. Pay for reserve force legal officers is on a per diem basis based on rank and not on performance reports.

8. In addition to providing counsel services at courts martial, legal officers provide 24 hour a day legal advice to those arrested or detained under the Code. They also act as appellate counsel for the member free of charge where an appeal is initiated by the Minister.

Royal Canadian Mounted Police

9. Like the Canadian Forces, The Royal Canadian Mounted Police (RCMP) have an internal disciplinary system. Unlike the Canadian Forces, the RCMP have a very limited disciplinary jurisdiction. Minor offences are dealt with by an informal process. The more serious offences are considered by an adjudicative panel of three officers, at least

one of whom is legally trained. These two procedures deal with offences against the RCMP Code of Conduct but do not affect the civilian courts' jurisdiction with respect to criminal activities. This is reflected in the types of sanctions that can be awarded. No sanction involves detention. The highest sanction available is an administrative discharge.

10. For the minor offences, representation is not provided to the member. However, for the more serious offences a member from the Member Representative Unit under the Staff Relations Program will normally be assigned to assist and represent the member or else the member can obtain civilian counsel at his or her own expense to provide such representation. Personnel from the Member Representative Unit report to a separate Deputy Commissioner than those involved with the prosecution or adjudication of the alleged misconduct.

11. The accused member has a right to an oral hearing. The member may, however, elect to have the evidence and representations done exclusively in writing. The member may also decide to represent himself or herself. Before making either decision, the member must fill out a form specifying that the legal position has been discussed with a member who is competent to provide advice on the matter.

12. Representatives are informed that they must meet the same standards as a lawyer in representing a client. A lengthy Code of Ethics is provided for such representatives. Members have the right to appeal both the decision and the sanction of an adjudicative panel to a separate review panel. Representation is provided for this appeal process.

Correctional Services Canada

13. Correctional Services Canada also has a system of discipline for correctional institutions under its control. The system involves an outside adjudicator who has significant powers that can effect the liberty interests of the inmate. Because of this, the Corrections and Conditional Release Act provides the inmate the right to a reasonable opportunity to retain and instruct counsel. However, no legal services are provided to the inmate from Correctional Services Canada itself. The inmate is given the opportunity to retain and instruct civilian counsel at his or her own expense. Some systems do exist for providing a type of legal aid to inmates, but these are provincially funded or associated with major law schools.

Treasury Board

14. Provisions already exist in Treasury Board policies to provide funded legal counsel for public servants and members of the Forces in certain circumstances. Eligibility for legal assistance exists where the servant has acted within the scope of his

or her duties, has met reasonable departmental expectations, and is:

- "(a) ... required to appear before, or be interviewed in connection with, a judicial, investigative or other inquest or inquiry;
- (b) ... sued or threatened with a suit;
- (c) ... charged or likely to be charged with an offence; or
- (d) ... faced with other circumstances that are sufficiently serious as to require legal assistance."

15. As can be seen, the above system is mainly designed for situations involving civil actions of some sort. While persons charged with an offence may be eligible, they would first have to show that they were acting within the scope of their duties and met reasonable departmental expectations. This would normally apply with respect to actions involving regulatory offences such as a mistaken decision resulting in a violation of a provincial environmental statute. On rare occasions, it might be applicable where there is an alleged criminal breach of some sort if, for instance, the federal government and a provincial government were in conflict on an issue and the provincial government laid charges against a federal official. It is highly unlikely that the provisions would apply to persons charged under the Code of Service Discipline.

Legal Aid Systems

16. The legal aid systems in Canada are included in this section not for their internal disciplinary systems, but rather for the ways in which they provide a government funded legal counsel service while maintaining the actual and apparent independence of their counsel. Canadian legal aid systems can be broken down into two basic models; those that fund private practitioners by means of a legal aid certificate (judicare) and those that maintain salaried staff legal aid lawyers. Most provinces use a combination of these systems. There are other variations on these models, such as services provided by law schools that use students as counsel, but these do not appear to have the potential for conflict of interest that ones established and funded by the provinces and territories do nor do they provide the same volume of services as the provincial and territorial systems.

17. To maintain the independence of counsel, the legal aid societies use a system of government funding and non-government functional control. For instance, in New Brunswick the Law Society is responsible for the provision of legal aid in the province. The Provincial Director of Legal Aid New Brunswick reports to the Law Society and submits a budget for running the service. The Law Society examines the budget and sends an approved final version to the provincial government. After any necessary discussion, the government then takes the steps to provide the funding to a trust account held by the Law Society. As with all legal aid systems in Canada, the money

approved by the province is provided from both federal and provincial funds pursuant to intergovernmental agreements. The Provincial Director is responsible for the day-to-day functioning of the system. Similar arrangements using the services of the Law Society as an intermediary between the legal aid society and the government are also in place in Alberta. Besides the financial separation from government, some societies see the use of private counsel who are merely paid by the society as an additional protection of independence.

18. Other legal aid societies use slightly different models. For instance, the Legal Services Society of British Columbia is governed by a Board of Directors that includes representatives appointed by the Lieutenant-Governor in Council, the Law Society of British Columbia, and other organizations. The Law Society itself does not act as an intermediary between the Board and the Government. Both Newfoundland and Nova Scotia have a similar system, using primarily a staff model for providing counsel. The legal aid commissions are established by legislation. The members are appointed by the government and the law society. Day-to-day operations are run by an executive director or equivalent. The staff lawyers provide the actual legal services with private counsel being authorized to act in those cases where staff lawyers cannot deal with the matter.

19. The common feature with all legal aid societies is the absence of government involvement in the actual running of the society or the individual defences. This results in both an actual independence for defence counsel in the conduct of the cases (subject to financial limits) and a perceived independence.

United States

20. The United States Armed Forces are all governed by the Uniform Code of Military Justice with respect to the conduct of disciplinary tribunals. This provides for a low level Non-Judicial Punishment plus three levels of court martial: Summary, Special and General. The court martial levels have different powers of sentencing and different composition, with the General Court Martial having full powers under the Code. However, each service has its own system for providing defence counsel.

21. The timing of the right to counsel is consistent for all of the American forces. There is no right to representation by counsel at the Non-Judicial Punishment and Summary Court Martial stages but there is a right to consultation with counsel. Free consultation is provided by military lawyers at these earlier stages. However, free representation by a military lawyer is not provided until the matter is to be tried by a Special Court Martial. The degree of advice given on consultations varies among the services. An accused can hire a civilian counsel to provide representation at any hearing. At the Non-Judicial Punishment level the decision as to whether that counsel will be permitted to actually speak on behalf of the accused at the hearing is at the discretion of the trying officer. At a Summary Court Martial there is a greater right for civilian counsel to speak. The accused has a right to refuse trial under the Non-Judicial

Punishment and the Summary Court Martial processes and require the matter to be sent to a superior Court Martial.

22. For all of the Forces, there is a right to the appointment of an Individual Military Counsel (IMC) requested by the accused. This counsel is in addition to any military counsel appointed by the defense counsel organization. Whether the requested counsel will be provided is subject to availability, but the availability decision is subject to review on appeal if an IMC is denied. The procedures for providing an IMC are governed by the regulations applicable to the individual services.

23. Under the UCMJ, all courts martial involving a sentence of punitive discharge or over one year's confinement are automatically reviewed by a Court of Criminal Appeals. Appeals that do not meet these criteria may still be heard, but the convicted member must initiate the appeal in these cases and a separate process is used to have the matter forwarded. In addition, an application for leave to appeal can be made to the Court of Appeals for the Armed Forces and, ultimately, the U.S. Supreme Court. There is an appellate defense organization to provide counsel for these appeals that is separate from the trial defense organization.

24. It must also be appreciated that military lawyers in the American forces have a considerably greater role to play than is the case in Canada or, indeed, in the other countries consulted. They provide pre-summary court martial, mental health evaluation and administrative board counselling as well as representing members at physical evaluation boards. Commanding Officers can also assign additional duties. Furthermore, in non-disciplinary areas they provide considerably greater support to individual members than do Canadian legal officers. This may help the perception that military lawyers are on the side of the individual as well as the system so that there is greater trust of uniformed defending officers.

U.S. Army

25. The U.S. Army has recognized the difficulties with providing independent military trial defence counsel since the Second World War. Their particular concerns related to whether defence counsel were adequately protected from improper command pressures, the experience level and competence of the officers routinely assigned as defence counsel, and the amount of support that defence counsel received from the command structure. A number of studies were conducted over the years on this issue. Some changes were approved to improve the independence of counsel, but no major modifications were accepted until 1978. As a result of persistent promotion from The Judge Advocate General, a two-year test of an independent Trial Defence Service (TDS) was undertaken that year at a major command to determine the feasibility of such a service for the Army as a whole. In 1979, the test was expanded to all continental U.S. units. Those in Europe and Korea also agreed to join the test. At its conclusion, there was general agreement that the test was a success. In 1980, the TDS was ordered to be implemented permanently throughout the Army.

26. The Army TDS has a "stovepipe" organization. In other words, it has its own chain of command separate from operational commanders and the local legal advisors. Defence counsel are appointed for 18 month tours in order avoid burn out or career difficulties. The Judge Advocate General has attempted to ensure that defence counsel have sufficient experience in military courts to properly defend their clients. Defending officers are evaluated by other defending officers in their chain of command so that undue influence is avoided. A code of conduct and standing operating procedures are also in place to ensure the independence of defence counsel. The TDS organization currently has approximately 134 legal officers.

27. The Army TDS provides fairly extensive counselling for those undergoing Non-Judicial Punishment or Summary Court Martial hearings. This extends to inquiries into the facts, review of reports, and, on occasion, interviewing witnesses. In exceptional circumstances, military counsel may even be authorized for a Summary Court Martial. This might be done, for instance, where an accused had succeeded in having the trial sent down to a Summary Court Martial from a Special Court Martial.

28. Appeals are dealt with by the Defense Appellate Division of the Army. This Division provides new counsel to conduct the appeal, although trial counsel may still be involved with post-trial issues such as applications for clemency.

29. Unlike the Active Forces of the U.S. Army, the reserve forces do not have a similar independent defence counsel structure for reserve courts martial. They have retained a system in which the defending officer is drawn from the local legal advisor's personnel.

U.S. Air Force

30. Since 1974, the Air Force has had a system of independent military legal defence counsel. Prior to that time, military defence counsel were assigned to a case by the Installation Staff Judge Advocate (SJA), the same officer that assigned the prosecutor. The SJA provided the evaluations on both officers. Despite the duty and ethical obligations to represent the client zealously, the defence counsel arrangement gave an appearance of conflicting interests. A 1972 Department of Defense Task Force Study entitled "Report on the Administration of Military Justice" recognized this difficulty.

31. A test was started in 1974 in the Air Force to establish an independent defence function. The program was made permanent in 1975 with the inception of the Area Defense Counsel (ADC) program. In this program, defence counsel have a separate chain of command headed by the Chief, Trial Defense Division, U.S.A.F Judiciary. ADCs have separate facilities on the installation, a separate chain for evaluations and awards exists, and a separate disciplinary chain is followed. There are approximately 108 legal officers in this division at this time.

32. With respect to the reserve forces, the representation depends on the individual's type of service. For instance, a member of the National Guard while under state control would not be represented but if the Guard was put under federal control, representation would be provided to the member. In general, the member will be provided counsel so long as the member is acting in a federal military capacity.

33. The Air Force also has an Appellate Defence Division. Since 1992 this division has been separate from the ADC system. It provides new counsel where appeals are undertaken. The separation and new counsel enables the accused to challenge the quality of representation at trial if this may be a ground of appeal.

U.S. Navy

34. The Navy defence counsel structure also has a separate chain of command. The Deputy Judge Advocate General is the Commander Naval Legal Service Command. In this capacity, he controls the Trial Service Office (TSO)(prosecutors), the Naval Legal Service Office (NLSO)(defence counsel), and the Naval Justice School. The Commanders of the TSO and NLSO are naval Captains. There are seven regional NLSOs, each with its own commanding officer. Local offices are located at military installations and report back to the regional CO. The NLSO organization has approximately 300 military lawyers at this time.

35. Defence counsel are posted into the NLSO by the office of the Judge Advocate General, not local authorities. The tour of duty is for three years. Fitness reports are prepared through the NLSO chain of command. The Staff Judge Advocate system for providing legal advice to commanders is separate from this military justice chain. With respect to the selection of Individual Defense Counsel, there are geographical restrictions as well as restrictions on selecting NLSO officers in certain positions.

36. Defence counsel for appeals is provided by a separate Division that serves both the Navy and the Marine Corps.

37. The Naval Reserve is a separate organization from the Active Forces. Military lawyers are assigned to Reserve units and provide support to the Active Force NLSOs. Other lawyers in the Reserve unit would provide similar support to Active Force TSOs.

U.S. Marines

38. The Marines and the U.S. Navy are sister organizations providing different aspects of naval services. However, the Marines are unique in a number of ways. For instance, the philosophy with respect to service requires that all officers be capable of performing operational duties. There is no distinct staff or specialist structure. Therefore, legal officers can be, and are, posted to operational positions including command positions. Systems exist, though, for providing staff and specialist services.

39. Prior to 1984, the Marines had a system in which the local Staff Judge Advocate (SJA) assigned both the prosecutor and defence counsel from among the officers in the office. Fitness reports on both were written by the SJA. After a complaint about interference by an SJA in a defence, the system was changed. The Marines now have a defence organization composed of the Chief Defense Counsel of the Marine Corps, Regional Defense Counsel, Senior Defense Counsel and Defense Counsel. Fitness reports are now written by other defence counsel. The organization is broken down into three regions - East, West, and Pacific. There are approximately 50-55 officers in the defense organization at any one time.

40. In most locations with a concentration of Marines there is a Legal Services Support Section responsible for providing prosecutors and defence counsel for courts martial duties when required by the local SJA. This is purely an administrative function. However, the officer in charge of this section has the authority to post legal officers into and out of the defense counsel organization. In some locations where there is no support section, the SJA retains defense counsel on staff but does not write the fitness reports. In these cases, though, the SJA does have the authority to post officers into and out of the defense function. This has resulted in some problems where allegations of "punitive reassignment" have been made when the defense counsel may have gotten on the wrong side of the SJA. Once reassigned out of the defense organization, it is the SJA that writes the fitness report. Consideration is being given to revising this system of postings.

41. Although an accused is counselled by Marine legal officers on his or her rights at the Non-Judicial Punishment and Summary Court Martial levels, the extent of involvement at this stage tends to be less than that in other services.

42. While the Marines have a system that is basically separate from that of the Navy at trial level, the two organizations integrate at the appellate level. As discussed with respect to the Navy, a separate appellate organization exists that provides government and defence appellate counsel for both the Navy and the Marines. The Appeal Court deals with appeals from both of these organizations.

43. The Marine reserve forces have a mirror structure to the active forces with respect to the provision of defence counsel. In addition to performing their defence role, reserve defence counsel are very active in providing continuing legal education to both the active forces and the reserves.

United Kingdom

Royal Navy

44. The British armed forces have recently amended their courts martial system through the Armed Forces Act, 1996. One of the significant changes was the creation of a Naval Prosecuting Authority independent of the chain of command. However, no

separate authority was created for provision of defence counsel. Legal aid is provided within the Navy, but there is no dedicated legal aid authority. The system is run by an administrator and an assistant. The legal aid system handles approximately 60 to 80 courts martial per year.

45. The member may be required to contribute to the defence, based on the member's ability to pay. Choice of legal representation is entirely a matter for the defendant. A civilian barrister or solicitor/ advocate can be briefed. Unlike the Army and the RAF, the accused has the alternative of selecting a serving uniformed naval barrister whose services will be provided free of charge. For cases to be tried outside the country, an accused may have the services of an Army or Royal Air Force lawyer, if available. This assumes that no appropriate naval barrister is available for defence. A civilian barrister might also be funded, but no case has arisen where this has been required since the 1996 changes providing for legal aid. Members of the reserve forces have the same entitlements for representation as regular force members if the accused is to be tried by court martial.

46. There is no clear demarcation between the prosecution, defence and judicial functions of barristers in the Royal Navy. Except for members of the Naval Prosecuting Authority, naval barristers may perform all three functions. Although Naval Prosecuting Authority lawyers prosecute most cases, they may brief another naval barrister to conduct a prosecution for a particular trial. That same barrister may act as a defending officer for the next case. This is similar to the civilian system where a barrister may defend a case one day, prosecute a different case the next day, and sit as a judge on a third case the day after.

47. Funding for appeals is only provided for applications for leave to appeal to the Court Martial Appeal Court. If leave is granted, that court takes over the funding.

British Army

48. No legal counsel is provided for an accused at the summary proceeding level of the disciplinary system. In addition, the Army does not use Army lawyers to defend at Army courts martial. Instead, it uses a Ministry of Defence legal aid system called the Army Criminal Legal Aid Authority. The system is mentioned in Queen's Regulations but is not a statutory scheme in the same way as the civilian legal aid system is. The military legal aid system tries to follow the civilian system as closely as possible. An accused that is going to court martial can apply for legal aid. Based on criteria similar to those used in the civilian courts, the application is assessed as to how much of a contribution the accused will have to make. Once legal aid is approved, the accused will contact a local barrister or solicitor to conduct the defence. The lawyer submits a bill, based on the legal aid tariff, to the Legal Aid Authority at the end of the trial. Members of the reserves who are to be tried by court martial also have an entitlement to legal aid under this system.

49. Overseas, the Legal Aid Authority will also fund the use of a British defence counsel for a court martial. The Authority makes the transportation and accommodation arrangements and counsel is paid a set fee for the trial rather than the hourly rate that is the norm in the UK. The authority also retains a list of barristers who have indicated a willingness to perform these overseas duties. Overseas the accused may also request a military defending officer from one of the other services rather than a civilian lawyer. However, the use of this system is apparently the exception. If a member of the British Army is charged with an offence that is to be tried by the civilian authorities in a foreign country, the Authority will authorize payment to a local lawyer to conduct the defence if the accused does not qualify for any local system of legal aid. So far, courts martial involving civilian counsel have not been held in a theatre where peacekeeping is taking place, such as Bosnia. Trials from these locations are normally held at the unit's home location such as the UK or Germany.

50. There is an interesting difference between the Canadian and British points of view on the payment of counsel. According to the sources consulted, if an accused has been found not guilty, he or she may have all or part of the costs of the defence paid by the Crown. This aspect is usually handled by the judge at the end of the trial. With the court martial system, an opinion will usually be obtained from the Judge Advocate General as to what portion, if any, of the costs or contribution should be refunded.

51. In addition to trial support, the Authority will provide funding for an application for leave to appeal to the Court Martial Appeal Court. If leave is granted, the Appeal Court will then take over the provision of legal aid from its resources. This is the same system as that used for appeals in the civilian courts.

52. The Authority is run by an administrator and a clerk. It handles approximately 450 cases a year. According to the administrator, the use of civilian counsel has not resulted in any problems of competence with respect to military law and procedures. Where there is a concentration of troops, local counsel soon become acquainted with court martial procedures and the applicable law.

Royal Air Force

53. The Royal Air Force system for the provision of defence counsel is virtually identical to that of the Army. Like the Army, the RAF does not provide legal branch officers to defend servicemen or servicewomen before summary proceedings. Although an accused may consult with a civilian lawyer before such a proceeding, that lawyer has no right to be heard at the hearing. For courts martial, the accused may have a defending officer and/or a civilian legal adviser. An RAF legal officer cannot actually defend an accused at an RAF court martial. Unlike the situation with the Canadian Forces, an RAF defending officer only helps the accused to prepare and conduct his defence and, sometimes, appear for the accused to present mitigation evidence on guilty pleas. Actual representation at an RAF court martial is provided by civilian counsel in the United Kingdom and overseas where the accused wishes civilian

counsel. Arrangements exist, usually for courts overseas, that would allow a Naval or Army legal officer to represent an accused before an RAF court martial if the accused wishes military counsel. RAF legal officers perform the same services for the other two Forces.

54. An accused who wishes to retain a civilian barrister or solicitor has a right to apply for legal aid. The accused may be required to pay a contribution to the cost of the defence depending upon his or her means. If the accused is charged with the commission of an offence that would be a crime for which he or she would have been entitled to legal aid if tried by a civilian Crown or Magistrates court, legal aid will invariably be granted. In addition, for purely service offences involving difficult legal points, the expert examination of witnesses, or possible serious consequences to the accused, legal aid will also invariably be granted. A separate financial authority handles the legal aid arrangements so as to divorce them from the Prosecuting Authority and Court Martial Administration Unit. An accused also has the right to receive free civilian legal advice when being interviewed by the service police about an offence.

55. The legal aid system for the RAF is run by one administrator. It handles approximately 80 cases per year. The functions of the administrator and the procedures and entitlements are basically identical to those of the Army.

56. With respect to international deployments, current RAF policy provides that, assuming the RAF will retain jurisdiction, the accused would normally be returned to his or her parent unit in the UK where access to a civilian legal advisor would be available. As indicated earlier, a defending officer from one of the other services or a civilian legal aid counsel may provide representation if the court martial is held overseas.

Australia

Australian Defence Force

57. The three services of the Australian Defence Force are subject to the Defence Force Discipline Act 1982 with respect to the system of military discipline. The tribunals provided for under this Act include Summary hearings, Defence Force Magistrates, Restricted Courts Martial and General Courts Martial. Defence Force Magistrates are normally used where the matter is of a mostly legal nature whereas Restricted Courts Martial are used when the issues relate more to command discipline. Both have the same powers of punishment - up to six months detention.

58. Members of both the permanent forces and the reserves are entitled to access to a legal practitioner of the person's choice when being investigated and can request that the practitioner be present during questioning by an investigating officer. The Judge Advocate General maintains a list of practitioners willing to perform this duty. While the

Act does not require that the practitioner be a member of the Australian Defence Force, in practice they usually are.

59. For summary hearings, the Defence Force Discipline Rules provide the accused the right to have a member of the Force defend the accused, but in practice the member is almost always a non-legally qualified member. The Navy and Army actively discourage the use of legal practitioners in these cases. The Air Force neither encourages nor discourages their use.

60. For courts martial and Defence Force Magistrate's hearings, the accused has a right to be advised before trial and be represented at trial by a legal officer. There is no cost to the accused. Due to the wording of the Defence Force Discipline Act, the Forces do not pay for advice or representation by civilian counsel in such cases. While it is technically the convening authority who provides defence counsel, in fact it is the accused who selects a defending officer. In the overwhelming majority of the cases, the defending officer is a member of the reserves.

61. With respect to courts martial outside Australia, the member may only be defended by a member of the Australian Defence Force, a legal practitioner, or a person qualified to practice in the courts of that country. In recent cases of this nature, the defence counsel has been selected by the director of the legal service for the service to which the accused belongs. The counsel has been a member of the permanent forces.

62. Appeals of decisions of courts martial and Defence Force Magistrates are made by way of a writ in Federal Court. The appeal court consists of three Federal Court judges. While there is no provision for the payment of a member's legal fees on appeal, in practice the barrister's fees and other costs are paid. At trial, the reserve legal officer appears in uniform and acts in a military capacity. On appeal, he or she is gowned and acts in a civilian capacity. No fees are paid if the matter goes up to the High Court.

New Zealand

New Zealand Defence Force

63. While the regular forces of the New Zealand Defence Force consist of the traditional three services (Royal New Zealand Navy, New Zealand Army, Royal New Zealand Air Force), the discipline system is, generally speaking, a unified one. The Navy does have some distinctions at the summary trial level, but none that are relevant to this study. There is no formalized role for lawyers in summary procedures. However, nothing in the controlling legislation prohibits the participation of lawyers. The current interpretation of the applicable law allows lawyers to attend the proceedings and assist clients, but not directly represent the accused. If an accused chooses to retain a lawyer for this process, it is at his or her own expense.

64. At the two levels of court martial, Restricted and General, the accused is entitled to be represented by counsel. While nothing prohibits regular force legal officers from conducting the defence, this option is rarely used. Instead, the accused normally uses the military legal aid system. The accused also has the right to retain counsel at his or her own expense or select representation from other, non-legally trained, sources. The legal aid scheme does not necessarily provide for the accused to be represented by counsel of the accused's choice.

65. When an accused wishes to use the legal aid scheme, an application is made to the court martial convening authority. This authority also makes the decision as to whether a court martial will be held and what charges the accused will face. If the prosecutor is a lawyer, which isn't mandatory, the convening authority must grant legal aid. If not, the convening authority is required to consider a legal aid report from a legal staff officer to determine if legal aid is warranted. A refusal to grant legal aid is reviewable at the next level of the chain of command. In practice, legal aid is virtually automatic.

66. When legal aid is granted, the convening authority assigns either a defence counsel from the Armed Forces Courts-Martial Counsel Panel or a suitably qualified service officer. In complex or serious cases, the convening authority may also authorize a senior counsel to be briefed. The Panel is composed of lawyers identified by the Director of Legal Services as possessing the necessary skills to be effective counsel before a court martial. Appointments to the Panel are made on application to that Director. The lawyer does not have to be a member of the Armed forces, but they usually are members of the territorial or reserve forces. A number of retired officers are currently on the Panel. Panel members are not restricted to defence roles. They may also be retained to provide prosecution services.

67. The New Zealand Defence Force has two avenues by which court martial decisions are examined; review and appeal. Both the conviction and the sentence are reviewed by a Board of Review consisting of three Deputy Chiefs of Staff. The legal adviser to the Board is the Judge Advocate General. The New Zealand Judge Advocate General is an independent judicial officer appointed by the Governor General. He is entirely separate from the prosecutorial authorities in the same way as the UK JAG. The Board has broad powers to quash or vary any conviction or sentence, except the sentence may not be increased. There is no provision for a convicted member to appear or be represented before the Board, which sits *in camera*. The convicted member may petition the Board in writing. However, as there is no explicit prohibition of representation, the Board policy is to grant an application for such representation. The first such application is expected in the near future. While there is no provision for legal aid for this representation, the Board has the power to regulate its own procedure and it remains to be seen whether publicly funded counsel will be authorized.

68. A member may appeal a conviction, but not the sentence, to the Court Martial Appeal Court (CMAC). That Court is a superior court of record. Legal aid in the CMAC

is determined by the Court itself based on the member's needs and the interests of justice. In practice, it is virtually automatic.

69. When a member uses the legal aid scheme, he or she is required to make a contribution to the defence. The rate is 3% of gross taxable Service emoluments for the immediately preceding 12 months, or an equivalent rate for reserve and territorial forces. Members of both these latter forces are entitled to representation to the same extent as regular force members. The contribution can be waived in whole or in part by the convening authority when satisfied that recovery would be impracticable or cause undue hardship.

70. For courts martial outside New Zealand, which are rare, there is provision for either the regular representation by New Zealand counsel or representation by a member of the legal profession of any other country who is approved by the convening authority as broadly equivalent to a barrister or solicitor of the High Court of New Zealand. Normally, the accused and witnesses are flown back to New Zealand for trial. With only 10 to 15 courts martial per year in total for the New Zealand Defence Force, the number that fall into this category has not created any major difficulties.

South Africa

South African National Defence Force

71. In the current discipline system for the South African National Defence Force, the accused's right to counsel begins with minor offences tried at the summary trial level. The accused is advised of the right to counsel and that, if he or she wishes to exercise that right, the trial officer will direct the holding of a preliminary investigation as a precursor to the trial of the accused by court martial.

72. In each case where a court martial may be held, whether due to a reference from a summary trial or directly for trial of a more serious offence, a preliminary investigation is held. In essence, the accused hears the whole of the prosecution's case before a final decision is taken on whether a court martial will be held. At the conclusion of the preliminary investigation, the accused is asked if he or she is to be represented by private counsel at his or her own cost or wishes to be represented by military counsel at no cost. The accused may request a particular military counsel and the preference will be honoured if the officer is available.

73. Defending officers also prepare representations and argue cases before Councils of Review, an internal system of appeal and review. The Adjutant General (equivalent to the Canadian Judge Advocate General) is a reviewing authority, controls the sittings of Councils and also, at times, the allocation of military law officers to represent the accused before the Councils. The Councils of Review are appointed by the Minister of Defence, are chaired by judges, and *de facto* have a single serving officer out of a

minimum of three members. When they have more than three members, the additional members are judges of the High Court.

74. The South African system still has the problem that the Canadian Forces and British Forces had until the recent past. The Convening Authority not only convenes and constitutes the courts, but also has the final say on decisions to prosecute and is the "provider" of defence counsel in the form of defending officers. Changes are likely to take place in the next year or so to correct this situation.

Chapter 3

Evaluation Considerations

Legal Standards

1. The design of the system for the provision of defence counsel must take into account the duties that those counsel would be expected to perform and the law applicable to the performance of these duties. Both civilian and military courts have considered the legal requirements for the provision of legal counsel. Subsection 10(b) of the Charter has been the main focus of the case law in this area. That subsection reads as follows:

"10. Everyone has the right on arrest or detention

(b) to retain and instruct counsel without delay and to be informed of that right;"

For the purposes of this study, the principal issues under this provision relate to the time when this right is applicable, requirements for a valid waiver of a constitutional right, and the necessity for publicly funded defence counsel.

Timing

2. The Supreme Court of Canada has frequently addressed the timing of the right to counsel and the way it applies in different situations. The initial standard, set in 1985 in *R. v. Therens*, [1985] 1 S.C.R. 613, specified that the right to retain and instruct counsel on "detention" arises when there is a restraint of liberty. The restraint may be "of varying duration in a situation in which a person may reasonably require the assistance of counsel and might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee." The detention does not need to be by physical constraint. It also occurs when the person in authority "assumes control over the movement of a person by a demand or direction which may have significant legal consequences and which impedes or prevents access to counsel." If failure to comply can result in criminal liability, the constraint qualifies as detention for the purposes of the constitutional protection.

3. The Supreme Court gradually refined the test in a number of different areas. These include, for instance, the time for granting the right when a search warrant is being executed (*R. v. Strachan*, [1988] 2 S.C.R. 980), the need for the person to understand the information when the right is given (*Clarkson v. The Queen*, [1986] 1 S.C.R. 383), and the need to inform the person detained of the available duty counsel

(*R. v. Brydges*, [1990] 1 S.C.R. 190, *R. v. Bartle*, [1994] 3 S.C.R. 173). When applied to a military context, the decisions indicate that the right to retain and instruct counsel would arise when the person subject to military detention or arrest is constrained either by physical means or by psychological compulsion, including by a legal order or direction that could result in a violation of the Code of Service Discipline or criminal law if not obeyed. In a rational interpretation of this standard, it would not include all situations where persons are given a military order or direction which requires them to do something or refrain from doing something; only those where the nature of the constraint could reasonably create a need to consult legal counsel. In such cases, the person must, without delay, be offered a reasonable opportunity to exercise the right.

4. The right to be informed of available legal aid and duty legal counsel does not require that a person who is arrested or detained be informed of all other possible options for retaining counsel. As stated by the Court Martial Appeal Court in *Clabby v. The Queen* (19) 4 C.M.A.R. 397 at p. 398:

"The *Charter* guarantees the right to retain and instruct counsel; it does not impose on the authorities an obligation to give advice to an accused as to what sort of counsel he should retain, or how."

Waiver

5. The issue of the waiver comes up in this study in relation to election for trial by court martial. By not electing court martial, the accused is, among other things, waiving his right to representation by counsel (although the trying officer does have a discretion to permit such representation). This issue could arise either under subsection 10(b) of the Charter or under s. 11. As the standard for a waiver is common, it will only be discussed here.

6. The waiver of a constitutional right can be either implicit or explicit. If implicit, there is a very high standard of proof required. The Supreme Court of Canada has specified that before a waiver of a constitutional right will be considered valid, the person waiving the right must have a true appreciation of the consequences of giving up the right (*R. v. Clarkson*, *supra*). Merely acting in a manner that may appear to waive the right is not sufficient (*R. v. Manninen*, [1987] 1 S.C.R. 1233, *Leclair and Ross v. R.*, [1989] 1 S.C.R. 3). A succinct discussion of the waiver requirements was given by that court in *R. v. Smith*, [1991] 1 S.C.R. 714. The Court specified that to establish a valid waiver of the right to counsel at trial the judge must be satisfied that in all the circumstances revealed by the evidence the accused generally understood the sort of jeopardy he or she faced when the decision was made to dispense with counsel. What is required is that he or she be possessed of sufficient information to allow making an informed and appropriate decision as to whether to speak to a lawyer or not. This decision suggests that in many cases, if not most, an accused should have access to a

lawyer when making an election for trial by court martial so that the decision is an informed one.

Funded Counsel

7. While the right to retain and instruct counsel exists in particular circumstances, this does not necessarily mean that the state must provide this counsel in order to comply with the constitutional provision. In *Deutsch v. L.S.U.C, etc.*, 48 C.R. (3d) 166 (Ont. S.C.) the Ontario Supreme Court stated, when referring to s. 10(b) of the Charter:

"This entrenched right to retain and instruct counsel is a matter separate and distinct from the issue of the right to funded counsel."

Later in the decision, the Court stated:

"There may be rare cases where legal aid is denied to an accused person facing trial, but, where the trial judge is satisfied that, because of the seriousness and complexity of the case, the accused cannot receive a fair trial without counsel, ... it seems to me that there is an entrenched right to funded counsel under the Charter. ... [T]here is no entrenched right to funded counsel under the Charter except as indicated above."

The Court had found that this right to funded counsel in certain circumstances had already existed at common law. This demonstrates that it was not a new right created by the Charter.

8. In *R. v. Robinson*, 51 C.C.C. (3d) 452 at p. 482, the Alberta Court of Appeal also stated:

"State funded counsel as an unqualified constitutional right of the Canadian accused, to the exclusion of any other consideration, at trial and, *a fortiori* on appeal, is a conclusion that cannot be reached."

9. For the Canadian Forces, the decisions of the Court Martial Appeal Court are binding unless overruled by the Supreme Court of Canada. In *Boland v. The Queen*, (1994) C.M.A.C.-374, the C.M.A.C. refused to hear the appeal by the Crown unless counsel for Boland was publicly funded. In that case, the court determined that the rules permitting the court to have counsel appointed at public expense did not apply due to a technical limitation in the rules. The Court apparently would otherwise have granted an application for appointment of counsel at public expense in this case. The Court therefore exercised its inherent jurisdiction to control its own process and stayed the appeal until the Crown had given an undertaking to pay the respondent Boland's legal fees. The Ontario Court of Appeal had earlier taken a similar position in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 9 at pp.69-70.

10. In light of the above, it appears that there is no absolute right to state funded counsel for an accused. The limited right will depend on the facts of the particular case as to whether an accused can receive a fair trial or fair hearing on appeal without funded counsel.

11. Although the Supreme Court in *R. v. Brydges* required that an accused be informed of available legal aid and duty legal counsel within the jurisdiction, the majority clarified this in *R. v. Prosper*, [1994] 3 S.C.R. 236, finding that s. 10(b) does not constitutionalize the right to free and immediate legal advice on detention. However, once a detainee has expressed the desire to exercise the right to counsel, a reasonable opportunity to do so must be provided and the agents of the state must hold off eliciting incriminatory evidence from the detainee until that opportunity has been given. Therefore, unless legal counsel is readily available to provide the required advice, including free counsel if the detainee cannot afford counsel, investigators may be seriously delayed in the completion of the investigation.

Effective Representation

12. In addition to the right to retain and instruct counsel, the issue of the effective assistance of counsel must be addressed. In this respect section 7 of the Charter is applicable. It states:

"7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

13. The courts have stated that an accused is to receive effective assistance of counsel, which involves more than just competence (see *R. v. Silvini* (1991), 9 C.R. (4th) 233 (Ont. C.A.)). The accused must have the undivided loyalty of counsel. Most of the criminal case law in the area concerns the joint representation of two accused by one counsel. The issue involves whether the defence of one accused was compromised because of the lawyer's interest in defending the co-accused. For instance, was certain advice given on plea or were certain avenues of questioning taken to assist the co-accused to the detriment of the other client? In any particular case, a large number of factors must be taken into account to determine if a conflict of interest exists. If such an analysis does demonstrate that the counsel was not able to give his or her undivided loyalty to the client, then the lawyer cannot act without a fully informed waiver from the client. Even with such a waiver, there is doubt if counsel should be permitted to represent the client due to the interests of justice.

14. In the overall legal context, the Supreme Court of Canada dealt with the issue of conflict of interest for lawyers in the case of *MacDonald Estate v. Martin*, [1991] 1 W.W.R. 705. That case involved a lawyer who had been actively working on a civil matter, changed firms to the firm to the one providing the legal representation on the other side of the matter, and worked on the very matter again for the new firm. The

Court specified that two questions must be addressed:

- "(1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?
- (2) Is there a risk that it will be used to the prejudice of the accused?"

15. In answering the first question, the Court said:

"...[O]nce it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge."

16. As to the second question, the Court stated:

"There is ... a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese walls and cones of silence.

.....

A fortiori undertakings and conclusory statements in affidavits, without more, are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying, "trust me." This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used."

17. Applying the Supreme Court's position on solicitor/client privilege to a system for the provision of defence counsel, there would need to be a system where either the prosecution and defence lawyers are not seen as part of a common law firm or institutional protections such as Chinese walls or cones of silence are in place to prevent confidential information being transmitted between the defence and the prosecution. In addition, protections would have to be in place to prevent the passage of confidential information if a lawyer changed from performing defence functions to performing prosecution functions and vice versa.

18. In light of the standards set by the courts with respect to counsel conflict of interest and by the Supreme Court of Canada in relation to the protection of solicitor/client confidences, a system for the provision of defence counsel should ensure that:

- a. a defence counsel is free of inappropriate organizational influences that could create, or reasonably be seen to create, a conflict of interest between the defence of the individual client and the counsel's personal interests in maintaining a beneficial relationship with the organization or its hierarchy; and
- b. defence counsel are protected from organizational relationships that could, or could reasonably be seen to, endanger solicitor/client confidences.

Choice of Counsel

19. A further issue is choice of counsel. The courts have pronounced a right to counsel of choice with some limitations. For instance, while an accused is entitled to retain and instruct counsel of his or her choice, the counsel must be reasonably available to perform the defence duties. In *R. V. Ross*, [1989] 1 S.C.R. 3 the Supreme Court has stated that :

"...accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available within a reasonable time that the detainee or the accused should be expected to exercise the right to counsel by calling another lawyer."

20. The C.M.A.C also commented on this issue in *The Queen v. Boland*. It stated as follows :

"Given the particular facts here, I consider it very important to the conduct of the respondent's case on appeal that he continues to be represented by his trial counsel if he so wishes. ... There appear to be important questions of both fact and law arising out of (the trial) process which trial counsel is surely in the best position to handle. Such a finding is not only consistent with common law principles but also with section 7 of the *Canadian Charter of Rights and Freedoms*."

Therefore, the Court effectively enforced a right to counsel of choice on appeal under the of circumstances of that case. As the circumstances were not that unusual in criminal or military law, the right to choice of counsel on appeal, at least to the extent of retaining trial counsel, appears to be the current state of the law for the Forces. The issue of the rules that should govern such a right have not yet been fully addressed by

the C.M.A.C., but they should be considered in the design of any new defence counsel system.

21. The choice of counsel may be restrained through factors other than the availability of the particular counsel. For instance, legal aid societies are not required to finance counsel at higher rates than provided for in the governing legislation and regulations merely because an accused wants a particular counsel (*R. v. Rockwood* (1989), 49 C.C.C. (3d) 129). Instead, the right to counsel extends only to receiving counsel competent to handle the matter at hand.

Official Languages

22. An additional, and major, legal requirement is the need for counsel who can represent the accused in his or her official language of choice. Subsection 19(1) of the Charter specifies that:

"Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament."

This right is further emphasized in section 14 of the Official Languages Act which makes both English and French the official languages of the federal courts. Specifically in relation to the Code of Service Discipline, Canadian Forces Administrative Order 111-1, paragraph 3 requires that the trial be in the official language of choice of the accused.

23. Considering the constitutional, statutory and regulatory requirements, the design of any defence counsel service must ensure that an accused can be provided with counsel who is competent to conduct the defence in the language of choice of the accused.

Summary of Legal Standards

24. In summary, the legal standards indicate that the Canadian Forces would only be required to provide funded legal counsel where the accused would otherwise be unable to obtain a fair trial or hearing on appeal. If a funded counsel system exists (such as a *Brydges* duty counsel, a legal aid system, or a military defence counsel system), a person arrested or detained must be informed of the system and given a reasonable opportunity to retain and instruct counsel. Any waiver of counsel must be clear and made with sufficient information to make an informed and appropriate decision. If no system exists and the person arrested or detained wishes to contact counsel, investigators would have to refrain from obtaining incriminating evidence from the detainee through lineups or other means until the person had a reasonable opportunity to contact counsel. Any counsel funded by the Canadian Forces must be, and be seen as, sufficiently independent of conflicting interests to provide services with undivided loyalty to the accused and must adequately protect solicitor/client confidences. The accused has a right to counsel of choice within the availability limits set by the courts

and the financial and selection limits of a funded counsel system. Any counsel provided must be competent to conduct the defence in the official language of choice of the accused.

Defence Counsel Organization and Roles

25. In the circumstances of this study, it was necessary to examine the current system of providing defence counsel in the CF in order to avoid any existing problems in the design of a new system. Furthermore, there is a need to determine what roles a defence counsel should be performing if a system is to meet the goal of being, and being perceived as, independent of conflicting interests.

26. With the current system for providing defence counsel in the CF, the principal concerns were whether the systemic influences on the defending officer in fact affected the requirement for undivided loyalty to the client and whether the client had a perception that the loyalty of the defending officer may be split between himself or herself and the Canadian Forces. The issue also arises as to whether there is a "law firm" situation that would require special protections to be in place if a new system involved a similar organization.

27. In the minds of those conducting the defences, there may well be no conflict. The duty of the defending officer is to provide the best possible defence for the client in keeping with appropriate ethical standards. The personnel evaluation reports of the defending officers are supposed to reflect the way in which they carry out this duty. Some defending officers, however, do have concerns that the system does create pressures unrelated to the proper defence of the client.

28. The credibility of the system rests, to a large degree, on the character of the officers in the defence counsel organization and the chain of command. There is a constant emphasis within the Legal Branch that military lawyers are officers first and lawyers second. The intent is to make military lawyers aware that they may be required to perform duties unrelated to their legal training. In this respect, the philosophy is the same as it is for other military occupations and trades. However, this emphasis also makes legal officers sensitive to the rank structure in the Forces.

29. It takes courage to subpoena a General to provide evidence and to aggressively cross examine him or her as a witness, particularly if you realize that you may be the legal adviser to that person at some time in the future. It also takes a dedication to the law to challenge military policies or legislation that the lawyer, in the capacity of a Canadian Forces officer, might think necessary for proper discipline. Fortunately for the system, most legal officers appear to take dealing with these as a challenge rather than a restraint. It is open to question, however, whether this psychological pressure on defending officers might influence decisions on tactics or questioning and therefore create a conflict between the officer and counsel roles similar to the conflict where two clients are being represented at the same trial. Granted, the same might apply to

civilian counsel or judges who aspire to higher appointments under the control of the government, but the relationship is more direct in the case of military legal officers. An aspect of this issue is currently being considered by the Court Martial Appeal Court in *Marsaw v. The Queen*. However, that decision is unlikely to be delivered before this report is submitted.

30. In an attempt to obtain some objective indication of the effectiveness of civilian counsel and military defending officers that might indicate whether there is an actual negative influence on the conduct of military counsel, the Study Team conducted an analysis of the courts martial for the past seven and a half years, 1990-97 (see Annex "C"). This examination showed that civilian counsel were hired for defence purposes on average 21.4% of the time. Not guilty findings were obtained on 38.43% of the charges defended by civilian counsel and 36.51% of the charges defended by military defending officers. Outright acquittals on all charges were obtained in 19.75% of the cases involving civilian defence counsel and 13.42% of the cases where defending officers conducted the defence. Civilian counsel pleaded guilty 45.76% of the time on a per case basis and 56% of the time on a per charge basis. Military counsel did so 55% of the time on a per case basis and 58.66% of the time on a per charge basis. If the statistics are evaluated on whether an accused is likely to be acquitted on a specific charge depending on whether military or civilian counsel defended the case, there is virtually no difference.

31. These statistics suggest that civilian counsel and military counsel are equally competent and aggressive when arguing cases before courts martial. In many cases, certain civilian defence counsel are hired frequently due to a good reputation among Forces members. Civilian counsel in this category often already have experience from previous military service or develop an expertise in court martial defences by focusing on this area as a part of their practices.

32. The statistics are not sufficiently significant to suggest that military defending officers are, in fact, adversely influenced in the conduct of the defence counsel function by their officer status or other systemic influences. On the contrary, statistics obtained on the rate of conviction in civilian courts in Canada in 1995-96 show that, on average, only 2.6% of the cases resulted in actual acquittals. Guilty findings were made 62% of the time and charges were stayed or withdrawn 29.1% of the time. As police officers laid the original charges and prosecutors made the decisions on withdrawals, it may well be that the evidentiary support for the charges is lacking more frequently than is the case for courts martial where military lawyers evaluate the charges before a recommendation is made for a court martial.

33. The above discussions show that the actual influence of systemic factors on defending officers is likely minimal, if it exists at all. The perception of independence is, however, a greater problem. The Special Advisory Group heard from members of the CF that the defence counsel were not seen as being sufficiently independent of the rest of the JAG organization. This concern has also been expressed in several of the

representations made to this Study Team and in most of the ones coming from Non Commissioned Members (NCMs). Therefore, whether the systemic influences actually do have an impact on the actions of defence counsel at trial is an issue of limited importance. If the CF members do not have faith that they will receive independent legal advice from military defence counsel, the current defence counsel system is not meeting one of the primary requirements of a good justice system - the appearance of justice. One issue to be dealt with is how to correct this perception problem.

34. The question of perception of legal counsel is also related to the issue of whether the Office of the Judge Advocate General can be considered a "law firm" requiring special procedures to protect client confidences. In *Sharpe v. Sharpe*, [1996] 4 W.W.R. 438, the Manitoba Queen's Bench briefly considered the issue of whether two military lawyers working in the same building in Germany would constitute "independent counsel" for the purposes of a separation agreement. The court concluded that they would qualify. However, the case appeared to rest to a large extent on the written acknowledgement by the party contesting counsel's status that the counsel were, in fact, independent. Little analysis was done of the requirements for independent counsel or the organizational structure under which the counsel operated. Therefore, the case appears to be of little benefit in the context of defence counsel independence for courts martial.

35. Under the current organization, the Directorate of Law/Defence is co-located with other JAG directorates and is on the same floor as the prosecution directorate and the JAG. No institutional safeguards such as Chinese walls or cones of silence are in place. The integrity of the protection of confidences relies on the integrity of the officers in the defence chain of command and unwritten policies concerning the communication of defence information. In addition, the Director reports through the Deputy Judge Advocate General/Advisory & Legislation to the JAG. The prosecution directorate reports through a separate DJAG to the JAG. Furthermore, defence counsel can be, and are, pulled from the conduct of defences to perform other urgent legal officer duties. All of these factors suggest that the Office of the Judge Advocate General constitutes a "law firm" for the CF and DND to the extent that special protections are required with respect to solicitor/client confidences. Any new system will need to rectify the current difficulties in this respect.

36. Besides the actual provision of defence counsel services at courts martial, there are a number of other duties that defence counsel would appear to be in the best position to provide. The legal standards specified earlier indicate that defence counsel should be available to provide advice to accused as to whether he or she should elect trial by court martial or stay with a summary trial. Otherwise, the accused may not be making an informed election and the election may be overturned at trial if challenged. Counsel may require detailed information or copies of documents in order to properly advise on this decision. There is also a distinct possibility that the detainee will be contacting counsel from a considerable distance. Any system established must ensure

that competent advice can be given in these circumstances by providing the appropriate communication tools to defence counsel.

37. Unless the summary trial system is modified, assisting officers will still be providing the main representation at summary trials. They need to receive training on how to carry out this role effectively and the ethical standards they should be meeting. The Special Advisory Group recommended such training in its report to the Minister (see recommendation 24). This training should be provided by those performing defence counsel duties as they are the ones most deeply involved with this aspect of disciplinary hearings. In addition, assisting officers will undoubtedly want to obtain legal guidance in some specific cases. Once again, defence counsel would appear to be the most appropriate source of this advice.

38. Legal officers at the Captain and Major ranks are currently acting as duty counsel to provide advice for those who are arrested or detained under the Code of Service Discipline. This function will need to continue to have an effective discipline system. Because of the nature of the advice being given, this role is also one that the defence counsel should be performing rather than a legal officer who may not have been dealing with criminal law in some time.

39. One of the observations by NCMs as to why the military defence counsel were not trusted as independent dealt with the lack of legal officer assistance to NCMs in non-discipline situations. For instance, if a member had a grievance application, no legal advice could be provided on the substance of the grievance as the legal officer would be in a conflict of interest. The legal officer is the adviser to the organization that the member may be complaining about. Similar problems exist such as members wishing advice when served with a notice of intent to release. Members may reasonably be in need of legal advice in such circumstances and may not have ready access to, or be able to afford, knowledgeable civilian counsel in such circumstances. Therefore, defence counsel should be assigned the role of providing advice to members when the issue relates to the CF and the member's position is adverse to that of the Forces. This should significantly increase the credibility of counsel as looking after the interests of the member, not the organization. At this time, we do not recommend that the service extend to other areas of personal legal advice. This is due to both the practical reason of the potential volume of such cases in relation to the available number of defence counsel and the legal difficulties of providing advice with respect to provincial law when the counsel may not be a member of the bar of that province. However, this issue should receive a separate review.

40. Defending officers currently only provide counsel services on appeal when it is the Crown that is appealing. As will be mentioned later in this report, legal aid counsel are not under the same restriction. For each legal aid society a system exists to determine if an appeal would be warranted. So long as such a safeguard is put in place, there appears to be no valid reason why the same level of service cannot be provided by defence counsel when a court martial decision is in question. Besides

ensuring that justice has been served, an appeal can benefit the military justice system as well. Appeals that are not frivolous help to clarify the applicable law and also provide guidance with respect to needed changes in the system. Therefore, defence counsel should be providing comprehensive appeal services to the same extent as would be provided by provincial legal aid.

Practical Considerations

41. Besides the legal requirements for the provision of defence counsel, there are a number of practical aspects that must be taken into account. In Canada there appear to be no significant practical obstacles to having defence counsel services provided by either military or civilian counsel. Accused can already retain civilian counsel, and frequently do. However, for courts martial outside Canada the situation is more complex.

42. Courts martial may be held in areas where combat is still underway or where a peacekeeping role places strict limitations on the number of foreign personnel who may be present in the country. It might be argued that in such cases the accused should be returned to Canada for trial. In certain cases this may be feasible where the unit is rotating back to Canada before a court martial could reasonably be expected to take place. However, where this is not the situation, it may be necessary to hold it in theatre. This situation is most likely to occur in a wartime scenario. Holding the trial in theatre would also enable the others in the unit see the disciplinary process in action. Furthermore, if witnesses were essential to operations, it would enable the mission to carry on with minimum disruption to its mandate. In addition, local civilian witnesses may be needed who would not be willing to come to Canada to testify or where significant other legal problems might arise if they were brought to Canada.

43. Using civilian counsel in theatre may be problematic at times. An example was provided by a former military judge, LCol (Ret'd) J. Pitzul. It involved a court martial in Bosnia. Civilian counsel was retained by the accused. As this was a United Nations operation in a foreign country, Canada had to follow the directions applicable to UN Forces. While this resulted in relatively straightforward treatment for military personnel in theatre, civilians received much less consideration from the local combatants. The counsel also had to acquire special insurance for the visit. Only one company was willing to provide the insurance and that company placed a time limit on the lawyer's stay. Should a trial be lengthy, these types of practical limitations may make the use of civilian counsel much more difficult.

44. In addition to the above, an accused will need counsel wherever in the world he or she may be serving, the need to have counsel available who can be required to provide the service is evident. The fact that a place may be dangerous should not prevent a serviceperson from receiving constitutionally mandated services. Therefore,

some mechanism must exist to ensure that the service can be provided in such circumstances.

45. A further practical consideration relates to the functioning of the Legal Branch of the Canadian Forces. The downsizing of the Forces and the other influences have resulted in a significant reduction in the number of courts martial annually. Therefore, fewer regular force legal officers are acting as trial counsel. This will inevitably have a negative impact on the ability of legal officers to function effectively in this role. Should the defence counsel function be taken away, a real danger arises that there will not be enough regular force officers with up-to-date trial experience to meet the need for military judges. Even if sufficient officers are available, their experience will all have been with the prosecution.

46. Although the above is a real danger, even the current system does little to address it. Only one regular force legal officer is actually conducting defences on a routine basis and he has been doing so for a considerable number of years. Therefore, new legal officers are not gaining much, if any, defence experience even under the present circumstances. Unless the number of courts martial increase dramatically, the problem of trial experience for regular force legal officers will exist regardless of the system chosen for the provision of defence counsel services. The remedy for this particular practical problem goes beyond the scope of this study. However, the issue should be addressed immediately as any solution might well involve a need for changes to the way in which judge advocates for courts martial are qualified and selected.

47. Canadians are currently blessed with a country at peace. If history is a reliable teacher, this situation may change at some time in the future. As the Canadian Forces must be able to deal effectively with such changed circumstances, a system for the provision of defence counsel, like the military justice system as a whole, must be capable of significant expansion without the requirement for major systemic changes.

48. Finally, the impact of size and numbers must be acknowledged. The Canadian Forces are, relatively speaking, very small in numbers and getting smaller. The number of courts martial has been decreasing as has the number of summary trials. Although the number of court days has not decreased as dramatically, it has decreased. With the decrease in these numbers comes the inevitable decrease in the requirement for legal counsel. Any system developed will have to take this reality into account. However, an evaluation will also be needed of any potential increase in courts martial or trial days when an independent prosecutor system is put in place and the military investigation services are modified.

Chapter 4

OPTIONS

Introduction

1. In determining the options that should receive closer scrutiny, a decision had to be made on the basic question of whether the CF should fund defence counsel in Canada at all. The option of pulling out of this function entirely has the attraction of decreasing the cost for providing such services. It would also eliminate the perception of divided loyalties on the part of defence counsel. The legal standards would require that some contingency exist for cases where the accused would otherwise be unable to obtain counsel and could not obtain a fair trial without counsel. However, this would be a much smaller number of cases than a funded system would provide for in light of the members' right to hire civilian counsel at his or her own expense and, for those few that might qualify, the possibility of receiving provincial or territorial legal aid.
2. Despite the attractions of pulling out entirely, this possibility was rejected by the Study Team for a number of reasons. One significant reason was the potential impact on the morale of those serving in the CF. In this era of pay freezes, restricted promotions, loss of esteem, downsizing, and questions of leadership, any attempt by the Forces to divest itself of this role would likely be seen by the members as one more indication that the Forces no longer care about their welfare. Cohesion and loyalty are two of the cornerstones of an effective military and these traits are being sorely tested in the CF at this time. Therefore, on the basis of fundamental principles of military leadership, no action should be taken that will further alienate members without exceptional justification. Eliminating legal support for members in Canada would be just such an action.
3. An additional problem with the Forces divesting itself of the defence function in Canada is the resulting inefficient organization that would be required for courts martial. There would need to be independent counsel available for defence duties outside Canada as well as inside Canada where a member cannot otherwise retain counsel. Because of the small numbers of cases in these categories, it would be financially expensive and administratively cumbersome to maintain an independent organization just for them.
4. Besides the considerations above, the option of the Forces completely divesting itself of the defence counsel role was not a recommendation of the Special Advisory Group or the Somalia Inquiry. Neither was it an option specified in the terms of the Study Directive. In light of all these factors, no further consideration has been given to this option.
5. Another possible addition to this system would be the concept of a contribution

by the member toward the cost of the defence. This is currently used by all Canadian legal aid systems as well as the British and New Zealand military legal aid organizations. The contribution would be based on the member's ability to pay considering both income and expenses. Although this may be a positive factor with respect to cost, it also has a negative aspect. Because military counsel has historically been at no cost, members are likely to see this as just another money grab by the government despite the fact that it is common to all legal aid systems. It will likely be viewed as a cost cutting measure in keeping with all of the other cost cutting measures of government. This may well have a negative impact on morale. If this concept is accepted and a contribution will be required, there will obviously be some reduction in the cost of the system. However, as the contribution benefit would not be great and would probably be outweighed by the loss of morale, it is recommended that there be no contribution demanded of the member.

6. In order to evaluate the cost aspect of the different options, the Study Team had the cost of the current system of providing defending officers analysed for the 1996/97 fiscal year. The costs included the salaries and benefits of the regular and reserve force officers, plus the administrative support costs. For that fiscal year, the provision of defence counsel services cost \$688,629. The figures used to reach this total are included in Annex "D" with the rest of the cost estimate information.

7. Based on the information obtained in the Study, seven options were developed that were examined in greater detail. Many other models might also work, but those that made the short list were either considered the ones most likely to meet the essential elements for an independent military defence counsel system or else had been mandated by the Study Directive. The seven options were:

- a. use of a regular force defence team augmented by reserve force members;
- b. use of a reserve force defence team augmented by regular force members;
- c. use of provincial legal aid inside Canada and private civilian lawyers outside Canada;
- d. the establishment of a CF Legal Aid Service using private civilian lawyers;
- e. the establishment of a CF Legal Aid Service with staff civilian lawyers;
- f. an employee takeover where former legal officers would establish a firm to conduct defences; and
- g. retaining civilian law firms in locations across Canada to conduct defences.

8. The selection of any one of the above systems would not effect the right of the accused to hire civilian counsel of choice at his or her own expense. However, each of these systems would permit the accused to receive legal counsel at public expense. Greater detail on the options and an analysis of the feasibility and costs of each option are set out in the paragraphs that follow.

9. It should be noted that the advantages and disadvantages of each system are listed without comment on the relative importance that should be given to each. This weighting process is done in the discussion portion and the analysis must be read as a whole to understand the recommendations. Merely adding up the advantages and disadvantages to reach a conclusion as to the most desirable option would be unsupportable.

10. The cost analysis for each option considered was performed by the Directorate of Managerial Accounting and Comptrollership. The analysis was done based on an estimate of 50 courts martial a year, which is somewhat more than the average for the last two years. The number was selected in anticipation of a slight increase in courts martial with the inception of independent investigation and prosecution services as well as the proposed reduction of the powers of commanding officers. To the extent possible, actual figures were used rather than estimates. For instance, for those options involving civilian counsel, the Department of Justice agent fee tariff was used and average costs were obtained from Justice officials. For the military options, it was assumed that the head of the defence organization would be a Lieutenant Colonel and the defence counsel Majors and Captains. For the staff legal aid model in option "E", Department of Justice salaries for levels equivalent to these ranks were used. The estimates are only as accurate as the underlying assumptions. If any factor is modified, the estimate for that option will have to be increased or decreased accordingly.

Option A: Regular Force Defence Team Augmented By Reserve Force Members

Organization

11. This option would create a similar system to that proposed for the new prosecution system. It involves the creation of an Office of Military Defence Counsel (OMDC). The head of OMDC should be a regular force position filled by an experienced legal officer who is supported by regular force defending officers and regional reserve force defending officers assigned to that office for a specific period. The head of the OMDC would also be appointed for a specific period and only be removable for cause in the same manner as the military judges. He or she would inform the JAG on the administration of the Office, but not with respect to individual cases or any other matter that might infringe, or be seen to infringe, on solicitor/client privilege. The JAG would only be empowered to give general guidance and administrative support and provide the needed legal officers. Any such guidance would have to be made public. The JAG would not be authorized to give guidance or direction in, or in any other way interfere with, the defence in individual cases.

12. To ensure that the functioning of the OMDC is transparent, and that issues of concern to the OMDC are recognized, the head of the OMDC should be required to provide an annual report on the functioning of the Office to the JAG. This report should then form a part of the JAG annual report.

13. To assist the perception of independence and the legal requirements, the officers of the OMDC should not share offices with either the JAG directorates, the prosecution services, or the military judges. Likewise, the reserve force officers should not share office space with the local legal adviser. As one of the main concerns expressed by the NCM representatives was the officer status of counsel, the use of the generic term of "defence counsel" for both civilian and military counsel might ease the perception problem to a small degree.

14. To further promote the fact and the perception of independence, the OMDC should have its own budget as a separate line item in the National Defence budget. This budget would include funds for the administrative costs of the Office, payment of the costs of witnesses for the defence, and any other costs associated with providing defence counsel services.

Size

15. The size of such a defence team would necessarily vary depending upon the anticipated number and length of courts martial. Over the last several years, the number of courts martial have decreased dramatically, although the decrease in the number of court days has not been as significant. Using the assumption of 50 courts martial per year in the near future, which is somewhat greater than the present number, the office of the OMDC should be staffed with five regular force officers, including the head of the organization. This size of regular force organization would provide a minimum level of flexibility. With the duty counsel responsibilities, the instruction of assisting officers, the provision of advice on elections for court martial, and other duties relating to grievances, etc, defence team members would likely be operating at maximum sustainable levels with this number of officers.

16. To be consistent with the concept of an independent defence counsel system, the reserve force should assign specific counsel to the defence team rather than having all counsel available for these duties. Seven reserve force legal officers should be assigned to the OMDC. These would be based regionally, with more than one assigned to the larger geographical regions for more-ready local support. This will provide needed local resources for the regular force team.

17. The numbers in the defence team should be modified as the number of courts martial and other duties warrant. Increases might be made at any time. However, to maintain the maximum appearance of independence, any decreases should only be done through attrition as posting tours are completed. To accommodate cases involving multiple accused where there may not be sufficient military defence counsel to represent them all without creating conflicts of interest, or for other unusual circumstances, the head of the OMDC should have the discretion to authorize civilian counsel to be retained at public expense where appropriate.

Personnel

18. In order to provide competent defence services, any officers assigned to the defence team should have trial experience or receive immediate training on joining the organization. The head of the OMDC should have at least 10 years at the bar and be appointed for four years with the possibility of an extension for a further fixed term. The assignment of defence counsel should be for a fixed period of time. Three years would seem to be appropriate in light of the number of officers that might be available for assignment to this team, the number of courts martial per year that the officers could be expected to perform and the need for stability in the organization. Reserve force members should also be appointed for a three year, but renewable, period. While performing defence counsel duties, the officers should not be removed from the defence team for any other duties except at the written request of the legal officer, at the commencement of retirement leave, on the officer's acceptance of promotion, for misconduct, or for incapacity. Such removal could be seen as a way of influencing defence counsel or limiting the effectiveness of the defence team. Furthermore, to reduce the possibility of command influence defence counsel should not be subject to direction from the chain of command, other than the OMDC chain of command.

19. To promote independence, the head of the OMDC should not receive a performance evaluation report or merit pay. Pay should be on the same basis as that of a military judge of equivalent rank. The performance evaluation reports on other counsel in the OMDC should be prepared only by other officers in that Office. With the original organization recommended, this would mean the head of the OMDC would prepare all other evaluations. No review would be conducted, although officers feeling aggrieved by the performance report would still be able to make an application for redress of grievance. While this may be seen as creating a potential for interference with the independence of the OMDC, it would be a minimal interference as it could only be initiated by someone within the defence counsel system. In addition, some provision is needed in any system to ensure that fairness for all members is maintained. To maintain the merit pay concept, the head of the OMDC should be authorized to determine the merit pay category of the defence counsel. However, the proportion categorized above fully satisfactory should not be permitted to exceed the norm in the Legal Branch for the number of officers concerned.

20. The OMDC should be staffed with sufficient bilingual personnel to carry out the defence counsel functions in the language of choice of the person requesting the services.

Training

21. Included in the OMDC budget should be sufficient funds to provide adequate initial and continuation training for defence counsel in the organization. This training should include, as a minimum, an initial short course from the Office on the ethics, philosophies, practices, and administrative procedures for providing defence counsel

services as well as upgrading courses provided by the Canadian Bar Association, the Federation of Law Societies, or other appropriate institutions.

Cost

22. The assumptions on which the cost estimates for this system are based are included in Annex "D". If the assumptions are accurate, this system will cost approximately \$1,017,000/yr including both direct and indirect costs.

Implementation

23. The implementation plan for this option should include:
- a. the statutory amendments necessary to establish the OMDC organization, including the terms of office for the head and the limited role of the JAG;
 - b. regulatory amendments to deal with issues such as the budget, discretion re retention of civilian lawyers, personnel status and pay, and other matters where regulatory authority is required or desirable; and
 - c. a separate Canadian Forces Administrative Order (CFAO) to provide the detail on posting tours, bilingual requirements, and other matters of administration not requiring statutory or regulatory authority.

24. As the required changes would be the least disruptive of all the options, this system should be capable of relatively rapid implementation.

Evaluation

25. Essential Requirements - This option would meet all of the essential requirements listed in paragraph 9 of Chapter 1. It would comply with the legal requirements, meet independence needs, provide services in the language of choice, have the greatest portability, maximize a just, speedy and efficient discipline system, and is practical and affordable.

Additional Advantages

26. Flexibility - The structure of the organization would permit relatively simple expansion and contraction as the volume of defence counsel duties grows or shrinks, including a core for expansion in case of mobilization.

27. Minimal Disruption - The continuity of the provision of defence counsel services could be maintained with minimal disruption as the personnel to establish the organization would initially come almost exclusively from those already serving.

28. Service Knowledge - Legal officers filling positions in this organization would normally have greater knowledge of the military and its functioning than would be the case with civilian counsel. This would be valuable in being able to go to the proper sources for assistance or information required for a defence.
29. Military Justice Knowledge - The knowledge of the military justice system would normally be greater among officers in this system than among civilian counsel. For civilian counsel who do include military defences as a regular part of their practices, this would not be a factor.
30. Military Skills - In combat situations, such as during the Gulf War, military defence counsel would require less assistance and protection than would be the case for civilian counsel.
31. Officer Career Flow - The Legal Branch would be able to retain legal officers with defence counsel experience and demonstrated litigation skills that may prove useful later in their careers when providing legal advice on military justice issues. Without this experience, legal officers may find it more difficult to analyze the weaknesses inherent in proposals involving the military justice system. In addition, this system would provide officers capable of becoming military judges. The inclusion of defence counsel would provide a more-balanced perspective to the Legal Branch as a whole.
32. Rapid Reallocation of Resources - In unusual circumstances such as mobilization, defence counsel resources could be reallocated more rapidly than would be the case if only non-military counsel performed the defence counsel role.
33. Enhanced Perception - If the increased roles of the defence counsel are implemented and an effective education program is initiated, the perception of defence counsel as acting in the interests of the individual rather than the organization will be improved.
34. Availability - The difficulties encountered in trial scheduling and completion encountered with civilian counsel as a result of the obligations of their civilian practices would be avoided.
35. Preparation - Legal officers preparing for trial are generally not as limited as civilian counsel in preparation time with a resulting greater ability to explore all the legal issues involved.
36. Assisting Officer Training - Regular force legal officers would have the knowledge of the military justice system required to provide competent training for assisting officers.
37. Grievance Assistance - Regular force legal officers would have the expertise to assist members with respect to applications for redress of grievance and responses to

notices of intent to recommend release.

38. Financial Control - With set salaries and other normal CF financial controls, the cost of the system can be predicted with greater accuracy than for some other options.

Disadvantages

39. Least Change - This system may be seen by members and the public as being the least proactive response to the concerns expressed to the Special Advisory Group, the Somalia Inquiry and this Study Team.

40. Officer Rank and Uniform - The continuing status of defence counsel as officers does not resolve the perception problem expressed by some NCMs of defence counsel being loyal to the officer corps and the system rather than the individual member. This perception problem may be reduced somewhat by having defence counsel robe for trial rather than wearing a uniform. However, as the participants in the trial would still know the ranks of the prosecutor and defence counsel, this change would be cosmetic at best.

41. Information Program - In order to address the perception problem that currently exists, an extensive information program will be needed to familiarize members of the CF and the public with the changes made to the defence counsel system.

42. Counsel Experience - The number of defence counsel required in order to create a viable system of this nature will create difficulties in maintaining counsel trial skills unless extensive continuation training takes place. Counsel's limited three year posting to the organization will further impact on the expertise levels.

43. Psychological Pressures - The perception, and perhaps reality, of psychological pressure on counsel who know that they are only on a limited tour in the defence organization may affect credibility. Counsel may consider that future postings may be affected by their defence performance. In addition, a counsel may be a future adviser to an authority he or she is currently challenging in court.

44. Size - Unlike the U.S. military systems, the small size of the OMDC organization does not permit a full chain of command for performance reviews for those in the organization.

45. JAG Resources - The posting of legal officers to the defence organization and the provision of administrative support would still be provided by the JAG. These may be viewed as means of controlling the effectiveness of the defence through the posting of less able officers to the organization or delaying or withholding needed support. In addition, the JAG will have to devote scarce resources to those tasks not related to defence counsel duties that were previously performed by defence counsel.

46. Universality of Service - Withdrawing defence counsel from the authority of the chain of command, except the OMDC chain of command, might be argued to violate the universality of service principle that states that an officer or NCM is a soldier, sailor or airman/airwoman first and a trade specialist second.

47. Rank differential - Because the defence counsel and prosecutor at a court martial may be of different ranks, the accused may perceive that he or she is either getting an advantage or a disadvantage depending on whether defence counsel held the higher or lower rank. In either case, the military rank structure would suggest a difference in credibility or experience in favour of the higher rank that detracts from the perception of fairness.

48. Preparation - The advantage of considerable preparation time may also be a disadvantage. Counsel may be tempted to research and present motions and arguments that might not otherwise warrant consideration, thereby extending the trial process and increasing the cost.

49. Cost - This is the most expensive option, although probably within the range of error for the estimates in relation to the other options.

Discussion

50. The advantages of this system are significant. It meets the essential requirements listed in paragraph 9 and has other major benefits as well. With the use of military defence counsel, a cohesive military justice system is maintained that can provide all necessary defence counsel services. The actual independence is increased from the current system to a level equal to that of the U.S. Army Trial Defence Service or the defence counsel services of the other U.S. military forces. The efficiency of the system is maintained through generally reliable trial scheduling and the ability to send lawyers to areas of need on short notice.

51. A significant advantage is the Forces' ability to provide experienced military counsel to eventually perform judicial duties. With a system using staff civilian counsel, those counsel would have to be eligible for appointment as military judges if the judicial panel is to retain a balance of prosecutorial and defence experience. If this is done, the conditions for appointment would obviously have to be modified and the rationale for using legal officers as judges would need to be re-examined. The use of military lawyers for defence counsel services would avoid the disruption and de-militarization of the discipline system inherent in such changes.

52. This system is also the best with respect to meeting urgent military requirements for defence counsel. Private civilian counsel, and even reserve force legal officers, have to consider their obligations with respect to their civilian clients before undertaking defence counsel duties or in considering the way in which those duties can be performed. Regular force defence counsel do not have these additional burdens.

53. While service knowledge, military justice knowledge and military skills are advantages, they carry limited weight in this discussion. The British legal aid system and the success of civilian counsel in Canadian courts martial have shown that civilian counsel can rapidly adapt to the military justice system. While convenient, the requirement for service knowledge and military skills is not a necessity or else civilian counsel retained by the accused would not be permitted to do courts martial in operational theatres nor would other civilians be permitted in theatre. Such is not the case.

54. The major concern with this option is the perception issue. The use of military legal officers in uniform may perpetuate the distrust of the military justice system. While much of this distrust may result from a lack of understanding of the ethical and organizational standards that military defence counsel must meet, it will not be overcome unless extensive, accurate, and convincing information is provided to military personnel. The field consultation on the options showed that 55% of the respondents didn't even know that military defending officers are fully qualified lawyers. In light of this perception, it is not surprising that the trust level is modest. Even with the provision of accurate information, it remains an open question whether the view of legal officers as officers first and defence counsel second can be overcome.

55. If this option is seen by the courts as an abandonment of the universality of service principle, it may create serious problems for the preservation of that principle. The concept of members being considered officers or NCMs first and trade specialists second has been supported by the Federal Court of Appeal in a trilogy of cases in the early '90s and the Supreme Court of Canada refused to hear the appeals of those decisions. To ensure the independence, and support the perception of independence, of defence counsel, it is essential that counsel can honestly tell the client that a superior officer outside the defence counsel chain of command cannot influence the way the defence is conducted. Without this, the trust in the defence counsel is likely to be minimal. However, there is a strong argument that the change does not actually infringe on the universality principle. Defence counsel would still be required to perform any lawful duty but the authority to require the duty to be done is limited to superiors in the OMDC organization. Practically speaking, a defence counsel caught in an emergency situation demanding military skills will undoubtedly volunteer to assist, both for altruistic reasons and self preservation.

56. The issue of preparation is a two-edged sword. While military counsel may be able to conduct more research due to additional preparation time, there is no evidence in the statistics on success rates at trial that this additional time is of benefit to the client. However, the admittedly-limited statistics for the past two and a half years on trial lengths shows that trials with military defence counsel take an average of 30% longer than those with civilian counsel. This results in costlier courts martial and more use of limited judicial resources. This is balanced by the less frequent need for delays in trial scheduling and the lower number of lengthy adjournments during the course of trials than is the case with civilian counsel.

57. The cost of this system is a disadvantage in relation to most other options. However, it still should be no more expensive than the current system for an equivalent number of courts martial and the difference between it and other options is small enough that it may well be within the range of error for the estimates. In addition, training and guidance by the head of the OMDC to defence counsel with respect to the effective use of court time may bring the average length of a trial more into line with that for civilian counsel with the resulting cost savings.

Option B: Reserve Force Defence Team Augmented By Regular Force Members

Organization

58. This type of system would similar to Option A using mainly reserve force officers with a small regular force contingent. The reserve force officers would normally provide defence counsel services for all courts martial. The head of the Office of Military Defence Counsel would be a full time job. It could be filled by either a regular force or reserve force officer with the necessary qualifications. The creation of the Office would be the same as for Option "A" as would the length of appointment of its head. There should also be a regular force legal officer to provide assistance to the head of the Office and to act as a coordinator in National Defence Headquarters for defence counsel requirements. This officer would also provide a back up in cases where no reserve force officer was readily available to perform defence counsel duties in an urgent situation.

59. As with option "A", the head of the OMDC would not receive performance reports but would prepare the reports on the defence counsel in the organization. As reserve force legal officers do not receive merit pay, allowance for this aspect would only need to be made with respect to the regular force assistant to the head of the OMDC. The organization should still have a statutory basis and all of the other features of Option "A" with appropriate modifications to reflect the reserve force status.

Size

60. The number of reserve force legal officers assigned to the defence team would have to be somewhat greater than would be the case with a regular force defence team. reserve force officers do not have the same flexibility as regular force officers due to the commitments of their civilian jobs or practices. In addition, reserve force officers are physically located in each of the regions rather than being centrally located in Ottawa. This would suggest a more regional type of defence counsel system if a reserve force defence team were to be used. Considering these factors, a reserve force defence team should be at least three times the size of a regular force defence team, i.e. fifteen officers, in order to permit adequate representation and to ensure other defence counsel obligations can be fulfilled. As indicated above, one regular force legal officer should also be assigned to the organization, not including the OMDC head.

Personnel

61. As is the case with regular force officers, reserve force officers performing defence counsel services should have trial experience prior to being assigned to this team. Preferably, they should have a criminal trial practice in their civilian capacities. With the increased size of the defence team, the calls on each reserve force legal officer will likely be fewer than for the regular force officers in option "A". Therefore, each officer should remain in the defence team longer than would be the case for a regular force officer. A tour of 5 years would seem appropriate. This would assist both the stability and the experience levels within the defence team.

62. One of the major problems likely to arise using this system is availability. Besides disrupting their civilian practices, a call out to perform court martial defences would normally cost the member a considerable amount of money at the present rates of pay. A counsel that might charge \$150/hr would be making less than that a day. This becomes a major disincentive for a reserve force legal officer to accept a call out for a defence, particularly a lengthy one. Therefore, there will likely be considerable difficulty recruiting sufficient legal officers to meet the needs of this option unless the pay system is modified.

Training

63. As with the regular force legal officers, reserve force officers on the defence team should receive sufficient defence counsel related training internally and with professional organizations to maintain competence in the area.

Cost

64. The assumptions on which the cost estimates for this system are based are included in Annex "D". With no change in the pay scale, this option would cost approximately \$859,000/yr including both direct and indirect costs. If the pay scale is adjusted for counsel conducting courts martial to that equivalent for counsel under a CF Legal Aid Service using private counsel, the cost would rise to approximately \$1,112,000 even if the number of days per court martial were to be reduced to the 3.5 used for the analysis of civilian costs.

Implementation

65. As with Option "A", the implementation of the OMDC should include:
- a. the statutory amendments necessary to establish the OMDC organization, including the terms of office for the head and the limited role of the JAG;
 - b. regulatory amendments to deal with issues such as the budget, discretion re retention of civilian lawyers, personnel

- status and pay, and other matters where regulatory authority is required or desirable; and
- c. a separate Canadian Forces Administrative Order (CFAO) to provide the detail on posting tours, bilingual requirements, and other matters of administration not requiring statutory or regulatory authority.

Evaluation

66. Essential Requirements - This option should meet all of the essential requirements listed in paragraph 9 of Chapter 1. However, with respect to practicality, serious questions arise about the ability to recruit or call out sufficient legal officers under the current pay scheme.

Additional Advantages

67. Low Level of Disruption - While there will be somewhat more disruption in the organization of defence services than under Option "A" while this system is established, the extent of disruption should not be significant and would be less than for most other options.

68. Service Knowledge - Reserve force legal officers will normally have a more extensive knowledge of military practices and procedures than would a civilian counsel.

69. Military Skills - Reserve force legal officers would normally have greater military skills that would reduce the amount of protection and assistance they would require in an operational theatre.

70. Military Justice Knowledge - Reserve force legal officers would normally have greater knowledge of the military justice system than would civilian counsel unless the civilian counsel included military justice cases as a regular part of his or her civilian practice.

71. Rapid Reallocation of Resources - In extreme circumstances such as mobilization, defence counsel resources could be reallocated more rapidly than would be the case if only non-military counsel performed the defence counsel role.

72. Enhanced Perception - As reserve force officers are not making a career of their military service, the use of reserves should reduce the concerns of careerism and greater loyalty to the system than the individual.

73. Cost - This system would be the least expensive of the six options if the pay scale is not adjusted.

74. Officer Career Flow - Reserve force legal officers would be able to obtain military trial counsel experience and demonstrate litigation skills that may prove useful later in their careers when providing legal advice on military justice issues. Without this experience, legal officers may find it more difficult to be able to analyze the weaknesses inherent in proposals involving the military justice system. In addition, this system would provide officers capable of becoming military judges.

75. Counsel Trial Experience - If reserve force defence counsel are selected from those members with a criminal litigation practice, the counsel would have trial experience equivalent to that of other civilian counsel and would have greater day-to-day court experience than the regular force officers in Option "A".

76. Assisting Officer Training - Reserve force legal officers would have the knowledge required to provide competent training for assisting officers.

77. Grievance Assistance - Reserve force legal officers would have the expertise to assist members in both the drafting and the substance of applications for redress of grievance and responses to notices of intent to recommend release.

Disadvantages

78. Perception - While there might be an improvement of the perception of independence in relation to regular force officers, the officer status and uniform may still engender distrust of the defence counsel's loyalties.

79. Universality of Service - As with Option "A", the restriction as to who can give a lawful command to a defence counsel might be argued to be a violation of the universality of service principle. Reserve forces have already been held by a human rights tribunal to be subject to the same universality standards as members of the regular force.

80. Availability - With the current levels of pay for reserve force legal officers, it will likely be difficult to recruit sufficient counsel to fill the positions or, if they are filled, to have counsel accept a call out for a trial of more than a brief duration. Also, like private civilian counsel, reserve force legal officers will likely have more difficulty with speedy trial scheduling and availability for other defence counsel duties due to the obligations of their civilian practices.

81. JAG Resources - As with option "A", the posting of legal officers to the defence organization and the provision of administrative support would still be provided by the JAG. These may be viewed as means of controlling the effectiveness of the defence through the posting of less able officers to the organization or delaying or withholding needed support. In addition, the JAG will have to devote scarce resources to those tasks not related to defence counsel duties that were previously performed by defence

counsel.

82. Rank Differential - As with option "A", because the defence counsel and prosecutor at a court martial may be of different ranks the accused may perceive that he or she is either getting an advantage or a disadvantage depending on whether defence counsel held the higher or lower rank. In either case, the military rank structure would suggest a difference in credibility or experience in favour of the higher rank that detracts from the perception of fairness. Also as mentioned with option "A", having defence counsel robe for trial rather than wear a uniform would be a cosmetic change at best.

83. Psychological Pressures - While the psychological pressures on reserve force officers are not likely to be as great as would be the case for regular force officers, there may still be some impact from sensitivity to the rank structure and knowledge that the legal officer will be leaving the defence counsel organization in the future to work in some other area of the JAG Reserve organization.

84. Information Program - As with option "A", in order to address the perception problem that currently exists an extensive information program will be needed to familiarize members of the CF and the public about the changes to the defence counsel system. The need for such a program appears greater where the defence counsel remain in uniform than is the case for civilian counsel in light of the comments received in the research phase of the study.

Discussion

85. If the reporting chain for reserve force legal officers is sufficiently separated from the chain of command, there are several advantages to this option. Because they also hold civilian jobs, reserve force legal officers may not be seen to be as concerned about pleasing the chain of command. They are not normally depending on their military careers for their livelihoods. As members of the CF, reserve force officers should not have the problems that a civilian might have in getting into theatre and while operating in theatre.

86. The counsel trial experience is a significant factor in favour of this option. Reserve force officers engaged in a civilian criminal trial practice will have maintained the courtroom skills essential to an effective trial counsel. Once again, while service knowledge, knowledge of the military justice system and military skills are useful, they play a minor role due to the ability of civilian counsel to learn the system fairly rapidly and the very infrequent requirement for military skills to be exercised by defence counsel.

87. There are also a number of potential disadvantages with this system. As with the regular force, the reserve force lawyers are officers, with the attendant loyalty problems from the point of view of the NCMs. The potential for different ranks prosecuting and defending continues to exist. The universality of service argument might be raised, but

these changes are unlikely to have a major impact on its defence in light of the comments in this area in the option "A" discussion.

88. There may also be an availability problem if an insufficient number are appointed to this role and if the pay system for trial counsel is not amended. On the other hand, if the pay system is amended to, for instance, reflect the fees paid to agents by the Department of Justice for prosecution work, defence counsel will be making considerably more per hour than the prosecutor and probably more than the military judge. A difference between the prosecutor or judge and the reserve defence counsel is the continuing overhead costs the defence counsel must pay for his or her civilian practice while performing military duty. However, this is also true of other reserve force legal officers who are called out for military service in non-defence counsel roles. If the pay system is modified to reflect Department of Justice rates, the cost advantage of this system would be eliminated as it would then cost the same or more than using civilian counsel under options "D", "F" or "G". The uncertainty as to availability under the current pay scale is a serious disadvantage in the selection of this model.

Option C - Provincial Legal Aid Inside Canada

Organization

89. This option envisions agreements with each of the provincial and territorial legal aid societies for the use of their administrative structures and legal aid systems in providing defence counsel under the Code of Service Discipline. When a person entitled to defence counsel at military expense wishes to contact such counsel, the address and the phone number of the local legal aid society would be provided. The legal aid society would then use its normal system for assigning counsel. These counsel would also be responsible for providing the *Brydges* duty legal counsel and advice on election for trial by court martial.

90. Under this system, the legal aid society would charge back the costs for the defence plus, according to the societies willing to consider such an arrangement, an administrative fee for its services. An agreement would have to be entered into with each province and territory to establish the extent of the services and the financial details. In addition, this option may require amendments to the provincial legal aid legislation or regulations where those do not contemplate this type of agreement. The type and cost of service provided by the legal aid societies would vary from province to province as some mainly use a *judicare* type of model (private counsel) while others use staff lawyers or a mixture of the two.

91. Because legal aid lawyers only provide services within the jurisdiction of their societies, there would still be a need for a separate system for the provision of counsel outside Canada. For cases outside Canada, the system administrator would develop a list, probably through the provincial law societies, of lawyers willing to perform

defence counsel duties outside Canada. This would include areas of potential or actual hostilities. The role of training assisting officers would probably best be carried out by those with existing knowledge of the military discipline system such as the JAG training directorate.

Size

92. The size of the defence counsel services in Canada would not be relevant for this study as it would depend upon the systems used by the legal aid societies and the number of counsel willing to perform defence counsel duties outside Canada. For administrative coordination, one administrator and a secretary/clerk should be able to perform the necessary duties.

Personnel

93. The administrator of this system should be familiar with the functioning of legal aid systems, be knowledgeable about the military justice system and have appropriate administrative skills.

Training

94. As civilian defence counsel are unlikely to have considerable knowledge, if any, of the military justice system, the legal aid societies should be provided with a training package consisting of the appropriate legislation, regulations and orders, and explanation of the system and perhaps a video showing a court martial in practice. This would provide a minimal amount of information for counsel prior to trial. Considering the number of counsel involved, it would obviously not be practical to conduct training of all lawyers involved in the provincial and territorial legal aid systems.

Cost

95. The costs for this system would include the costs charged by the provincial and territorial legal aid systems, the pay and benefits for administrator, and the costs of administrative support. For the legal aid systems, the pay to the counsel would be in accordance with the scale for the particular province or territory.

Implementation

96. To implement this system would require detailed negotiations with each province and territory to determine the services that would be provided, the cost of these services, and any provincial or territorial legislative or regulatory amendments needed to permit this arrangement. It would then require suitable amendments to the national Defence Act or Code of Service Discipline to establish the CF legal aid system using this model. Appropriate funding authority will also be needed. Considering the number

of jurisdictions involved and the potential for provincial as well as federal legislative change, the implementation of this option would likely take at least a year assuming all jurisdictions are willing to enter into such arrangements.

Evaluation

97. Essential Requirements - This option would not meet the essential requirement of practicality. It would meet all other essential requirements listed in paragraph 9 of Chapter 1.

Additional Advantages

98. Perception - This system would be seen as one under which counsel would be acting for the client without a divided loyalty between the client and the CF.

99. Administration - At least for trials in Canada, most of the administrative burden would be born by the legal aid societies.

100. Universality of Service - This option should not create any arguments on the CF universality of service principle.

101. Rank Differential - No rank comparison would take place between the prosecutor and defence counsel that could impact on the perceived fairness of the trial.

Disadvantages

102. Philosophical Impediments - For the most part, legal aid societies are established to provide legal services to the poor. As a result, they have financial criteria that must be met to qualify for support. As most members of the CF would be unable to meet these financial criteria, the legal aid societies would have to be willing to modify their underlying philosophies to accommodate providing services on a contractual rather than need basis.

103. Provincial Legislative Changes - The controlling legislation for many of the jurisdictions does not contemplate agreements of this nature. There would be a need for amendments to such legislation with the accompanying political problems and time needed to pass and implement the changes.

104. Complexity - There would be a need to develop and renew agreements with twelve (soon to be 13) jurisdictions that would provide a common standard of service for persons subject to the Code of Service Discipline. In addition, a separate system would need to be established and maintained for the small number of courts martial outside Canada.

105. Implementation Timing - Even if all jurisdictions are willing to enter into arrangements to provide defence counsel services, the amount of time it would take to negotiate agreements and modify legislation would be excessive in comparison to the other options. As not all provinces are willing to consider this at this time, further delays would be inevitable in attempts to change the opinion of any reluctant provinces.

106. Service Knowledge - Legal aid lawyers will not normally be familiar with the functioning of the CF and the procedures for accomplishing tasks effectively in the military environment as would lawyers with current or prior military service.

107. Military Justice Knowledge - Legal Aid lawyers are unlikely to have the knowledge of the military justice system that military lawyers or other lawyers practising regularly in the field would have.

108. Military Skills - legal aid counsel are unlikely to have military skills unless they have prior military service.

109. Availability - Problems similar to those of private law firms are likely to occur with respect to availability considering the caseload of most legal aid staff lawyers and the practice obligations of private counsel doing legal aid.

110. Military Judges - This option would not develop counsel sufficiently knowledgeable to become military judges. It is also unlikely that legal aid systems using staff counsel would be willing to release their counsel for this duty considering the current funding and workload problems they are experiencing.

111. Assisting Officer Training - Legal aid counsel are unlikely to have the requisite knowledge of the military justice system to provide training to assisting officers. In addition they are unlikely to have the time to provide such training in those jurisdictions using staff models for legal aid services.

112. Grievance Assistance - While legal aid counsel may have the skills to provide advice on applications for redress of grievance and responses to notices of intent to recommend release, it is doubtful that they would have the time for those systems using staff models. There has been a common complaint of over commitment for these systems. For those using a judicare model, it would be difficult to maintain financial control for this type of service.

Discussion

113. This system has a number of attractive features. Both the fact and the appearance of independence of counsel would be established as the decisions on counsel would not be under the control of the military hierarchy. The administration of the system in Canada would be handled by the appropriate legal aid society for the most part, with only a minor requirement for coordination and financial control. Legal

aid societies are already well known in Canada so that little would be required in the way of education to convince members of the fairness of the system.

114. Despite the attractive features, this system runs into a host of problems. The development and renewal of agreements with each province and territory would be cumbersome. Each would likely be different as initial indications show the administrative charges would not be constant between jurisdictions. Amendments may be required to the controlling legislation for the societies to expand their permissible services. As most members of the CF would make too much to qualify for legal aid under normal circumstances, the addition of services for these members would constitute a fundamental shift in the philosophic basis of legal aid.

115. While some provinces, such as British Columbia and Manitoba, have shown an interest in discussing this possibility further, a show stopper at present is a response from Nova Scotia stating that an agreement with that province is not feasible. It would be contrary to the mandate of the Legal Aid Society of providing legal services for the poor. Furthermore, additional lawyers would have to be hired as the Society does not have the resources to meet existing demands. Quebec and a number of other jurisdictions appear to have similar problems with their legislative mandates. Even if the problems of financial eligibility could be overcome, the practical difficulty of insufficient resources is likely to exist in those jurisdictions that rely on a staff model for providing legal aid. This might be overcome by requesting that legal aid for the military be provided strictly by private counsel on a legal aid certificate, but it will likely be a difficult selling job to already overburdened organizations.

116. As the provincial and territorial legal aid societies are geographically restricted, there is the need for an additional system to provide counsel for cases outside Canada. However, such a system would be no more problematic than is the case with options "D", "E", "F" and "G".

117. Considering the practical difficulties of obtaining provincial agreement, this option does not meet the essential requirement of practicality. Therefore, this option was not considered viable and no costing was done. It is not recommended.

Option D - CF Legal Aid Service using Private Counsel

Organization

118. Option "D" would be based on the British model with some modifications. Instead of using the provincial legal aid systems inside Canada, the Forces would establish a CF Legal Aid Service. This system would provide funding for civilian lawyers to be hired by the accused or to be assigned on a rotating basis from a list of participating lawyers where an accused does not make a choice. The list of lawyers participating in the scheme would be broken down on a regional basis in order to provide the accused with appropriate local counsel. For duty outside Canada, a procedure could be

established in which the accused would be given a list of civilian counsel who had expressed a willingness to perform defence counsel duties outside Canada.

119. Control of a CF Legal Aid Service should be sufficiently separate from the chain of command to create no doubts about counsel independence. It would be established by statute as a separate employer. One suggestion received, although in the context of using reserve force legal officers, proposed a legal aid commission composed of a three people. This commission would be responsible for approving the budget for a CF legal aid program and issuing general instructions to the Executive Director. No instructions in individual cases would be permitted. The Executive Director would be responsible for running the program. However, the decisions on individual cases would remain solely with the lawyer representing the accused. This is similar to the way in which the provincial legal aid plans are run. In the opinion of the Study Team this suggestion provides a workable model for a CF Legal Aid Service. The Study Team would vary the suggestion somewhat by referring to the body as the Board of Directors. It would be composed of a person experienced with the concerns of CF members, a person familiar with the requirements of the government, and a person knowledgeable about the functioning of legal aid systems in Canada.

120. To maintain the fact and perception of an independent system, the Executive Director should be a civilian with administrative experience and, preferably, some legal and military background. In addition, the Legal Aid Service should have its own budget as a separate line item in the National Defence budget. The budget should include provision for all costs of providing defence counsel services, including such items as the cost of defence witnesses and the administrative support costs for the Service. To control costs, the right to select counsel would be restricted to counsel within either the province where the accused is resident or the province where the court martial will take place. For flexibility, the Executive Director would retain a discretion to authorize the retention of counsel outside these areas in exceptional circumstances. Counsel for cases outside Canada would obviously not be subject to this limitation. It would be up to the accused to obtain willing counsel in such cases, probably from the list of such counsel mentioned earlier.

121. The Legal Aid Service under this option would be tasked with providing defence counsel for courts martial, duty legal aid for persons arrested or detained, and advice on election for trial by court martial. Due to the nature of the system, it would be difficult to task it with providing training and advice to assisting officers as only a few civilian counsel would have the knowledge of the military justice system to do so competently. In addition, if advice on applications for redress of grievance were to be added, it would be extremely difficult to maintain financial control over the system.

Size

122. The CF should open this system to all members in good standing of a provincial or territorial bar with a valid practising certificate. In this way, no accusations can be

made that the defence counsel have been hand-picked because of a favourable attitude toward the military. The ultimate size of the regional pools would depend on the attractiveness of the system to the civilian lawyers. For cases outside Canada, the system should be open to counsel willing to perform defence counsel duties in these circumstances, including in situations of actual or potential hostilities.

Personnel

123. Defence counsel would be members of provincial or territorial bars as described above. For defence counsel services outside Canada, the provincial bar societies should be asked to request their members to inform the Executive Director if they would be willing to perform these duties outside Canada, including in areas of hostilities. The remaining personnel in this system would be the members of the Board of Directors, the Executive Director, and any required support staff.

124. To maintain some assurance that counsel will be available for duty outside Canada if they have indicated that they would be, it will be necessary to institute rules to remove counsel from the list if they fail to carry through on this undertaking.

Training

125. In order to assist in the smooth operation of a court martial system, civilian lawyers who are chosen by the accused or assigned through the rotation system should be loaned instructional material setting out the nature of the military justice system, the applicable legislation, regulations and orders, and the court martial procedures. Once again, a video containing a mock court martial would also be helpful. As an added instructional tool, a web site containing this background information should be set up so that it could be accessed by lawyers using the Internet. This would also make the system transparent to the public as any member of the public on the Internet would also be able to review the military justice system.

Cost

126. The costs of this system would include the functioning of the Board of Directors, the pay and benefits for the Executive Director plus his or her support costs, and the payments to counsel for fees and disbursements. As this would be a federally-funded system, lawyers defending the accused under the Code of Service Discipline should be paid at the same rate as agents are paid by the Department of Justice when acting as prosecutors. This would provide a uniform standard of compensation as well as equating the importance of the prosecutor and defence counsel in the system. At present, agents for the Department of justice are paid at a rate between \$60 and \$82 an hour depending on the number of years at the bar, with an average of \$75 an hour. To the extent feasible, travel and accommodation should be provided by the CF to keep financial control on the disbursements. Counsel's entitlements in this respect should be the same as for the prosecutor to maintain the appearance of balance. Based on these

assumptions, the total cost of this system should be approximately \$966,000/yr including both direct and indirect costs.

Implementation

127. The CF Legal Aid Service would need to be established by amendment to the National Defence Act or Code of Service Discipline. This amendment would provide for the Board of Directors and Executive Director and the general organization of the legal aid service. It would also empower the Board of Directors to hire the Executive Director, provide policy direction on related matters such as fee tariffs, eligibility for appointment as counsel, etc. Many of the technical requirements to implement this system would be similar to those for other options such as the development of guidelines, provision of information to the public and interested organizations, and the recruitment of personnel. While these processes are likely to take a slightly longer time than would be the case for options "A" or "B", it should still be feasible to set the system up within a matter of months of passage of the enabling legislation.

Evaluation

128. Essential Requirements - Assuming sufficient civilian counsel will be willing to perform defence counsel duties outside Canada, this option would meet all of the essential requirements set out in paragraph 9 of Chapter 1.

Additional Advantages

129. Flexibility - This system is adaptable to expansion and contraction as counsel will only be retained when there is a need. However, it does not provide the same core of experience for expansion in case of mobilization as do options "A" and "B".

130. Perception - This system will probably be seen by members as more independent than those using military counsel.

131. Choice of counsel - This option provides the maximum choice of counsel, matched only by those provincial and territorial legal aid systems using mainly private counsel.

132. Universality of Service - This option should not create any arguments on the CF universality of service principle.

133. Counsel Trial Experience - Assuming accused will choose counsel with a criminal law practice, the trial skills of counsel will probably be superior to those staff models where a limited number of courts martial offer the main forum for maintaining these skills.

134. Rank Differential - There is no rank differential at trial that may impact on the perception of the fairness of the process.

135. Administration - The administration of this system is relatively straightforward compared to some of the more complex options.

136. Travel Costs - Travel costs should be reduced using this option as normally counsel will be located closer to the location of the trial.

137. Local Service - Using local firms should provide both a faster and more personal service than would systems using a centrally located staff of lawyers.

Disadvantages

138. Military Judges - This option would not develop counsel eligible for appointment as military judges.

139. In Theatre Problems - Civilian counsel are likely to encounter difficulties with obtaining insurance while in theatre. In addition, complications may arise with respect to their status in theatre unless their presence is contemplated in the preparation for a mission and appropriate provisions are included in the controlling documents.

140. Service Knowledge - Private counsel will not normally be as familiar with the functioning of the CF and the procedures for accomplishing tasks effectively in the military environment as would lawyers with current or prior military service.

141. Military Justice Knowledge - Private counsel are unlikely to have the knowledge of the military justice system that military lawyers would have unless military law comprises a regular part of their practices.

142. Military Skills - Unless the counsel has prior military training, he or she would not have the military skills that a military legal officer would have.

143. Interaction with JAG - The knowledge of defence counsel issues will be missing to a greater extent when JAG representatives are dealing with matters where such background knowledge would prove useful. However, when dealing with issues that touch directly on the provision of defence counsel services, the Executive Director will presumably be consulted as is already the case with military judges.

144. Assisting Officer Training - Private counsel are unlikely to have the requisite knowledge of the military justice system to provide training to assisting officers.

145. Grievance Assistance - While private counsel may have the skills to provide advice on applications for redress of grievance and responses to notices of intent to

recommend release, it would be difficult to maintain financial control for this type of service.

146. Financial Control - For this system to function, it will be necessary to establish a fee tariff for counsel and probably a system for taxing bills where there is a dispute as to entitlements. In addition, as the cost of the system will depend on the number of hours billed, it is harder to predict costs than would be the case for salary-based representation. This could be remedied somewhat in the design of the payment system with the inclusion of financial controls similar to those used by provincial legal aid societies.

Discussion

147. This option contains the elements of independence of the provincial and territorial legal aid systems while avoiding the complex agreements that would be necessary with that earlier option. The organizational structure can be kept relatively simple and the administrative costs can be kept to a minimum. Local counsel would be available in most cases to provide advice, thereby cutting travel costs and improving the speed with which counsel could communicate with the accused in person.

148. It could reasonably be argued that civilian defence counsel would not have the experience with the military justice system necessary to provide the desired level of competent advice to members. However, the statistics referred to in Chapter 3 and the experience of the British forces with this type of a system do not support these concerns.

149. In developing a fee schedule for this system, the Department of Justice scale for payment of agents acting as prosecutors provides a good baseline. There is also a ceiling of 10 billable hours a day under that tariff. A similar procedure might be applied for this option, with the Executive Director having authority to authorize fees within the normal range. In extremely unusual cases, counsel could apply for a higher rate but these would require the approval of the Board of Directors. For criminal cases, the Department of Justice normally has less than 20 such requests per year on a volume of approximately 15,000 cases handled by standing agents.

150. This option is in the mid range as far as costs are concerned. However, the potential for variation from the estimated cost is greater than that for systems involving salaried lawyers. Therefore, the estimate must be treated with some caution.

151. Whether sufficient counsel will be willing to act as defence counsel outside Canada is an open question. The fact that counsel have done so in the past, even when the accused had to pick up the cost, suggests that there are qualified counsel willing to do so. Although such trials might not be lucrative, they still have the attraction of the unusual. Counsel is given an opportunity for travel to foreign locations to perform counsel duties in an uncommon setting which some may well find intriguing. In addition,

the British experience with the use of this system for decades has not shown any major difficulties in this respect according to the sources consulted. However, it is rare for British barristers to go to areas of hostilities. Therefore, some assurance should be obtained that counsel will be available under such circumstances before this system is permanently enshrined.

152. With this option, there would be a civilianization of the military justice system to a certain extent. It raises questions as to the understanding on the part of counsel of the disciplinary needs for the CF and the trust in the system by commanders attempting to maintain discipline within their units. In addition, it would bring into serious question the need for military judges to be members of the CF.

Option E - CF Legal Aid Service Using Staff Lawyers

Organization

153. As indicated in the description of existing systems, several of the legal aid societies use a system of staff lawyers to provide the legal aid services with private counsel providing the services where the staff lawyers cannot. Adapting this system to the provision of defence counsel services for the CF would be done using the same infrastructure as described in Option "D", i.e., a three person Board of Directors and an Executive Director. The CF Legal Aid Service would be a separate employer reporting through the Minister of National Defence. The lawyers would be civilian staff lawyers in permanent positions in the same way as provincial staff legal aid lawyers.

154. Staff counsel could provide the same services as regular force or reserve force legal officers; including assistance with respect to applications for redress of grievance and objections to notices of intent to recommend release. These latter services would be provided on an "as available" basis so that they could be temporarily curtailed when the other defence counsel duties required more time.

Size

155. This organization would require basically the same size as option "A" plus the part time Board of Directors. The Executive Director would be supported by four staff lawyers and a secretary. Instead of reserve force officers to supplement the service in the regions, the Executive Director would be authorized to retain civilian counsel to handle those cases as well as cases involving the conflicts of interest or in the other circumstances mentioned in option "A".

Personnel

156. The lawyers hired for this organization should have trial experience and, preferably, some knowledge of the military and military law. They must be members in good standing of a provincial bar with a valid practicing certificate. In order to maintain

independence, they should not become members of the Public Service. Instead, the CF Legal Aid Service should constitute a separate statutory organization with the status of a separate employer for employee relations and related purposes.

157. The pay and benefits for the Executive Director and the defence counsel should be at rates equivalent to those of legal officers at the same level. The Board of Directors should receive per diem rates equivalent to an EX1 in the public service to reflect the level of responsibility.

Training

158. It would be the responsibility of the Executive Director to ensure his or her personnel received sufficient initial and continuation training to remain competent. Funds for this training would obviously need to be included in the budget for the organization.

Cost

159. The assumptions on which the cost estimates for this system are based are included in Annex "D". If the assumptions are correct, this option would cost approximately \$962,000/yr including both direct and indirect costs.

Implementation

160. The CF Legal Aid Service should be established in the National Defence Act or Code of Service Discipline in the same way as option "D". This amendment would provide for the Board of Directors and Executive Director and the general organization of the legal aid service. It would also empower the Board of Directors to hire the Executive Director, provide policy direction on related matters such as fee tariffs where private counsel need to be engaged, etc. Many of the technical requirements to implement this system would be similar to those for other options such as the development of guidelines, provision of information to the public and interested organizations, and the recruitment of personnel. In light of the structure and procedures involved in implementing this option, it will likely take the same amount of time as option "D". Therefore, it should still be feasible to set the system up within a matter of months of passage of the enabling legislation.

Evaluation

161. Essential Requirements - This option would meet all of the essential requirements listed in paragraph 9 of Chapter 1.

Additional Advantages

162. Flexibility - The system is capable of rapid expansion in time of need, although a

reduction will entail the same difficulties as for any other government or private institution.

163. Perception - This system is likely to be perceived as more independent than those using military counsel.

164. Service knowledge - Staff counsel will quickly develop an expertise in the functioning of the CF and in its procedures through frequent interaction.

165. Military Justice Knowledge - Staff counsel would acquire considerable knowledge of the functioning of the military justice system through constant interaction.

166. Availability - There would be fewer problems with trial scheduling, the length of adjournments and meeting other defence counsel obligations using this option as the majority of the duties would not involve private counsel. Therefore the private practice scheduling conflicts would be avoided.

167. Universality of Service - This option should not create any arguments on the universality of service principle.

168. Preparation Time - Staff counsel are likely to have somewhat more time for preparation of defences than private counsel as the financial imperatives applicable to a private practice would not be as great.

169. Assisting Officer Training - Staff counsel should quickly develop the necessary knowledge of the military justice system to provide training to assisting officers on their roles.

170. Grievance Assistance - Staff counsel would be competent to provide assistance with respect to applications for redress of grievance and objections to notices of intent to recommend release. In addition, the concerns about financial control that exists with private counsel would not be applicable.

171. Financial Control - This option would enable more accurate budgeting and financial control than would those relying on payments to counsel on an hourly basis.

Disadvantages

172. Military Skills - Unless the counsel has prior military training, he or she would not have the military skills that a military legal officer would have.

173. Military Judges - Unless the current system for appointing military judges is changed, this option would not develop counsel eligible for appointment.

174. Job Satisfaction - Defence counsel may see this as a learning position only or as

a dead end job considering the small size of the organization and the very limited possibility of advancement. This may well result in a high turnover rate with the accompanying reduction in counsel experience. The problem would be alleviated somewhat if these counsel were eligible for appointment as military judges.

175. Interaction with JAG - The knowledge of defence counsel issues will be missing to a greater extent when JAG representatives are dealing with matters where such background knowledge would prove useful. However, when dealing with issues that touch directly on the provision of defence counsel services, the Executive Director will presumably be consulted as is already the case with military judges.

176. Counsel Trial Practice - Considerable continuation training will likely be required to maintain trial skills considering the low number of courts martial.

177. Preparation Time - As with option "A", the additional preparation time that is likely to be available to defence counsel under this option has a down side. Counsel will be tempted to over prepare and put forward motions or issues that would not otherwise have been raised.

178. Cost - This option and option "A" are the most expensive options.

Discussion

179. This option has virtually all of the advantages of option "A" with the exceptions of officer career flow and military skills. The perception problem encountered by military lawyers should disappear. It should be capable of providing a full range of services, which would not be the case with other systems using civilian counsel. Trial scheduling and other factors promoting efficiency in the system would be equivalent to the regular force system in option "A".

180. The principal disadvantages are the failure to develop military judges and the potential for job stagnation. Both of these problems could be addressed if the eligibility to become a military judge were to be opened up to knowledgeable civilians. However, as discussed with respect to option "D", this would entail a further civilianization of the discipline system. As with other options involving civilian counsel, some question arises as to the actual willingness of counsel to perform defence counsel duties when the need arises in a theatre where hostilities are taking place. However, this is factor that cannot be evaluated on the basis of any available data.

181. The difference between the cost of this and other options using civilian counsel is not great and is probably within the range of error for the estimates. Therefore, the cost cannot be considered a significant factor.

Option F - Employee Takeover

Organization

182. The concept of an employee takeover has gained considerable momentum with government organizations. The Treasury Board has issued instructions as to how such a process is to take place. In the context of this study, an employee takeover would involve a member or members of the legal branch making a proposal in accordance with Treasury Board Guidelines to take over the defence counsel function in all its aspects. The most obvious way in which this would occur would be for legal officers to retire or resign once the plan has been approved by appropriate authorities and establish a law firm providing these services under contract to the CF. The organization of the firm would be up to its members. However, an alternative would involve a member of the legal branch retiring and setting up a network of lawyers across Canada who would be willing to provide the services. The lawyer making the proposal would act as the coordinator as well as performing defence counsel functions himself or herself. The terms under which the services are provided would be a matter of negotiation.

183. The Board of Directors would still be required with this system to oversee the contractual process and create the necessary independent supervision for the administrator. As the system will be functioning pursuant to contractual terms, this Board may only need to meet once or twice a year. The administration of the system should be done by an person having administrative experience and a knowledge of the functioning of the military legal system, although it would not be essential that the person be a lawyer. The administrator would handle the daily coordination functions, review of bills, etc. Considering the limited nature of the administrator's duties, he or she should be at the level of the civilian equivalent of a major.

Size

184. The size of the organization established to carry out the defence counsel functions would vary considerably depending on the way in which the legal officer(s) decided to establish it. At its simplest, it would involve a part time coordinator at NDHQ with administrative support, and a retired legal officer as a coordinator for defence counsel located across Canada. At the more-complex end of the spectrum, it would involve the establishment of a law firm that would provide the defence counsel services as well as carrying out the other roles of a civilian law firm. This would also require a part time coordinator at NDHQ for administration and financial control with associated administrative support.

Personnel

185. One of the major issues with this option would be the qualifications to become a

member of the firm. If the employee takeover option is to retain its intent, the majority of members should be retiring or retired legal officers. Other civilian lawyers would also be eligible to join the organization so long as it continued to be composed mainly of lawyers formerly with the CF.

Training

186. As the firm would be under contract to the CF, the training of its members would presumably be done within the firm or through continuing education programs and military conferences. The cost of such training would be included in the contract price for the services.

Cost

187. The assumptions on which the cost estimates for this system are based are included in Annex "D". If the assumptions are correct, this option would cost approximately \$961,000/yr including both direct and indirect costs.

Implementation

188. This option would be implemented under the provisions of the Treasury Board Employee Takeover Policy and the NDHQ VCDS Instruction on Employee Takeover (4/96). Legal officers would be invited to make proposals for the provision of the services. These would be considered by the appropriate authorities. If approved, the legal officer or officers would retire, establish the necessary organizational structure, and be awarded the contract to provide the services. If normal practices are followed, the contract would be for three years after which the firm would have to compete for the contract with other firms willing to provide the services.

189. This option would involve minimal legislative and minor regulatory changes to implement. An amendment would be required to the National Defence Act or Code of Service Discipline to authorize defence counsel services to be contracted out if the system is to be seen by members and the public to be independent. This amendment would also have to provide for the Board of Directors and their powers in relation to determining contract terms, selection of subsequent contract winners, policies for the provision of Defence counsel services, etc. The timing for the implementation of this option and its ultimate feasibility are difficult to evaluate. They depend on the willingness of someone to make a proposal that is acceptable and the speed with which the system could be set up in light of the proposal. As no proposal exists at this time, and it is uncertain whether such a proposal will ever be made, this option should be viewed as one that will take a significant time to implement.

Evaluation

190. Essential Requirements - Assuming an acceptable proposal is made, this option would meet all of the essential requirements listed in paragraph 9 of Chapter 1.

Advantages

191. Perception - This system is likely to be perceived as more independent by those using it than would be this case with the options using serving military officers.

192. Service Knowledge - The former legal officers in this firm would have a more extensive knowledge of military practices and procedures than would a civilian counsel with no recent military experience.

193. Military Justice Knowledge - The lawyers providing defence counsel services under this option would have more knowledge of the military justice system than would be the case of a lawyer straight from private practice.

194. Military Skills - Many of the counsel in this option would have military skills that would reduce the need for their protection in theatre. However, not all counsel would likely have these skills and they would deteriorate over time without practice in any case.

195. Universality of Service - This option should not create any arguments on the universality of service principle.

196. Administration - As this option would only require an administrator and any necessary support, the system would be one of the less complex to administer.

197. Rank Differential - There would be no rank differential between the prosecution and defence that could impact on the perceived fairness of the trial.

Disadvantages

198. Uncertainty - It is questionable whether a proposal will be made that would initiate the evaluation process for this option.

199. Military Judges - This option will not provide the personnel capable of being appointed as military judges unless the system for such appointments is changed.

200. In Theatre Problems - The problems with respect to insurance and status in theatre will be the same as for other options using non-staff or non-military lawyers.

201. Availability - As with other options involving non-staff or non-military lawyers, there will likely be more difficulty with trial scheduling, the need for adjournments, and

the provision of other defence counsel services due to the conflicting obligations of the civilian practice or practices of the lawyers providing these services.

202. Stability - As the original contract will normally only be for three years, there will be only short term stability in the provision of services. Should the firm be unsuccessful in obtaining the subsequent contract, the system is effectively into a variation of option "G".

203. Grievance Assistance - In the opinion of the Study Team, it would not be feasible to include assistance on grievances as one of the services provided under this option. Any system not using salaried lawyers raises serious concerns about the cost of providing services of this nature.

Discussion

204. A major difficulty in evaluating this option is the lack of a proposal from a legal officer to create such a system. The design of the system would have a significant impact on both the costing and the feasibility of this option. Even assuming that an appropriate proposal is submitted, this option suffers from many of the problems relating to civilian law firms with only minimal advantages to compensate. Furthermore, the benefits are liable to be short term unless the employee takeover firm is successful in subsequent contracts. Despite these concerns, the option is feasible if a legal officer does submit an acceptable proposal.

205. As the anticipated cost of this option is in the mid range, cost is not a major factor in favour or against this option.

Option G - Retention of Civilian Law Firms

Organization

206. In this final option, private law firms would be retained to provide defence counsel services at agreed upon rates. The two reasonable systems for retaining law firms would be:

- a. regional - a large firm in a major location is retained to provide services for the entire region, e.g. a large Winnipeg firm to provide services to the prairie provinces ; or
- b. local - smaller firms would be retained in each location where there is a significant CF presence.

207. The use of a regional firms would have the advantage of simplicity. Fewer contracts would be necessary and the administrative liaison would likely be easier. In addition, specific counsel would probably be designated by the firm to perform this service with the resulting development of expertise by those counsel. However, there

would likely be increased travel expenses as the lawyers may be some distance away from the client. With the use of local law firms counsel would be more readily available for personal consultation with the detainee or accused. Travel and accommodation costs are likely to be lower as well. While either of these systems would work, the local law firm option would be preferable in the Study Team's opinion.

208. Counsel should be made available from the firms to act as duty legal aid and provide advice on election for court martial. The firms would be responsible for determining which counsel would perform these duties. In addition, the firms could be polled to determine which counsel would be willing to perform defence counsel duties outside Canada. The contract retaining the firm should be renewable annually to permit adjustments in costs and to make retention of a different firm easier if a higher quality of service is desirable.

209. The firms would be on a retainer that would vary depending on the area and potential volume of work the firm is likely to do. This latter information could be based on the historical need for the services in the area for which the firm would be responsible. As services are provided, they would be charged against the retainer until it was gone. The rate for the provision of services should be equivalent to the Department of Justice agent rates for prosecutors.

210. The Board of Directors would still be required with this system to oversee the contractual process and create the necessary independent supervision for the administrator. As the system will be functioning pursuant to contractual terms, this Board may only need to meet once or twice a year. The administration of the system should be done by a person having administrative experience and a knowledge of the functioning of the military legal system, although it would not be essential that the person be a lawyer. The administrator would handle the daily coordination functions, review of bills, etc. Considering the limited functions of the administrator, he or she should be at the level of a Major civilian equivalent.

Size

211. There would need to be at least twelve firms under retainer if this system were to be implemented. These would be located in relation to the major military establishments and cover the local establishment as well as any others that would be within a reasonable distance (e.g. a 2-3 hour drive). For instance, a firm in the Halifax area could provide services to the units there as well as to 14 Wing Greenwood. A firm in the Winnipeg area could also provide the services for CFB Shilo. In addition, the contract with the firms should require them to make counsel available for courts martial outside Canada. Sufficient volunteers from these firms for courts outside Canada should be confirmed before the system is finalized to have some degree of assurance that this need will be met.

Personnel

212. The contract with the firm should stipulate that experienced criminal counsel must be appointed to fulfil the requirements of the retainer. Otherwise, there is a distinct possibility that firms will tend to assign their most junior and inexperienced counsel to this type of work and members would not be served at an appropriate level.

Training

213. As with previous options utilizing civilian lawyers, the competency of counsel would be the responsibility of the firm. However, information on the functioning of the military justice system similar to that in option "D" should be made available to the firm to reduce the difficulties of integrating the civilian lawyers into the court martial process.

Costs

214. The assumptions on which the cost estimates for this system are based are included in Annex "D". If the assumptions are correct, this option would cost approximately \$961,000/yr including both direct and indirect costs.

Implementation

215. The implementation of this option would involve the same type of statutory amendments as for option "F". The Board of Directors would be empowered to set contract criteria, approve contracts, hire the administrator, etc.. As to the timing for implementation, once the legislation is passed there would be a need to develop criteria, advertise for bids from law firms, and do the final selections. These activities should still enable the system to be running within a few months of the legislative approval. Once again, the organization should be established as a separate employer for the purpose of employee relations and similar matters.

Evaluation

216. Essential Requirements - This option would meet all of the essential requirements listed in paragraph 9 of Chapter 1 so long as local firms are required to have arrangements for the provision of bilingual services.

Additional Advantages

217. Local Service - Using local firms should provide both a faster and more personal service than would systems using a centrally located staff of lawyers.

218. Perception - This option will likely be perceived by the users of the system as more independent than would the options using military legal officers.

219. Travel Costs - Travel costs should be reduced using this option as normally counsel will be located closer to the location of the trial.

220. Administration - As this option would only require an administrator and any necessary support, the system would be one of the less complex to administer.

221. Universality of Service - This system should not create any arguments on the CF universality of service principle.

222. Rank Differential - There would be no rank differential at trial that could impact on the perceived fairness of the process.

223. Counsel Trial Practice - If the local firms retained under this option have a criminal trial practice, the trial skills of counsel will probably be superior to those staff models where a limited number of courts martial offer the only forum for maintaining these skills.

Disadvantages

224. Military Judges - This option will not provide the personnel capable of being appointed as military judges.

225. In Theatre Difficulties - As with other systems using private lawyers, problems may well arise with respect to personal insurance and status in theatre depending on the location of the court martial.

226. Service Knowledge - Private counsel will not normally be as familiar with the functioning of the CF and the procedures for accomplishing tasks effectively in the military environment as would lawyers with current or prior military service.

227. Military Justice Knowledge - Initially at least, counsel from private law firms are unlikely to have the knowledge of the military justice system that a legal officer would have. However, this should improve as counsel are involved in courts martial.

228. Military Skills - Unless the counsel has prior military training, he or she would not have the military skills that a military legal officer would have.

229. Complexity - Like the use of provincial legal aid societies, this option would require negotiated agreements with a multitude of service providers. However, it does not suffer from the additional problems of a legislative mandate and the requirement for provincial legislative and regulatory change.

230. Availability - Although priority should be given to military defence services due to the retainer paid to these firms, the other obligations of the legal practice will still need to be taken into account. These will likely create greater availability problems than would

be the case with a staff model.

231. Assisting Officer Training - Private counsel are unlikely to have the requisite knowledge of the military justice system to provide training to assisting officers.

232. Grievance Assistance - In the opinion of the Study Team, it would not be feasible to include assistance on grievances as one of the services provided under this option. Any system not using salaried lawyers raises serious concerns about the cost of providing services of this nature.

Discussion

233. When a member is seeking legal advice, it can be extremely frustrating to try to do so at long distance. It is difficult to develop a rapport and trust without personally meeting the counsel early on in the process. Using local counsel addresses this issue better than most of the other options. The system would probably be seen as independent by the users, with the resulting benefits in trust.

234. As this system falls within the mid range of costs, this is not a major factor in evaluating it. Like option "D", however, the estimated costs may vary considerably depending on the actual number and lengths of courts. Therefore, the cost figures should be treated with caution.

235. As with option "F", the need for a Board of Directors may seem questionable. However, without this buffer, the administrator would presumably be receiving instructions through the CF or DND chain of authority. This would leave the potential for considering the system subject to the same influences as might be perceived to exist with the present system. There may be a perception that firms could be influenced in the conduct of the defences because of concerns over contract renewal. With the inclusion of an independent Board of Directors overseeing the contract process, this concern is diminished. The additional cost would be minimal considering the limited number of times a year the Board would need to meet to deal with these issues.

FIELD REACTION TO OPTIONS

236. Consulting learned works and discussing issues with individuals familiar with the military legal system is a valuable starting point in determining a viable system for the provision of defence counsel. However, it remains an academic exercise unless there is some input from those who will be required to implement the system or who may need the services of defence counsel. Besides requesting input from a variety of military and civilian sources on perceived problems and possible options, the Study Team consulted with field officers and non-commissioned members with respect to the six viable options that were developed for the purpose of determining the opinions of the

potential users of the new system. The consultations took place at CFB Valcartier, NDHQ Ottawa, and CFB Trenton on 29 July, 1997 and at CFB Halifax on 5 August, 1997. The locations were picked in order to obtain opinions from each element as well as the national headquarters. Due to time constraints, it was not feasible to have the same consultations conducted in current operational theatres or with reserve force units.

237. The format of the consultation was by questionnaire given to individuals from varied rank levels at each location. Each location was requested to have the questionnaire completed by 100 NCMs and 50 officers following the normal rank pyramid (many lower ranks, fewer higher ranks) to the extent possible. This format was used in order to ensure that all rank groups had an input into the system. In addition, this would help make certain that the system would receive consideration from both the practicality and fairness perspectives. As the questionnaire did not, and could not practically, include the amount of detail contained in this paper, it is not possible to determine if any changes to the responses would have resulted from the provision of greater detail.

238. The term "consultation" has been used deliberately in describing the process. Due to the time of year and the time constraints on completion of the study, the number of members consulted was not as high as would be desired to extrapolate the results to the CF population in general. In addition, the selection pool was not as broad as would have been the case for a more-comprehensive survey in that responses had to be obtained from those available in the time frame that the questionnaire was to be completed, i.e., during the summer leave and posting period. The results do, however, give a reasonable indication of the major areas of concern on the part of the system's users and the general characteristics of the system they would like to see in place. The respondents' confidence in the fairness and efficiency of the current military justice system might be described as lukewarm at best. The consultation questionnaire and results are shown at Annex "E".

Comparison of Viable Options

239. All options except "C" (provincial legal aid) are, in the opinion of the Study Team, viable if implemented properly. A basic consideration is whether the CF should retain a defence counsel system using military legal officers or should switch to a civilian counsel system. The Study Team has been sensitive to the potential for perceived bias with respect to this issue as all team members are legal officers in the Canadian Forces, although three of the four are members of the reserve force with separate civilian occupations. Therefore, in developing, analyzing, and comparing the options, the Team has attempted to ensure that the report is based on provable facts or information and suggestions provided from outside sources rather than merely the individual perceptions of the Team members.

240. Option "A" (regular force defence team) has a considerable number of significant advantages in knowledge levels, availability, provision of services, portability, in theatre operations, etc. If the new organization and policies mentioned in that option are implemented, it should be able to withstand rigorous scrutiny by the courts and professional bodies. The one real drawback of this option is the potential for a perception on the part of CF members and the public that there's been no change. The likely attack on the option would argue that there are still uniformed defence counsel and they cannot help but be influenced by those higher in the military hierarchy no matter what protections are put in place to ensure this doesn't happen.

241. The above concern was partially allayed by the results of the questionnaire answered by CF members. This option was most frequently given the best ranking across all measures (overall endorsement, fairness, and efficiency). However, the questionnaire also showed a very significant lack of knowledge of the military justice system on the part of the respondents. As mentioned earlier, 55% did not know that military defending officers are fully qualified lawyers. This may have contributed to some of the perceptions of civilian counsel objectivity and impartiality that motivated selection of civilian counsel as the choice of a large percentage. This option addresses the concerns of both the Special Advisory Group and the Somalia Commission on the need for an independent defence counsel function.

242. Despite the advantages of option "B" (reserve force defence team), it was not one of the favourites for the majority of the Study Team members. The basic reason for this lack of acceptance was a perception that the option was an unsatisfactory compromise. Because of the availability question, it does not have the same level of practical advantages as option "A". As the defence counsel is still in uniform, it lacks the greater perception of impartiality of Options "D" and "E". If pay rates are adjusted to increase the probable availability of reserve force officers, the option loses its main advantage of cost and becomes the most expensive choice. In the consultation with the systems potential users, this option placed low in the scale of preference. While the option may be viable, there are insufficient advantages with this system to successfully compete with option "A" as the choice for the model using military legal officers.

243. Of the options using mainly civilian counsel, options "E" (CF Legal Aid - Staff Counsel) and "D" (CF Legal Aid - Private Counsel) are the most attractive in the Study Team's opinion. They maximize independence and enhance the perception that the defence counsel has no loyalty to superiors or the military hierarchy that might interfere with the required loyalty to the client. They also retain a reasonably straightforward system of administration. The private counsel option ("D") creates the greatest choice of counsel. It also shares a common users' perception of civilian counsel as having greater professional objectivity and impartiality. This option placed second in the preference of with the field and headquarters respondents to the questionnaire. The staff counsel model ("E") has most of the advantages of the regular force option while avoiding the major perception problem of that option. While the staff counsel model was in the top

three for each of the Study Team members, it did not place in the top two with the respondents to the questionnaire.

244. The major advantage of option "F" (employee takeover) appears to be for legal officers who wish to retire and have a secure source of work during a transition period to civilian life. This is a valid consideration in light of the government philosophy on employee takeovers in this era of downsizing. However, it obtained a poor rating in the field consultations and among Study Team members. Without additional unique benefits to the functioning of an independent and effective defence counsel system, this option rates low on the scale of preference.

245. The "local service" advantage of option "G"(civilian firms), while desirable, is not unique to this option. Similar or better local service might be provided by the private counsel in option "D"(CF Legal Aid - Private Counsel). In addition, it has most of the disadvantages of option "D" without that option's administrative simplicity. It does not provide all of the desired services as Option "E"(CF Legal Aid - Staff Counsel) does and it has no other significant advantages that would make it stand out as a preferred option. Finally, the consultations with the users of the system indicated that this was one of the least acceptable of the options. In light of these factors, this option places near the bottom in the opinion of the Study Team.

246. In light of all of the above information, the Study Team is of the unanimous opinion that option "A"(Regular Force Defence Team) should be selected as the system for providing defence counsel in the CF. However, it is essential that accurate information on the way the system operates, the safeguards, the ethical standards, and legal qualifications of the lawyers in the system is provided to members of the CF and the public for the system to be trusted.

Chapter 5

LIST OF RECOMMENDATIONS

- 1. We recommend that the term "defence counsel" be used when referring to military or civilian defence counsel.**
- 2. We recommend that regulations specify that defence counsel are responsible for providing:**
 - a. defence counsel services at courts martial and on appeals by either the Crown or the defence;**
 - b. duty legal aid services for persons who are arrested or detained under the Code of Service Discipline;**
 - c. advice to members who are required to make an election with respect to trial by court martial;**
 - d. training and advice to assisting officers;**
 - e. advice, as resources permit, to members with respect to applications for redress of grievance and responses to notices of intent to recommend release; and**
 - f. such other duties involving a member in conflict with CF or DND authorities as may be authorized under guidelines issued by the Judge Advocate General.**
- 3. We recommend that an Office of Military Defence Counsel (OMDC) be established in the National Defence Act.**
- 4. We recommend that the OMDC be funded by a budget that constitutes a separate line item in the National Defence budget and that the budget provide funding for all defence counsel related services.**
- 5. We recommend that the head of the OMDC be a regular force position filled by a legal officer with at least ten years at the bar of a province.**
- 6. We recommend that the head of the OMDC be appointed by the Minister of National Defence on the recommendation of the Judge Advocate General.**
- 7. We recommend that the National Defence Act be amended to provide that the Judge Advocate General is responsible for the provision of legal officers to**

the OMDC and administrative support of the OMDC as well as the development and issuance of general guidelines as to the structure and policies of the OMDC, but that the Judge Advocate General is not permitted to provide guidance or interfere in any way with the defence of individual cases.

8. We recommend that any general guidance provided by the Judge Advocate General to the OMDC be required by regulation to be made public in an appropriate manner.
9. We recommend that the head of the OMDC inform the Judge Advocate General on the administration of the Office, but not with respect to individual cases or any other matter that might endanger, or be seen to endanger, solicitor/client confidences or the independence of the OMDC.
10. We recommend that the head of the OMDC submit an annual report to the Judge Advocate General on the functioning of the OMDC which shall be included with the annual report of the Judge Advocate General.
11. We recommend that the term of office for the head of the OMDC be established by regulation at four years and the terms of the legal officers assigned to the OMDC be established by regulation at three years; such terms to be modified in individual cases only at the written request of the legal officer, at the commencement of retirement leave, on the officer's acceptance of promotion, for misconduct, or for incapacity.
12. We recommend that the procedure for removal of a defence counsel from the OMDC for misconduct, including the head of the OMDC, be the same as that for the removal of a prosecutor for misconduct.
13. We recommend that sufficient bilingual legal officers be posted to the OMDC to ensure that a member can receive defence counsel services in the official language of his or her choice.
14. We recommend that legal officers assigned to the OMDC be required to perform only those duties assigned by the head of the OMDC.
15. We recommend that legal officers assigned to the OMDC be subject only to the OMDC chain of command in the performance of their duties, not the Canadian Forces or Judge Advocate General chain of command.
16. We recommend that the head of the OMDC be paid on the same basis as a military judge of the same rank and not receive a performance evaluation report.

17. We recommend that legal officers in the OMDC, other than the head, have performance evaluation reports written and reviewed only by superior officers in the OMDC.

18. We recommend that regular force legal officers in the OMDC be paid merit pay in accordance with their merit pay categories as determined by the head of the OMDC, but that the distribution of merit pay categories above fully satisfactory must comply with the norm for such distribution among legal officers.

19. We recommend that the original establishment of the OMDC include the head, four regular force legal officers, seven reserve force legal officers, and the necessary facilities and administrative support.

20. We recommend that, while the size of the OMDC can be increased at any time to meet demand, the OMDC only be reduced through attrition as posting tours are completed or legal officers depart for other reasons.

21. We recommend that the facilities of the OMDC in Ottawa and in the field offices be physically located separate from the offices of the Judge Advocate General, the prosecution directorate, and the military judges.

22. We recommend that the head of the OMDC be authorized to retain civilian defence counsel to provide defence counsel services where members of the OMDC would be in a conflict of interest or in other circumstances where it would either not be possible or not be appropriate for an OMDC legal officer to provide the services.

23. We recommend that the head of the OMDC establish formal procedures for the application of "Chinese walls" and other appropriate systems for the protection of solicitor/client confidences involving officers of the OMDC.

24. We recommend that the head of the OMDC have the discretion to initiate publicly funded appeals by the defence pursuant to guidelines issued by the Judge Advocate General, but that the member retain the right to initiate an appeal at his or her own expense or under funding authorized by the Court Martial Appeal Court.

25. We recommend that the rates of pay for reserve force legal officers be examined to determine if they are sufficient to ensure that reserve force legal officers will be available to perform court martial duties when required and that they be adjusted as appropriate.

26. We recommend that a review be conducted by the head of the OMDC of the training requirements to maintain the court room skills of defence counsel and that a program be developed to provide such training on a regular basis.

27. We recommend that an information program be developed, either separately or in conjunction with information programs relating to the military justice system as a whole, to inform members of the CF and the public about changes in the system for providing defence counsel.

28. We recommend that the changes to the way in which defence counsel services are provided in the Canadian Forces be instituted incrementally as soon as practicable.

CONCLUSION

29. Probably the most significant finding of the research conducted for this study was the lack of understanding of the military justice system on the part of both the public and members of the CF. This point was reinforced over and over in unrelated submissions from Command Chief Warrant Officers, letters from civilian lawyers who are often retained for court martial defences, and, finally, the statistics from the field consultations. The current system has a number of weaknesses that need to be addressed as discussed in this report. However, unless the public and members of the CF are informed of the way in which the corrected system will function, and informed in a way that will generate interest in an audience that is already saturated with information, there will continue to be a perception problem in relation to the military justice system. Therefore, it is crucial that an innovative and accurate information program be developed using all appropriate modern communication techniques, and that this be done quickly in conjunction with the changes.

30. An additional aspect in need of attention is the requirement for a continuing review of the military justice system so that rapid corrective action can be taken when problems are identified. In this era of minimum personnel for maximum workload, it is difficult to assign resources to a duty of this nature when so many legal fires are burning and crying for immediate attention. To rectify this, consideration might be given to scheduled reviews by a committee composed of designated senior legal officers representing all of the legal interests in the military justice system and representatives of the field users of the system. These latter representatives would probably be more sensitive to the areas where the system isn't working or where perception problems are arising.

31. As the Minister's Special Advisory Group noted, the military justice system is essentially sound. However, it must keep up with developing Canadian values not only in its application, but in its structure. The recent reviews and the current activity in relation to the system should ensure it complies with the high standards expected of Canadian justice.

Annex "A"

Study Team Directive

DEPARTMENT OF NATIONAL DEFENCE

OFFICE OF THE
JUDGE ADVOCATE GENERAL



MINISTÈRE DE LA DÉFENSE NATIONALE

CABINET DU
JUGE-AVOCAT GÉNÉRAL

Memorandum

1150-2-2-2 (DJAG/A&L)

9 Jun 97

Distribution List

**JAG STUDY DIRECTIVE -
MILITARY DEFENCE COUNSEL SERVICES REVIEW**

BACKGROUND

1. The Office of the JAG currently has an establishment of four officers (one LCol and three Majs) to provide military defence counsel services (MDCS). Their current duties are:
 - a. providing legal advice to CF members who have been arrested or detained;
 - b. providing legal advice to assisting officers concerning summary trials; and
 - c. acting as defence counsel at courts martial and as counsel on appeal to the Court Martial Appeal Court.
2. The MDCS function is presently located in the Constitution Building in the Office of the JAG. It shares a law library and common support facilities with other members of the Office of the JAG in this building.
3. The provision of MDCS to CF members was examined in the Report of the Special Advisory Group on Military Justice and Military Police Investigative Services (SAG) presented to the Minister of National Defence on 14 March 1997. Recommendation number seven at page 25 of the SAG Report provides as follows:

"We recommend that, whenever a Canadian Forces member is entitled to legal advice under the Code of Service Discipline, the Judge Advocate General provide such advice in a manner that is independent of the Judge Advocate General's prosecution and judicial functions."

4. Prior to the Report by the SAG, I had considered the removal of the defence function from its current location and was going to examine the feasibility of transferring the defence function to another JAG establishment. The SAG was advised that the two options that were being explored by my office were as follows:

- a. defence counsel services would be provided by civilian counsel through provincial Legal Aid programmes which would be reimbursed by DND (the contracting-out option). For cases in operational areas and outside Canada, the feasibility of the provision of MDCS by qualified Reserve Force lawyers was being explored; and
- b. the present MDCS would be moved outside the JAG and co-located with other personnel services such as chaplains and medical services. JAG would remain responsible to assign qualified counsel to these functions for a fixed term and a DJAG, not involved in prosecutions or the administration of military justice, would be responsible for oversight.

5. I indicated that I had reservations with the contracting-out option. With military counsel, an accused member receives the benefit of a more intimate knowledge about military justice and the CF. Also, speed and portability are of prime importance in military justice and military defence counsel are immediately deployable.

6. The SAG indicates at page 24 of their Report that they heard from several members of the CF who believed that the MDCS provided by the JAG was not sufficiently independent as other legal officers from the JAG could be prosecuting them, or be advising the Military Police or commanding officers about the laying of charges. The SAG felt that, in principle, the independence between the JAG office and the defence must be enhanced. After discussing the merits of both options, the SAG stated that they were inclined to favour a plan of maintaining military defence counsel option, assuming that a meaningful separation from judicial and prosecutorial functions could be preserved.

AIM

7. The aim of this Study is to develop detailed recommendations for the provision of defence counsel services in a manner that is independent of the JAG's prosecutorial and judicial functions, while maintaining the necessary portability of such services to meet the operational requirements of the CF.

SCOPE/CONSIDERATION

8. Col McDonald (Team Leader), assisted by Col Fairbanks, LCol Couture and LCol Riedel, are hereby tasked to develop detailed recommendations with specific

options to enhance the provision of legal advice under the Code of Service Discipline that is independent of the JAG's prosecutorial and judicial functions. Planning and approximate financial costs associated with each alternative are to be presented. The approaches of similarly situated military forces, such as the UK and US, are to be considered. The following options as a minimum are to be examined:

- the provision of defence counsel services through provincial Legal Aid programmes reimbursed by DND;
- a separate Legal Aid plan established and funded by DND;
- the provision of defence counsel services by an employee takeover (ETO or other alternate service delivery (ASD) arrangement; and
- military defence counsel.

9. In the review of defence counsel through provincial Legal Aid programmes, a separate plan established by DND, an ETO or other ASD arrangement, the feasibility and means to provide portability of defence services for operational requirements are to be addressed.

10. In the review of the military defence counsel option, analysis and recommendations are sought as to the degree of separation between defence services, and the JAG's prosecutorial and judicial functions, that may be achieved under this option, and the feasibility and means to achieve this separation.

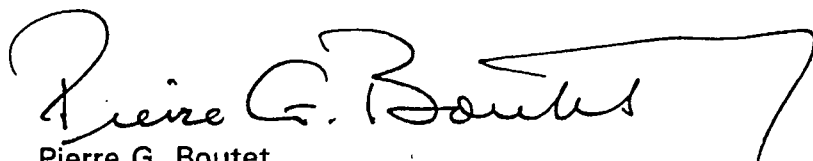
11. The Team may wish to consult with DJAG/A&L, DJAG/Lit, CMTJ, D Law/P&A, D Law/MJ or any other JAG officer as considered appropriate. Consultation outside the Office of the JAG may be arranged through DJAG/A&L.

COORDINATION

12. Milestones for the completion of the Study are as follows:

15 June 1997 - Team commences study under direction of Col McDonald, and

15 August 1997 - Submission of final report to JAG.



Pierre G. Boutet

BGen

JAG

996-8470/992-3019

Distribution List p. 4

Distribution List

Action

Col(Ret) R.A. McDonald
Col D.A. Fairbanks (DJAG/Res)
LCol D. Couture (D Law/D)
LCol W.W.A. Riedel (A/D Law/T)

Info

DM
A/CDS
CMTJ
DJAG/A&L
DJAG/Lit
D Law/P&A
D Law/MJ

ANNEX "B"

LIST OF CONSULTATIONS

LIST OF CONSULTATIONS

Civilian Organizations

1. Canadian Bar Association
2. Federal Department of Justice
3. Royal Canadian Mounted Police
4. Correctional Services Canada
5. Legal Aid Society of Alberta
6. British Columbia Legal Services Society
7. Legal Aid Services Society of Manitoba
8. Legal Aid New Brunswick
9. Newfoundland Legal Aid Commission
10. Legal Services Board of the North West Territories
11. Nova Scotia Legal Aid Society
12. Ontario Legal Aid
13. Prince Edward Island Legal Aid
14. Commission des Services Juridiques du Québec
15. Saskatchewan Legal Aid Commission
16. Yukon Territory Legal Services Society

Military Organizations

17. U.S. Army
18. U.S. Air Force
19. U.S. Navy

s.19(1)

20. U.S. Marines
21. Royal Navy
22. British Army
23. Royal Air Force
24. Australian Defence Force
25. New Zealand Defence Force
26. South African National Defence Force

Individuals

27. University of Toronto
28. Nova Scotia Director of Public Prosecutions
29. Boyne Clarke, Barristers and Solicitors
30. Mr. Justice Walter Goodfellow, Nova Scotia Supreme Court
31. Grainger & Associates Inc.
32. Carroll & Wallace, Barristers and Solicitors
33. Consultant
- 34.
- 35.
36. Maj John R. Fisher, Ontario Court of Justice (Provincial Division)
37. CPO1 K.D. Enta, CFNES CPO
38. Maj Mario Léveillé, Post Graduate Studies, University of Ottawa
39. Barrister and Solicitor
40. Mel Hunt & Associates, Barristers and Solicitors

s.19(1)

41. LCol Norman Peel, Barrister and Solicitor
42. CWO R. Elphick, CCWO Aircom
43. CPO1 T. Meloche, CCWO Marcom
44. CWO L. Busby, CCWO ADM (Mat)
45. CWO W. Thornton, CCWO ADM(Per)
46. CWO G. Parent, CFCWO
47. CWO J. Gregoire, CCWO ADM(Dis)
48. CWO Dussureault, CCWO LFC
49. former Deputy Chaplain General
50. All CF legal officers
51. CF consultation groups - CFB Halifax, BFC Valcartier, NDHQ Ottawa, 8 Wing Trenton.

ANNEX "C"

COURT MARTIAL STATISTICS 1990-97

s.19(1)

July 2, 1997

Courts Martial Statistics, 1990-1997
Comparison of Conviction, Acquittals and Other Findings¹ between Accused represented by Military Defence Counsel and Civilian Defence Counsel

Year	Total CM s	# Military Defending Officer	# Conviction Military DO	% Conviction Military DO	Acquittal # Military DO	Acquittal % Military DO	Other Findings # Military DO	Other Findings % Military DO	# Civilian Defending Officer	# Conviction Civilian DO	% Conviction Civilian DO	Acquittal # Civilian DO	Acquittal % Civilian DO	# Other Findings Civilian DO	% Other Findings Civilian DO
1997	8 ¹	4	3	75.00	1	25.00	0	0.00	4 ³	4	100.00	0	0	0	0.00
1996	28	24	20	83.33	2	8.33	2	8.33	4 ⁴	4	100.00	0	0.00	0	0.00
1995	33	21	15	71.43	5	23.81	1	4.76	12	7	58.33	5	41.67	0	0.00
1994	44	27	21	77.78	4	14.81	2	7.41	17 ⁵	12	70.59	3	17.65	2	11.76
1993	64	52	33	63.46	10	19.23	9	17.31	12	5	41.67	4	33.33	3	25.00
1992	60	45	38	84.44	4	8.89	3	6.67	15	13	86.67	1	6.67	1	6.67
1991	72	62	52	83.87	9	14.52	1	1.61	10	7	70.00	3	30.00	0	0.00
1990	70	63	54	85.71	5	7.94	4	6.35	7	7	100.00	0	0.00	0	0.00
Total	379	298	236	79.19	40	13.42	22	7.38	81	59	72.84	16	19.75	6	10.17

¹Other findings refer to Courts Martial terminated by pleas in bar of trial.

²This represents the number of Courts Martial in 1997 on which information has been received, not the total number of Courts Martial held to date.

³Includes one case of self representation,

⁴Includes one case where both military and civilian counsel represented the accused,

⁵Includes one case where both military and civilian counsel represented the accused, 38/94.

MILITARY DEFENDING OFFICER

Follows is a break down of convictions for selected years by guilty finding and guilty plea to represent a sample of Courts Martials. Guilty pleas refer to courts where all convictions resulted from pleas of guilty when accused represented by military counsel

Year	Convictions	Guilty Findings #	% Guilty Findings	Guilty Pleas #	% Guilty Pleas
1997	3	2	66.67	1	33.33
1996	20	10	50.00	10	50.00
1995	15	9	60.00	6	40.00
1994	21	11	52.38	10	47.62
1993	33	14	42.42	19	57.58
1992	38	16	42.11	22	57.89
1991	52	26	50.00	26	50.00
1990	54	18	33.33	36	66.67
Total Sample	236	106	44.92	130	55.08

C-2

CIVILIAN DEFENCE COUNSEL

Follows is a break down of convictions for selected years by guilty finding and guilty plea to represent a sample of Courts Martials. Guilty pleas refer to courts where all convictions resulted from pleas of guilty when accused represented by civilian counsel.

Year	Convictions	Guilty Findings #	% Guilty Findings	Guilty Pleas #	% Guilty Pleas
1997	4	1	25.00	3	75.00
1996	4	3	75.00	1	25.00
1995	7	5	71.43	2	28.57
1994	12	5	41.67	7	58.33
1993	5	4	80.00	1	20.00
1992	13	7	53.85	6	46.15
1991	7	3	42.86	4	57.14
1990	7	4	57.14	3	42.86
Total Sample	59	32	54.24	27	45.76

C-3

MILITARY DEFENDING OFFICER

Follows is a break down of convictions on a per charge basis for selected years by guilty finding and guilty plea to represent a sample of Courts Martials when accused represented by military counsel

Year	Conviction	Guilty Findings #	% Guilty Findings	Guilty Pleas #	% Guilty Pleas
1997	4	3	75.00	1	25.00
1996	84	40	47.62	44	52.38
1995	29	17	58.62	12	41.38
1994	41	20	48.78	21	51.22
1993	67	19	28.36	48	71.64
1992	86	36	41.86	50	58.14
1991	96	42	43.75	54	56.25
1990	84	26	30.95	58	69.05
Total Sample	491	203	41.34	288	58.66

C-6

CIVILIAN DEFENCE COUNSEL

Follows is a break down of convictions on a per charge basis for selected years by guilty finding and guilty plea to represent a sample of Courts Martials when accused represented by civilian counsel.

Year	Conviction	Guilty Findings #	% Guilty Findings	Guilty Pleas #	% Guilty Pleas
1997	7	0	0.00	7	100.00
1996	6	6	100.00	0	0.00
1995	16	11	68.75	5	31.25
1994	23	9	39.13	14	60.87
1993	14	6	42.86	8	57.14
1992	36	14	38.89	22	61.11
1991	12	3	25.00	9	75.00
1990	11	6	54.55	5	45.45
Total Sample	125	55	44.00	70	56.00

s.19(1)

Comparison of Number of Military Defence Counsel vs. Civilian Defence Counsel on a per charge basis.

Year	Total Charges	# Military Defending Officer Charges	% Military Defending Officer Charges	# Civilian Defending Officer Charges	% Civilian Defending Officer Charges	Total CM's	# Military Defending Officer CM	% Military Defending Officer CM	# Civilian Defending Officer CM	% Civilian Defending Officer CM	Average Charges per CM Military DO	Average Charges per CM Civilian DO
1997	32	18	56.25	14 ⁷	43.75	8	4	50.00	4 ⁸	50.00	4.50	3.50
1996	147	132	89.80	15 ⁹	10.20	28	24	85.71	4 ¹⁰	14.29	5.50	3.75
1995	110	82	74.55	28	25.45	33	21	63.64	12	36.36	3.90	2.33
1994	108	66	61.11	42 ¹¹	38.89	44	27	61.36	17 ¹²	38.64	2.44	2.47
1993	197	162	82.23	35	17.77	64	52	81.25	12	18.75	3.12	2.92
1992	201	145	72.14	56	27.86	60	45	75.00	15	25.00	3.22	3.73
1991	182	159	87.36	23	12.64	72	62	86.11	10	13.89	2.56	2.30
1990	134	118	88.06	16	11.94	70	63	90.00	7	10.00	1.87	2.29
Total	1111	882	79.39	229	20.61	379	298	78.63	81	21.37	2.96	3

⁷Includes one case of self representation.

⁸Includes one case of self representation.

⁹Includes one case where both military and civilian counsel represented the accused.

¹⁰Includes one case where both military and civilian counsel represented the accused

¹¹Includes one case where both military and civilian counsel represented the accused, 38/94.

¹²Includes one case where both military and civilian counsel represented the accused, 38/94.

Statistical Summary - Courts Martial¹

Period of February 7, 1995 to June 17, 1997

Total Number of Courts Martials: 85

Trial Counsel of Court Martial

	Military Counsel	Civilian Counsel	Self-Representation	Total
Days in Court	280.00	82.00	24.00	386.00
Type of Counsel on a CM Basis	61.00	24.00	1.00	85.00
Average Days Per Trial	4.59	3.42	24.00	4.54

Language of Court Martial Trial

	English	French	Total
Language of Trial	69	16	85
English Trials in French Speaking Region	n/a	n/a	0
French Trials in English Speaking Region	n/a	n/a	3 1 in Trenton 2 in Kingston

¹Source, DLAW/D files.

Annex "D"

Option Cost Estimates

Memorandum

7100-1 (DMAC 2)

3 / Jul 97

JAG

**COST OF OPTIONS FOR CREATION
OF OFFICE OF HEAD MILITARY DEFENCE COUNSEL**

Refs: A. Cost Factors Manual 1997-1998

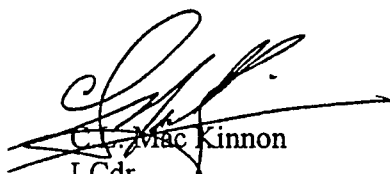
B. Department of Justice Document Agents Chapter A-6 Agents

C. JAG Option Analysis Study

D. Financial Information System

1. DMAC 2 in consultation with Col McDonald and LCol Couture have reviewed various options to create a new Directorate of Law/Defence. The cost analysis supporting these options is enclosed.
2. The assumptions and rationale developed to support the costed options are listed on the Recap sheet. Please note that changes to any of these assumptions or activity rates will result in changes to the corresponding cost figures. You are requested to confirm the average duration for a civilian defender (3.5 days); this is contrary to the average duration of a court martial (5 days); which implies a greater efficiency using civilian defenders. The impact of one-time costs (physical movement, FAD 50 conversions, etc) have not been identified. As well, it is assumed that, due to the small number of personnel, existing DND facilities will be made available.
3. The requirement for incremental funding will obviously differ from option to option and will not equate to differences in the total costs of the options. The majority of the TD and O&M funding will be provided from existing resources within JAG. One funding source for options such as Reserve and private counsel is the conversion of Regular Force positions using FAD 50; non-consideration of such conversions will increase the incremental costs to such options. The value of the O&M apportioned share was based on discussions with the JAG/ADM O. As this amounts to a significant portion of the overall cost, you may wish to review these costs in further detail.
4. The apportioned cost of the current operation forms the O&M base for any new organization. This amount should be removed from the current Budget Managers and transferred to the New Budget Manager. All Salaries (Military and Civilian) for established positions should be removed from the current organization by means of an ECP and transferred to the new organization if required. If the option chosen is a private organization, the funds now used to pay for salaries must be made available to pay for the contracted services. Incremental costs will have to be funded from internal resources or additional funds requested through the JAG business plan.

5. Please contact Capt Dale MacMurdo (992-5611) or the undersigned with any questions on the attached cost analysis.



C. MacKinnon
LCdr
DMAC 2
992-6558

Enclosure: 1

RECAP SHEET

Common Assumptions:

1. Assume that there are 50 courts martial (CM) per year; an increase from the current level of 31CM.

2. The average duration in days of each CM is 5 days
 The average duration in days for a civilian defender is 3.5 days
 According to JAG, avg. duration of a CM is 4.54 days. 5 days is used as a Reservist would be paid a full days pay for any portion longer than a half-day.

Total days of CM per year = 250 Military Reg & Reserve
 Total days of CM per year = 175 Civilian

3. Average hours per day is 10 Military Reg & Reserve
 3. Average hours per day is 10 Civilian
 4. Average hours per year is 2,500 Military Reg & Reserve
 4. Average hours per year is 1,750 Civilian
 5. Average TD cost per CM is \$2,500 (based on FY 96/97 data)
 6. Preparation time before the CM is 2 days per 1 day of CM.

7. Current operating budget of D Law/Defence is \$247,000
 8. Current TD expenses based on 31 CMs is \$77,194
 or \$2,490 per CM

9. Cost per day of TD (travel costs, meals) for one EX 01 is \$ 1,000.

10. Daily Rate for Reserve Mayor basic 143.76

11. Daily Rate for Reserve Captain ba 94.56

Defence Fund Calculations

Minimum per hour (Dept of Justice) pays per hour is \$60
 Maximum per hour (Dept of Justice) pays per hour is \$82
 Average per hour for this costing \$75
 Total court room hours for 50 CM is 2,500 Military Reg & Reserve
 Total court room hours for 50 CM is 1,750 Civilian
 Total preparation time hours for 50 CM is 5,000 Military Reg & Reserve
 Total preparation time hours for 50 CM is 3,500 Civilian

Total hours 7,500 Military Reg & Reserve
 Total hours 5,250 Civilian

Disbursements:

Travel costs for Military and Civilian \$2,500 per Cm
 Incremental training cost \$5,000 per extra staff
 O&M Costs were set at 1996/97 expenditures \$247,000
 Minimum amount of Defence Fund \$317,500
 Maximum amount of Defence Fund \$433,000

Notes:

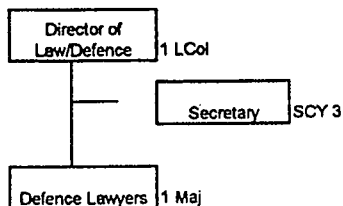
1. Any reduction or increase in Personnel must be ECP so that the Establishment reflect the new organization.
2. When the new Office Military Defence Counsel is formed the transfer of Apportioned Budgets must occur and DB informed of the transfer and a business plan submitted to reflect and increase or decrease in required resources.
3. The current O&M apportionment of \$247,000 is assumed to be the budget funding required to support the new Defence Organization and as such will form the base line funding requirements.

D-4

Options		Current	Option A Reg F Defence Tm	Option B Res F Defence Tm	Option D CF Legal Aid using Private counsel	Option E CF Legal Aid using staff lawyers	Option F Employee Takeover	Option G Retention of Civilian Law Firms
Categories		LCol, Maj, Secretary	LCol, 3 Maj, 1 Capt, Secretary Res F 5 Maj, 2 Capt	LCol, Maj, Secretary Res F 11 Maj, 4 Capt	LA 02(B), Secretary	LA 02(B), Secretary 3 LA 02 (A), 1 LA 01	LA 02(A), Secretary	LA 02(A), Secretary
Personnel	Military Regular Force	\$188,862	\$405,322	\$188,862				
	Military Reserve Force		\$29,970	\$116,053				
	Civilian	\$36,615	\$36,615	\$36,615	\$147,211	\$423,034	\$147,211	\$147,211
	Contracted Lawyers (Defence Fund)				\$393,750	\$39,375	\$393,750	\$393,750
	Seconded Personnel	\$80,081						
Sub-Total		<u>\$305,558</u>	<u>\$471,907</u>	<u>\$341,530</u>	<u>\$540,961</u>	<u>\$462,409</u>	<u>\$540,961</u>	<u>\$540,961</u>
Other Govt. Dept Costs	Military Regular Force	\$36,643	\$77,282	\$36,643				
Includes all Statutory Benefits such as	Military Reserve Force		\$1,527	\$11,452				
CPP, CFSA, EI, HLTH, SDB	Civilian	\$5,434	\$5,434	\$5,434	\$21,550	\$63,615		\$21,550
Sub-Total		<u>\$42,077</u>	<u>\$84,243</u>	<u>\$53,629</u>	<u>\$21,550</u>	<u>\$63,615</u>	<u>\$21,550</u>	<u>\$21,550</u>
Total Personnel Costs		<u>\$347,635</u>	<u>\$556,150</u>	<u>\$395,059</u>	<u>\$562,511</u>	<u>\$526,025</u>	<u>\$562,511</u>	<u>\$562,511</u>
TD(Current 31CM / Projected 50 CM)		\$77,194	\$125,000	\$125,000	\$125,000	\$125,000	\$125,000	\$125,000
O&M Apportioned Share As per Adm O		\$247,000	\$302,000	\$322,000	\$247,000	\$262,000	\$247,000	\$247,000
Facilities Cost as per Cost Factors								
Manual @ \$112 /sq. metre @ 50 sq.		\$16,800	\$33,600	\$16,800	\$16,800	\$33,600	\$11,200	\$11,200
metres per full time personnel					\$15,000	\$15,000	\$15,000	\$15,000
TD(Travel Costs, Hotels, Meals, etc.) for Commission								
Total Cost		<u>\$688,629</u>	<u>\$1,016,750</u>	<u>\$858,859</u>	<u>\$966,311</u>	<u>\$961,625</u>	<u>\$960,711</u>	<u>\$960,711</u>
CM Per Year		31	50	50	50	50	50	50
Cost / CM		\$22,214	\$20,335	\$17,177	\$19,326	\$19,232	\$19,214	\$19,214

Current Situation

Current Org Chart



Notes:

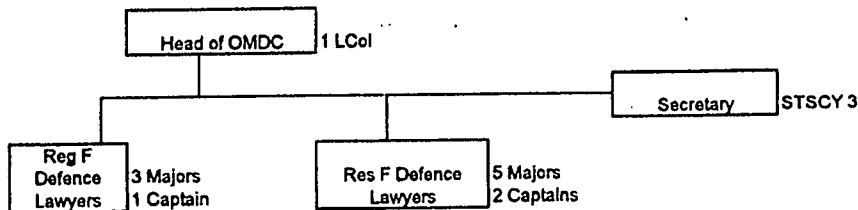
1. Director of Law/Defence reports directly to JAG
2. Reserve lawyers are used as required from a pool of Reserve lawyers which are shared by all directorates of JAG

Personnel Costs				Other Govt. Dept Costs				Grand Total		
Personnel # of Pers	Salary	Voted Indirect Costs	Total	Direct Costs	Indirect Costs	Total				
Reg F										
LCol	1	\$ 94,106	\$ 14,003	\$ 108,109	\$ 19,854	\$ 1,399	\$ 21,253	\$ 129,362		
Maj	1	\$ 68,516	\$ 12,237	\$ 80,753	\$ 14,372	\$ 1,018	\$ 15,390	\$ 96,143		
		<u>\$ 162,622</u>	<u>\$ 26,240</u>	<u>\$ 188,862</u>	<u>\$ 34,226</u>	<u>\$ 2,417</u>	<u>\$ 36,643</u>	<u>\$ 225,505</u>		
\$ -										
Civilian										
SCY 3	1	<u>\$ 30,496</u>	\$ 6,119	<u>\$ 36,615</u>	\$ 4,539	\$ 895	<u>\$ 5,434</u>	<u>\$ 42,049</u>		
\$ -										
Res F										
	Daily Rate	Days of Service								
LCol	0 \$ 211	35								
Maj	\$ 173	250								
Capt	\$ 124	250								
Full Time Personnel Costs				<u>\$ 193,118</u>	<u>\$ 32,359</u>	<u>\$ 225,477</u>	<u>\$ 38,765</u>	<u>\$ 3,312</u>	<u>\$ 42,077</u>	<u>\$ 267,554</u>
Personnel Cost for Other Military Defence Council and Civilian Defence Council for FY 1996/97									<u>\$80,081</u>	
Total Personnel Costs									<u>\$ 347,635</u>	
O&M Costs										
TD									\$ 77,194	
Allocated O&M cost Less TD									\$ 247,000	
Total O&M Costs									<u>\$ 324,194</u>	
Facilities Cost as per Cost Factors Manual @ \$112 /sq. metre @ 50 sq. metres per full time personnel									<u>\$ 16,800</u>	
Total Costs									<u>\$ 688,629</u>	

Option A - Regular Force Defence Team augmented by Reserves

Proposed Org Chart

Head of Office Military Defence Council
located in different building than Jag



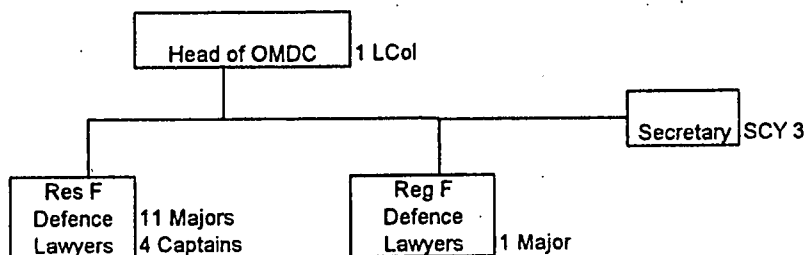
Assumptions:

1. Assume TD, training arrangements continue to be done by JAG admin cell
2. Requires dedicated fax, secure communications
3. Assume 1 CM per Res F lawyer (i.e. 7 out 50 CM to be handled by Res F lawyers) 7 CMs handled by Reservists
4. Head of OMDC has dedicated operating budget
5. Head of OMDC is able to authorize the hiring of civilian lawyers
6. Reservists are assumed to be on class B service taking into account preparation time, travelling time and court time.
7. Training costs of 10 days per reservists plus additional \$5000 incremental cost added for training, professional fees and other related O&M Costs..
8. Facilities Cost of @ \$112 per Sq. Metre at 50 Sq. Metres per Pers. No cost for part-time personnel.

Personnel Costs					Other Govt. Dept Costs			
Personnel # of Pers		Salary	Voted Indirect Costs	Total	Direct Costs	Indirect Costs	Total	Grand Total
Reg F								
LCol	1	\$ 94,106	\$ 14,003	\$ 108,109	\$ 19,854	\$ 1,399	\$ 21,253	\$ 129,362
Maj	3	\$ 205,548	\$ 36,711	\$ 242,259	\$ 43,116	\$ 3,054	\$ 46,170	\$ 288,429
Capt	1	\$ 44,382	\$ 10,572	\$ 54,954	\$ 9,201	\$ 658	\$ 9,859	\$ 64,813
Res F				\$ 405,322			\$ 77,282	\$ 482,604
Days per CM								
LCol	0	5 \$ -	\$ -	\$ -		N/A	\$ -	\$ -
Maj	5	125 \$ 17,970	\$ 6,269	\$ 24,239	\$ 1,209	N/A	\$ 1,209	\$ 25,448
Capt	2	50 \$ 4,728	\$ 1,003	\$ 5,731	\$ 318	N/A	\$ 318	\$ 6,049
Civ Pers				\$ 29,970			\$ 1,527	\$ 31,497
STSCY 3	1	\$ 30,496	\$ 6,119	\$ 36,615	\$ 4,539	\$ 895	\$ 5,434	\$ 42,049
Total Pers Costs				<u>\$ 471,907</u>			<u>\$ 84,243</u>	<u>\$ 556,150</u>
								125000
TD								247000
Allocated O&M cost Less TD								55000
Training & Incremental pers cost								427000
Total O&M Costs								<u>33600</u>
Facilities Cost as per Cost Factors Manual @ \$112 /sq. metre @ 50 sq. metres per full time personnel								<u>\$ 1,016,760</u>
Total Costs								

Option B - Reserve Force Defence Team

Proposed Org Chart



Assumptions:

1. Assume TD, training arrangements continue to be done by JAG admin cell
2. Requires dedicated fax, secure communications
3. Reg F lawyer is mainly there to offer advice and fill in when Res F lawyers are unavailable.
Assume Reg F lawyer would do 5 CM per year
4. Director of Law/Defence has dedicated operating budget
5. Director of Law/Defence is able to authorize the hiring of civilian lawyers
6. Director of Law/Defence is a full time Reg F position filled by a LCol, either Reg F or Res F.
If filled by Res F, member would be on Class C
7. 45 CM would be done by Res F lawyers. 5 CM would be done by Reg F lawyers.
8. 10 days per year for training and courses
Preparation time per person = 10 per CM

Personnel Costs

Other Govt. Dept Costs

Personnel		# of Pers	Salary	Voted Indirect Costs	Total	Direct Costs	Indirect Costs	Total	Grand Total
Reg F									
LCol	1		\$ 94,106	\$ 14,003	\$ 108,109	\$ 19,854	\$ 1,399	\$ 21,253	\$ 129,362
Maj	1		\$ 68,516	\$ 12,237	\$ 80,753	\$ 14,372	\$ 1,018	\$ 15,390	\$ 96,143
Capt	0		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	
		Days per CM			\$ 188,862			\$ 36,643	\$ 225,505
LCol	0	235	\$ -	\$ -	\$ -	\$ -	N/A	\$ -	\$ -
Maj	11	605	\$ 86,975	\$ 6,068	\$ 93,043	\$ 5,853	N/A	\$ 5,853	\$ 98,895
Capt	4	220	\$ 20,803	\$ 2,207	\$ 23,010	\$ 5,599	N/A	\$ 5,599	\$ 28,609
					\$ 116,053			\$ 11,452	\$ 127,505
Civ Pers									
STSCY 3	1		\$ 30,496	\$ 6,119	\$ 36,615	\$ 4,539	\$ 895	\$ 5,434	\$ 42,049
								\$ 395,059	
									\$ 125,000
TD									\$ 247,000
Allocated O&M cost Less TD									\$ 75,000
Training Costs/Courses/Misc Fees @ 5000 per member /15 pers									\$ 447,000
Total O&M Costs									

Facilities Cost as per Cost Factors Manual @ \$112 /sq. metre @ 50 sq. metres per full time personnel

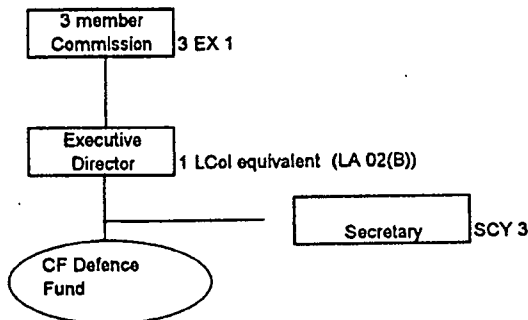
\$ 16,800

Total Costs

\$ 858,859

Option D - CF Legal Aid Service using Private Counsel

Proposed Org Chart



Assumptions:

1. 3 member commission are of the EX 1 level
2. 3 member commission meet 5 times a year for one day
3. Space requirements include office for executive director and board room for directors
4. Executive director responsible for overall management of CF Defence fund.
5. Funding for CF Defence fund will need to be identified
6. Daily rate of pay for PS employee is annual salary divided by 260.88 days as this represents the average amount of days worked in a year by PS employees
7. Voted indirect costs for PS employees includes CPP, EI, 4% vacation pay and provincial health.
8. Cost of Civilian Defence Lawyer is in the range of \$60 to \$82 /hr the expected average is \$75/hr.
9. The cost for TD will remain the same per CM as the present military rate of \$2500/CM.

Personnel # of Pers	Personnel Costs			Other Govt. Dept Costs			Total	Grand Total
	Salary	Voted Indirect Costs	Total	Direct Costs	Indirect Costs			
Reg F	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -		
Civ Pers								
EX 1 3	\$ 8,941.58	N/A	\$ 8,941.58	\$ 520.85	\$ 136.81	\$ 657.65	\$	9,599
LA 02 (B) 1	\$ 93,898	\$ 7,757	\$ 101,655	\$ 12,987	\$ 2,471	\$ 15,458	\$	117,113
STSCY 3 1	\$ 30,496	\$ 6,119	\$ 36,615	\$ 4,539	\$ 895	\$ 5,434	\$	42,049
			<u>\$ 147,211.11</u>			<u>\$ 21,549.98</u>	\$	<u>168,761</u>

Defence Fund Requirements For Civilian Lawyers to perform 50 CM with an average of 3.5 days per CM court time and 7 days preparation time at 10 hours per day @ approx. \$75 per hour.

\$ 393,760

TD
Allocated O&M cost Less TD
TD(Travel Costs, Hotels, Meals, etc.) for Commission
Total O&M Costs

\$ 125,000
\$ 247,000
\$ 15,000
\$ 387,000

Facilities Cost as per Cost Factors Manual @ \$112 /sq. metre @ 60 sq. metres per full time personnel

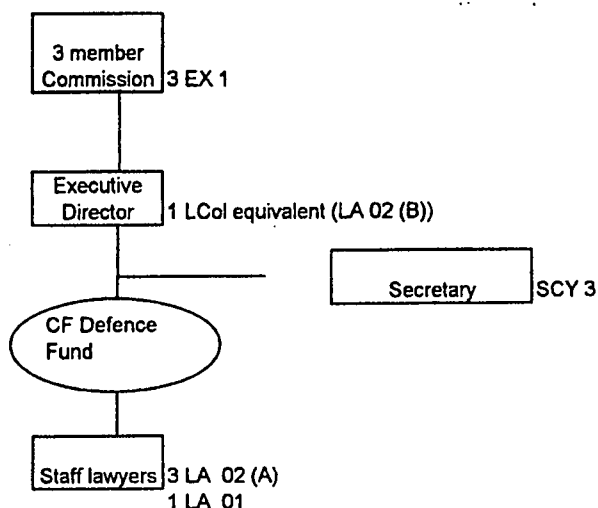
\$ 16,800

Total Costs

\$ 966,311

Option E - CF Legal Aid Service using staff lawyers

Proposed Org Chart



Assumptions:

1. All military positions would be converted to their civilian equivalents
2. TD requirements would remain the same as Options A and B
3. Facilities is based on \$112 sq. m @ 50 sq. m per pers
4. Training & Incremental pers cost @ \$5000 per extra staff.
5. 45 CM would done by staff and 5 CM contracted out to private counsel.

Personnel Costs					Other Govt. Dept Costs				
					Direct Costs	Indirect Costs			
Personnel	# of Pers	Salary	Voted Indirect Costs	Total			Total	Grand Total	
Civ Pers									
EX 1	3	\$ 8,941.58	N/A	\$ 8,941.58	\$ 520.85	\$ 136.81	\$ 657.65	\$ 9,599	
LA 02 (B)	1	\$ 93,898	\$ 7,757	\$ 101,655	\$ 12,987	\$ 2,471	\$ 15,458	\$ 117,113	
STSCY 3	1	\$ 30,496	\$ 6,119	\$ 36,615	\$ 4,539	\$ 895	\$ 5,434	\$ 42,049	
LA 02 (A)	3	\$ 204,924	\$ 20,659	\$ 225,583	\$ 28,985	\$ 5,393	\$ 34,378	\$ 259,961	
LA 01	1	\$ 44,174	\$ 6,066	\$ 50,240	\$ 6,525	\$ 1,162	\$ 7,688	\$ 57,928	
				\$ 423,034			\$ 63,615	\$ 486,650	

Defence Fund Requirements For Civilian Lawyers to perform 50 CM with an average of 3.5 days per CM court time and 7 days preparation time at 10 hours per day @ approx. \$76 per hour.

\$ 39,375

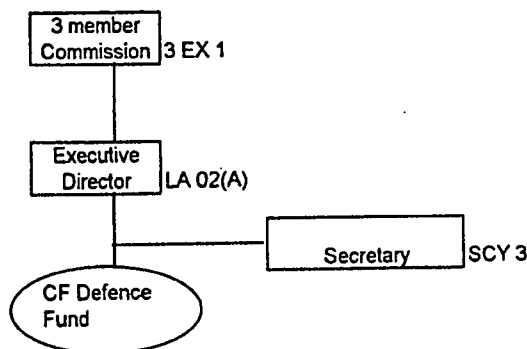
TD	\$ 125,000
Allocated O&M cost Less TD	\$ 247,000
Training & Incremental pers cost	\$ 15,000
TD(Travel Costs, Hotels, Meals, etc.) for Commission	\$ 15,000
Total O&M Costs	<u>\$ 402,000</u>

Facilities Cost as per Cost Factors Manual @ \$112 /sq. metre @ 50 sq. metres per full time personnel \$ 33,600

Total Costs \$ 961,625

Option F - Employee Takeover

Proposed Org Chart



Assumptions:

1. Point of contact for this "law firm" would be LA 02(A)
2. LA 02(A) would still be required to provide help to assisting officers etc.
3. Cost of "law firm" would be based on minimum and maximum hourly rate charged by Dept of Justice. They would not be willing to work for less otherwise they would work for Dept of Justice on contract.
4. TD and O&M still required to support office and provide services
5. Facilities still required for LA 02(A) and Secretary

		Personnel Costs			Other Govt. Dept Costs				
					Direct Costs	Indirect Costs			
Personnel	# of Pers	Salary	Voted Indirect Costs	Total			Total	Grand Total	
Civ Pers									
EX 1	3	\$ -	\$ 8,942	N/A	\$ 8,942	\$ 521	\$ 137	\$ 9,599	
LA 02 (B)	1	0	\$ 93,898	\$ 7,757	\$ 101,655	\$ 12,987	\$ 2,471	\$ 117,113	
STSCY 3	1	0	30496	6119	36,615.00	\$ 4,539	895	42,049	
					\$ 147,211		\$ 21,550	\$ 168,761	

Defence Fund Requirements For Civilian Lawyers to perform 50 CM with an average of 3.5 days per CM court time and 7 days preparation time at 10 hours per day @ approx. \$76 per hour.

\$ 393,750

TD
 Allocated O&M cost Less TD
 TD(Travel Costs, Hotels, Meals, etc.) for Commission
 Total O&M Costs

\$ 125,000
\$ 247,000
\$ 15,000
\$ 387,000

Facilities Cost as per Cost Factors Manual @ \$112 /sq. metre @ 50 sq. metres per full time personnel

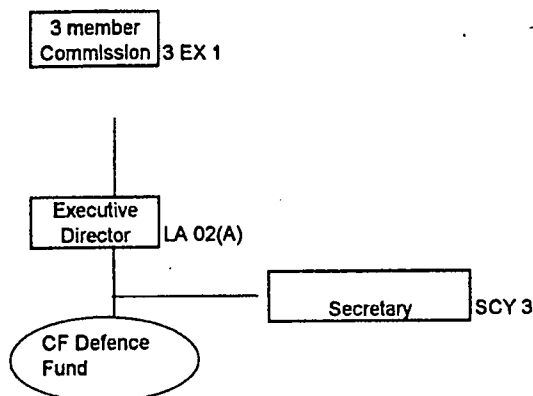
\$ 11,200

Total Costs

\$ 860,711

Option G - Retention of Civilian Law Firms

Proposed Org Chart



Assumptions:

1. Point of contact for this "law firm" would be LA 02(A).
2. LA 02(A) would still be required to provide help to assisting officers etc.
3. Cost of "law firm" would be based on minimum and maximum hourly rate charged by Dept of Justice. They would not be willing to work for less otherwise they would work for Dept of Justice on contract.
4. A retainer fee of \$5,000 would be required for each law firm as the number of court martial per year per law firm would not guarantee their continued service.
5. To support this option, there would be retainer fees with law firms. No addition cost included as it is assumed that they would be consumed with the provision of service.
6. TD Cost are assumed to remain the same with Civilian Lawyers.
7. O&M cost assumed to remain to support the LA 02(A) and secretary and provide the service

Personnel # of Pers	Personnel Costs			Other Govt. Dept Costs			Total	Grand Total
	Salary	Voted Indirect Costs	Total	Direct Costs	Indirect Costs			
Civ Pers								
EX 1	3	0 \$ 8,942	N/A	\$ 8,942	\$ 520.85	\$ 136.81	\$ 657.65	\$ 9,599.24
LA 02 (B)	1	0 \$ 93,898	\$ 7,757	\$ 101,655	\$ 12,987	\$ 2,471	\$ 15,458	\$ 117,112.86
STSCY 3	1	0 \$ 30,496	\$ 6,119	\$ 36,615	\$ 4,539	\$ 895	\$ 5,434	\$ 42,049.00
			<u>\$ 147,211</u>				<u>21,649.98</u>	<u>168,761.09</u>

Defence Fund Requirements For Civilian Lawyers to perform 50 CM with an average of 3.5 days per CM court time and 7 days preparation time at 10 hours per day @ approx. \$76 per hour.

	<u>\$ 393,760</u>
TD	\$ 125,000
Allocated O&M cost Less TD	\$ 247,000
TD(Travel Costs, Hotels, Meals, etc.) for Commission	\$ 15,000
Total O&M Costs	<u>\$ 387,000</u>
Facilities Cost as per Cost Factors Manual @ \$112 /sq. metre @ 50 sq. metres per full time personnel	<u>\$ 11,200</u>
Total Costs	<u>\$ 960,711</u>

Annex "E"

Option Consultation Results

**Survey of Defence Counsel Services:
A Report to the Department
of National Defence**

August 1997

**COMPAS Inc.
Multi-Audience research
Ottawa and Toronto**

Executive Summary

- The Minister of National Defence established a Special Advisory Group to review the military justice system and military police investigation services. With DND assistance in the field, COMPAS conducted a self-administered, paper-and-pencil survey among members from the three branches of the Canadian Armed Forces and from National Defence Head-quarters to assess their opinions of the policy options under consideration.
- **The data indicated that members of the Canadian Armed Forces have a moderate, perhaps modest , knowledge of the military justice system.** This is true both in term of self-assessed rating of their knowledge, and their factual knowledge of the qualifications of a military defending officer. The principal ramification of this finding could be the need for a communications/education program.
- **Assessment of the current military justice system and its fairness is slightly or modestly positive.** Members' moderate confidence in the military justice system emerges not only in response to direct questions on topic but also in their evaluations of the actors. Members, especially in the lower ranks, have more confidence in the performance of civilian defence counsel than in that of military defence counsel.
- **The creation of an Office of Military Defence Counsel was the option most frequently cited as the best, fairest and most efficient option.** Considerable support was also expressed for a Canadian Armed Forces Legal Aid Service with civilian lawyers (private counsel).
- **Attitudes towards military and civilian policy options tend to be somewhat polarized.** Personnel who favor options with a military element tend not to favor options with a civilian element and vice versa. This may have important ramifications in terms of the need to acknowledge members' twin concerns to protect the military commitment and expertise that they associate with a military presence as well as the impartiality and fairness that they associate with a civilian presence.
- **Support for the creation of an Office of Military Defence Counsel as the best, fairest, most efficient option is present across all ranks, but the intensity of the support for this option diminishes as rank diminishes.**
- Support for the creation of an Office of Military Defence Counsel is present for all branches of the Canadian Armed Forces surveyed, but **support for this option is less intense from the members of the Air Force.**

- Support for the creation of an Office of Military Defence Counsel is present irrespective of past involvement with a military court martial, but **those with past court martial involvement report more intensity that this option is the best and fairest.** No difference in intensity exists with respect to efficiency.

Table of Contents

Executive Summary	i
Background	1
Knowledge of the Current System	1
The Present System.....	4
Assessing Policy Options	10
Conclusion	14

Appendices :

**Questionnaire
Relative Ranking**

Survey of Defence Counsel Services
A Report for the Department of National Defence August 8, 1997

Background

COMPAS undertook a quantitative study to gather feedback from members of the Department of National Defence regarding potential improvements to the provision of defence counsel. Questionnaires were self-administered on July 29th and August 5th to 540 members recruited by the DND. A random sample survey of 540 respondents is normally deemed accurate to within +/- 4.4% 19 times out of 20.

The purposes of the project were to:

- present members with the options that are presently under consideration,
- collect their input on those options, and
- assess the members' level of knowledge and perception of the present military justice system.

Knowledge of the Current System -- Limited Knowledge Drawn from a Diversity of Sources

Purpose

At the outset, the paper-and-pencil questionnaires sought to gauge respondents' apparent knowledge of the military justice system in order to appreciate the context from which Armed Forces personnel assess the military justice system. Two measures were used to appraise knowledge of the military justice system: respondents' self-assessed ratings of understanding of the military justice system and a factual question designed to test respondents' actual knowledge. Respondents were also asked to indicate the degree to which they depended on various sources of their knowledge.

Questions

The self-reported knowledge, measured knowledge, and knowledge sources questions were as follows:

- How would you describe your knowledge of the military justice system: very extensive, somewhat extensive, limited, or essentially non-existent?
- To your knowledge, a military defending officer is: a fully qualified lawyer, trained only in military law, or a non-legally trained officer assigned to perform legal duties.

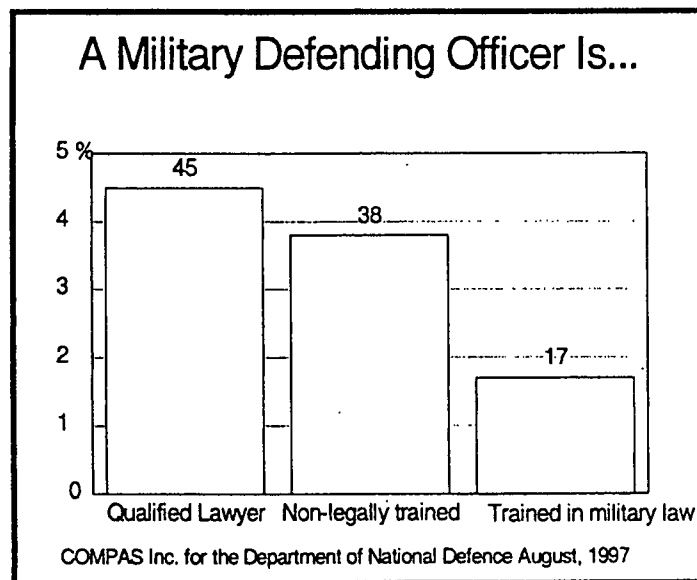
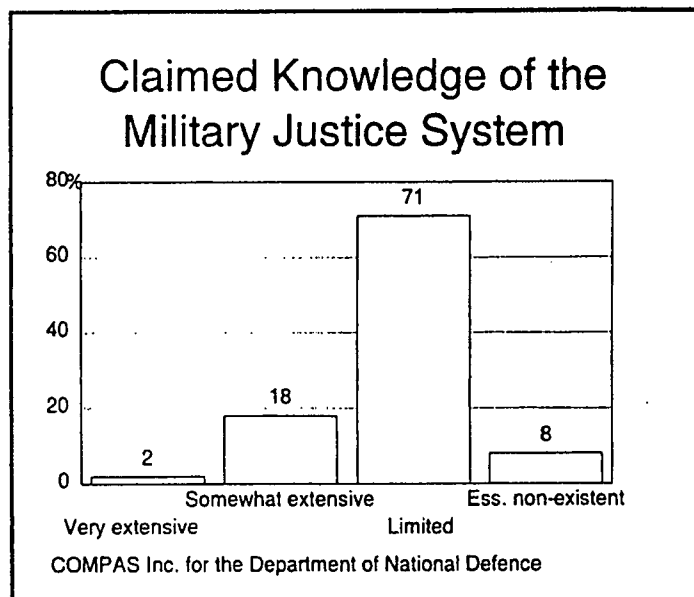
Survey of Defence Counsel Services

A Report for the Department of National Defence August 8, 1997

- What percentage of your information about the military justice system has come from: TV and newspapers, work related experience, military studies, word of mouth?

Main Findings

The portrait emerging from the data is of Armed Forces personnel with moderate, perhaps modest, knowledge of the military justice system drawn from a diversity of sources. A clear majority of members readily acknowledge that their understanding of the military justice system is "limited" (71%) as opposed to very extensive or somewhat extensive.



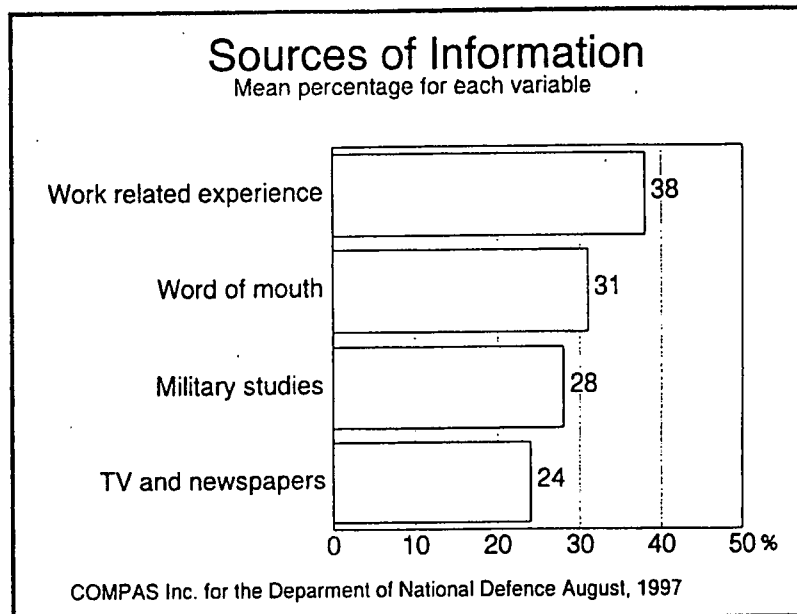
Given the moderate, if not modest, self-scores of respondents, one might expect them to exhibit little actual knowledge of the system when answering factual questions about the military justice system. Indeed, precisely such a pattern emerges. Less than a majority of respondents (45%) realized that a Military Defending Officer is a fully qualified lawyer. Indeed, almost as many respondents thought that the Military Defending Officer lacks legal training (38%) as possesses it (45%). The strong division of opinion on this apparently simple

factual question suggests that respondents are truthful in their self-characterized knowledge of the system as "limited." It is conceivable that some respondents confounded the role of Military Defense Officer with the role of Assisting Officer.

Survey of Defence Counsel Services

A Report for the Department of National Defence August 8, 1997

Respondents reported that they had derived their knowledge, however limited, from a diversity of sources. Work-related experience is the single source of information that contributed most to the respondents' knowledge of the military justice system (38%). The other sources of knowledge are word of mouth (31%), military studies (28%), and TV and news papers (24%).



The percentages in the accompanying graph on this theme do not sum to 100% because a number of respondents did not fully observe the instruction to quantify their relative dependence on different sources using 100 as the base for such calculations.

Sub-Sample Differences

Self-reported and directly measured knowledge of the military justice system are distributed unevenly among members of the Forces. The largest difference by far is according to rank. But knowledge also varies by age/experience, previous court martial involvement, and whether the member is located at National Defence Head-quarters.

Some groups are more apt to know than others that military defence counsel have legal training, notably:

- Senior ranks (among Majors and above, the proportion knowing is 78%; this decreases to 31% for Warrant Officers and below,
- those over 40 (51% versus 44% for those under 41),
- personnel located at NDHQ (59% versus 44% for Halifax, and 34% for 8 Wing and CFB Valcartier), and
- members with pervious court martial involvement (54% versus 40% for those without involvement).

The following patterns emerged with respect to self-reported or claimed understanding:

Survey of Defence Counsel Services

A Report for the Department of National Defence August 8, 1997

- personnel over 40 years of age claimed the most knowledge (28% decreasing to 11% for those under 30),
- NDHQ staff (30% versus CFB Valcartier at 20%, Halifax at 15%, and 8 Wing at 12%)
- members who have been involved in a court martial (37% vs. 10% for those with no involvement), and
- senior commissioned and non-commissioned¹ members (53% and 38% respectively).

Seemingly the length of time that an individual has been a member of the Canadian Armed Forces has a greater impact on perceived knowledge than does rank alone. Senior non-commissioned and senior commissioned members, who will have served longer than their junior counterparts, reported higher levels of knowledge. Fifty-three percent of senior commissioned members and 38% of senior non-commissioned members reported their knowledge to be very or somewhat extensive compared to 21% and 12% for junior commissioned and non-commissioned members.

Ramifications

The principal ramification for Canada's Armed Forces is that they may need to give serious consideration to an effective communications/education program. When so few members of the Armed Forces have an accurate understanding of a matter as central as the military justice system, this situation may attenuate in small part the Forces' ability to achieve its various objectives. On the one hand, some members of the Forces may not conduct themselves in the most rational and effective manner as a result of their mistaken belief that the system does not utilize competently trained personnel to the extent that it actually does. On the other hand, a vacuum of knowledge is well suited to the emergence of rumour, unfounded suspicion, and mistrust.

The Present System -- Evaluation Moderately Favorable

Purpose

The survey sought to measure satisfaction with the present military justice system by asking respondents to rate the fairness and efficiency of the system. Satisfaction levels were also gauged indirectly through respondents' evaluations of the performance of prosecutors, military defending officers and civilian defence counsel.

¹ Senior non-commissioned member as defined by MWO and CWO. Senior commissioned member as defined by Major and above.

Survey of Defence Counsel Services

A Report for the Department of National Defence August 8, 1997

Questions

The relatively direct measures of satisfaction were:

- Would you say that the military justice system is very fair, somewhat fair, not really fair, not fair at all.
- Would you say that the military justice system is very efficient, somewhat efficient, not really efficient, or not efficient at all.

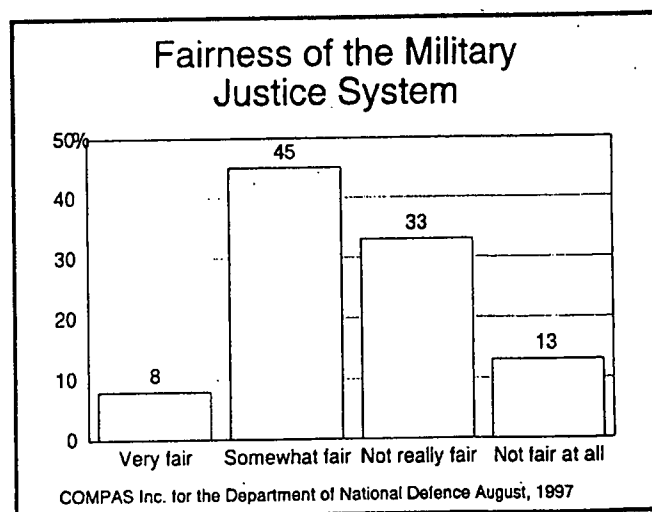
The more indirect measures were:

- How would you rate the performance of the prosecutor: outstanding, very good, satisfactory, not very good, terrible or don't know.
- How would you rate the performance of the military defence counsel: outstanding, very good, satisfactory, not very good, terrible, no military defence counsel or don't know.
- How would you rate the performance of the civilian defence counsel: outstanding, very good, satisfactory, not very good, terrible, no civilian defence counsel or don't know.

Main Findings

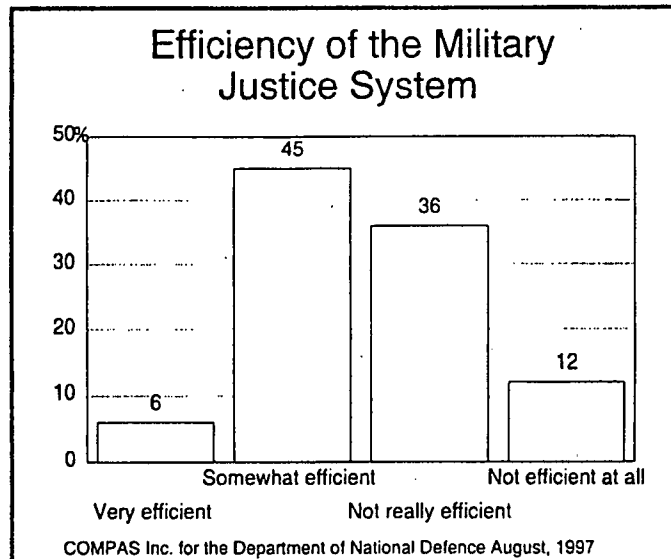
Respondents tend to be slightly or modestly positive in their assessments of the military justice system. Ratings on all but one measure are clustered strongly around the mid-points, albeit slightly on the positive side. These results should not be interpreted as fundamentally positive because Canadian respondents in most surveys tend to overstate their approbation or satisfaction for cultural reasons. It is not considered culturally acceptable to be too critical. For this reason, the measured assessments of the military justice system by respondents should be interpreted as a weaker endorsement than might appear at first glance.

When evaluating the fairness of the system, 45% of respondents indicated that the system is somewhat fair and 33% not really fair. Evaluations of the system's efficiency parallel those of its fairness, 45% reporting the system to be somewhat efficient and 36% indicating not really efficient.



Survey of Defence Counsel Services

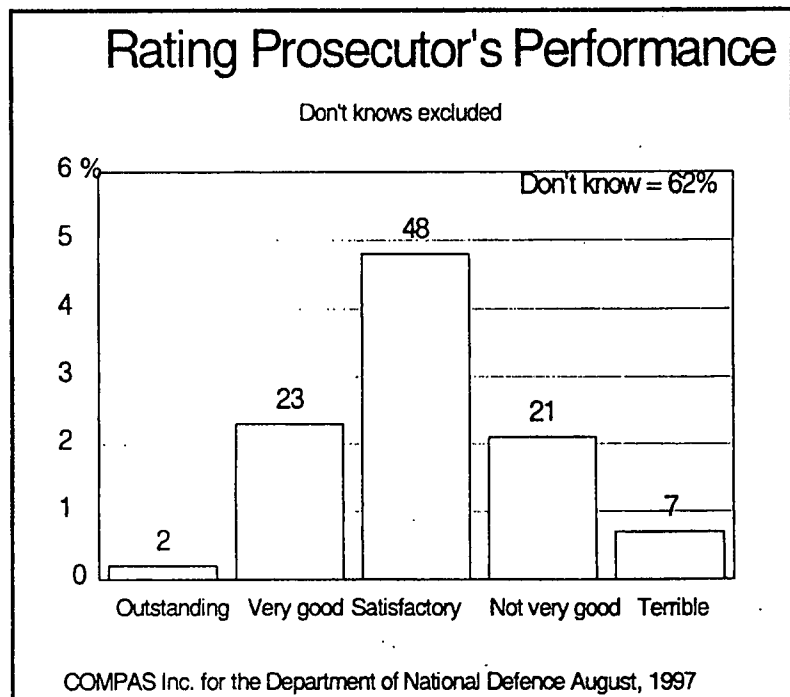
A Report for the Department of National Defence August 8, 1997



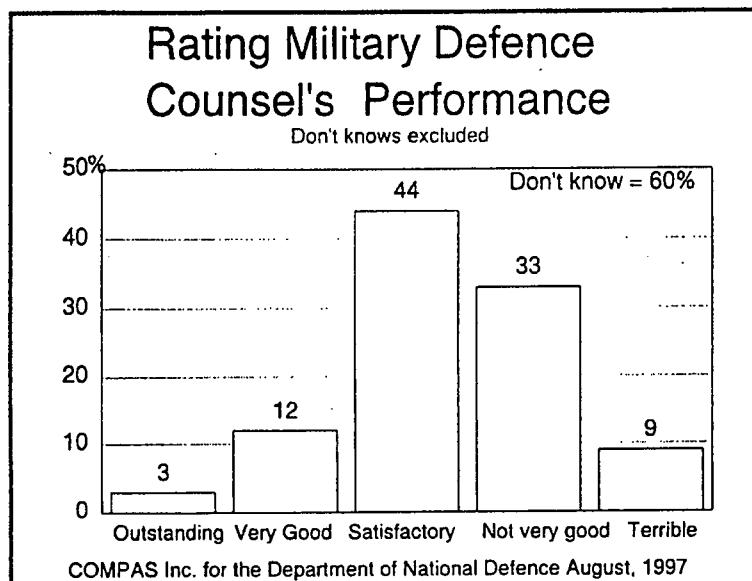
The portrait of moderate confidence in the military emerging from the more direct measures is corroborated by responses to the more indirect measures. As indirect measures of confidence or satisfaction in the system, respondents were asked to rate the performance of prosecutors and defence counsels. In practice, response rates were low, approximately one-third answering the three questions on actor performance. Most respondents apparently felt that they did not have enough direct knowledge of court room performance to judge the players.

Those who did answer the actor evaluation questions tend to assign middling, "satisfactory" scores to both prosecutor and military defending officers. Forty-eight percent rated the prosecutor's performance as satisfactory and 44% did so for military defending officers. Few respondents thought that either set of actors performed in outstanding or terrible ways.

On balance, respondents were modestly more satisfied with the performance of prosecutors than military defence counsel. This is particularly evident when



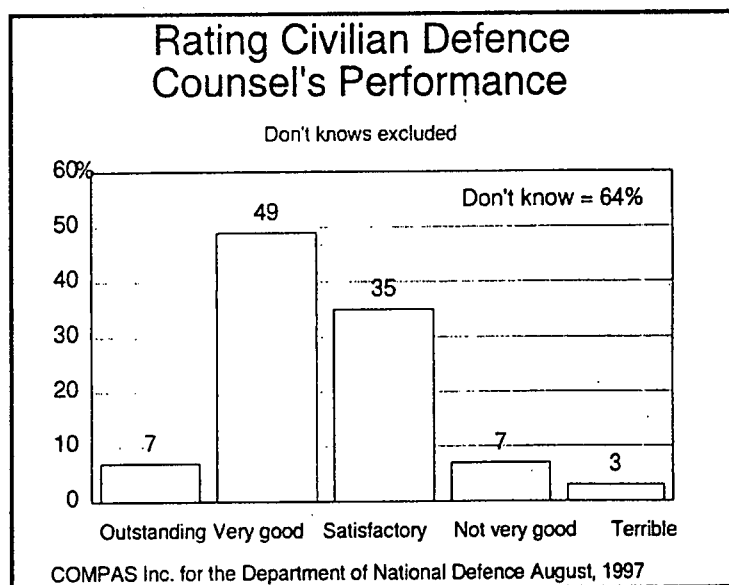
Survey of Defence Counsel Services A Report for the Department of National Defence August 8, 1997



negative evaluation scores are compared. As many as 33% of respondents score the performance of military defending officers as not very good or terrible compared to 21% for the prosecutor.

If respondents are modestly less enthusiastic about the performance of military defence counsel than prosecutors, they are especially unenthusiastic about military defence counsel when

compared with their civilian counterparts. Respondents are more impressed with the performance of civilian than military counsel. Thus, they are almost four times more likely to score civilian counsel as very good or outstanding. In particular, 56% rate civilian defence counsel as very good or outstanding compared to 15% in the case of military defence counsel. Meanwhile, 42% rate military counsel as not very good or terrible compared to 10% in the case of civilian counsel.



Respondents' much greater satisfaction with civilian defence counsel reinforces the notion that satisfaction with the current system is modest. This is because military prosecutors and military defence counsel do embody the present system. Indeed, the

Survey of Defence Counsel Services

A Report for the Department of National Defence August 8, 1997

notion that military personnel embody the system and have a potentially better understanding of it than civilian lawyers is a frequent refrain in responses to open-ended questions at the end of the questionnaire about why respondents prefer the military justice solutions that they recommend. These open-ended responses are discussed more fully at the bottom of this report.

Sub-sample Differences

Higher ranks are more sanguine than lower ranks in their assessments of the military justice system as a whole and in their assessments of military actors in the system while they are less positive in their assessments of civilian defence counsels. COMPAS staff explored for possible variations in response by rank, branch, and the member's past involvement in a court martial.

Rank is the only one of the variables that appears to impact on perceptions with much certainty. Perceived fairness increases as rank increases. Thus, 57% of WO and below stated that the system is not really or not at all fair compared to only 16% with this view among Majors and above.

Higher ranks are not only more confident in the system's fairness but they are also more confident in its efficiency. Thus, 57% of WO and below score the system as not really or not at all efficient compared to only 25% among Majors and above.

Given their greater confidence in the system's fairness and efficiency, one might expect higher ranks to evaluate military defence counsels more favourably. Indeed, they do. Thus, Majors and above are most likely to rate the performance of military defence counsel as very good or outstanding (38% as opposed to a range of 27% to 5% for other rank groupings).

Given their greater confidence in the military justice system and its military actors, higher ranks might be expected to exhibit slightly lower confidence in civilian defence counsels. Such is the case. Thus, Majors and above are also less likely to rate the performance of civilian defence counsel as outstanding or very good (44% versus a range of 64% to 53% for other rank groupings).

No major difference emerges in the perceptions of the fairness of the system among members of different branches of the Canadian Armed Forces. Respondents from 8 Wing are moderately less satisfied with the efficiency of the system (55% attributing not really or not at all efficient versus 48% for NDHQ, 47% in CFB Valcartier, and 44% at CFB Halifax).

Members of the Air Force are also more inclined to evaluate the performance of military prosecutors and military defence counsel as terrible or not very good (45% versus 34% of those from CFB Halifax and of those 20% from NDHQ and Valcartier). They are also more likely to evaluate civilian defence counsel's performance as outstanding or very good (71% versus 58% from Valcartier, 56% from NDHQ, and 36%

Survey of Defence Counsel Services

A Report for the Department of National Defence August 8, 1997

from CFB Halifax).

Respondents' experience with or exposure to court martials appears unrelated to their perceptions of efficiency but somewhat related to their perceptions of fairness. Those with court martial experience are somewhat more inclined to describe the present system as unfair (49% describing it as not really or not at all fair as opposed to 44% among those with no involvement).

Experience appears to have an impact on respondents' assessments of military defence counsels but not of prosecutors or civilian defence counsels. Actual exposure to courts martial appears to enhance respondents' appreciation or, at least diminish their scepticism, about military defence counsels. Military defence counsel are less apt to be considered not very good or terrible by those with court martial involvement (38%) than by those without (59%).

Ramifications

Clearly, the Department's commitment to a careful consideration of the military justice system is fully justified by the responses to this survey. Respondents do not have enormous confidence in the system or its fairness.

Power is a major factor in respondents' assessments. The more powerful (higher ranks), the more sanguine. Given that power cannot be readily redistributed within armed forces structures, one option for the Armed Forces is to disseminate as much information to the lower ranks as possible and to proclaim as strong a commitment to impartiality as possible. Even without structural changes in the system, knowledge is bound to provide some reassurance. After all, those respondents with exposure to a courts martial are the ones most apt to have some confidence in the performance of military defence counsel.

A key factor in respondents' attenuated confidence in the system as a whole and in military defence counsels in particular is concern that rank and power can outweigh fairness and impartiality. A concern about impartiality does emerge in the open-ended answers alluded to above and to be discussed below. This concern helps explain respondents' confidence in civilian defence counsels even though the open-ended responses (below) suggest some misgivings about civilian lawyers' familiarity with military matters. Apart from the possibility of bringing about structural improvements in the military justice system, the Armed Forces can help enhance trust in the system by reiterating senior officers' commitments to impartiality and fairness in the process.

Survey of Defence Counsel Services

A Report for the Department of National Defence August 8, 1997

Assessing Policy Options -- A Plurality of Support for the Creation of an Office of Military Defence Counsel (Reg. Force), albeit with Polarized Opposition

Purpose

Respondents were presented with six potential policy reforms for their consideration. Respondents were invited to rank these six policy options from best to worst in general as well as on the basis of fairness and efficiency. Further open-end questions followed each ranking question to determine the rationale behind respondents' ranking.

Questions

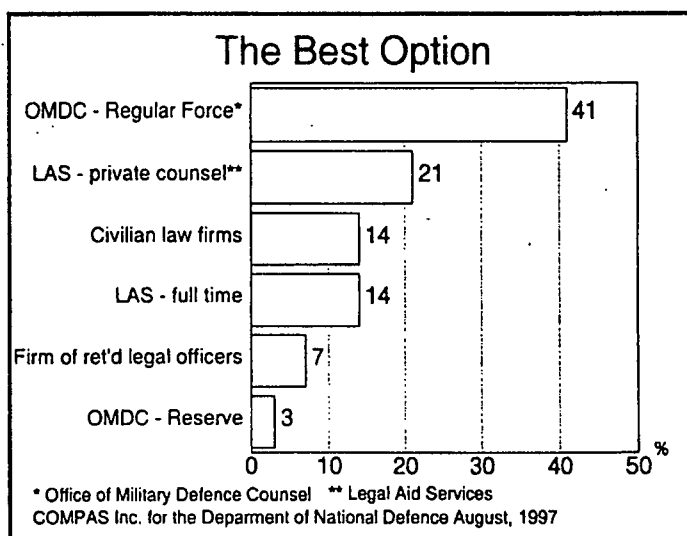
The exact wording of the questions were:

- Please, rank the six options using the numbers 1 to 6 where one indicates the best option and 6 the worst option.
- Now rank the options from the fairest to the least fair, again using the same scale.
- Please rank the six options in terms of efficiency.

As follow-up questions, respondents were presented with open-ended questions calling for them to give reasons for their judgement of the best, worst, fairest, and most efficient options and to offer any general suggestions for improvement that they might have.

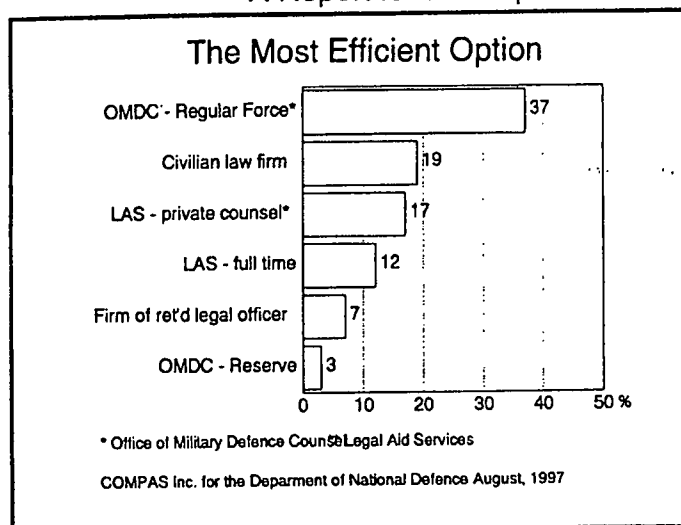
Main Findings

The creation of an Office of Military Defence Counsel (Regular Force) was most frequently given the best ranking (1) across all measures (overall endorsement 41%, fairness 32%, and efficiency 37%). The second most preferred option is the establishment of a Canadian Armed Forces Legal Aid Service with civilian lawyers (private counsel).

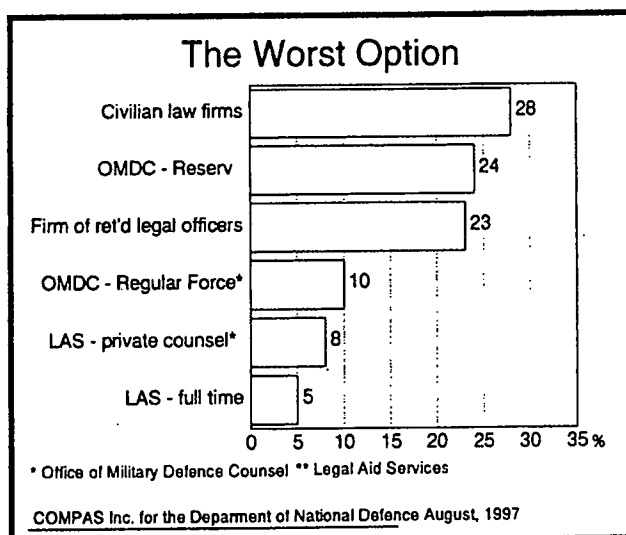
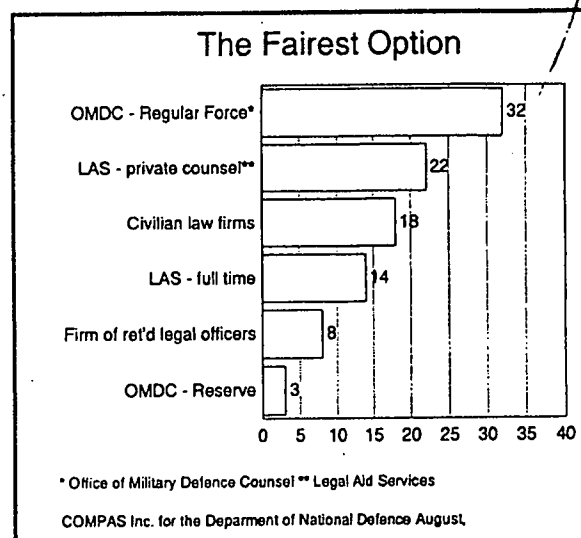


Survey of Defence Counsel Services

A Report for the Department of National Defence August 8, 1997



The option most frequently given the worst ranking (6)² across all measures is retaining the services of civilian law firms (overall endorsement 28%, fairness 27%, and efficiency 27%). An Office of Military Defence Counsel (Reserve Force) is rated poorly as well, mainly with respect to overall endorsement. Creating a law firm of retired legal officers likewise receives a lower rating, mainly on grounds of fairness.



The data showed some polarization between civilian and military preferences. Some respondents tend to score civilian options highly and military options poorly, and vice-versa. In statistical language, the Spearman rank order correlations between the military and civilian options tended to be statistically significant and in the range of -0.4 to -0.5.

The modest polarization in preferences for military or civilian solutions are founded on rival concerns

² Please note that when the term "worst option" is used, it refers to the option that received last ranking the most often (a ranking of six). The graphs contained in this report illustrate the ranking of options according to best ranking (a ranking of one). Thus, the last option listed in the graphs does not represent the worst option, but rather the option that received first ranking least frequently.

Survey of Defence Counsel Services

A Report for the Department of National Defence August 8, 1997

for military expertise and military commitment on the one hand and civilian impartiality and objectivity on the other hand. These concerns about military commitment and civilian fairness emerged as the main themes in response to open-ended questions about respondents' reasons for selecting their best, worst, fairest, and most efficient options. In the case of the best option, 46% of respondents pointed to military commitment, experience, or knowledge as the basis for their choice while 36% pointed to civilian professional objectivity and impartiality as the basis for their choice.

The pattern of preoccupation with the twin themes of military commitment and impartiality re-emerged in the case of perceived fairness and worst options. In the case of the fairest option, 32% pointed to impartiality as a consideration while 27% pointed to the virtues of military personnel and expertise. No other answer came close in frequency.

Fairness and military commitment/expertise re-emerged in responses to the open-ended question about reasons for the worst option. Thus, 39% mentioned military commitment or expertise, albeit not always to attack civilian options. For example, among the 35% highlighting military commitment and knowledge, 12% were concerned that an office staffed with reserves would fail on this ground.

As to efficiency, the open-ended responses were diverse. Some did refer to military commitment and competence while others were abstract or imprecise, e.g. expressions of preference for a "fresh approach" or cost effectiveness in general.

Polarization over the twin themes of military commitment and impartiality becomes evident when the open-ended responses are examined in light of respondents' specific policy preferences. Respondents favouring the Office of Military Defence (Regular Force) Counsel are overwhelmingly concerned to have military personnel involved for reasons of loyalty, commitment, competence, expertise, or tradition. A total of 57% volunteer that their preference is essential because of the value of retaining a military role. In second position is the view that such an office could provide a wide range of good services, volunteered by 15% of respondents.

Respondents favouring the second most preferred policy option, the Canadian Armed Forces Legal Aid Service with civilian lawyers (private counsel), do so primarily because of a desire for impartiality. Thus, 57% opine that their civilian option is desirable because only civilian lawyers can be assumed to be fully impartial. The second most frequent response, offered by 15% of respondents, is that members should be able to choose their own lawyer.

Apart from being asked to assess six options presented to them, respondents were also invited to offer their own suggested policy solutions. The main overarching theme to emerge from their answers is impartiality, including freedom from influence and conflict of interest, independence from the chain of command, incorruptibility, and the right of the accused to make his or her own choice of counsel, including the possibility of civilian counsel. Altogether, 30% expound on this general theme of impartiality.

Survey of Defence Counsel Services

A Report for the Department of National Defence August 8, 1997

Sub-Sample Differences

Regardless of rank, the option most frequently attributed top ranking (1) remained the creation of an Office of Military Defence Counsel (Regular Force). This is followed by the establishment of a Canadian Armed Forces Legal Aid Service (private counsel). Nonetheless, intensity of opinion varies across rank. In the case of the Office of Military Defence Counsel, support intensifies as rank increases (61% for Majors and above to 32% for WO and below). In the case of the establishment of a Canadian Armed Forces Legal Aid Service, support intensifies as rank decreases (10% for Majors and above, to 26% for WO and below).

In terms of the worst option, there exists disparity based on rank. WO's and below most frequently ranked as worst the creation of an Office of Military Defence Counsel - Reserve (29%). For MWO and CWO, the worst option is apt to be a firm created by retired legal officers (30%). For 2nd Lt. to Capt. and for Majors and above, the worst option is retaining the services of a civilian law firm (32% and 41% respectively).

Ranking of the most efficient option, creation of an Office of Military Defence Counsel (Regular Force), did not change with rank. The intensity of support for this option nonetheless diminishes as rank decreases (51% for Majors and above to 30% for WO and below). The second option ranked first in terms of efficiency does differ between NCM's and commissioned members, NCM favored retaining a civilian law firm (WO and above 21%, MWO/CWO 16%), but the second choice for commissioned members is the establishment of a Canadian Armed Forces Legal Aid Service - private counsel (2nd Lt./Lt./Capt. 16% and Majors and above 12%).

Differences in terms of the intensity of support for various option was present across military branches. Although the ranking of the best, fairest and most efficient option remains the same across all branches (Creation of an Office of Military Defence Counsel - Regular Force), members of 8 Wing manifested:

- weaker overall support for this option (34% versus a range of 46% to 41% for the other branches).
- weaker support for this option as the fairest (25% versus a range of 37% to 33% for members of the other branches), and
- weaker support for this option as the most efficient (25% versus a range of 41% to 40% from members of the other branches).

Members of the Air Force offer more intense support for establishing a Canadian

Survey of Defence Counsel Services

A Report for the Department of National Defence August 8, 1997

Armed Forces Legal Aid Service (Private Counsel) and retaining the service of civilian law firms as second and third choices.

When comparing members that have had military involvement against those without, no differences in the ranking of the options is present, but some variations in intensity exist. Those with past court martial involvement report more intensely that the creation of an Office of Military Defence Counsel (Regular Forces) would be the best option (46% vs. 39%), and the fairest option (36% vs. 30%). No difference in intensity exists with respect to the most efficient option.

No differences are present in the data across age.

Ramifications

By far the most important ramification emerges from the absence of clear consensus on the most preferred option and the emergence of twin, polarized concerns about military commitment and civilian impartiality. Whichever direction is chosen by the Armed Forces, special efforts should be expended to demonstrate by word and deed a commitment to acknowledge the validity of these two concerns.

Conclusion

Members of the Armed Forces have some misgivings about the present military justice system. On balance, they would prefer the creation of an Office of Military Defence Counsel (Regular Forces) but they are somewhat ambivalent. They appreciate the objectivity and impartiality that they attribute to a civilian presence in military justice.

Instructions to the Administrator

Kindly:

- ◆ Provide each respondent with one copy of the questionnaire and a writing instrument if necessary.
- ◆ Place the questionnaires' shipping box in a central location of the area you are administering the questionnaire in.
- ◆ Read the "Instructions to the Respondents" once all the participants have arrived.
- ◆ Leave the room to ensure confidentiality for the respondents.

After the completed surveys have been returned to the box, secure the box for shipping and have it couriered to the address below.

COMPAS Inc.
350 Sparks Street, Suite 702
Ottawa, On
K1R-7S8
Tel: (613) 237-4493 ext. 30
Contact: I

Note that the questionnaires must be received by COMPAS at the above address no later than July 30, 1997.

Instructions to the Respondents

The Minister of National Defence established a Special Advisory Group to review the military justice system and military police investigative services. A Study Team is reviewing different ways of providing defence counsel services in order to meet one of the recommendations from the Special Advisory Group.

Your input is very important to the Defence Counsel Study Team. Please read the questionnaire carefully, and take the time to consider the options that will be presented to you. In providing your answers, circle the number immediately to the left of the appropriate option, and remember that your answers will be kept strictly confidential. Once you have completed the questionnaire, please return it *yourself* to the box located at the front/back/side... of the room. Finally, please take note that the questionnaire is printed on both sides of the page.

Survey on Defence Counsel Services Under the Code of Service Discipline

**Confidential and Anonymous
To be analyzed by COMPAS Inc.,
an independent public opinion research firm.**

In order to implement a recommendation of the Minister's Special Advisory Group, the Judge Advocate General has established a study team to look for better ways to provide defence counsel to persons charged under the Code of Service Discipline.

Before the study team makes any recommendations, it is essential to get input from those that might be affected by changes in the system. To this end, COMPAS, an independent public opinion and market research firm, has been charged with designing and analyzing the data from the following questionnaire. Please keep in mind that there are no right or wrong answers. All data will be kept strictly confidential and used in statistical form only.

**Please circle the appropriate answers and
follow all instructions carefully**

Section 1 -- The Military Justice System

1. To your knowledge, a military defending officer is ...
 - 1 a fully qualified lawyer
 - 2 trained only in military law
 - 3 a non-legally trained officer assigned to perform legal duties
2. Have you had any involvement with a court martial as an accused, an administrator (officer of the court, escort, orderly), a trying officer, a spectator, or a witness?
 - 1 yes
 - 2 no

If you have been exposed to a court martial on more than one occasion, use your most recent experience to answer the following questions. If you have no experience but have an opinion, answer as well. Otherwise, please select DK (don't know, no opinion)

3. How would you rate the performance of the prosecutor?
 - 1 outstanding
 - 2 very good
 - 3 satisfactory
 - 4 not very good
 - 5 terrible
 - 9 DK

4. How would you rate the performance of the military defence counsel?

- 1 outstanding
- 2 very good
- 3 satisfactory
- 4 not very good
- 5 terrible
- 6 no military defence counsel
- 9 DK

5. How would you rate the performance of the civilian defence counsel?

- 1 outstanding
- 2 very good
- 3 satisfactory
- 4 not very good
- 5 terrible
- 6 no civilian defence counsel
- 9 DK

6. Have you ever been defended by a military defending officer at a court martial?

- 1 yes
- 2 no

7. Have you ever been defended by civilian counsel at a court martial?

- 1 yes
- 2 no

If your answer was No to both Q6 and Q7, please proceed to Q9.

8. Were you ...

- 1 convicted on all charges,
- 2 convicted on some charges, or
- 3 acquitted on all charges.

9. How would you describe your knowledge of the military justice system?

- 1 very extensive
- 2 somewhat extensive
- 3 limited
- 3 essentially non-existent

10. What percentage of your information about the military justice system has come from...

- ___ TV and newspapers
- ___ work related experience
- ___ military studies
- ___ word of mouth
- 100% Total**

11. Would you say that the military justice system is ...

- 1 very fair
- 2 somewhat fair
- 3 not really fair
- 4 not fair at all

12. Would you say that the military justice system is ...

- 1 very efficient
- 2 somewhat efficient
- 3 not really efficient
- 4 not efficient at all

Section 2 -- Options For The Provision of Defence Counsel

The Study Team has consulted with various military forces and civilian groups. Out of this research, six workable options have been developed for providing defence counsel services. None of these options affect the member's right to hire civilian counsel at their own expense. Please read each of the following options carefully and take the necessary time to consider them. Keep in mind that ultimately the new system must:

- ◇ meet the requirements of Canadian law for the provision of such services
- ◇ be, and be seen by CF members as independent, and acting at all times in their best interest;
- ◇ be able to provide bilingual services wherever the need for legal advice arises
- ◇ meet the military need for a just, and efficient disciplinary system
- ◇ be useable in all circumstances in which the Canadian Forces may find themselves both in Canada and outside Canada, including in circumstances of peace, peacekeeping, peacemaking and war; and
- ◇ be practical and affordable.

OPTION A

This option would create an Office of Military Defence Counsel Services. The head of the organisation would be an experienced Regular Force legal officer appointed for four years. He or she could not be removed from that position during the four years except using the same system that is in place to remove military judges. The head of the organisation would be supported by Regular and Reserve Forces legal officers appointed for fixed three year terms. Legal officers are fully trained lawyers. They would be providing defence counsel services only. They would not be subject to direction from anyone else, including military supervisors, in their defence of an accused. The organisation would have its own budget that would cover all of the costs associated with defence counsel services. The defence counsel officers would be

located separately from the prosecution officers and military judges. The head of the organisation would inform the Judge Advocate General as to how the defence counsel services were functioning. However, the Judge Advocate General would only be authorised to provide general guidance, administrative support, and the legal officers needed for the defence counsel positions. Any guidance given would have to be in writing and made public. The Judge Advocate General would not be authorised to give guidance or direction in, or in any way interfere with, individual cases.

Services provided under this option include:

- Advice to members on application for redress of grievance and notice of intent to recommend release
- Advice to members on elections for trial by court martial
- Advice and training to Assisting Officers
- Representation of accused at court martial and on appeal
- Duty counsel advice for persons arrested or detained

OPTION B

This option would create the same system as Option A except the defence counsel services would be provided by Reserve Force legal officers. The head of the organisation would have a full time position that could be either a Regular Force or Reserve Force legal officer. The Reserve Force defence counsel would be appointed to the organisation for five years rather than three as in Option A.

Services provided under this option are the same as Option A.

OPTION C

This option would establish a Canadian Forces Legal Aid Service using private civilian lawyers to defend at court martial. The Legal Aid Service would be established by statute and have its own budget. A Board of Directors would be created to oversee the system. The board would consist of a person experienced with the concerns of Canadian Forces members, a person familiar with the requirements of the government, and a person knowledgeable about the functioning of legal aid systems in Canada. The Legal Aid Service would be run on a day to day basis by an Executive Director. A person entitled to legal assistance would contact a civilian lawyer in the province for representation, although the Executive Director would have some discretion to permit counsel from outside the province to be selected in exceptional circumstances. The lawyer would obtain a military legal-aid certificate from the Executive Director and provide the services at set rate for fees. For cases outside of Canada, the accused would have to obtain counsel willing to provide defence counsel services outside of Canada using the fee scale set for such cases. A list of counsel willing to provide this service outside Canada would be given to the member.

Services provided under this option include:

- Advice to members on elections for trial by court martial
- Representation of accused at court martial and on appeal
- Duty counsel advice for persons arrested or detained

OPTION D

This option would establish a Canadian Forces Legal Aid Service employing full time civilian staff rather than private counsel. Private counsel would provide an overflow capacity where the case could not be handled by the staff counsel. The same organization for a Board of Directors and the Executive Director would be used as in Option C and the service would have a separate budget. A person entitled to counsel would contact the legal aid office and a lawyer would be assigned to assist. Staff lawyers would also be made available to provide defence counsel services outside of Canada and to advise on matters such as applications for redress of grievance. They would provide defence counsel services only, not legal advice to commanders. The staff defence counsel positions would be permanent in the same way as they are for civilian legal aid societies using the staff model.

Services provided under this option are the same as Option A.

OPTION E

This option would have legal officers retiring and setting up a law firm to provide the defence counsel services. This would be an employee takeover under the guidelines for these takeovers put out by the Treasury Board. If the normal procedures were followed, the firm would provide the services for three years and then have to compete with other firms for the contract. The lawyers with this firm would be mainly former legal officers, although other lawyers may also be accepted by the firm. These lawyers would provide all of the normal legal advice to the members needing legal assistance for matters under the Code of Service Discipline. This would include services inside Canada and outside Canada.

Services provided under this option include:

- Advice to members on elections for trial by court martial
- Advice and training to Assisting Officers
- Representation of accused at court martial and on appeal
- Duty counsel advice for persons arrested or detained

OPTION F

Under this option, local civilian law firms would be retained by the Forces near each major military installation to provide the defence counsel services. A person needing legal advice would be directed to the firm having the contract in his or her area. The firm would be paid at a rate agreed upon in the contract retaining it. One or more of these firms would provide the counsel needed for cases outside Canada.

Services provided under this option would be the same as Option C.

13 Please, rank the six options using the numbers 1 to 6 where 1 indicates the best option and 6 the worst option.

- Option A ___ Create an Office of Military Defence Counsel - Regular Forces
Option B ___ Create an Office of Military Defence Counsel - Reserve Forces
Option C ___ Establish a Canadian Forces Legal Aid Service with civilian lawyers (private counsel)
Option D ___ Establish a Canadian Forces Legal Aid Service with full time civilian lawyers
Option E ___ Set up a law firm created by retired legal officers
Option F ___ Retain the services of civilian law firms

13a. Why is your preferred option the best?

13b. Why do you think the option you ranked last is the worst option?

14. Now, rank the option from the fairest to the least fair, again using the same scale.

- Option A ___ Create an Office of Military Defence Counsel - Regular Forces
Option B ___ Create an Office of Military Defence Counsel - Reserve Forces
Option C ___ Establish a Canadian Forces Legal Aid Service with civilian lawyers (private counsel)
Option D ___ Establish a Canadian Forces Legal Aid Service with full time civilian lawyers
Option E ___ Set up a law firm created by retired legal officers
Option F ___ Retain the services of civilian law firms

14a. Why is your preferred option the fairest?

15. Please, rank the same six option in terms of efficiency?

- Option A ____ Create an Office of Military Defence Counsel - Regular Forces
Option B ____ Create an Office of Military Defence Counsel - Reserve Forces
Option C ____ Establish a Canadian Forces Legal Aid Service with civilian lawyers (private counsel)
Option D ____ Establish a Canadian Forces Legal Aid Service with full time civilian lawyers
Option E ____ Set up a law firm created by retired legal officers
Option F ____ Retain the services of civilian law firms

15a. Why is your preferred option the most efficient?

16. What suggestions, if any, do you have for a better system?

Section 3 -- Demographics

17. Which category best describes you age?

- 1 under 30
- 2 30 - 40
- 3 over 40

18. Which category best describes your rank (or naval equivalent)?

- 1 Pte/Cpl
- 2 MCpl/Sgt/WO
- 3 MWO/CWO
- 4 2nd Lt./ Lt./Capt
- 5 Maj/LCol/Col
- 6 BGen/MGen/LGen/Gen

19. And finally, at which location has this questionnaire been administered to you?

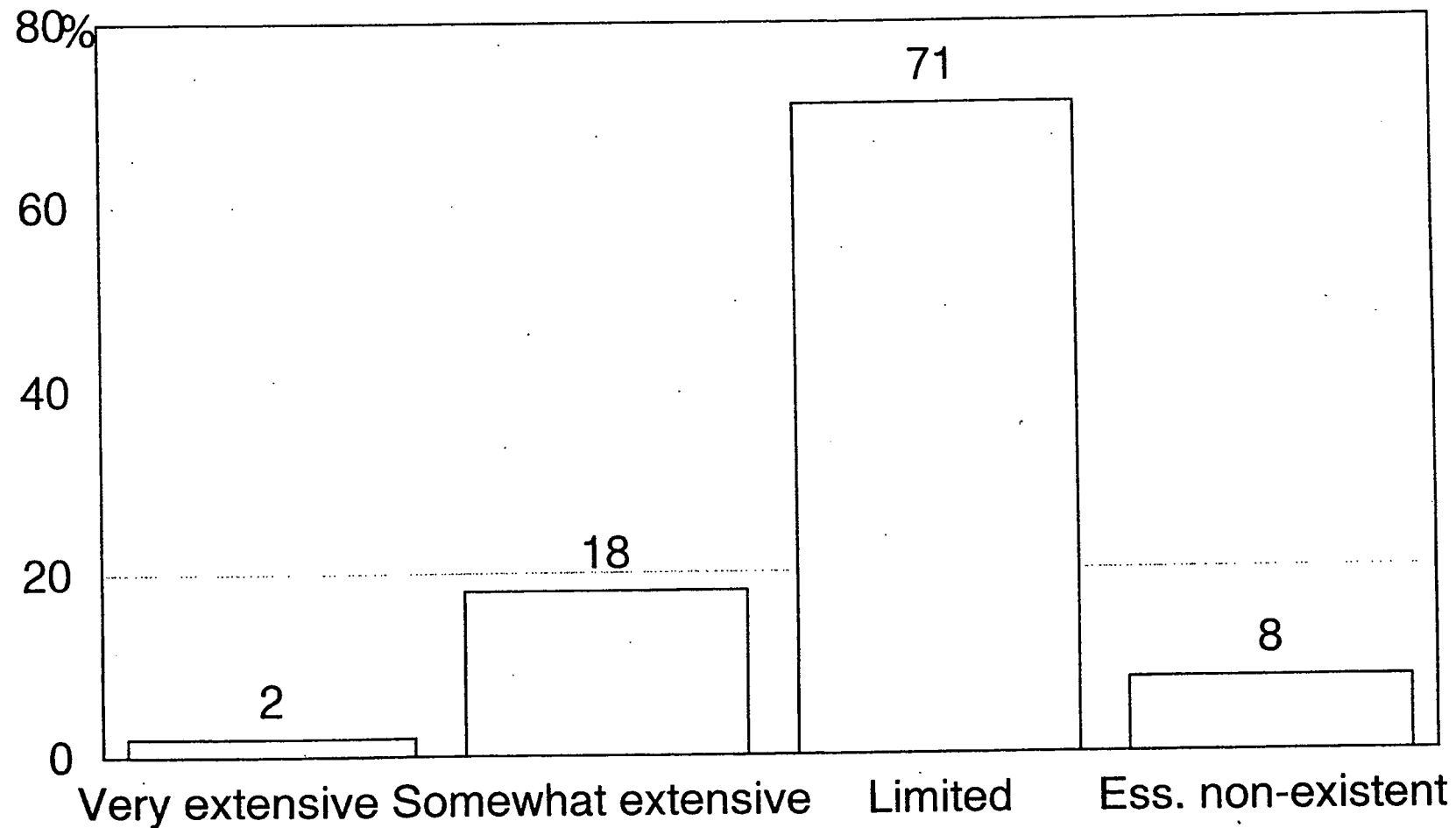
- 1 8 Wing Trenton
- 2 CFB Valcartier
- 3 CFB Halifax
- 4 National Defence Head Quarters

Relative Ranking Overall Best/Worst Option

	By First Ranking	By Second Ranking	By Third Ranking	By Fourth Ranking	By Fifth Ranking	By Sixth Ranking
Office of Military Defence Counsel Regular Forces	41%	11%	10%	13%	14%	10%
Canadian Armed Forces Legal Aid Services Private Counsel	21%	18%	18%	19%	15%	8%
Retaining Civilian Law Firms	14%	11%	17%	14%	14%	28%
Canadian Armed Forces Legal Aid Services Full Time	14%	25%	23%	19%	14%	5%
Firm of Retired Legal Officers	7%	12%	19%	19%	19%	23%
Office of Military Defence Counsel Reserves	3%	22%	12%	14%	23%	24%

E-27

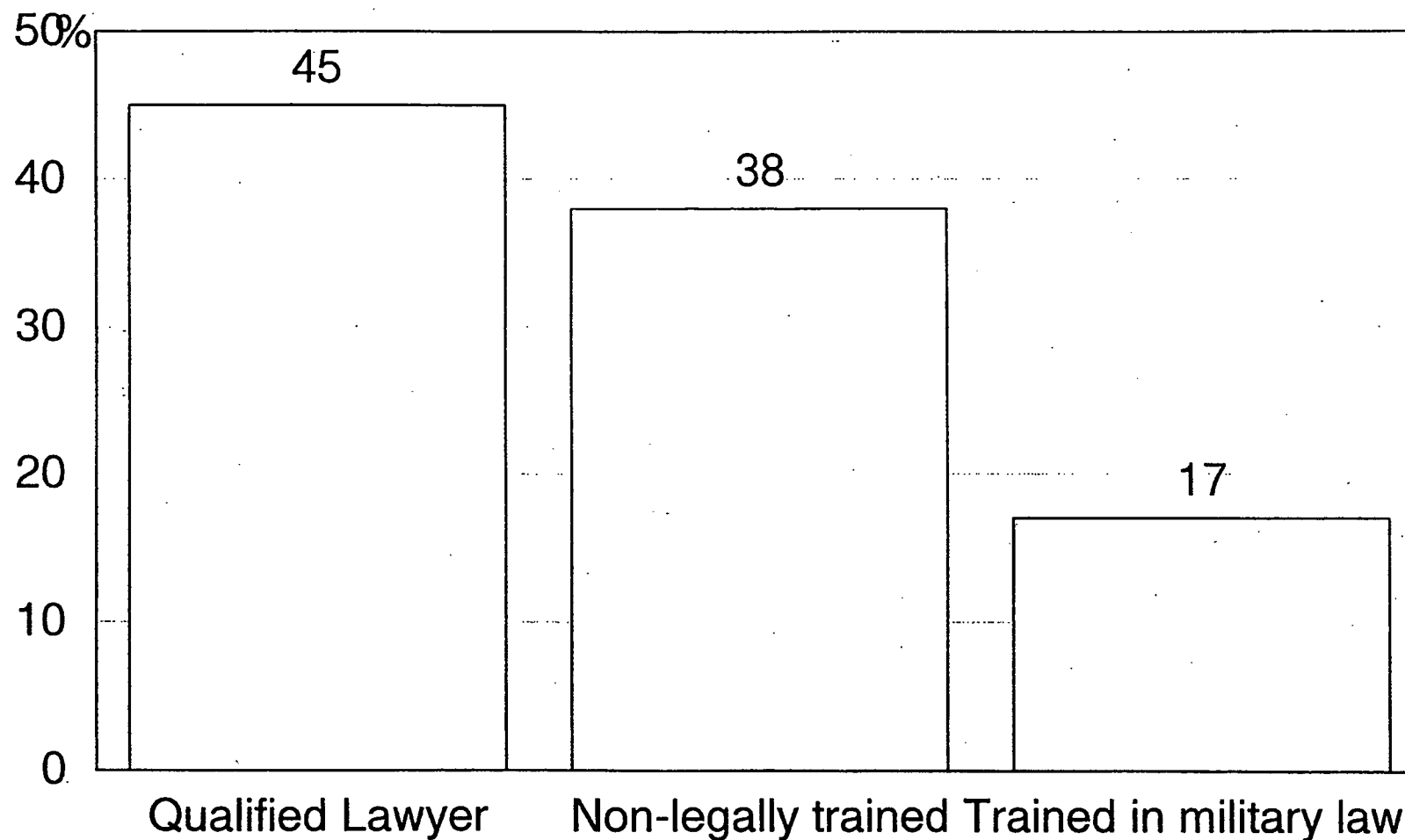
Claimed Knowledge of the Military Justice System



E-28

COMPAS Inc. for the Department of National Defence August, 1997

A Military Defending Officer Is...

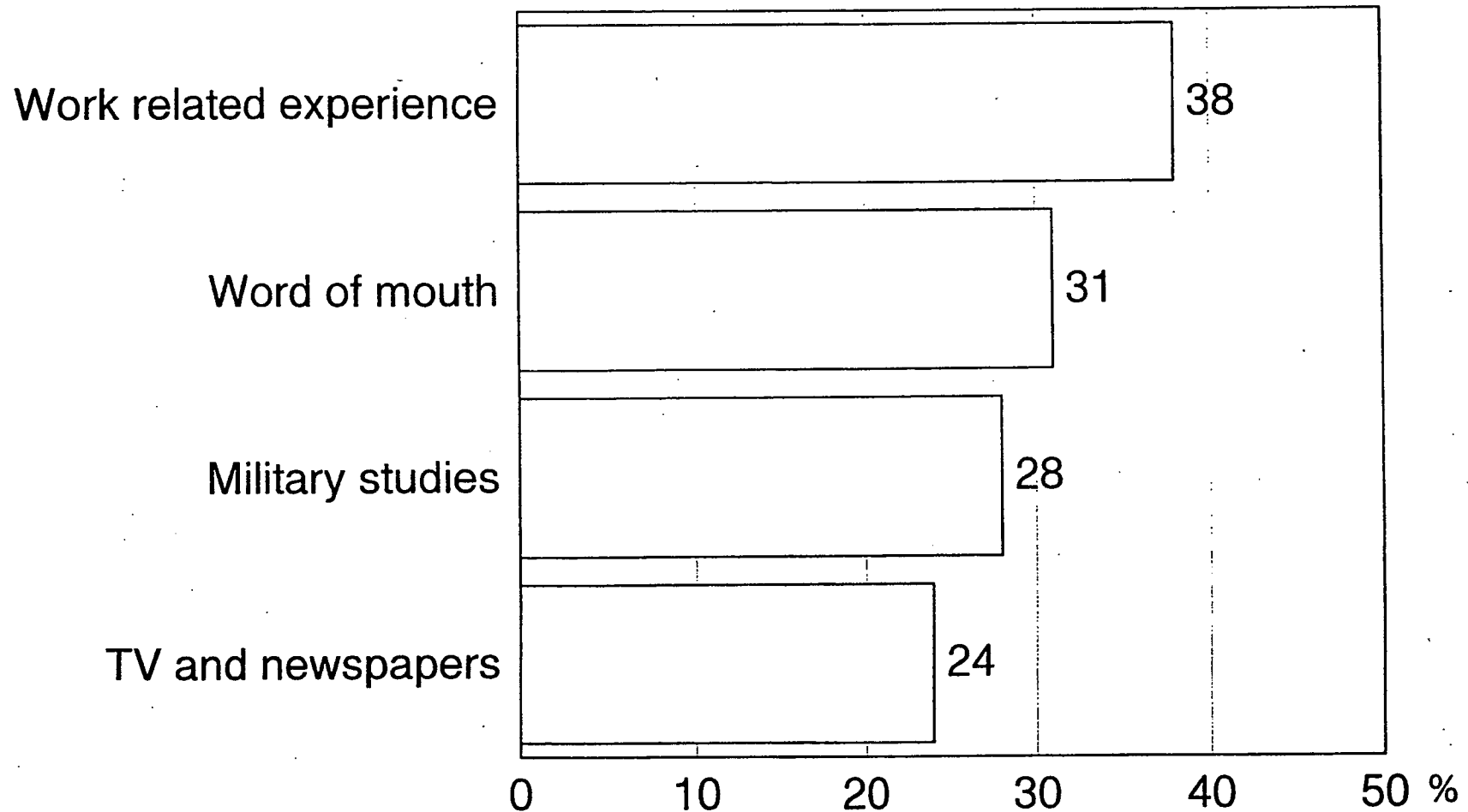


E-29

COMPAS Inc. for the Department of National Defence August, 1997

Sources of Information

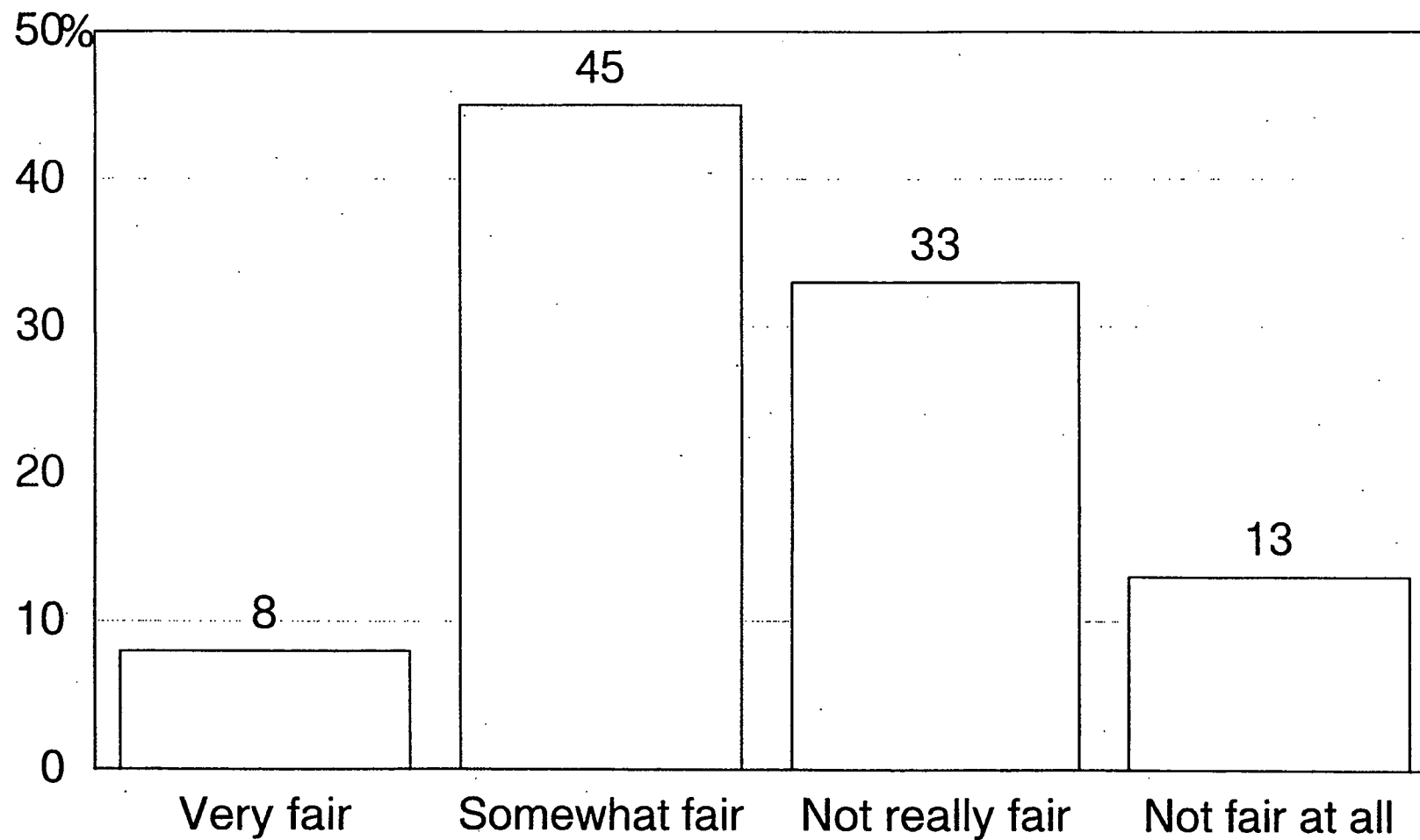
Mean percentage for each variable



E-30

COMPAS Inc. for the Department of National Defence August, 1997

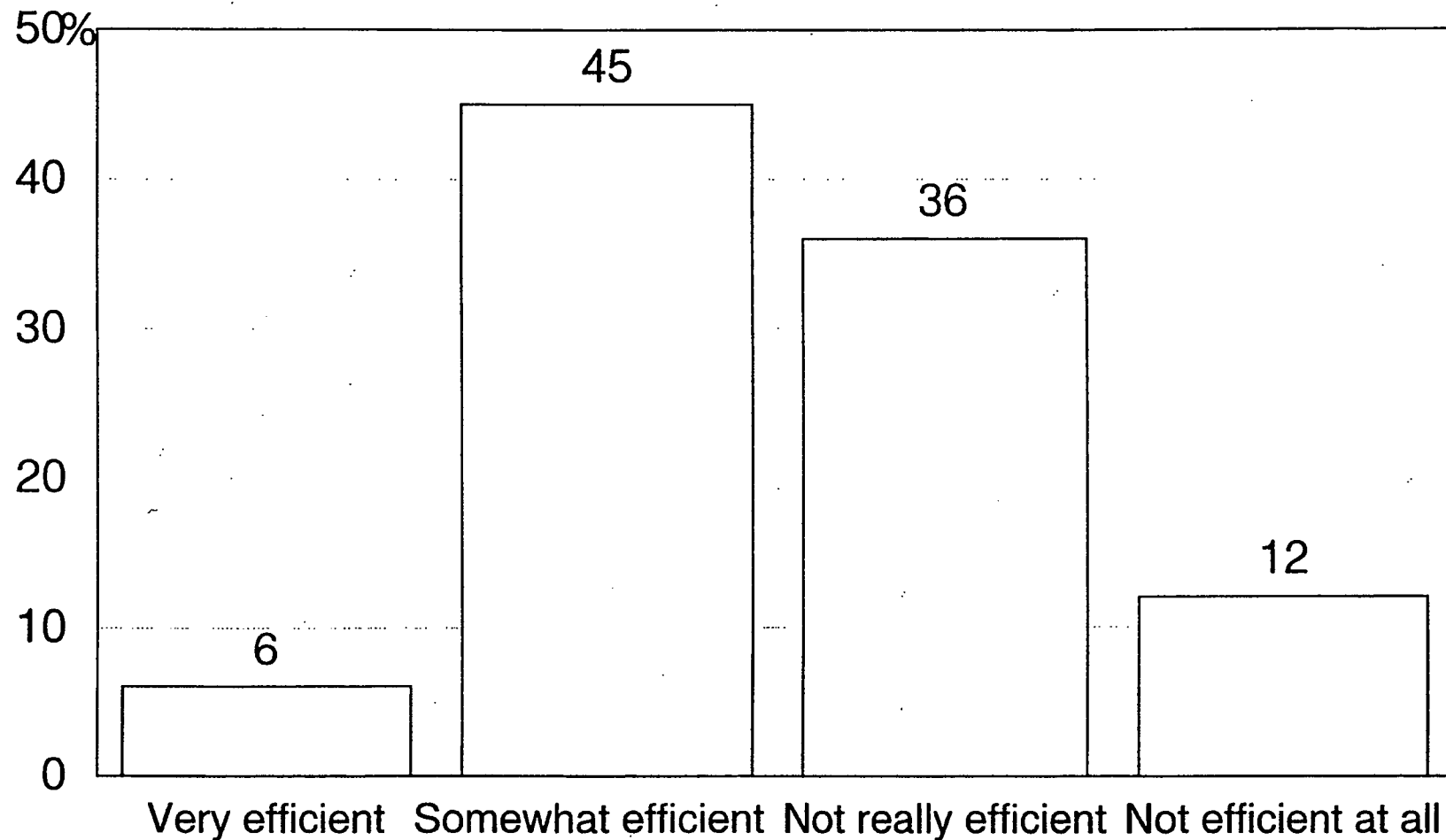
Fairness of the Military Justice System



E-31

COMPAS Inc. for the Department of National Defence August, 1997

Efficiency of the Military Justice System

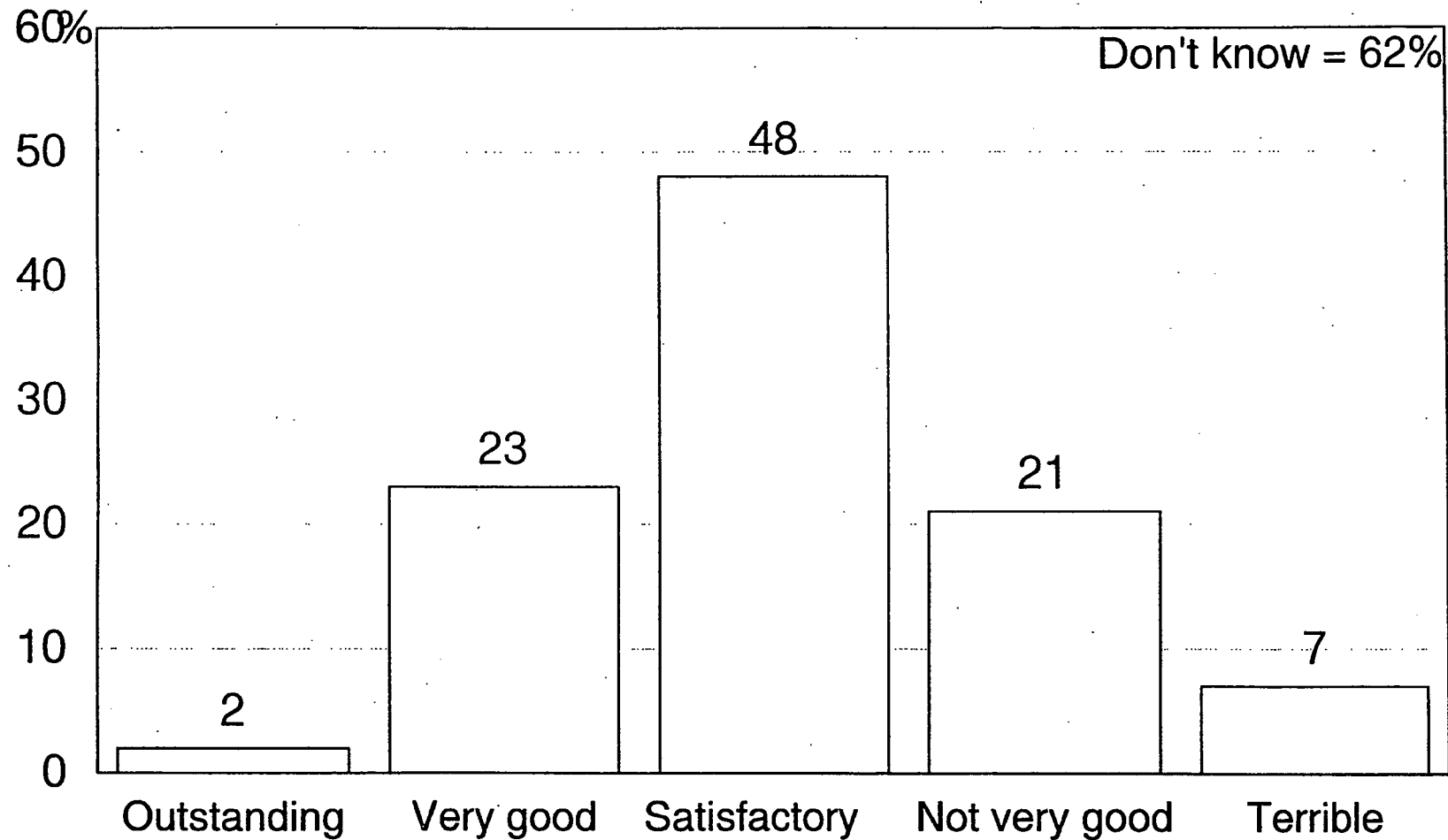


E-32

COMPAS Inc. for the Department of National Defence August, 1997

Rating Prosecutor's Performance

Don't knows excluded

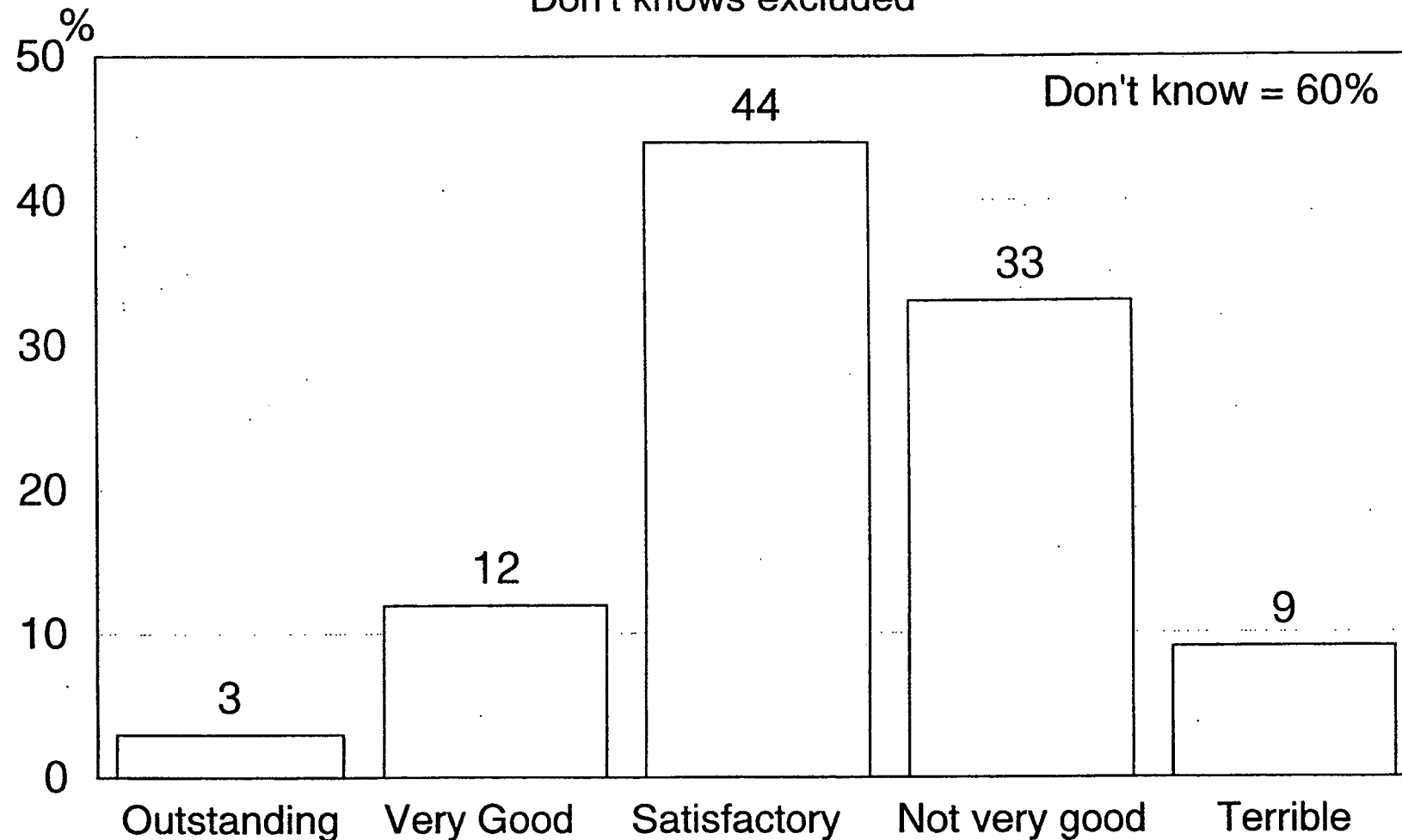


E-33

COMPAS Inc. for the Department of National Defence August, 1997

Rating Military Defence Counsel's Performance

Don't knows excluded

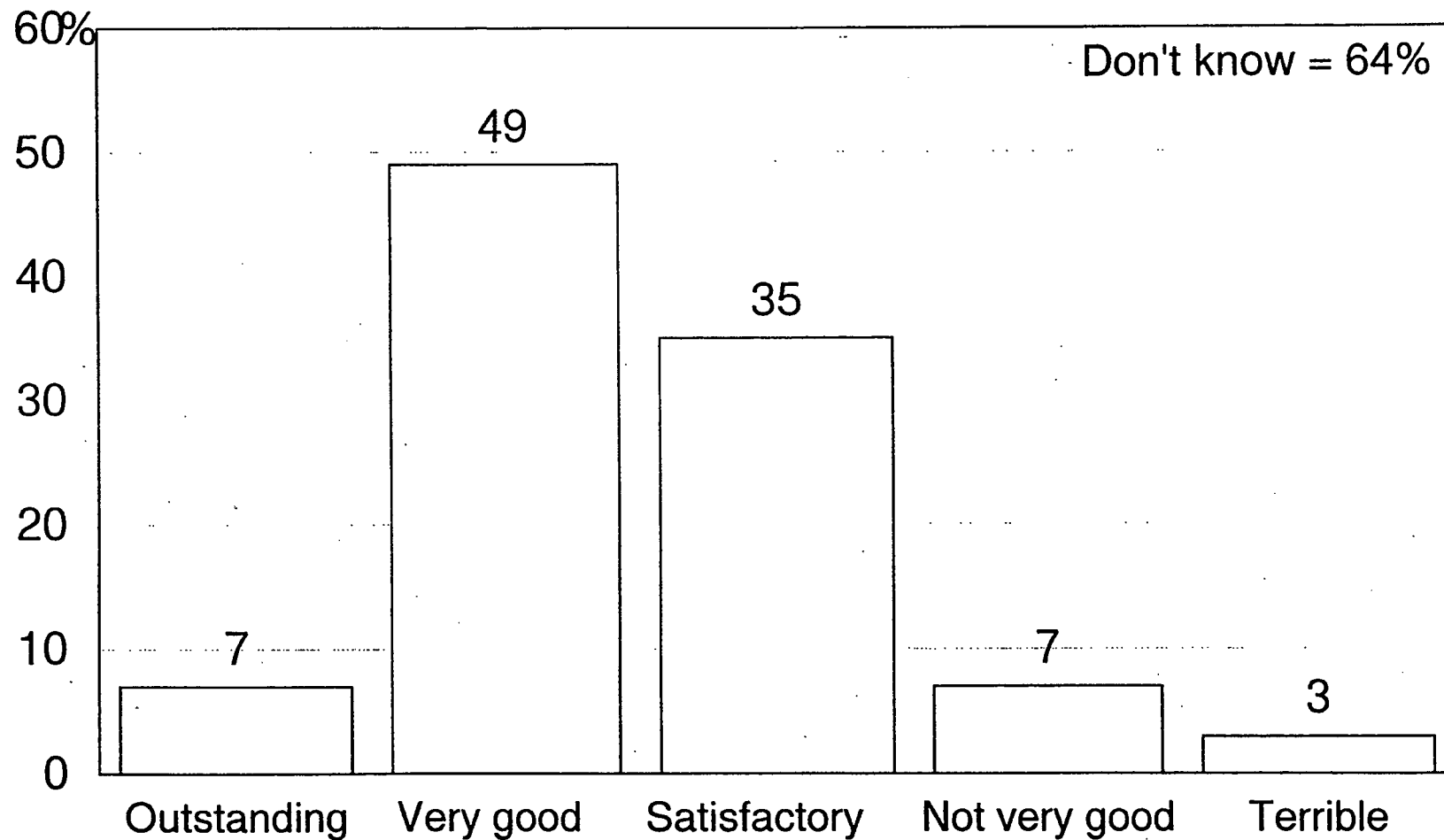


COMPAS Inc. for the Department of National Defence August, 1997

E-34

Rating Civilian Defence Counsel's Performance

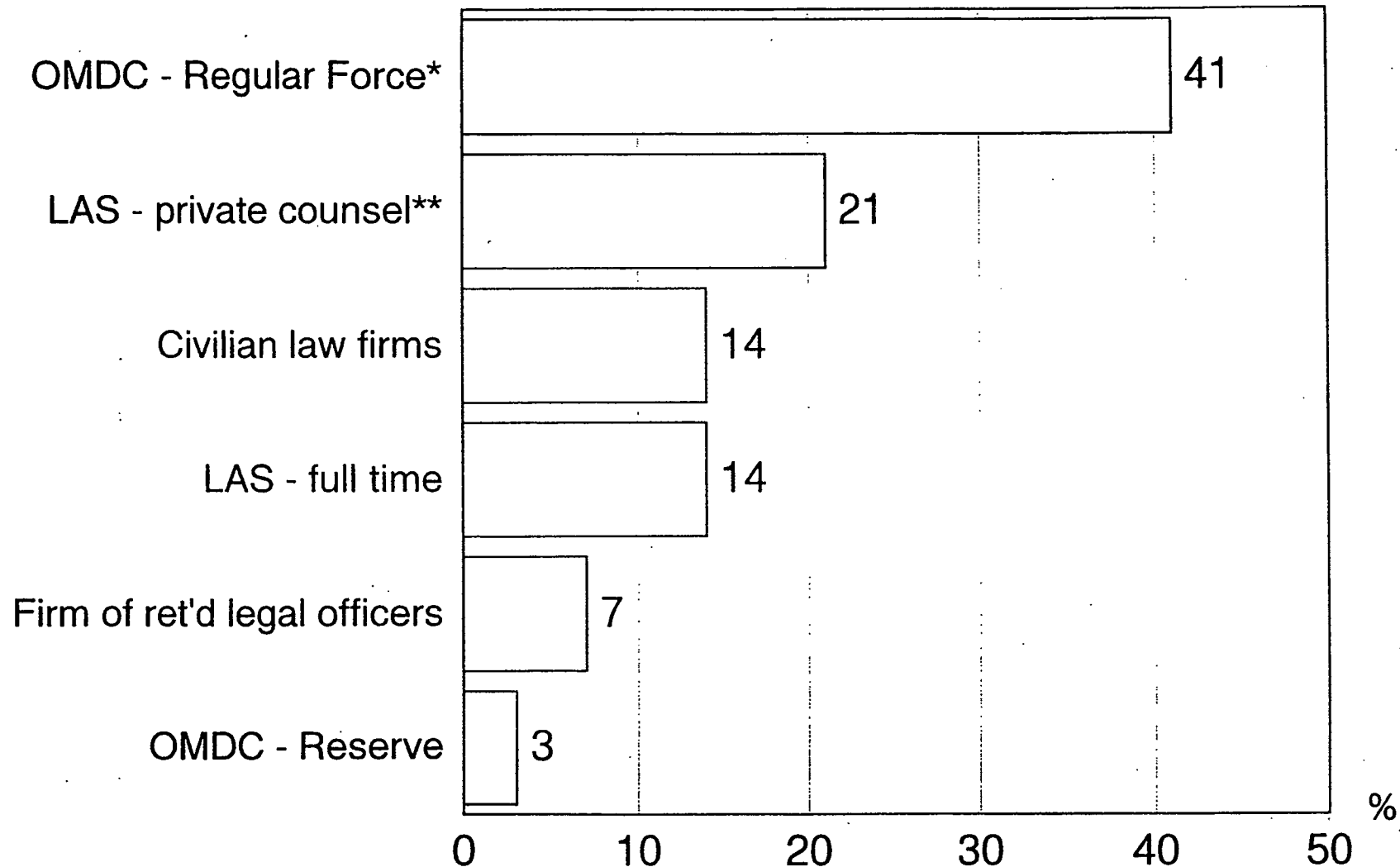
Don't knows excluded



COMPAS Inc. for the Department of National Defence August, 1997

E-35

The Best Option



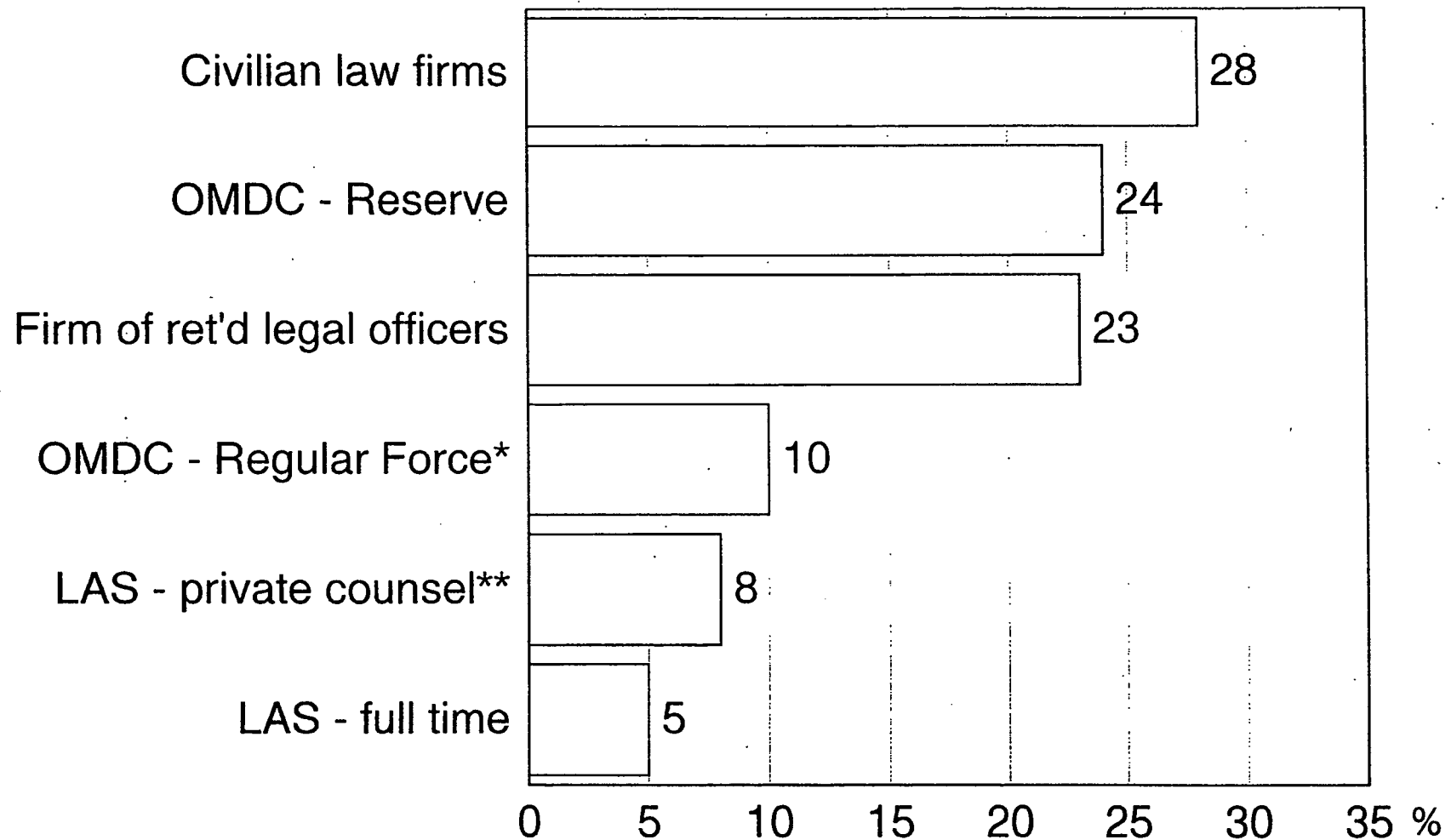
* Office of Military Defence Counsel

** Legal Aid Services

COMPAS Inc. for the Department of National Defence August, 1997

E-36

The Worst Option

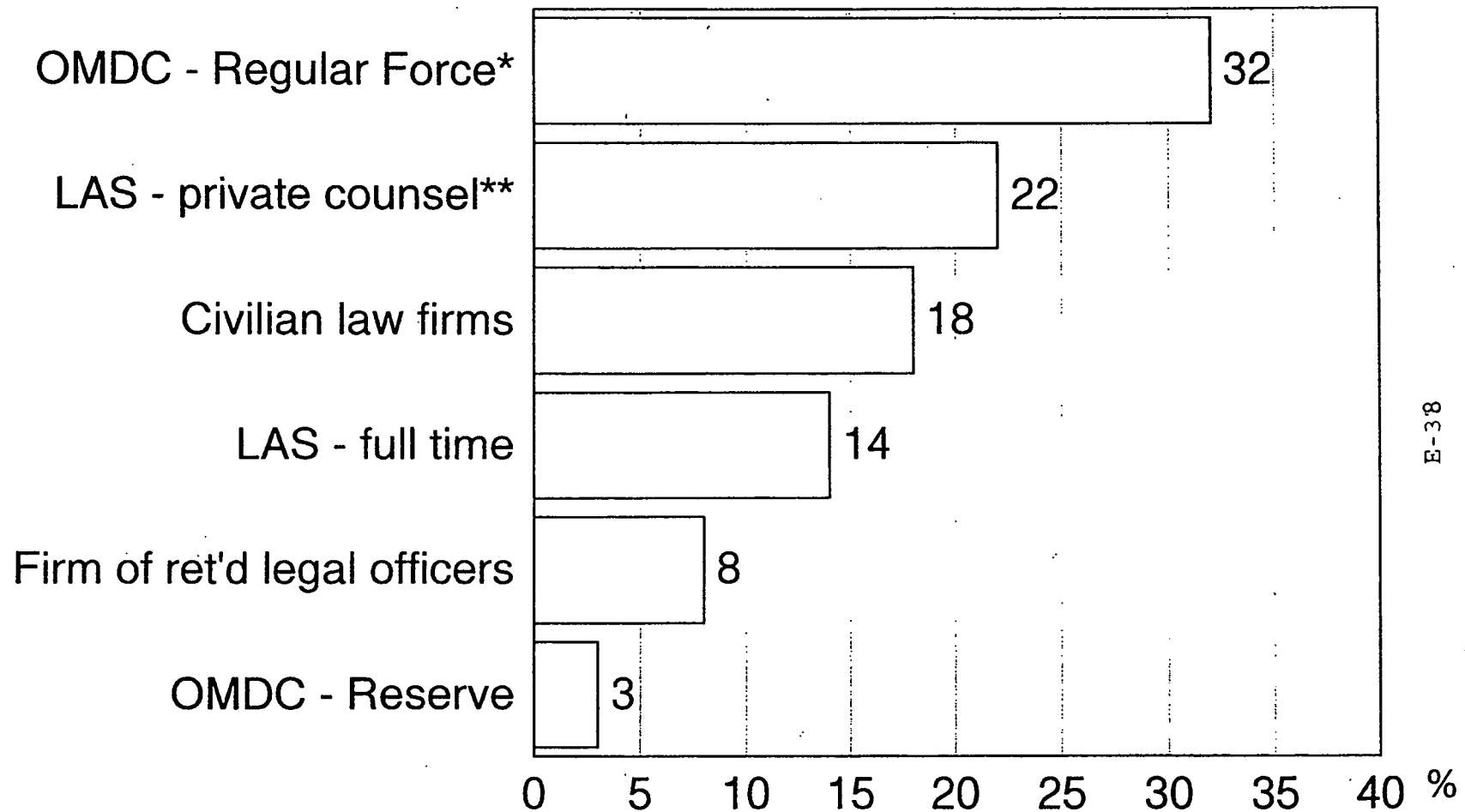


* Office of Military Defence Counsel

** Legal Aid Services

COMPAS Inc. for the Department of National Defence August, 1997

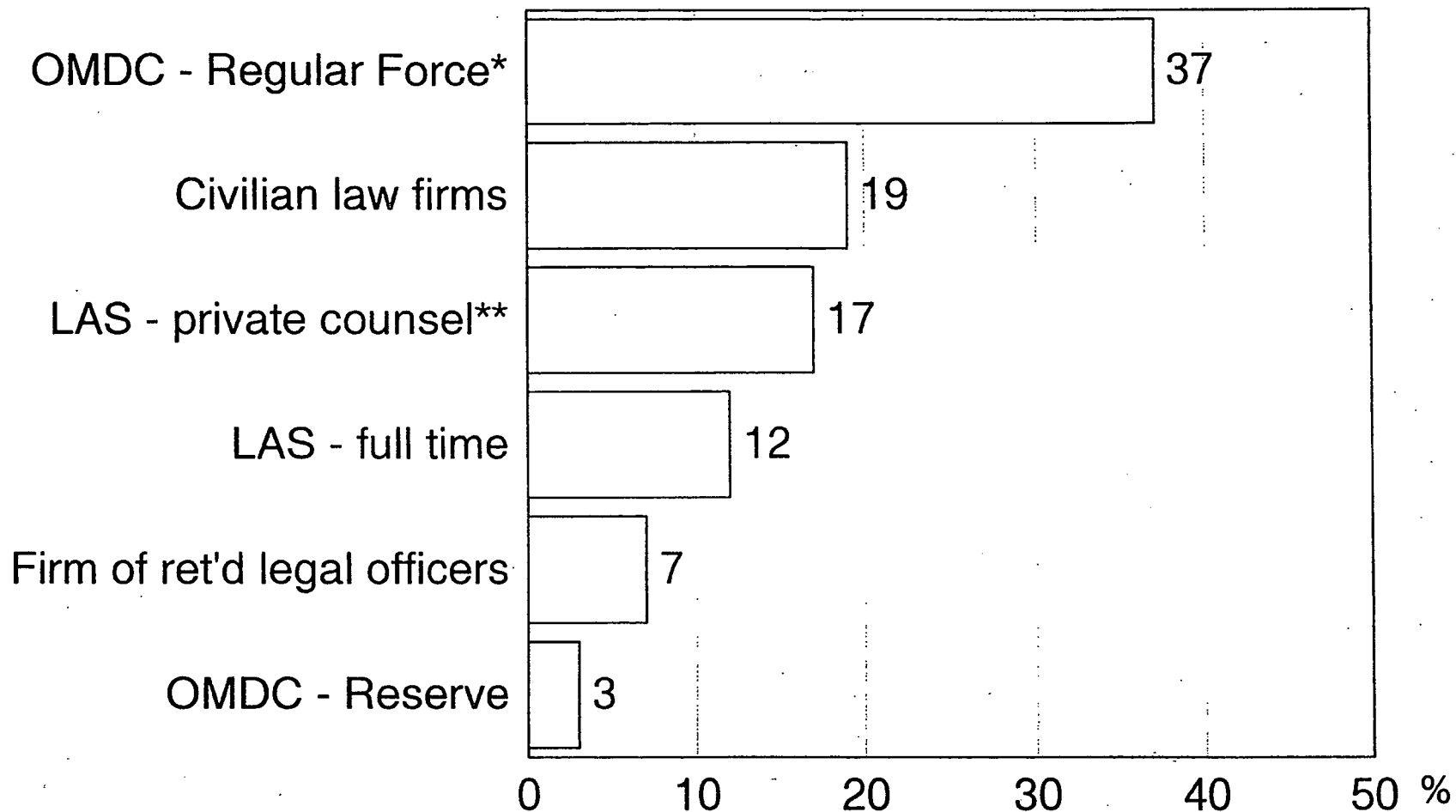
The Fairest Option



* Office of Military Defence Counsel ** Legal Aid Services

COMPAS Inc. for the Department of National Defence August, 1997

The Most Efficient Option



E-39

* Office of Military Defence Counsel ** Legal Aid Services

COMPAS Inc. for the Department of National Defence August, 1997

Annex "F"
BIBLIOGRAPHY

BIBLIOGRAPHY

Reports

Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, Rt Hon Brian Dickson, LGen C.H. Belzile, Mr. J.W. Bird, 14 March 1997

Report to the Prime Minister on the Leadership and Management of the Canadian Forces, Hon. M.D. Young, P.C., M.P., Minister of National Defence, 25 March 1997

Dishonoured Legacy: The Lessons of the Somalia Affair - Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 30 June 1997

Report of the Task Force on the Administration of Military Justice in the Armed Forces, U.S. Department of Defense, 1972

Summary Trial Working Group Report, Canadian Forces, 2 March 1994

General Disciplinary Return - Summary Trials for the Periods 1 Jan 1991 to 30 Jun 1995, Canadian Forces

Court Martial Statistics 1974-1996, Office of the JAG, 10 July 1996

Table 1.8, Cases by Disposition, Selected Provinces and Territories in Canada, 1995-96, Canadian Centre for Justice Statistics, Adult Criminal Court Survey.

Aide Juridique 1996, Commission des services juridiques du Québec, 31 March 1996.

1995-96 Annual Report, British Columbia Legal Services Society.

The Legal Aid Society of Alberta 1996 Annual Report

Legal Aid New Brunswick Criminal Legal Aid Policies, 5 December 1994.

Articles and Papers

Talking Paper on the Area Defense Counsel (ADC) Program, Col. Jackson, Chief, Trial Defense Division, Air Force Legal Services Agency, June, 1997.

TDS: Establishment of the U.S. Army Trial Defense Service, [1983] 100 Military Law Review 4.

Going the Last Mile in Reforming the Courts-Martial System: Removing the Convening Authority from the Panel Selection Process, Capt. G.B. Thompson Jr., Thesis, The Judge Advocate General's School, United States Army, 1987.

Military Justice System: An Overview, Office of the Judge Advocate General, U.S. Navy, March, 1997.

Orders, Instructions and Agreements

Queen's Regulations & Orders For the Canadian Forces

Treasury Board Employee Takeover Policy, Treasury Board of Canada, 15 March 1996

NDHQ Instruction VCDS 4/96 - Employee Takeover, Canadian Forces, 22 July 1996

Commissioner's Standing Orders (Representation), RCMP, 30 June 1988

Standard Operating Procedures - U.S. Army Trial Defense Service, U.S. Department of Defense, 1 June 1994

Naval Legal Service Office and Trial Service Office Manual, U.S. Navy, COMNAVLEGSVCCCOMINST 5800.1D, JAG 63, 18 June 1997

BR 11, Chapter 28, Legal Aid, Royal Navy.

Defence Force Orders (Discipline), Section 16 (Rules for the Provision of Legal Aid), New Zealand Defence Force.

Agreement Respecting Legal Aid in Criminal Law Matters and in Matters Relating to the Young Offenders Act Between The Government of Canada and the Government of New Brunswick, 22 January 1997.

A0590122_56-A-2018-02048--00177