



**Own motion investigation into how
the Australian Defence Force
responds to allegations of
serious incidents and offences.**

Review of Practices and Procedures

**Report of the Commonwealth Defence Force
Ombudsman pursuant to
section 35A of the Ombudsman Act 1976**

January 1998

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Executive Summary

1. On 14 July 1995, General Baker, Chief of the Defence Force (CDF) asked that I conduct an 'own motion' investigation into matters surrounding allegations arising from an incident at a Defence base. The central element of the incident was an allegation of sexual assault.

2. In particular, CDF was interested in obtaining my recommendations on what lessons might be learnt for the handling of such investigations in the future, and what administrative measures and/or management processes might need to be put in place in the ADF.

3. The approach to this investigation has been to focus on the systemic issues arising from the way the ADF responds to serious incidents and offences, particularly sexual offences, through the review of a number of ADF investigations of serious incidents.*

4. In conducting the investigation I examined a number of ADF investigations in detail. They have formed the basis for the conclusions contained in this report. For privacy reasons, however, the specific cases have been omitted from this report.

The framework

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

- the *Defence Force Discipline Act 1982 (DFDA)*
- the laying of charges under civilian criminal law
- the Defence Inquiry Regulations (DIRs)
- external administrative review bodies, and
- other dispute resolution strategies.

* I have also investigated complaints to this office about the incident but this is not the subject of this report.

6. The appropriate mechanism to deal with an allegation of a serious incident or offence is clear for purely military type offences (such as desertion), or cases where the guidance is unequivocal (such as serious sexual offences). However, Commanding Officers face a difficult decision in choosing the correct mechanism for dealing with other serious incidents, particularly where the facts of a matter are unclear.

7. First, there is the question of whether to conduct a *military rather than a civilian investigation*. An investigation under the DFDA or DIRs is relatively quick compared to investigations by civilian authorities, and a Service investigation and prosecution may be considered desirable (for disciplinary purposes), irrespective of whether the civilian authorities also elect to investigate an incident or offence.

8. On the other hand, Commanders should generally be aware that an offence should only be dealt with under the DFDA where such proceedings substantially serve the purpose of maintaining and enforcing Service discipline, and that the ADF's use of its jurisdiction to deal with offences which are also offences under the civil criminal law has come under considerable scrutiny and criticism.

9. Then there is the question of whether to investigate under the *DFDA rather than the DIRs*. Unlike a DIR investigation, a DFDA prosecution requires adherence to the rules of evidence, and proof beyond reasonable doubt. It is an adversarial process, often involving legal counsel, and inevitably takes time. On the other hand, self-incriminating evidence given in an investigation under the DIRs cannot be used against a person in proceedings before a Service Tribunal.

10. An administrative investigation under the DIRs is generally quick, and inexpensive. The penalty can be serious (resulting in discharge), and if, at the end of the investigation, there is sufficient evidence to suggest a disciplinary offence has been committed, a disciplinary proceeding can still be invoked. However, in my view Investigating Officers conducting administrative investigations under the DIRs should not be entitled to find that a criminal offence has been committed.

11. A third issue is whether to choose an *Investigating Officer rather than a Board of Inquiry*.

12. In reviewing a number ADF investigations I found that there were inconsistencies in the manner in which very similar complaints were handled by the ADF.

13. In one case allegations were investigated by a Board of Inquiry; in a complaint on very similar matters it was investigated by an Investigating Officer with significantly lesser powers. This raises a question about the perceptions of members on the consistency and seriousness with which complaints are treated. In the absence of more information, I suggest that the ADF consider introducing more specific guidance which might minimise any such problem.

14. In recent times, the ADF has placed an increased emphasis on the resolution of complaints of harassment, discrimination and unacceptable sexual behaviour without instituting a formal investigation. The Services have established a network of contact officers who can advise on the use of *alternative dispute resolution* techniques.

15. However, the employment of mediation or conciliation to resolve complaints is relatively new, and is not part of routine training. I believe there should be a consistent emphasis on the use and value of other dispute resolution strategies across all the ADF's instructions which deal with addressing and resolving complaints. Adequate training should be provided to Commanding Officers and support personnel.

16. To help in this task, I believe that the ADF needs to collect data on decisions to use (or not use) alternative dispute resolution techniques, particularly in relation to complaints about discrimination, harassment and unacceptable sexual behaviour.

Preliminary inquiries

17. There will always be a need to obtain some information regarding an incident or complaint before deciding how best to resolve it. However, with the exception of the Army guidelines, there is very little guidance on the rules for the conduct of 'informal investigations'.

18. In my view, to label investigations as 'informal' can suggest to complainants that the matter is not being treated seriously or authoritatively and/or that their version of events is not believed. It may also encourage a tendency to be less assiduous about documenting discussions and decisions, and the reasons for those decisions.

19. The use of the term 'informal' is a misnomer. Irrespective of the fact that they are not conducted under any statute, and without recourse to formal powers, the actions taken are of an administrative character and can be reviewed. In my

opinion, the ADF should use another term, such as 'preliminary inquiries' .

20. In my view, the ADF should:

- consider removing all reference to 'informal investigations' in the guidance
- amend the Defence Instructions to provide clear guidance on the purpose of preliminary inquiries and the extent to which they can be used, and
- amend the Defence Instructions to provide clear guidance on accountability requirements for preliminary inquiries.

What to do and who to do it

21. The ADF's handling of some investigations into allegations of serious incidents and offences over the past few years has attracted criticism from the Senate, complainants, HREOC and my office. The lack of centralised reporting of complaints means that I have been unable to determine the extent of the problem.

22. I found that investigations performed by the Service police under the Defence Force Discipline Act are generally satisfactory. However, other investigations, particularly administrative investigations of personnel-related issues, indicated that there are a number of commonly occurring problems.

23. The result of a poorly handled investigation will often be a complaint to an external review agency. There is a significant cost to the public. While these are not necessarily the norm, I am aware of two such investigations which are each estimated to have cost of the order or in excess of \$1 million.

Selection of investigators

24. I found little reference in the Instructions to what considerations should be taken into account when choosing an Investigating Officer. Perhaps because the principles are understood, they are not written down.

25. *Seniority and rank* are relevant, but should not be seen as the dominant or only factors. There is acknowledgment of the need for an *independent Investigating Officer* in some but not all of the ADF guidance. Investigating Officers should declare any actual or potential conflict of interest. An Investigating Officer should have the appropriate *personal qualities* and the specialist

expertise, either to conduct the investigation or to provide assistance. Expertise can be in the subject matter and/or in the processes of investigation.

Terms of Reference

26. The Army's instruction on the reporting and investigation of incidents addresses how to develop terms of reference in more detail than the Tri-Service instruction.

27. It is common practice for the Instrument of Appointment for administrative investigations to include a 'catch all' clause empowering the investigating body to inquire into any matters which are relevant, but this can be risky.

28. Of those cases examined by my office, very few terms of reference were framed around the outcomes for the investigation. However, even where terms of reference were based on outcomes, they did not deal with the whole of the complaint because they failed to take into account the 'context management' issues surrounding the specific allegations.

29. It is my view the ADF needs to revise its Instructions:

- on the handling of complaints and grievances, and on the conduct of investigations to include reminders of the factors to be considered when selecting or appointing an Investigating Officer, and
- to ensure that Commanding Officers are provided with guidance on how to develop terms of reference, and in particular, the requirement for terms of reference to be outcome focussed and to address context management issues.

Training of investigators

30. The lack of experienced investigators and the inadequacy of training in investigations means that investigators do not always grasp the real issues.

31. Service police skills are currently maintained through accreditation from agencies such as the Commonwealth Law Enforcement Board, attendance at the National Investigator Training Centre (run by the AFP) and liaison and placements with civilian agencies.

32. The training of Service police presents a real difficulty for the ADF, but I am satisfied that every effort is being made to

ensure that Service police will be adequately trained in the future, and that accreditation processes will promote adequate guidance and documentation for their investigative functions.

33. However, the training for other Investigating Officers has been much less structured. The Army advises me that there is some training in investigations conducted during initial officer training and promotion courses for warrant officers, but that it is relatively cursory. There is no formal training provided to Investigating Officers in the Navy. Since my investigation the RAAF has introduced training courses for investigators.

34. There is a need to provide better training to officers investigating matters under the DIRs, and I therefore recommend that the ADF develop a training strategy for officers who conduct investigations under the DIRs, and advise me of its strategy within two months of this report. I also recommend that officers should not be appointed to conduct investigations under the DIRs unless they have received training, or they have other experience or expertise which makes them suitably qualified to do so.

Guidance

35. The main source of guidance for Investigating Officers (who are not Service police members) under the DFDA is the Discipline Law Manual. For investigations under the Defence Inquiry Regulations, the main source of guidance is the Instruction on Inquiries into matters affecting the Defence Force. The ADF has also produced a video and handbook for officers appointed to investigate allegations of harassment and/or discrimination.

36. While all the information provided in various documents, taken as a whole, is a useful 'ready reckoner' for Investigating Officers, it does not represent a comprehensive manual on how to conduct an investigation.

37. The review of a number of cases has indicated a range of problems experienced in such investigations. These have included:

- inadequate planning of investigations
- failure to interview all relevant witnesses and assumptions made about the credibility of witnesses interviewed
- pursuit of irrelevant issues in witness interviews, use of inappropriate questioning techniques and failure to put contradictory evidence to witnesses for a response

- failure to record evidence properly, and possibly, preparation of witnesses and unauthorised questioning of witnesses
- failure to analyse evidence objectively, and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made, and
- inadequate record keeping.

38. There is no guidance in the DIR Instruction to investigating bodies on how to develop recommendations, despite the fact that their power to make recommendations is unfettered.

39. The guidance should encourage the Investigating Officer to seek advice from lawyers and other experts in the formulation of recommendations relating to serious incidents or offences, human rights type complaints, and procedural fairness issues.

40. I also think it imperative for the guidance to indicate the need for recommendations to take account of any systemic issues raised by the investigation, that is, to look beyond any remedy or action in relation to an individual and to ask if the existing rules, procedures or legislation need to be improved.

41. I therefore recommend that the guidance on such investigations be revised to provide advice to Commanding Officers and Investigating Officers on how to plan and conduct investigations.

42. In my view, it would be sensible for the ADF to incorporate the relevant Instructions and supporting guidance into a comprehensive investigation manual for investigations under the DIRs. The guidance should also cover questioning techniques, clearly indicate that an Investigating Officer cannot compel witnesses to answer questions where the answer may tend to incriminate them for a criminal or Service offence, and indicate that assistants to an Investigating Officer do not have the power to question witnesses.

Monitoring and supervising Investigations

43. I am satisfied that the processes in place for supervising and monitoring Service police investigations are appropriate. The same cannot, however, be said for investigations under the Defence Inquiry Regulations.

44. It appears that there is no structured process for monitoring the progress of investigations (other than in the Army

and for complaints of unacceptable sexual behaviour), to see if the investigation is addressing the necessary issues and is being conducted properly.

45. I am aware that there is a strong view that officers appointed as investigators should complete their task without command interference.

46. I do not believe that structured supervision and monitoring arrangements have to mean 'command interference'. I suggest that a regular reporting arrangement, particularly to cover process questions, would help to ensure that investigations are being conducted properly.

47. The basic purpose of the monitoring is not to pre-empt or influence the investigator's conclusions, but to make sure that help and guidance is available which will enable the production of a comprehensive, balanced and impartial report.

48. I recommend that:

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

Support services

49. A crucial adjunct to the investigation or resolution of a complaint of a serious incident or offence, is provision of support and ongoing assistance to the individuals involved.

50. Since the Senate Inquiry into Sexual Harassment in the ADF, the ADF has invested considerable effort in ensuring that parties to complaints regarding harassment, discrimination and unacceptable sexual behaviour are dealt with fairly and compassionately. The ADF provides a comprehensive range of services to members affected by harassment, discrimination or unacceptable sexual behaviour.

51. The challenge for the ADF lies in ensuring that support services are always offered to complainants and respondents, and

become part of routine incident management, thereby building confidence in the ADF's ability to handle such matters appropriately.

52. There is, however, a need to ensure that consideration is given to the provision of support services for *any* complaint involving violence against a person (such as a serious physical assault).

53. One solution is to build into the investigatory process a requirement to report to an appropriate authority what services have been offered to the complainant and the respondent, their response, and any follow-up action required.

Trend analysis

54. In response to the Senate Inquiry into Sexual Harassment in the ADF, a centralised reporting system has been implemented for such incidents. In my view, this sort of analysis is something the ADF should consider doing not just for sexual harassment, but for all incidents of a serious nature.

55. I believe it would be sensible for a similar review process to be undertaken for DIR investigations on an ADF wide basis, in order to assist the ADF in considering whether any further action needs to be taken in relation to guidance, procedures, training or policy for investigators or their advisers.

56. It may also be useful for the ADF to consider analysing whether there is any correlation between the ingestion of alcohol and/or drugs and serious incidents. I am aware that the ADF is presently reviewing alcohol and drug awareness programs and considering incorporating a module to highlight the connections between alcohol consumption and unacceptable sexual behaviour in a number of incidents.

57. The Army presently requires Commanding Officers to indicate, when reporting on incidents of sexual harassment, discrimination or offences, whether the incident involved the use of alcohol or illegal drugs. In my view, it would be useful to have this information for any incidents of a serious nature.

Procedural fairness

58. In circumstances where an investigation is instituted which may adversely affect a member, he/she can have a

reasonable expectation that the principles of procedural fairness will apply. In my view, this entitles the member to:

- be informed of any allegations or complaints made against them where any action (for example, an investigation) is to be taken as a result
- an adequate opportunity to respond to any such allegations or complaint
- access to any evidence relied upon in making a decision or taking any action which affects them
- timely notification of any action or decision which affects them arising from the allegation or complaint
- expect actions or decisions taken as a result of an investigation will be based on logically probative evidence
- an investigator who approaches his/her task with an open mind and who has not prejudged issues
- be provided with reasons for any decisions made or actions taken (including the factors considered in reaching a decision and any further action proposed)
- an opportunity to respond to any decision or action which may affect them, and
- the right to have any information submitted by them in response to the action or decision (or intended action or decision) considered.

59. They are also entitled to be advised of any right of review which may exist, and to expect that any information relating to them will be treated discreetly and their privacy respected.

60. Under the DFDA these principles of procedural fairness and rights of review are built into the processes for charging a member with an offence, hearing of the charges and the orders of the hearing authority. They are also covered in various instructions, for example, on Redress of Grievances. However, they are not fully spelt out in the Defence Inquiry Regulations or the related Instruction.

Privacy

61. My examination of several cases has caused me to question whether the ADF pays sufficient attention to the need for confidentiality and privacy to be respected when dealing with member's complaints. Certainly, the guidance is clear on this matter. Unfortunately, the guidance is not always adhered to.

I provided the ADF with my draft findings for its comment. The ADF, following a full consideration of my draft report, accepted the majority of those recommendations and took action to implement them. It formed a team, known as the Ombudsman Implementation Team, which has performed valuable work in considering the full implications of the draft recommendations and in putting them into effect.

In the course of this the Ombudsman Implementation Team has developed a comprehensive draft manual titled *Administrative Inquiries and Investigations in the ADF*, a task for which it is to be highly commended. This draft manual, intended for release in 1998, incorporates many of the recommendations and is expected to replace the relevant Defence Instructions.

The details of the actions taken by the ADF in response to the draft report are contained in the main report.

Background

Decision to conduct an own motion investigation

1.1. On 14 July 1995, General Baker, Chief of the Defence Force (CDF) asked that I conduct an 'own motion' investigation into matters surrounding allegations arising from an incident at a Defence base. The central element of the incident was an allegation of sexual assault.

1.2. The parties concerned have made a number of complaints regarding their treatment by the Service, both at the time of the incident and subsequently, to the Minister, the Service and to my office.

1.3. The allegations have been the subject of two successive Service investigations, a hearing in a Tribunal presided over by a Supreme Court Judge, a complaint to the Police, a referral to the Director of Public Prosecutions, and two Federal Court actions. One of the parties has also taken their complaint to the Human Rights and Equal Opportunity Commission (HREOC).

1.4. The second Service investigation was the subject of a Federal Court action. The judge, in delivering his judgement, found that the report was 'vitiating by fundamental errors of law', and his judgement severely criticised the investigator's pursuit, assessment and presentation of the evidence. The judgement, and the complaints received by this office, raised serious concerns about the Service's handling of the matter. Accordingly, CDF sought my assistance.

Purpose of the investigation

1.5. CDF saw the purpose of the investigation as being to determine the adequacy of the Australian Defence Force (ADF) response to the allegations arising from the incident, whether the individuals involved were fairly and appropriately dealt with, and whether there were any deficiencies in the policy and administration applicable to cases of this kind.

1.6. In particular, CDF was interested in obtaining my recommendations on what lessons might be learnt for the handling of such investigations in the future, and what administrative measures and/or management processes might need to be put in place in the ADF.

1.7. The approach to the investigation has therefore been twofold. First, I have focussed on the systemic issues arising from the way the ADF responds to serious incidents and offences, particularly sexual offences. This report deals with those systemic issues. Second, I have examined the specific complaints to my office. In doing so, I have examined the comprehensiveness and quality of the Service's investigations into the case, not only because I need to respond to their complaints about their treatment by the Service but also because they provide guidance on what issues to pursue in considering how the ADF might improve its responses to allegations of serious offences.

1.8. My role was not to investigate whether a sexual assault did, or did not occur. That is a matter the civilian police and prosecuting authorities have addressed. However, I have taken into account the fact that an allegation of sexual assault was made in addressing both the complaints received by this office and in examining the more general issues.

1.9. This report is not a response to the complaints as such, but is based on an examination of a number of ADF investigations. While my conclusions are based on a range of cases, specific reference to these have been omitted for privacy reasons. A separate report is being prepared on the complaints themselves.

Conduct of the investigation

1.10. During the course of the investigation my officers examined the relevant legislation and Service guidance, ADF files, records of investigation, and court judgements in relation to the incident. Discussions were also held with ADF and Departmental staff and relevant civilian authorities such as the Australian Federal Police and the Rape Crisis Centre in the ACT.

1.11. To assist me with my investigation, CDF provided support in the form of a legal officer, Lieutenant Fiona Sneath, who was seconded from the RAN to my office for a period of three months. Lieutenant Sneath's contribution was substantial and invaluable.

1.12. It is with regret, however, that I must say that the level of cooperation and assistance from elsewhere in the ADF was not of the same standard. In particular, on a number of occasions I had to resort to the use of formal powers under the *Ombudsman Act 1976* to obtain information relevant to my investigation, and the attitude of some officers of the ADF to my inquiries appeared obstructive. I was

therefore forced to raise this issue with the VCDF during the course of my investigation.

1.13. VCDF was very helpful and issued an instruction that ADF personnel were to cooperate with my investigation. I am now satisfied that the ADF understands and accepts that there should be no need for me to use formal powers to obtain information and documents, except in rare instances. I am keen to dispel any legal or attitudinal concerns which might inhibit ADF members from providing information to my office quickly and willingly.

1.14. Given the time constraints in which the investigation was conducted, and the difficulties in obtaining information in some cases, not every issue raised could be considered in detail. This report attempts to discuss the key issues, to identify problems the ADF may need to examine in greater depth and to make recommendations designed to improve the way that the ADF deals with certain types of incidents or offences.

Scope of the investigation: what constitutes a serious incident/offence?

1.15. Section 101(1) of the Defence Force Discipline Act 1982 (DFDA) defines a 'serious Service offence' as a Service offence punishable by a maximum punishment, or a fixed punishment, of imprisonment for life or a period exceeding 6 months.

1.16. This definition includes a wide range of military offences.¹ It also includes offences against the ordinary law which are triable by Service tribunals (such as murder and assault).

1.17. This report does not attempt to deal with the way the ADF responds to allegations of *all* serious offences under the DFDA. It does attempt to examine the way in which the ADF deals with allegations of some serious offences which are also offences under civilian criminal law, and by virtue of the incident which gave rise to this investigation, specifically deals with the way the ADF responds to allegations of sexual assault or other offences of a sexual nature.

1.18. However, this report is not limited to serious offences as defined by the DFDA. It also deals with certain serious human rights 'offences' such as serious harassment, discrimination and

¹ Serious offences include various offences relating to operations against the enemy, mutiny, desertion, absence without leave and violence, offences relating to compliance with commands and orders, the obstruction of Service policemen, offences by persons on guard or watch, dangerous behaviour, various offences relating to ships, vehicles, aircraft, weapons or property, offences relating to arrest, custody and proceedings before Service tribunals, and miscellaneous offences (eg. making false statements, unauthorised disclosure of information).

unacceptable sexual behaviour. These are offences under civil law, are proscribed by Service policy, and are treated very seriously by the ADF; the difficulties the ADF faces in dealing with these types of complaints are similar to those it faces in dealing with complaints regarding sexual assault and some other criminal offences.

1.19. Although the conclusions and recommendations contained in this report were developed as a result of an investigation into the ADF's handling of *serious* incidents and offences, most of the recommendations are also applicable to more minor matters. It is important that any incident is dealt with appropriately, and if necessary investigated, in a professional and thoughtful manner, regardless of the seriousness of the incident.

ADF framework for responding to allegations of serious incidents and offences

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

- investigation, and if appropriate, the laying of charges under the *Defence Force Discipline Act 1982* (DFDA)
- investigation, and if appropriate, the laying of charges under civilian criminal law²
- investigation under the Defence Inquiry Regulations (DIRs).³ The outcome of a DIR investigation may be a recommendation that disciplinary action or administrative action be instituted, or a decision that no further formal action is warranted
- investigation and resolution by external administrative review bodies (such as the Human Rights and Equal Opportunity Commission and my office), and
- the use of other dispute resolution strategies.

Use of the DFDA

2.2. An investigation under the DFDA will include matters which are relevant and proximate to the alleged infraction and which are necessary for the conduct of the investigation. The purpose of an investigation under the DFDA is to determine whether there is sufficient evidence to establish the basis of a disciplinary charge.

2.3. DFDA investigations are generally conducted by Service police, although the Act does make provision for investigations to be conducted by an officer, warrant officer or non-commissioned officer (not being a Service policeman).

2.4. The conduct of an investigation under the DFDA is very similar to the conduct of an investigation by civilian police authorities. A person may be asked questions by an investigating

² Where civilian authorities investigate a matter and decide not to proceed with charges under the civilian criminal law, the ADF may still decide to investigate and, if appropriate, lay charges under military law, or take administrative action.

³ The DIRs derive their authority from the *Defence Act 1903*.

officer about an incident or offence, but they are not obliged to answer. Once an investigating officer has decided to charge a member with an offence, or to seek a summons, they should issue a caution that anything they say or do may be used in evidence. There are specific rules governing confessions and admissions and the use of investigation powers (such as search and arrest powers).

2.5. When a charge is heard, the onus is on the Service's prosecutor to prove beyond reasonable doubt that the accused is guilty (ie. the criminal standard of proof and rules of evidence apply).

Civilian criminal processes

2.6. Members of the ADF are subject to both the ordinary criminal law of Australia and to the military disciplinary system provided for in the DFDA. The DFDA incorporates a wide range of criminal offences by virtue of s61; that section creates 'Territory Offences' which are offences against the laws of the Commonwealth in force in the Jervis Bay Territory, and offences against the Crimes Act 1900 (New South Wales) in its application to the Jervis Bay Territory.⁴

2.7. While, in many circumstances, these offences may be dealt with under the DFDA, the purposes of its disciplinary proceedings are, in legal terms, significantly different from those of the criminal law. Disciplinary proceedings are primarily intended to maintain proper standards of conduct and to protect the integrity and reputation of the organisation.

2.8. On the other hand, criminal proceedings serve a broader range of social purposes, including, to protect the public generally; deter other potential wrongdoers; and to punish the wrong committed. The prosecution is intended to exact retribution and deter.⁵

2.9. There have been concerns raised by the DPPs and the Attorneys-Generals about the appropriateness of using the DFDA in some cases (as opposed to the civilian processes). The High Court has ruled that only matters which would substantially serve the purpose of maintaining and enforcing discipline should be dealt with under the DFDA. However, there is still an area of

⁴ "Territory offence" also includes "(c) an offence against the Police Offences Act 1930 of the Australian Capital Territory, in its application to the Jervis Bay Territory as amended or affected by Ordinances from time to time in force in the Jervis Bay Territory."

⁵ To a lay observer, it would seem that the actions taken under the DFDA are also intended to punish and deter.

overlap. Following the High Court's rulings, authority to deal with a matter under the DFDA may exist because it would substantially serve the purpose of maintaining and enforcing discipline, but the matter may also be one that the civilian authorities think should be dealt with in the civilian domain. Consequently, the ADF has agreed that certain matters (some serious and all sexual offences) will be automatically referred to civilian authorities for investigation, and if appropriate, prosecution.

2.10. The issues surrounding the appropriateness of the ADF using its jurisdiction to deal with other matters, whether in preference to or simultaneously with civilian processes, are very complex. They have been a matter of significant concern to State Attorneys-General, and civilian prosecuting and investigating authorities for a number of years.

2.11. My investigation of these jurisdictional matters raised a number of sensitive issues which still remain to be resolved and are not dealt with further in this report. This will be the subject of further discussions.

Use of the DIRs

2.12. A DIR investigation may be used to inquire into any matter affecting the Defence Force. An investigation under the DIRs may be undertaken by:

- a General Court of Inquiry
- a Board of Inquiry, or
- an Investigating Officer.⁶

2.13. A General Court of Inquiry will investigate a matter which concerns the Defence Force and has major ramifications. It consists of, or is presided over by, a judge or an experienced legal practitioner.

2.14. A Board of Inquiry will investigate a matter significant to the Defence Force but which does not warrant a quasi-judicial inquiry. The guidance states that a Board Of Inquiry should be appointed, rather than an Investigation Officer, where there are compelling reasons for the appointing authority to be presented with findings arrived at through more formal processes (such as

⁶ There is also provision for a Combined Board of Inquiry, to inquire into a matter which involves the armed forces of another country as well as the Australian Defence Force.

the taking of evidence under oath or affirmation). For example, a Board of Inquiry would usually be appointed in cases of serious injury or death or substantial loss of Commonwealth property.

2.15. An Investigating Officer will investigate minor matters, or may be appointed to inquire into the facts of a matter, even though a Court or Board of Inquiry is to be or may be appointed in due course. This may be appropriate when the situation is not sufficiently clear to enable the superior authority to decide on the type of inquiry necessary, or where there is a danger that vital information may be lost by delay.

2.16. The scope of an investigation under the DIRs is determined by the instrument of appointment for the inquiry. While such inquiries are intended to be limited to matters relevant to the issues giving rise to the inquiry, I have found instances in which certain inquiries may have addressed issues outside their terms of reference or the terms of reference were so broad as to be open to abuse.

2.17. Other inquiries need not be stopped when a DIR investigation is commenced. For example, the report of a Service Police investigation may be considered by a Board of Inquiry. Evidence that an offence has occurred may be investigated and charges may be laid notwithstanding that matters related to the offence are being investigated by a Board of Inquiry. However, the hearing of evidence under the DFDA should not begin until the hearing by the Board of Inquiry has been completed.

2.18. The rules for the operation of Courts and Boards of Inquiry differ from those operating for Investigating Officers. Courts and Boards of Inquiry may be conducted in public or in private. They may take evidence under oath or affirmation, and are assisted by counsel.

2.19. Witnesses are required to appear and answer any questions put to them, or produce any documents requested of them, except where the answer or production of the document would disclose a secret process of manufacture or would be prejudicial to the defence of the Commonwealth. They may *not* claim the privilege against self incrimination (except where the answer may incriminate them in respect of an offence with which they have been charged and that charge has not been finalised).

2.20. In certain circumstances, witnesses may be represented by a legal practitioner. However, there is no requirement to follow the rules of evidence (hearsay evidence may be taken) or to comply with the normal legal procedures which apply in civilian courts or

tribunals. Nevertheless, the nature of the evidence taken may affect the weight it is given.

2.21. Any statement or disclosure made by a witness in the course of giving evidence is not admissible in any civil or criminal proceedings against that witness, or any proceeding before a Service Tribunal, except for the prosecution of an offence under the DIRs. However, the evidence given by a witness may be used by external review agencies, such as my office.⁷

2.22. Investigating Officers, however, cannot take evidence on oath or affirmation. Witnesses may be ordered to appear before an Investigating Officer and to produce any documents, but are not *entitled* to legal representation or to have another person speak on their behalf. The rules of evidence do not apply. However, witnesses *are* able to claim the privilege against self incrimination.⁸

2.23. Witness statements made in the course of giving evidence to an Investigating Officer cannot be used in proceedings under the DFDA, but *may* be admissible as evidence in any civil or criminal proceedings, and may be used by external review agencies.⁹

Investigation by external agencies

2.24. In some cases, an incident may be referred directly to an external body (such as my office, HREOC or the Minister) for investigation and resolution. This is usually where a member is not satisfied with the results of how a matter has been handled by the ADF, or the member has concerns about the ADF's capacity to deal with a matter satisfactorily.

2.25. ADF guidance clearly states that, although it is preferable for members to make a complaint through the chain of command in the first instance, members are free to take a complaint to an external body at any time.

2.26. Occasionally, such as in the case of this investigation, the ADF may itself approach an external agency to obtain an independent investigation of an incident.

2.27. The conduct of investigations by external agencies is determined by that agency's enabling legislation. For

⁷ Direct evidence given by a witness against another person may also result in that witness being called to give evidence before a DFDA or civil criminal proceeding.

⁸ See Sheppard. J, 'X' v McDermott (1994) 51 FCR 1.

⁹ As above.

investigations by my office and HREOC, the burden of proof is based on the 'balance of probabilities test' (ie. not the criminal test).

Other dispute resolution strategies

2.28. As a result of a Senate Inquiry into Sexual Harassment in the ADF,¹⁰ over the past few years the ADF has increasingly considered the use of other dispute resolution strategies, particularly for complaints involving harassment and/or discrimination.

2.29. ADF guidance¹¹ now places some emphasis on the resolution of such complaints without recourse to formal administrative or disciplinary action (ie. by self resolution, confidential interviews, conflict resolution, mediation and/or conciliation).

Which route to choose?

2.30. The choice of mechanism for dealing with allegations that a serious offence has been committed will generally be determined by the nature and seriousness of the incident, and where the incident occurs.

2.31. Where an incident occurs outside Australia, the ADF is the only body with the jurisdiction to deal with the incident.¹² It is responsible for providing support for the victim (and alleged perpetrator), conducting investigations, and for making a decision about whether to proceed with disciplinary or administrative action.¹³

¹⁰ The inquiry arose as a result of a referral to the Senate Standing Committee on Foreign Affairs and Trade, and arose from allegations of sexual assault and sexual harassment aboard HMAS Swan during 1992.

¹¹ See for example, DI(G)PERS 35-5: Harassment, Discrimination, Fraternisation and Unacceptable Sexual Behaviour in the Australian Defence Force.

¹² The ADF has also agreed that civilian authorities will investigate sexual offences occurring in flight or on ships at sea. Where service personnel commit offences in a foreign jurisdiction, that power may seek to exercise its jurisdiction against the offender.

¹³ At the conclusion of its inquiry, the Senate Standing Committee on Foreign Affairs and Trade recommended that 'amendments to the Defence Force Disciplinary Act be considered to allow for alleged sexual offences involving only Australian military personnel that occur outside Australian territorial waters, including on board Australian vessels, to be tried in a civilian criminal court under the relevant law applying in the Jervis Bay Territory in Australia, having been investigated by the appropriate civilian police and prosecuting authorities.' The ADF's response to this matter indicates that the Attorney-General's Department and the ADF are still examining the complex legal and practical issues surrounding this recommendation. In the draft of the new Act to replace the Crimes At Sea Act 1979, the issue of crimes committed by all personnel on board Australian vessels outside

2.32. For incidents within Australia, separate guidance exists (in various Defence Instructions) for dealing with certain kinds of incidents, for example, allegations of fraud, the use and abuse of alcohol and drugs, unacceptable sexual behaviour, discrimination and harassment. The action to be taken varies, even among matters that are civil criminal offences.

2.33. For example, incidents of fraud are generally reported through line management or the chain of command, and may then be referred to the Inspector-General's office in the Department of Defence, to Service or civilian police, or for administrative or disciplinary action.

2.34. In the case of illegal drugs, Service disciplinary action is to be taken under the DFDA. Where an offence under both civilian and military law has been committed, Commanding Officers must obtain legal advice on whether the matter should also be dealt with, as a drug offence, under the military or civilian jurisdiction.

2.35. On the other hand, sexual offences are immediately reported to the civilian police.

2.36. The correct mechanism to choose to deal with an allegation of a serious incident or offence is clear for purely military type offences (such as desertion), or cases where the guidance is unequivocal (such as sexual offences). However, Commanding Officers face a difficult decision in choosing the correct mechanism for dealing with other serious incidents, particularly where the facts of a matter are unclear.

When the facts are not clear

2.37. Where a serious allegation has been made, and the facts of the matter are not clear or it is not clear that an offence has been committed, a Commanding Officer has to choose whether to commence a military investigation under the DFDA, conduct an administrative investigation (after which it may be necessary to initiate disciplinary action) or refer the matter to civilian authorities. He or she may initially decide to set up some preliminary inquiries rather than move directly to formal action (see section 3 of this report).

2.38. It is a difficult decision, and one that will inevitably be influenced by the practicalities of any investigation. First, there is

the question of whether to conduct a *military investigation rather than referring the matter to civilian authorities*. If a Commanding Officer thinks the civilian authorities may decline to proceed with a matter, there may be a perception that 'justice has not been done' unless the matter is then dealt with by the ADF.

2.39. An investigation under the DFDA or DIRs is relatively quick compared to investigations by civilian authorities, and the swiftness of a military investigation helps to ensure that the 'disciplined Service' philosophy is reinforced. Where the ADF deals with a case under the DFDA, it also bears the costs of all parties.

2.40. Service police or other personnel are available to conduct such investigations. A Service investigation and prosecution may be considered necessary and desirable (for disciplinary purposes) even though the offence is also an offence under civilian criminal law.

2.41. On the other hand, Commanders should generally be aware that an offence should only be dealt with under the DFDA where such proceedings can reasonably be regarded as substantially serving the purpose of maintaining and enforcing Service discipline. In fact, the ADF's use of its jurisdiction to deal with offences which are also offences under the criminal law has come under increasing scrutiny and criticism in recent years from the Senate, the High Court and the Commonwealth, State and Territory Directors of Public Prosecutions. On the initiative of the (then) New South Wales Director of Public Prosecutions (Reg Blanch QC), this matter has also been considered by the Standing Committee of Attorneys-General and has been discussed on a number of occasions over the last five years by the Conference of Australian Directors of Public Prosecutions.

2.42. Apart from the issue of military or civilian investigation, there is the question of whether to investigate under the *DFDA rather than the DIRs*. Even where it is clear that proceedings under the DFDA would maintain and enforce discipline, a DFDA prosecution requires adherence to the rules of evidence, and proof beyond reasonable doubt. It is an adversarial process, often involving legal counsel, and inevitably takes time. On the other hand, self-incriminating evidence given in an investigation under the DIRs cannot be used against a person in proceedings before a Service Tribunal (except in a prosecution for an offence under the Regulations, such as giving false evidence or contempt), so if it is possible that a disciplinary offence has been committed, it may be more efficient to investigate under the DFDA.

2.43. Where the facts of a matter are unclear, an administrative investigation under the DIRs is an attractive option. They are generally quick, and inexpensive (they can be undertaken by any experienced officer or a Service policeman if necessary). The rules of evidence do not apply, and the burden of proof is the balance of probabilities. The penalty can be serious (eg. resulting in a request of the member to show cause why they should not be discharged), and if, at the end of the investigation there is sufficient evidence to suggest a disciplinary offence has been committed, a disciplinary proceeding can still be invoked.

2.44. In addition, defendants are increasingly more informed of their rights, and will probably ask for legal representation if a matter is dealt with under the DFDA. An officer hearing an offence may not be sure of his ground in dealing with a defendant who is being represented by an experienced barrister, and who raises difficult jurisdictional or other complex legal questions.

2.45. Under the DIRs, however, legal representation is not a 'right'. The DIRs provide protections to the Investigating Officer, witnesses are compellable, and the matter is still being investigated (and is therefore seen as being treated seriously). There are also protections regarding the release of information.

2.46. The results of my investigation indicate there has been an increasing tendency in recent years to institute an administrative investigation under the DIRs, rather than the DFDA. In the absence of structured data on why this is so, I think the ADF should guard against administrative investigations being used inappropriately, for example, to deal with serious incidents or offences where there is insufficient evidence for a civilian or DFDA prosecution.

2.47. The treatment of one incident has led me to question whether it is appropriate for an administrative investigation to make a finding of guilt on a criminal matter.

2.48. In that case, two separate investigators were tasked with investigating matters under the DIRs, which included the potential to make findings on an allegation of criminal conduct.¹⁴ While the first Investigating Officer found that there was insufficient evidence to make a finding that criminal conduct had

¹⁴ The initial terms of reference for the second investigation of the incident did not require an examination of the allegation of sexual assault. However, the Federal Court found that, by virtue of an amendment to the terms of reference, it was within the Investigating Officer's purview to investigate the allegation of sexual assault.

occurred, the second Investigating Officer found that, in his view, a member was guilty of criminal conduct.

2.49. The issue is not that two investigators took a different view. My concern lies with the fact that the second investigator formed the opinion that a member was guilty of a criminal offence on the basis of evidence gathered under a DIR process where the rules of evidence do not apply.

2.50. I would have been far less concerned had the second Investigating Officer simply found that there was sufficient evidence to suggest that a criminal offence may have taken place, and that the matter should be referred to the appropriate authorities.¹⁵

2.51. It seems to me that in theory Investigating Officers conducting investigations under the DIRs should not be entitled to find that a criminal offence has been committed. I say “in theory” because I understand that there may be legal and practical problems in dealing with some incidents (for example, sexual or racial harassment) which may or may not constitute a criminal offence.

2.52. I note that the Army’s way of dealing with this situation has been to state explicitly in the terms of reference for a DIR investigation, that the investigation is not into the criminal offence itself. This seems to me to be a reasonable approach, and one which should be adopted across the ADF.

2.53. The Air Force considers that this action should not be necessary, as an Appointing Authority under the DIRs is required¹⁶ to consider carefully whether the matter to be investigated is a proper one for investigation under the DIRs. If criminal or disciplinary offences are suspected from outset, then the policy is to refer the matter to civilian or Service police rather than conduct a DIR investigation. In my opinion, the guidance in this respect is not explicit enough and the actions taken by the RAAF, in one case brought to my attention, of appointing an Investigation Officer to investigate an allegation of sexual assault demonstrate that this policy is not always adhered to.

2.54. A third issue is whether to choose an *Investigating Officer* rather than a *Board of Inquiry*.

¹⁵ I am aware that the matter was referred to the relevant Director of Public Prosecutions subsequent to the second investigation report.

¹⁶ Under paragraph 6 of DI(G)ADMIN 34-1: Inquiries into matters affecting the Defence Force.

2.55. Two cases examined raised a number of similar significant issues. Both the complaints referred to:

- concerns about the manner in which the members' postings were effected
- sexual harassment
- sexual assault
- continued co-location with the alleged offender after the allegation of assault had been made
- possible bias on the part of the Investigating Officer
- failure to pay for private accommodation after the allegation of sexual assault
- delayed access to appropriate counselling
- conflicting advice regarding postings
- pain and suffering arising from their treatment by the ADF, and
- loss of career (and consequently money).

2.56. The allegations of one incident were investigated by a Board of Inquiry; the very similar complaint was investigated by an Investigating Officer with significantly lesser powers. This raises a question about the perceptions of members of the seriousness with which complaints are treated. In the absence of more information, I suggest that the ADF consider whether the instruction which covers choosing a BOI rather than an Investigating Officer needs amendment by way of more specific guidance which might minimise any such problem.

Is formal investigation appropriate for all types of complaints?

2.57. A Commanding Officer needs to consider the value of alternative dispute resolution techniques. An investigation is not always going to resolve a complaint, particularly where the:

- truth or full facts of the matter cannot be established (for example where only two individuals are involved and their version of what occurred is very different, and/or
- feelings and perceptions of the complainant may be central to the complaint (such as frequently occurs in harassment or discrimination complaints).

2.58. There is evidence to suggest that complaints resolved through investigative processes are likely to become a talking point within the work unit. A number of witnesses to one formal inquiry spoke of the resentment and backlash directed against them where they made a complaint which was formally investigated.

2.59. During the course of my investigation, I examined a number of case files relating to complaints of sexual incidents or offences and/or harassment or discrimination. In many of those cases, complainants indicated a strong reluctance to 'take matters further' where to do so would result in a formal investigation of the complaint.

2.60. In addition, for some complainants, the investigation has caused greater concern than the incident giving rise to the complaint, particularly where a complaint of harassment or discrimination had been handled insensitively.

2.61. These difficulties have led to the ADF placing an increased emphasis on the resolution of complaints of harassment, discrimination and unacceptable sexual behaviour without instituting a formal investigation. The Services have established a network of contact officers who can advise on the use of alternative dispute resolution techniques.

2.62. However, the employment of alternative dispute resolution strategies such as mediation or conciliation, is relatively new, and is not part of routine training. Commanding Officers may therefore require the help of experts to resolve a serious complaint by conciliation and mediation, but only a small number of ADF members have training in mediation and conciliation techniques. There is a reluctance among some Commanding Officers to call for such outside help and a preference to resolve matters at the workplace.

2.63. The ADF's traditional preoccupation with gathering evidence and facts in an investigation may also result in alternative dispute resolution options simply being overlooked.

2.64. In addition, the emphasis placed on mediation and conciliation of complaints varies significantly between the Defence Instructions on the management of complaints of unacceptable sexual behaviour, sex discrimination and race discrimination, complaints to HREOC and Redress of Grievance procedures. I believe there should be a consistent emphasis on the use and value of other dispute resolution strategies across all the ADF's instructions which deal with addressing and resolving complaints.

2.65. In my view, there is a need for the ADF to ensure that continuing emphasis is given to the mediation and conciliation of complaints wherever possible, and that adequate training is provided to Commanding Officers and support personnel (such as social workers and chaplains) to ensure that independent mediators are available to assist.

2.66. To help in this task, I believe that the ADF needs to collect data on decisions to use (or not use) alternative dispute resolution techniques, particularly in relation to complaints about discrimination, harassment and unacceptable sexual behaviour.

Conclusions

2.67. It seems to me that in theory Investigating Officers should not be entitled to find that a criminal offence has been committed, although it may be necessary to inquire into the circumstances of a criminal allegation in order to deal with a matter appropriately. Accordingly, I **recommend** that the ADF:

- consider amending DI(G)ADMIN 34-1 to the effect that it is not appropriate for Investigating Officers, Boards or Courts of Inquiry to make a finding that a criminal offence has been committed, and where there is sufficient evidence to suggest that an offence has been committed, the matter should be referred to the appropriate authority for investigation under the DFDA and/or the civil criminal law, and
- consider amending the sample Terms of Reference provided in the guidance on investigations under the Defence Inquiry Regulations (and in single Service instructions where they exist) to the same effect.

In responding to my draft findings on this issue, ADF agreed to amend the Defence Instruction and the sample terms of reference. Both issues are covered in detail in the draft investigation manual.

2 . 6 8 . I **recommend** that the ADF consider whether amendments are necessary to the guidance on when to choose a Board of Inquiry rather than an Investigation Officer, in order to encourage consistency and to minimise any perceptions that complaints are not being treated sufficiently seriously.

ADF agreed to amend the Defence Instruction. This is covered in the draft investigation manual.

2.69. The ADF has taken a number of steps to encourage the resolution of certain types of incidents through alternative dispute resolution mechanisms, and there is a need to continue to emphasise the value of such an approach, particularly for complaints of harassment or discrimination.

2.70. Consequently, I **recommend** that the ADF:

- consider the adequacy of training in the use and value of alternative dispute resolution techniques
- review the Defence Instructions on the management of complaints to HREOC of sexual or racial discrimination, or under the Redress of Grievance procedures to ensure that a consistent emphasis is placed on resolving complaints by alternative dispute resolution mechanisms
- collect data (in a format similar to that for unacceptable sexual behaviour) for all complaints of discrimination and harassment, and when reported, require units to indicate whether resolution of the complaint by alternative dispute resolution mechanisms was considered, and if not, why not, and
- expand the reporting requirements for incidents of unacceptable sexual behaviour to require the same data for incidents of that nature.¹⁷

In response to my draft findings ADF advised me that the Ombudsman Implementation Team proposed the ADF place greater emphasis on mediation. It was of the view that other complaint resolution techniques, such as conciliation and arbitration, are not well suited to the ADF although there may be occasions on which these could be utilised. The Team suggested that when a requirement for alternative complaint resolution techniques, other than mediation, was identified the commanders contact the Complaints Resolution Agency for guidance.

In respect of mediation, one chapter of the draft manual has been devoted to this technique. Action is also being taken to ensure that training courses for officers, commanding officers and senior non-commissioned officers provide guidance on the use and value of alternative dispute resolution methods. In addition, the Complaints Resolution Agency will provide assistance to commanders who require access to mediation services.

ADF also advised that it has considered the adequacy of existing mediation resources. It proposes to meet its foreseeable requirements from the use of

¹⁷ I note that the guidance already requests reports on whether unacceptable sexual behaviour complaints were resolved informally. However, this does not allow for an assessment of whether mediation and conciliation is being routinely considered, or whether such approaches are being used when appropriate .

existing trained Service personnel and by outsourcing to civilian organisations where this is appropriate. The ADF presently has 19 trained and accredited Navy mediators which, together with outsourcing, it considers is adequate to meet the requirements of the three Service.

ADF has issued individual policies concerning discrimination and inappropriate behaviour.

In relation to the reporting requirement ADF advised that incidents of discrimination are fully reported, and it incorporated a requirement to report incidents of harassment during 1996. Further, the reporting from August 1996 included data on whether the issue was resolved formally or informally.

Informal investigations

3.1. There will always be a need to obtain some information regarding an incident or complaint before deciding how best to resolve it. One question is whether that information should be obtained by the immediate institution of an investigation under the DIRs or the DFDA.

3.2. If no formal action is taken, then the complaint may be perceived as unsubstantiated. For the complainant, however, the complaint remains.

3.3. What is needed is another process, where information is collected, and a decision is then taken on how the matter is progressed. This approach is already in effect in reality. Indeed, the Army's Instruction¹⁸ on the investigation of incidents discusses the use of 'informal investigations' for this purpose.

3.4. However, with the exception of the Army guidelines, there is very little guidance on the rules for the conduct of 'informal investigations'.

Guidance

3.5. In the Army, Commanding Officers have the discretion as to whether a formal or informal investigation is undertaken. The Army Instruction indicates that, where an incident is reported, an informal investigation is to be conducted, and where appropriate:

- the incident is to be notified to the local Military Police unit/section
- disciplinary action is to be initiated, and/or
- the incident is to be formally investigated.

3.6. In the Instruction, an informal investigation is defined as an oral or written report (other than a formal investigation) and includes such reports as military or civilian police accident reports or reports of injury or illness. The investigation is not conducted under the authority of any legislation, there are no terms of reference, and they can be conducted by any member.

¹⁸ DI(A)ADMIN 23-2: Reporting and Investigation of incidents.

3.7. The Army also provides specific guidelines for the informal investigation of incidents involving harassment or discrimination, including general principles for dealing with such complaints:

- complaints are to be dealt with seriously, sensitively and swiftly
- the investigation should be conducted without bias and with objectivity
- assumptions should not be made about the complainant or accused
- all members, including all available witnesses, are to be interviewed
- written records should be kept of interviews (an interview checklist is provided to assist)
- records of interviews are to be accorded appropriate confidentiality
- all members involved are to be given equal opportunity to present their case and no one is to be disadvantaged
- appropriate action for the resolution of the complaint in consultation with those concerned is to be determined as soon as possible
- the outcome as a result of the investigation is to be appropriate and meet the needs of those involved and the Army, and
- if the incident being investigated results in accusations being made against any member(s), the accused member(s) are to be given equal opportunity to present their case. (A checklist is provided to assist in dealing with the accused and complainants).

3.8. Where the accused denies that anything took place and there remains a live allegation, the matter is to be handed over for formal investigation.

3.9. The Army's approach has, in part, been reflected in the new ADF-wide guidance on the management of unacceptable sexual behaviour.¹⁹ That guidance provides a checklist of questions for complainants and the accused (for non-disciplinary

¹⁹ Draft DI(G) PERS 35-3 Harassment, Discrimination, Fraternisation and Unacceptable Sexual Behaviour in the Australian Defence Force

cases), principles for complaint investigation and a requirement to get the details of the complaint or incident in writing.

3.10. There is also some reference to 'informal investigations' in Navy guidance. The instruction on its investigative services states that part of the role of the Naval Investigative Service is to conduct 'preliminary inquiries', in order to assist the Command in determining whether a full investigation is required.

3.11. Navy guidance also refers to less formal investigations in relation to drug offences; a 'preliminary investigation' of all reported instances of illegal drug use is to be carried out by Naval Police Coxswain staff.

3.12. The only other reference in guidance to 'informal investigations' found during the course of my investigation was in the guidance on applications for Redress of Grievance. Those guidelines state that Commanding Officers need not appoint an Investigating Officer under the DIRs unless the complaint raises serious matters, or may adversely affect members other than the complainant.

3.13. They also state that minor complaints may be investigated by an informal investigation; however, the key factors and conclusions must be documented for possible perusal by a Redress Action Authority or by a Chief of Staff/CDF. An acknowledgment by the staff member that the member is satisfied, or otherwise, with the outcome of such an investigation, must also be recorded.

3.14. During the course of my investigation, I endeavoured to establish the extent to which 'informal investigations' are used by each of the Services. However, there is no central reporting (at either a Service or ADF level) of all incidents or complaints and how they are resolved.

Status of informal investigations

3.15. I agree with the use of 'informal investigations' to gather information about an incident in order to make decisions on how the incident should be handled. I do, however, have some concerns about the:

- labelling of these inquiries as 'informal investigations', and

- lack of any guidance (beyond that articulated by Army) on how to manage such processes, and to what extent they should be used.

3.16. In my view, to label investigations as informal has a number of effects. Firstly, it can suggest to a complainant that the matter is not being treated seriously or authoritatively and/or that their version of events is not believed. This can have serious ramifications for whether a member feels that their complaint has been resolved satisfactorily.

3.17. Secondly, where an investigation is viewed as 'informal' there may be a tendency to be less assiduous about documenting discussions held, decisions or actions taken and the reasons for those decisions or actions. The reality is that complainants always have the option of taking issue with how an 'informal investigation' was handled. If there is insufficient documentation to indicate what action was taken and why, it becomes extremely difficult for either higher military authorities or external review agencies to determine what happened, or how to resolve the complaint, and the ADF is left open to criticism of its investigatory processes.

3.18. The use of the term 'informal' is a misnomer. Irrespective of the fact that they are not conducted under any statute, and without recourse to formal powers, the actions taken are of an administrative character and can be reviewed by my agency. In my opinion, it would be preferable for the ADF to use another term, such as 'preliminary inquiries' when referring to investigations of this nature.

3.19. During the course of my investigation, some members of the ADF (particularly legal personnel) raised concerns about the use of 'informal investigations' for any purpose, as witnesses cannot be compelled to answer questions, individuals do not have the protections which come into play under the DFDA and the DIRs, and there is the possibility that incidents or complaints could be 'swept under the carpet'.

3.20. These concerns may reflect a lack of any consistent or agreed view about when 'informal investigations' should be used by Commanding Officers. There is no doubt that witnesses cannot be compelled to answer questions during such processes, and individuals do not have the protections afforded to them under the DFDA or the DIRs.

3.21. In my view, however, where it is necessary to compel a witness to answer a question the matter is probably better suited to investigation under the DIRs or DFDA in any case. In respect of

the lack of protections, I am not sure how this is different to the situation that currently exists where no complaint has been made, but there may be an indication (or suspicion) that an incident or offence has occurred, and a senior officer is trying to determine whether some action is necessary.

3.22. In any case, there are strict rules governing the information that can be used in a DFDA process, and under a DIR investigation, it will always be open to an investigating body to compel a witness to answer questions about information they provided to other personnel, incidents they witnessed or heard about, or offences they may have committed.²⁰

3.23. In relation to any concerns about complaints being swept under the carpet, it is my opinion that, providing there are clear guidelines on the extent to which preliminary inquiries can be used and Commanding Officers are sufficiently accountable for their actions in this respect (for example, all incidents of unacceptable sexual behaviour have to be reported in any case), the use of preliminary inquiries should not pose too great a problem.

What should 'informal investigations' be used for?

3.24. The purpose of 'informal investigations' should be clearly articulated within the guidance on investigation of incidents, and the Defence Instructions on dealing with specific types of incidents. In my view, the purpose of preliminary inquiries should be *confined* to:

- making inquiries sufficient to establish whether it is reasonable to suggest that an incident may have occurred, or that there may be some validity to the complaint or allegation
- establishing basic facts, such as who was involved, when it occurred, whether there is any corroborating information or witnesses, and what action the member(s) took as a result of the incident
- determining who else has been informed of the allegation or incident (both for the privacy and protection of the accused and for determining whether any action may need to be taken in respect of other members)

²⁰ The exception is that the privilege against self incrimination may be claimed before an Investigating Officer.

- establishing what action the complainant or member(s) affected thinks should be taken in relation to the complaint and/or the incident
- determining what further action should be taken to resolve the complaint or deal with the incident (ie. use of alternative dispute resolution mechanisms, conduct of an investigation under the DFDA or DIRs, referral to outside authorities, or a decision that no further action is warranted), and
- establishing what action needs to be taken to ‘manage the context’ of the complaint or incident (such as access to general or specialised counselling, provision of legal advice, movement etc).

3.25. The ADF should amend its instructions to indicate the value of conducting preliminary inquiries to assist in determining the best course of action for resolving a complaint, and the extent to which those inquiries should (or should not) be used.

Accountability issues

3.26. At present, there is very little guidance on adequate documentation or accountability requirements for informal investigations.

3.27. I accept there will always be difficulties in deciding in advance what ‘adequate’ means. However, I would consider that the minimum requirements are:

- records of individuals questioned or interviewed, or with whom the matter was discussed, and the information obtained (in some cases it will be appropriate to have a member sign a record of interview or discussion)
- copies of any documentation or corroborating evidence
- a brief history of (and reasons for) actions and decisions taken
- a record of action taken to determine ‘context management’ requirements, and whether any follow up action is required (eg. ongoing counselling, monitoring to ensure no victimisation)
- a record of when both the complainant and respondent (and any other affected members) were informed of the allegations against them, what action has and will be taken, and any advice given

- a brief record of any expert advice sought (such as legal advice, advice from a higher authority or advice on medical or counselling requirements) and the substance of any advice provided
- the outcome of preliminary inquiries and any further action to be taken (eg. appointment of Investigating Officer, mediation of complaint or insufficient basis on which to pursue complaint), and
- whether any systemic issues have been identified and where the matter has been referred (for example, where a complaint involves a problem with policy and/or procedures, and the matter has been referred to Headquarters).

3.28. While it may seem that this requirement would be onerous, in my view it should be possible to develop a checklist which the responsible officer then notes with his or her actions.

3.29. Given the particular difficulties presented by certain types of incidents (such as sexual assaults or serious physical assault or fraud) it would also be useful to provide a prompt for Commanding Officers on the checklist that these types of incidents may require special action (such as immediate quarantining of evidence or medical examination), and they should refer to the specific instructions for advice on the management of those incidents.

Conclusion

3.30. Due to the lack of any centralised reporting of how incidents are handled, I have been unable to determine the extent to which 'informal investigations' are used by the ADF, and for what purpose. If they are not used appropriately, the ADF is open to criticism from my office.

3.31. To ensure that preliminary inquiry processes are managed properly in the future, I **recommend** that the ADF:

- considers removing all reference to 'informal investigations' in the guidance
- amend the Defence Instructions to provide clear guidance on the purpose and value of preliminary inquiries, and the extent to which they can be used, and
- amend the Defence Instructions to provide clear guidance on accountability requirements for preliminary inquiries.

ADF considered my draft recommendations and agreed to remove references to 'informal inquiries', to provide guidance on preliminary inquiries and to amend the Defence Instructions accordingly. The use of preliminary enquiries, to be known as 'general enquiries', has been covered in detail in the draft investigation manual.

What to do and who to do it?

4.1. The ADF's handling of some investigations into allegations of serious offences and incidents over the past few years has attracted criticism from the Senate, complainants, HREOC and my office. The lack of centralised reporting of complaints means that I have been unable to determine the extent of the problem.

4.2. However, my discussions with personnel responsible for dealing with (and providing advice on) complaints indicate the range of problems experienced. There have been complaints regarding lack of documentation, delays in investigating complaints and answering correspondence, bias, failure to take complaints seriously and to investigate them sensitively, intimidation and pressure to withdraw complaints, failure to enter into meaningful negotiations during conciliation conferences, and attempts to thwart investigation by outside agencies.

4.3. The result of a poorly handled investigation will often be a complaint to an external review agency, such as HREOC, my office or the courts. There is a significant cost to the public. During 1995, weaknesses in the way in which the Army handled harassment and discrimination complaints led to almost \$100,000 in settlement costs, and one public hearing cost \$120,000 alone. HREOC estimates that it costs an employer a minimum of \$36,500 in staff time to resolve a complaint when it is made internally. Obviously, that cost is significantly increased where the matter is not resolved satisfactorily, and the complaint is then made to a higher or external authority.

4.4. Clearly there is a need to ensure that the ADF's policy, procedures and practices for the investigation of complaints are of a high standard, not only for the benefit of those involved, but also for the ADF and the general public which ultimately bears the cost of any mismanagement. The appointment of competent and effective investigators is part of this.

Selection and appointment of investigators

4.5. My reading of the guidance and discussions with ADF members indicates that the selection of an Investigating Officer has normally been left to the discretion of the Commanding Officer responsible for dealing with the incident or allegation. His or her choice of personnel will be influenced by whether the matter is to be dealt with as a Service offence, or whether an administrative investigation is to be conducted.

DFDA

4.6. Investigating Officers are not 'appointed' under the DFDA. However, in all three Services, serious incidents or offences are usually investigated by Service police (even though the Act provides for other officers to undertake this role). Usually, where there is an indication an offence has been committed the Commanding Officer will refer the matter to the nearest Service police unit.

4.7. In the Navy, the responsibility for investigating serious Service offences or any other matter seriously affecting Service discipline lies with the Naval Investigative Service. They may be assisted in their role by those establishments complemented with Naval Police Coxswain personnel with advanced investigator training.

4.8. In addition to investigating Service offences, the Army uses its Military Police for the investigation of serious harassment and discrimination complaints, allegations of obscene behaviour and assault.

4.9. In the past the RAAF has also used its Service police to investigate some other matters, such as allegations of homosexuality, and sexual harassment complaints. However, in the last few years, concerns about the lack of sensitivity with which some of those matters were handled has meant that RAAF police are now less likely to be used to investigate them.

4.10. Although the Discipline Law Manual provides guidance on how a matter is to be investigated under the DFDA, there is no commentary on factors to be considered when selecting an Investigating Officer. A Service policeman will normally be chosen on the basis of his or her availability, seniority and any specialist expertise required.

DIRs

4.11. Under the DIRs, an Investigating Officer, Board or Court of Inquiry may be appointed in writing at any time by an Appointing Authority. An Investigating Officer may be an officer, a warrant officer, or an ASO4 or higher in the APS.

4.12. The Instruction²¹ says nothing about the factors (other than rank) to be considered when selecting personnel for Investigating Officer duties; there is no commentary on the

²¹ DI(G) ADMIN 34-1: Inquiries into matters affecting the Defence Force.

desirability of particular expertise, experience, qualifications or personal characteristics for certain types of investigations. Thus the selection of an appropriate Investigating Officer is entirely at the discretion of the Appointing Authority.

4.13. However, the Guide for Managers, Supervisors and Harassment Contact Officers: Eliminating Harassment in the Defence Environment states that when appointing Investigating Officers for harassment allegations, managers should be aware of the need for the process to be free of bias, and direct supervisors or personnel acquainted with any of the parties involved should not be appointed. The Guide acknowledges that this will not always be practicable, especially in smaller establishments.

4.14. In addition, the Instruction on the investigation of complaints to HREOC states that, in all but the most straight forward matters, assistance and guidance is to be sought from the Director of the Complaints Resolution Agency, HQADF upon (among other things) the choice of Investigating Officer. The Instruction points out that this is an important factor in ensuring an investigation of a quality which can be relied upon in HREOC hearings.

4.15. In the RAN, Investigating Officers are chosen having regard to the nature of the incident, the appropriateness of their rank or specialisation, and their experience with respect to the matter being investigated.

4.16. In the Army's case, Investigating Officers are chosen by the Appointing Authority, and in particularly sensitive or complicated investigations the advice of a legal officer is sought concerning the identity of the Investigating Officer. There has been an increasing tendency within Army to use Legal Officers as Investigating Officers on complicated investigations because line officers and Military Police are not sufficiently trained. The Army also points out, however, that not all Legal Officers would be considered suitable for Investigating Officer duties.

4.17. A discussion paper designed to find ways to improve the Army's handling of harassment and discrimination complaints notes that Investigating Officers are normally junior in rank and only one Investigating Officer is appointed. Yet experience has shown that when this practice is followed for harassment and discrimination investigations, the investigation has sometimes lacked depth, been cursory in its approach, has visibly demonstrated bias or has not uncovered critical information. The discussion paper concluded that some investigations had been so poor that the Army has had to direct supplementary investigations.

4.18. As a result, the Army is considering appointing two Investigating Officers, of Major rank and different genders, to conduct investigations into harassment and discrimination complaints.

4.19. In their training, Commanding Officers are advised to appoint senior Captains, Majors and above to investigate complaints of harassment and discrimination because of the experience required to deal with such complaints. Commanding Officers are also informed that the Investigating Officer should not be from the chain of command, and if there is no-one from outside the chain of command available, they must come from outside the unit.

4.20. As in the other Services, the selection of an Investigating Officer in the Air Force is left to the discretion of the Appointing Authority, who is in the best position to choose a suitable officer (eg. an equipment officer to investigate allegations of missing stores). However, the Air Force has moved to establish a dedicated team for investigations requiring specialist expertise because of problems it has experienced with investigations in the past.

What factors to consider when choosing an Investigating Officer?

4.21. In the course of my investigation, I found little reference in the Instructions to what considerations should be taken into account when choosing an Investigating Officer. Perhaps because the principles are understood, they are not written down.

Seniority/Rank

4.22. Seniority and rank are relevant considerations in an appointment, but in my view they should not be seen as the dominant or only factors.

4.23. I acknowledge that in an ADF environment, it may be preferable to have someone of equivalent (or higher) rank investigating. However, this will not always be possible.

4.24. In my opinion, the significant factor is not so much rank, but whether there is any actual or perceived conflict of interest arising from the choice of Investigating Officer, and whether he or she has the experience and skills to do the job properly. Where such an individual cannot be found within the work unit, it will be necessary to look elsewhere. In particularly

complex cases, it may even be appropriate to request the assistance of an external agency.

Independence

4.25. In the past there have been accusations of bias in some investigations, and there has been one case where a Commanding Officer investigated a complaint against himself.

4.26. I note that one Board of Inquiry recommended that efforts be made to ensure that the investigation of alleged offences are carried out by persons who are not friends or acquaintances of either the accused or the person making the allegation.

4.27. The Senate Inquiry into Sexual Harassment in the ADF also considered this matter. Although the Senate Committee did not make a recommendation regarding the choice of Investigating Officers, it did recommend that care be taken to ensure that the choice of legal counsel assisting with inquiries or legal proceedings does not give rise to perceptions of possible conflict of interest. In my view, the same consideration should be given to the appointment of Investigating Officers.

4.28. There is some acknowledgment of the need for an independent Investigating Officer in the ADF guidance. The Instruction on Redress of Grievances and the guide to managers, supervisors and Harassment Contact Officers on eliminating harassment²² address this issue. In its training, the Army advises Commanding Officers that the Investigating Officer must be from outside the chain of command.

4.29. The Air Force Instruction on aircraft safety occurrences²³ states that the seriousness, complexity and/or implications of some incidents may be such that a Commander should consider that the matter should be independently investigated.

4.30. In addition, the Air Force Instruction on Redress of Grievance procedures states that complaints may be referred to subordinate commanders for investigation, but this would be inappropriate if the subordinate commander has had any involvement in the circumstances leading to the complaint, or any potential future influence on the complainant (eg. as the applicant's assessor, when a complaint concerns performance of duty). The guidance goes on to say that a Commanding Officer

²² Eliminating Harassment: A Guide to Managers, Supervisors and Harassment Contact Officers.

²³ DI(AF) SAFETY 2-2: Air Safety Occurrence Reporting and Investigation.

may appoint an officer or senior non-commissioned officer from another unit to conduct the investigation (subject, of course, to the concurrence of the other Commanding Officer).

4.31. However, there is no reference to the requirement that the Investigating Officer be independent in the Tri-Service Defence Instruction on investigations under the Defence Inquiry Regulations, in the Instruction on Harassment, Discrimination, Fraternisation and Unacceptable Sexual Behaviour, or in the Discipline Law Manual.

4.32. In my experience, in any other agency with an investigation function, there is a requirement that the Investigating Officer must declare any actual or potential conflict of interest, and any association with the parties to the complaint. I think the ADF should be the same.

Experience/Expertise

4.33. In my view, a crucial consideration is not only whether the proposed Investigating Officer has the appropriate personal qualities to handle an investigation, but also whether specialist expertise is required, either to conduct the investigation or to provide assistance. Expertise can be in the subject matter and/or in the processes of investigation. The use of untrained and inexperienced investigators may exacerbate the matter, and put the Investigating Officer at risk of a complaint about how the matter was handled.

4.34. Moreover, simply amending the relevant Instructions to suggest that only experienced and qualified officers are appointed as Investigating Officers is not sufficient. There is a range of factors to be considered when appointing an Investigating Officer, and the requirements will vary according to the circumstances of the complaint. Commanding Officers need reminding of all the factors to be taken into consideration.

Developing terms of reference for investigations

4.35. DFDA investigations are by their nature limited to the collection of evidence relating to the offence, and are governed by the DFDA and the guidance in the Discipline Law Manual.

4.36. There is some guidance to Appointing Authorities for investigations under the Defence Inquiry Regulations. The Instruction states that care should be taken to state precisely the circumstances which are to be investigated and to specify whether or not the Investigating Officer, Board or Court of Inquiry is

empowered to make recommendations. The Appointing Authority may at any time add to or vary the matters to be inquired into, or revoke an appointment.

4.37. The instruction on dealing with applications for Redress of Grievances states that the Commanding Officer should issue terms of reference for the investigation, and provides a sample. That sample requires the Investigating Officer to obtain all information relevant to the complaint, and provides some specific guidance on the information required if the complaint relates to the making of a decision.

4.38. Interestingly, the instruction on the investigation of fraud is much more specific. By virtue of the reporting requirements of a fraud investigation, the terms of reference are reasonably well defined.

4.39. The Army's instruction on the reporting and investigation of incidents addresses how to develop terms of reference in more detail than the Tri-Service instruction. It states that the Appointing Authority is to attach terms of reference to the instrument of appointment, and provides a range of samples²⁴ which can be combined or varied.

4.40. The Director of the Complaints Resolution Agency, legal officers, administrative review areas and personnel involved in providing advice on the management of complaints regarding harassment and discrimination are all available to provide advice to Appointing Authorities.

Best practice

4.41. It is common practice for the Instrument of Appointment to include a 'catch all' clause empowering the investigating body to inquire into any matters which are relevant.

4.42. A 'catch all' clause may appear useful to ensure that Investigating Officers can deal with any pertinent issues which arise during the course of the investigation, but which were not identified at the outset. However, such clauses are inherently risky and open to abuse where they are the foundation of the terms of reference. Of those cases examined by my office the terms of reference were usually framed in this way (for example,

²⁴ Samples include detailed specifications for investigating and reporting on vehicle accidents, incidents involving discrepancies or damage, death or injury of members, loss or damage to a member's clothing or personal effects, allegations of sexual/personal harassment/sexual offences/discrimination, and a general Terms of Reference for other incidents.

'investigate all circumstances surrounding an allegation of ... '). Very few terms of reference were framed around the outcomes for the investigation.

4.43. A better example is the terms of reference used by the Army in one investigation. The terms of reference were clearly outcome focussed, specified the minimum witnesses to be interviewed, how the allegations of discrimination should be handled given there was also an allegation of sexual assault, took into account the interests of the accused, indicated what documentation should be attached to the report, and set a time frame for the completion of the investigation.

4.44. They are a good example of how to draft terms of reference for the investigation of specific allegations. However, such terms of reference do not deal with the whole of the complaint, and may not provide sufficient basis on which to resolve a complaint to an external agency such as HREOC or myself. This is because they fail to take into account the 'context management' issues surrounding the specific allegations. That is, they fail to address broader issues such as:

- the nature of the work environment and the treatment of the complainant in that context (ie. whether there were other issues or incidents surrounding the work environment and the treatment of individuals, including the complainant, which may have contributed to the complaint)
- whether there were any other incidents involving the complainant, perpetrator or other personnel (but which may not have led to a complaint) but which should be considered in the context of the work or management environment in which the complaint was made, and
- how the parties to the complaint were treated subsequent to the lodgement of the complaint (ie was there any change in the manner in which they were treated by virtue of their having laid a complaint)
- whether the parties to the complaint were provided with access to adequate support services (such as specific counselling, medical or legal assistance) after the complaint was made (and which should be offered irrespective of the merits of the complaint), and
- whether there are any systemic issues arising from the complaint which should be addressed at an ADF or Service wide level.

4.45. My investigation reveals that 'context management' issues are rarely included in terms of reference, because they are not considered directly relevant (in terms of supporting evidence) to the specific allegations made. However, it is my view that until such matters are routinely included in the terms of reference for investigations, the ADF will not be in a position to deal comprehensively with complaints to external agencies.

4.46. During my investigation, I was pleased to see the handling of a recent allegation of sexual assault provided a direct contrast to some past practices. In that case, a police investigation was conducted into the allegation of assault, but the Service took other actions to ensure that the context in which the incident arose was carefully examined.

4.47. The first was to commission an investigation into the safety of the work environment and the accommodation of the female personnel and the regulation of the consumption and control of alcohol at the establishment. The second was to commission a team to provide support to the Commanding Officer and other members (for example counselling and the re-investigation of a previous incident about which a member still held concerns).

4.48. My comments about the need for adequate support services are contained in section seven of this report. However, the response of the Service in this case demonstrated a clear appreciation of the need not only to investigate the complaint itself, and to examine the broader contextual issues in which the incident took place, but also a recognition of the impact of a serious allegation on all the members of the work unit. In my view, there is a need to make such considerations a part of the response to all serious incidents.

Conclusion

4.49. There have been problems with the choice of Investigating Officers, in some cases due to lack of appropriate experience and conflicts of interest. Little guidance exists on the factors to be considered when choosing an Investigating Officer.

4.50. In addition, there is little guidance to Commanding Officers on how to develop terms of reference for investigations under the Defence Inquiry Regulations, although the Army has much better guidance in this respect.

4.51. Accordingly, I **recommend** that:

- all Instructions on the handling of complaints and grievances, and on the conduct of investigations include reminders of the factors to be considered when selecting or appointing an Investigating Officer. Where particular expertise may be required, the Commanding Officer should be advised to ensure that the Investigating Officer has the appropriate expertise, or that the Investigating Officer consults with individuals with the relevant expertise (preferably before commencing the investigation)
- all Investigating Officers, under both the DFDA and the DIRs (and members of Boards or Courts of inquiry) be required to declare any actual or potential conflict of interest before commencing an investigation, and
- the ADF revise its Instructions to ensure that Commanding Officers are provided with guidance on how to develop terms of reference, and in particular, the requirement for terms of reference to be outcome focussed and to address context management issues.

In response to my draft recommendations, ADF agreed to implement the above proposals. It noted, however, that there may be occasions when an Investigating Officer with the appropriate expertise will not be readily available, in which event the Appointing Authority will be instructed to explore all available options. Guidance on selecting Investigating Officers and preparing terms of reference has been included in the draft investigation manual.

Planning and conducting investigations

Training and support for investigators

5.1. The ADF's then Director of Complaints Investigation has informed me that the lack of experienced investigators and the inadequacy of training in investigations means that investigators do not always grasp the real issues.

5.2. Concerns about the inadequacy of training for investigators dealing with sexual harassment matters were also highlighted by the Senate Inquiry into Sexual Harassment in the ADF. The Senate Committee recommended that all personnel appointed to investigate incidents must have had appropriate training in the investigation of such complaints.

5.3. In the case of investigation of offences under the DFDA, there is a need for professionally trained Service police to investigate a range of offences under the DFDA and almost all offences committed outside Australia.

5.4. Service police skills are currently maintained through accreditation from agencies such as the Commonwealth Law Enforcement Board, attendance at the National Investigator Training Centre (run by the AFP) and liaison and placements with civilian agencies.

5.5. I acknowledge that the training of Service police presents a real difficulty for the ADF; it has limited involvement in the investigation of certain types of incidents or offences within Australia, and therefore its expertise in these areas is hard to establish and maintain. It is difficult to obtain placements in specialist civilian police units, and therefore difficult to maintain currency of expertise in specialist policing areas. Even where training is obtained, skills are eroded over time where the training is not backed up with experience. The Navy faces special challenges in this respect, as its Naval police are also eligible for service at sea, and may not always be available for specialist investigations.

5.6. There are also difficulties arising from divided loyalties. Service police are only able to investigate where a Commanding Officer requests the investigation, or gives his or her permission for the investigation to proceed (although the matter would normally then be taken up by the head of the Service police).

5.7. It is partly for this reason that the RAAF's revised investigating structure is centrally controlled. A police officer can raise with the central unit concerns about the possibility of an offence having been committed, irrespective of whether the Commanding Officer directs that an investigation is commenced.

5.8. The Army has undertaken a restructure of its police and security trade groups, and has developed a suite of courses that underpin the structure. These courses have received civilian accreditation and meet best practice standards. The RAAF has also commenced basic and advanced investigator training at the Army's Military Police school, following a reconsideration of its structure, role and functions.

5.9. The Navy has not committed itself to the Army training process, but has foreshadowed its involvement, possibly from mid-1998. However, senior Naval Police Coxswains filling sea-going billets will usually receive basic investigator training and refresher training, equipping them to deal with minor Service offences committed on board. The Naval Investigative Service receives advanced investigator training, enabling them to deal with all serious Service offences.

5.10. Looking ahead, during 1998 the ADF is intending to commence a review into the tri-Service investigation and policing capability for the ADF, which I understand will also address training issues. I am satisfied that every effort is being made to ensure that Service police will be adequately trained in the future, and that accreditation processes will promote adequate guidance and documentation for their investigative functions.

5.11. However, until recently no formal training was provided for other Investigating Officers (ie those who are not members of the Service police).²⁵ Officers effectively 'graduate' through experience from investigating minor traffic incidents to more complex investigations; some never graduate.

5.12. The Army advises me that there is some training in investigations conducted during initial officer training and promotion courses for warrant officers, but that it is relatively cursory.²⁶ This is why the Army advises Commanding Officers to appoint Investigating Officers with three to four years experience to deal with complaints regarding discrimination and harassment. In

²⁵ At the time of my investigation no formal training was provided for other Investigating Officers. Following receipt of my draft recommendations the RAAF introduced a training course for such officers.

²⁶ There is, however, extensive training in counselling, values and ethics.

addition, Investigating Officers can seek guidance from the CREWET²⁷ team or from Legal Officers.

5.13. There is no formal training provided to Investigating Officers in the Navy. Investigators are usually appointed as a result of their qualifications and/or experience and only minimal additional training is considered necessary. They are provided with assistance, guidance and supervision by a suitably qualified and experienced officer; this may be a Legal Officer, or an officer with other technical or professional experience appropriate to the investigation. Investigating Officers may also consult staff associated with the Navy's Good Working Relationships program for advice.

5.14. As already noted, the RAAF has been moving toward a centrally controlled and specially trained group of investigators to deal with both disciplinary and administrative investigations. As in the other Services, RAAF investigators can also obtain advice from Legal Officers and relevant personnel dealing with harassment and discrimination issues.

5.15. It would be possible to suggest that, because of the superior investigation training provided to Service policemen, it would be appropriate for them to conduct investigations of other serious incidents (which are not necessarily offences). Indeed, I understand that this has occurred in the past. However, both RAAF and Army personnel involved in dealing with human rights type complaints have indicated that there have been problems with this approach (possibly arising from the tendency to focus on evidence gathering and disciplinary type procedures), and there have been complaints about the investigation of sensitive matters (such as unacceptable sexual behaviour) by the Service police. Hopefully, this will change in the future, as Service police are now provided with training in handling such matters.

5.16. As a result of problems in the past, there has been an increase in the number of complex or sensitive investigations conducted by legal officers. Indeed, the guidance on investigating complaints to HREOC states that in potentially serious cases consideration should be given to using suitably qualified permanent or Reserve lawyers as Investigating Officers.

5.17. I would be concerned if a view was taken that the fact a person has legal qualifications is assumed to mean that they have the necessary investigative skills. This is not necessarily the case.

²⁷ Combat Related Employment of Women Education Team

Guidance

5.18. The main source of guidance for Investigating Officers (who are not Service police members) under the DFDA is the Discipline Law Manual. For investigations under the Defence Inquiry Regulations, the main source of guidance is the Instruction on Inquiries into matters affecting the Defence Force. The ADF has also produced a video and handbook for officers appointed to investigate allegations of harassment and/or discrimination.

5.19. The Discipline Law Manual provides advice on matters such as the questioning of persons, suspension from duty, summons and arrest powers and the treatment of individuals in pre-conviction custody.

5.20. In respect of investigations under the Defence Inquiry Regulations, the Instruction states 'on receipt of his appointment the Investigating Officer should consider who should be called as witnesses to give evidence at his inquiry and which documents he may require to be produced.'

5.21. The video and handbook on investigation of allegations of harassment and discrimination also provide some information on the limits of authority for Investigating Officers, the protections which apply, where to seek specialist advice and information, the rights and obligations of witnesses, brief information on interviewing witnesses and taking statements, and the fact that the rules of evidence do not apply. They then provide a framework for drafting a report, some information on the disclosure of information contained in a report, related legislation and the role of external review agencies.

5.22. The handbook also states that the Investigating Officer should familiarise him or herself with all the available material, read the terms of reference carefully and critically and then re-read the available material. The next step (after consulting a legal officer about any difficulties) is to schedule witnesses. Investigating Officers should consider who needs to be interviewed and in what order (usually the complainant first, then the respondent and relevant witnesses).

5.23. The DFDA guidance says that where an accused is to give evidence at a trial, he/she should be called before any other defence witness.

5.24. My discussions with ADF personnel indicate that difficulties have arisen where witnesses were provided with notice in advance of a requirement to appear before an Investigating Officer; they then had the chance to share information. There

have also been instances where Investigating Officers have failed to interview all relevant or key witnesses.

5.25. While all the information provided in various documents, taken as a whole, is a useful 'ready reckoner' for Investigating Officers, it does not represent a comprehensive manual on how to conduct any investigation.

5.26. In my view, comprehensive guidance on how to conduct investigations, collected into one instruction, would be very helpful in ensuring that investigations are appropriately planned, focussed and managed, and that difficult policy or legal issues are identified at the outset.

Questioning style and approach to witnesses

5.27. The Discipline Law Manual provides some guidance in relation to questioning. It deals with the member's right to refuse to answer questions, the issue of cautions before questioning where a person is to be charged or summonsed, the treatment of confessions, and the rules for questioning once a person has been charged.

5.28. The Instruction on investigations under the Defence Inquiry Regulations makes no reference to questioning of witnesses. The handbook for officers investigating harassment and discrimination complaints states that the Investigating Officer should list the questions to be asked of each witness and provides some general guidance on interviewing witnesses (such as gaining the confidence of witnesses, that witnesses may give a different story when questioned in subsequent interviews and that they may have different versions of the same event).

5.29. Once again, this is a guide to the basics, but more could be provided to Investigating Officers in planning and phrasing their questions. This may help an Investigating Officer avoid inappropriate, or inappropriately framed questions.

5.30. Examples of what I consider to be an inappropriate questioning technique occurred in one of the cases I reviewed. The following is a small selection:

- 'And would it be fair to say that [X] was most unforthcoming in terms of what actually happened?
- 'I certainly formed the view that [X] was at the very least evasive and possibly even more than that. Is that fair comment?'

- 'I formed the opinion on a number of times that when asked a question, [X] would give you half an answer or no answer at all?'
- 'Would you say that [X's] evidence seemed to be designed to cast [X] in the best light possible - the best light possible, given the circumstances of what was already known?'

5.31. To ask such leading questions *may* be acceptable for a barrister in the adversarial circumstances of a court, but in my view they are not usually appropriate for an objective, impartial questioner in an inquisitorial situation. Such practices leave the ADF open to accusations of bias. While good questioning technique comes with experience, in my view there is a need for comprehensive guidance and training in how to plan and phrase the questions in the first instance.

Taping of interviews/taking of statements

5.32. My examination of a number of cases also raised the question whether there is sufficient guidance on how to record interviews and take statements.

5.33. The handbook provides some guidance on the requirement for statements, such as the need to follow a logical and chronological sequence, the use of the first person, use of the witnesses' own words, and the need to avoid irrelevant material and opinions. It also provides a pro-forma for statements.

5.34. I acknowledge that this can be a difficult task for an Investigating Officer, but until comprehensive guidance is available, and adequate training provided, it is likely there will be situations where the value of the evidence recorded will be limited, if not negligible.

5.35. In one case examined by my office, none of the statements taken from witnesses was signed, and the content of the witness statements contained little more than innuendo, hearsay and gossip. A subsequent police investigation found that, contrary to the findings of the first investigation, there was no evidence to support the allegation, and that the evidence of witnesses was of marginal value.

5.36. In my view, the guidance also needs to make it clear that there should be no unexplained breaks in the tape recording of an investigation, no off-the-record statements or questions and no questioning by unauthorised personnel.

Knowledge and use of powers

5.37. The Discipline Law Manual provides guidance on an Investigating Officer's powers under the DFDA. The guidance on DIR investigations provides advice on the power to compel witnesses to answer questions and produce documentation, the right of witnesses to claim the privilege against self incrimination, the witnesses' right to representation, and the treatment of information provided to an inquiry. However, the guidance on whether a member can claim the privilege against self incrimination when appearing before an Investigating Officer is, in my view, not sufficiently clear.

5.38. This was demonstrated in one instance when a person was requested to appear before an Investigating Officer where he was expected to answer all questions. The person applied to the Federal Court for a decision on whether he was entitled to object on reasonable grounds to answering any questions which he believed may tend to incriminate him. While the Court decided that the Investigating Officer did have the power to inquire into the incident and to require the witness to appear, it also held that the right to claim privilege against self-incrimination existed.

5.39. It is of some concern to me that the person had to proceed with an application to the Federal Court for a decision on whether the privilege existed, when the Service had internal legal advice during 1991 that the privilege existed for witnesses appearing before Investigating Officers. That advising stated that there was no legislative support for the proposition that a member of the Defence Force must answer incriminating questions asked by an Investigating Officer.²⁸

5.40. In my view, the DIR instruction needs to be amended to make the right to claim the privilege against self incrimination explicit. The fact that the instruction has not been clear on this point in the past, leads me to ask if other individuals (who were not prepared to go the extent of challenging the ADF in Court) have not claimed the privilege when they were entitled to.

Evidence gathering and analysis

5.41. There is comprehensive guidance on the rules of evidence in the Discipline Law Manual for matters dealt with under the DFDA.

²⁸ This is different to Boards and Courts of Inquiry which can take evidence under oath, and for which the privilege of self incrimination does not exist.

5.42. In respect of investigations under the Defence Inquiry Regulations, the Instruction states that there is no requirement to follow the rules of evidence (eg. hearsay evidence may be received) or to comply with normal legal procedures which may apply in civilian courts or tribunals.

5.43. The handbook on the investigation of harassment and discrimination complaints states that the rules of evidence do not apply, gives an example of hearsay evidence, and advises that it is up to the Investigating Officer to decide what weight is to be given to any hearsay evidence accepted.

5.44. Beyond this, there is nothing to guide an Investigating Officer on how to assess the evidence obtained during the course of an investigation and there have been difficulties with treatment of evidence in investigations in the past.

5.45. These difficulties include the reliance upon hearsay and rumour, the manner in which evidence is taken (which can render it of little value), the failure to obtain evidence from all relevant witnesses, and the apparently biased evaluation of the evidence obtained based on the personal perceptions of the Investigating Officer.

5.46. Errors of these types can have significant consequences for a person who is the subject of an inquiry if they are not detected and the findings overturned. It also represents a cost to the Services if investigations are poorly conducted and are based ultimately on whether the investigator believed one or other of two possible but conflicting stories.

5.47. An Investigating Officer's findings are not arrived at simply by determining who you believe. They are about examining the evidence to see whether, on the balance of probabilities (or the required standard of proof) there is sufficient evidence to suggest that an incident or offence occurred. In assessing the evidence, you may also assess the credibility of the witness. However, where the required level of evidentiary substantiation does not exist, then the principle of 'innocent until proven guilty' must stand.

5.48. In my view, there is an urgent need for additional guidance on how to gather and assess evidence, and recognition that it will not always be possible to confirm or refute an allegation.

Record keeping

5.49. The DFDA provides guidance on documentary evidence required for the investigation and prosecution of offences. There is virtually no guidance in the Instruction on DIR inquiries about documentation of the investigation.

5.50. The handbook on investigating harassment and discrimination complaints states that the Investigating Officer should list the Instructions and Directions consulted and the reliance placed upon them, and attach in an annex copies of relevant documents or extracts as appropriate. It also states that the terms of reference, all signed statements and any exhibits must be attached.

5.51. Various other Defence Instructions also provide guidance on the level of documentation required. The specific requirements vary from Instruction to Instruction, but there is generally a requirement to keep records of complaints, counselling interviews, records of conversations, advice or information given and other relevant correspondence or documents. The Army's Instruction²⁹ and the General Instruction on Fraud are probably the most comprehensive in respect of the documentation required.

5.52. However, it is my view that this aspect of the guidance could be considerably improved.

Conclusion

5.53. In my investigation I found that, in a limited number of instances, there were examples of complaints where there have been serious flaws in the investigatory process. As there is no central review of DIR investigations, I am unable to determine how frequent or widespread such problems may be.

5.54. I consider that there is evidence of a range of problems experienced in the conduct of investigations in cases examined by my office. These have included:

- inadequate planning of investigations
- failure to interview all relevant witnesses and assumptions made about the credibility of witnesses interviewed
- pursuit of irrelevant issues in witness interviews, use of inappropriate questioning techniques and failure to put contradictory evidence to witnesses for a response

²⁹ DI(A) ADMIN 23-2: Reporting and Investigation of Incidents

- failure to record evidence properly and, possibly, preparation of witnesses and unauthorised questioning of witnesses
- failure to analyse evidence objectively, and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made, and
- inadequate record keeping.

5.55. It is significant that the bulk of the cases examined by my office where there had been problems involved investigations under the DIRs rather than the DFDA. It is possible that this has occurred because the ADF has a much greater experience of the investigation of disciplinary offences than other matters, there are significantly higher numbers of DFDA investigations conducted, and many (if not most) disciplinary investigations are conducted by specially trained officers.

5.56. With the increasing incidence of DIR investigations there is a need to provide better training to officers investigating matters under the DIRs, and to support that training with comprehensive guidance, particularly if DIR investigations continue to be undertaken by line officers.

5.57. I therefore **recommend** that the ADF develops a training strategy for officers who conduct investigations under the DIRs, and advises me of its strategy within two months of this report. I also **recommend** that officers should not be appointed to conduct investigations under the DIRs unless they have received training, or they have other experience or expertise which makes them suitably qualified to do so.

In response to my draft recommendations, ADF decided to form a working party to develop an ADF-wide training strategy and guidance on DIR investigations. In addition, the Ombudsman Implementation Team, in consultation with my office, has developed a new draft manual titled *Administrative Inquiries and Investigations in the ADF* which is expected to be released early in 1998. I consider this initiative to be a significant step forward and am most satisfied with the ADF's response.

In considering my draft recommendation that only officers who have the requisite training or expertise perform investigations under the DIRs, ADF stated that while every effort is made to appoint appropriately qualified Investigating Officers, the exigencies of a military force will often dictate that it would not be possible to give an undertaking that only such officers would be appointed. I responded that I did not regard it as essential an officer should have completed such a course, but that the officer appointed should have the requisite expertise, whether through training or other relevant expertise.

I note, also, that the RAAF did introduce a comprehensive training course for investigators, conducted by Charles Sturt University, in response to my recommendation. In my view, that training would provide a good basis for an ADF-wide training strategy.

5.58. Elsewhere in this report, I have recommended substantial changes to the guidance on the investigation of serious offences and incidents. Because of the difficulties experienced with DIR investigations in the past five years, I am also **recommending** that the guidance on such investigations be revised to provide advice to Commanding Officers and Investigating Officers on how to plan and conduct investigations.

ADF agreed to this draft recommendation.

5.59. In my view, it would be sensible for the ADF to incorporate the relevant Instructions and supporting guidance into a comprehensive investigation manual for investigations under the DIRs.

ADF agreed to this draft recommendation and, as noted above, the Ombudsman Implementation Team has developed a comprehensive draft manual titled *Administrative Inquiries and Investigations in the ADF*.

ADF noted that the new manual would not, however, address DFDA matters properly the province of the Discipline Law Manual.

5.60. Finally, there is an urgent need for the Defence Instruction on investigations into matters affecting the Defence Force to be amended to clearly indicate that an Investigating Officer investigating under the DIRs cannot compel witnesses to answer questions where the answer may tend to incriminate them for a criminal or Service offence, and to indicate that assistants to an Investigating Officer do not have the power to question witnesses.

5.61. There is also a need to amend Annex C³⁰ to the Instruction to the same effect. I **recommend** that these amendments to the Instruction be made immediately.

ADF agreed to this draft recommendation. This has been included in the draft manual, expected to be issued early in 1998. The manual will replace the existing Instruction.

In relation to my draft recommendation concerning assistants, ADF advised that an amendment was not necessary as assistants to Investigating Officers would no longer be appointed.

³⁰ Annex C to the Instruction is given to members to inform them of offences under the Defence Inquiry Regulations.

Monitoring, Supervising and Reporting on Investigations

6.1. The bulk of Service police investigations do not relate to complex matters, and are completed within a relatively short time frame. Service police are specifically trained to conduct investigations, and the proof of the quality of their investigatory work lies in whether the evidence is admissible before a Service Disciplinary Authority or Tribunal.

6.2. In addition, Service policemen are required to keep diaries or notebooks of their work, which are routinely examined by their superiors. The frequency of that examination will depend on the complexity of the investigation, but in any case, evidence debriefings with superior officers are conducted either during the course of a complex investigation or after the completion of simple investigations. The evidence is then written up against the charges and a superior officer will examine the proofs to ensure that the evidence has been collected and presented in an appropriate manner.

6.3. I am satisfied that the processes in place for supervising and monitoring Service police investigations are appropriate. The same cannot, however, be said for investigations under the Defence Inquiry Regulations.

6.4. From my examination of past investigations I observed that there had been problems experienced which raised the question of supervision of investigations. This caused me to question what arrangements the ADF had in place to monitor investigations to ensure that they are being conducted appropriately, confined to their terms of reference (or terms of reference are amended where necessary), and expert assistance is sought or provided.

Monitoring and supervision of investigations

6.5. The Air Force has advised me that Investigating Officers will normally be the subject of limited direct guidance and supervision, and it is the Investigating Officers who decide how the investigation is to be conducted. However, they are at liberty to approach the Appointing Authority at any time to seek clarification or guidance if it is required. They are not usually provided with dedicated assistance, other than administrative support, but are aware of the option of obtaining specialist advice.

6.6. The Army advises me that the supervision of Investigating Officers is left to the Appointing Authority and is not incorporated into terms of reference or instruments of appointment. The assistance, guidance or supervision required is dependent upon the experience of the Investigating Officer and the complexity and sensitivity of the matter. In some cases, a Legal Officer provides assistance, in others a more senior officer may supervise. Generally speaking, it is up to the Investigating Officers to seek any guidance or assistance they require.

6.7. In the Navy, assistance, guidance and supervision of the Investigating Officer is provided by a suitably qualified and experienced officer who may be a Service Legal Officer, or an officer with other technical or professional experience appropriate to the investigation.

6.8. There is no requirement that an Investigating Officer submit a plan prior to commencing an investigation, or that the Investigating Officer report to the Appointing Authority or Commanding Officer on any pre-arranged basis throughout the investigation.

6.9. This is possibly because the Instructions relating to a range of incidents anticipate that a report on the investigation will generally be submitted within 28 days of the commencement of the investigation.³¹ Where an investigation cannot be completed within the time frame specified, the Investigating Officer may seek an extension.

6.10. Beyond this, the Instructions state that, where an investigation cannot be completed within 28 to 30 days, the complainant and respondent (as well as any other parties affected) are to be updated on a regular basis on the investigation and the reasons for the delay.

6.11. The Army's instruction also has a requirement that when a redress of grievance cannot be resolved within one month, monthly progress reports are to be made to the Army office until the matter is finalised.

6.12. Incidents of unacceptable sexual behaviour must also be reported on a monthly basis.

³¹ The Instructions vary between 28 and 30 days on this matter. The Instruction on Fraud investigations, for example, specified that complex investigations should be completed within three months. The Instructions also vary on whether the completion date is to be specified in the Instrument of Appointment.

6.13. Accordingly, it appears that there is no structured process for monitoring the progress of investigations (other than in the Army and for complaints of unacceptable sexual behaviour), to see if the investigation is addressing the necessary issues and is being conducted properly.

6.14. I am aware that the framework in which the ADF operates encourages officers to demonstrate initiative and to make decisions within their sphere of responsibility without undue reliance on their supervisors or managers. I am also aware that there is a strong view that officers appointed as investigators should complete their task without command interference.

6.15. I do not believe that structured supervision and monitoring arrangements have to mean 'command interference'. I suggest that a regular reporting arrangement, particularly to cover process questions, would help to ensure that investigations are being conducted properly. I believe that the Appointing Authority or Commanding Officer needs to be regularly informed of such things as:

- the progress of the investigation
- the matters yet to be investigated
- the processes that have been followed to ensure procedural fairness
- confirmation that the investigator has access to all relevant material and witnesses
- whether the investigator has considered the need to consult experts on process and substance
- whether the investigator is confident that he/she knows how to identify and resolve differences of opinion, expert or otherwise
- confirmation that the investigator appreciates the need to back up judgements by reasoned analysis which will stand up to external scrutiny, and
- advice on whether the expected completion date will be met, and if not, why not - this may involve a re-definition of what was originally thought to be peripheral.

6.16. The basic purpose of these kinds of questions is not to pre-empt or influence the investigator's conclusions, but to make sure that help and guidance is available which will enable the production of a comprehensive, balanced and impartial report. In

my view, the consequences of failing to have this sort of an arrangement in place are demonstrated by the fact that, in several cases, the ADF has had to direct that a further, or supplementary investigation is conducted, and/or has been severely criticised by external review agencies or under administrative law review processes.

Reports of investigations

6.17. Investigations under the DFDA do not result in reports. The outcome of a DFDA investigation will be the production of briefs of evidence for any charges which have been laid. There is substantial guidance to and training for Service police on how this task is to be undertaken.

6.18. The instruction on investigations under the Defence Inquiry Regulations states that, on completion of his/her investigation, the Investigating Officer is to submit a written report to the Appointing Authority setting out the findings and recommendations (if empowered to do so). Any evidence taken down in writing and documents or articles received as evidence should be forwarded with the report. A brief sample report structure is also provided.

6.19. The handbook for the investigation of harassment and discrimination complaints provides some further guidance. It also provides a structure for the report, and provides brief advice on the information to be contained in each section of the report. It includes advice on the need to provide an assessment of the evidence (including an explanation of any conflicting evidence) and options for resolving the complaint.

6.20. In my view, the existing guidance could be improved (for example, by providing advice on how to weigh evidence, and on how to avoid some of the problems the ADF has experienced with investigation reports in the past).

Developing Recommendations

6.21. In the instrument of appointment for an investigation under the Defence Inquiry Regulations, the Appointing Authority may authorise an Investigating Officer, Board or Court of Inquiry to make recommendations.

6.22. There is no guidance in the DIR Instruction to investigating bodies on how to develop recommendations, despite the fact that their power to make recommendations is unfettered.

6.23. In my view, the ADF should develop guidance for Commanding Officers and Investigating Officers on the limits of the Investigating Officer's authority in relation to an inquiry, covering a number of matters including the claiming of privilege, pursuit of issues which are relevant, adherence to the terms of reference and the boundaries of such an inquiry.

6.24. Any proposed recommendations relating to a serious offence having been committed should be referred to a legal officer for advice in the first instance.³²

6.25. Similarly, the guidance should encourage the Investigating Officer to seek advice from experts in the formulation of recommendations relating to human rights type complaints, and to address procedural fairness issues.³³

6.26. The guidance should also indicate that there is little value in making recommendations or administrative action in relation to members who have already been discharged, and who are unlikely to seek to rejoin.

6.27. Finally, I think it imperative for the guidance to indicate the need for recommendations to take account of any systemic issues raised by the investigation, that is, to look beyond any remedy or action in relation to an individual and to ask if the existing rules, procedures or legislation need to be improved.

Quality Assurance

6.28. As I have indicated elsewhere, the processes for supervising and monitoring investigations under the DFDA reduce the risk of investigators failing to conduct a proper investigation. The ultimate quality assurance test for such investigations is, of course, whether or not the evidence is admissible before the hearing authority.

6.29. In the case of investigations under the Defence Inquiry Regulations, the Instruction states that, on receipt of the report, if the Appointing Authority considers that the Investigating Officer should reopen his inquiry and make a further report with respect to particular matters within this period, he should so direct in writing and the inquiry is then reopened. Similar provisions exist for Boards and Courts of Inquiry.

³² Noting that an investigator under the DIR should not be reaching findings on offences.

³³ My comments on procedural fairness issues arising from investigations conducted by the ADF are in section eight of this report.

6.30. Perhaps the Appointing Authority would find it useful at this stage to have a review checklist, to cover the same kinds of issues I have suggested should be part of the monitoring process. This could be signed off by a legal or administrative review officer, indicating that the report and supporting documentation has been examined, and is considered appropriate, or should be returned to the investigating body for further inquiries or explanation.

6.31. In accordance with the Instruction on DIR investigations, a copy of the proceedings of an inquiry, the Investigating Officer's report and any comments or notes of action taken by all officers superior in the chain of command to the Appointing Authority are to be forwarded to the Director of the Complaints Resolution Agency.

6.32. The report is examined to ensure that the findings and recommendations are appropriate, consistent with Service policy and supportable on the basis of the evidence presented.

Conclusion

6.33. In my opinion, the ADF's guidance and processes for supervising and monitoring investigations under the Defence Inquiry Regulations should be improved.

6.34. There is no structured process for monitoring and supervising investigations, with the exception of some monitoring of investigations undertaken by the Army and the investigation of complaints of unacceptable sexual behaviour.

6.35. In my opinion, concerns about command interference should not mean that investigators and Appointing Authorities are not responsible and accountable for the way in which investigations are conducted from the outset.

6 . 3 6 . I recommend that the ADF:

- implement a process whereby investigating bodies report periodically on the progress of their investigation (if the investigation is to take more than one month), and which allows for an assessment of whether the investigation is being conducted appropriately, and
- amend the present guidance to investigators to provide advice on the development of investigation reports and recommendations, and the limits of their authority in this

respect (eg. they are not to make a finding on whether a criminal offence occurred).

6.37. In my view, there is also a need to ensure that Investigating Officers whose investigation and/or reports are subsequently found to be flawed are counselled regarding the inadequacy of their investigation and/or report. There may be a need for further training, or even administrative or disciplinary action in cases where more serious errors are made.

As part of the new investigation manual, ADF is introducing a mechanism for interim reports on investigations (where the investigation takes more than one month) which enables the Appointing Authority to assess progress and determine if the investigation is being conducted appropriately.

In relation to the second point and paragraph 6.37, ADF agreed to amend the guidance to investigators and to institute counselling of investigators where appropriate.

Support Services

7.1. As indicated elsewhere in this report, a crucial adjunct to the investigation or resolution of a complaint of a serious incident or offence, is provision of support and ongoing assistance to the individuals involved.

7.2. A repeated complaint of victims of harassment and discrimination or sexual offences has been the insensitive way in which complaints are handled and the lack of support services, such as post incident counselling.

7.3. Since the Senate Inquiry into Sexual Harassment in the ADF, the ADF has invested considerable effort in ensuring that parties to complaints regarding harassment, discrimination and unacceptable sexual behaviour are dealt with fairly and compassionately.

Availability of support services

7.4. The Instruction on harassment, discrimination and unacceptable sexual behaviour emphasises the need for Commanding Officers to ensure that both the victim and the alleged offender are provided with the necessary Service assistance and support to ensure there is no victimisation or retribution during the course of investigations and judicial proceedings.

7.5. The Instruction also states that any measures aimed at resolving a complaint and ensuring that there is no recurrence may require consideration of posting action, suspension of duty with or without pay, or involuntary separation from the Service as a result of formal administrative action. The single Service Instructions provide for regular review and monitoring of members' performance after a serious incident, with feedback provided to the member.

7.6. Members (including the alleged offender) are encouraged to seek advice from any legal officer, chaplain, social worker, psychologist, health service officer, or other support person they may choose, noting that there may be an obligation on those personnel to then assist in having the matter dealt with through the correct channels.

7.7. The guidance also contains checklists for dealing with complainants and respondents which refer to the need to ask the

individuals involved whether they require any legal, medical or counselling support.

7.8. The Army has a requirement that, in the case of complaints involving harassment, discrimination or unacceptable sexual behaviour, complainants and respondents are required to have at least one counselling session with a psychiatrist, but subsequent counselling is voluntary. This is designed to reduce any stigma which may be attached to seeing counsellors; the first session is mandatory to open the door to further counselling if the member wishes it.

7.9. In addition to the support services outlined above, the personal or community service organisations for each of the Services provide access to social workers and counselling services for members (and their families) faced with crisis situations.

7.10. Members who are the 'survivors' of sexual offences require special care and attention. The guidance recognises this, and states that the management of sexual offences rests on the need for appropriate crisis intervention and follow up counselling, medical care and legal redress. It also recognises that crisis intervention with long-term psychological counselling is important for the prevention of Post Traumatic Stress Disorder, and that where such intervention is not made or is inadequate, the potential for long-term stress, including severe depression, increases markedly.

7.11. During my investigation, my office held discussions with the AFP Sexual Assault Unit and the Rape Crisis Centre about the particular needs of survivors of sexual assault. My office was advised that it is imperative that the survivor is given the following support and information after the event:

- that the incident is not the victim's fault, and that the allegation is accepted without any implication of disbelief
- that no judgements will be made on the basis of the complaint or their response to it, and no 'why' questions (such as 'why did you go off with him/her?') will be asked
- that they have immediate and on going access to specialised counselling (the counsellor must specifically be trained in handling sexual assault matters)
- any movement of a survivor may encourage a perception of blame, and consequently the survivor must be given the choice of remaining located within the workgroup, or moving elsewhere

- access to appropriate medical assistance/examination, and the 'morning after pill' if desired
- access to a support person so that the survivor can 'talk things through', and
- information on legal processes if they take their complaint to the police, so they can make an informed decision on whether to proceed with their complaint.

7.12. Specialist counselling for the survivor's partner may also be necessary.

7.13. This information is not contained within the ADF Instruction on dealing with complaints of sexual offences. In my view, it is important that senior personnel (such as Commanding Officers) are aware of the issues of concern to survivors, and do not inadvertently exacerbate the situation through actions which (although well intentioned) may not be appropriate.

7.14. The Instruction does not contain a list of organisations which are able to provide the necessary specialist counselling (for both survivors and the alleged offender, where it is available), and does not indicate the ADF's policy where a member alleges they have been the victim of a sexual offence, but they do not wish to make a complaint to the police, or to have the matter investigated by the ADF. The exception is the Army guidance which states that complaints are referred to the police with the member's permission. In my view these are also issues which should be addressed in the Service-wide instruction.

7.15. Despite these omissions, the ADF provides a comprehensive range of services to members affected by harassment, discrimination or unacceptable sexual behaviour. The range of services is outlined below.

Contact officers

7.16. As a consequence of the Defence Reform Program, the three Service equity organisations were combined into the Defence Equity Organisation. This maintains a network Contact Officer/EEO Contact Officers within units to provide impartial advice to complainants, alleged offenders and management in relation to all forms of discrimination and harassment. These officers are available to provide advice to both Service and civilian employees involved in harassment. They may provide moral support and advice on options for future action to those seeking assistance. They do not, however, become involved in any

investigation which may follow, or the resolution of a complaint, or speak for the complainant, alleged offender or management.

7.17. The Defence Equity Organisation maintains, in conjunction with the Department of Defence, a consolidated database of EEO Contact Officers (Air Force), Harassment Contact Officers (Army) and Good Working Relationships Facilitators (Navy), which is updated on an annual basis.

7.18. Work has also commenced on sequentially numbered Defence Instructions which deal with the diverse range of ADF orders on EEO and harassment for use and reference by commanders in the field. The Organisation is also preparing ready-reference packs to assist Harassment Contact Officers with their duties.

Problem Response Teams/Critical Incident Teams

7.19. In addition to harassment contact officers, both the Navy and the Air Force Instructions make reference to the use of dedicated response teams for particularly complex or traumatic cases. Such mechanisms are usually only put in place where a number of personnel are affected.

7.20. The Navy may institute a Problem Response Team to resolve particularly difficult conflicts between personnel in their Command or Division.

7.21. For very serious incidents, a Navy Critical Incident Stress Management Team comprising dedicated and specifically trained personnel may be instituted to prepare Service personnel to manage job-related stress after exposure to a particularly stressful event and to assist personnel who are experiencing the negative effects of stress. The Air Force has similar arrangements for critical incidents.

7.22. The Army guidance does not refer to problem response teams or critical incident teams. However, as they usually operate within Australia, the necessary services can be accessed, and where they deploy outside Australia or on exercise, support structures (such as Military Police, legal officers, and medical officers) are usually in attendance. Where necessary, they will access civilian resources if appropriate Army personnel are not available, or (as was the case in one mission) the required resources are flown in.

7.23. The Navy guidance on critical incident stress management also offers managers and supervisors a check list of critical incident stress symptoms. In my view, it would be sensible

for this material to be incorporated into all Instructions and guidance on the management of serious incidents or offences.

ADF advised that, following from the Defence Reform Program, the three Service Equity organisations had combined and the Navy check list will be available to the three Services.

Hotline services

7.24. Each of the Services has a hotline number for members to call if they require assistance in dealing with an incident. The previously separate units dealing with the calls are now amalgamated within the Defence Equity Organisation, although each Service has its own dedicated line.

7.25. Outside normal working hours, messages may be left on an answering machine and a response will be provided within 12 hours. All operators undergo a telephone counselling course, and are educated in EEO and Human Rights issues. They are also aware of ADF complaint mechanisms and support systems, and are able to arrange access to mediation or conflict resolution support services.

7.26. The hotline can be accessed by anyone, including Commanding Officers wishing to seek advice on the appropriate procedure for dealing with an incident which has come to their attention.

Alcohol and drug related counselling

7.27. Cases examined by my office during the course of my investigation indicated there is a high correlation between the ingestion of alcohol and/or drugs and the incidence of serious offences. The ADF has recognised this, and provides assistance to members who may have problems with drugs or alcohol. Counselling, education and medical treatment is available.

7.28. The guidance provides that the 12 months following rehabilitation or treatment programs is critical and that Commanding Officers are to ensure that opportunities are available for members to attend further counselling and support groups as necessary. The Air Force requires that Commanding Officers are to review the member's progress at regular interviews in the 12 months following rehabilitation.

Access to family, significant others

7.29. In some cases (for example, serious sexual offences) access to a member's spouse or another significant individual is

essential to their speedy recovery. This can be difficult, especially if the incident occurs outside Australia.

7.30. Under the guidelines for compassionate travel, a member may be granted one free return travel entitlement in a leave year for a journey to a compassionate destination in Australia, where the approving authority considers the presence of the member essential because of exceptional circumstances. There is also provision, where a member is serving in a remote locality, for a spouse's travel to be paid when the approving authority considers the presence of the spouse essential because of exceptional circumstances.

7.31. However, there is no entitlement to compassionate travel to a destination outside Australia, which has particular implications for members of the Navy and members participating in exercises or missions outside Australia. The Navy guidance on sexual offences does indicate that where a ship is at sea every effort is to be made to land the victim as soon as possible, not only to facilitate appropriate medical attention, but for purposes of counselling and long-term care.

7.32. There is no requirement in the Instruction on harassment and discrimination that Commanding Officers give consideration to whether a victim should be offered the choice of either leaving the establishment (or a significant other joining them at the establishment if possible) to assist with their recovery. In my view, this is part of the 'context management' requirements of serious incidents, and the policy on this matter should be clearly stated in the relevant guidelines.

7.33. Experts in dealing with sexual assaults also advised me that it is imperative that any movement of the alleged 'survivor' should be the survivor's decision. This is because sexual assaults are about power rather than sex, and it is crucial that the alleged 'survivor' begins to make decisions for him/herself after the assault has occurred. I note there is no mention in the guidance on the need to allow the 'survivor' to make his/her own decision in this respect.

7.34. The guidance on harassment, discrimination and unacceptable sexual behaviour does, however, recognise that it may be necessary for members to be temporarily transferred pending the completion of police or judicial action, and that this should be arranged in a manner which does not prejudice the outcome of those proceedings.

Legal assistance

7.35. Where a serious allegation is made, or a serious incident occurs, there may be a need for complainants and respondents to get legal advice at an early stage. The ADF provides considerable assistance to its members in this regard.

7.36. Legal assistance (provided to any member of the Defence Force) includes advice on the nature and consequences of military charges of allegations made against them and representation of members where appropriate before Service disciplinary tribunals and courts and boards of inquiry. Legal officers are made available to defend members at courts martial and to assist members in preparing petitions and appeals, if convicted.

7.37. However, assistance is dependent on the availability of legal officers. Where a permanent Legal Officer is not readily available - possibly because there would be a conflict of interest in advising both the command structure and the member - members may make use of the legal officers of the Reserve Forces who are situated nearest.

7.38. On overseas postings, legal assistance is also subject to the exigencies of service. If a legal officer is in the locality, he or she will usually provide legal assistance if other duties permit and, again, if giving assistance does not involve any conflict of interest as legal adviser to the commander.

7.39. In civil cases, a Legal Officer may not act for or formally represent the member in the Legal Officer's military capacity but may, if a member of the Reserve Forces, be retained by the member as a private legal practitioner.

7.40. Legal aid (counselling advice *and* professional representation) may be provided to any ADF member overseas charged with criminal or civil 'off duty' offences or facing litigation as a result of 'off duty' incidents, provided the charges of litigation arose during the course of a period of approved leave from official overseas duty. This includes professional representation by a Service legal officer, solicitor or barrister at committal/preliminary hearings, coronial inquests, civilian trials or at litigation proceedings relating to personal or property damages.

7.41. If members overseas face serious criminal charges, it is regarded as essential that legal aid is provided immediately. Commanding Officers or detachment Commanders are authorised to expend up to \$5000 for this purpose. Higher amounts can be authorised by Service Assistant Chiefs of Staff.

7.42. There is also provision for payment of bail or bond and, pending trial, payment of fines (which the member must subsequently repay) and payment for interpreting services where necessary.

7.43. Legal assistance can also be sought in preparing an application for a Redress of Grievance. The role of legal officer is not to take on the running of the complaint, but to provide advice on rights and principles of administrative law and procedural fairness.

7.44. In addition to the above services, a free legal advisory service is available to members and their families by appointment through the Personal or Community Services Organisations attached to each Service.

7.45. However, the training notes from the Director of Complaints Investigation (now the Complaints Resolution Agency) indicate that the provision of legal assistance to complainants or respondents is something of a difficult issue in relation to HREOC complaints.

7.46. At present, only initial advice is available to either party under the relevant Defence Instruction.³⁴ When a member of the ADF is notified that he/she is named as a respondent in a complaint lodged with HREOC, he/she is advised to seek initial legal advice before making any response to the Commission. However, the granting of assistance beyond initial advice is discretionary. Nevertheless, where the Commonwealth may be vicariously liable, legal assistance may be sought to defend a claim before HREOC.

7.47. There is also the question of who pays for the costs of a complainant's witnesses, and if they are ADF members, whether they are considered to be on duty when providing evidence. The Senate Inquiry into Sexual Harassment in the ADF noted that it is not standard practice for *witnesses* in cases of alleged sexual assault to have the assistance of legal counsel, but that the Navy provided such assistance when requested.

7.48. Because of the difficulties in dealing with HREOC complaints, the guidance is currently under review.

Medical management

³⁴ DI(G) PERS 12-1: General Scope of Legal Assistance provided to Service Personnel and Legal Aid to ADF Members Overseas.

7.49. In cases (such as sexual incidents or offences which occur outside Australia) or assaults resulting in injury to a member, or where there is a delay before civilian authorities can arrive, there may be a need for a member to receive medical attention. Medical management includes not only clinical care and the collection of forensic evidence, but also (in the case of sexual offences), the detection of sexually transmitted diseases, including AIDS, and the provision of 'morning after' oral contraceptives.

7.50. ADF members have access to medical, counselling and psychiatric services. The Services also have a comprehensive Health Policy Directive for dealing with cases of sexual assault. The Directive addresses not only the need to collect evidence and treat the physical aspects of sexual assault, but also addresses the importance of assistance to the victim by way of psychological and first aid management, including the re-empowerment of the victim by presenting options.

7.51. The Navy guidance states that, in the case of sexual assault, a medical examination should only occur with the consent of the victim, and the consent to treat and examine, where possible, is to be obtained in writing before undertaking any examination. A member of the same sex is to be present during the medical examination wherever possible, unless the victim requests otherwise. The victim is to be provided with immediate medical attention from either Service or civilian sources, whichever is the more practical.

7.52. There is no equivalent statement in the Tri-Service Instruction on the management of sexual offences, nor any indication that forensic evidence can be collected up to 72 hours after the event. In my view, the Instruction needs to be amended to reflect the ADF's policy on medical examinations and the time frame for the collection of evidence. This is crucial for ensuring that Commanding Officers and other support personnel respect the rights of survivors, and that they do not make assumptions about whether it is too late to collect evidence.

Use of case managers

7.53. Where a serious offence or incident occurs, there may be a need to involve a significant number of personnel in managing the fallout from the incident. For example, it may be necessary to repeat the story to personnel involved in coordinating posting action, personnel in the administrative review and counselling areas and personnel involved in processing the payment of civilian medical expenses.

7.54. It can be very distressing to a survivor of a sexual offence or incident to have to repeat his/her story in order to obtain the necessary action (for example, a compassionate posting).

7.55. In my view, it would be sensible for the ADF to consider appointing 'case managers' in serious incidents, who could facilitate all the appropriate action. This would assist in minimising the distress to complainants and ensuring that action is taken in a timely fashion.

Training and education for support services

7.56. The ADF has introduced extensive programs to educate all personnel on Equal Employment Opportunity matters, including the elimination of sexual harassment. Training programs cover both initial entry and through-career courses. These are supplemented by specific training for any personnel who wish to develop skills and techniques for dealing with harassment at the interpersonal level.

7.57. The Navy has also produced a video called 'Fair Game' which deals with unacceptable workplace behaviour. The video has been used to support the Navy's Good Working Relationships training and education program.

7.58. Training is provided to personnel (such as Medical Officers, Psychiatrists, Social Workers and Chaplains) in each of the Services who may be used as alternative avenues of support to identify and assist personnel who may be at risk. This includes the identification of cases which should be referred to another agency for more detailed management, and explanations to all personnel on the role of specialists.

7.59. Harassment Contact Officers receive training from each of the Services, covering such issues as the relevant legislation, legal issues, conflict resolution, EEO and, in some cases, mediation.

7.60. The Instruction on harassment, discrimination and unacceptable sexual behaviour states that it is the responsibility of all Commanding Officers to implement appropriate training programs for all members within their unit. As a minimum, formal training is to be given at all initial entry courses, non-specialist promotion courses, command courses, Service staff colleges, and courses for Harassment Contact Officers/Equal Employment Opportunity Contact Officers. The Services have developed training and education material for use by commanders.

7.61. The Services also have specific education initiatives on alcohol and drug awareness for all members, and for personnel assisting with education and rehabilitation programs.

Other initiatives

7.62. In addition to the ADF wide initiatives outlined above, the Services have introduced a range of other measures designed to minimise the risk of harassment and discrimination of members, and to ensure that adequate support services are in place where incidents occur:

- the Navy has a policy (which it shares with some overseas forces), of never placing women in workplaces on their own. No female junior sailor is posted to a ship where there are no billeted female senior sailors or officers, and every effort is made to post women in groups of no less than three
- the Navy also has an additional reporting requirement to record formal counselling or warning for any unacceptable sexual behaviour. The record includes information about whether the offender has been referred to counselling
- Navy personnel also have access to a Divisional Support System to obtain advice and support on any matter of concern
- in the Army, where a complaint is resolved informally, there is a requirement that the situation is monitored roughly every two weeks for a month, and afterwards, on a monthly basis for up to a year. The length and frequency of monitoring is a judgement for Commanding Officers, but the process is designed to ensure offenders do not write the situation off as being 'unlucky to be caught' and to minimise the risk of any victimisation
- the RAAF has a system whereby an Airman's Friend may be provided to assist with formulating a complaint, and
- a 1995 survey of sexual harassment in the ADF will be used to target individual Service training programs aimed at preventing sexual harassment.

7.63. The support services offered by the ADF are extremely comprehensive, and may well represent 'best practice' for Australian employers. The ADF is to be highly commended for its efforts in this regard.

7.64. Major Quinn's 1995 survey³⁵ found that only a small proportion of victims use support positions (3 to 8%) or official grievance procedures within or outside the ADF. Major Quinn also found that one quarter of those personnel making complaints were not satisfied with the outcome of their complaint or the way the complaint was handled. Fewer than half were clearly satisfied. The challenge for the ADF lies in ensuring that support services are always offered to complainants and respondents, and become part of routine incident management, thereby building confidence in the ADF's ability to handle such matters appropriately.

Conclusion

7.65. Despite criticisms in the past regarding the lack of support services and poor handling of complaints, I am encouraged that more recent complaints about harassment, discrimination and unacceptable sexual behaviour appear to have been handled much more sensitively.

7.66. There is, however, a need to ensure that consideration is given to the provision of support services not only for these types of complaints, but also for any complaint involving violence against a person (such as a serious physical assault). Because there are no instructions pertaining to such behaviour, Commanders may inadvertently neglect to offer support services in those cases. One solution is to build into the investigatory process a requirement to report to an appropriate authority what services have been offered to the complainant and the respondent, their response, and any follow-up action required.

7.67. There is also a need to amend the guidance to:

- provide Commanding Officers with information regarding the particular support requirements of survivors of sexual incidents or offences and a list of contact points or organisations where the necessary specialist help can be obtained
- clearly state the ADF's policy on what action is to be taken where a member does not wish to make a formal complaint or to be medically examined
- advise Commanding Officers that, in relation to sexual incidents or offences, evidence can be collected up to 72 hours after the event, and within that time frame, the survivor (and the alleged offender, if appropriate) should be referred to the authorities immediately so that forensic evidence can be collected

³⁵ Survey of Sexual Harassment in the ADF, Major K Quinn, 1995

- clearly state the ADF's policy on compassionate travel for members (and their partners or next of kin) where serious offences occur
- advise Commanding Officers of the need to allow survivors of sexual incidents or offences to make their own decisions wherever possible, and particularly in relation to their movement after an offence has occurred, and
- provide a critical incident stress management checklist for managers and supervisors to assist with observing personnel after an incident to ensure they are receiving adequate support.

7.68. I therefore recommend that these amendments be made to the relevant Instructions.

ADF responded that the certain issues raised concerning support services are dealt with by counsellors and psychologists in their professional capacity. It is not appropriate to include those matters in general Defence Instructions.

In relation to the draft recommendations above, ADF accepted these and advised that it had issued a revised Annex F to Defence Instruction (General) Personnel 35-3 'Harassment, Discrimination, Fraternisation and Unacceptable Sexual Behaviour in the Australian Defence Force', incorporating management of sexual assault cases. The amendments dealt comprehensively with the recommendations.

ADF also advised in relation to the last point that it has developed, in consultation with eminent psychiatrists, an 'Operational Stress Management Manual', issued in June 1997. Appropriate stress management procedures to be followed have resulted from the Manual.

Trend Analysis, Procedural Fairness and Privacy

8.1. A number of broad issues have arisen from the ADF's approach to handling serious incidents and offences. Those matters are addressed in this section, and relate to monitoring of trends across the ADF, procedural fairness and privacy.

Monitoring of trends

8.2. In response to the Senate Inquiry into Sexual Harassment in the ADF, a centralised reporting system has been implemented for such incidents. In future, the Chief of the Defence Force and the Chiefs of each Service will be presented with an annual report on the review of unacceptable sexual behaviour statistics. Reports to date have identified trends (over a limited period of time) in the incidence and nature³⁶ of sexual harassment and offences within the ADF. However, the analysis contains no comparison of incidence rates (on a proportional basis) among the Services, or any comparison of incidence within the ADF to the general population or other Defence Forces.

8.3. I recognise that this is a difficult issue. There is very little data available from other Defence Forces, and often what data is available has been collected using different definitions of harassment.

8.4. However, civilian agencies have data on the incidence of sexual offences in the general population which could be used as a comparable indicator, and the Army has done some comparisons with the Canadian and Belgian armed forces.

8.5. My office's analysis of inter-Service incidence rates reveals some interesting statistics.³⁷ That analysis appears to show that:

- the Air Force had the highest proportion of reports of harassment incidents, and in particular, the highest proportion of reports of verbal harassment

³⁶ Such as the rates of incidence of verbal harassment vs other forms of harassment, the respective ranks and gender of perpetrators and victims and whether incidents are more likely to occur on or off duty.

³⁷ Analysis was done on the basis of staff levels derived from Defence's Annual Report for 1994/95.

- the Army had the highest proportion of reports of physical harassment
- the Air Force had the highest proportion of reports of sexual assault within the sexual offences category, and
- the Air Force also had the highest proportion of complaints which were informally resolved.

8.6. This analysis assumes that the incidence of reports is distributed across the Services in proportion to total numbers of personnel, and does not take account of the fact that different services will have different proportions of female members. I am aware that this may not be the case and any conclusions drawn from these results would have to take other factors into account. Nevertheless, it would be useful to analyse proportional reporting over time, to compare the data to data from other Defence Forces and to incidence rates within the general population.

8.7. The information could then be used, for example, to compare the training and education strategies employed by the three Services in order to determine which strategies appear to be the most effective, and whether there are any reasons for high or low reporting rates within each Service.

8.8. In my view, this sort of analysis is something the ADF should consider doing not just for unacceptable sexual behaviour, but for all incidents of a serious nature, regardless of whether they are dealt with under the DFDA, the DIRs or by civilian authorities.

8.9. I asked each of the Services whether any analysis of DIR investigations is done on a broader level (for example, what issues emerge from the investigation reports completed in any one year). I was advised that such an analysis is either not done, or is done on a case by case basis.

8.10. A number of examples of the process I think desirable already exist within the ADF. A Malfunction Review Board is convened to consider Air Cargo Delivery Equipment malfunctions once a year and to consider all malfunctions since the last meeting. It recommends modification to equipment or procedures arising from trends in the frequency or nature of malfunctions. Similar procedures have also been implemented in other areas (such as fraud, alcoholism, usage of illegal drugs, accidents and dangerous occurrences, ammunition incidents and air safety occurrences).

8.11. In my view, it would be sensible for a similar review process to be undertaken for DIR investigations on an ADF-wide basis, in order to provide a useful tool for considering whether any

further action needs to be taken in relation to guidance, procedures, training or policy for investigators or their advisers.

8.12. It may also be useful for the ADF to consider analysing whether there is any correlation between the ingestion of alcohol and/or drugs and serious incidents. I am aware that the ADF is presently reviewing alcohol and drug awareness programs and considering incorporating a module to highlight the connections between alcohol consumption and unacceptable sexual behaviour in a number of incidents.

8.13. The Army presently requires Commanding Officers to indicate, when reporting on incidents of sexual harassment, discrimination or offences, whether the incident involved the use of alcohol or illegal drugs. In my view, it would be useful to have this information for any incidents of a serious nature.

Sharing of information/expertise across the Services

8.14. In the area of complaints about harassment, discrimination and unacceptable sexual behaviour, the Navy conducted an evaluation study of its Good Working Relationships project at the end of 1996. The Army and Air Force also reviewed their individual programs.

8.15. In my view, it is crucial that the results of any evaluation within the Services can be used as a learning experience for the ADF as a whole. I was pleased to note that the ADF has established an Advisory Forum on Discrimination to provide senior management with an awareness of contemporary community programs, trends and strategies in combating discrimination and inequality.

8.16. In addition, initiatives such as the Quinn survey³⁸ and the Burton research³⁹ will assist the ADF to focus its strategies for dealing with sexual harassment and the employment of women in the ADF.

8.17. However, I am advised that the Army and Air Force were unable to access Navy Training Material for sexual harassment because of the contractual arrangements for the development of that material. The other Services then had to seek the training material from other sources. In my opinion, there is a

³⁸ Survey of Sexual Harassment in the ADF, Major K Quinn, 1995.

³⁹ Women in the ADF, Two Studies: The Cultural, Social and Institutional Barriers Impeding the Merit-Based Progression of Women, and The reasons why more women are not making the ADF a long term career, C Burton, 1996

need to ensure that, where an outside agency is employed to develop material which may be of use to the other Services, that material can be made available, or is commissioned on a Tri-Service basis. There is little value in each of the Services having to reinvent the wheel.

Procedural fairness and rights of review

8.18. In circumstances where an investigation may adversely affect a member, he/she can have a reasonable expectation that the principles of procedural fairness will apply. In my view, this entitles the member to:

- be informed of any allegations or complaints made against them⁴⁰ where any action (for example, an investigation) is to be taken as a result
- an adequate opportunity to respond to any such allegations or complaint
- access to any evidence⁴¹ relied upon in making a decision or taking any action which affects them
- timely notification of any action or decision which affects them arising from the allegation or complaint
- expect actions or decisions taken as a result of an investigation will be based on logically probative evidence and to be provided with reasons for any decisions made or actions taken (including the factors considered in reaching a decision and any further action proposed)
- an opportunity to respond to any decision or action which may affect them, and
- the right to have any information submitted by them in response to the action or decision (or intended action or decision) considered.

8.19. Members are also entitled to be advised of any right of review which may exist, and to expect that any information relating to them will be treated discreetly and their privacy respected.

⁴⁰ The exception will be where a person is suspected of an offence and where any forewarning may result in the destruction of evidence.

⁴¹ There will be exceptions, for example, where a witness provides information which, if disclosed, may constitute a threat to his/her safety.

8.20. Under the DFDA these principles of procedural fairness and rights of review are built into the processes for charging a member with an offence, hearing of the charges and the orders of the hearing authority. They are also covered in various instructions, for example, on Redress of Grievances. However, they are not fully spelt out in the Defence Inquiry Regulations or the related Instruction.

The right to be informed

8.21. Under the Defence Inquiry Regulations, there is no *requirement* that members be informed of allegations against them where the matter is to be investigated. In my opinion, it is essential that members be informed of any complaint or allegation against them where any action (such as an investigation) is to be taken as a result. The right to be informed should apply not only to those members about whom allegations have been made, but also to any member who may be adversely affected by the outcome of an investigation.

8.22. For Boards and Court of Inquiry, the Instruction acknowledges that members may be affected by an inquiry and may therefore wish to have input to their deliberations. Whether a member is considered to be affected by an inquiry is a matter for the President's judgement.

8.23. Factors that the President may take into account when deciding whether a person may be affected include where the Board or Court of Inquiry has received cogent evidence which, if still accepted at the conclusion of the inquiry, may lead to the person being charged with an offence, subjected to adverse administrative action, criticised as to his or her character or conduct or otherwise incurring a substantive detriment.

8.24. There is, however, no suggestion in the Instruction that the same consideration should be given to persons affected by an Investigating Officer's inquiry. It is quite possible for a member to be investigated without ever being informed of the allegations against them or being given the opportunity to put their case.

The opportunity to respond

8.25. For Boards and Courts of Inquiry, the Appointing Authority has the responsibility for considering whether any person is likely to be affected by an inquiry and whether that

person should therefore be represented (if appearing before the Board or Court of Inquiry).⁴²

8.26. The Instruction states that where evidence given to an inquiry may affect a person who was not present at the inquiry, or who was not represented, the President *may* furnish the person with a copy of that evidence and inform him or her of their right to apply to appear before the Board and to submit a written statement to the Board (emphasis added).

8.27. In my view, it is not necessary for any person to be afforded an opportunity to appear before an investigating body merely by virtue of the fact they feel they may be affected by the inquiry. However, the principles of procedural fairness require that a report which is critical of a member should not be made to an Appointing Authority without the member having been afforded an opportunity to appear before the inquiry and to make any submissions (either orally or in writing) as he or she thinks fit.

8.28. At present, the Regulations leave such considerations to the discretion of a Board or Court of Inquiry, and make no comment on persons affected by an Investigating Officer's inquiry.

Access to evidence considered

8.29. Persons who have approval to represent witnesses before a Board or Court of inquiry may question all witnesses who appear. (The President may, however, disallow any questions). They may also, with the approval of the President, present witnesses to the Board or Court of Inquiry in addition to those called by the counsel for the inquiry.

8.30. The President of a Court or Board of Inquiry can give directions (in writing) to prohibit the disclosure of information or documents either completely or to a particular person or persons named. It is an offence to contravene such a direction.

8.31. During the Senate Committee's inquiry into sexual harassment in the ADF, the Captain of HMAS Swan submitted to the Committee that he had been denied natural justice in the Board of Inquiry process. Although advised he was a person affected by the inquiry, he was not given access to all the transcripts of evidence, and he appeared as a witness before the Board of Inquiry without knowing all of the evidence the Board was considering in reaching its conclusions. The Senate Committee

⁴² Witnesses before Investigating Officers do not have the right to be represented. Representation by a legal practitioner requires the permission of the President, or where proceedings have commenced, the Appointing Authority.

also found that there was no explicit information in the evidence that a finding would be made against the Captain. The Board's adverse finding was not put to the Captain during the course of the inquiry.

8.32. The Board of Inquiry's recommendation that the Captain be advised that he did not keep himself sufficiently informed of events, particularly with respect to gender-related issues and the state of the morale within the RANTEWSS⁴³ team was rejected by the Chief of Naval Staff, and he suffered a harsher penalty, that of censure. The Senate Committee noted that the censure contained at least one element that had not been specifically canvassed either during the Board of Inquiry or in the subsequent Notice to Show Cause for Censure.

8.33. The Senate Committee concluded that the failure to inform some of the persons directly affected (by the Board of Inquiry) resulted not only in those people experiencing a high level of unnecessary stress but in creating a perception on their part that Navy was trying to cover up the matters raised by the Board of Inquiry.⁴⁴

8.34. In my view, witnesses before any investigation under the Defence Inquiry Regulations should be provided with a record of their evidence.

8.35. On a related issue, members should in general automatically be given any evidence about themselves, critical or otherwise, and any information relied upon which results in any adverse finding against them. There will of course be exceptions (such as where the provision of evidence would result in the threat to the safety of a witness).⁴⁵

8.36. There is almost no reference in the guidance to requests for personal information, or Freedom of Information requests submitted during the course of an investigation. In my view, the Instruction should cover this issue, including the point that members should not have to go through FOI channels to obtain documents about themselves.

Timely notification of decisions

⁴³ Royal Australian Navy Tactical Electronic Warfare Support Section.

⁴⁴ Senate report, page 87.

⁴⁵ While there is a good reason not to provide the full information or evidence, a summary of the information or evidence should be provided.

8.37. Presently, the Instruction on investigations under the Defence Inquiry Regulations makes no reference to the need to inform the parties to a complaint (or witnesses affected) of the outcome of the inquiry.

8.38. The Senate Committee's inquiry into sexual harassment in the ADF raised concerns about the length of time taken to inform witnesses of the outcome of the Board of Inquiry. The Board reported on its findings in March 1993, but the Navy took until August 1993 to advise the Minister of the outcome and what action had been taken in response to the Board of Inquiry's recommendations. The Committee concluded that the problem was not only one of delay, but the impression that it was none of the business of the people directly involved to know the outcome. There was no indication that Navy intended to tell those involved the outcome of the investigations in other than the most general terms.

8.39. The Committee therefore recommended that the Defence Instruction covering inquiries be amended to include a requirement that, in the case of an inquiry into personnel matters such as sexual harassment, all witnesses (including those who are not directly the subject of recommendations) should be informed of their status at the conclusion of the inquiry. The Committee also recommended that consideration should be given to advising all those directly involved in an inquiry of the outcome of any action taken pursuant to the inquiry as soon as possible after decisions on the implementation of the Inquiry's recommendations have been made.

8.40. The ADF's response to the Senate Committee's report was that it considers it appropriate, in the case of an inquiry into personnel matters, to inform all witnesses of their status and the outcome of the inquiry in relation to matters relevant to them. However the release of information to all witnesses must be handled sensitively so that the provisions of the Privacy Act 1988 are met. The relevant instruction is to be amended and updated.

8.41. I note that the Tri-Service Instruction is yet to be amended, although the Navy guidance states that where the intervention of a third party is required to resolve the matter, or is sufficiently serious to warrant either disciplinary action or a formally recorded and reported counselling/warning, the complainant is to be advised by the Commanding Officer of the outcome of the matter.

8.42. I am aware that affected members are not always advised of the final outcome of an inquiry. In my view, it is important that the Defence Instruction is amended as soon as

possible, and that the ADF also institutes a process for ensuring members are advised of the outcome of any DFDA matter which affects them.

Defensible decisions, reasons for decisions and factors considered

8.43. A member is entitled to expect that any findings and recommendations at the conclusion of an investigation are consistent with an objective consideration of the evidence, and that the reasons for an investigating body's conclusions are clear.

8.44. In an investigation under the Defence Inquiry Regulations, the reasons for a decision, factors considered and any action proposed as a result of the investigation are contained within the investigating body's report.

8.45. Members affected by the report do not have an automatic right to that document. An Investigating Officer, Board or Court of Inquiry's report can only be released to a member with Ministerial approval.

8.46. There is no guidance in the Instruction on whether, at the conclusion of an investigation, permission is to be sought from the Minister for the release of the report to any member adversely affected by it. In my view, members who may be adversely affected as a result of an investigator's report should be afforded access to the report. There is a need to amend the Instruction to set out how this should be done.

The right of reply and to have submissions considered

8.47. Despite the best efforts of an investigating body, in my experience there will always be occasions where some information or evidence arguably relevant to a matter is not considered. For example, it may be that the information was not provided to the Investigating Officer because the member did not recognise its relevance, or that the right questions were not asked.

8.48. For that reason, it is important to ensure that individuals affected by a decision are given the opportunity to respond to any conclusions reached or decisions made. Where they then provide additional information relevant to the matter under consideration, they are entitled to have that information considered and, if appropriate, the decision or conclusion amended.

8.49. The Defence Inquiry Regulations provide that the appointment of an investigating body continues until two months after the inquiry is completed, and for Appointing Authorities to

direct that a further report be made, where they consider that necessary.

8.50. However, the Regulations and the Instruction make no reference to members affected by a report being informed that they may make submissions on a matter, or that the Appointing Authority should take those submissions into account when deciding whether to act on the recommendations contained in a report. Even though the Minister may have refused to provide the member with a copy of the investigation report, the member should still be advised of the outcome of any inquiry and provided an opportunity to comment if he/she wishes.

8.51. It is perhaps because such an opportunity is not automatically provided that complainants and alleged offenders sometimes seek review action by higher authority, external agencies or in the courts.

Advice on rights of review

8.52. The various Instructions on particular types of incidents (such as harassment and discrimination) provide advice on a member's right to seek redress of any grievance, or to approach the chain of command or external agencies for a review of a decision.

8.53. However, there is no mention of review avenues in the Instruction on investigations under the Defence Inquiry Regulations. In my opinion the Instruction should indicate to Appointing Authorities that when advising members of the outcome of an inquiry, they should also alert them to their rights of review.

Confidentiality and privacy issues

8.54. My examination of a number of cases has caused me to question whether the ADF pays sufficient attention to the need for confidentiality and privacy to be respected when dealing with member's complaints.

8.55. Certainly, the guidance is clear on this matter. Unfortunately, the guidance is not always adhered to.

Access to information

8.56. In my investigation I found some suggestion that information relating to an incident had been provided to, or sought from, individuals who did not have a right to know it.

This appears to have been the result of certain individuals' failure to observe the procedures concerning confidentiality.

A breach of trust

8.57. Other members have also complained about confidentiality and privacy issues. I have not investigated these thoroughly but note that it is an issue of continuing concern for members under investigation. It is particularly a matter for concern in situations there is inadequate control over documents, whether in paper or electronic form, relating to an investigation.

8.58. In these circumstances the failure to maintain control over records can lead to a serious breach of agreements in relation to those records, and to the possibility of the documents being accessed by unauthorised personnel.

Public comment on incidents

8.59. The guidance on inquiries under the DIRs states that it is an offence for any person to fail to comply with, or to contravene, without reasonable excuse, a direction given by the President of an inquiry which prohibits the disclosure of information or of a document, or of information contained in a document.⁴⁶

8.60. Also relevant is an Instruction on public comments and dissemination of information by members of the ADF.⁴⁷ That instruction states that members are not to reveal any information which relates to an accident or incident, beyond the fact that an accident or incident has occurred, and the time, place, circumstances and resultant number of casualties. Any comment on the circumstances of an incident or accident is not to purport to attach blame to an individual or individuals who could be the subject of disciplinary proceedings. Members are expected to use the appropriate Service channels for the statement of complaints or for the submission of comments or suggestions on Defence administration.

8.61. I note that the Instruction only states that no blame is to be attached to individuals who could be the subject of disciplinary proceedings; it makes no mention of administrative proceedings. Public comment on incidents, however sensitively framed, can be the cause of considerable distress to the parties to

⁴⁶ The offence does not apply to information or documents which the Minister for Defence has, by instrument in writing, made available to the public, or to a person who has been authorised by the Minister to disclose such information or documents.

⁴⁷ DI(G) ADMIN 8-1.

the incident. The ADF has an expectation that its members will not air their grievances in public. In my view, the ADF has a reciprocal responsibility to consider the consequences for individuals of any public comment it might make on an incident.

8.62. That is not to say that the ADF does not have the right (or that it is not necessary) to make public statements about incidents from time to time. Rather, it is to suggest that when doing so, it should take account of the implications for the individuals involved.

8.63. I have seen nothing in the guidance which requires that the ADF forewarn a member of a statement which it is releasing in relation to a particular incident which affects them (even if the member is not named). As a consequence, the first a member may know of the statement is when they receive a phone call asking if they have any comment.

8.64. In my view, whenever possible, a member should be informed in advance that a public statement is to be released on an incident in which he/she has been involved, and is provided with advice on the content of that statement.

Reporting patterns

8.65. Despite the encouragement to ADF members to report incidents to their chain of command or to support services (who can then assist them in reporting the matter through the correct channels), my examination of a number of incidents involving sexual offences, harassment and/or discrimination indicates that victims do not, in the first instance, report the matter through official channels.

8.66. The first report of an incident appears to be more likely to be made to a close friend or confidant, and it is these individuals who then seek out the authorities to deal with the matter.

8.67. On reflection, this is not surprising given the very personal and sensitive nature of the complaints. In some cases examined by my office several personnel were informed of the incident before it was reported to an appropriate authority. This has serious confidentiality implications for the alleged offender. I am aware that all personnel receive training in how to report and deal with incidents, but there may be a need to emphasise in the training the implications for the accused where a matter is discussed among other personnel before being reported.

8.68. It also suggests that it is important Commanding Officers inquire as to who has been informed, and then take steps

to caution those members that they are not to discuss the incident more widely.

Conclusion

8 . 6 9 . I recommend that the ADF :

- extend its monitoring of trends in the incidence of sexual harassment and offences to include comparisons among the Services
- undertake regular trend analysis of DFDA and DIR investigations
- consider analysing any correlation between alcohol and/or drug abuse and serious incidents, and
- ensure that information and expertise can be readily shared among the Services.

Following discussion of the draft recommendations with the ADF, I agreed that the trend monitoring and analysis mechanisms in place for DFDA matters were adequate, but that further action was needed for DIR investigations.

ADF agreed that, in the analysis of statistics of unacceptable sexual behaviour for 1996/97, proportional data would be incorporated in comparisons among the Services. With respect to DIR investigations, procedures would be introduced through the Complaints Resolution Agency to enable trend analysis to be undertaken.

ADF also advised me that, following the Defence Reform Program and the creation of the Complaints Resolution Agency and the Defence Equity Organisation in July 1997, trends analysis and information on a tri-Service basis is being shared between these two agencies.

8.70. The principles of procedural fairness are contained in a number of instructions, but not in the DIR Instruction. Accordingly, I recommend that the ADF :

- spell out in the Defence Inquiry Regulations and Instruction, and particularly for Investigation Officers, the principles of procedural fairness and rights of review, and

ADF advised that these matters have been included in the draft investigation manual.

- ensure that members are advised of the outcome of any DFDA proceedings which affects them.

ADF considered this recommendation and agreed to amend the Defence Law Manual. This amendment will direct commanders to ensure that those members affected by the conduct of an accused person are advised of the outcome of the investigation and any subsequent disciplinary proceedings.

8.71. The ADF guidance on confidentiality and privacy is very clear, but not always adhered to. I recommend that the ADF consider including in the guidance advice about the desirability of forewarning a member of any public statement which may affect him/her personally.

ADF responded that it is standard practice that an individual's name or identifiers not be mentioned in statements to the media, but that in circumstances in which the media request information about a specific person, that person is contacted by the Public Information unit. However, guidance, possibly limited to those cases where the reputation of a person may be adversely affected, is still under consideration.