

## CHAPTER 5

### THE TERMS OF REFERENCE of THE BOARD of INQUIRY TERMS of REFERENCE 1(e) and 1(d)

**This Chapter looks at whether the Terms of Reference of the Board of Inquiry were sufficient to enable it to consider any aspects of unacceptable behaviour that occurred on board the SWAN.**

5.1 The Board of Inquiry<sup>1</sup> was appointed by the Maritime Commander Australia on 21 December 1992 to inquire into certain matters concerning Navy, namely those matters relating to Maritime Command which were raised by Lieutenant Carol WHEAT, RANR in her letter to the Minister for Defence, Science and Personnel dated 25 November 1992. The Minister received the letter on 2 December. The Chief of Naval Staff wrote to the Maritime Commander on 11 December 1992 requiring him to investigate thoroughly all the issues raised in the letter. He requested a plan of action from the Maritime Commander by 15 December stating: "*I am determined to act quickly and decisively*"<sup>2</sup>. The Board was convened on 21 December and it heard witnesses for the first time on the same day.

5.2 The speed with which the Board moved reflected the direction from the CNS, the proximity of the Christmas holidays, with the consequent effect on the availability of witnesses, as well as the need to conclude proceedings within a time frame that took into account the existing commitments of Board members. Although the haste with which the Board began its work created some difficulties, on balance the Committee accepts that it was desirable and reasonable to proceed quickly.

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1 The Board of Inquiry, convened by the Maritime Commander on 21 December 1992, is also referred to as the Board or the BOI.

2 Letter from Chief of Naval Staff, VADM I. MacDougall to Maritime Commander, 11 December 1992.

## Terms of Reference of the Board

5.3 The Terms of Reference of the Board were:

*"(a) in particular but not limited to:*

- (1) the living conditions for females in HMAS SWAN including suitability of accommodation and ablution facilities,*
- (2) allegations of sexual harassment of females in HMAS SWAN, including the behaviour of LEUT P.D.J. BARTLETT, RAN towards females in HMAS SWAN,*
- (3) the behaviour of officers from HMAS SWAN while ashore during the deployment referred to by LEUT WHEAT and*
- (4) LEUT WHEAT's allegation that she was forced to pay for her accommodation in Kuala Lumpur and flight to Singapore; but*

*(b) excluding those events which are directly associated with charges of sexual assault on 15 August 1992 laid against LCDR R.D. JAMES, RAN." <sup>3</sup>*

## Powers of the Board of Inquiry

5.4 The Board was convened under Regulation 23 of the Defence (Inquiry) Regulations, 1985, made under the *Defence Act 1903*. As such it had significant powers to summon witnesses and require the production of documents before it. Evidence is required to be taken under oath. The convening authority appointing the Board can empower it to make recommendations under sub-regulation 25 of Regulation 23. In this case the Board was empowered to make recommendations arising out of its findings.

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3 Board of Inquiry Report, p. 1.

5.5 In evidence to the Committee, the then Maritime Commander, Rear-Admiral Walls said:

*"The terms of reference were developed in such a way that they should not be seen to be, or considered by members of the board to be, limiting in any of the matters they might investigate in the course of their inquiry and that they should be sufficiently broad as to enable them to pursue any unexpected items which might come up in the course of people giving evidence or in the course of the investigation."*<sup>4</sup>

5.6 Before proceeding to analyse the Board's approach to its Terms of Reference, the Committee looked at the procedures followed by the Board of Inquiry. Procedures for Boards of Inquiry are standard throughout the Defence Force and the inquiry into the incidents on HMAS SWAN was set up according to the DI(N): Defence Instruction (Navy) 35-15.<sup>5</sup> The Board followed all the instructions of the DI(N) and adopted procedures in accordance with those instructions.

## **Complaints about the Board's Procedures**

### ***Captain Mole***

5.7 Captain Mole submitted to the Committee that he:

*"was denied natural justice and procedural fairness by the Board and that [he] clearly ought to have been told that the Board was proposing to make an adverse finding or recommendation against [him] and given the opportunity to put evidence before the Board and make submissions to the Board about that matter."*<sup>6</sup>

5.8 The Board first sat on 21 December 1992 and Captain Mole was the first witness called before it. Captain Mole told the Committee that he was telephoned at 9 o'clock in the morning of 21 December 1992 and required to appear as a witness four hours

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4 RADM R. Walls, Committee Hansard, p. 1275.

5 Note that the DI(N) used in this case, Defence Instruction NAVY ADMIN 35-15 stems from DI (GENERAL ADMIN) 34-1, and is the same as DI (ARMY ADMIN) 23-1 and DI (AIR FORCE PERS) 11-18.

6 CAPT D. Mole, Committee Hansard (in camera - released), p. 35.

later.<sup>7</sup> On 8 January 1993, the President of the Board wrote to Captain Mole in the following terms:

*"As a result of evidence that has been given by yourself and a number of other witnesses before the Board concerned under the Reference, I now consider that you may be a person affected by the Inquiry being conducted by the Board. That being so, Regulations 33 and 34 of Defence (Inquiry) Regulations provide that where a person may be affected by an Inquiry he may seek to appear before the Board to deal with relevant evidence against him (which he may possibly do by means of a legal practitioner) and/or submit a written statement to the Board."<sup>8</sup>*

The letter went on to offer any necessary transcript of the proceedings on request, provided they were not disclosed to anyone except a legal adviser. The letter concluded:

*"It is suggested that you contact your local legal officer or a private legal practitioner of your choice concerning this letter."<sup>9</sup>*

The Board sent letters similar to the one received by Captain Mole to five other witnesses and they all obtained legal representation at Navy's expense. The Committee observed that there was considerable variation in the tenacity of the various legal counsel in pursuing the interests of their clients at the BOI.

5.9 The Board used the wording of the DI(N) in advising witnesses that they may be affected. Captain Mole told the Committee that:

*"I was not given any indication that the Board was proposing to make any adverse findings against me and I did not expect that they would do so."<sup>10</sup>*

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7 *ibid.*, p. 52.

8 Letter from the President of the Board, CAPT C. Harrington to CAPT D. Mole, 8 January 1993 (emphasis added).

9 *ibid.*

10 CAPT D. Mole, Committee Hansard (in camera - released), p. 35.

Captain Mole had virtually no personal experience of the way in which naval Boards of Inquiry operate. The Committee accepts Captain Mole's assertion that he:

*"went into it with blind faith of the Navy's ability to get to the bottom of what really went on."*<sup>11</sup>

5.10 At the end of the Inquiry, the Board recommended that:

*"CAPT Mole be advised by the Maritime Commander that he did not manage to keep himself sufficiently informed of certain events occurring within his command, particularly with respect to gender related issues and the state of morale within the embarked RANTEWSS team".*<sup>12</sup>

5.11 After considering all the evidence before it, the Committee is of the view that the Board fulfilled its obligations towards Captain Mole by advising him that he *"may be a person affected by the Inquiry"*. However, the following needs to be noted:

- following the Board's letter of 8 January, Captain Mole was given access to some transcripts, but not all of the transcripts of evidence were then available. Moreover, further hearings were held after Captain Mole's second appearance before the Board. In effect, Captain Mole was not aware, by the time of his second appearance before the Board, of all the evidence that the Board would consider in reaching its conclusions;<sup>13</sup>
- there was no explicit information in the evidence that a finding against Captain Mole would be made; and
- the adverse finding itself was not put to Captain Mole during the inquiry.

The Committee concludes that it was open to Captain Mole and his legal counsel at the time to pursue more vigorously with the Board the specific nature of the *"relevant evidence against him"*.

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11 CAPT Mole told the Committee he had only once before given evidence to a naval Board of Inquiry as a junior sub-lieutenant in 1972, Committee Hansard (in camera - released), p. 57.

12 Report of Board of Inquiry (BOI) to the Maritime Commander, p. 97.

13 This is confirmed by the Maritime Commander in his Minute of 12 July to CNS.

5.12 It is also relevant to note that the consequences of the Board's failure to be more specific in the advice that Captain Mole may be "*a person affected*" and Captain Mole's failure to press the Board for more details at the time have been magnified by the way the Board's recommendation was dealt with by the Chief of Naval Staff.

5.13 The Board's recommendation regarding Captain Mole was not followed. The Chief of Naval Staff instead imposed a more severe penalty on him by issuing a censure against him. The censure contained at least one element that had not been specifically canvassed either during the Board's inquiry or in the subsequent Notice to Show Cause for Censure. This is dealt with in Chapter 7 of this Report.

5.14 The Committee received submissions from two other witnesses to the Board of Inquiry who, like Captain Mole, complained about the procedures followed by the Board. They were Lieutenant Commander Paul Flynn, one of the investigating officers of the 15 August incident on the SWAN and Lieutenant Kelvin Turner, the SWAN's Deputy Supply Officer.

#### *Lieutenant Commander Flynn*

5.15 Lieutenant Commander Flynn, the Naval Police investigator, wrote to the Assistant Chief of Naval Staff - Personnel on 22 November 1993 pointing out that the Board did not appraise him of Lieutenant Wheat's allegations against him (that he was a "*friend of the accused*") prior to his giving evidence before the Board.<sup>14</sup> Lieutenant Commander Flynn also complained about the failure of the Board of Inquiry to warn him that it might make adverse comments about him. The Board did not make a recommendation about Lieutenant Commander Flynn. However, it commented in its report that:

*"Whilst LCDR FLYNN was honest and forthright in his investigation, the problem which arose was that once his friendship with LCDR JAMES was known to LEUT WHEAT, perfectly understandably she viewed everything said with a degree of suspicion. That suspicion was compounded by the unconsciously insensitive way that LCDR FLYNN dealt with his friendship with LCDR JAMES."*<sup>15</sup>

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14 Annexures to letter from LCDR P. Flynn to the Committee, 19 January 1994.

15 BOI Report, p. 71. This matter is discussed in greater detail in paras 5.34 - 5.47 of this Chapter.

## ***Lieutenant Turner***

5.16 Lieutenant Turner, the Deputy Supply Officer complained about the lack of information given by the Board about why he was being called before it:

*"I sat outside the Inquiry room from 8 a.m to 6 p.m. without knowing why I was there...It seemed to be that we were all asked to 'defend ourselves' but not given access to the charges...I was never formally advised by the Board that I was not in any sort of trouble, and only from press releases in September of this year did I know." <sup>16</sup>*

5.17 In their submissions to the Committee, both Lieutenant Turner and Lieutenant Commander Plummer, who had served on WESTRALIA, complain about the fact that Lieutenant Slattery QC, who had been the prosecutor at the Court Martial, was heavily involved in the Board of Inquiry (as Counsel Assisting the Board).

5.18 This issue was also raised by Counsel representing Lieutenant Commander James and Lieutenant Commander Spruce before the Board of Inquiry. The Board considered the issue of a possible conflict of interest for Lieutenant Slattery in his role as Counsel Assisting the Board and concluded that it had been able to:

*"make sound judgements based on the evidence presented, and that no person has been disadvantaged by the fact that LEUT SLATTERY had been the prosecutor in LCDR JAMES' court martial." <sup>17</sup>*

5.19 The Committee does not question the professional integrity of Lieutenant Slattery and the Committee recognises the benefits of using counsel already very familiar with many aspects relevant to the inquiry because of his involvement with the Court Martial. This no doubt assisted the Board in identifying avenues to pursue and witnesses to call more quickly than might otherwise have been possible. The Committee notes, however, that by employing the same experts, unnecessary anxiety might be caused to persons involved in these types of investigations. It is important that the procedures should not only be impartial but also be clearly seen to be impartial.

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16 LEUT K. Turner, submission, pp. 11-12.

17 BOI Report, p. 4.

5.20 Recommendation Four: The Committee recommends that care be taken to ensure that the choice of legal counsel appointed by Navy, Army and Air Force to assist with multiple inquiries or legal proceedings into the same or related matters does not give rise to perceptions of possible conflict of interest.

5.21 The Defence Instruction <sup>18</sup> governing the setting up of Boards of Inquiry was written to enable investigations of various matters:

*"on which the appointing authority requires to be thoroughly informed, including a major accident or incident."* <sup>19</sup>

"*Incident*" here clearly includes administrative bungling. The Committee notes that the Defence Instruction was last updated in 1986, at a time when a Board of Inquiry into sexual harassment was inconceivable.

5.22 Boards of Inquiry are not courts of law. Members of the Defence Force are not called before Boards of Inquiry because they are charged with any wrong-doing. The inquiries are essentially information gathering exercises. Nevertheless an officer who has been involved in an accident has some notion of what his or her degree of responsibility for it might have been. This is not the case in sexual harassment. As has already been discussed in chapter 1, the lack of understanding of what constitutes "*sexual harassment*" could result in a person unwittingly engaging in sexual harassment and finding out about it only when a complaint is formally lodged. Likewise the complainant can be left wondering and worrying about the outcome of an investigation. Such a situation can cause a great degree of anxiety and unnecessary stress. This happened to some of the persons involved in the case of the Board of Inquiry into the events on HMAS SWAN.

5.23 Ms Connelly, one of the Leading Seamen in the RANTEWSS team, contacted a number of people in her unsuccessful attempts to find out about the Board's Report. She told the Committee:

*"At that stage, I was worried about the Board of Inquiry. We had not heard anything. We were more or less told that we were not on the "need to know"*

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18 Defence Instruction NAVY ADMIN 35-15.

19 *ibid.*, p. 5.



*list and that what happened at the Board of Inquiry was none of our business. I felt it was, because it was chewing me up."*<sup>20</sup>

5.24 The Committee recognises that there are excellent reasons for not warning witnesses at Boards of Inquiry, in advance, of the matters about which they will be questioned. Further it is the hope of the Committee that another Board of Inquiry into sexual harassment will not prove to be necessary in future in any of the Services. However, there are no compelling reasons for failing to reassure witnesses who are directly involved in an inquiry shortly after the inquiry is concluded. The failure in this case to inform some of the persons directly affected such as Dr Wheat and Leading Seamen Connelly and Flannery, as well as several other witnesses 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. The Board had made a genuine attempt to gather all the relevant evidence and less secrecy would have ensured some recognition for its work.

5.25 The Board reported on its findings in March 1993. It took Navy until 10 August to advise the Minister of the outcome and what Navy was doing in response to the Board's recommendations. The time taken reflects, at least in part, the difficulty of some of the issues raised and the debate within the leadership of the Navy on how to deal with the Board's recommendations.<sup>21</sup>

5.26 However, the problem was not only the delay, but the impression they gained that it was none of the business of the people directly involved to know the outcome. There is no indication in the advice to the Minister that Navy had it in mind at that stage to communicate the outcome of the investigations in other than in the most general terms to those involved.

**5.27 Recommendation Five: The Committee recommends that the Defence Instructions covering Inquiries into Matters Affecting the Defence Force be amended to include a requirement, in the case of an inquiry into personnel matters such as sexual harassment, to inform all witnesses, including those who are not directly the subject of recommendations, of their status at the conclusion of the inquiry. Consideration should also be given to advising all those directly involved in an inquiry**

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20 Ms S. Connelly, Committee Hansard (in camera - released), pp. 300-302.

21 For further details of the internal debate see Chapter 7 of this Report.

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.

## The Board's interpretation of its Terms of Reference

5.28 In its report, the Board stated that, in interpreting its Terms of Reference, it had not felt tightly constrained by strict definitions of sexual harassment or unacceptable sexual behaviour:

*"It [the Board] has interpreted the Terms of Reference to mean that the Board was to enquire into all matters relating to problems experienced by females on board SWAN during the time in question, and which were the result of their gender." <sup>22</sup>*

Further, the Board stated that it had used the term "harassment":

*"to cover any form of unsavoury behaviour or action towards, or in the presence of, females." <sup>23</sup>*

5.29 The evidence accepted by the Board of Inquiry suggests that the Board in fact applied a broad interpretation to its Terms of Reference and to the term "sexual harassment". It heard evidence from 42 witnesses, including all the female sailors and female officers on HMAS SWAN, as well as from those members of the ship's crew against whom allegations of sexual harassment had been made after the HMAS SWAN 1992 Asia deployment. The Board also called many members of the ship's crew who could reasonably have been expected to have been present and observed the behaviour of the complainant and those against whom allegations of sexual harassment had been made.

5.30 The Board found it difficult to deal with some of the complaints of Dr Wheat without considering the question of training and prior preparation of medical officers for Fleet billets.<sup>24</sup> Lack of training also revealed itself to be a problem for the female sailors in the RANTEWSS team and for all members of the SWAN's crew who had no

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22 BOI Report, p. 77.

23 *ibid.* (emphasis added).

24 *ibid.*, p. 11.

preparation towards accepting and integrating women at sea. The Board canvassed those issues at length in its report.<sup>25</sup> Evidence heard by the Board also led it to look carefully in its report at the failure of the Divisional System on SWAN.<sup>26</sup> Both those matters are dealt with elsewhere in this report.

5.31 The Board heard evidence and made recommendations on the following issues:

- the treatment of the female junior sailors by their superiors, their peers and other crew members as well as the social environment in which the female sailors had to perform their duties;
- the language used towards the female junior sailors and whether it could be said to constitute "*verbal harassment*";
- the language used and type of conversation in the wardroom of HMAS SWAN, its effect on Dr Wheat, including the question of awareness of that effect among the officers present;
- whether any measures were taken to put a stop to the behaviour and language in the wardroom; and
- Lieutenant Commander James' behaviour towards Dr Wheat throughout her time on HMAS SWAN and the perceptions members of the crew (not only officers) had of the relationship between Dr Wheat and Lieutenant Commander James.

5.32 During the Inquiry, members of the Board, counsel assisting the Board of Inquiry and Dr Wheat's legal representative, Commander Willee asked questions and cross-examined Lieutenant Commander James about the allegations of sexual harassment (not sexual assault) made against him by Dr Wheat. The questioning about this matter alone fills 24 pages of the transcript. Evidence was also taken from a number of officers from HMAS WESTRALIA which accompanied SWAN on the 1992 Asia deployment.

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25 *ibid.*, pp 42-54.

26 *ibid.*, pp 54, 58, 61-62.

5.33 In addition the Board interpreted literally its directive of "*in particular, but not limited to*"<sup>27</sup> and it addressed a number of issues in depth, although they were not strictly in its Terms of Reference. They were:

- the gathering of evidence and conduct of the initial investigation into Dr Wheat's allegations of sexual assault by the team sent to Lumut in Malaysia in August 1992;
- the performance appraisals of Dr Wheat (PR 5) and of Leading Seaman Connelly and Leading Seaman Flannery (PERS-1) and whether they had received poorer ratings because of their gender or gender related issues or, in the case of Dr Wheat, because she had made complaints of sexual harassment and sexual assault.

#### ***Initial investigations at Lumut***

##### *Friendship between the parties*

5.34 The Board used a broad definition of "*those events associated with charges of sexual assault on 15 August 1993*" (the charges themselves were specifically excluded from its Terms of Reference) and it inquired at some length into the initial investigation at Lumut and the subsequent follow-up investigation in Australia. It also looked into the way in which Lieutenant Commander Flynn made Dr Wheat aware of his acquaintance with Lieutenant Commander James.<sup>28</sup> The Board came to the conclusion that the preliminary and subsequent interviews had been fairly conducted.

5.35 In her letter to the Minister, Dr Wheat stated that:

*"A factor which added to my distress was that the investigating officer was a friend of the offender, an admission made by both parties."*<sup>29</sup>

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27 *ibid.*, p. 1 (emphasis added).

28 *ibid.*, p. 68.

29 Letter from Dr. C. Wheat to Minister for Defence Science and Personnel, 25 November 1992.

5.36 Subsequently, Dr Wheat's submission to the Committee states that:

*"Dr Wheat's knowledge of LCDR Flynn's friendship with LCDR James doomed the investigation to failure ..."*<sup>30</sup>

Like the Board of Inquiry, the Committee spent some time addressing the question of whether Lieutenant Commander Flynn and Lieutenant Commander James were friends and the effect that such a friendship might have had on the subsequent investigations.

5.37 Lieutenant Commander Flynn told the Board that as soon as he was told who the accused was in the matter that had to be investigated at Lumut, he told the Fleet Legal Officer that he knew the accused. He explained to the Board:

*"I've been in the Navy a long time, I've got a lot of acquaintances and mates, and in fact, the last three or four officers that I've actually investigated have all been people I've known. It doesn't really affect the way I do my work and they're all well aware of that. These are people I've met on courses or on postings and they know how I do my work. Everyone accepted that and we then left for Lumut."*<sup>31</sup>

5.38 In its submission, Navy told the Committee that the choice of Lieutenant Commander Flynn was influenced by the fact that:

*"there was a very limited pool of Naval Police Coxswains available to conduct this investigation. The rank of the accused and the seriousness of the offence were factors taken into account in appointing officers to conduct the investigation. In a Service the size of the Royal Australian Navy the possibility of an investigating officer and an accused person being acquainted cannot always be eliminated."*<sup>32</sup>

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30 Dr C. Wheat, submission, Committee Hansard (in camera - released), p. 128.

31 BOI Transcript, p. 2501.

32 RAN submission, Committee Hansard, p. 211. See also chapter 12 of this Report.

5.39 Lieutenant Commander Flynn told the Board that at the first interview with Dr Wheat (at Lumut) he:

*"just talked to her in general conversation which included the information that although I knew LCDR James, it wouldn't affect the way I did the job in any way whatsoever."*<sup>33</sup>

In answer to a question from Lieutenant Slattery, he added that his purpose in saying that was *"to make sure that she was fully informed of exactly what was going on"*.<sup>34</sup>

5.40 The Committee has had access to both the transcript and the tape of the interviews Lieutenant Commander Flynn conducted with Dr Wheat. The introductory conversation, including the revelation of the acquaintance was not recorded (the tape was still turned off). The details Dr Wheat gave the investigators did not differ from what she had earlier told Captain Mole and Chief Petty Officer McKay about the alleged sexual assault. Both the account of what happened and the gaps in recall were substantially the same in each of those three accounts. It is the view of the Committee that the tape and transcript do not reveal any reluctance or inhibition to give evidence to the investigator.

5.41 The Committee considers that Lieutenant Commander Flynn acted properly in informing Dr Wheat of his acquaintance with Lieutenant Commander James. The Committee would have been gravely concerned, as surely would Dr Wheat have been, had Lieutenant Commander Flynn attempted to hide the fact of that acquaintance. The transcript of the interview he subsequently conducted with Lieutenant Commander James (and which the Committee has studied) reveals that Lieutenant Commander Flynn indeed showed no favour towards Lieutenant Commander James. This is also borne out in the evidence of Commander Judith Horobin.

5.42 Commander Judith Horobin, a legal officer, was the head of the investigation team sent by Navy to Lumut. She was present at all the interviews Lieutenant Commander Flynn conducted with Dr Wheat and with all other witnesses. In relation

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33 BOI Transcripts, p. 2502.

34 *ibid.*, p. 2502.

to the manner in which Lieutenant Commander Flynn told Dr Wheat that he knew Lieutenant Commander James, Commander Horobin told the Board:

*"I recall him saying the he knew him and had met him at the staff college and my recollection is that was the limit of their acquaintance. That they, you know, they had beers together on the staff course."*<sup>35</sup>

5.43 The Board of Inquiry recognised in its report that Lieutenant Commander Flynn "was honest and forthright in his investigation". However, the Board recommended that:

*"Every effort should be made to ensure that investigation of alleged offenders are carried out by persons who are not friends or acquaintances of either the accused or the person making the allegation. This is particularly so where sexual offences are concerned."*<sup>36</sup>

5.44 The Committee notes that Navy has taken steps to implement this recommendation. Its submission to the Committee states that it has taken action to ensure that:

*"where practicable that even where location, rank or other circumstances severely limit available naval police investigative resources, in sexual assault cases in particular, a situation will not be allowed to recur where Navy's investigating officer is acquainted with an accused person. This has been achieved by making arrangements with the Australian Federal Police Special Sexual Assault Unit, so that the duty officer of that unit will be on call twenty four hours a day to Naval Police Coxswains. A proposal to induct civilian police into a specialist sexual investigation team through the Royal Australian Naval Reserve is also being examined."*<sup>37</sup>

5.45 The Committee welcomes these initiatives taken by Navy and notes that it is also taking steps to educate Naval Police Coxswains personnel about the requirements for sensitivity in investigating cases of sexual assault. The Committee is of the view that

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35 BOI Transcript, p. 2246.

36 BOI Report, p. 71.

37 RAN, Committee Hansard, p. 212.

special skills are absolutely necessary in dealing with cases of alleged sexual assault. This need was highlighted by the different perceptions of the protagonists in the SWAN allegations.

5.46 Dr Wheat told the Board of Inquiry that she felt that Lieutenant Commander Flynn, the investigative officer, had made comments about Lieutenant Commander Jame's reputation with women because:

*"he was trying to make me feel at ease and to try to make me feel that he was on my side, rather than being an antagonist...At first I was just confused... And it certainly didn't make me feel at ease, which I think the intention had been, but right at the beginning I really didn't form an opinion as to whether it was good or bad. I was just surprised. It was later on that I began to see it in a negative aspect."*<sup>38</sup>

Lieutenant Commander Flynn explained that he had made those comments as:

*"Part of the general conversation to make her feel that things were not quite as bad as she might think they are. To interview someone you want them to be relaxed and to trust you... You've got to be there to understand it. It did work, I might add."*<sup>39</sup>

5.47 The Committee accepts that the views expressed by both Dr Wheat and Lieutenant Commander Flynn are valid. The comments mentioned could have opposite effects on different people, effects determined largely by their personalities and possibly sometimes by their gender. Since a growing number of women are now employed by the Australian Defence Force, the Committee believes that it is essential that mechanisms be put in place to ensure that personnel with specialist skills are available to investigate and deal with allegations of sexual assault.

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38 BOI Transcript, p. 2283.

39 BOI Transcript, p. 2503.



### *Pressure to withdraw the allegations*

5.48 Dr Wheat told the Committee that:

*"On 9 September, I had another interview with an investigating team, who made it clear to me that they did not believe me."*<sup>40</sup>

In the course of the Board's inquiries into the manner in which the investigation team had conducted its task, Dr Wheat claimed that:

*"there was a lot of pressure, as I said, for me to withdraw the allegations and the impression I had was that they were saying that - that they did not have enough evidence on which they could lay charges and that it might be better if the whole thing were dropped, and if I wished to change my - if I wished to withdraw my statement I was quite free to do so."*<sup>41</sup>

5.49 On the same day, Dr Wheat told the Board that at the second interview (in Melbourne on 9 September 1992) the investigation team *"spent the whole time trying to destroy my credibility and tried to get me to retract my statement"*.<sup>42</sup> As already mentioned, the Committee has closely studied the transcript and tape of those interviews. The questions and answers are all aimed at remembering details of the alleged sexual assault.

5.50 The Committee does not believe that the apparently *"normal"* exchanges between interviewers and interviewee recorded on tape were interspersed, whenever the tape was turned off, with episodes where Dr Wheat was placed under pressure to withdraw her allegations. Had such pressure been applied, even if Dr Wheat had chosen to say nothing about it on the tape itself, the Committee believes that Dr Wheat's answers would sound at least constrained and there is no evidence on the tape that they were.

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40 Dr C. Wheat, Committee Hansard (in camera - released), p. 178.

41 Dr C. Wheat, BOI Transcript, p. 973.

42 *ibid.*, p. 974.

5.51 Lieutenant Commander Flynn told the Board that he had said to Dr Wheat at the 9 September 1992 interview that:

*"if she wanted to change any of her evidence in the light of subsequent recovery of memory or a clearer idea in her own mind as to what took place, then she was quite able to do so."<sup>43</sup>*

Commander Horobin also explained to the Board that Lieutenant Commander Flynn's intention was:

*"to be sure...that if she had recalled things and that there were differences in the earlier statement and as a result of her recollection she wanted to change it, that she could make a later statement."<sup>44</sup>*

5.52 There is evidence from the tape that the investigating team did everything possible to assist Dr Wheat in remembering the events of 15 August 1992. At the beginning of the second interview Dr Wheat unequivocally asserted that she could not remember anything other than the facts she had given to the investigating team at the time of the first interview. The team informed her of the evidence given by other witnesses and pointed out to her inconsistencies between her own and the other evidence. While it is possible to interpret these statements (as Dr Wheat did) as being evidence that the investigating team did not believe her, they can equally be seen as attempts to assist Dr Wheat in getting her story together to enable prosecution to proceed.

5.53 If anything, the Committee has reservations about the extent to which the investigating team revealed to Dr Wheat the detail of what other witnesses had said to them in their efforts to assist her recall. The team was in an awkward position. Had Lieutenant Commander Flynn and Commander Horobin not put to Dr Wheat the conflicting evidence that they had gathered from all the witnesses, they could have been subsequently accused of concealing information from her or not being sufficiently thorough. Their actions could have been construed as ensuring that no Court Martial would eventuate.

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43 BOI Transcript , p. 2509.

44 *ibid.*, p. 2253.

5.54 The Committee finds that the members of the investigating team were doing a difficult job as best they could under the circumstances. The Committee accepts the evidence that their intention in telling Dr Wheat that she could change her initial statement (where she could not remember what had actually happened to her) was to allow Dr Wheat to make a statement with the benefit of any memory she might have regained. The Committee concludes that Lieutenant Commander Flynn and Commander Horobin did not pressure Dr Wheat to withdraw her statement or change her evidence.

### **Other Matters Investigated by the Board.**

#### *Payment for Dr Wheat's expenses*

5.55 The Board of Inquiry had to inquire into the following matter as part of its Terms of Reference:

*Lieutenant WHEAT's allegation that she was forced to pay for her accommodation in Kuala Lumpur and flight to Singapore.*

The Board made a thorough inquiry into this matter and found that although Dr Wheat had received an advance from HMAS SWAN to cover most of her travel expenses, she was out of pocket for the sum of \$109.60, which represented payment for her flight from Malaysia to Singapore and for part of her accommodation after she left the SWAN in August 1992. This resulted from a change of travel plans on her part. The Board found that:

*"by a series of poor communications she was not encouraged to pursue reimbursement and was given little or no assistance. Accordingly, she concluded that the money was to all intents and purposes irrecoverable."<sup>45</sup>*

5.56 The Board recommended that the money be reimbursed to Dr Wheat. The Committee notes that the "*poor communications*" mentioned by the Board came about partly as a result of an understandable attempt to keep confidential Dr Wheat's reasons for travel. The Committee also notes that Dr Wheat did not avail herself of an

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45 BOI Report, p. 40. See also para. 7.48 of Chapter 7.

opportunity suggested to her in Singapore to collect the outstanding amount immediately. Dr Wheat has now been reimbursed and the Committee considers that the matter has been resolved to the satisfaction of all concerned and it has no further comment to make on this issue.

*The Board's analysis of the PR5*

5.57 The Board of Inquiry analysed in depth Captain Mole's assessment of Dr Wheat's performance and compared it to a draft PR5 by Commander Wellham covering the 3 week period Dr Wheat had served on HMAS WESTRALIA. A PR5 is a report on an officer's performance, usually raised annually by that officer's supervisor. In the case of officers who are being considered for promotion, the performance reports are raised half yearly and in the case of officers being considered for new postings, performance report may be raised after only a few months. Officers are rated on a scale ranging from 1 to 10 with scores carrying the following definitions:

*"3 - Satisfactory with general shortcomings*

*4 - Satisfactory with slight shortcomings*

*5 - Satisfactory or normal*

*6 - Good*

*7 - Very good indeed" <sup>46</sup>*

5.58 It is the Committee's understanding that there is no officially specified minimum score for promotion or appointment to a new posting. It is up to the officer taking the decision to exercise her or his judgement in the matter. The weight given to the PR5 in making the decision takes account of the circumstances under which the PR5 was drawn up, including the length of time for which it was possible to observe the performance of the officer involved.

5.59 The reports on Dr Wheat from the two Commanding Officers were quite similar, the scores differing only in the following areas:

**Leadership: 3 (SWAN)            5 (WESTRALIA)**

**The Board gave a 4.**

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46 DI(N) PERS 52-2, Appendix 1 to Annex D.

**Personal Qualities: 4 (SWAN)**

According to the draft report, it was likely to have been higher on WESTRALIA.

The Board changed it to a 6.

**Motivation and Drive: 3 (SWAN)**

No score from WESTRALIA.

The Board changed the 3 to a 5 because it: *"respected her determination to right what she sees as a number of wrongs that she has experienced at Navy's hands and her determination to remain on full time service."*<sup>47</sup>

5.60 Dr Wheat had scored above 5 on HMAS SWAN on all other counts except for **Initiative** (4 for both ships) and the Board did not change that assessment nor the 7 (higher than the WESTRALIA score) given by Captain Mole for **Intellectual Qualities**. The amended report (by the Board) gave Dr Wheat a total of 5.4 compared with a previous score of less than 5. The Committee notes that a number of witnesses who appeared before the Board made comments that supported Captain Mole's views about Dr Wheat's attitudes and suitability for working in a ship's environment.<sup>48</sup> The Committee notes that Dr Wheat herself told the BOI that:

*"I don't believe he [Captain Mole] was wrong in his assessment of my [naivety] about Service matters..."*<sup>49</sup>

She also agreed with Commander Wellham's judgement that she:

*"certainly was a fish out of water on a warship."*<sup>50</sup>

5.61 The Board's discussion and analysis of Dr Wheat's PR5 was done in the context of the future employment of Dr Wheat. The Committee believes that the Board of Inquiry's analysis of Dr Wheat's PR5 is positive and generous towards Dr Wheat. The

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47 BOI Report, p. 66.

48 BOI Transcript, pp. 584,871,1016.

49 *ibid.*, p. 954.

50 *ibid.*, p. 957.

Board recommended that Dr Wheat should be offered a permanent position in Navy subject to her meeting the conditions of service.

5.62 In her letter to the Minister, Dr Wheat said that she believed that she had been given a *"terrible"* performance report (PR5) because she had *"made complaints about sexual harassment and assault in the RAN that the Navy wish to ignore."*<sup>51</sup> The Committee found no evidence to substantiate this claim. The Committee notes that Captain Mole did not ignore Dr Wheat's initial complaint about the behaviour of Lieutenant Bartlett. He took the initiative to investigate the matter immediately it was brought to his attention. He was alerted to the matter by officers other than Dr Wheat. Captain Mole took appropriate action against the offender.<sup>52</sup> The allegation of sexual assault was thoroughly investigated and a decision to convene a Court Martial was made on 13 November 1992, more than a week before Dr Wheat sent her letter to the Minister.

5.63 At the Board of Inquiry, Dr Wheat provided further insight into her complaint about her PR5. She agreed that her real complaint was that she was being assessed for life on board SWAN, which she felt had no resemblance to the job she would be doing at COONAWARRA. It appears that Dr Wheat did not fully appreciate that the assessment of suitability for appointment to the Permanent Naval Force (PNF), which includes sea service, is not the same as assessing suitability for contract employment at a particular shore position.<sup>53</sup> The COONAWARRA position is discussed in greater detail in paragraphs 5.82 - 5.95 of this Chapter.

5.64 The Committee agrees with the Board of Inquiry's view that Captain Mole had a very difficult task in raising a PR5 for an officer who had been on his ship for only 2 months. The Board of Inquiry concluded that Captain Mole had made:

*"a genuine attempt to raise a PR5 in difficult circumstances. He had really observed her for only two months. Also, because of her alienation within the*

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51 Letter from Dr C. Wheat to Minister, 25 November 1992.

52 The handling of this incident is discussed in greater detail in Chapter 7 of this Report.

53 BOI Transcript, p. 958.

*wardroom, there was a bias (of which he was unaware) in the drafts he received."*<sup>54</sup>

5.65 Moreover, since Dr Wheat had been granted six years' rank seniority, it was appropriate that Captain Mole assess her performance during the posting on that basis.<sup>55</sup> The Board recommended that the PR5 written by Captain Mole be retained on Dr Wheat's file, together with the Board's analysis of her performance because the Board was conscious that:

*"its analysis may be faulty as no member of the Board was on board SWAN during the deployment in question. Similarly, CMDR Wellham's draft PR5 is based on a very limited observation period."*<sup>56</sup>

5.66 The evidence before the Committee suggests that the Board is right in adopting a cautious approach to its own partial re-writing of the PR5. The report was meant to be an evaluation of Dr Wheat's performance at sea. In particular the Committee notes that the Board's granting of a 5 for **Motivation** and **Drive** rather than the 3 granted by Captain Mole is based on the Board's observation of Dr Wheat after she left SWAN (namely her determination in pursuing her claim for redress). What happened after the deployment was obviously not relevant to Captain Mole's evaluation of her performance during the deployment.

5.67 It is most important to be absolutely clear whether a PR5 is a judgement about the individual's performance during the designated time and at the level at which the individual has been appointed to the position. It should not be a judgement about how that individual might perform in different circumstances, or if allowances were made for lack of training, or illness or any other extraneous factor. It is up to the appointing authority to take these aspects into account when considering posting, promotion or permanent appointment.

5.68 It is possible and at times useful to speculate about what performance might be under different circumstances, comment on potential and indicate what external factors

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54 BOI Report, p.66. The question of alienation is discussed more fully in Chapter 7 of this Report.

55 The mistake in the seniority granted to Dr Wheat came to light well after Dr Wheat left the SWAN. See paras 5.79-5.86 of this Chapter.

56 BOI Report, p. 66.

might have influenced performance at the time. It should also be made clear in an assessment if no opportunities presented themselves for an individual to demonstrate capacity in a particular area. However, the distinction between rating the actual performance and the other factors should be clear and unambiguous. The Committee recognises that in the Navy environment, an individual's performance at a shore establishment may be an incomplete indication of how that individual will perform at sea. The on-the-spot appraisal is invaluable to determine suitability for duties at sea.

5.69 The Committee is concerned that a PR5 and PERS-1<sup>57</sup> is sometimes written after only a short period of service at sea and that it may not be a fair indication of the potential of a crew member. This places both the assessor and the person being assessed in an invidious situation.

**5.70 Recommendation Six:** The Committee recommends that supervisors be clearly instructed and required to record in writing whether a performance assessment of an individual is based on a short period providing limited opportunities for observation of the performance of that individual.

### ***Court Martial***

5.71 Dr. Wheat submitted to the Committee that a Board of Inquiry ought to have been convened "*for the purposes of investigating [her] allegations of rape*"<sup>58</sup> before any decision to convene a Court Martial was made. The process leading to a Court Martial had been in train since August 1992. A decision to convene a Court Martial was made on 13 November 1992 after Dr Wheat had indicated, in writing, her interest in proceeding with the charges. The Court Martial was set to commence on 9 December 1992.

5.72 At no stage did Dr Wheat indicate to Navy that she felt that an Inquiry should be conducted into her allegations. Dr Wheat's first "*protest*" against the Court Martial was in the form of asking for its delay (not for an inquiry) in her letter to the Minister, which was received in the Minister's office on 2 December 1992 and which was forwarded to Navy on 14 December 1992 while the Court Martial was in progress. In the

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57 Note: A PERS-1 is a performance report for non commissioned officers.

58 Dr C. Wheat, submission, Committee Hansard (in camera-released) pp. 128-9.



circumstances, Dr Wheat submitted to the Committee that the Board's Terms of Reference should have included:

- (1) the effect of the circumstances of the initial investigation (at Lumut) on the Court Martial, the convening and conduct of the Court Martial, and
- (2) the way she was treated by Navy "*following the rape*".<sup>59</sup>

5.73 The Board of Inquiry was convened ten days after Navy received Dr Wheat's letter of complaint to the Minister. The Court Martial had concluded 3 days earlier, on 18 December 1992. The Committee is of the view that it would have been improper for the Board to investigate matters that had been dealt with following due process in a court of law. It would have also been inappropriate for the Board to inquire into the effect of the investigations on the Court Martial.<sup>60</sup>

5.74 In her evidence to the Committee, Dr Wheat also claims that the finding of "*not guilty*" was made because the officers from the SWAN were lying to the Board. Dr Wheat told the Committee:

*"The prosecutor told me that he had overheard some of the other witnesses talking about having been round to the hotel of the accused the night before and working out a story to get him off."*<sup>61</sup>

The prosecutor, Lieutenant Michael Slattery wrote to Navy in response to these allegations:

*"I never heard of any such thing at the time that the court martial was taking place or afterwards until I read it in the transcript before the Senate. I did not say this to Dr Wheat and no conduct by prosecution or defence witnesses of this kind ever came to my attention".*<sup>62</sup>

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59 Dr C. Wheat, submission, Committee Hansard (in camera - released), p. 129.

60 In both court martial proceedings and in trial by jury, there can be no appeal against acquittal of the accused.

61 Dr C. Wheat, Committee Hansard (in camera - released) p.233.

62 LEUT M. Slattery, Memorandum of 7 April 1994, forwarded to the Committee as enclosure to letter from CAPT B. Robertson to Committee Secretary, dated 8 April 1994.

## **Committee Conclusion**

5.75 In all, the Board of Inquiry took some 2000 pages of evidence from its 42 witnesses (including 4 civilian witnesses who had experience in managing the integration of men and women in work environments which had previously been exclusively male). After analysing the evidence gathered by the Board and its report, the Committee concludes that the Board's Terms of Reference were sufficient to enable the Board to consider any aspects of the unacceptable behaviour occurring on board HMAS SWAN. It was appropriate that the allegations of possible sexual assault on 15 August were dealt with as a separate matter and not as part of the inquiries conducted by the Board. It was also appropriate that the Board inquired into how the initial investigations that ultimately led to a Court Martial were conducted. The fact that it did so confirms the Committee's assessment that the Terms of Reference did not restrict the Board from pursuing any relevant matters. Related aspects of the Court Martial are examined in Chapter 8 of this Report.

5.76 The Committee notes here, that there were some facts relating to allegations of sexual harassment that did not emerge during the Board's inquiry. These are examined in Chapter 7 of this Report. The Board's failure to investigate these matters cannot be attributed to any shortcomings in the Terms of Reference. The appropriateness of the recommendations of the Board is examined in Chapters 6 and 7 of this Report.

## **Parallel Inquiry by Assistant Chief of Naval Staff - Personnel**

5.77 The issue of the employment of Dr Wheat by Navy subsequent to the allegations of sexual assault and of sexual harassment that she had made against individual members of Navy is not a separately identified Term of Reference of this Committee. However, it is clearly a matter of grave concern to Dr Wheat and she alleges a direct link between her complaints of sexual harassment and her failure to secure a particular permanent position in the Navy. This matter affects some of the issues central to this inquiry and the Committee views it as part of its general Terms of Reference. The Committee has therefore inquired into it.

5.78 Some of the evidence for these aspects is drawn from ACPERS-N<sup>63</sup> internal Navy investigation of some of Dr Wheat's complaints. It is important to understand that

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63 Assistant Chief of Naval Staff - Personnel.

the Board of Inquiry was set up within Maritime Command. Its Terms of Reference required it to investigate particularly matters within that command. Nevertheless the Board raised a number of issues and commented on matters which lay outside the jurisdiction of Maritime Command. In addition, on 11 December 1992, the Chief of Naval Staff directed ACPERS-N to:

*"investigate all allegations and claims made in the Reference [Dr Wheat's letter to the Minister] which relate to LEUT Wheat's postings, conditions of employment and personal support aspects."*<sup>64</sup>

5.79 ACPERS-N conducted a wide-ranging investigation covering the following issues:

- Dr Wheat's rank and pay seniority;
- the circumstances surrounding her posting to HMAS SWAN;
- her further service following the incident on the SWAN, including her posting preferences;
- the conduct of the investigation at Lumut, following the allegations made by Dr Wheat;
- the medical examination of Dr Wheat following the incident;
- follow up counselling and return to work;
- the completion of her period of full-time service (Dr Wheat was a Reserve officer on Continuous Full-Time Service not a member of the Permanent Naval Force); and
- the payment of her medical expenses by Navy.

5.80 The report produced by ACPERS-N for the Chief of Naval Staff (CNS) covered all of the above issues and was made available to the Committee. The report points to administrative errors made in granting seniority to Dr Wheat. It also reveals that Navy has taken many steps to assist Dr Wheat in the aftermath of her experiences

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64 CNS 1650/92 Minute to ACPERS-N, 11 December 1992, (emphasis added).

aboard HMAS SWAN. This has included the provision of counselling and psychiatric services and support for her rehabilitation.

5.81 The Committee is not aware whether ACPERS-N considered the option of convening a Board of Inquiry to investigate the matter referred to him by the Chief of Naval Staff. There are certain benefits in conducting an investigation in that way. However, it is also a costly method both in terms of human and financial resources. Following its own examination of the issues referred to ACPERS-N by CNS, the Committee is of the view that the matters were thoroughly investigated and a formal Board of Inquiry would not have been justified.

### ***Dr Wheat's Employment***

5.82 In her submission to the Committee, Dr Wheat claimed that she was "*deprived of the position offered to her at HMAS Coonawarra*"<sup>65</sup> because of the "*unfair*" PR5<sup>66</sup> given her by Captain Mole and the delays associated with it. When she left the SWAN at the end of August 1992, Dr Wheat believed that Captain Mole would write her performance report immediately. He did not in fact do so until 11 November 1992. Navy told the Committee that the delay:

*"is not an unusual circumstance in reports on officers who are at sea or who have just finished service at sea."*<sup>67</sup>

5.83 The Committee notes that, although the matter of Dr Wheat's employment by Navy was not one of the specific Terms of Reference of the Board of Inquiry convened by Maritime Command, the Board investigated the matter of the PR5 in depth and recommended that Captain Mole's PR5 on Dr Wheat be retained on her file but that

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65 Dr C. Wheat, submission, Committee Hansard (in camera - released), p. 126.

66 *ibid.*, p. 125. Note: A PR5 is an annual performance report raised on officers of the Navy. For various reasons a PR5 is sometimes raised more frequently. In this case, a PR5 was requested because the posting had been Dr Wheat's first sea posting and she was applying for a Permanent Naval Force commission.

67 CAPT G. Kennedy, Committee Hansard, p. 1301.

the Board's analysis of her performance should also be filed. Further the Board recommended that Dr Wheat be advised that subject to:

*"successful completion of an orientation course, medical fitness and her acknowledging that she may receive short notice postings including sea postings to meet the requirements of the service, she can apply for full-time service."*<sup>68</sup>

Dr Wheat was employed as a member of the Naval Reserves for 135 days Continuous Full-Time Service for the 1992 Asia deployment. In order to become a member of the Permanent Naval Force, she had to apply for and obtain a permanent commission.

*The offer of a position at HMAS COONAWARRA to Dr Wheat*

5.84 As already stated, Dr Wheat blamed the "poor"<sup>69</sup> assessment in her PR5 for her failure to be offered a permanent position at *HMAS COONAWARRA* near Darwin.<sup>70</sup> From the time she was still on *HMAS SWAN* in August, she had been encouraged to indicate her interest in the job and on 18 September 1992, she applied for the *COONAWARRA* position. Dr Wheat had numerous telephone conversations with staff in Navy's Personnel department in relation to that position.<sup>71</sup>

5.85 On 2 October 1992, Dr Wheat was contacted by telephone and told that due to an error made in May 1992 when she joined *HMAS SWAN*, she had been granted six years rank and pay seniority instead of only pay seniority based on her years of experience as a medical officer. Dr Wheat was told that the error would have to be rectified if she joined the Permanent Naval Force.<sup>72</sup> Dr Wheat refused to accept what she perceived to be a demotion and she withdrew her application for a permanent position. The Committee does not accept Dr Wheat's characterisation of the need to correct an administrative error as "a demotion". It is, of course, regrettable that the administrative error was made.

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68 BOI Report, p. 100 (emphasis added).

69 Dr C. Wheat, Committee Hansard (in camera - released), p. 232.

70 *ibid.*

71 Letter from Dr C. Wheat to Minister, 25 November 1992.

72 Comments on the effects of errors made by Navy's Personnel section are made in Chapter 7 of this Report.

5.86 Ten days later, on 12 October 1992, Dr Wheat submitted another request to join the Permanent Naval Force. On 22 October 1992, Dr Wheat rang Navy Personnel and was told that *"the Admiral would not sign my commission until he had received a report on me from HMAS Swan"*.<sup>73</sup> On 17 November 1992, Dr Wheat was advised that the position at HMAS COONAWARRA was no longer open to her. The position had been offered to a member of the Permanent Naval Force, Lieutenant Lee. Lieutenant Lee's posting was formally promulgated in the *'List of Officers Postings'* dated 26 November 1992.<sup>74</sup> If Dr Wheat joined the Permanent Naval Force, she would have to be posted somewhere other than Darwin. She withdrew her application to join the Permanent Naval Force.

5.87 In its submission to the Committee, Navy did not mention the delay in receiving the PR5 as being the reason for not posting Dr Wheat to COONAWARRA, Darwin:

*"Although she wanted to take up a posting at HMAS COONAWARRA in Darwin as a member of the Permanent Naval Force, the uncertainty surrounding the further investigations, the Court Martial and the Board of Inquiry made this impractical and another officer was posted there."*<sup>75</sup>

5.88 Dr Wheat is correct when she points out that at the time when she was advised that the COONAWARRA position was no longer open, the letter which prompted the setting up of the Board had not yet been dispatched. It is nevertheless true, as the Navy says, that there was much uncertainty surrounding her availability. Her letter of 10 November indicating that she wished the Court Martial to proceed had just been received and consultations with Navy's lawyers on whether there was sufficient evidence to proceed to Court Martial were being actively pursued. It is self-evident that positions cannot be held open indefinitely.

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73 Letter from Dr C. Wheat to Minister, 25 November 1992. Note: the problem caused by the delay in receiving the PR5 was confirmed by RADM Chalmers in a letter to Dr Wheat on 17 December 1992.

74 Letter from CAPT B. Robertson to Committee Secretary, 8 April 1994. LEUT Lee took up the position on 18 January 1993, i.e. before the BOI hearings had been completed.

75 RAN submission, Committee Hansard, p. 216.

5.89 In evidence to the Committee, Dr Wheat said that she believed the Board of Inquiry should have investigated the:

*"question of my posting to COONAWARRA which was cancelled after I had been promised it." 76*

Responding to the claims of cancellation of a promised posting, Rear-Admiral Oxenbould told the Committee that:

*"It is quite normal in the posting process that we discuss with people over the telephone whether they would be keen, especially, to go to areas such as COONAWARRA ... It is not unusual for us to carry out these discussions. We might have discussions with several people and only one would be selected to go forward." 77*

Rear-Admiral Oxenbould further explained that:

*"throughout this whole process (selection), there is considerable consultation, wherever possible, between the desk officer in the Naval Personnel Division, or the career manager...No promises are made because they are not the final decider of who is going to the posting." 78*

Captain Kennedy also told the Committee:

*"At no stage did her desk officer ever indicate to her that she was approved to be posted to HMAS COONAWARRA. There is an approval process and he is not the approving officer of that posting." 79*

5.90 The Committee accepts Navy's evidence that Dr Wheat was never "promised" the COONAWARRA position. However, the Committee believes that Dr Wheat took her discussions with Lieutenant Commander Harrod to mean that she would obtain the COONAWARRA position. The evidence before the Committee suggests that Dr Wheat

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76 Dr C. Wheat, Committee Hansard (in camera - released) p. 205.

77 RADM C. Oxenbould, Committee Hansard, pp. 1301-1302.

78 *ibid.*, p. 1619.

79 CAPT G. Kennedy, Committee Hansard, p. 1621.

had an inadequate understanding of the rules governing public employment and did not perceive that the position was not Lieutenant Commander Harrod's or even Captain Flynn's to give. She lacked an appreciation of the procedures Navy routinely follows when posting officers.<sup>80</sup>

5.91 The Committee notes that as part of the Good Working Relationships Project:

*"service personnel who are appointed to positions which include responsibility for or to defence civilians will be required to undertake Public Service awareness training."*<sup>81</sup>

**5.92 Recommendation Seven:** The Committee recommends that a special effort be made to ensure that all qualified entry personnel be given sufficient information to understand the regulations governing public employment in the Defence Force and Navy's way of applying those regulations to its organisation.

*Dr Wheat's further employment by Navy*

5.93 On 17 December 1992, (before the Board of Inquiry commenced its hearings) the then Assistant Chief of Naval Staff - Personnel, Rear Admiral Chalmers wrote to Dr Wheat offering her:

*"a one year extension to your contract in HMAS CERBERUS as a civilian medical practitioner or two years continuous full-time service on the RANR in HMAS ALBATROSS.*

*Any extensions of service beyond these periods would need to be reassessed against the prevailing manning situation at that time. Moreover, if you remain interested in a transfer to the PNF, your extensive medical experience will continue to influence any decision in this regard. However, you should recognise that a transfer to the PNF requires an unfettered ability*

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80 In his submission, CAPT P.G. Habersberger, the Director of Reserve Health Support - Navy had this to say about Dr Wheat's expectation that she was going to sea on HMAS WESTRALIA: *"Although I did indicate to LEUT Wheat that they were particularly looking for a Medical Officer for HMAS WESTRALIA, I did not give her any guarantee that she would be actually posted to that ship."*

81 RAN submission, Committee Hansard, p. 265.



*to move freely between postings in any locality, and that you would be liable for further sea service.”<sup>82</sup>*

5.94 It should be noted that at the time of Rear Admiral Chalmers' letter there was no active application by Dr Wheat to join the PNF. She had withdrawn her application on 17 November 1992. Rear Admiral Chalmers' letter proposed alternative opportunities open to her and classified the standard conditions that she would have to accept were she to apply for appointment to the PNF. Dr Wheat chose to have her contract at HMAS CERBERUS extended for one year. She resigned that position on medical advice on 6 August 1993.

5.95 The evidence before the Committee suggests that Navy has not at any time refused to employ Dr Wheat as a result of the allegations she has made. Dr Wheat has exercised her right to choose and has refused a number of offers of positions (both short term and long term) made by Navy.<sup>83</sup> Dr Wheat was only interested, at that time in temporary positions at CERBERUS or in a PNF posting in Darwin.<sup>84</sup> A Permanent Naval position requires posting to any establishment and to sea if required.<sup>85</sup> Dr Wheat has at no time indicated that she is prepared to accept those conditions of service. She cannot be considered for a permanent position until she applies for a permanent position and indicates that she is prepared to accept those conditions.

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82 Letter from RADM D. Chalmers to Dr Wheat, 17 December 1992.

83 i.e: 2 years continuous full-time service at ALBATROSS, extension of her contract at CERBERUS or a new application for a PNF position.

84 Letter from CAPT B. Robertson to Committee Secretary, 14 March 1994, (enclosure 7) Officers Posting and Course Preferences. RADM C. Oxenbould, Committee Hansard, p. 1622.

85 The Committee notes for example that over the period 1989 - 1993, Dr Carmel Moore was posted first to HMAS PENGUIN for 6 months, then to HMAS COONAWARRA for 7 months and then to sea, during which time she had 11 posting changes. Dr C. Moore, submission, para. 11.

### *Treatment of Dr Wheat after her return to Australia*

5.96 In certain respects, Dr Wheat has received more favourable treatment from Navy than is the norm for victims of alleged sexual assault in the community, for example in:

- the provision of legal counsel for Dr Wheat during the Court Martial;
- the provision of accommodation in Sydney at above the standard rate;
- agreement to pay for Dr Wheat's husband and two-year old child to join her in Sydney during the Court Martial; and
- agreement (from the Minister) to pay for Dr Wheat's legal representation at the Senate Inquiry and for pursuing any claim she may have against the Commonwealth "*with the usual reasonable costs conditions to apply.*"<sup>86</sup>

5.97 To date, Navy has paid some \$105,215.83 in legal fees for Dr Wheat. The total legal bill to June 1994 amounted to \$172,565.83. There is a legal bill for \$67,350 to Minter Ellison Morris Fletcher Solicitors and counsel which has not yet been paid<sup>87</sup> and which is the subject of discussions between the Attorney-General's Department and Dr Wheat's solicitors. The matter has now been referred to the Minister.<sup>88</sup>

5.98 Dr Wheat complains that she had to ask Navy to provide her with a legal counsel for the Court Martial. The fact is that it is not standard practice for witnesses in cases of alleged sexual assault to have the assistance of legal counsel. Navy provided such assistance when requested and also provided Dr Wheat with legal assistance for the Board of Inquiry's hearings and at this Committee's hearings. In relation to the accommodation in Sydney, Navy paid an extra \$30 per day to respond to Dr Wheat's request for change as soon as she indicated that she did not consider the

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86 Letter dated 16 September 1993 from the Minister for Defence Science and Personnel to Dr C. Wheat.

87 Letter from CAPT T. Stodulka to Committee Secretary, 10 June 1994.

88 Letter dated 14 June 1994 from Minter Ellison Morris Fletcher to Committee Secretary. (Attachment).

accommodation suggested by Navy (and used by other witnesses at the Court Martial) as suitable.<sup>89</sup>

5.99 The Committee considers that the Navy has been sensitive and responsive to concerns expressed by Dr Wheat after she made the allegations of sexual assault and sexual harassment. Prior to Dr Wheat joining HMAS SWAN, two administrative errors were made. The more serious, in terms of its consequences, was the error made in granting her six years' seniority. It appears to have adversely affected the feelings of some of the SWAN's crew towards Dr Wheat and the subsequent correction of the error adversely affected Dr Wheat's feelings towards the Navy.

5.100 The Committee considers the other matters raised by Dr Wheat (such as Navy's expectation that she would make her own way to the airport to go to Sydney for the Court Martial) do not reflect any ill intent towards her and are likely to occur in any large organisation, especially if tasks are delegated down a long chain of command, are not routine and are carried out at some distance from the point of decision. Where mistakes have been brought to the attention of those in command, directions that they be rectified have been promptly given. For example, Navy paid for a taxi to take her from her home to the airport to attend the Court Martial at a cost of \$74.<sup>90</sup>

### *Compensation*

5.101 The Board of Inquiry did not look at the issue of compensating Dr Wheat for loss of income in the wake of the SWAN incident as this matter was outside its Terms of Reference. The Committee considers that this was the proper approach to adopt since the Board did not inquire into all matters affecting Dr Wheat (personnel and

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89 Letter from CAPT B. Robertson to Committee Secretary 8 April 1994, (enclosures - Dr Wheat aspects).

90 Dr Wheat told the Committee that the taxi fare was only provided following a request from her legal adviser. However, documents provided by Navy show that original instructions given by Maritime Command regarding payment of Dr Wheat's taxi fare had not been followed and the Fleet Legal Officer had to re-issue those instructions.

personal support matters were inquired into by ACPERS-N). At Navy's last appearance before the Committee, Navy advised that the previous day, 24 March 1994:

*"Dr Wheat agreed on 24 March to commence rehabilitation processes, initially through contact established with Defence Compensation and her doctors."*<sup>91</sup>

The Committee understands that negotiation on the compensation claim by Dr Wheat has broken down since an offer for compensation made by Navy on 18 March 1994 was rejected by Dr Wheat's counsel. Navy advised the Minister for Defence Science and Personnel that:

*"The mediation process was concluded on the basis that the parties could not reach a mutually acceptable compromise."*<sup>92</sup>

#### *Medical Investigation*

5.102 In a letter written to the Committee to respond to certain comments made about her, Dr Wheat alleged that she had been further discriminated against because the medical officer who examined her after the alleged sexual assault told her that sexual intercourse had not taken place although he knew that it had. Dr Wheat alleged that:

*"She was part of a process in a system, which ... continued the discrimination against her, previously commenced in the ship. Its proceedings were tainted by the conduct of the investigation upon which they were founded. Principally being conduct of an officer who was a close friend of LCDR James ...and by a medical officer who purported to advise her that sexual intercourse had not taken place. This was extraordinary, in light of what must have then beknown (sic) by the investigators, that LCDR James was claiming that intercourse had taken place and that it was consensual."*<sup>93</sup>

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91 Ms H. Taylor, Committee Hansard, p. 1635.

92 RADM C. Oxenbould, Minute dated 23 March 1994.

93 Letter from Minter, Ellison, Morris, Fletcher (Dr Wheat's Solicitors) to Committee Secretary, 3 February 1994, p. 5.

5.103 In his submission to the Committee, Captain Flynn challenges Dr Wheat's claim. He states that he examined Dr Wheat during the morning of 20 August 1992 and that he gave an opinion which:

*"I believe ... to have been a valid one at the time that I counselled her on the basis of the information and evidence available to me... The assertion by LCDR James was made apparently in the afternoon of the 20 of August. I believe I was told of this by the investigators either that evening, or possibly the following day, but in any case, after I completed my investigation and written reports... Although I had the opportunity to see Surgeon Lieutenant Wheat on two or three occasions after I became aware of his assertion, I did not feel that it was my place to acquaint her with this as the investigation was still in progress."*<sup>94</sup>

5.104 The Committee accepts that Captain Flynn's comments to Dr Wheat were made strictly on the basis of his medical examination of Dr Wheat and that<sup>95</sup> he did not know at that stage that Lieutenant Commander James would tell the investigating team that sexual intercourse (without ejaculation) had taken place. After careful consideration of the evidence placed before it, the Committee concluded that Captain Flynn acted with professional integrity and the Committee firmly rejects any suggestion to the contrary.

5.105 The Committee notes that the Navy had shown foresight in developing and distributing to naval vessels a medical sexual assault kit in the event that the most serious of sexual offences were to occur. Called the Sexual Assault Investigation Kit (SAIK) the kit contains:

*"necessary instructions, documentation and equipment required to obtain and preserve in a forensically acceptable state, all relevant medical evidence. Its protocol requires referral for specialist counselling and this is re-inforced by the Navy policy (Naval Health Circular 7/91)."*<sup>96</sup>

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94 CAPT M. Flynn, supplementary submission, para. 14.

95 Note: CAPT Flynn examined Dr Wheat on 20 August 1992, five days after the alleged assault had taken place. In all the interviews at Lumut Dr Wheat stated that she could not recall whether or not intercourse had taken place.

96 CAPT M. Flynn, submission, para. 35

HMAS SWAN had the SAIK on board and it was used by Captain Flynn to examine Dr Wheat after she had made the allegations of sexual assault. The Committee notes that Dr Wheat was initially reluctant to undertake the counselling offered as part of the package and she was encouraged to do so by the investigation team.<sup>97</sup>

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<sup>97</sup> BOI Transcript, p. 2243.