

**External Review into Sexual Misconduct and Sexual  
Harassment in the Canadian Armed Forces**

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## Executive Summary

While problems of sexual harassment and sexual assault are not unique to the CAF—numerous organizations are struggling to address the prevalence of inappropriate sexual conduct—the time is right for the leadership of the Canadian Armed Forces (CAF) to tackle the issue. Sexual harassment and sexual assault not only harm the victims, but also the integrity, professionalism and efficiency of the CAF as a whole.

One of the key findings of the External Review Authority (the ERA) is that there is an underlying sexualized culture in the CAF that is hostile to women and LGBTQ members, and conducive to more serious incidents of sexual harassment and assault. Cultural change is therefore key. It is not enough to simply revise policies or to repeat the mantra of “zero tolerance”. Leaders must acknowledge that sexual misconduct is a real and serious problem for the organization, one that requires their own direct and sustained attention.

While cultural change is not an easy enterprise, the CAF has a variety of tools at its disposal including policies, training programs, the disciplinary and military justice system, and victim support services. However, these instruments need to be strengthened if they are to be effective. This Report represents the findings of the ERA’s review of the policies, procedures and programs of the CAF relating to inappropriate sexual conduct, and its recommendations for how to best utilize such tools to reduce the prevalence of sexual harassment and sexual assault in the armed forces.

### Scope and Mandate of the Review

The mandate of the ERA was to examine CAF policies, procedures and programs in relation to sexual harassment and sexual assault, including the effectiveness with which these policies are currently being implemented. To carry out this mandate, the ERA conducted a series of confidential interviews with reserve and regular members, from all ranks and environments (Naval, Land, and Air Force, and training), from July to December, 2014. The ERA also interviewed individuals whose work in the CAF relates, in various ways, to the investigation or prevention of sexual harassment and sexual assault, or to providing support to victims of such prohibited conduct. These individuals included Commanding Officers, harassment advisors, workplace relation advisors, military police, investigators from the Canadian Forces National Investigation Service, representatives of the Judge Advocate General, chaplains, physicians, nurses, social workers, and representatives of support groups, as well as several military researchers. The ERA also met with two civilian organizations, one operating in the law enforcement sector and one commercial corporation, and reviewed information concerning the practices of a number of other armed forces, to examine “best practices” in addressing inappropriate sexual conduct in the workplace.

The ERA’s consultations were conducted through focus groups, face-to-face interviews and telephone interviews, and were held at various locations, including two naval bases, three land bases, two air bases, two training bases, two military colleges, and on several

reserve units sites. In addition, CAF members were informed about the Review on the CAF website and through widely broadcast emails, and were invited to contact the ERA directly through a dedicated, confidential email address. The ERA made itself available to meet with individuals both on and off-base in order to ensure confidentiality and to maximize the participation of interested individuals. Ultimately, over 700 individuals contributed to the Review.

## Culture of the CAF

The military ethos of the CAF is founded on respect for dignity of all persons, a principle that is embodied in CAF policies, which are themselves enforceable through both administrative and disciplinary action. The ERA found a disjunction, however, between the high professional standards established by the CAF's policies on inappropriate sexual conduct, including sexual assault and sexual harassment, and the reality experienced by many members day-to-day.

Throughout its consultations, the ERA met with members who appeared genuinely happy with their choice of career, and who found great personal pride and satisfaction in their work for the military. At the same time, however, the ERA's consultations revealed a sexualized environment in the CAF, particularly among recruits and non-commissioned members, characterized by the frequent use of swear words and highly degrading expressions that reference women's bodies, sexual jokes, innuendos, discriminatory comments with respect to the abilities of women, and unwelcome sexual touching. Cumulatively, such conduct creates an environment that is hostile to women and LGTBQ members, and is conducive to more serious incidents of sexual harassment and assault.

Although the most common complaints to the ERA related to this hostile, sexualized environment, the ERA also heard reports of *quid pro quo* sexual harassment. Some participants further reported instances of sexual assault, including instances of dubious relationships between lower rank women and higher rank men, and date rape. At the most serious extreme, these reports of sexual violence highlighted the use of sex to enforce power relationships and to punish and ostracize a member of a unit.

The ERA found that members appear to become inured to this sexualized culture as they move up the ranks. For example, non-commissioned officers (NCOs), both men and women, appear to be generally desensitized to the sexualized culture. Officers tend to excuse incidents of inappropriate conduct on the basis that the CAF is merely a reflection of civilian society. There is also a strong perception that senior NCOs are responsible for imposing a culture where no one speaks up and which functions to deter victims from reporting sexual misconduct.

As a result of these attitudes, there is a broadly held perception in the lower ranks that those in the chain of command either condone inappropriate sexual conduct, or are willing to turn a blind-eye to such incidents.

Comprehensive cultural change is therefore required, and such change cannot occur without the proactive engagement of senior leaders in the CAF. Senior leaders—particularly those with general oversight responsibilities—need to acknowledge the problem of sexual harassment and sexual assault in the armed forces, clearly state that such misconduct is unacceptable, and adopt a comprehensive strategy to eliminate the sexualized environment and to better integrate women into the military, including by appointing more women to positions of senior leadership.

## Under-Reporting

It was readily apparent throughout the consultations that a large percentage of incidents of sexual harassment and sexual assault are not reported. First and foremost, interviewees stated that fear of negative repercussions for career progression, including being removed from the unit, is one of the most important reasons why members do not report such incidents. Victims expressed concern about not being believed, being stigmatized as weak, labeled as a trouble-maker, subjected to retaliation by peers and supervisors, or diagnosed as unfit for work. There is also a strong perception that the complaint process lacks confidentiality. Underlying all of these concerns is a deep mistrust that the chain of command will take such complaints seriously. Members are less likely to be willing to report incidents of sexual harassment and assault in a context in which there is a general perception that it is permissible to objectify women's bodies, make unwelcome and hurtful jokes about sexual interactions with female members, and cast aspersions on the capabilities of female members. That such conduct is generally ignored, or even condoned, by the chain of command prevents many victims from reporting incidents of inappropriate conduct.

The ERA heard repeatedly from participants that the only way to increase the frequency of reporting is to create a reporting mechanism outside of the chain of command. Indeed, a number of other military organizations—for example in the United States, Australia and France—have created independent offices to receive reports of sexual misconduct, as well as to provide victim support, conduct training, and track data. Most of these offices allow victims to decide whether or not they wish their complaint to trigger a formal complaint and investigation process. Regardless of which path they choose, however, victims are offered treatment and support.

As has been modeled in other countries, and is demanded internally by many of the CAF's own members, the ERA recommends creating a center for accountability for sexual assault and harassment, independent from the CAF, with responsibility for receiving complaints of inappropriate sexual conduct, as well as responsibility for prevention, victim support, data collection, training, and monitoring of case outcomes. Complaint processes should allow victims to choose whether or not they wish their complaint to trigger a formal investigation, but in either case should entitle the victim to receive treatment and support services.

## Definitions

While mere policy change is not, in and of itself, sufficient to reduce the prevalence of inappropriate sexual conduct, policies do constitute a key tool to guide the conduct of CAF members. Unfortunately, the ERA found that the definitions of prohibited conduct in the current policies are deficient.

In particular, interviewees expressed confusion about what constitutes *sexual harassment*, *sexual misconduct*, *adverse personal relationship*, and *fraternization*. In the case of sexual harassment in particular, the CAF definition is not only overly-complex, it is also unduly narrow and fails to capture a broad range of inappropriate sexual conduct.

The definition of sexual harassment should cover not only individual and *quid pro quo* harassment, but also unwelcome sexual conduct that contributes to a hostile organizational culture. This includes sexual comments or jokes that are not necessarily addressed to a particular person, but which create a negative sexualized environment. In addition, the definition of sexual harassment should not be limited to incidents that occur in the workplace, given that members generally live, work, and socialize together within organizational structures created by the CAF.

The notion of *adverse personal relationship* is also poorly understood. It is only described in CAF policies by reference to the negative consequences on the unit, and does not specifically address relationships between members in different positions of authority. In view of the inherent power imbalance between members of different rank, however, there should be an administrative presumption of an adverse personal relationship applicable where such relationship has not been disclosed in accordance with the policy.

The concept of *sexual misconduct* is also poorly defined, in large part because the term has a different meaning in the policy than its ordinary meaning in plain language. The term “sexual assault”, which is commonly understood by Canadians and is consistent with the *Criminal Code*, should therefore be used to describe all instances of intentional, non-consensual touching of a sexual nature. The policy should also address the concept of consent and the effect of drugs or alcohol or a power imbalance on the existence of genuine consent in a sexual encounter.

Overall, the ERA found that the rules would be more effective if there existed a unified approach to inappropriate sexual conduct containing clear definitions and examples of the prohibited conduct, and which captures the institutional environment in which CAF members live, work and socialize. The policy should be expressed in plain language consistent with the *Criminal Code*.

## Processes and Procedures

The current processes in place to identify, report, investigate and resolve incidents of sexual harassment are complex and do not yield appropriate results. It is not surprising that an overwhelming number of victims choose not to report an incident at all.

In particular, before a complaint of sexual harassment is finally resolved, the parties may have to pursue three separate stages of attempted resolution: a process of alternate dispute resolution (in which the complainant is encouraged to confront the alleged harasser informally), an administrative investigation by the Responsible Officer, and a grievance. This process is overly long and burdensome. Further, the emphasis on the use of self-help techniques and on resolving the complaint at the lowest level is problematic. Victims will generally not be comfortable taking a confrontational position with their harasser, particularly when the harasser was of a higher rank. Moreover, many interviewees who did bring their complaint forward to a supervisor reported that the complaint was not taken seriously. The ERA found that the pressure to settle complaints at the lowest level functions to stifle complaints and intimidate complainants; it has the very opposite effect of a zero tolerance policy. Formal alternative dispute resolution (ADR) is also offered to victims, however the ERA found that these procedures are generally inappropriate in cases of sexual harassment.

The ERA also heard that even where complaints of sexual harassment are ultimately held to be well-founded, the resulting sanction was generally perceived as meaningless—a “slap on the wrist”—and ineffective as a deterrent.

To simplify the process, the complaint should by-pass the two first stages and commence at the grievance level. The CO, acting as adjudicator, would still have the option of initiating a harassment investigation as part of the grievance procedure. This streamlined process would cut out unnecessary delay and pressures on the victim, and bring the matter to the attention to the CO more rapidly. Although victims could be offered mediation or other ADR techniques, this should only be one of the options available to them. Also, to improve consistency and deterrence, COs should receive guidance as to appropriate sanctions where sexual harassment is found to have occurred.

Even more serious problems were reported with respect to the procedures in place to investigate sexual assault. The ERA is particularly concerned by the reports it heard of the lack of appropriate skills demonstrated by the military police. While the ERA met with a number of dedicated members of the military police, many were confused about the relevant policies, insensitive to the problem of sexual assault, lacked training on the basic elements of the offence (including the legal concept of consent), and were unaware of the available resources to support victims. Further, the ERA heard that low-level assaults, and assaults that do not result in physical injury, tend to be ignored, and charges in these cases are often not laid.

For these reasons, among others, victims, concerned about how they will be treated by the military justice system, tend not to report sexual assaults. Many of those victims who did report an offence said that their experiences were “atrocious”. To rebuild trust in the system, complainants need to be reassured that the CAF is committed to ensuring that their complaints are appropriately investigated. This can be achieved, in part, by allowing the victim to request to have her case transferred to civilian authorities.

Finally, the ERA found that very little data is collected by the CAF with respect to the occurrence of either sexual harassment or sexual assault. While the military does have systems in place to track incidents, these tools appear to be used only inconsistently, and most incidents are not reported in any event. As a result, there is very little accountability in the chain of command or the military police as to the outcome of any particular incident, and the CAF lacks relevant information in trying to prevent future incidents from occurring.

## Programs and External Resources

While an impressive number of programs and services appear to be offered to support victims of inappropriate sexual conduct in the CAF, the reality is that many of these services are only available in a few locations, or are inadequate and ineffective. Moreover, many participants indicated that they had no idea what services were available to them, and noted that there is no centralized source of information, such as a comprehensive CAF website, where they can learn about victim support services.

Overall, the ERA found that nurses and social workers are the most important resource for victims of inappropriate sexual conduct and, at times, for distressed respondents or accused. The role of nurses and social workers is necessarily limited, however, because they usually only become involved when a victim is seriously distressed and has been referred for medical care. Many victims avoid accessing medical services because of a frequent perception that this could result in a loss of confidentiality. Further, a number of interviewees had had negative experiences when reporting sexual assault to a physician. Finally, while nurses and social workers play an important role in supporting victims, their role is not to act as an advocate or to provide the member with guidance about how to navigate the various legal processes and proceedings.

## Training

Members of the CAF receive mandatory training at regular intervals, including on prohibited sexual conduct. As a practical matter, however, this training does not seem to have any significant impact. A large number of participants reported that the classes are not taken seriously: harassment training is laughed at, the course is too theoretical, and training on harassment gets lost among the other topics covered. Power-point training is dubbed “death by power-point”, and training on-line is severely criticized. A number of interviewees also expressed scepticism about unit-led training: there is a common view that in many cases the trainers were themselves complicit in the prohibited conduct. Participants reported that COs are insufficiently trained and that they are unable to appropriately define, assess and address sexual harassment.

Overall, the ERA found that the training currently being provided is failing to inform members about appropriate conduct, or to inculcate an ethical culture in the CAF. Rather, current training lacks credibility and further perpetuates the view that the CAF does not take sexual harassment and assault seriously.

Training on inappropriate sexual conduct should be a stand-alone topic and should be carried out by skilled professionals in small groups utilizing interactive techniques. Unit-led training should be limited, and on-line training should only be used for non-commissioned members when accompanied by interactive training. Leaders should also be required to undertake regular training on inappropriate sexual conduct and their responsibilities under the relevant policies. Training for military police should include a focus on victim support, interviewing techniques, and the concept of consent. Physicians, nurses, social workers and chaplains would also benefit from increased training on how to support victims of inappropriate sexual conduct.

## **Conclusion: Avenues Going Forward**

Policy change is a critical tool for the CAF to be able to confront the problem of sexual harassment and sexual assault. However, the challenge for the CAF goes beyond policy revision if it is to effectively address the problem of inappropriate sexual conduct in the military.

First, cultural change is key. Without broad-scale cultural reform, policy change is unlikely to be effective. This requires the CAF to address not only more serious incidents of sexual harassment and assault, but also low-level sexual harassment, such as the use of sexualized and demeaning language, which contributes to an environment that is hostile to women and LGBTQ members.

Second, strong leadership drives reform. The deep, genuine, and concrete commitment of senior leaders is essential to developing programs that will meaningfully impact the organization, as well as to convey a clear message to CAF members that inappropriate sexual conduct will not be tolerated, and to rebuild trust between CAF members and senior leadership.

Third, improving the integration of women, including in positions of senior leadership, is necessary to cultural reform. While the broader question of whether women are adequately represented in the CAF falls outside of the mandate of this Review, there is an undeniable link between the existence of a hostile organizational culture that is disrespectful and demeaning to women, and the poor integration of women into the organization. Increasing the representation of women in the CAF, including in the highest positions of senior leadership, is therefore key to changing the culture of the organization.

Fourth, the CAF needs to re-build the confidence of members that the organization takes sexual harassment and assault seriously. Establishing an independent agency to receive reports of inappropriate sexual conduct and to provide support to victims, among other things, is an important step in improving processes to address sexual harassment and assault, and will demonstrate to members that the CAF takes the issue of inappropriate sexual conduct seriously. Similarly, allowing victims of sexual assault to request that their complaints be brought to civilian authorities will send a strong signal that the CAF is prioritizing their needs.



The willingness of the CAF to take a hard look at its own practices and procedures through this independent review is a measure of the seriousness with which the military takes the problem of inappropriate sexual conduct. It is an indication of a willingness on the part of the CAF to take concrete steps to reduce incidents of sexual harassment and assault, and to create a more inclusive organizational culture that respects the dignity of all its members. Cultural change, improving the integration of women into the organization, rebuilding the trust of members in the chain of command, and reducing the prevalence of sexual harassment and sexual assault, will not be easy to achieve. Such goals require strong leadership and sustained commitment. But they are essential to the development of a modern military organization that not only embraces the principle of respect for human dignity, but is also able to optimize on the skills and talents of *all* its members. The Canadian public expects it, and CAF members deserve it.

# Recommendations

## Recommendation No. 1

Acknowledge that inappropriate sexual conduct is a serious problem that exists in the CAF and undertake to address it.

## Recommendation No. 2

Establish a strategy to effect cultural change to eliminate the sexualized environment and to better integrate women, including by conducting a gender-based analysis of CAF policies.

## Recommendation No. 3

Create an independent center for accountability for sexual assault and harassment outside of the CAF with the responsibility for receiving reports of inappropriate sexual conduct, as well as prevention, coordination and monitoring of training, victim support, monitoring of accountability, and research, and to act as a central authority for the collection of data.

## Recommendation No. 4

Allow members to report incidents of sexual harassment and sexual assault to the center for accountability for sexual assault and harassment, or simply to request support services without the obligation to trigger a formal complaint process.

## Recommendation No. 5

With the participation of the center for accountability for sexual assault and harassment:

Develop a simple, broad definition of sexual harassment that effectively captures all dimensions of the member's relationship with the CAF.

Develop a definition of adverse personal relationship that specifically addresses relationships between members of different rank, and creates a presumption of an adverse personal relationship where the individuals involved are of different rank, unless the relationship is properly disclosed.

Define sexual assault in the policy as intentional, non-consensual touching of a sexual nature.

Give guidance on the requirement for consent, including by addressing the impact on genuine consent of a number of factors, including intoxication, differences in rank, and the chain of command.

## **Recommendation No. 6**

With the participation of the center for accountability for sexual assault and harassment, develop a unified policy approach to address inappropriate sexual conduct and include as many aspects as possible of inappropriate sexual conduct in a single policy using plain language.

## **Recommendation No. 7**

Simplify the harassment process by:

- Directing formal complaints to COs acting as adjudicators in a grievance
- Reducing emphasis on ADR.

## **Recommendation No. 8**

Allow victims of sexual assault to request, with the support of the center for accountability sexual assault and harassment, transfer of the complaint to civilian authorities; provide information explaining the reasons when transfer is not effected.

## **Recommendation No. 9**

Assign responsibility for providing, coordinating and monitoring victim support to the center for accountability for sexual assault and harassment, including the responsibility for advocating on behalf of victims in the complaint and investigation processes.

## **Recommendation No. 10**

Assign to the center for accountability for sexual assault and harassment, in coordination with other CAF subject matter experts, responsibility for the development of the training curriculum, and the primary responsibility for monitoring training on matters related to inappropriate sexual conduct.

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## 1. Introduction

The men and women who serve in the Canadian Armed Forces are required to make great personal sacrifices on behalf of their country. They should not also be required to tolerate violations of their dignity or security as a result of inappropriate sexual conduct.

The problem of sexual misconduct in society at large cannot be overstated. In the wake of unprecedented public discussion about the harms of sexually inappropriate conduct,<sup>1</sup> the prevalence and impact of sexual harassment and assault has become an issue that employers, universities, governments and other organizations across Canada are struggling to address. The time is right for the leadership of the Canadian Armed Forces (CAF) to tackle the problem of sexual harassment and assault. The members of the armed forces need to see that such conduct will not be tolerated in the Canadian military.

To that end, it is not enough for the CAF to simply reiterate the mantra of zero tolerance. Given the everyday experiences of CAF members, this would only feed the existing scepticism that zero tolerance is easily spoken, but rarely implemented. Instead, CAF leadership, including both junior and senior leaders, need to take concrete steps to improve the experiences of members and their confidence in their leadership. Such change will not occur simply by revising the CAF's policies on paper. Rather, there must be a multi-faceted effort, with the genuine commitment and involvement of senior leadership—particularly those with general oversight responsibilities—to embrace change at all levels of the organization. In particular, there must be recognition that a truly professional culture requires respect for the dignity and integrity of all persons, regardless of gender or sexual orientation. This requires CAF leadership to acknowledge and address the problem of sexual harassment and sexual assault in the armed forces. Perhaps most importantly, for any real change to occur the CAF must accept that the problem of sexually inappropriate conduct is not a woman's problem, or the problem of any single individual. Instead, it is a problem affecting the integrity, professionalism, and efficiency of the CAF as a whole.

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<sup>1</sup> In the fall of 2014, allegations of inappropriate sexual conduct were made against CBC host Jian Ghomeshi leading to his dismissal. At the same time, claims of sexual assault by members of the Canadian House of Commons led to the expulsion of two members from the Liberal Party caucus, and charges of sexual assault against American comedian Bill Cosby continue to surface. All of these allegations have been widely covered by the media and have generated considerable discussion within the Canadian public about sexual misconduct.

## 1.1 Terminology

As discussed in greater detail below, one of the findings of the External Review Authority (ERA) is that the term “sexual misconduct” as defined in Defence Administrative Order and Directive (DAOD) 5019-5 is confusing and misleading because the DAOD’s use of the term is inconsistent with its plain language meaning. In this Report, the term “sexual assault” is therefore used to refer to acts that would be considered offences under the Canadian *Criminal Code*, while “inappropriate sexual conduct” is used broadly to include a range of conduct of a sexual nature, from prohibited personal relationships, to sexual harassment and sexual assault.

In most cases, this Report uses feminine pronouns (she and her). This reflects the fact that, in the vast majority of cases, victims of sexual harassment and sexual assault in the CAF are women. Most often, quotations from interviews are from female members.

The use of the term “policy” also requires clarification. In the context of the CAF, the word “policy” is sometimes used to refer to formal policies, such as DAODs issued by the Chief of Defence Staff (CDS), but it may also refer to rules that are universally accepted within the CAF, but which are not named in a particular document. For example, the CAF’s policy of zero tolerance towards sexual misconduct is not found in a formal document, but is nevertheless accepted as an operating policy within the organization. In yet other instances, the term “policy” is used broadly to refer to a set of rules contained within a number of different policy instruments. In this Report, when the word “policy” refers to a specific policy instrument, the originating document is cited. Otherwise, the expression “policy” is used in its broad meaning to refer to the system of principles in place in the CAF to guide organizational decision-making, whether by virtue of a written document or common practice.

Finally, a third expression needs to be explained. “Leadership”, in the military context, is exercised by anyone who is charged with the supervision of members of a lower rank. As such, all junior non-commissioned officers (NCOs), senior NCOs, Officer cadets and junior officers are encompassed in this expression. The term “senior leadership” comprises all majors and above.

## 2. Scope and Mandate of the Review

In December 2013, the CAF released the results of a survey conducted in 2012, which was designed to “examine how informed [regular] CAF members are about the harassment policy, to obtain a measure of how often harassment occurs in the CAF and to explore the attitudes, perceptions and experiences of [regular] service members in relation to harassment in the CAF.”<sup>2</sup> Of 1705 survey respondents, only 56 indicated that they had experienced an incident of sexual harassment in the preceding 12 months.<sup>3</sup> Around the same time, the Judge Advocate General (JAG) released its Annual Report, which stated that for the year 2011-2012, only nine charges of sexual assault had been brought to court martial.<sup>4</sup> It is to be noted that charges may also have been laid before civilian courts, but no numbers were provided. Not long after the release of these data, however, French and English Canadian media outlets reported a dramatically higher incidence of sexual misconduct within the CAF.<sup>5</sup> As a result of the discrepancies between the CAF data and the allegations contained in these media reports, the CDS requested an external independent review of the CAF’s policies, procedures and programs with respect to sexual harassment and misconduct, as well as of their implementation.<sup>6</sup> To that end, the CDS asked the ERA to carry out an independent review (the Review) and to prepare this Report.

Given the urgency with which the CDS wanted to confront allegations of sexual misconduct within the organization, the ERA undertook to conduct its fact-finding between July and December 2014, and to file its Report by the spring of 2015. This meant that the ERA could visit only a select number of bases and that research of secondary sources (for example, sociological research, relevant case law, and best practices) was necessarily limited. Nonetheless, the ERA is satisfied that it had the opportunity to meet with an adequate number of members, former members, and outside resources, and to review all relevant policies and a sufficient number of comparative documentation, to formulate its recommendations.

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<sup>2</sup> J. Coulthard, 2012 *Canadian Forces Workplace Harassment Survey*, 2013, p. 9

<sup>3</sup> *Canadian Forces Workplace Harassment Survey*, p. 15

<sup>4</sup> JAG 2012-2013 Annual Report, p. 32

<sup>5</sup> N. Mercier and A. Castonguay, “*Crimes sexuels: le cancer qui ronge l’armée canadienne*”, L’Actualité, April 22, 2014; N. Mercier and A. Castonguay, “*Our Military’s Disgrace*”, Maclean’s, May 5, 2014

<sup>6</sup> CDS Announcement, July 9, 2013



## 2.1 ERA's Mandate

The mandate of the ERA is to:<sup>7</sup>

“consider and make recommendations concerning:

- the adequacy of the definition of “sexual misconduct” as provided for in Defence Administrative Order and Directive 5019-5m and “sexual harassment” as provided in Defence Administrative Order and Directive 5012-0;
- the adequacy of policies, procedures and programs in relation to sexual misconduct and sexual harassment;
- the training CAF members receive in relation to sexual misconduct and sexual harassment;
- the resources dedicated to the implementation of the policies, procedures and programs in relation to sexual misconduct and sexual harassment;
- the extent to which CAF members report alleged incidents of sexual misconduct or sexual harassment and if applicable, any reasons why reporting may not occur, including the role of military culture and the chain of command as it relates to the reporting of incidents; and
- any other matter that the [ERA] considers relevant in assisting the CAF to strengthen the prevention of incidents of sexual misconduct and sexual harassment.”

The mandate contains limitations as to its scope. Specifically, the ERA “shall not review any decision relating to the military or criminal justice system including:

- a decision by a military judge in the performance of his or her judicial duties
- a decision of a court martial or summary trial
- or a decision made in the exercise of discretion to investigate complaints, lay charges, proceed with charges or prosecute charges.”

Additional limitations provide that the ERA “shall not review:

- legal advice received by the Department of National Defence (DND) or the CAF in relation to any matter or any proceedings;
- professional conduct and professional standards under the jurisdiction of the Law Society of a province;
- conduct of military police that may be the subject of a complaint under Part IV of the National Defence Act (the *NDA*); or

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<sup>7</sup> Contract No 8404-15008/001/7G

- any matter related to the JAG in respect of his superintendence of the administration of military justice in the CAF.”

## 2.2 Fact-Finding Process

The ERA was asked by the CDS to meet with reserve and regular members from all ranks and environments (Naval, Land and Air Forces, and training), as well as with individuals responsible for the development and implementation of the CAF’s sexual harassment and misconduct policies. Further, the ERA was asked to be available through e-mail correspondence to members and former members, in addition to conducting a review of relevant CAF policies and related documentation.

The Director General, Military Personnel (DGMP) and a coordinator of the Chief Review Service of the DND (the Coordinator) assisted in selecting sites for base visits; however, the ultimate decision about which sites to visit was made by the ERA. In addition, the Coordinator was assisted by on-site officers to organize visits and access to documents, following protocols established by the ERA.

Between July and December, 2014, the ERA held consultations at various military locations across Canada, including two naval bases, three land bases, two air bases, two training bases, and the two military colleges. The ERA also met with members from nine reserve units. Other in-person consultations involved meetings with a law enforcement agency, a large commercial organization, and an expert specialized in crisis management. In addition, the ERA conducted several days of telephone interviews and received a number of written statements. Excluding senior leaders whose participation was limited to town hall meetings, over 700 individuals—of whom more than 400 participated through focus groups—were consulted throughout the Review.<sup>8</sup> The ERA was assisted in all interviews by a senior litigator who conducted the discussions in both French and English, and by counsel with expertise in labour and human rights law in the preparation of this Report.<sup>9</sup>

CAF members (and former members) were informed about the purpose and mandate of the Review on the CAF web-site, and were invited to contact the ERA directly through its dedicated,

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<sup>8</sup> Throughout the Report, references to discussions with contributors are identified according to whether the contribution came from a focus group, an interview organized by the Coordinator, or a volunteer contribution. Where sufficiently homogeneous, the gender and rank of the participants in the focus groups are indicated. Reserve units are also explicitly identified. “Coordinator interviews” include interviews with CAF members or civilians involved in the application of the relevant policies, or in supporting the victims, such as harassment advisors, harassment investigators, social workers, nurses, physicians, etc. However, to protect confidentiality, the profession of the interviewee is not identified. “Volunteer contributions” include face-to-face interviews conducted during walk-in sessions on-base, in private meetings off-base, and through telephone calls, as well as through written statements submitted to the ERA by email.

<sup>9</sup> Pierre Fournier acted as senior counsel throughout all of the interviews and assisted in the revision of the Report. Emma Phillips was counsel to the ERA and assisted in the preparation of the Report. The ERA was also assisted with legal research by Camille de Vasconcelos Taillefer and Gabrielle Perrault.

confidential e-mail address. In addition, before each visit to a base, an email message was sent to all members in that location to announce the dates of the ERA's visit and to invite interested persons to meet with the ERA, or to contact the ERA via email.<sup>10</sup>

On most bases, the ERA began by holding a town hall meeting where it could explain to senior leaders and their invitees the mandate of the Review and its fact-finding process, as well as to answer questions. Also on many bases, the ERA was able to tour the base to assess where members might be at greater risk of experiencing incidents of a sexual nature, such as the barracks, mess hall, etc.

In most cases, focus groups were organized to include only men or women, or only individuals of a particular rank, to enable more candid conversation within the group. Focus group discussions addressed the prevalence of varying types of inappropriate sexual conduct, the members' awareness and understanding of policies, coping mechanisms for dealing with inappropriate sexual conduct, reporting of incidents, and training. While participation by members in the focus groups was on the whole voluntary, the ERA was informed that in some cases members were "voluntold" to participate if there were insufficient volunteers. The ERA is satisfied that the integrity of the focus groups was not impaired as a result of the fact that a superior may have ordered an individual to participate; on the contrary, it added a layer of objectivity to the process, ensuring that a number of those who participated did not have a vested interest in the subject matter of the Review.

In addition, the Coordinator and the contact person on-base arranged for joint or individual interviews with CAF members and civilians involved in the implementation of the relevant policies, such as Commanding Officers, harassment advisors, workplace relation advisors, military police, investigators from the CAF National Investigation Service, local JAGs, chaplains, physicians, nurses, social workers and representatives of support groups such as the Military Family Resource Center, as well as with a few researchers (together, these are referred to as the "Coordinator interviews"). These interviews tended to be more focused on the particular job-related experiences of the interviewee, but also included, as in the focus groups, the personal experiences of the individuals. Since these individuals came from a variety of ranks and diversified backgrounds, both military and civilian, and were often long-time members or employees of the CAF, their input proved invaluable.

During each visit, the ERA also made itself available for private interviews with interested individuals through walk-in sessions, pre-scheduled appointments and, in many instances, off-base meetings with individuals who could not or would not visit a base.

Consultations were not designed to specifically reflect the demographics of the CAF (for example, percentage of men versus women, or lower rank versus officer). Nor did the ERA ask the interviewees to limit their comments to a specific time period. As a consequence, except for

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<sup>10</sup> An example of a message sent to members before a visit to a base is included as Appendix 'A'.

the discussions with lower rank members and trainees, some of the contributors addressed historic incidents and how these were dealt with by the organization at the time, as well as more current concerns.

### **2.3 Confidentiality in the Consultation Process**

On each visit, the ERA put in place a protocol aimed at fostering open and unhindered communication. Except for interviews with Generals, all interviews and focus groups were confidential and were audio-recorded on an anonymous basis. Participants were asked to identify themselves only by pseudonyms, which were also used in any follow-up communication. Where personal information was included in a written contribution, this information was deleted. The ERA undertook not to use personal information in its Report or communications with the CAF, or any information that could lead to the identification of the contributor.

In most instances, the officers involved in the organization of the interviews and focus groups appeared genuinely invested in the success of the Review. However, a few members informed the ERA that they had been warned not to raise any “issues” and the ERA noted that some members appeared to feel that they were not free to speak openly. In several instances, the ERA was informed that the Review was not being taken seriously. Despite these challenges, the ERA is of the view that, given the guarantees of anonymity, most interviewees ultimately voiced their honest opinions. In particular, focus groups with lower rank members proved very informative. In almost all of these groups, at least one member would rise to the challenge of expressing him or herself freely, opening up discussion and encouraging other participants to express their own views.

### **2.4 Documentary Review**

The ERA received, with the assistance of the Coordinator, the DGMP, and two senior officers of the JAG, documentation consisting not only of the policies of the CAF and other military organizations, but also relevant research papers conducted by the CAF and external organizations. The ERA also reviewed sociological research about, and external reviews of, the treatment of sexual harassment and assault by other law enforcement and civilian organizations, and relevant legal cases, mostly by Canadian labour arbitrators and courts.

### 3. Background to the Review

The 2014 media articles on sexual assault in the military were not the first time such issues were reported. Indeed, one of the same media outlets published a previous exposé on sexual assault in the CAF in 1998.<sup>11</sup> Concerns about inappropriate sexual conduct in the Canadian Forces have also been the subject of intense internal examination by the DND and CAF for the last 20 years. For example, the 2012 Harassment survey was carried out contemporaneously with a Diversity and Employment Equity survey, and was preceded by no less than five studies bearing on harassment.<sup>12</sup> While “sexual misconduct”, as defined by the DAOD policies, may not have been covered directly by these studies, they did address underlying concerns with respect to the integration and treatment of women in the military. In addition, numerous other internal and independent reviews related to the broader topics of diversity and discrimination have attempted to capture the environment in which CAF members train, work, live and socialize.<sup>13</sup>

Following the release in 2013 of the results of the 2012 Harassment and Diversity and Employment Equity surveys, the CDS circulated a message highlighting what he viewed as positive trends in the prevalence of harassment, including sexual harassment, in the organization:

The surveys present a number of positive results and trends: a large majority of our members reported having knowledge of harassment policies and had received training; a large majority of our members stated that they had not experienced any of the four forms of harassment in the CAF in the past 12 months; the majority of our members do not perceive the CAF as a whole, as well as the leadership, to be tolerant of harassment; and the majority of Regular Force members believe that the CAF climate is positive and accepting of diversity.<sup>14</sup>

What this message fails to acknowledge, however, is the possibility that respondents to the survey may have been under-reporting incidents of harassment, in particular, and inappropriate

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<sup>11</sup> J. O'Hara with B. Branswell, J. Geddes, S. Deziel, S. Doyle Driedger and S. Nolen, *Rape in the Military*, Maclean's, 25 May, 1998

<sup>12</sup> 1993, *Personal Harassment in the Canadian Forces Survey*; 1995, B. R. Thompson, *Harassment in Air Command*; 1998, J. E. Adams-Roy, *Regular Forces*; 1998, J. E. Adams-Roy, *Reserve Forces*; 2006, D. A. Jenkins, *Harassment and Policy Program Evaluation*

<sup>13</sup> 1999, The Technical Cooperation Panel (TTCP), *Sexual Harassment Policies and Programs in the TTCP Countries*; 2001, TCP, *A comparative Analysis of Harassment Surveys in TTCP Nations*; 2004, Ajlon Consulting, *Canadian Forces Employment System*; 2006, I. Goldenberg, *Diversity and Employment Equity in the Canadian Forces*; 2008, N. Otis and M. Straver, *Review of Attrition and Retention Research in the Canadian Forces*; 2011, K. Koundakjian and K. Michaud, *Retention in the Canadian Forces*; 2012, K. Watkins, *Deployment Stressors Experienced by Members of the Canadian Forces Deployed in the Kandahar Province, Afghanistan, 2006-2009*; 2012, K. Michaud and I. Goldenberg, *Canadian Forces Exit Survey*; 2013, Z. Wang, *Diversity and Employment Equity in the Canadian Forces*

<sup>14</sup> Harassment and Discrimination Prevention – Chief of Defence Staff Guidance, 508501 DGMP, March 11, 2014

sexual conduct, in general. Indeed, as set out in this Report, one of the most significant findings made by the ERA is that CAF members, in overwhelming numbers, do not report incidents of inappropriate sexual conduct.

The CAF has undertaken the unification of a number of its policies with those of the DND, including its policies on sexual harassment.<sup>15</sup> Given the terms of its mandate, however, the ERA did not engage in any consultations aimed at determining whether or to what extent the DND should be affected by its recommendations. As such, the recommendations in this Report are focused exclusively on the CAF.

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<sup>15</sup> A brief historical background of the CAF policies on sexual harassment is found in the *Military Administrative Law Manual*, DND, Chapter 22

## 4. Culture of the CAF

While this Report does not aim at capturing all aspects of the culture of the CAF, or its many subcultures, the ERA found that certain cultural behaviours and expectations are directly related to the prevalence of inappropriate sexual conduct in the organization. Any discussion, therefore, of the causes and consequences of sexual harassment and assault in the armed forces—including the effectiveness of current policies and practices—must begin with an examination of the underlying cultural norms that inform the ways in which CAF members interact with each other, and what they perceive to be acceptable conduct.

### 4.1 Military Ethos

According to *Duty with Honour: Profession of Arms In Canada*, first published by the CDS in 2003 and reviewed in 2009, “(t)he military ethos...is the foundation upon which the legitimacy, effectiveness and honour of the Canadian Forces depend.”<sup>16</sup> Amongst other goals, military ethos “is intended to establish the trust that must exist between the Canadian Armed Forces and Canadian society; guide the development of military leaders who must exemplify the military ethos in their everyday actions; [and] enable professional self-regulation within the Canadian forces.”<sup>17</sup> Military ethos is therefore essential to creating and maintaining a high degree of professionalism within the organization, and underpins the right of the CAF to self-regulate through an independent system of military justice. It is “the foundation upon which the legitimacy, effectiveness and honour of the Canadian Forces depend.”<sup>18</sup>

The concept of military ethos is founded upon respect for the values protected by the *Canadian Charter of Human Rights* (the *Charter*), including the right to dignity and security of the person.<sup>19</sup> More precisely, DAOD 7023-0 on “Defence Ethics” emphasizes that the Canadian public expects the highest standards from CF members:

The DND and the CF are integral parts of our democratic society and must reflect and practice the values of that society. Fundamental to the effectiveness of the DND and the CF is the strength and vitality of its ethical culture. The Canadian public expects the highest level of adherence to ethical standards by DND employees and CF members.

Leaders are taught that respect for the dignity of others takes precedence over other ethical principles:

The Statement of Defence Ethics contains three ethical principles that are hierarchical in nature; that is, normally, the first one takes precedence over the second one, which takes

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<sup>16</sup> *Duty with Honour: Profession of Arms*, 2009, p. 26

<sup>17</sup> *Duty with Honour: Profession of Arms*, 2009, p. 26

<sup>18</sup> *Duty with Honour: Profession of Arms*, 2009, p. 26

<sup>19</sup> *Duty with Honour: Profession of Arms*, 2009, p. 30

precedence over the third:

- Respect the dignity of all persons;
- Serve Canada before self; and
- Obey and support lawful authority.<sup>20</sup>

Further, CAF members belong to the “Profession of Arms”. Professionalism and military ethos are interconnected concepts:

Understanding the nature of professionalism, its relation with the military ethos, and the vital institutional role of the CF is crucial to combat effectiveness and to meeting Canadian’s expectations that their military professionals will defend the nation with honour. This entails meeting the highest standards of professionalism and having a full understanding of the obligation inherent in military services.<sup>21</sup>

To meet the Canadian public’s high expectations, CF members:

have a special responsibility to fulfill their functions competently and objectively for the benefit of society. [They] are governed by a code of ethics that establishes standards of conduct while defining and regulating their work. This code of ethics is enforced by the members themselves and contains values that are widely accepted as legitimate by society at large.<sup>22</sup>

The Canadian public has granted the CAF the right to self-govern. In some respects, this is related to the fact that Canadians hold members of the CAF to a *higher* standard of conduct than ordinary Canadians. This is because of the unique role played by the CAF in Canadian society and abroad. Thus, one of the reasons for establishing an independent military justice system, separate and apart from the justice system that regulates the conduct of ordinary Canadians, is to be able to uphold these higher standards. As Justice Lamer stated in *R. v. Généreux*:

Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.<sup>23</sup>

The *National Defence Act* includes the CAF’s *Code of Service Discipline* (the CSD), and is the legal foundation upon which the military justice system is based. In addition, policies on administrative and remedial measures<sup>24</sup> give to CAF leaders specific tools to intervene to ensure compliance with those higher standards. Again, as leaders are instructed:

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<sup>20</sup> *Leadership in the Canadian Forces: Leading People*, 2007, p. 16

<sup>21</sup> *Duty with Honour, Profession of Arms*, 2009, p. 23

<sup>22</sup> Definition of “profession” adopted in *Duty with Honour: Profession of Arms*, 2009, p. 6

<sup>23</sup> *R. v. Généreux*, [1992] 1 S.C.R. 259

<sup>24</sup> DAOD 5019-2 Administrative Review; DAOD 5019-4 Remedial Measures



effective self-regulation is necessary to sustain the trust and confidence of both the Government and the society served by an armed force.<sup>25</sup>

As a consequence, significant responsibility is given to CAF leaders both to ensure that members are treated with dignity, and to maintain a standard of professional conduct that respects the dignity of all persons. Only by carrying out this self-regulation effectively will the CAF be able to maintain the trust and confidence of the broader Canadian public.

Unfortunately, however, it was apparent throughout the consultations that, with respect to inappropriate sexual conduct, the culture of the CAF on the ground does not, in many ways, measure up to the professional standards established by the policies and described in *Duty with Honour*. Rather, the ERA found that there is a significant disjunction between the aspiration of the CAF to embody a professional military ethos which embraces the principle of respect for the dignity of all persons, and the reality experienced by many CAF members day-to-day.

## 4.2 CAF Culture On the Ground From the Perspective of the ERA's Mandate

### 4.2.1 Organizational Culture

By “culture”, the ERA refers to the ways in which, over time, people who work or live within a particular organizational and institutional setting develop a shared set of understandings, which allow them to interpret and act upon the world around them. As one expert in organizational behaviour has defined it:

Organizational culture is the pattern of basic assumptions that a given group has invented, discovered, or developed in learning to cope with its problems of external adaptation and internal integration, and that have worked well enough to be considered valid, and, therefore, to be taught to new members as the correct way to perceive, think, and feel, in relation to those problems.<sup>26</sup>

Organizational cultures are defined both by the values they espouse (for example in public statements of identity such as *Duty With Honour* and the DAOD policies), and deeper, tacit assumptions that are embedded, taken-for-granted behaviours. These assumptions are usually unconscious, and so well integrated in the organizational dynamic that members of the organizational culture may not even be able to recognize or identify them.<sup>27</sup>

The ways in which these shared assumptions are passed on to new members entering the organization, and in which the organization is able to develop a recognizable identity, are

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<sup>25</sup> *Leadership in the Canadian Forces: Conceptual Foundations*, 2007, p. 42

<sup>26</sup> E.H. Schein, *Coming to a New Awareness of Organizational Culture*, Sloan Management Review, 25:2 (1984: Winter) p. 3; also see E.H. Schein 'What is Culture' in M. Godwyn & J.H. Gittel, *Sociology of Organizations: Structure and Relationships* (2011) 311

<sup>27</sup> E.H. Schein, *Organizational Culture and Leadership* 4<sup>th</sup> Ed. San Francisco: Jossey-Bass, 2010

through processes of socialization. For example, training practices, social events, and rites of initiation are all means of bringing new members into an established group. Multiple sub-cultures will, of course, exist in any organization, particularly one as large and diverse as the CAF. These sub-cultures co-exist in overlapping, and sometimes conflicting, ways. At the same time, military organizations generally have particularly strong internal cultures because of their nature as “total institutions”<sup>28</sup>; members of the military live, work, train and socialize together within a closely regulated environment, largely set apart from the rest of society. The particular intensity of experience associated with training, combat, and the overall mission of the organization, also lends to the growth of a strong organizational culture.

The development of group culture can be a very positive phenomenon. Indeed, it is through shared assumptions and understandings that groups develop organizational cohesion, loyalty, and camaraderie, and are able to act together in efficient and effective ways to achieve their objectives. Throughout its consultations, the ERA observed many powerful and positive manifestations of the organizational culture of the CAF. Participants expressed their deep commitment to, and engagement in, the broader mission of the Canadian Armed Forces. Sparkling eyes, engaged voices and active participation in the interviews conveyed the sense of fulfillment these members experience both in their day-to-day work, and in their participation in the broader community of the armed forces. The ERA met with participants, both men and women, who appeared genuinely happy with their experiences in their unit. Participants indicated that military life allows them not only to contribute to society, but also to exercise their chosen trade or profession and to have an opportunity to move up the social ladder. The CAF provides them with the comfort of a family and the benefits of a rewarding work environment.

At the same time, however, the consultations revealed that there is a sexualized culture in the CAF, particularly among members of lower rank. This sexualized culture is manifested through the pervasive use of language that is demeaning to women, sexual jokes and innuendos, and low-level harassment. While the ERA heard fewer reports of sexual assault, it was clear that the occurrence of sexual harassment and sexual assault are integrally related, and that to some extent both are rooted in cultural norms that permit a degree of discriminatory and harassing conduct within the organization.

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<sup>28</sup> E. Goffman, *Asylums* (New York) Anchor Books, 1961

## 4.2.2 Differences Between Naval, Land and Air Forces, Colleges and Reserve Units

Interviewees consistently described cultural differences between the Air Force, the Navy and the Army, and it is clear that different subcultures exist within the three different service areas. For example, participants described members of the Air Forces as more “mature and educated” and the Air Force environment as one in which “skills are more valued”.<sup>29</sup> However, ultimately there were no substantive differences between the three subcultures with respect to the nature, frequency or severity of sexual harassment and assault reported to the ERA. Neither was there any evidence that the responses of the CAF to such conduct were better or more effective in any one particular service. As such, the ERA’s findings and recommendations apply equally to all three branches of the CAF.

In the colleges the ERA visited—the Collège militaire royal du Canada and the Royal Military College of Canada—participants reported that sexual harassment is considered a “passage obligé”,<sup>30</sup> and sexual assault an ever-present risk.<sup>31</sup> One officer cadet joked that they do not report sexual harassment because it happens all the time.<sup>32</sup>

Experiences in reserve units appear to be more mixed; while members in several units reported a highly respectful environment, other units appear to have adopted a sexualized culture similar to the regular forces.<sup>33</sup> Because of the constraints of the Review, the ERA did not have the opportunity to delve into the causes of the differences between various units. Therefore, no distinction is made in the Report between reserve units or between reserve and regular members.

In general, the ERA found that the locations where incidents of inappropriate sexual conduct occur are diverse. Although a number of interviewees mentioned that sexual assaults are more likely to occur in barracks, incidents of sexual harassment do not appear to be limited to particular locations or hours. As such, the ERA could not conclude that simple changes to physical facilities were likely to reduce the occurrence of inappropriate sexual conduct.

## 4.2.3 Differences Between Ranks

During the consultations—more particularly during focus group discussions with junior and senior non-commissioned members (NCMs)—the ERA found that there is a prevailing sexualized environment characterized by the frequent use of sexualized language, sexual jokes, innuendos, discriminatory comments with respect to the abilities of female members of the military, and less serious but unwelcome sexual touching, such as touching an individual’s

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<sup>29</sup> Focus group: PAT; Coordinator interviews

<sup>30</sup> Focus group: female trainees, female NCOs, female junior officers; Coordinator interviews

<sup>31</sup> Focus group: mixed gender junior officers; Coordinator interviews

<sup>32</sup> Volunteer contribution

<sup>33</sup> Focus groups: female lower rank, reserve units; Volunteer contribution

shoulder or back without her consent. While the degree to which this sexualized culture is evident may vary across regular and reserve, Naval, Land and Air Forces, and as between individual units and different ranks, the ERA found that it is widespread, and frequently condoned. Specifically, the ERA found that this sexualized culture creates a climate conducive to more serious incidents of sexual misconduct.<sup>34</sup>

More specifically, a significant majority of lower rank women who participated in the Review reported being exposed to frequent and demeaning sexualized language. As one interviewee put it, “all women have experienced to a certain extent how men do not want them in the military”.<sup>35</sup> Another participant put it more bluntly, referring to the frequency with which women experience inappropriate sexual conduct in the CAF: “There is not a female who has not had a problem”.<sup>36</sup>

Experiences with sexual harassment and sexual assault begin as early as basic training, where inappropriate language used by trainers appears to go unpunished.<sup>37</sup> The consultations revealed that more serious conduct, such as dubious sexual encounters between trainers and trainees and date rape, is also prevalent.<sup>38</sup> At the same time, interviewees commented that trainees are reluctant to call the behaviour of their trainers into question for fear of negative repercussions. As a result, many women trainees learn to keep their concerns to themselves early on.<sup>39</sup>

Amongst the NCMs, the use of language that belittles women is commonplace. Interviewees reported regularly being told of orders to “stop being pussies” and to “leave your purses at home”.<sup>40</sup> Swear words and highly degrading expressions that reference women’s bodies are endemic. The use of the word “cunt”, for example, is commonplace, and rape jokes are tolerated.<sup>41</sup> In response, women feel pressure to accept the sexualized environment or risk social exclusion. Many develop informal coping mechanisms to protect themselves from persistent unwanted comments. Ultimately, many women report having to develop a thick skin

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<sup>34</sup> Participants in Coordinator interviews also commented on the connection between the generalized sexual environment and the likelihood of more serious incidents of sexual harassment and assault occurring.

<sup>35</sup> Coordinator interview

<sup>36</sup> Coordinator interview

<sup>37</sup> Focus groups: female lower rank, mixed gender PAT

<sup>38</sup> Focus groups: female trainees; Coordinator interviews

<sup>39</sup> Focus groups: female trainees, female NCOs

<sup>40</sup> Focus groups: female trainees, female lower rank, female NCOs; Coordinator interview

<sup>41</sup> For example, the expression “a cunt’s hair away” is frequently used as a unit of measurement (Focus group: male lower rank); “C U Next Thursday” is used to refer to “cunt” without appearing to do so (Focus group: female lower rank); one female NCM reported being repeatedly greeted in a meeting room with the letters C U N T posted on the wall (Focus group: reserve lower rank); “if a guy was charged for using the word [cunt], he would make sure to drive the girl down” (Focus group: male lower rank); the word “slut” is run-of-the-mill (Focus groups: male lower rank, male NCOs; Volunteer contribution)

and to becoming desensitized to a culture of sexually inappropriate conduct.<sup>42</sup> LGBTQ members also report a similarly degrading environment.<sup>43</sup>

Notably, while the ERA heard numerous comments about the hostile environment that results from this pervasive low-level harassment, fewer participants reported instances of *quid pro quo* harassment (in which an individual feels pressured to accept unwelcome sexual conduct in exchange for some workplace benefit or to avoid some detrimental action against her).<sup>44</sup> The ERA found, therefore, that members of the CAF are less likely to be faced with *quid pro quo* harassment than they are to be affected by an overall organizational culture that conveys demeaning and negative attitudes about the role and value of women.

Perhaps not surprisingly, male and female members of the CAF generally reported vastly different perceptions of the occurrence of inappropriate sexual conduct. While most male participants in the Review recognized that the experiences of their female colleagues are different, many of these male interviewees did not perceive that there is pervasive inappropriate sexual conduct in the CAF. Rather, many men perceived the treatment of women in the military to be similar to what they would experience in broader Canadian society,<sup>45</sup> and some felt that women in fact fare better in the CAF than men do.<sup>46</sup> Others argued that inappropriate incidents are simply inevitable as a result of the integration of women into the CAF, or expressed the view that a certain degree of aggression is appropriate in the military.<sup>47</sup> In particular, most men did not view sexual language as harassing,<sup>48</sup> and thought that attempts to “police” language would be “ridiculous”;<sup>49</sup> as one male participant stated, “girls that come to the Army know what to expect”.<sup>50</sup>

While women of a higher rank seemingly do not suffer as much from the sexualized environment, the ERA found that this is largely because members appear to internalize the prevailing sexualized culture as they move up through the organization. Whether to achieve their career goals or as a coping mechanism, female NCOs and higher-ranking women tend to adapt their own conduct and to adopt male attitudes in order to conform to the perceived social values of the organization.<sup>51</sup> As one interviewee put it, “as women move up the ranks, so too does acceptance of the sexualized culture.”<sup>52</sup> In point of fact, a number of lower ranking members,

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<sup>42</sup> Focus groups: female trainees, female lower rank (several), mixed gender NCOs, female NCOs; female reserve (several), mixed gender reserves (several); Coordinator interviews

<sup>43</sup> Focus groups: male lower rank (several); Volunteer contributions

<sup>44</sup> This is a pattern that has been noted in other military organizations: A. Estrada and A. Berggren, *Sexual Harassment and its Impact for Women Officers and Cadets in the Swedish Armed Forces*, *Military Psychology*, 21:162–185, 2009, p. 166

<sup>45</sup> Focus group: male lower rank; Coordinator interviews; Volunteer contributions

<sup>46</sup> Focus groups: male lower rank (several)

<sup>47</sup> Focus group: male lower rank

<sup>48</sup> Focus groups: male lower rank, male PAT; Coordinator interviews

<sup>49</sup> Focus group: male PAT

<sup>50</sup> Focus group: male lower rank

<sup>51</sup> Focus groups: female reserve, male reserve; Coordinator interviews; Volunteer contributions

<sup>52</sup> Volunteer contribution

both male and female, commented that many female NCOs do not mentor or support more junior women.<sup>53</sup> Independent researchers also confirm that as a result of developing such coping mechanisms, women play a particular role in contributing to the “maintenance and re-creation of masculine military culture”.<sup>54</sup>

Indeed, among NCOs, the ERA heard—and itself observed—that the sexualized culture appears to be well established and that most NCOs have either internalized the prevailing culture to the point where they no longer perceive that harassment or misconduct is occurring, or accept that this is simply a part of life in the armed forces.<sup>55</sup> A number of contributors also observed personally that male senior NCOs also engage in inappropriate sexual conduct,<sup>56</sup> including through the use of inappropriate language, sexual innuendos, harassing comments, and by seeking out relationships with lower-rank female members.<sup>57</sup>

Equally serious, many members reported that senior NCOs are responsible for “imposing a culture where no one speaks up”.<sup>58</sup> Senior NCOs are generally perceived not only as condoning a culture of sexually inappropriate conduct, but also as actively deterring the reporting of such incidents.<sup>59</sup> Given the critical role NCOs play in grooming junior officers,<sup>60</sup> this is particularly problematic. Moreover where, as in many cases, the NCO is asked by the Responsible Officer to receive or investigate a harassment complaint, as well as to maintain discipline among subordinates,<sup>61</sup> this can seriously impede a victim from coming forward to report misconduct.

The sexualized culture appears to be less evident among junior officers, perhaps because not all junior officers receive their training in a military college and therefore have not been in the CAF environment long enough to internalize the culture. However, the ERA found that too often junior officers turned a blind eye to the inappropriate conduct occurring around them. While many junior officers interviewed by the ERA conveyed their satisfaction with military life and stated that they had never been exposed to incidents of sexual misconduct,<sup>62</sup> others appeared to be either

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<sup>53</sup> Focus groups: female lower rank (several), male lower rank (several), female NCOs (several), mixed gender reserve (several); Coordinator interview

<sup>54</sup> K. Davis, *Negotiating Gender in the Canadian Forces, 1970-1999*, Doctoral Thesis presented at RMCC, 2013, p. 66; K. Mackenzie Davey, *Women’s Accounts of Organizational Politics as a Gendering Process, 2008 Vol 15 Gender, Work and Organization 650*

<sup>55</sup> Focus groups: male trainees, female NCOs, mixed gender reserve; Coordinator interviews; Volunteer contribution

<sup>56</sup> Focus groups: female lower rank (several); Coordinator interview

<sup>57</sup> Focus groups: female lower rank (several)

<sup>58</sup> Focus groups: female lower rank (several); Coordinator interviews

<sup>59</sup> Focus groups: female lower rank (several); Coordinator interviews; Volunteer contribution

<sup>60</sup> Focus groups: reserve (several); Coordinator interviews

<sup>61</sup> Focus groups: junior officers

<sup>62</sup> Focus group: junior officers; Volunteer contribution

in a state of denial<sup>63</sup> or clearly were not being transparent about their knowledge of sexual incidents.<sup>64</sup>

Further, the ERA found that many officers were quick to excuse sexual incidents in the CAF on the basis that this kind of conduct is a “reflection of Canadian society”.<sup>65</sup> Both male and female officers appeared to have become desensitized to the prevalence of sexually inappropriate conduct,<sup>66</sup> and female officers in particular reported wanting incidents of sexual misconduct they had experienced to just “be dealt with” without formal complaint, so they could “move on”.<sup>67</sup> The ERA also heard numerous comments about dubious relationships between members of different rank in which the participants questioned whether the lower ranking (usually female) member had been induced into the relationship, or where consent was not truly genuine.<sup>68</sup>

Ultimately, there was a broad perception among participants that the senior leadership of the CAF condones sexually inappropriate conduct. One of the comments heard most frequently by the ERA was that addressing inappropriate sexual conduct is not a priority for CAF leaders.<sup>69</sup> Senior leaders are perceived as “burying the issues” and as being “desensitized”.<sup>70</sup> This is exacerbated by the fact that the career posting system favours avoiders: Responsible Officers (responsible for receiving and addressing complaints of sexual harassment), moving from one posting to the other, are likely to leave complaints unresolved or, as an incomer, resist taking action.<sup>71</sup>

#### 4.2.4 Integration of Women into the CAF

A number of interviewees felt that the sexualized culture in the CAF is tied to broader challenges that women face integrating into the organization. While many members stated that there has been significant improvement to overt displays of sexism (for example, pictures of nude women are no longer posted in lockers and pornographic movies are no longer shown in messes),<sup>72</sup> the ERA found that many men continue to hold negative attitudes about the presence of women in the military. For example, a commonly held attitude is that, rather than be a soldier, a sailor or an aviator, a woman will be labeled an “ice princess”, a “bitch”, or a “slut”.<sup>73</sup> Another saying is that

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<sup>63</sup> Focus groups: mixed gender junior officers, male junior officers; female junior officers; Coordinator interviews

<sup>64</sup> Coordinators interviews

<sup>65</sup> Focus group: reserve; Coordinator interviews; Volunteer contribution

<sup>66</sup> Focus groups: female NCOs, female junior officers

<sup>67</sup> Focus groups: female junior officers; Volunteer contribution

<sup>68</sup> Focus groups: female lower rank (several), male lower rank, female NCOs; Coordinator interviews; Volunteer contribution

<sup>69</sup> Focus groups: female lower rank; Coordinator interviews; Volunteer contributions

<sup>70</sup> Focus groups: female lower rank, female NCOs; Coordinator interviews

<sup>71</sup> Focus groups: PAT, female NCOs; Coordinator interviews; Volunteer contributions

<sup>72</sup> Coordinator interviews

<sup>73</sup> Focus groups: female trainees, female lower rank, male lower rank; Coordinator interview

women enter the CAF “to find a man, to leave a man, or to become a man”.<sup>74</sup> Men often greet a new woman in their unit with a comment such as, “fuck, I have a girl in my crew”.<sup>75</sup> The overall perception is that a “boy’s club” culture still prevails in the armed forces.<sup>76</sup>

Civilian tribunals often deal with complaints of sexual harassment against women within the framework of sex discrimination, and there is an undeniable connection between the negative views of some male members about the role of women in the military, and the prevalence of inappropriate sexual conduct in the CAF. In the ERA’s view, however, the roots of inappropriate sexual conduct are not confined to discriminatory attitudes. Rather, such conduct appears to be more broadly related to issues of power and control. This is illustrated, for example, by the evidence the ERA heard about male-on-male sexual abuse, in which sexual violence is used as a means of punishing or ostracizing another member.<sup>77</sup>

Indeed, a significant body of sociological research has developed around the inter-related issues of gender, power, and identity in military cultures, including in the CAF.<sup>78</sup> Studies have, for example, examined how the ideal of the combat male warrior concept has impacted on the integration of women into the military.<sup>79</sup> Researchers have also looked at the deep-seated hierarchical nature of military cultures, and the degree to which emphasis on the values of obedience, conformity and respect for superiors can lead to abuses of power, the susceptibility of junior members to negative social influence, and under-reporting of unprofessional behaviour. Research has, moreover, been carried out on how women negotiate traditional male military cultures, including through adaptive techniques and mechanisms for coping with risks of sexual harassment and assault.<sup>80</sup>

While the ERA found such studies insightful and of considerable assistance in understanding some of the underlying dynamics potentially at work in the CAF, the mandate of the Review is not to engage in an in-depth sociological examination of the cultural dynamics of the armed forces. Nevertheless, the ERA notes that many of the observations in the sociological literature

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<sup>74</sup> Focus group: female reserve

<sup>75</sup> Focus groups: female lower rank, female reserve; Coordinator interviews

<sup>76</sup> Focus groups: female lower rank; female NCOs; Coordinator interviews

<sup>77</sup> Coordinator interview; Volunteer contribution; see also S. McDonald and A. Tijerino, *Male Survivors of Sexual Assault: Their Experiences*, Dept. Justice Canada, 2013

<sup>78</sup> L. M. Cortina and J. L. Bergdahl, *Sexual Harassment in Organizations, A decade of Research in Review* in *The Sage Handbook on Organizational Behaviour*, Chap. 25, 2008, p. 474; H. Carreras, *Gender and the Military Women in the Armed Forces of Western Democracies*, 2006. P. 53; C.M. Hunt M.J. Davidson S.L. Fielden H. Hoel, (2010), *Reviewing sexual harassment in the workplace – an intervention model*, *Personnel Review*, Vol. 39 Iss 5, p. 655, at 659;

<sup>79</sup> *Women in the Military: Facing the Warrior Framework*, K. Davis and B. McKee, in *Challenge and Change in the Military: Gender and Diversity Issue*. Edited by F.C. Pinch, A.T. MacIntyre, P. Browne, and A.C. Okros, Chap. 2, p. 52; A.X. Estrada, K.J. Olson and C.R. Harbke, *Evaluating a Brief Scale measuring Psychological Climate for Sexual Harassment* at p. 416; V. Basham, *Armed Forces & Society: Effecting Discrimination: Operational Effectiveness and Harassment in the British Armed Forces*, September 2008, at p. 732; K.D. Davis, *Negotiating Gender in the Canadian Forces, 1970-1999*, 2013, at p. 53 to 55

<sup>80</sup> See also: *Report of the Standing Committee on the Status of Women, A study on Sexual Harassment in the Federal Workplace*, presented to the House of Commons on February 2014, at p. 26



are strongly consistent with the comments made by participants.<sup>81</sup> It is therefore important to examine whether there are particular structural and cultural conditions within the military that contribute to an increased risk of harassment and assault.

### 4.3 Risk Factors

Throughout its consultations, the ERA identified a number of risk factors that increase the vulnerability of members of the CAF, and particularly women, to incidents of inappropriate sexual conduct. As discussed, the prevailing sexualized environment constitutes the background for more severe sexual assaults. However, particular risk factors were also repeatedly identified by participants, which aggravate the risk of sexual assault.

The use and abuse of alcohol by CAF members appears to be one of the most significant contributors to sexual assault. While the consumption of alcohol is not in and of itself problematic, and may have some benefits in terms of enhancing *esprit de corps*, the ERA heard repeatedly from members that the excessive consumption of alcohol, which significantly lowers social inhibitions, made the chance of sexual harassment or sexual assault more likely to occur.<sup>82</sup> At the same time, members were much less likely to report such incidents because of a fear that they would be viewed as having been complicit in the conduct.<sup>83</sup>

With respect to the prevalence of sexual harassment and sexual assault, age, linked with a lack of maturity, appears to be a prominent factor, given that young persons are “still exploring their sexuality” and feel “invulnerable”.<sup>84</sup> Further, the unique circumstances of training, operational deployment,<sup>85</sup> and career courses, may create particular conditions of vulnerability. In particular, when a member is geographically relocated, a number of factors may make him or her more vulnerable and a target of inappropriate sexual conduct. These include the loss of family or social support networks, the communal setting, and a lack of knowledge of, or trust in, the temporary chain of command.<sup>86</sup>

These risk factors are exacerbated by a number of other inter-related conditions, many of which have already been discussed. These include:<sup>87</sup>

- the prevalence, and possible escalation, of sexually inappropriate conduct (ranging from low-level harassment to assault);
- the perception that sexually inappropriate conduct is condoned by the chain of command, which contributes to a higher likelihood of inappropriate sexual behaviour;

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<sup>81</sup> Coordinator interviews

<sup>82</sup> Focus groups: female lower rank, mixed gender junior officers; Coordinator interviews

<sup>83</sup> Coordinator interviews; Volunteer contributions

<sup>84</sup> Focus group: female trainees; Coordinator interviews

<sup>85</sup> The ERA heard the expression “deployment” used mostly to refer to deployment for exercise rather than on a mission.

<sup>86</sup> Focus group: female lower rank; Coordinator interviews

<sup>87</sup> Coordinator interviews; Volunteer contributions

- the lack of trust in the chain of command to prevent inappropriate sexual conduct from occurring, or to resolve incidents of sexual harassment and assault;
- the perception that the policies are inconsistently applied and that the CAF does not sanction sexual misconduct in a meaningful way; and
- the failure of many victims of sexual harassment and assault to report such incidents to the CAF.

Combined together, such conditions may intensify the vulnerabilities of some CAF members, most notably female recruits and lower-rank women, to sexual predation.

The interconnection between these phenomena highlights a key point. The existence of a culture in which low-level inappropriate sexual conduct is generally condoned is problematic not only because it may be uncomfortable for, and offensive to, some members of the CAF. More importantly, the existence of a sexualized culture creates an environment that is conducive to more serious incidents of sexual harassment and sexual assault. As described above, the ERA found that members are less likely to be willing to report incidents of sexual harassment and assault in a context in which there is a general perception that it is permissible to objectify women's bodies, make unwelcome and hurtful jokes about sexual interactions with female members, and cast aspersions on the capabilities of female members. That such conduct is generally ignored, or even condoned, by the chain of command prevents many victims from reporting incidents of inappropriate sexual conduct. At the same time, it likely feeds a feeling of invulnerability on the part of predatory members, which can open the door to more aggressive sexual behaviours. This is exacerbated by the fact that many of the more serious complaints of sexual harassment or assault appear to be disbelieved, brushed under the table, or result in only minimal sanctions.

#### **4.4 Changing the Culture: An Issue for Leaders**

Based on the consultations, the ERA finds that the CAF has not achieved its goal of maintaining the high standard of conduct that the Canadian public expects leaders to maintain, when it comes to incidences of sexual harassment and sexual assault. In many cases, leaders are failing to ensure that members conduct themselves in a professional manner, or that "CF members and others in the care or protection of the CF are not subjected to coercion or exploitation".<sup>88</sup> Indeed, the norms of conduct in the CAF appear to fall below what would be tolerated in most workplaces.

##### **4.4.1 Role of Leaders in Changing the Culture**

In particular, the ERA finds the failure of CAF senior leaders, and particularly those with general oversight responsibilities, to maintain a respectful and inclusive environment troubling. While the use of highly-disrespectful and sexualized language may seem like a minor issue to some, the

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<sup>88</sup> DAOD 5019-1 *Personal Relationships and Fraternalization*

ERA heard repeatedly throughout the consultations that many women find the use of such demeaning language offensive, humiliating and denigrating. Further, the use of sexual language and innuendos, without reprimand or sanction, creates an environment that is hostile to women and LGBTQ individuals, sends a negative message about the value of these members in the CAF, and creates a workplace culture that is conducive to more serious incidents of sexual harassment and assault.

While, as mentioned above, some male participants in the Review scoffed at the idea of “policing language” as “ridiculous”, in the ERA’s view this is, in fact, a critical step in reforming the culture of the CAF to create a more inclusive organizational culture and to reduce the incidence of sexually inappropriate conduct. Indeed, many civilian workplaces have addressed the use of offensive and demeaning language in the workplace for exactly this reason. In one case, for example, a captain in a fire department was disciplined for referring to women firefighters as “cunts”.<sup>89</sup> Faced with the concern that female firefighters had already reported feeling marginalized within the service, and that some male firefighters might continue to believe that such disrespectful language was acceptable, the employer terminated the captain—despite the fact that he had an unblemished record of thirty years—in order to send a clear message that such conduct would not be tolerated. Subsequently, the employee issued an apology and the employer reduced the sanction to an eight-week suspension. The captain then grieved the eight-week suspension and the dispute went to arbitration.

In dismissing the grievance, the arbitrator emphasized the importance of the employer’s goal in trying to change the male-dominated culture in the workplace, and to create a more inclusive workplace. As the arbitrator stated:

Firstly, we must consider the context of the workplace. The City and the CFD have a duty to take all reasonable efforts to maintain a workplace free of discrimination and harassment. Firefighting is a male-dominated profession with only 30 female firefighters in a CFD workforce of about 1300. A major objective of the CFD is to create a more inclusive workplace creating a welcome environment for women. Negative attitudes towards women and hostile conduct towards women firefighters undermine the efforts of CFD to make progress on this important objective.

Secondly, we must consider the context of the Grievor's position as Fire Captain. While the position is within the bargaining unit, a Fire Captain supervises and commands the crew at a Fire Hall. Fire Captain is a position of authority and leadership within the CFD. Fire Captains are expected to serve as role models demonstrating appropriate conduct for the crews they command. Captains are expected to lead by example with respect to their peers, colleagues, and the public.

Thirdly, we must consider the content of the statements in question. Obviously, referring to female firefighters as "qash" and "cunts" is repugnant and demeaning towards women...

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<sup>89</sup> *Calgary (City) and Calgary Fire Fighters Assn. (Hendricks) (Re)*, (2012) 111 C.L.A.S. 331

...

The Grievor's comments would have been demoralizing to Firefighter #1. She would have understood that her supervisor on that day was prepared to refer to her in a repugnant and demeaning way. She would also have understood he believed that having female firefighters at a Fire Station was a very negative circumstance.

...By referring to the female firefighters as "gash" and "cunts", he was sending a message to the crew he led on that day that it was acceptable to refer to their female colleagues using degrading and demeaning terms. As importantly, he sent the message to the crew that brought into the question the legitimacy of even having female firefighters. That message was entirely inappropriate. Given that Captains are to serve as role models and given the CFD objective of creating an inclusive working environment for women, the Grievor's comments constitute a profound failure of leadership. Such conduct is deserving of a very serious disciplinary response.<sup>90</sup>

[emphasis added]

Sexualized language is problematic not only because it is offensive and demeaning, but also because of the message it sends about the value to be attached to women in the workforce. As the arbitrator commented, the use of such language “constitute[s] a profound failure of leadership.”

Underlying the arbitrator's reasoning is the view that simply because a workplace has traditionally been male-dominated does not mean that women (or LGBTQ members) should be required to tolerate offensive and demeaning behaviour. Women should not be required to accept that a male-dominated workplace will be rough and coarse, or that the environment that pre-existed the entrance of women workers will set the contextual norm against which sexual harassment will be judged.<sup>91</sup> As participants in the Review commented, women members of the CAF should not be required to act like men, or to tolerate discriminatory conduct, in order to belong to the organization or be promoted through the ranks.

The firefighter case further illustrates the importance of two key tools for effecting cultural change. First, the organization must develop clear policies establishing what conduct is and is not permissible; and second, the organization must implement those policies in a strict and consistent manner, including by imposing meaningful sanctions where a breach occurs. It is only in this way that an organization can move towards real cultural change. Such a change, however, cannot occur without the willingness of leaders to identify and sanction offensive conduct when it occurs.

#### 4.4.2 Proactive Leadership

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<sup>90</sup> *Calgary (City) and Calgary Fire Fighters Assn. (Hendricks), (Re)*, (2012) 111 C.L.A.S. 331 at paras 33-38

<sup>91</sup> A. P. Aggarwal and M. M. Gupta, *Sexual Harassment in the Workplace*, 2000, p. 153

In order to bring about cultural change in an organization, and to reduce the occurrence of sexual harassment and sexual assault, it is essential that senior leaders, and particularly those with general oversight responsibilities, become directly engaged in cultural reform. This includes not only putting in place strong policies and following up with strict implementation, but also integrating these policies into a global strategy that includes better role modelling. Lower ranking male members need to see senior male leaders clearly acknowledge, through word and conduct, that inappropriate sexual conduct is unacceptable in the CAF. Lower ranking female members need to see that senior leaders value the role of women in the armed forces, and recognize the serious and negative impact of inappropriate sexual conduct.

Junior officers and NCOs, both male and female, also need to act as role models. Female leaders face a particular challenge. As noted, numerous participants in the interviews reported hearing negative comments about the presence of women in the military. Others commented that there are few mentors for female members, and that there are not enough women to have sufficient peer support.<sup>92</sup> Further, it was obvious to the ERA that, while there is strong representation of women in certain trades, such as support or medical, there is a very low proportion of women in operational positions, and a very low representation of women in the senior ranks and high command overall. Women contribute to a diverse workforce that strengthens the CAF's ability to be an effective, modern, relevant and high-performing organization. The ERA notes that many military organizations struggle with the under-representation of women and that there appears to be less interest among women than men in pursuing military careers. Nevertheless, the under-representation of women in the armed forces at all levels, but in senior positions in particular, should remain a source of concern for the CAF. While the mandate of the Review did not explicitly include an examination of the integration of women into the CAF, there is an undeniable link between the existence of negative and discriminatory attitudes towards women in the CAF, the low representation of women in senior positions in the organization, and the prevalence of sexual harassment and assault.

Proactive leadership is essential to give appropriate attention and momentum to initiatives to reduce the prevalence of inappropriate sexual conduct, and to demonstrate to members, both men and women, that the CAF values the presence of women in the organization and takes seriously its responsibility to foster a more inclusive culture. In particular, the importance of direct engagement by senior leaders to bring about cultural change should not be underestimated. Research shows that it is the CEO's commitment, in words and actions, to gender diversity that creates the greatest incentive for members of the organization to adopt programs and metrics to improve the integration of women into the workplace. This involves addressing breaches of conduct and implicit bias amongst senior leaders, appointing women to positions of power, developing support networks for women, and reviewing policies for gender inclusiveness.<sup>93</sup>

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<sup>92</sup> Focus groups: female trainees, female NCOs; Volunteer contributions

<sup>93</sup> *How to engage senior men to promote women to decision-making positions*, Working Paper. European Commission's Network to Promote Women in Decision-making in Politics and the Economy (September, 2012) at p. 5

These strategies have been adopted by a number of Canadian organizations, both in law enforcement and in the corporate world. The Vancouver Police Department (VPD), for example, has set itself the goal of achieving more diversity in the service,<sup>94</sup> including by increasing the representation of women. To achieve this goal, a multi-faceted strategy has been implemented, including the personal involvement of the Chief of Police, targeted hiring strategies, hiring expert trainers, and involving the service in a number of activities supporting diversity. As a result of such initiatives, in 2014, 24% of sworn members of the VPD were women. Even more significant, the VPD has increased the percentage of female officers from 0.5% in 2011 to 30% in 2014, and the percentage of female Staff Sergeants and Deputy Chiefs from 0% in 2012 to approximately 15% in 2014. Similar strategies have also been adopted by large civilian organizations such as BCE, where the Chief Executive Officer was personally involved in the implementation of the organization's *Code of Ethics* (which contains part of the company's policies on inappropriate sexual conduct), because of the importance to the organization of maintaining a high standard of conduct.

One of the critical strategies these organizations have undertaken to bring about cultural change is to appoint more women to key positions within the governance structure. As a result of public pressure, for example, the percentage of women on the boards of Canadian stock index companies—traditionally, a male dominated environment—has increased to 20.2% in 2014.<sup>95</sup> Further, the percentage of women in Canada at the level of senior management was 27% in 2013.<sup>96</sup> The CIA is another example of an organization that has made a notable transformation of its culture by ensuring that women have greater representation across the agency, with women making up 46% of the CIA's workforce. In addition, the CIA has made significant efforts to appoint women at the highest levels of senior leadership.<sup>97</sup>

By comparison with the representation of women in these organizations, the CAF and other military organizations are lagging behind. As of January 1, 2015, 14.57% of all officers in the CAF were women, or 2758.<sup>98</sup> This is analogous to the representation of women on the boards of directors of the largest American companies ten years ago.<sup>99</sup> By comparison, the Australian

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<sup>94</sup> Volunteer interview with a number of high level representatives of the Vancouver Police Department, including Chief Jim Chu.

<sup>95</sup> *2014 Catalyst Census: Women Board Directors*. New York: 2015.

<http://www.catalyst.org/knowledge/2014-catalyst-census-women-board-directors>

<sup>96</sup> Catalyst, *Quick Take: Women in Management, Global Comparison*. New York: Catalyst, 2014;

<http://www.catalyst.org/knowledge/women-management-global-comparison>

<sup>97</sup> Nevertheless, structural barriers still exist to the promotion of women to senior positions. A number of appointments of women to positions of senior leadership were made following an external review of the CIA's practices with respect to the hiring and promotion of women by Madeleine Albright in 2012, which resulted in the report *CIA Women in Leadership*. Brigid Schulte, "Many women in CIA still encounter glass ceiling, agency report says". *The Washington Post*. June 13, 2013. For the 2013 report *CIA Women in Leadership* see [https://www.cia.gov/library/reports/CIA\\_Women\\_In\\_Leadership\\_March2013.pdf](https://www.cia.gov/library/reports/CIA_Women_In_Leadership_March2013.pdf)

<sup>98</sup> Figures provided by CAF. As of January 1, 2015, there were 2758 female officers and 16,165 male officers out of a total of 65,691 regular members.

<sup>99</sup> Figures for Canadian companies are not readily available, but an analogy can be made to the largest American companies, where women held 14.7% of the board of director seats in 2005: 2005 Catalyst

Defence Forces (ADF) report that female officers represent 18.2% of all officers. This places the ADF somewhat ahead of the CAF, and indicates that increasing the representation of women officers in senior positions in a military organization is possible.

Increasing the presence of women in the higher levels of the organization is likely to have a significant impact on improving the professionalism of CAF culture, and to create a more inclusive and equitable environment.<sup>100</sup> Equally important, a gender-based analysis of CAF policies would help to ensure that policies do not implicitly lead to discriminatory practices. Such a step is necessary to remove barriers to women entering the CAF, and progressing up the ranks in the organization.

Whereas the remainder of this Report will address how CAF policies and procedures on sexual harassment and assault should be improved, the ERA cannot emphasize strongly enough that revising policies without addressing the underlying cultural conditions would be an exercise in futility. Because of the nature and pervasiveness of the problems of sexual harassment and sexual assault, leaders need to realize that these are institutional issues, not just individual issues, and certainly not just a woman's issue. Inappropriate sexual conduct does not occur in a cultural vacuum, but in many cases is a manifestation of, or response to, underlying systemic conditions. Without taking fundamental steps to bring about cultural change, even the best policies will be ineffective and the consequences of inappropriate sexual conduct will continue to affect the well-being of members, the effectiveness of units, and the cohesion of the CAF as a whole. Thus, a change in cultural attitudes is imperative both to protect the right of members to integrity and dignity, and to improve military efficiency.

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Census of Women on Board of Directors of the Fortune 500: <http://www.catalyst.org/knowledge/2005-catalyst-census-women-board-directors-fortune-500>

<sup>100</sup> Focus groups: female trainees, female lower rank; Volunteer contribution

## **Recommendation No. 1**

**Acknowledge that inappropriate sexual conduct is a serious problem that exists in the CAF and undertake to address it.**

## **Recommendation No. 2**

**Establish a strategy to effect cultural change to eliminate the sexualized environment and to better integrate women, including by conducting a gender-based analysis of CAF policies.**



## 5. Under-Reporting

The CAF has, until now, failed to acknowledge the extent and pervasiveness of the problem of inappropriate sexual conduct. This may be the result of the very low number of complaints that are reported every year. In 2012, for example, a representative of the CAF testified before the Parliamentary Standing Committee on the Status of Women that the CAF Harassment Tracking System had recorded, for the ten-year period beginning in 2002, only 31 complaints of sexual harassment, of which 11 were founded or partially founded.<sup>101</sup> Further, as noted, the JAG reported that only nine charges of sexual assault had been brought before Court Martial in the year 2011-2012. These statistics do not, however, take into account the likelihood of under-reporting, and create a misleading picture of the problem. This, in turn, has had the consequence of shifting attention in the CAF away from the problem of inappropriate sexual conduct and its impact on the organization. Indeed, in releasing the results of the 2012 Canadian Forces Workplace Harassment Survey, the Director General of Military Personnel, Research and Analysis recommended “that attention be placed on addressing *personal* harassment and abuse of authority in the CAF”,<sup>102</sup> rather than on *sexual* harassment, given the low rate of sexual harassment reported in the survey.

Although the ERA was not asked to conduct surveys and obtain comparable data, the consistent evidence of inappropriate sexual conduct heard throughout the consultations strongly suggests that a much higher level of incidents occur, particularly of sexual harassment. The ERA can only conclude that there is a very serious problem of under-reporting in the CAF. Indeed, the problem of under-reporting was itself raised by numerous contributors and, as discussed in greater detail below, the ERA heard repeatedly throughout its consultations that victims of both sexual harassment and sexual assault fail to report such incidents for a variety of reasons.

The failure to report both sexual harassment and sexual assault is not specific to the CAF. Indeed, it is well-documented in other military organizations<sup>103</sup> and more broadly in civilian life. Many of the reasons why CAF members are reluctant to report such incidents, however, appear to be connected to certain cultural norms, some of which have already been described. In particular, participants reported concerns about negative consequences for the complainant’s career, loss of privacy and confidentiality, fear of collateral charges, and a deep scepticism that the chain of command would respond sensitively and appropriately to the complaint. Yet without information about what is occurring on the ground, the CAF is unable to make necessary changes to reduce inappropriate sexual conduct. Improving the rate of reporting is therefore

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<sup>101</sup> House of Commons Standing Committee on the Status of Women, *A Study on Sexual Harassment in the Federal Workplace*, testimony No 50, presented on November 22, 2012

<sup>102</sup> CFWRS, Executive Summary, p. iii

<sup>103</sup> *Rapport de la mission d’enquête sur les cas de harcèlement, agressions et violence sexuels dans les armées, Contrôle général des armées (France)*, 4 avril 2014, p. 15, Chapter 1.3; SAPRO 2013 Annual Report, p. 8, *Review into the treatment of women in the Australian Defence Force*, Australia Human Rights Commission, 2012, p. 47; *Report of the Defense Task Force on Sexual Assault in the Military Services (U.S.)*, December 2009, Chapter 4, p. 30

crucial if senior leaders are to understand how policies are implemented and where they need to be improved. Under-reporting is a reality that needs to be understood and addressed if a change of culture and reduction of incidents is to be achieved.

## 5.1 Impact on Career Progression

First and foremost, the ERA heard that fear of negative repercussions for career progression is one of the most serious reasons why members do not report incidents of either sexual harassment or sexual assault.<sup>104</sup> In particular, a common response to allegations of sexual harassment or sexual assault seems to be to remove victims from their unit, which is generally perceived as punishing the victim.<sup>105</sup> This is only one of the numerous negative career consequences reported by victims; others included not obtaining a hoped-for posting, not being deployed during the course of the investigation, or being required to miss training.<sup>106</sup> As one contributor summarized, “the consequences of reporting are frightening”.<sup>107</sup>

Unfortunately, the ERA found that such concerns are not without reason, and the ERA heard numerous examples of complainants who had suffered retaliation as a result of laying a complaint.<sup>108</sup> Furthermore, despite the fact that the *Guidelines* provide for third-party reporting (where a third-party may report an incident that he or she has witnessed) and that DAOD 5019-5 and QR&O 4.02(e) and 5.01(e) impose an obligation to report sexual misconduct, third-party reporting is very rare.<sup>109</sup> Some participants even reported having been actively muzzled when attempting to make a third-party report.<sup>110</sup>

## 5.2 Lack of Confidentiality

Another major reason victims of sexual harassment, and particularly of sexual assault, gave for their decision not to report the incident is the perceived lack of confidentiality within the chain of command and the unit.<sup>111</sup> For victims of sexual harassment, this lack of confidentiality is aggravated by the policy of lowest-level resolution, discussed below, which requires complainants to report the incident to the next person up the chain of command, regardless of whether this individual has any sensitivity about how to handle incidents of sexual harassment. The incentive for those in the chain of command is not to resolve a complaint or to support the

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<sup>104</sup> Focus groups: female lower rank (several), male lower rank, female reserve, female NCOs (several), mixed gender junior officers (several); Coordinator interviews; Volunteer contributions

<sup>105</sup> Focus groups: mixed gender NCOs; Coordinator interviews; Volunteer contributions

<sup>106</sup> Focus group: female lower rank; Coordinator interviews; Volunteer contributions

<sup>107</sup> Volunteer contribution; other participants commented that reporting is like giving the “kiss of death to your career” (Coordinator interview), “shooting yourself in the foot” (Volunteer contribution), and is a “lose-lose” situation (Volunteer contribution)

<sup>108</sup> Focus group: female reserve; Coordinator interviews

<sup>109</sup> Coordinator interviews

<sup>110</sup> Volunteer contributions

<sup>111</sup> Focus groups: female lower rank (several); Coordinator interviews; Volunteer contributions

complainant, but rather to make the complaint disappear so that it does not tarnish the reputation of the unit or come to the attention of those of a higher rank.<sup>112</sup>

For victims of sexual assault, the concern about loss of confidentiality appears to be an even more significant cause of under-reporting.<sup>113</sup> Victims of sexual assault frequently resist sharing information about what is often a violent and intimate incident, and are particularly concerned about breaches of privacy. Reporting means losing control over information, including who will be informed about the nature and details of the assault. While reporting to civilian police also entails a loss of confidentiality, the consequences do not appear to be as dramatic. When the military police are informed of the incident, the details of the matter are shared with the NIS and the investigation process is triggered, all of which results in the disclosure of details of the assault—including potentially intimate details about which the victim might feel embarrassment or shame—to a number of individuals. In the tight community of a unit or base, rumours begin to spread quickly and the privacy of the victim (as well as of the accused) can be severely impacted.<sup>114</sup>

These concerns are compounded by a general fear of being judged, not being believed, and of being stigmatized as a victim of rape or other forms of sexual assault.<sup>115</sup> Such concerns are frequently reported by victims of sexual assault in Canadian society at large, but may be particularly powerful in the context of an organizational culture that values strength and power, and which can appear unsympathetic to any perceived manifestations of fragility or weakness.<sup>116</sup>

### 5.3 Lack of Trust in the Chain of Command

Participants, mostly in the lower ranks, described a number of additional reasons for choosing not to report an incident of sexual harassment or assault. Underlying these concerns is a deep mistrust that the chain of command will take such complaints seriously.<sup>117</sup> More specifically, these reasons included:

- pressure not to report;<sup>118</sup>
- fear of being stigmatized as weak;<sup>119</sup>
- concerns about being labeled a trouble-maker and as the “person who charged a teammate”;<sup>120</sup>
- concerns about retaliation by peers;<sup>121</sup>

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<sup>112</sup> Focus group: female lower rank, mixed gender junior officers; Coordinator interviews

<sup>113</sup> Focus group: mixed gender NCOs; Coordinator interviews; Volunteer contributions

<sup>114</sup> Focus groups: female lower rank (several); Coordinator interviews; Volunteer contribution

<sup>115</sup> Focus groups: female NCOs; Coordinator interviews; Volunteer interviews

<sup>116</sup> Focus groups: mixed gender junior officers; Coordinator interviews

<sup>117</sup> Focus groups: female lower rank, female junior officers; Coordinator interviews; Volunteer contribution

<sup>118</sup> Focus group: female NCOs; Coordinator interviews; Volunteer contribution

<sup>119</sup> Focus groups: female junior officers, male junior officers; Coordinator interviews; Volunteer contribution

<sup>120</sup> Focus groups: female lower rank, male lower rank; Coordinator interviews; Volunteer contributions

<sup>121</sup> Focus groups: female lower rank, male lower rank; Coordinator interview; Volunteer contribution

- Fear of collateral charges;<sup>122</sup>
- desire to avoid disturbing group cohesion;<sup>123</sup> and
- desire to avoid negative consequences for the aggressor.<sup>124</sup>

Further, in several cases interviewees specifically pointed to the conduct of the NCO as a deterrent to reporting an incident, particularly where the CO had asked the NCO to deal with the practical aspects of the harassment complaints (a common practice).<sup>125</sup> NCOs are the eyes and ears of the upper levels of the organization and yet they are often viewed as complicit in the problem of harassment.<sup>126</sup> In particular, not only do NCOs supervise member conduct, but they are also charged with assessing the complainant's performance. As a result, a victim's perception about how the NCO will react to a harassment complaint plays a pivotal role in the decision of members about whether or not to report an incident of harassment.

Male victims of sexual assault by other men also appear to suffer dramatically and are even less likely to report the offensive conduct.<sup>127</sup> Indeed, the ERA heard of incidents of violent sexual attack by men against their male peers,<sup>128</sup> including gang rape.<sup>129</sup> As previously noted, these incidents reveal the extent to which incidents of sexual assault may be more about the abuse of power to demonstrate dominance and control, and to ostracize the victim from the group, rather than about sexual attraction. The shame of being viewed as weak, and potentially as gay (in a culture that continues to be affected by strains of homophobia), may inhibit male victims of assault from reporting.<sup>130</sup>

Finally, perhaps one of the most significant deterrents to reporting sexual assault is the actual experience of other victims with the military justice system. Those who make a formal complaint are likely to be required to repeat their statements on numerous occasions, are given little or no guidance or information about how the investigation or discipline process works, and receive no emotional support.<sup>131</sup> As a result, re-victimization and frustration appear to be the standard consequences of reporting. Even more damaging are the stories that circulate of complaints of sexual assault that result in little or no repercussion for the aggressor.<sup>132</sup> Faced with the potentially serious career-ending consequences of reporting a sexual assault, and the likelihood

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<sup>122</sup> Coordinator interview; Volunteer contributions

<sup>123</sup> Focus group: mixed gender junior officers; Coordinator interviews

<sup>124</sup> Focus group: female NCOs; Coordinator interview; Volunteer contributions

<sup>125</sup> Focus group: female NCOs; Coordinator interviews

<sup>126</sup> Focus groups: female lower rank; Coordinator interviews

<sup>127</sup> Coordinator interviews; Volunteer contributions

<sup>128</sup> Coordinator interviews

<sup>129</sup> Volunteer contribution

<sup>130</sup> Coordinator interviews

<sup>131</sup> Coordinator interviews; Volunteer contributions

<sup>132</sup> Coordinator interviews; Volunteer contributions

that the aggressor will not ultimately receive a meaningful sanction, many victims reasonably decide that a complaint is simply not a worthwhile avenue.<sup>133</sup>

Underlying all of these reasons is a clear lack of trust in the chain of command, deep scepticism that the system will be responsive to complaints of sexual harassment, and a lack of confidence that leaders will do anything to prevent the negative impact of harassment on members. Interviewees deplored the lack of accountability of those in the chain of command who are responsible for supporting members and protecting their well-being.<sup>134</sup> Too many participants expressed the view that the chain of command is mostly interested in protecting itself from the negative effect of a complaint on the reputation of leaders in the unit, and is less concerned with protecting the well-being of complainants.<sup>135</sup> These difficulties translate into a leadership problem.

#### 5.4 Avenues for Improvement

The ERA heard frequently that the only way to increase the frequency of reporting is to create a reporting mechanism outside of the chain of command.<sup>136</sup> To clarify, while reports of sexual harassment are made to the chain of command, complaints of sexual assault are currently directed to the military police, not to the victim's chain of command. However, participants in the consultations generally did not make this distinction. The reason for this confusion may be two-fold. First, one of the first persons a victim initially turns to after an assault (if she makes a complaint at all) is her immediate superior. Second, the military police may not appear to victims to be sufficiently independent from the chain of command. Thus, many interviewees suggested that investigations be conducted by outside investigators in order to improve trust in the complaint process.<sup>137</sup> Such an independent body could also improve confidentiality for the members involved, and consistency in the treatment of complaints.<sup>138</sup> Interviewees also suggested that an independent advocate should be available to provide support and information for members who have experienced inappropriate sexual conduct.<sup>139</sup>

Many COs and senior officers suggested that any mechanism that could provide support to victims of sexual harassment and assault, while maintaining cohesion within the unit, would be welcome, outside of deployment.<sup>140</sup> However, some COs also warned about unintended consequences that could flow from utilizing an outside mechanism to receive and investigate complaints, including the "de-responsibilization" of COs, and degradation of the chain of command.<sup>141</sup> Other concerns included the possibility that outside investigators would not

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<sup>133</sup> Focus groups: female trainees

<sup>134</sup> Focus groups: mixed gender junior officers; Coordinator interviews; Volunteer contributions

<sup>135</sup> Coordinator interviews; Volunteer contributions

<sup>136</sup> Focus groups: mixed gender junior officers; Coordinator interviews; Volunteer contributions

<sup>137</sup> Focus groups: female lower rank, male lower rank; Coordinator interviews; Volunteer contributions

<sup>138</sup> Coordinator interviews

<sup>139</sup> Coordinator interviews

<sup>140</sup> Coordinator interviews

<sup>141</sup> Coordinator interviews

understand how the military works,<sup>142</sup> that the unit has a responsibility to know about any misconduct that occurs,<sup>143</sup> and that civilian authorities also have problems appropriately investigating complaints of harassment and sexual assault.<sup>144</sup> Concerns were also raised that allowing anonymous complaints to be laid could result in potential abuses of the system.<sup>145</sup>

Even with an outside mechanism, however, it is important to underscore that victims should not have to bear the burden of the complaint process. As much as it is important for the CAF to be advised of incidents of inappropriate sexual conduct, it is ultimately up to the victim to decide whether or not he or she is willing to report such incidents. Whatever the victim decides, he or she should be offered appropriate support to address the harm that has been done. Once the victim's needs are addressed, the CAF can focus on preventing other occurrences from taking place, in part by imposing administrative or disciplinary measures, or, in the case of sexual assault or criminal harassment, by prosecuting the matter.

The CAF is not the only military organization to be concerned with the problem of under-reporting of inappropriate sexual conduct. Other armed forces have experimented with various models to improve reporting, including by creating a body outside the military organization to receive complaints, provide victim support, develop training programs, and collect data about sexual misconduct. In 2005, for example, the US Department of Defence created the Sexual Assault Prevention Office (SAPRO). SAPRO, which is independent from the chain of command, was created to operate as the single point of authority for the US Armed Forces' sexual assault policy, including victim support and oversight.<sup>146</sup> One of the most important issues for SAPRO has been the underreporting of sexual assault. To address this, SAPRO created two streams for members to report a complaint: restricted and unrestricted reports. If a member chooses to make a restricted report, no investigation is triggered, but the victim is nonetheless entitled to support.<sup>147</sup> Restricted reports may also ultimately evolve into unrestricted reports if the victim changes his or her mind about pursuing an investigation. In its 2013 annual report, SAPRO observed an unprecedented 50% increase in reporting.<sup>148</sup> This increase may be attributable to an increased willingness of victims to report occurrences.<sup>149</sup>

Further to the release in 2012 of the Review on the Treatment of Women in the ADF, the Australian government similarly created the Sexual Misconduct Prevention and Response Office

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<sup>142</sup> Coordinator interviews

<sup>143</sup> Coordinator interviews

<sup>144</sup> Coordinator interviews

<sup>145</sup> Coordinator interviews

<sup>146</sup> United States Department of Defence Sexual Assault Prevention and Response:

<http://www.sapr.mil/index.php/about/sapr-strat-plan>

<sup>147</sup> <http://www.sapr.mil/index.php/dod-policy/reporting-options/restricted-reporting>

<sup>148</sup> <http://www.sapr.mil/index.php/annual-reports>, FY13 DoD Annual Report on Sexual Assault, p. 3

<sup>149</sup> <http://www.sapr.mil/index.php/annual-reports>, FY13 DoD Annual Report on Sexual Assault, p. 45: "A change in reports of sexual assault may reflect a change in victim confidence in DoD response systems. The continuing growth of Restricted Reporting may be a sign that victims view this option as a valuable and trustworthy means to access support while maintaining confidentiality."

(SeMPRO), which operates outside the armed forces, under the authority of the Department of Defence.<sup>150</sup> SeMPRO's responsibilities are to support victims, provide advice and guidance to commanders and managers, implement education and prevention strategy, develop policies, practice and procedures, and monitor compliance.<sup>151</sup> Just as with the American SAPRO, the Australian SeMPRO accepts both restricted and unrestricted reports.<sup>152</sup> Unlike SAPRO, however, SeMPRO accepts reports of both sexual assault and sexual harassment.<sup>153</sup>

In France, sexual assaults that are alleged to have occurred in a military context are referred to the civilian justice system. To deal with sexual harassment complaints, the French government created a new independent office in April 2014, Cellule Thémis. Cellule Thémis has three mandates: (1) providing support for victim and prevention of occurrences, (2) improving transparency, which includes collection of data, and (3) overseeing sanctions (which includes harmonizing sanctions).<sup>154</sup> Cellule Thémis is independent of the chain of command, and instead forms part of the Contrôle général des armées, which is the auditor general for the Department of Defence and the Armed Forces.

In the Netherlands Armed Forces (NLAF), members can use any of three different channels to report incidents of sexual harassment. The first is similar to the present CAF process, whereby victims can address their complaint to their supervisor; a second is an agency independent of the chain of command, but which has representatives in each of the NLAF's divisions: army, navy, etc.; and the third is an external reporting mechanism outside the NLAF. In the NLAF, "confidants" are available to assist victims by giving moral support and guidance on the harassment complaint process. Generally, "confidants" are members of the NLAF who have volunteered for the role.<sup>155</sup>

The trend towards providing outside help to support victims is not limited to the military environment. It is now standard practice for many large corporations to contract with companies specializing in employee assistance to provide a variety of services, such as hot lines, support

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<sup>150</sup> Australian Government Department of Defence, Defence Instructions (General), PERS 35-4, *Reporting and management of Sexual Misconduct Including Sexual Offences*;

<http://www.defence.gov.au/sempro/about/default.asp>;

<sup>151</sup> <http://www.defence.gov.au/sempro/about/default.asp>

<sup>152</sup> Australian Government Department of Defence, Defence Instructions (General), PERS 35-4, *Reporting and management of Sexual Misconduct Including Sexual Offences*, annex A *Informations for Victims of Sexual Misconduct*; <http://www.defence.gov.au/sempro/reporting/default.asp>

<sup>153</sup> Australian Government Department of Defence, Defence Instructions (General), PERS 35-4, *Reporting and management of Sexual Misconduct Including Sexual Offences*, p. 2 and Annex B *Definitions*

<sup>154</sup> *Plan d'action contre les harcèlements violences et discriminations*, 14 avril 2014, Annex to the Nov. 14, 2014 No 14-03763-DEP/DEF/CGA/THEMIS Note du Contrôleur des Armées pour le Bureau représentation des Étrangers, État-major des armées, Sous-chefferie relations internationales

<sup>155</sup> Information concerning the NLAF processes was provided to the ERA by the NLAF with the support of the CAF Director of the Military Personnel.

services, and counselling. Often, employees can also make confidential and anonymous reports of any sexually inappropriate conduct to these organizations.<sup>156</sup>

It may take time to rebuild trust between members and the CAF. However, the creation of an independent center outside of the CAF is an important step towards improving reporting rates and should be adopted by the CAF. The ERA therefore recommends that the CAF adopt this best practice and establish an independent center for accountability for sexual assault and harassment. The ERA does not make a formal recommendation with respect to the name of the center, but for the purpose of the Report, the acronym CASAH will be used. CASAH should be responsible for receiving reports of both sexual harassment and sexual assault, and victims should have control over whether the report will or will not trigger an investigation. In either event, the victim should be entitled to receive assistance and support. Further, CASAH should be tasked with prevention, victim support, monitoring of accountability (including follow-up on complaints of both sexual harassment and sexual assault), and conducting research. CASAH should also act as a central authority for the collection of data with respect to sexual and harassment and assault, including the number of reports made, complaints filed and charges laid, the status of investigative procedures, and the outcome of complaints by year, unit and environment. CASAH should produce annual reports.

As discussed below, the ERA further recommends that CASAH be involved in the development and implementation of policies and procedures related to inappropriate sexual conduct, and to the development and implementation of training.

Victims should also retain the option of reporting to the chain of command if they prefer. Not all victims may be comfortable using the same channel for reporting, and it is important to provide victims with a range of options.

A final issue which merits further attention by the CAF is how to create incentives to reward supervisors for taking action to identify and prevent sexual misconduct, and for appropriately sanctioning such conduct when it is uncovered. Incentives should be developed to counter the practice of ignoring, or even participating in, a hostile, sexualized environment, and to encourage leaders to address the problem of inappropriate sexual conduct overall.

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<sup>156</sup> Volunteer interviews; the ERA is also aware that other large corporations, such as Telus and TD Bank, have contracted with companies to manage their personal misconduct policies, including complaints of sexual harassment.



### **Recommendation No. 3**

**Create an independent center for accountability for sexual assault and harassment outside of the CAF with the responsibility for receiving reports of inappropriate sexual conduct, as well as prevention, coordination and monitoring of training, victim support, monitoring of accountability, and research, and to act as a central authority for the collection of data.**

### **Recommendation No. 4**

**Allow members to report incidents of sexual harassment and sexual assault to the center for accountability for sexual assault and harassment, or simply to request support services without the obligation to trigger a formal complaint process.**

## 6. Definitions

While the ERA found that mere policy change is not, in itself, sufficient to address the problem of inappropriate sexual conduct in the CAF, policies do constitute a key tool upon which CAF leadership can rely to guide the conduct of members.

Definitions are central pillars in any policy. They provide important guidance to members about how to conduct themselves by circumscribing what is permissible, and what is subject to sanction. Yet the ERA found that the definitions of both *sexual harassment* and of *sexual misconduct* in the DAOD policies are ineffective at clearly articulating a standard of behaviour that best protects the dignity and security of members. For example, participants commented that while extreme cases of sexual harassment or sexual misconduct are easy to recognize, it is often difficult to discern whether conduct that is less overt or egregious—but nevertheless offensive—would be covered by the relevant definitions.<sup>157</sup> Interviewees also commented that the line between sexual harassment and misconduct is sometimes difficult to draw,<sup>158</sup> and that they were unclear about the definition of “personal relationships” and “fraternization”.<sup>159</sup> Members also reported that they found the policies complex<sup>160</sup> and ineffective at addressing the systemic nature of sexual harassment.<sup>161</sup>

In reviewing the CAF policies on harassment and sexual misconduct, several problems readily come to light. First, there is no actual definition of these concepts contained in the policies: while sexual harassment is simply not defined in DAOD 5012-0, sexual misconduct is described in DAOD 5019-5 only by reference to other legal documents, and “adverse personal relationship” is defined in DAOD 5019-1 only by reference to the negative consequences it has on the unit, a post-facto definition which may be difficult for members to interpret on their own. Furthermore, the terminology is often inconsistent with plain language uses of the terms, all of which causes confusion for members. Second, the criteria to determine whether sexual harassment has occurred are complex and unclear, making it difficult for a victim to decide if she should complain, and challenging for a Responsible Officer (RO) to conclude whether or not sexual harassment has occurred. Third, and finally, sexual harassment, sexual misconduct and adverse personal relationship are treated as three distinct issues and addressed in distinct policies; this fails to recognize the clear linkages that often exist between these types of sexually inappropriate conduct.<sup>162</sup>

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<sup>157</sup> Focus groups: female lower rank, female NCOs; Coordinator interviews; Volunteer interviews

<sup>158</sup> Focus groups: female lower rank, male lower rank; Coordinator interviews

<sup>159</sup> Focus groups: mixed gender lower rank, NCOs; Coordinator interviews; Volunteer contribution

<sup>160</sup> Focus group: male lower rank; female junior officers; Coordinator interviews

<sup>161</sup> Coordinator interviews

<sup>162</sup> To exemplify the dichotomy between the two concepts, it is interesting to consult the information provided to members in *Military Administrative Law*, Chap. 23-1 where they are instructed to distinguish between two types of conduct: “It is important to be able to distinguish between sexual misconduct, which has a disciplinary or criminal aspect to it, and sexual harassment which (although equally unacceptable),

## 6.1 Sexual Harassment

DAOD 5012-0 covers incidents of personal harassment, abuse of power, sexual harassment and racism,<sup>163</sup> all under the rubric of *harassment*. The term harassment is defined in that document as:

any improper conduct by an individual that is directed at and offensive to another person or persons in the workplace, and that the individual knew or ought reasonably to have known would cause offence or harm.

Although sexual harassment is encompassed by this definition, it is not specifically addressed in the policy.

Under the DAOD definition, five criteria must cumulatively be met before a finding of harassment can be made:

- 1) the conduct must be improper;
- 2) the conduct must have been directed at another person or persons;
- 3) the conduct must be offensive to another person or persons;
- 4) the accused knew or ought reasonably to have known that the conduct would cause offence or harm; and
- 5) the conduct occurred in the workplace.

In order to make a finding of sexual harassment, a sixth criterion, that the conduct is sexual in nature, must also be met.

Taken together, these six elements narrow the scope of prohibited conduct significantly, making the definition much less inclusive than the definitions of several provincial human rights and labour law statutes.<sup>164</sup>

In addition, the CAF definition of sexual harassment is narrower and more complex than the definition articulated by the Supreme Court of Canada, which informs the interpretation of

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is dealt with through an administrative process.”

<sup>163</sup> Depending on the policy instrument, the fourth type of prohibited conduct is listed as either racism or bullying.

<sup>164</sup> The Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 at 10(1) and the Ontario *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, at 1(1), use the expression “unwelcome” and do not require the conduct to be directed at a specific person; similarly, in New Brunswick, the expression “unwelcome” is used in the *Human Rights Act*, R.S.N.B. 2011, c. 171, at 10(1), as it is in the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214, at 3; in the province of Quebec, the expression “unwanted” is used in *An Act Respecting Labour Standards*, RLRQ, c. N-1.1, at 81.18, whereas the *Saskatchewan Employment Act*, S.S. 2014, c. S-15.1, at 3-1(1) uses the expression “inappropriate”.

Canadian and provincial human rights and labour statutes.<sup>165</sup> In *Janzen v. Platy Enterprises Ltd.*, Chief Justice Dickson defined workplace sexual harassment as follows:

sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.<sup>166</sup>

By comparison to the six conditions that must be met in order to demonstrate sexual harassment under DAOD 5012-0, this definition requires that only four criteria be met for a finding of sexual harassment to be made. Specifically, the definition requires that the conduct:

- 1) was sexual in nature;
- 2) was unwelcome;
- 3) caused harm; and
- 4) affected the work environment or led to adverse job-related consequences for the complainant.

Not only does the *Janzen* definition contain fewer criteria for a finding of sexual harassment, but also the criteria themselves establish a lower threshold. For example, the CAF policy requires that the conduct be found to be improper and offensive, in order to constitute sexual harassment, whereas the *Janzen* criteria only require that the conduct be unwelcome. The *Janzen* criteria therefore encompass a much wider scope of inappropriate sexual conduct.

Furthermore, under the *Janzen* definition the fourth condition—whether the conduct has affected the work environment or led to adverse job-related consequences—is broadly interpreted to include consideration of whether the conduct interfered with an individual’s work or performance, or had the effect of creating an intimidating, hostile, or offensive environment. The complainant is not required to demonstrate that the conduct resulted in concrete harm in order for sexual harassment to be made out.

In a context where sexual language is endemic to the organizational culture, in particular where the sexual nature of some comments or expressions may no longer even be apparent to some individuals but continue to cause offence and discomfort to others, many of the conditions built in to the DAOD definition of sexual harassment are ineffective at capturing the offensive conduct. For example, the requirement that the conduct be directed at an individual limits sexual harassment only to conduct that was directly aimed at a specific person. This is made evident by instructions on the interpretation of the criterion:

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<sup>165</sup> J. Bourgault, *Le harcèlement psychologique au travail*, Montreal: Wilson & Lafleur, 2006, at p. 40; A. P. Aggarwal and M. M. Gupta, *Sexual Harassment in the Workplace*, 3rd ed., Toronto and Vancouver: Butterworths, 2000, at p. 120

<sup>166</sup> *Janzen v. Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252

For improper conduct to be considered directed at another person, that person must both be the subject of the conduct and personally experience the conduct and/or the repercussions of it.<sup>167</sup>

As noted, the generalized use of inappropriate sexual language in the lower ranks is endemic in the CAF. Yet, the requirement that the conduct be directed at another member fails to capture sexually harassing comments made at large, for example, in a group or social setting. These are precisely the kinds of circumstances that contribute to an environment that is hostile to women and LGTBQ individuals, and which the CAF needs to tackle. While the definition of sexual harassment must be able to capture instances of *quid pro quo* harassment, the policy will be generally ineffective unless it can also address the use of sexualized and demeaning language.

Similarly, the requirement in the DAOD definition that the accused ought reasonably to have known that the conduct would be offensive functions to exclude conduct that is commonplace in the CAF, but that may nevertheless be unwelcome to some. For example, in an environment in which highly demeaning sexualized terms are commonplace, it may be difficult for ROs to conclude that the speaker ought reasonably to have known that the use of such language in a particular instance would cause offence, since the perpetrator can justify the use of such language on the basis that it is the norm within the organization.

As currently delineated, the term *sexual harassment* therefore fails to capture a range of inappropriate conduct, and has been ineffective at driving necessary organizational reform. Not surprisingly, this overly-narrow definition feeds the belief among members that the directed at and offensive to criteria are “easy escapes”<sup>168</sup> for the perpetrator of the conduct, and a bar to a complainant offended by the conduct. This perception, along with the overly narrow definition itself, contributes to the extremely low rate of reporting of sexual harassment in the CAF.

Likewise, the requirement that the conduct take place in the workplace is unduly restrictive. Workplace is defined in DAOD 5012-0 as follows:

Workplace includes the physical work location or the greater work environment such as work-related functions and other activities where work relationships exist.

The limitation of sexual harassment to incidents that occur in the workplace is artificial, given the unique nature of the CAF as a “total institution”.<sup>169</sup> Unlike in the case of a civilian employer, members of the military do not simply work for the CAF, but work, socialize and often live within institutional and social structures established by the military. While the definition of workplace in DAOD 5012-0 specifically alludes to the greater work environment and appears to encompass at least some incidents that occur in a social environment, the reference to conduct occurring “in the workplace” is a source of confusion. In particular, it fails to capture the fact that even if the

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<sup>167</sup> *Harassment Advisor Reference Manual*, p. 57

<sup>168</sup> Focus group: mixed gender NCOs; Coordinator interviews

<sup>169</sup> E Goffman, *Asylums*, New York, Anchor Books, 1961

conduct does not occur *in* the workplace, the consequences may nevertheless have an impact *on* the workplace.

By contrast, many other foreign armed forces rely on a broader definition of sexual harassment. For example, neither the United States nor the British Armed Forces limit the scope of their harassment policies to instances of *quid pro quo* harassment, or to harassment that takes place in the workplace.<sup>170</sup> The ADF has also adopted a very broad definition of sexual harassment, which does not tie the definition of harassment to the workplace. As stated in the ADF's recently introduced policy on *Reporting and Management of Sexual Misconduct including Sexual Offences*:

Sexual harassment for the purposes of this Instruction is any unwelcome sexual behaviour that is likely to offend, humiliate or intimidate. The *Sex Discrimination Act 1984* contains a detailed definition.<sup>171</sup>

Similarly, policies on sexual harassment in Canadian workplaces generally recognize that an employer has the authority to sanction any form of sexual harassment that has a nexus to the member's employment relationship. For example, it is well established in labour law that an employer has the right to discipline an employee, even if the conduct took place outside of the workplace and outside of work hours, if the conduct has a nexus to the employment relationship. Among the factors used to determine whether such a nexus exists are whether the employee's conduct has:<sup>172</sup>

- harmed the employer's reputation;
- rendered the employee unable to perform his duties satisfactorily;
- led to the refusal, reluctance or inability of other employees to work with him; or
- made it difficult for the employer to efficiently operate its workplace and direct its workforce.

The Ontario Court of Appeal has also held that a finding of sexual harassment does not depend on whether the incident took place in the workplace. In the context of allegations of sexual harassment against a senior manager, the Court held that:<sup>173</sup>

It would be artificial and contrary to the purpose of controlling sexual harassment in the workplace to say that after-work interaction between a supervisor and other employees cannot constitute the workplace for the purpose of the application of the

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<sup>170</sup> For the United States: AR 600–20, 7-5 and 7-6, 18 March 2008; For UK, reference to the questionnaire provided by the British Armed Forces; see also the Netherlands Armed Forces, as per the information provided in the questionnaire, and Checklist for Campus Sexual Misconduct Policies proposed by the US Task Force to Protect Students from Sexual Assault, 2014;

<sup>171</sup> Annex B to D(G) Pers 35-4

<sup>172</sup> *Millhaven Fibres Ltd. v. Oil, Chemical & Atomic Workers Int'l Union, Local 9-670*, [1967] O.L.A.A. No. 4 (Ont. Lab. Arb.)

<sup>173</sup> *Simpson v. Consumers' Association of Canada et al*, 57 O.R. (3d) 351 (Ont. C.A.) (application for leave to appeal to the SCC dismissed, [2002] SCCA 83)

law regarding employment-related sexual harassment. The determination of whether, in any particular case, activity that occurs after hours or outside the confines of the business establishment can be the subject of complaint will be a question of fact.

Limiting the definition of sexual harassment to conduct that takes place in the workplace is therefore inconsistent with current Canadian norms, as well as with best practices in other allied military organizations.

Further, the ERA observes that DAOD 5012-0 fails to specifically address sexual harassment that may take place through the use of social media, which interviewees identified as an increasingly prevalent occurrence.<sup>174</sup>

The ERA also heard from contributors that in addition to clarifying the definition of sexual harassment, the policy should include concrete examples of impermissible conduct to better illustrate the concept. Including explanatory examples is a recognized practice in workplace harassment policies<sup>175</sup> because they can convey much more effectively the scope of prohibited conduct. The following are examples of conduct that constitute prohibited sexual harassment:

- use of belittling language referring to body parts;
- unwelcome sexual invitations or requests;
- unnecessary touching or patting;
- leering at a person's body;
- unwelcome and repeated innuendo or taunting about a person's body, appearance or sexual orientation;
- suggestive remarks or other verbal abuse of a sexual nature; or
- visual displays of degrading or offensive sexual statements or images.

In addition, sexual harassment may occur in the course of one incident, or in a series of incidents, which in isolation would not necessarily constitute sexual harassment. The victim and the harasser may be of the same or different sexes, and the harasser need not be employed by the victim's organization; rather the victim can be anyone affected by the conduct.

In sum, the CAF needs more effective tools to be able to address and sanction unwelcome sexual behaviour in order to establish a professional environment for its members. Given the prevalence of a hostile environment of sexual harassment and the lack of clarity members express about what constitutes sexual harassment, the ERA finds that the term *sexual harassment* should be clearly defined in the relevant policy, recognizing that it is separate and

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<sup>174</sup> Focus groups: female lower rank, male lower rank, mixed gender junior officers; Coordinator interviews; Volunteer contributions

<sup>175</sup> L. Gouliquer, *Soldiering in the Canadian Forces: How and Why Gender Counts*, Doctoral Thesis, McGill, Dept of Sociology, 2011, p. 282. Of note, they are found in the US policy AR 600–20, 7-5 and 7-6 and in the Vancouver Police Department's *Respectful Workplace Policy*, 4.1.11

distinct from other forms of workplace harassment. Although the ADF definition of sexual harassment cannot be used without modification, the CAF definition should aim at similar simplicity. The CAF should remove from the definition the reference to *directed at* and *in the workplace*. The policy should define sexual conduct that is “unwelcome” as harassment, rather than sexual conduct that is improper or offensive. The focus of the definition should be on protecting individuals from negative work consequences and a hostile environment. The policy should further clarify that all means of communication, including on-line and via social media, are covered by the policy. Further, the definition should be broadened to capture a wider scope of conduct. Concrete examples of prohibited conduct should be included in the policy.

## 6.2 Fraternalization and Adverse Personal Relationships

Based on the interviews, there also appears to be uncertainty among CAF members with respect to the line between *personal relationship*, *adverse personal relationship*, and *sexual misconduct*. The expressions *fraternization* and *adverse personal relationship* appear to be a particular source of confusion for many members.

DAOD 5019-1 uses the expressions *personal relationship*, *adverse personal relationship*, and *fraternization*. A personal relationship is defined as an “emotional, romantic, sexual or family relationship between two CAF members, a CAF member and a DND employee or contractor, or a CAF member and a member of an allied force.” An adverse personal relationship is described as a personal relationship that has “a negative effect on the security, cohesion, discipline or morale of a unit”. Fraternization, by contrast, does not involve a relationship between two CAF members, but rather “any relationship between a CF member and a person from an enemy or belligerent force,” or “a local inhabitant within a theatre of operations where CF members are deployed.”

Unlike the conduct included in the DAOD 5019-5 policy on sexual misconduct, however, DAOD 5019-1 does not clearly prohibit adverse personal relationships. It is the responsibility of the CO to impose restrictions on a personal relationship. If the relationship contravenes the local policy established by the CO, administrative and disciplinary measures may be imposed.<sup>176</sup> Adverse relationships are usually prosecuted under s. 129 of the *National Defence Act*.<sup>177</sup> Even if the CO is not in a position to impose a disciplinary sanction, he or she can enforce administrative measures, for example by asking for the transfer of one of the individuals in the adverse relationship to another unit.

Despite the definitions set out in the policies, most interviewees who referred to the existence of personal relationships in the CAF mistakenly used the expression *fraternization*,<sup>178</sup> illustrating the degree to which many members are confused about these concepts. Significantly, numerous

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<sup>176</sup> DAOD 5019-1, Administrative Action

<sup>177</sup> In *R. v. Paul and Babin*, 2014 CM 2013, the CO's order with respect to what were the prohibited personal relationships was found to be impermissibly vague and the charge under s. 129 NDA dismissed.

<sup>178</sup> Focus groups: female NCOs, male NCOs; Coordinator interviews; Volunteer contributions



interviewees cited examples of personal relationships between members of different rank in which interviewees perceived a clear potential for abuse of power.<sup>179</sup> Participants questioned whether such relationships were truly consensual<sup>180</sup> and expressed concern about their negative impact on the morale of many members, and on the cohesion of the unit as a whole.<sup>181</sup> In particular, interviewees referred to the training context as being a particularly fertile ground for dubious personal relationships, and described what was perceived to be a double standard for officers.<sup>182</sup>

None of these situations are expressly addressed in the policies. Indeed, when the concept of adverse personal relationship was raised with members involved in the implementation of the policies, many were quick to point out the difficulty of controlling such relationships.<sup>183</sup> However, DAOD 5019-1 specifically states that leaders shall engage in “the protection of vulnerable CF members and others” by “[imposing] restrictions on personal relationships if required” and “[ensuring] that CF members and others in the care or protection of the CF are not subjected to coercion or exploitation”. Thus while adverse personal relationships may not always be easy to control, this is nevertheless one of the responsibilities of CAF leaders. The difficulty is that the policies, as currently framed, do not address the ways in which relationships between members of different rank may be inherently coercive or have a negative impact on member morale and the cohesion of a unit.

The ERA appreciates the need to respect the right of members to form personal relationships, as well as the privacy interests of members in their relationships. However, because of the deeply hierarchical nature of the organizational structure in the CAF, and because of the inherent risk for abuse of power, the CAF and should address such relationships at a policy level. With the participation of CASAH, the definition of *adverse personal relationship* should be clarified to address situations of power imbalance more explicitly, including by creating an administrative presumption that personal relationships between members of different rank are *adverse* personal relationships unless the relationship has been disclosed to the appropriate authority. The senior-ranking member involved in such relationship should be held responsible if the relationship is not properly disclosed.

The ERA further notes that there may be situations in which a relationship between members in different positions of authority amounts to sexual assault, where the imbalance of power is such that the lower-ranking member has not freely consented to engage in the sexual activity. These circumstances are discussed with respect to the concept of consent, below.

### 6.3 Sexual Misconduct

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<sup>179</sup> Focus groups: female lower rank, female NCOs; Coordinator interviews

<sup>180</sup> Focus groups: female lower rank (several), male lower rank, female NCOs; Coordinator interviews; Volunteer contribution

<sup>181</sup> Coordinator interviews

<sup>182</sup> Focus group: female NCOs; Coordinator interviews

<sup>183</sup> Coordinator interviews

The meaning of the term *sexual misconduct* is particular to the CAF and distinct from its meaning in everyday use. DAOD 5019-5 defines sexual misconduct as one or more acts that:

- are either sexual in nature or committed with the intent to commit an act or acts that are sexual in nature; and
- constitutes an offence against the *Criminal Code* or Code of Service Discipline (CSD).

Acts that may constitute a sexual offence under the CSD include: behaviour in a scandalous manner unbecoming of an officer,<sup>184</sup> abuse of a subordinate,<sup>185</sup> and conduct to the prejudice of good order and discipline.<sup>186</sup> Notably, conduct to the prejudice of good order and discipline is the provision under which more than half of all incidents are prosecuted in the military justice system,<sup>187</sup> and is also the provision under which adverse personal relationships can be subject to discipline. Sexual misconduct in DAOD 5019-5 therefore includes a wide range of conduct, from consensual sexual activity that may be prosecuted under the CSD, to violent sexual assault as defined by the *Criminal Code*.

The use of the expression *misconduct* appears to be a source of confusion for members about what specific conduct is prohibited under this policy. The fact that the plain language meaning of sexual misconduct is much broader than the term as defined in DAOD 5019-5 is a particular source of confusion. This is for several reasons.

First, all forms of sexual harassment fall, in plain language, within the concept sexual misconduct, and would normally be understood to be included within this term. It is therefore confusing for members who have no legal training to distinguish what constitutes sexual harassment from sexual misconduct. This same problem exists with the French language version of the policies. For example, in the French version of DAOD 5019-5, *inconduite sexuelle* is used to refer to conduct of a sexual nature which would constitute an offence under the *Criminal Code*, or which is otherwise prohibited by the CSD. In plain language, however, *inconduite sexuelle* is a much broader term, which encompasses both sexual assault and sexual harassment.

Second, the confusion is compounded by the fact that some forms of sexual harassment are prohibited under the *Criminal Code*<sup>188</sup> and are therefore covered by DAOD 5019-5, making it difficult to distinguish between sexual harassment and sexual misconduct under that policy. The interpretation is further obscured by the fact that the plain language meaning of misconduct is used in sections 73 and 74 of the CSD.

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<sup>184</sup> Section 92, *NDA*

<sup>185</sup> Section 95, *NDA*

<sup>186</sup> Section 129, *NDA*

<sup>187</sup> *Report of the Second Independent Review Authority to the Honourable Peter MacKay, Minister of National Defence, Patrick J. Lesage*, p. 19

<sup>188</sup> See: Sections 372(1), 372(2), 372(3) and 423 of the *Criminal Code*

Perhaps even more importantly, the interviews revealed that the notion of consent is not well understood by a number of members, COs or military police, which compounds the confusion about what constitutes sexual misconduct. In part, this is because there is no discussion of consent in the policies. The failure to address the concept of consent, and to give members clear guidance as to the necessity for consent and how to determine if consent exists, can be very serious. Despite the fact that the law is very clear that non-consensual sexual touching constitutes assault, there remains a perception that victims may have implicitly consented to or invited their own assault. Members suggested that in some circumstances a victim may have “blurred the line” as to whether or not he or she had consented to or caused the offensive activity, and that there may be “grey areas”.<sup>189</sup> This aggravates the perception that victims will not be believed by those in a position of authority (for example, members of the chain of command, the military police, or physicians).

### 6.3.1 Using Plain Language

The patchwork of prohibitions under numerous CAF policies resembles the miscellany of laws related to sexual assault that existed in Canadian criminal law prior to the comprehensive reform of that section of the *Criminal Code* in 1983.<sup>190</sup> Following upon recommendations by the Law Reform Commission of Canada, Parliament streamlined the relevant provisions in order to create a more cohesive set of rules. Pursuant to these reforms, the expression *assault* and more specifically *sexual assault* replaced other terminology and is now used to encompass all non-consensual intentional sexual touching.<sup>191</sup> The ERA is of the view that the CAF provisions on prohibited sexual misconduct should be similarly revised.

In particular, in the ERA's view it is important to provide members with a much clearer understanding about the regulation of sexual conduct. This will be much more achievable if the terminology used to describe prohibited sexual conduct is consistent with expressions members are likely to understand, without having to look up definitions or go through extensive training. In the ERA's view, therefore, the DAOD would be stronger and more effective if it utilized plain language terminology as much as possible, as well as terminology consistent with the *Criminal Code*. Thus, for example, intentional non-consensual touching of a sexual nature should be referred to as *sexual assault*, in order to be consistent with the *Criminal Code*. The term sexual misconduct should instead be used to encompass all prohibited sexual conduct, including fraternization, adverse personal relationships, sexual harassment, and sexual assault.

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<sup>189</sup> Focus group: female lower rank; Coordinator interviews; Volunteer contributions

<sup>190</sup> 1983 (*An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125)

<sup>191</sup> Sexual assault may be defined as touching without consent in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. See: *R. v. Bernier*, 119 C.C.C. (3d) 467, (confirmed by *R. v. Bernier*, [1998] 1 S.C.R. 975), for the definition of assault, and *R v. Chase* 1987 2 SCR 293 for the definition of sexual assault.

### 6.3.2 Concept of Consent

There appears to be significant confusion in relation to the concept of consent among members of the CAF. In order for sexual activity to be deemed consensual, what conditions have to exist? What must an individual do to determine if consent exists, and when can consent be implied? Does consent need to be obtained at each new level of the sexual interaction? Does the lack of a “no” constitute consent?

Institutions across Canada and the United States are engaged in active debate about how to combat deep-seated stereotypes about victims of rape, for example that a victim may have implied an invitation to sexual activity, or that she implied consent. These efforts are all varying responses to the recognition that consent is fundamental to healthy sexual interactions, that the concept of consent continues to be poorly understood, and that clear policies are required to make the shift to a positive consent culture.<sup>192</sup> Many universities across North America have also adopted student codes of conduct that establish a rigorous standard of consent for sexual activity. California, for example, recently passed legislation mandating that colleges and universities adopt a student conduct policy requiring “affirmative, conscious, and voluntary agreement to engage in sexual activity,” as a condition for state funding.<sup>193</sup> The bill defines consent to sexual activity as the presence of a “yes” rather than the absence of a no, although consent does not necessarily need to be verbally expressed.

In Canada, the concept of consent was clearly elucidated more than fifteen years ago in the Supreme Court of Canada’s seminal judgment, *R. v. Ewanchuk*.<sup>194</sup> As the Court made clear, consent is determined by reference to the complainant’s internal state of mind with respect to the sexual touching at the time it occurred.<sup>195</sup> There is no requirement on the complainant to verbally communicate her lack of consent to the aggressor; silence cannot be interpreted as consent. More specifically, the Supreme Court rejected the idea of *implied* consent; if a woman has not consented in her mind to the sexual activity, then it is not open to the accused to argue that she implicitly consented through her conduct. In other words, if the trier of fact finds that the complainant did not subjectively consent to the conduct in her own mind, then it does not matter what her outward conduct may have been. It is, however, open to the accused to use the complainant’s outward conduct to argue that she actually was consenting in her mind, or that he genuinely had an “honest but mistaken belief” that the complainant had consented.<sup>196</sup>

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<sup>192</sup> In Ontario, for example, Premier Kathleen Wynne recently called for the provincial sex-education curriculum to be revised to include education about “healthy relationships and the topic of consent”: <http://www.cbc.ca/news/canada/toronto/new-ontario-sex-ed-curriculum-will-include-consent-awareness-1.2894623>; February 2, 2015

<sup>193</sup> Senate Bill No. 967, Ch. 748; *An act to add Section 67386 to the Education Code, relating to student safety*. Approved by Governor, September 28, 2014.

<sup>194</sup> *R. v. Ewanchuk*, [1999] 1 S.C.R. 330

<sup>195</sup> *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paras. 26 and 29

<sup>196</sup> *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 42

Certain conditions are held to automatically vitiate consent, including submission to the sexual activity by reason of fear, or as a result of the exercise of authority.<sup>197</sup>

Under the standard articulated by *Criminal Code* and the Supreme Court of Canada, genuine consent may be communicated by word or conduct. However, where either party indicates by any means—verbal or not—that he or she is uncomfortable or reluctant to continue with the sexual activity, an obligation crystallizes on the other party to specifically obtain consent before proceeding any further. While the Court did not explicitly require that this consent be verbal, as a practical matter where there is doubt as to whether or not a party has consented to sexual activity, the only clear way to dispel such doubt will be to verbally seek consent.

In this regard, the ERA notes that there has been some public debate as to whether sexual activity in the absence of express or verbal consent constitutes sexual assault. For example, some universities have written into their student codes of conduct that individuals must obtain express verbal consent before engaging in sexual activity in order to remove any possibility of ambiguity or misunderstanding.<sup>198</sup> In the ERA's view, such a requirement is unrealistic and risks creating more harm than good. It is highly improbable that individuals will seek each other's verbal and express consent before and during every stage of sexual activity. In many, if not most, consensual interactions, the individuals involved communicate to each other through non-verbal means their willingness to participate in the activity. To create a requirement for express or verbal consent, absent which the activity constitutes assault, risks criminalizing genuinely consensual interactions between autonomous adults. At the same time, such a requirement creates a standard that is hard to implement and therefore may fail to protect individuals against truly coercive and abusive conduct.

In the ERA's view, the standard set by the Supreme Court strikes an appropriate balance between recognizing the realities of human intimate relationships, and the need to establish clear consent on the part of all parties to participation in sexual activity. This is not to say that the clear, verbal communication of consent should not be encouraged. Obviously, the more clearly individuals can communicate with each other about their willingness to engage in sexual activity, the less likelihood there will be for misunderstanding or coercive conduct. However, the ERA is concerned that a rule which requires verbal consent in all circumstances is overbroad, unenforceable and therefore of limited utility. Instead, the concept of consent should be clearly stated to members in CAF policies, and explained through mandatory training.

Ultimately, the standard articulated by the Supreme Court shares the same purpose as the affirmative consent standard adopted by many university campuses. As the new California law defines affirmative consent:

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<sup>197</sup> Section 265.(3) of the *Criminal Code*

<sup>198</sup> This is sometimes referred to as the "Antioch standard", based on a set of standards set in 1991 by Antioch University in Ohio, which required verbal consent (excluding "moans") for "each new level" of sexual activity.

An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. “Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.<sup>199</sup>

[emphasis added]

The purpose of the affirmative consent standard is to change the way institutions approach the definition of sexual assault. Instead of asking the victim of an assault: “Did you say no?”, a well-trained investigator should ask: “Did you consent?”

### 6.3.1 Consent and the Consumption of Alcohol

The influence of alcohol or drugs is particularly pernicious in the context of sexual assault. Alcohol and drugs have the power to take away a complainant’s ability to control his or her decision-making, while at the same time masking the sexual activity in the cloak of consent and making the complainant appear to be agreeable to the conduct. As the Quebec Court of Appeal noted in a decision that was ultimately affirmed by the Supreme Court:

An assault which is sexual in nature does not always appear hostile in the way an assault in the ordinary sense of the word does. In the case at bar, the hostility of the assault comes from the lack of consent, as G.B. was under the influence drugs which were taken involuntarily as a result of the actions of [the accused].

*R. v. Daigle* (1997), 127 C.C.C. (3d) 130 at 138 (Que. C.A.), affirmed [1998] 1 S.C.R. 1220

With respect to the consumption of alcohol or drugs, this means that even if a complainant *appears to be* in agreement with the sexual activity, legally there is no consent if the complainant is so intoxicated that he or she lacked the minimal capacity required to consent or to withhold consent to the sexual activity.<sup>200</sup> The question to be asked is whether the complainant was intoxicated “to the point where she could not understand the sexual nature of the act or realize that she could choose to decline to participate”.<sup>201</sup>

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<sup>199</sup> Senate Bill No. 967, Ch. 748; *An act to add Section 67386 to the Education Code, relating to student safety*. Approved by Governor, September 28, 2014.

<sup>200</sup> *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.)

<sup>201</sup> *R. v. G. (L.)* (2007), 228 C.C.C. (3d) 194 (Ont. C.A.)

To be clear, Canadian courts have found that simply by consuming alcohol, a complainant does not necessarily become incapacitated and unable to consent to sexual activity. Impairment is not equivalent to incapacity; nor is alcohol-induced imprudent decision-making, memory loss, or loss of inhibition or self-control.<sup>202</sup> The ERA notes that, in this respect, Canadian law differs from new codes of conduct being adopted by some American universities, some of which indicate that the mere consumption of alcohol may vitiate consent.<sup>203</sup> Whether or not a complainant has reached the legal threshold of being incapable of consenting must be determined on the specific facts of a given case. Canadian courts have held that the absence of consent can be proven by circumstantial evidence, including the number of drinks or the kind of drugs consumed, the slurring of words, loss of physical control (i.e. stumbling, unable to control limbs), a subsequent black-out, the inability to concentrate or to engage in decision-making, reported feelings of drowsiness and of being disassociated from one's body, and complete loss of inhibition.<sup>204</sup>

The ERA is of the view that, as with the concept of consent, it would be inappropriate to hold members of the CAF to a different standard than that which governs civilians under the *Criminal Code*. The same law with respect to whether a victim is incapacitated as a result of the consumption of alcohol or drugs therefore applies to members of the CAF.<sup>205</sup> However, given the repeated references during the fact-finding investigation to (often excessive) alcohol consumption in relation to incidents of sexual assault, the CAF should carefully review its policies with respect to the provision and consumption of alcohol in CAF-related activities. In particular, the CAF should reconsider the emphasis on consumption of alcohol at compulsory or semi-compulsory events, which promotes the excessive consumption of alcohol and can lead to overly aggressive conduct in which some military members, particularly women, are vulnerable.

In the course of the Review, the ERA was made aware of changes to be made to policies with respect to sale and consumption of alcohol on CAF property. The ERA can only underscore the importance for the CAF to discourage the excessive consumption of alcohol.

### 6.3.2 Consent and Imbalances of Power

Central to the question of whether an individual has genuinely consented to sexual activity is whether both parties have freely entered into the conduct. Where there is a power imbalance as between the parties involved, determining whether genuine consent existed at the relevant time

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<sup>202</sup> *R. v. Jensen*; *R. v. J.M.W.*, [2004] O.J. No. 1295 (Ont. S.C.J.)

<sup>203</sup> For example, the University of Notre Dame website states: "Agreement given while under the influence of alcohol or other drugs is not considered consent" and "if you have not consented to sexual intercourse, it is rape.": <http://oade.nd.edu/educate-yourself-alcohol/hookups/sexual-assault/> Accessed on February 11, 2015

<sup>204</sup> *R. v. R.(J.)* (2006), 40 C.R. (6<sup>th</sup>) 97 (Ont. S.C.J.), affirmed 2008 ONCA 200, 59 C.R. (6<sup>th</sup>) 158; *R. v. G.(L.)* (2007), 228 C.C.C. (3d) 194

<sup>205</sup> Sections 273.2 and 33.1(2) of the *Criminal Code*

is particularly complex. As the Ontario Court of Appeal commented in relation to a sexual harassment complaint by various employees against their supervisor:

Because of the power imbalance in an employee's relationship with a supervisor, and the perceived consequences to objecting to a supervisor's behaviour, particularly when the behaviour is not directed specifically at that employee (for example, making comments to or touching another employee, being nude in front of a group of people), an employee may go along with the conduct. In those circumstances, the employee will be effectively consenting to unwelcome conduct because she feels constrained from objecting.<sup>206</sup>

[emphasis added]

This concern is particularly relevant to the context of the CAF where the chain of command, and the organizational structure that supports it, is the basis of most interactions. Power imbalances may also spring from differences in rank, which again affect almost all work and social interactions. The authority structure inherent to a military organization may therefore strongly affect a complainant's sense of what options are realistically open to her and that when faced with a sexual advance or sexual touching by a senior-ranking officer. In the all-encompassing power structure of the CAF—where a senior-ranking officer may have control over not only a complainant's employment, but also her career advancement, transfer, or deployment—a complainant may feel even greater pressure to go along with sexual conduct than an employee in a civilian employment context.

The focus on obedience and conformity within the chain of command, and the overall social and organizational hierarchy within the CAF, may therefore lead some junior (more likely female) members to feel that they have little choice to but to go along with the sexual advances of more senior (more likely male) members. Indeed, participants noted that senior officers, even COs, sometimes turn a “blind eye” on highly dubious relationships.<sup>207</sup> It is precisely to address circumstances like these that the *Criminal Code* provides that there is no consent where the accused abuses his or her position of power or authority over the complainant to engage in sexual activity.<sup>208</sup> Whether or not an accused is in a position of authority or power over a complainant will generally be a question of fact to be determined on a case-by-case basis.

## 6.4 Single Policy

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<sup>206</sup> *Simpson v. Consumers' Association of Canada*, (2001) 57 O.R. (3d) 351 at para 64

<sup>207</sup> Focus group: female lower rank; Volunteer contribution

<sup>208</sup> Section 273.(2) of the *Criminal Code* provides:

No consent is obtained, for the purposes of sections 271, 272 and 273, where

...

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;



As noted, the ERA found that there was considerable confusion among participants resulting from the fact that the policies circumscribing prohibited sexual conduct are covered by a number of different documents. A single, coherent policy which addresses all of the different kinds of prohibited sexual conduct would more effectively describe the rules with respect to sexual conduct, and provide CAF members with better guidance. This would entail describing the rules with respect to fraternization, adverse personal relationships, sexual harassment, and sexual assault in the same instrument. However, since some CAF policies are common to the CAF, the DND and to other federal government departments, the CAF may not be in a position to readily adopt a single policy document covering all prohibited sexual conduct. Nevertheless, the CAF should develop a unified approach to address inappropriate sexual conduct, including by addressing as many aspects of prohibited sexual conduct as possible under a single policy document, so that there are clear linkages between the relevant definitions and procedures, and the information is easily accessible to members.

While all prohibited conduct need not be subject to the same processes for reporting, investigation, adjudication, or sanction, the processes applicable to each type of misconduct needs to be clear and coherent.

Not only would such a change bring greater clarity to the scope of prohibited conduct (and any potential areas of overlap), but it would highlight a critical, but often invisible, common factor underlying adverse personal relationships, sexual harassment, and sexual assault: that inappropriate sexual conduct is frequently motivated by power, rather than sexual attraction. Indeed, although the target of inappropriate sexual conduct is more frequently a woman, the fact that men are also at risk underscores the power dynamics at play.

Too often, this recognition of the underlying power dynamics is missing from discussions of different forms of prohibited sexual conduct, and particularly with respect to sexual harassment. Although there is ongoing debate as to the underlying causes of inappropriate sexual conduct,<sup>209</sup> the element of power is an ever-present dimension. Yet, the abuse of power inherent in unwelcome sexual conduct has not, to date, been part of the narrow concept of sexual harassment or adverse personal relationships in the DAOD policies. This lacuna in the policies must be addressed in view of the potentially far-reaching psychological impact for the victim, and liability for the CAF.<sup>210</sup> Indeed, the right to the integrity of the person protected under section 7 of the *Charter* includes protection against psychological harm as much as physical harm. Despite the issue of power being repeatedly raised, directly and indirectly, in the interviews, the ERA was not made aware of any ongoing policy discussion at the higher levels of the CAF about how to effectively address abuse of power and inappropriate sexual conduct.

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<sup>209</sup> L. M. Cortina and J. L. Bergdahl, *Sexual Harassment in Organizations, A decade of Research in Review*, in *The Sage Handbook on Organizational Behaviour*, Chap. 25, p. 474

<sup>210</sup> K. S. Zippel, *The Politics of Sexual Harassment*, 2006, p. 25; Re liability see e.g.: *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28

Addressing all prohibited sexual conduct under the same policy would establish a clear connection between those types of unwelcome conduct and the underlying dynamics of power that often motivates them. This, in turn, would help to highlight the fact that neither sexual harassment nor sexual assault can be reduced to simply a workplace issue,<sup>211</sup> and that sexual harassment and sexual assault are not simply a “women’s issue,” but an issue for the CAF as a whole.<sup>212</sup>

## 6.5 Avenues for Improvement

While policy change in and of itself will not reduce the prevalence of inappropriate sexual conduct in the CAF, it is a critical first step. CAF leaders need strong, well-crafted policies to be able to bring about cultural change, sanction prohibited conduct, and deter aggressors. Defining and addressing prohibited sexual conduct clearly in plain language is the foundation upon which the CAF will be able to act to reduce incidents of sexual assault and sexual harassment, and to improve the standards of professionalism within the organization. Since the ERA recommends assigning responsibilities related to the prevention of sexual assault and sexual harassment to CASAH, the center should also be involved in the development of the policies addressing those issues.

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<sup>211</sup> K. Zippel, *The Politics of Sexual Harassment*, 2006, p. 36

<sup>212</sup> Focus group: female lower rank; Coordinator interviews

## **Recommendation No. 5**

**With the participation of the center for accountability for sexual assault and harassment:**

**Develop a simple, broad definition of sexual harassment that effectively captures all dimensions of the member's relationship with the CAF.**

**Develop a definition of adverse personal relationship that specifically addresses relationships between members of different rank, and creates a presumption of an adverse personal relationship where the individuals involved are of different rank, unless the relationship is properly disclosed.**

**Define sexual assault in the policy as intentional, non-consensual touching of a sexual nature.**

**Give guidance on the requirement for consent, including by addressing the impact on genuine consent of a number of factors, including intoxication, differences in rank, and the chain of command.**

## **Recommendation No. 6**

**With the participation of the center for accountability for sexual assault and harassment, develop a unified policy approach to address inappropriate sexual conduct and include as many aspects as possible of inappropriate sexual conduct in a single policy using plain language.**

## 7. Processes and Procedures

Except where sexual harassment rises to the level of criminal conduct, sexual harassment and sexual assault are treated as distinct and unrelated conduct. In the ERA's view, this strict dichotomy is misplaced and risks allowing some improper sexual conduct to go unpunished, particularly low-level sexual assaults. Moreover, the consultations raised a number of serious concerns with respect to whether the procedures currently in place are appropriate and effective.

### 7.1 Sexual Harassment

#### 7.1.1 Current Practices

The practices and procedures for receiving, investigating and adjudicating a complaint of sexual harassment are set out in a number of different policy documents within the CAF. As noted, DAOD 5012-0 regulates four different types of harassment: personal harassment, abuse of power, sexual harassment, and racism. While the DAOD establishes the broad parameters of the policy—including the delegation of authority to certain individuals to receive, investigate and adjudicate complaints of harassment—more detailed instructions are provided in the *Harassment Prevention and Resolution Guidelines (Guidelines)*. These *Guidelines* are intended to provide procedural guidance in support of the *Harassment Prevention and Resolution Policy*.<sup>213</sup> They are issued under the authority of the CDS and have the same compulsory force as the DAOD 5012-0.<sup>214</sup> Both DAOD 5012-0 and the *Guidelines* flow “directly from and are consistent with the Treasury Board of Canada Secretariat Policy on the Prevention and Resolution of Harassment in the Workplace”.<sup>215</sup>

As set out in DAOD 5012-0 and in the *Guidelines*,<sup>216</sup> COs and other more senior officers may be assigned the responsibility to adjudicate harassment complaints and, in such circumstances, are referred to as ROs. ROs have decision-making authority under the DAOD and the *Guidelines*. They receive specific instructions from the CDS to discharge their duties.<sup>217</sup> Guidance is also provided to Harassment Advisors (HAs),<sup>218</sup> whose role includes advising ROs with respect to processing a complaint of harassment. HAs are designated by COs and will generally be members of a unit who have either volunteered, or been requested, to serve in this role.

The *Harassment Advisor Reference Manual* identifies two broad approaches to resolving harassment complaints: (1) alternate dispute resolution (ADR), which is “encouraged”,<sup>219</sup> and (2)

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<sup>213</sup> *Harassment Prevention and Resolution Guidelines*, p. 1-1

<sup>214</sup> Section 18.2, *NDA*

<sup>215</sup> *Harassment Prevention and Resolution Guidelines*, p. 1-1

<sup>216</sup> *Harassment Prevention and Resolution Guidelines*, p. 3-1

<sup>217</sup> *Responsible Officer Guide to Harassment Prevention and Resolution Policy*

<sup>218</sup> *Harassment Advisor Reference Manual*

<sup>219</sup> *Harassment Advisor Reference Manual*, p. 5

administrative investigation. Generally speaking, complainants are strongly encouraged to pursue ADR (either through informal ADR techniques used by those in the chain in command, or with the assistance of a third party mediator) before laying a formal complaint and requesting an administrative investigation. In either case, the *Harassment Advisor Manual* establishes that one of the guiding principles for the RO is to attempt to resolve the problem at the lowest possible level utilizing ADR techniques:

When harassment has occurred and/or a harassment complaint has been submitted, DND employees and CAF members are encouraged to resolve harassment issues at the most appropriate, lowest possible level, through alternative dispute resolution techniques.<sup>220</sup>

This focus on low-level resolution and ADR is also reiterated in the *RO Guide*.<sup>221</sup>

Given these procedural requirements, before a harassment complaint is fully resolved, a harassment victim may be required to go through three separate stages. The first stage (ADR)<sup>222</sup> takes place after the victim reports the improper conduct but before a formal complaint is lodged, the second stage (the Administrative Investigation)<sup>223</sup> is initiated once a complaint is filed, and the third stage (a grievance)<sup>224</sup> occurs if a party seeks to challenge the RO's decision on the complaint.

With respect to the first stage, although it is not mandatory, the CAF strongly encourages its members to start by using so-called "self-help" techniques whereby the concerned individual should first speak directly to the instigator of the unwelcome conduct.<sup>225</sup> If this is not possible, the victim can ask for supervisor intervention. If the immediate supervisor cannot help, or if the supervisor is a party to the incident, the victim may turn to a higher-level supervisor to seek his or her intervention. This approach is part of the CAF's "open door" policy.<sup>226</sup> If recourse to the chain of command does not produce adequate results, or if it is not appropriate, the member may be offered formal ADR with the help of a third party mediator.<sup>227</sup>

If none of these techniques is successful or appropriate, the victim may lay a formal complaint, which leads to the second stage: an administrative investigation. This is generally initiated by a written complaint and triggers certain procedural obligations, such as that the complainant has

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<sup>220</sup> <http://www.forces.gc.ca/en/news/article.page?doc=department-of-national-defence-and-canadian-armed-forces-harassment-prevention-and-resolution-policy/hnm1d4u>; see also *Harassment Advisor Reference Manual*, pp. 13 and 62

<sup>221</sup> *Responsible Officer Guide to Harassment Prevention and Resolution Policy*, p. 19

<sup>222</sup> *Guidelines*, Part 5, Complaint Resolution – Alternate Dispute Resolution (ADR), p. 5-1

<sup>223</sup> *Guidelines*, Part 6, Complaint Resolution – Administrative Investigation, p. 6-1

<sup>224</sup> *Guidelines*, Sub-section 6.7 Grieving the decision

<sup>225</sup> *Guidelines*, Sub-section 5.2 Self-Help

<sup>226</sup> *Guidelines*, Sub-section 5.3 Supervisor Intervention

<sup>227</sup> *Guidelines*, Sub-section 5.4 Mediation

the right to receive information about the complaint.<sup>228</sup> A workplace relation advisor (WRA) can also be assigned to the complainant.<sup>229</sup> The WRA provides information about the investigation process, but cannot provide advice on the merits of the complaint. For moral and additional administrative support, both the complainant and the respondent can also receive the help of an “Assistant”.<sup>230</sup> As with Has and WRAs, Assistants are members who have volunteered, or who have been requested, to take on the role.

Once a written complaint is received, a situational assessment is conducted. The *Guidelines* foresee that the investigation process is seldom terminated at this stage, however:

There may be exceptional circumstances where the RO is completely satisfied that he/she has all the facts.<sup>231</sup>

In such rare circumstances, the RO will decide, based on the situational assessment, whether the criteria provided in DAOD 5012-0 are met or not.<sup>232</sup> If he or she is not so satisfied, a harassment investigation will be conducted by a harassment investigator (HI).<sup>233</sup> An HI is either a member who has been certified as an investigator through CAF training, or a civilian certified to conduct investigations. Also, if it is found that the facts warrant the continuation of the investigation process, the complainant will again be invited to use ADR.<sup>234</sup> If it is determined that an HI must be appointed, terms of reference (TOR) circumscribing the mandate of the HI are drafted, and the file will be assigned to an HI.

After completing the investigation, the HI must first file a draft report, which does not contain any recommendations. The RO reviews the draft report for conformity with the TOR. Once the RO is satisfied that the draft report is consistent with the TOR, the RO forwards it both to the complainant and to the respondent.<sup>235</sup> The RO must ensure that procedural fairness is respected.<sup>236</sup> The RO is then in a position to make a decision as to whether or not administrative action will be taken, and of what kind. In the case of a harassment complaint that is found to be substantiated, the RO can impose remedial measures, which range from counselling to a written warning on the perpetrator’s record or, in the most severe cases, counselling and probation and release from the CAF.<sup>237</sup>

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<sup>228</sup> *Guidelines*, Sub-section 3.1.2 h.

<sup>229</sup> *Guidelines*, Sub-section 3.1.2 and 3.8 and *Harassment Advisor Reference Manual*, p. 28-29

<sup>230</sup> *Guidelines*, Sub-section 3.5

<sup>231</sup> *Guidelines*, Sub-section 6.1

<sup>232</sup> *Guidelines*, Sub-section 4.3

<sup>233</sup> *Guidelines*, Sub-section 6.2

<sup>234</sup> *CDS Responsible Officer Guide to Harassment Prevention and Resolution Policy*, p. 19

<sup>235</sup> *Guidelines*, Sub-section 6.4.2

<sup>236</sup> *Guidelines*, Sub-section 4.4

<sup>237</sup> *Military Administrative Law Manual*, 14-3

The *Guidelines* provide that if either party is not satisfied with the decision of the RO, he or she can grieve the decision.<sup>238</sup> Although the grievance process is not used exclusively for harassment complaints, for a harassment complainant, it is the third and final stage. The grievance is submitted to an Initial Authority, who is usually the CO of the complainant. Upon receipt of the grievance, the CO must first determine if he or she is in a position to offer redress. If the CO has this authority and has no conflict of interest, he or she will make the initial decision on the grievance. If he or she is not in a position to adjudicate, the grievance will be forwarded to an officer who has the appropriate authority. Principles of procedural fairness must be followed, including disclosure to the respondent.<sup>239</sup> If the grievor or the respondent remains unsatisfied with the decision of the Initial Authority, he or she can ask the Final Authority—the CDS—to review the grievance decision.<sup>240</sup> The CDS may ask the Military Grievance External Review Committee (MGERC) to review the matter and present recommendations.<sup>241</sup> The MGERC is an independent body, and it does not have authority to issue a final and binding decision, but only to make recommendations to the CDS.

In addition to the multiplicity of policy documents that apply across the CAF, more explicit or specific orders may also be issued by the COs of the Naval, Land and Air Forces, which apply to the members in the unit. Within each formation or unit, additional orders may be made which may reiterate, or in some cases expand upon, the words of the policy. As a consequence, just as a subordinate member must obey the order of his or her superior unless it is manifestly illegal,<sup>242</sup> in practice members must abide by the lowest level instrument, the CO's standing orders, which he or she is asked to recognize in writing upon joining the unit. For example, unless it is illegal, a seaman must follow the standing orders issued by the vessel's CO, without questioning whether these are consistent with the upper level policy statements in the DAOD or *Guidelines*.

The ERA notes that this normative order is significantly different than in the civilian world. In civilian law, there is a clear hierarchy of law, which is vertical and works top down. The most fundamental law, the *Constitution*, takes precedence over statutes, which take precedence over regulations, which take precedence over policies. Every citizen may question the authority of a government policy, regulation or law if it appears to be contrary to the *Constitution*. In the military, by contrast, a number of different policy instruments all have the same—horizontal—normative force. This can result in the inconsistent interpretation and application of CAF policies and, in practice, may lead to practices that do not conform to the policies.

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<sup>238</sup> *Guidelines*, Sub-section 6.7; Section 29, *NDA*; *Military Administrative Law Manual*, 34-4

<sup>239</sup> *Pelletier v. Attorney General of Canada*, [2005] F.C.J. No. 1891 (QL) at para. 85, aff'd [2007] F.C.J. No. 6 (QL)

<sup>240</sup> Section 29.11, *NDA*

<sup>241</sup> Section 29.12, *NDA*

<sup>242</sup> Section 83, *NDA* and QR&O19.05, Note B: "Even though (the subordinate) doubts the lawfulness of the command, (he shall) obey unless the command is manifestly unlawful."

Given this difference in the operation of rules, it is all the more important that CAF leadership is appropriately trained in the content and importance of policies on inappropriate sexual conduct, in order to ensure a more consistent implementation of the policies across the organization.

Not surprisingly, given the number of different stages involved in a harassment complaint and the number of steps within each stage, interviewees described the harassment complaint process as confusing and overly complex.<sup>243</sup> In addition, participants raised a number of concerns which highlighted substantive problems with the processes in place to investigate sexual harassment.

### 7.1.2 Lowest-level Resolution

The ERA heard numerous serious criticisms about the CAF's policy of attempting to resolve sexual harassment complaints at the lowest level. The purpose of this policy appears to be to allow for the resolution of minor disputes without unnecessarily escalating a complaint, which can be damaging both for the respondent and for the complainant. While this goal is laudable, the ERA found that in fact the policy acted as a major disincentive for complainants to come forward or pursue a complaint. In particular, the policy fails to recognize the anxiety many complainants may feel about having to face their aggressor, and the fact that the imbalance of power that may have given rise to inappropriate sexual conduct may still be at play in the context of "low-level resolution" or mediation.<sup>244</sup> For example, while several resolute female interviewees said that they had been able to speak up about sexually harassing conduct and to confront the perpetrator,<sup>245</sup> many more interviewees indicated that ADR techniques were not appropriate for sexual harassment cases because victims were not comfortable taking a confrontational position, particularly when the harasser was of a higher rank.<sup>246</sup>

Further, the vast majority of interviewees who did take the step of discussing their complaint with supervisors reported that the complaint was not taken seriously.<sup>247</sup> Responses from supervisors ranged from warning the complainant about the negative consequences to their careers if they continued with the complaint,<sup>248</sup> to openly disbelieving the victim.<sup>249</sup> Regardless of the basis upon which the supervisor discouraged the complainant from pursuing a complaint, it is clear that the policy of "lowest-level resolution" is a major impediment to the resolution of sexual harassment complaints and to a change in the overall culture of the CAF.

Furthermore, the ERA heard that the process of attempting to resolve complaints at the lowest level tends to undermine confidentiality—a key concern for most complainants. Lowest-level

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<sup>243</sup> Focus group: mixed gender trainees; Coordinator interviews; Volunteer contribution

<sup>244</sup> Focus group: female junior officers, reserve; Coordinator interviews

<sup>245</sup> Focus groups: female lower rank, female NCOs

<sup>246</sup> Focus group: female reserve lower rank; Coordinator interviews; Volunteer contributions

<sup>247</sup> Coordinator interviews; Volunteer contributions

<sup>248</sup> Focus group: female lower rank; Coordinator interviews; Volunteer contribution

<sup>249</sup> Coordinator interviews; Volunteer contribution



resolution requires sharing the information with the supervisor, or potentially escalating the complaint through numerous individuals up to the RO. Further, witnesses may need to be interviewed if an investigation is launched. All of which will result in a serious loss of confidentiality as a number of members will necessarily learn both about the details of the incident, and the fact that the victim has made a complaint.<sup>250</sup> As a result, interviewees indicated that they preferred not to report out of fear that their reputations would be damaged, and the stigma that would likely attach.<sup>251</sup> Many victims were also concerned about being labelled as someone who would complain about a teammate,<sup>252</sup> which could result in becoming socially ostracized.<sup>253</sup> Interviewees further reported that harassment incidents are “swept under the carpet” by those higher up in the chain of command.<sup>254</sup> The easy answer from supervisors when learning of a complaint seems to be to just “get over it”.<sup>255</sup>

Ultimately, the ERA found that, despite the good intentions behind the policy, the pressure to settle a complaint at the lowest level functions to stifle complaints at an early stage and to intimidate complainants so that they will not pursue legitimate concerns. As a result, actual or perceived roadblocks prevent victims from obtaining satisfactory resolution where sexual harassment has occurred, and feeds distrust in the system.<sup>256</sup>

Furthermore, the policy of resolving complaints at the lowest level is inconsistent with the CAF’s zero tolerance policy. This policy is embodied in DAOD 5012-0:

Harassment in any form constitutes unacceptable conduct and will not be tolerated.

Because the practical effect of the low-level resolution policy is that complainants are strongly discouraged from pursuing their complaints and incidents of sexual harassment are swept under the carpet, this directly undermines the credibility of the CAF’s zero tolerance policy. Most participants viewed the zero tolerance policy as purely rhetorical, with little connection to the reality on the ground.<sup>257</sup>

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<sup>250</sup> Focus group: female lower rank; Coordinator interviews

<sup>251</sup> Focus group: female lower rank; Coordinator interviews; Volunteer interviews

<sup>252</sup> Coordinator interviews; Volunteer contributions;

<sup>253</sup> Focus group: female NCOs; Coordinator interviews; Volunteer contribution

<sup>254</sup> Coordinator interview; Volunteer contributions

<sup>255</sup> Focus group: female NCOs; Coordinator interviews, Volunteer contributions

<sup>256</sup> Coordinator interviews

<sup>257</sup> Focus groups: female lower rank, female NCOs, male junior officers

### 7.1.3 “Open-Door Policy”

At the same time that many interviewees reported facing difficulties resolving complaints at the lowest level, the ERA found that attempts to escalate complaints to a higher level were also largely unsuccessful. Although several COs advised the ERA that the CAF has an open door policy, many interviewees described this as an unrealistic option. Too many NCOs are seen as part of the boys’ club<sup>258</sup> and concerned more with protecting the reputation of their unit than supporting a victim.<sup>259</sup> Interviewees further reported that, groomed by NCOs, junior officers often turn a blind eye to inappropriate sexual conduct.<sup>260</sup> Moreover, not only is it seriously frowned upon to skip a level in the chain of command,<sup>261</sup> but there also appears to be only a small number of exceptionally open COs who would be prepared to act on a complaint of sexual harassment in a meaningful way when a complainant skips one or more levels of the chain of command.<sup>262</sup>

As a result, the practical reality is that when a member attempts to meet with a CO about a sexual harassment complaint, the “open door” is in fact guarded by a number of persons who insist on knowing why the CO is being approached.<sup>263</sup> In such circumstances, the possibility of filing a formal complaint with an HA is not a realistic option, nor is the purported right of the complainant to convey his or her concerns directly to the CO or to someone at a higher level.<sup>264</sup> Again, this creates serious impediments to reporting and to the effective investigation and resolution of complaints. It only takes one person in the chain of command to make a complaint disappear. Indeed, an individual who can make a complaint disappear is generally seen as a problem-solver and as appropriately protecting his superior.<sup>265</sup>

### 7.1.4 Challenges with Using ADR

The heavy reliance on ADR techniques in the complaint procedures also raises concerns. The *RO Guide* suggests that ROs should consider ADR at two different points. First, ROs should consider utilizing ADR techniques early in the complaint process, before the administrative investigation is formally set in motion. Second, if this early attempt at resolution is unsuccessful and a formal complaint is filed, ADR should be utilized after the harassment investigation is concluded.<sup>266</sup> While, theoretically, alternative dispute resolution has certain advantages, a number of critics have suggested that this approach is generally not appropriate when

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<sup>258</sup> Focus groups: female lower rank, male lower rank; Coordinator interviews

<sup>259</sup> Coordinator interviews

<sup>260</sup> Focus group: female lower rank; Coordinator interviews

<sup>261</sup> Coordinator interviews

<sup>262</sup> Focus groups: female PAT, female reserve; Coordinator interviews; Volunteer contribution

<sup>263</sup> Focus group: male trainees; Volunteer contributions

<sup>264</sup> *Guidelines*, Sub-section 4.1.1

<sup>265</sup> Coordinator interviews

<sup>266</sup> *Responsible Officer Guide to Harassment Prevention and Resolution Policy*, p. 19

addressing incidents of sexual harassment.<sup>267</sup> As one researcher notes, “(p)lacing the responsibility to confront the harasser on the person being harassed does not work well within the rigid power relations and hierarchy of the military.”<sup>268</sup> Moreover, as a participant commented, the CAF’s ADR service is designed to help restore harmony to the workplace, not to address the broad cultural aspects of inappropriate sexual conduct.<sup>269</sup> This comment was substantiated by many comments the ERA heard from participants in the Review. Indeed, it is not insignificant that although almost 15 years have passed since the adoption of the DAOD 5012-0, the ERA was not provided with any examples in which ADR techniques had been successfully used for sexual harassment cases.

Nonetheless, even if ADR techniques are generally inappropriate in addressing sexual harassment complaints, there may be a limited number of circumstances in which a complainant prefers to address the complaint with the help of a third party mediator. The essence of ADR is to offer an empowering approach to conflict resolution.<sup>270</sup> In the context of sexual harassment, this principle is key because of the importance to victims of being able to exercise a degree of autonomy in the complaint process. For this reason, victims need to retain some control over the process and should, without pressure to settle, be offered ADR only as one possible course of action.

### 7.1.5 Other Problems

Even where sexual harassment complaints were ultimately held to be well-founded and remedial measures were imposed, the sanctions were often perceived by interviewees as a “slap on the wrist”<sup>271</sup> and meaningless—for example being required to complete an on-line training course—and inconsistent.<sup>272</sup> At the same time, as previously discussed, complainants may experience a number of negative repercussions as the result of pursuing a complaint, including impediments to career progression, stigma, and becoming socially ostracized. The dichotomy of outcomes for the victim and the harasser reinforces the view of many members, discussed above, that the CAF does not take sexual harassment complaints seriously.

The ERA also heard frequently from interviewees that an unintended consequence of the posting system is that harassment complaints are not dealt with in a timely fashion by the

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<sup>267</sup> S. K. Hippensteele, *Revisiting the Promise of Mediation for Employment Discrimination Claims*, 9 Pepp Resol. L. J. 211, 2008-2009; S. K. Hippensteele, *Mediating Ideology: Navigating the Space from Myth to Reality in Sexual Harassment Dispute Resolution*, 15 *Journal of Gender, Social Policy & the Law* 43 (2006); C. A. Bond, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 *Fordham L. Rev* 2489, 1996-1997; M. Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances?* 9 *Ohio St. J. on Disp. Resolution* 27 (1993-1994)

<sup>268</sup> L. Gouliquer, *Soldiering in the Canadian Forces: How and Why Gender Counts*, Doctoral Thesis, McGill, Dept of Sociology, 2011

<sup>269</sup> Coordinator interview

<sup>270</sup> B. Mayer, *The Dynamics of Conflict Resolution: A Practitioner Approach*, 2000, p. 240

<sup>271</sup> Volunteer contributions

<sup>272</sup> Focus groups: female lower ranks, female reserve; Coordinator interviews

departing CO, and are left for the incoming CO to deal with when he or she is new to a unit, and least capable of effectively resolving the matter.<sup>273</sup> The fact that the cost of the harassment investigation is borne by the unit also appears to be a disincentive to ordering an investigation.<sup>274</sup>

Overall, the ERA found that the complexity of policies and procedures related to sexual harassment diminishes the relative value of each one.<sup>275</sup> In addition, the policies are, at times, inconsistent and inefficient. Reporting is not encouraged and the higher leadership is protected from information about what is occurring on the ground.<sup>276</sup> In fact, the CDS's instructions to COs indicate that ROs are unlikely to even hear about a harassment incident unless and until a written complaint is filed.<sup>277</sup> Ultimately, many of those who used the formal complaint process were left scarred. One interviewee described the experience as "atrocious",<sup>278</sup> and a number stated that they would not do it again.<sup>279</sup>

### 7.1.6 Collection of Data

Finally, the ERA found that data with respect to harassment complaints, investigations, and outcomes are not recorded in a systematic way. Although several members indicated that it would be possible to simply enter data with respect to sexual harassment complaints in logs already in use, this is not currently taking place. The Harassment Complaint Tracking System appears unreliable for many reasons, including the lack of clear instructions as to how and when to file reports, confusion over coding systems, and the absence of any sanction where members simply fail to use the tracking system.<sup>280</sup> The Significant Incident Report (SIR) system appears to be more widely used but, as its name indicates, only tracks the most serious incidents.<sup>281</sup> Further, the ERA was warned about the unreliability of the Canadian Forces Health Information System (CFHIS).<sup>282</sup>

The end result is a general absence of any means of assessing the frequency of reported incidents or how these incidents were dealt with—including whether investigations were carried out, the length of time between when a complaint was lodged and any resolution achieved, and the nature of the ultimate sanction, if any. This makes it impossible for the CAF to measure the overall accountability of the chain of command in responding to harassment complaints.<sup>283</sup> This lack of accountability allows those in command to minimize or ignore complaints if they choose, and those who breach the policies on sexual harassment to do so with impunity.

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<sup>273</sup> Coordinator interviews; Volunteer contribution

<sup>274</sup> Coordinator interviews

<sup>275</sup> Coordinator interviews

<sup>276</sup> Coordinators interviews; Volunteer contribution

<sup>277</sup> *CDS Guidance to COs*, 1211.1

<sup>278</sup> Volunteer contribution

<sup>279</sup> Coordinator interviews; Volunteer contributions

<sup>280</sup> Focus group: female NCOs; Coordinator interviews; Volunteer contribution

<sup>281</sup> Coordinator interview

<sup>282</sup> Coordinator interviews

<sup>283</sup> Coordinator interview

## 7.2 Avenues for Improvement

Overall, the ERA found that the harassment complaint process is overly complex, emphasizes informal resolution to the detriment of victims, and impedes the CAF from fully confronting and resolving incidents of sexual harassment. As such, three important steps should be taken to improve the harassment complaint process.

First, as previously discussed, complainants should be able to report complaints of sexual harassment to CASAH, acting as an independent authority outside of the CAF, and should have control over whether the complaint triggers a formal complaint process, including a possible investigation. If a victim chooses not to initiate an investigation, he or she should still have access to support and advice. If the complainant decides to commence a formal complaint process, the complaint would trigger the administrative investigation process.

Second, the process should be simplified and streamlined. Formal complaints should be channelled directly to a grievance procedure before a CO acting as an adjudicator, rather than emphasizing the use of self-help techniques, or requiring the complaint to pass through numerous members in the chain of command and then through the formal investigation process. This would have the advantage of making sure that incidents of sexual harassment come to the attention of the CO as quickly as possible. The grievor and the respondent would both be offered assistance to advise and support them with respect to the grievance procedures. Similar to the current practice for harassment complaints, the CO could have the option of requesting an HI to conduct a more in-depth investigation. Both parties would also have the right to submit a written statement to the CO. The respondent would be entitled to procedural fairness, including disclosure of the relevant information.

Third, the policy should significantly reduce the emphasis on ADR and low-level resolution of complaints. Requiring the victim to confront his or her harasser, particularly where there is an imbalance of power, will be inappropriate in most instances. While the CO should give the grievor the option of utilizing the most appropriate ADR mechanism, it should be made clear to her that this is only one option, and is entirely voluntary.

The proposed model allows the member to have access to a simplified process—one that is reduced from three stages to just one. In addition, under this model, the CO retains better control of his or her unit and is able to intervene at a much earlier stage.

## **Recommendation No. 7**

**Simplify the harassment process by:**

- **Directing formal complaints to COs acting as adjudicators in a grievance.**
- **Reducing emphasis on ADR.**

### 7.3 Sexual Assault

As a preliminary matter, the ERA notes that, as part of its mandate, it has been requested to consider and make recommendations concerning the following:

- “the adequacy of the definition of sexual misconduct as provided for in DAOD 5019-5;
- the adequacy of CAF policies, procedures and programs relating to sexual misconduct;
- the training of CAF members in relation to sexual misconduct;
- the resources dedicated to the implementation of the policies, procedures and programs in relation to sexual misconduct;
- the extent to which CAF members report alleged incidents of sexual misconduct or any reasons why reporting may not occur, including the role of military culture and the chain of command; and
- any other matter that the ERA considers relevant in assisting the CAF to strengthen the prevention of incidents of sexual misconduct.”<sup>284</sup>

As discussed above, sexual assault is included within the definition of misconduct.

Consistent with this mandate, throughout its six-month fact-finding process the ERA conducted interviews with members and civilian employees responsible for the implementation of the CAF policies on sexual misconduct, including members of the JAG office, the CFNIS branch of the military police, the regular military police service, and the military prosecution service. In addition, the CAF shared with the ERA relevant policies, protocols and other documents related to sexual misconduct. With the efficient support of the DMP, representatives of the JAG, and CAF bases and DND coordinators, as much information as possible was gathered in order for the ERA to fulfill the terms of the mandate.

This said, the ERA’s mandate contains an express limitation which requires some comment. The mandate states that the ERA shall not review “any matter related to the Judge Advocate General (JAG) in respect of his or her superintendence of the administration of military justice in the Canadian Forces”. A question arises as to what is captured by the JAG’s “superintendence of the administration of military justice” and therefore falls outside of the scope of this Review. Two interpretations may be offered.

Under a broad interpretation of the limitation, merely discussing sexual misconduct, the investigation of which falls under both military and civilian jurisdiction, would be excluded by this limitation. The consequence would be that most of the references to “sexual misconduct” in the mandate would be moot. Such a broad interpretation of the limitation would therefore result in the exclusion of a large and explicit part of the mandate. Not only is such an interpretation at odds with a plain language reading of the mandate, but it also contradicts the way in which the CAF itself interpreted the mandate during the course of the Review. In fact, most of the

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<sup>284</sup> A more complete version of the mandate is reproduced in Section 2, above.

interviewees involved in the implementation of the policies, procedures and programs on sexual misconduct would not have been made available to the ERA if their role was not relevant to the gist of its mandate.

A narrower interpretation of the limitation is more respectful of the text of the mandate, the respective responsibilities of the JAG and of the Provost Marshal, and the way in which the CAF interpreted the mandate in the course of the Review.

The JAG is a commissioned officer appointed by the Governor in Council to superintend the administration of military justice.<sup>285</sup> To ensure the independence of the military justice system, the JAG reports to the Minister of Defence and not to the CAF. Among the JAG's responsibilities relevant to this Review in relation to the administration of military justice, the JAG is responsible for court martial and summary trials. The effect of the limitation in the ERA's mandate is therefore to exclude from review the JAG's oversight of court martial proceedings and summary trial.

By contrast, responsibility for the military police rests with the Canadian Forces Provost Marshal, who serves as the Commander of the Canadian Forces Military Police Group.<sup>286</sup> Whereas the JAG is independent of the CAF, the Provost Marshal reports to the Vice-Chief of Defense Staff.

As such, the ERA's mandate encompasses a review of the conduct of the military police, including the CFNIS, *vis a vis* incidents of sexual misconduct. This includes the policies and procedures by which the military police receive complaints of sexual misconduct, communicate with and provide support to victims, and exercise their discretion as to which organization—the MP, the CFNIS, or civilian police—should or will investigate such allegations.

Given that the CDS did in fact direct that the policies, procedures and programs related to sexual misconduct are to be the subject of meaningful review, the narrower interpretation of the limitation must be favoured. As such, the ERA makes no comment with respect to court martials or summary trials. However, the ERA's mandate clearly encompasses a review of the policies, procedures and programs that have been adopted by the CAF with respect to the investigation of, and laying of charges for, sexual misconduct by the military police.

### 7.3.1 Current Practices

Until recently, complaints related to CAF members that involved sexual assaults, and which occurred in Canada, were normally investigated by civilian police, and all charges for such allegations were prosecuted before the civilian courts. This changed in 1998,<sup>287</sup> however, when

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<sup>285</sup> Section 9.2(1), *NDA*

<sup>286</sup> Sections 18.3 and 18.4, *NDA*

<sup>287</sup> S.C. 1998, c. 35 “*An act to amend the National Defence Act and to make consequential amendments to other Acts*” Bill C-25 section 22 amending section 70



Parliament amended the *National Defence Act* to also allow the military justice system to handle charges of sexual assault. Under the shared jurisdiction, approximately half of the cases<sup>288</sup> investigated by CFNIS are referred to the civilian justice system for a number of reasons, such as they involve cadets who are not subject to the CSD, civilian victims, or incidents of family violence, etc.<sup>289</sup> As a consequence, even if, as a matter of military police policy, the military justice system takes priority over the civilian system,<sup>290</sup> the sharing of jurisdiction is a reality.

Military Police (MP) operate on CAF property and “outside Canada during contingency and expeditionary” circumstances.<sup>291</sup> When the MP is informed of an incident involving a sexual assault<sup>292</sup> they notify the Canadian Forces National Investigation Service (CFNIS),<sup>293</sup> which has jurisdiction over all sexual assaults.<sup>294</sup> The CFNIS consists of members of the MP who are organized as an independent unit; it has jurisdiction over serious and sensitive offences, including sexual assault.<sup>295</sup> When CFNIS receives a report of a sexual assault, it determines whether it will exercise its investigative mandate, or whether it will refer jurisdiction back to the reporting MP unit.<sup>296</sup> In practice, the CFNIS generally turns sexual assault incidents over to the MP where no penetration has occurred.<sup>297</sup>

If the CFNIS determines that it will turn jurisdiction over to the local MP, the MP can exercise their discretion as to whether or not the case will be pursued,<sup>298</sup> following the same procedures as exist for other types of charges. Notably, in determining whether or not charges should proceed, the MP consult with the chain of command.<sup>299</sup> By contrast, if CFNIS has carriage over the matter, it may lay charges without having to consult the chain of command.<sup>300</sup>

According to comments made by Brigadier-General Pitzul several years after the CAF assumed jurisdiction over sexual assaults, the justification for allowing the military to deal with sexual assault is that such offences can have a detrimental impact on cohesion within a unit, and therefore should be treated in a similar manner to other offences that may have the same

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<sup>288</sup> Figure provided by the CAF

<sup>289</sup> CF MP Order 2-300, Law Enforcement Operations – General, sections 12, 13 and 15

<sup>290</sup> CF MP GP Order 2-363, section 10

<sup>291</sup> CF MP order 2-300, Law Enforcement Operations – General, section 5

<sup>292</sup> For triggers for an investigation, see: A-SJ-100-004/AS-000 Chapter 7 *Military Police Policies and Technical Procedures Manual*, section 10

<sup>293</sup> Canadian Forces National Investigation Service, *Standard Operating Procedures*, Chptr 2, section 10

<sup>294</sup> *Military Police Policies and Technical Procedures Manual*, Chapter 6, Appendix A, section 8 e., CF MP GP Orders 2-381.1 Benchmarks – Serious and Sensitive Offences, section 2. g.

<sup>295</sup> CF MP GP Order 2-381, Canadian Forces National Investigation Service Jurisdiction, sections 6 and 7

<sup>296</sup> CF MP GP Orders 2-381, sections 13 and 2-381.3 (6)

<sup>297</sup> Coordinator interview

<sup>298</sup> CF MP GP 2-363, section 6

<sup>299</sup> QR&O 107.02 a); CF MP Order 2-300, Law Enforcement Operations – General, section 8

<sup>300</sup> QR&O 107.02 c)

effect.<sup>301</sup> Gen. Pitzul's comment is consistent with the purpose of creating a separate system of military justice, as described by Justice Lamer in *R. v Généreux*:

The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. ... [T]he military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.<sup>302</sup>

Unfortunately, victims of sexual assault have not reaped the benefits hoped for under the new jurisdiction. Victims criticize the lack of training of the MP, poor support by the chain of command, and inconsistency with which charges of sexual assault are ultimately sanctioned.<sup>303</sup> While civilian law enforcement, prosecutorial authorities, and courts have also been criticized for their conduct of sexual assault cases, there is a strong perception among members of the CAF that the way in which the military handles such cases is the cause of *added* prejudice to the victim.<sup>304</sup>

### 7.3.2 Treatment of Victims

Many participants complained about problems in the reporting and investigation process. Criticisms by contributors and interviewees touched on many aspects of the process, starting with failure to call the military police in a timely way when a report of sexual assault was made,<sup>305</sup> to not having been offered immediate medical support,<sup>306</sup> being made to feel, even before providing a statement, at fault for what had occurred,<sup>307</sup> the case held in abeyance because of confusion over jurisdiction,<sup>308</sup> failure to follow up with key witnesses,<sup>309</sup> and poor training with respect to investigating incidents of sexual assault.<sup>310</sup> Participants criticized delays in the investigation process<sup>311</sup> and having to repeatedly provide statements, which required them to relive the events each time.<sup>312</sup> The ERA heard many examples of failings in the investigation of sexual assaults,<sup>313</sup> including concerns about the contamination of evidence,<sup>314</sup> and a frequent

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<sup>301</sup> Brig-Gen J. S.T. Pitzul, *A Perspective on Canada's Code of Service Discipline*, (2002) vol. 52 Air Forces Law 15

<sup>302</sup> *R. v Généreux*, [1992] 1 S.C.R. 259

<sup>303</sup> Focus groups: female lower rank, female reserve; Coordinator interviews; Volunteer contributions

<sup>304</sup> The ERA here draws an inference from participant comments, previously referred to, concerning the need to create an outside mechanism to receive complaints of sexual harassment and assault.

<sup>305</sup> Volunteer contributions

<sup>306</sup> Volunteer contributions

<sup>307</sup> Focus group: female reserve; Volunteer contribution

<sup>308</sup> Coordinator interview; Volunteer contributions

<sup>309</sup> Volunteer contribution

<sup>310</sup> Coordinator interviews

<sup>311</sup> Coordinator interview

<sup>312</sup> Focus group: female lower rank; Coordinator interview; Volunteer contributions

<sup>313</sup> Coordinator interviews; Volunteer contributions

<sup>314</sup> Coordinator interview; Volunteer contribution

perception that the MP lack in their understanding of the legal concept of consent.<sup>315</sup> One interviewee, referring to procedural problems in the investigation which could potentially be relied upon to undermine a prosecution and secure an acquittal, commented: “Defence attorneys love [CFNIS investigations] because there are always issues”.<sup>316</sup> Such problems have resulted in a serious lack of trust in the ability of the MP to properly handle reports of sexual assault.

These problems are particularly unfortunate, given that MPs are specifically warned about the consequences of sexual assault on victims. For example, MP orders state that:

Sexual assault is one of the most traumatic types of criminal victimization.<sup>317</sup>

Further:

Sexual assault is an act of aggression using power and control to dominate and violate an individual. It is not an act of intimacy.<sup>318</sup>

The applicable policies therefore make clear that, in the context of the military life, sexual assault requires heightened attention, particularly when the aggressor is a member of the CAF “family”. As the Sexual Assault MP protocol states:

Sexual assault frequently includes a violation of trust by those who are in a position of perceived or real power or authority.<sup>319</sup>

If the sentiments behind these statements were put into action and the relevant policies were fully implemented, many of the misgivings of the contributors would be resolved. Indeed, the ERA finds that the problem lies not in the policies themselves, but with inadequate training, poor implementation, and members’ lack of faith in the ability or interest of the military justice system to respond appropriately to instances of sexual assault. While the ERA met with a number of dedicated and knowledgeable members of the MP, it also found that others were confused about the process,<sup>320</sup> insensitive to the problem of sexual assault,<sup>321</sup> lacking training on the basic elements of the offence,<sup>322</sup> and unaware of the available resources.<sup>323</sup> One of the problems appears to be that, although policies and protocols are in place, the number of incidents the military system handles is far fewer than those in the civilian justice system.<sup>324</sup> The various parties in the system are therefore caught in a deteriorating cycle: the way victims feel about their treatment by the military justice system feeds underreporting, and underreporting leaves

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<sup>315</sup> Volunteer contributions

<sup>316</sup> Coordinator interview

<sup>317</sup> CF MP GP Order 2-295, section 1

<sup>318</sup> A-SJ-100-004/AS-000, Chapter 7, Sexual Assault Protocol – Statement of principle and beliefs

<sup>319</sup> A-SJ-100-004/AS-000, Chapter 7, Sexual Assault Protocol – Statement of principle and beliefs

<sup>320</sup> Coordinator interview; Volunteer contributions

<sup>321</sup> Coordinator interviews

<sup>322</sup> Coordinator interviews

<sup>323</sup> Coordinator interviews

<sup>324</sup> Coordinator interview

the military police unable to develop and maintain appropriate skills to manage these sensitive and important cases.

The ERA is further concerned that less serious incidents of sexual assault are given inadequate attention and consideration. Participants in the Review commented that when victims have reported less severe assaults, including unwelcome touching of breasts, buttocks, etc., they have been told by MPs that these incidents would not be prosecuted in the civilian justice system.<sup>325</sup> The clear message is that the matter is not serious enough to be pursued. Whether or not such comments about the likelihood of prosecution before a civilian court are accurate, members of the CAF deserve fuller protection by the military justice system. Unless the incident reported is an isolated and benign one where the principle of proportionality dictates restraint, sexual assaults, even those that leave no physical injury, must be taken seriously. If criminal sanctions are inappropriate, the chain of command can resort to administrative or disciplinary action to send a clear signal that the dignity of all members will be protected. Only strong sanctions, through military justice, disciplinary and administrative action, will deter further assaults. Both individual and general deterrence are important.

The ERA further notes that while not all assaults are of the same gravity, different victims will react differently to an assault, depending on their own particular experiences and psychological make-up. While an incident of unwelcome touching may leave no psychological impact on one person, this same conduct may cause serious psychological injury to another. The thin skull principle<sup>326</sup> in Canadian law makes clear that an aggressor does not get to choose his victim; regardless of how severe an assault, the conduct constitutes an offence under the *Criminal Code*. Discounting incidents of sexual assault where there has been no physical injury is inconsistent with Canadian law, which views psychological harm as seriously as physical harm.<sup>327</sup>

Overall, the ERA found that the difficulties met by victims of sexual assault have a damaging effect not only on the individual victims—who do not achieve resolution to serious and traumatic incidents—but on the CAF as a whole. When incidents of sexual assault go unresolved, this negatively impacts the CAF both because individual members have been harmed, and because it perpetuates the perception that the CAF does not take such incidents seriously.

### 7.3.3 Data Collection

As with sexual harassment, there is very poor collection of data regarding incidents of sexual assault in the CAF. Since sexual assaults go widely unreported, the data does not in any way reflect the actual rate of occurrence. Even where complaints are laid, the fact of a sexual assault

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<sup>325</sup> Coordinator interview; Volunteer contribution

<sup>326</sup> *R. v. Smithers* [1978] 1 SCR 506

<sup>327</sup> *R. v. McCraw* [1991] 3 S.C.R. 72 at 81: “There can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm. I can see no principle of interpretation nor any policy reason for excluding psychological harm from the scope of s. 264.1(1)(a) of the *Code*.”

will often be buried in the court record.<sup>328</sup> For example, if the accused pleads guilty to an alcohol-related charge, or to conduct to the prejudice of good order and discipline, only a careful review of the sentence will, in some cases, indicate that the conduct or underlying issue involved acts of a sexual nature.

Tracking the occurrence and outcome of incidents of sexual assault is essential to determine if the CAF's policies are functioning to improve the conduct of its members, both on an individual and systemic basis. Yet in the case of sexual assault in the CAF, the relevant data is missing. While it is true that data on sexual assault is difficult to gather, the CAF needs to understand how incidents are impacting its members, and victims are entitled to make an informed decision about whether or not to disclose a complaint. The ERA heard from participants that a number of data banks are in place in the CAF that could be used to improve data collection.<sup>329</sup> For example, if appropriate coding systems were in place, the CFHIS, which is currently used to report injuries, could be refined to also reflect the causes of the injuries—including sexual assaults. Unfortunately, this is not taking place and the failure to keep data on complaints of sexual assault significantly weakens the accountability of the chain of command and impedes the CAF's ability to prevent future sexual assaults from occurring.

#### 7.4 Avenues for Improvement

In the Canadian civilian justice system, sexual assaults rank among the most serious offences and are frequently dealt with through specialized procedures by prosecutorial and court authorities. While the ERA has not conducted Canada-wide research on local procedures for sexual assaults, it is aware that in a number of judicial districts, investigation, prosecution and adjudication is reserved to specialized sexual assault teams, which benefit from additional resources that enable improved support for victims. Such a specialized infrastructure can be put in place, in part, because there is a large volume of cases that come before civilian police and courts. It would be difficult for the CAF to undertake similar support for the benefit of its members. For this reason, there is a perception among some members that there is more expertise in the civilian justice system, if only because of the volume of cases.<sup>330</sup> Of course, access to these specialized resources does not mean that in every case victims will fare better, or that they will be able to exert increased autonomy or control over their complaint. However, the perception gives cause to seriously consider offering victims the option of referring their case to the civilian justice system. Further, as previously discussed, there is a strong perception among members that the progress of an investigation may be influenced by the views of those in the chain of command, potentially undermining the integrity and objectivity of an investigation.

Since both civilian and military justice system have jurisdiction over sexual assault, nothing prevents the CAF from adopting a policy or agreeing on the modalities of the shared jurisdiction.

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<sup>328</sup> Coordinator interview

<sup>329</sup> Coordinator interviews

<sup>330</sup> Coordinator interviews

This would allow for a more extensive reliance on the civilian resources already relied upon, such as crisis centers, hospitals, etc.

As mentioned previously, CFNIS already refers to the civilian justice system approximately half of all sexual assault incidents they investigate. Referring cases before the investigation would not make the CAF stand apart. Other military organizations already resort to the civilian justice system for all or most of cases of sexual assault. In Australia, for example, most allegations of sexual offences are referred to the civilian police.<sup>331</sup> A memorandum of understanding between the Director of Public Prosecution and the Australian Director of Military Prosecution provides that where the conduct may be characterized both as a criminal offence and as a breach of the service discipline, the consent of the DPP is required to treat the matter under the military justice system.<sup>332</sup> Of interest, the MOU makes clear that in determining if consent will be granted, the views of the victim are to be considered. The MOU gives sexual assault as an example of a charge where the public interest may be best served by prosecution of the alleged offender in a civilian criminal court. In France, the process of abolishing military tribunals, initiated in 1953, culminated in 2011 and a specialized chamber within the civilian court system now exists to handle sexual assaults relating to military personnel. In sum, each country has developed its own response as to how best to investigate, prosecute and adjudicate sexual assaults. While several jurisdictions are resorting increasingly to civilian authorities, each country's practice is guided by its local environment and restrictions.

The ERA recognizes that, in Canada, one of the challenges the CAF faces is the wide diversity of resources available within civilian society, given that some CAF members work in more remote areas of the country and may not have access to the same resources as in the big urban centers. The ERA cannot, therefore, simply recommend that the CAF divest itself of all responsibility for cases of sexual assault, given that not all civilian authorities will themselves have more appropriate resources to tackle such problems than the military. The CAF operates training facilities, offers services for victim support, and has developed a full range of services in its military justice system, complete with disciplinary and administrative measures. The CAF therefore has the human and physical resources which, when properly marshalled, could benefit victims of sexual assault.

Unfortunately, however, as this Report has detailed, these services are generally not currently performing to an appropriate level and do not adequately address the needs of victims.

The ERA is of the view that, outside of deployment, a victim of sexual assault should be able to request to have her complaint transferred to the civilian justice system. In deciding whether or not to request the transfer of jurisdiction, the victim should receive support from CASAH through the help of an advocate. The advocate can advise the victim about different avenues and resources available. In the event the CAF resolves not to follow the victim's request, information should be provided to the victim explaining the reasons.

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<sup>331</sup> PERS 35-4, par. 37

<sup>332</sup> MOU provided to ERA

Allowing members of CAF to express their preference to resort to the civilian justice system gives victims a voice in the process and serves as a first step in re-establishing trust. Consultation with the victim should be a formal part of the transfer protocol. Over time, it may be that the better the relationship of trust between the CAF and its members, the more likely that victims will opt for the military justice system. Establishing a memorandum of understanding with local civilian authorities in order to be able to ease the transfer of sexual assault cases should be seen as recognition of the heightened attention required by such cases.

In any event, even where a case of sexual assault is referred to civilian authorities, the CAF should carry out its own parallel assessment as to whether any administrative sanctions should be imposed (for example, suspension, demotion, release from the CAF, etc.). The ERA was informed that the MP maintains a shadow file for all incidents involving CAF members that are processed by civilian authorities.<sup>333</sup> The CAF is therefore in a position to impose administrative measures on a perpetrator. The imposition of administrative sanctions is important in demonstrating to members the seriousness with which the CAF takes such matters, and to deter future offences.

Administrative sanctions are also particularly important in the case of incidents of low-level assault, where the conduct was unwelcome but criminal charges are unlikely to result. While these may be less severe offences, they should nevertheless be addressed through meaningful administrative sanctions, which clearly indicate that such conduct is unacceptable in the armed forces.

To achieve consistency in administrative measures, the CAF should establish guidelines to help guide COs. Factors to be taken into account in determining the appropriate sanction should include not only the personal circumstances of the offender and the nature of the incident, but the organization's over-arching goal of creating a more inclusive organizational culture that is less hostile to women and LGBTQ members. The guidelines should also include concrete examples to aid COs to understand when a sanction is not only appropriate, but required. It will also be important in addressing instances of "low-level" assault which, while not particularly egregious, nevertheless contribute to a disrespectful, unprofessional and sexualized culture.

## Recommendation No. 8

**Allow victims of sexual assault to request, with the support of the center for accountability for sexual assault and harassment, transfer of the complaint to civilian authorities; provide information explaining the reasons when transfer is not effected.**

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<sup>333</sup> Coordinator interviews

## 8. Programs and External Resources

An impressive number of programs are offered to support members who are victims of sexual harassment or sexual assault. They range from moral support, to medical and legal services. There is wide variation, however, in terms of how available such services actually are to members in need, and the degree to which they provide effective support.

### 8.1 Chaplains, Nurses, Social Workers and Physicians

Chaplains, nurses, social workers and physicians are present in every base, and are the most readily available resources for distressed victims. While interviewees identified limitations to the help victims received from these individuals, they remain an important resource.

#### 8.1.1 Chaplains

In accordance with the Queen's Regulation & Order on the provision of chaplains, every CO must make a chaplain available to base, unit or element members.<sup>334</sup> The ERA met with chaplains on each visit to bases. Notably, different chaplains appeared to have very different perceptions about what their role should be in relation to incidents of sexual harassment and assault. For example, on some bases the chaplains described themselves as having a passive role, offering mostly religious support and a listening service. On other bases, chaplains described a proactive role, sometimes even acting as an advocate for victims.

While members acknowledged the availability of chaplains, several appeared not to have had positive experiences. For example, a number of lower rank female members stated that they had had to ask permission from a superior in order to visit the chaplain, and were questioned on why they needed to resort to a chaplain. This resulted in the stigma of "crying padre"<sup>335</sup> and a loss of confidentiality. Further, many members felt that the actual help that they were able to obtain from their chaplain was limited. For example, one interviewee stated that the chaplain had offered to "pray for him",<sup>336</sup> another was advised not to pursue a complaint in order to avoid harming her career,<sup>337</sup> and yet another interviewee believed that the chaplain had subsequently passed on her confidences to her CO.<sup>338</sup> It was clear to the ERA that base chaplains are not trained counsellors, and the actual support they are able to provide depends on the natural aptitude and willingness of the individual, rather than on any institutional approach.

Despite these criticisms and the fact that the help they provide is insufficient, however, the services of chaplains remain a comforting resource for many members.

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<sup>334</sup> QR&O 33.06

<sup>335</sup> Focus group: female lower rank; Coordinator interviews

<sup>336</sup> Volunteer contribution

<sup>337</sup> Volunteer contribution

<sup>338</sup> Focus group: female reserve, female lower rank; Coordinator interviews; Volunteer contributions



### 8.1.2 Nurses and Social Workers

CAF members are also entitled to medical care, which may frequently follow from sexual harassment or assault. Medical care includes the support not only of physicians, but also of nurses and social workers. On almost all bases, nurses and social workers provided valuable information to the ERA. They appear to be able to inspire the confidence of the victims and to be able to support them more than any other support person in the CAF.

Many nurses and social workers who participated in the interviews described what they perceived as the lack of importance the CAF attaches to incidents of sexual harassment and sexual assault. A number of social workers deplored being limited in the scope of the services they could offer. They felt that victims need the help of an advocate, a role that they were not equipped to play. Furthermore, while social workers appear to be an invaluable resource, they normally only become involved when a victim is seriously distressed and has been referred by their medical care unit. Indeed, while according to the policy, mental health crisis service can be obtained directly from the base medical clinic, members tend to go to their unit clinic first, which delays treatment. The advanced state of distress in which some nurses found victims illustrates the harm that may occur to the victim as a result of not being given support in a timely way.

Another difficulty with accessing medical services is the loss of confidentiality that results from having to attend the medical facility (which is usually centrally located, and often subjects the victim to public view) while waiting for care, and the stigma attached to being identified as having a “medical issue”.<sup>339</sup>

Overall, the ERA found that nurses and social workers are a precious resource for victims of sexual harassment and sexual assault and, at times, for distressed respondents or accused.

### 8.1.3 Physicians

The ERA notes that few physicians were open to speaking about incidents of sexual harassment or assault. In many instances, they indicated that they had never seen a case of either sexual harassment or assault which, in at least several cases, seemed to indicate a clear lack of transparency given information the ERA learned from other sources.<sup>340</sup> These claims were therefore troubling, and raised questions with respect to the willingness of the physician to address instances of sexual harassment or assault, or the training the individual had received. Such concerns were compounded by the reports of some interviewees who told the ERA that when they reported a sexual assault to a physician, they were met with scepticism rather than support.<sup>341</sup>

The ERA notes that physicians could be an important source of support for victims, however, if

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<sup>339</sup> Focus group: female trainees; Coordinator interviews

<sup>340</sup> Coordinator interviews

<sup>341</sup> Focus group: PAT mixed gender

given appropriate training and instruction as to the CAF's expectations in that regard.

## 8.2 Other Victim Support Services

Under the Military Police Victim Services Program, “every victim shall be provided with regular and continuous contact from the MP,” and “victims of sexual assault shall be afforded additional consideration.” The MP must be in regular and continuous contact with the victim to “discuss any assistance requirements and to update the status of the case.”<sup>342</sup> Similarly, according to the policy, a Victim Assistance Coordinator should be appointed to act as a point of contact for all victims who have been assigned a CFNIS investigator. A flyer that is distributed on bases contains a list of services and contact information on victim support services.

Despite the clear policy of providing support to victims of sexual assault, interviewees reported a high rate of dissatisfaction with respect to victim support.<sup>343</sup> Victims reported not being appropriately informed about the progress of the military justice process, and not being given adequate emotional support.<sup>344</sup> Victims also reported not being properly prepared for court appearances.<sup>345</sup> Indeed, the Military Police Victim Services Program appears not to even be in use in a large number of cases. In sum, while, on paper, a number of mechanisms have been put in place to support victims, the ERA found that the reality is an *ad hoc* approach that fails to meet the needs of many victims in a variety of ways.

In addition to the Military Police Victim Services Program, other services are available on a handful of bases, such as Military Family Resource Centers, which sometimes take an active role in providing assistance to victims of sexual harassment and assault. Other examples include a resource center offering advocacy services for female victims of assault, partly funded by a provincial government. Again, however, these services are *ad hoc* and not available to many victims.

A number of help lines are also available to members, both local and nationwide. For example, the Canadian Forces Member Assistance program, in partnership with the Employee Assistance Service of Health Canada, offers a 24-hour a day, year-round crisis line. Members can also access the Canadian Forces Health information line to obtain guidance on how to access health care services.

A number of base organizations also distribute pamphlets listing available services in the community.<sup>346</sup> Concerns with respect to the general mental health of members has also received increased attention in recent years, and information provided to members in that context often

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<sup>342</sup> Victim Assistance Program, document provided to the ERA by CAF

<sup>343</sup> Volunteer contributions

<sup>344</sup> Volunteer contributions

<sup>345</sup> Volunteer contributions

<sup>346</sup> For example, the Defence Community Wellness Advisory Team of Esquimalt distributes a crisis pamphlet listing local resources such as the Victoria Women's Sexual Assault Center.

includes referral information for chaplains, medical services, and the Members Assistance Program help line, as well as local civilian resources.<sup>347</sup>

At the RMCC in Kingston, a Peer Assistance Program (PAG) was created a number of years ago. The ERA met with several participants who had had experiences with, or were involved in, the program. Overall, the ERA was impressed with the training that the participants receive and the support they appear to be able to provide to their distressed peers, and suggests that further research be conducted into the effectiveness of PAG and the possibility of extending the program to other locations.

While there appear to be a number of programs available to victims of sexual assault, the difficulty most interviewees complained of is that information about services is hard to find; victims do not know who to turn to or where to find relevant information. Recruits indicated that they do not have access to the CAF website and, more generally, a number of interviewees criticized the fact that there is no website where information on all available resources is centralized. The amount of information a victim receives therefore varies widely depending on who they ask and where they are located. While a few female officers indicated that they had sometimes been able to identify signs of distress in lower rank women and offer support, most interviewees who reported incidents to the ERA indicated that they had hidden these incidents from their peers and supervisors.

### 8.3 External Resources

Members of the CAF also have access to external resources such as the Ombudsman for the Department of Defence, and the Canadian Human Rights Commission (CHRC). For the following reasons, the ERA found that these bodies provide little support or assistance to victims of sexual assault.

The CAF *Harassment Advisor Manual* indicates that the Ombudsman may act as a resource in the resolution of a complaint:

The Ombudsman is independent of the chain of command and is accountable directly to the Minister. If a complaint is made to the Ombudsman about the handling of a complaint, the Ombudsman may review only the process, to ensure that the individual or individuals are being treated in a fair and equitable manner.<sup>348</sup>

The Ombudsman takes the position that the institution has no jurisdiction over sexual assault matters, but that he does have jurisdiction to review the harassment process.

Despite the ERA's efforts, the Ombudsman declined to participate in the Review. In any event,

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<sup>347</sup> Coordinator interviews

<sup>348</sup> *Harassment Advisor Manual*, p. 20

of the interviewees who had communicated with the Ombudsman's Office, none had found it helpful. In some instances the Ombudsman refused to investigate a complaint,<sup>349</sup> or did not follow-up on initial correspondence.<sup>350</sup> In other cases, interviewees considered that this was not a useful avenue to pursue, based on a perception that the institution would not help vindicate the rights of a complainant.<sup>351</sup> The ERA concludes that the Office of the Ombudsman is not a resource that is designed to help victims with either legal or emotional support, and should not be referred to as a resource for victims who need help before, during, or after a complaint of sexual harassment or assault.

A second external resource sometimes cited by the CAF is the Canadian Human Rights Commission. Members are told that they are free to go to the CHRC to seek redress in relation to complaints of sexual harassment. The difficulty with this channel is that the CHRC will only accept a complaint if the member has first exhausted all internal avenues within the CAF. In other words, the complainant will generally have to take the complaint up the chain of command and through the grievance process before the CHRC will accept his or her complaint. In fact, statistics provided to the ERA indicate that no harassment complaint—which would include a complaint of sexual harassment—was referred to the Canadian Human Rights Tribunal between January 1, 2009 and July 18, 2014.<sup>352</sup>

#### 8.4 Avenues for Improvement

There is no substitute for the internal resources described above. Victims, and sometimes the respondent, need support, and chaplains, nurses, social workers and physicians will often be one of the first professionals a victim will see after an incident has occurred. They therefore play a critical role in supporting victims and providing necessary medical care. These services therefore need to be maintained and strengthened. In particular, the responsibilities of chaplains, nurses, social workers and physicians should be enlarged and the scope of their role in assisting victims of sexual harassment and assault should be clarified. These individuals should be given additional training with respect to supporting victims of inappropriate sexual conduct; physicians and chaplains in particular should be given additional training to assist distressed members in a sensitive and appropriate manner.

Further, the numerous other *ad hoc* resources for victims need to be coordinated. The responsibility for coordination should rest with the center for accountability for sexual assault and harassment. In addition, CASAH staff should be available to help advocate for victims of sexual harassment and sexual assault. In the case of sexual assault, the advocate could replace the Victim Support Coordinator and monitor how the victim's needs are met. The advocate should be given responsibilities, such as accompanying the victim to give statements, contacting the relevant police authority for status up-dates on the case, etc. To be clear, the ERA does not

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<sup>349</sup> Volunteer contributions

<sup>350</sup> Volunteer contribution

<sup>351</sup> Coordinator interview; Volunteer contribution

<sup>352</sup> Manual count provided to the ERA; Coordinator interview

recommend that a single position of “advocate” be created to coordinate support services. Rather CASAH staff should include a number of advocates who would be available to actively guide and advise victims who are navigating the complaint and investigation processes.

## **Recommendation No. 9**

**Assign responsibility for providing, coordinating and monitoring victim support to the center for accountability for sexual assault and harassment, including the responsibility for advocating on behalf of victims in the complaint and investigation processes.**

## 9. Training

Formal training with respect to sexual harassment appears to have been first integrated into Canadian military curriculum in 1998, with the Standard for Harassment and Racism Prevention program (SHARP). Members referred to the SHARP era with various degrees of respect.<sup>353</sup> Some described SHARP training as the high point in harassment awareness and training. Others, by contrast, viewed it as a caricature. For example, one long-time member recalled young male members laughing and saying: “I was SHARP-trained”, implying that the training in fact gave them license to act with impunity.<sup>354</sup> The reality appears to be that after a few years, the program lost its lustre. This seems to be related, in part, to the fact that while experts were hired to carry out training in the early years, this did not continue over time.

### 9.1 Policies

DAOD 5012-0 mandates that there should be programs for the prevention of harassment. Specifically, it states that it is the responsibility of the CAF and the DND to:

- inform all CF members and DND employees about behaviour that constitutes harassment; their rights and responsibilities under this policy, ways of dealing with conflict and harassment; and the resources available to them; and
- provide supervisors and Responsible Officers with guidance, support and training to carry out their responsibilities to prevent harassment and resolve any conflict and harassment situations that may occur.

The ERA also notes that CAF policies provide that one of the “direct obligations” of leaders is to engage in the prevention of harassment:

One of the most important factors in preventing and dealing with harassment is the development and maintenance of a positive and supportive ethical climate. The ideal organizational foundation is one of respect for the rights and dignity of others, rather than fear of punishment. Creating this ethical foundation is a direct obligation of leadership. The Defence Ethics Program requires leaders to be ethical persons and to build ethical organizations. It also provides the basic ethical expectations of respect, fairness, obligations for the welfare of others and accountability, necessary to mitigate harassment issues.<sup>355</sup>

More specifically, the *Harassment Prevention and Resolution Guidelines* establish that all CAF staff should be provided with “sensitivity and awareness” education through a variety of means:

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<sup>353</sup> Coordinator interviews

<sup>354</sup> Coordinator interview

<sup>355</sup> *Harassment Prevention and Resolution Guidelines*, p. 2-1

Sensitivity and awareness education of all staff through orientation and information sessions and the use of continual reminders such as staff meetings, memos, e-mails, notices, posters and videos, is important.<sup>356</sup>

In addition, DAOD 5019-5 indicates that the sexual misconduct policy should be made known to applicants for enrolment, members during recruit and officer training, and members on leadership courses. Those persons are to be informed about the content of DAOD 5019-5, the meaning of sexual misconduct, the expectation of the CAF with respect to a respectful workplace, the requirement for CAF members in positions of leadership to take an active role in providing guidance and information on sexual misconduct, and the availability of health services.

In practice, the duty to inform members of the CAF about what constitutes sexual misconduct, and their rights and responsibilities, is discharged through training programs provided to members at all levels.

## 9.2 Current Practices

Throughout their career in the armed forces, members receive training at regular intervals. Inappropriate and prohibited sexual conduct, however, is not a stand-alone topic, but is integrated into broader training programs dealing with a range of subject matters.

During basic training, a number of topics compete for priority and time. Recruits receive, in the same session, training on personal conduct policies, human rights, and employment equity.<sup>357</sup> Personal conduct covers harassment, sexual misconduct, racism and personal relationships. The component on harassment includes all the different types of conduct covered by the DAOD 5012-0, sexual harassment being only one of these. The components on sexual misconduct and personal relationships address, respectively, the policies under DAOD 5019-5 and 5019-1.<sup>358</sup> The length of time allocated for training is not mandated in any policy, however in recent years the total training time devoted to all of these topics for recruits has only been one two-hour lecture. At the end of the course, recruits are required to pass a test and sign a form saying that they understand the policy and know of no reason why they cannot follow it.<sup>359</sup>

After enrolment, and every year thereafter, members undertake training in ethics. There are different options about how to take the ethics training. The preferred course for many members appears to be unit-led, including with on-line training. In recent years, the approximate time allocated to the yearly ethics training has been 200 minutes.<sup>360</sup>

For leaders, training on all policies is included in the leadership program. ROs can also review

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<sup>356</sup> *Guidelines*, sub-section 2.3 Education and Training

<sup>357</sup> Coordinator interview

<sup>358</sup> Curriculum of basic training provided as a follow-up to a Coordinator interview

<sup>359</sup> Coordinator interview

<sup>360</sup> Coordinator interview; another Coordinator interview evaluated the length of time as an average of 45 minutes per year.

the *Responsible Officer Guide to Harassment Prevention and Resolution Policy*. However the ERA is not aware of any specialized training offered to ROs about the *Guide* or their responsibilities under it.

The CAF also trains HAs and WRAs on their specific responsibilities in a five-day training course which includes interactive approaches. While HIs used to receive specialized training, no HI has completed all of the required steps for accreditation in the last six years, apparently because of the lack of opportunity to conduct sexual harassment investigations as a result of the small number of complaints that proceed to an administrative investigation.<sup>361</sup>

MPs receive training on how to conduct investigations and support victims. However, as previously noted, the ERA heard repeatedly from interviewees that victims of sexual assault are frequently rebuffed or not believed. The prescribed training is therefore either not being properly carried out, or MPs too often do not implement what they are taught.

As a practical matter, the training of members on prohibited sexual conduct, while mandatory, does not appear to have had any significant impact on members.<sup>362</sup> In one of the focus groups, five out of six female participants did not remember having received any training on sexual harassment at all,<sup>363</sup> and other interviewees mentioned that many members sleep through briefings<sup>364</sup> or play with their phones.<sup>365</sup> Indeed, a large number of interviewees reported that the classes are not taken seriously and that harassment training is laughed at.<sup>366</sup> The course was criticized for being too theoretical,<sup>367</sup> “lost” in the diversity program,<sup>368</sup> and given too late in basic training.<sup>369</sup> Power-point training is dubbed “death by power-point”,<sup>370</sup> and training on-line was severely criticized as being unhelpful and insufficient<sup>371</sup> because it is not complemented with any interactive exercises.<sup>372</sup>

Participants in the Review observed that the training of members had failed to change the dominant boy’s club mentality of members, and that members neither learn what constitutes acceptable conduct in the military, nor what is prohibited under the policies. A number of interviewees also commented that COs are insufficiently trained, and show weakness in recognizing that inappropriate sexual conduct is occurring, assessing the situation, and

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<sup>361</sup> Coordinator interview

<sup>362</sup> Focus group, female reserve; Coordinator interviews

<sup>363</sup> Focus group: female lower rank

<sup>364</sup> Coordinator interviews

<sup>365</sup> Coordinator interview

<sup>366</sup> Focus group: female trainees; Coordinator interview; Volunteer contributions

<sup>367</sup> Coordinator interview

<sup>368</sup> Coordinator interview

<sup>369</sup> Coordinator interviews

<sup>370</sup> Focus group: female lower rank

<sup>371</sup> Coordinator interview

<sup>372</sup> Coordinator interviews



addressing it.<sup>373</sup>

Interviewees also expressed scepticism about unit-led training because of the common view that those carrying out the training were often themselves complicit in the prohibited conduct.<sup>374</sup>

With respect to the obligation of leaders to engage in the prevention of sexual misconduct, the ERA found that the engagement of leaders was highly variable. On some site visits, it appeared to the ERA that leaders had shown minimal interest in reducing the incidence of inappropriate sexual conduct. At other locations, however, the ERA understood that the issue is of considerable concern to senior leaders. Indeed, at a number of sites where sexual harassment and assault were perceived to be a particularly serious problem, special efforts were being made to promote awareness, generally by engaging NCOs in updating programs with respect to the prevention of inappropriate sexual conduct.

Overall, the ERA found that the reality on the ground supports the assessment of numerous interviewees who indicated that the training currently being provided is failing to inform members about appropriate conduct or to inculcate an ethical culture in the CAF. In the ERA's view, current training efforts not only lack credibility, but also further reduce member confidence that inappropriate sexual conduct is an issue that the CAF takes seriously. Part of the problem appears to be that while efforts have been made to carry out training on issues of diversity and harassment in general, there has been little focus or attention on the particular problems of sexual harassment and sexual assault. More broadly, however, it was very apparent throughout the consultations that conducting training on such serious and complex matters through lectures or power-point is ineffective, particularly when recruits lack sleep and are preoccupied by other tests. Nor is unit-led training an appropriate alternative, given the broad perception that many of those carrying out the training are in fact part of the problem.

Finally, as previously discussed, the ERA found that military police require considerably better training with respect to how to interact with victims of sexual assault, as do many physicians.

### 9.3 Avenues for Improvement

The CAF's policies on sexual harassment and sexual assault will not be effective if they are not supported by training to inform members about the CAF's expectations and the consequences of violating the policies. Unfortunately, training on sexual harassment and sexual assault can too easily become the subject of ridicule, or, worse, can encourage members to misbehave and violate the policies.

Skilled professionals with expertise in training in the area of sexual harassment and sexual assault need to be involved to ensure that the right tone and appropriate examples are used. In addition, it was clear to the ERA that one-time lectures and on-line training are inadequate.

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<sup>373</sup> Coordinator interview

<sup>374</sup> Focus group: female reserve; Coordinator interviews

Sufficient time must be devoted to training if it is to contribute to cultural change, and regular face-to-face sessions to discuss sexual harassment and sexual assault should be mandatory. Training should include a variety of interactive techniques, as well as concrete examples to help members understand the scope of acceptable behaviour. This is particularly important when addressing deeply embedded cultural behaviours such as the use of sexualized language and sexual innuendo, which contribute to a broader organizational culture that is hostile and inappropriate. The use of real-world scenarios, applicable to the day-to-day experiences of members of the CAF, is therefore essential in imparting to members the boundaries of acceptable behaviour and the importance of cultural change.

While junior members need to rapidly internalize the notions of professionalism and respect for dignity, senior NCOs and officers should also undergo regular refreshers and reinforcement training on sexual harassment and sexual assault. Equally important, such concepts as consent should be incorporated into training for both junior and senior members. Given the importance of the broad cultural reform previously described, regular training should therefore be required at all levels of the CAF, including senior leaders with general oversight responsibilities.

While in many cases members of the MP undertake training with civilian law enforcement authorities, closer attention should be paid to the content of this training to ensure that it includes sufficient training on sexual assault, and particularly on how to interact with victims of sexual assault.

In order to ensure that training is conducted with sufficient expertise and that the focus is on sexual harassment and sexual assault, CASAH should be assigned, with other CAF subject matter experts, the responsibility for the development of the curriculum and the primary responsibility for the monitoring of training for all members, including senior officers, military police, medical professionals and chaplains. CASAH should also be responsible for ensuring the accountability of other groups involved in providing training.

## **Recommendation No. 10**

**Assign to the center for accountability for sexual assault and harassment, in coordination with other CAF subject matter experts, responsibility for the development of the training curriculum, and the primary responsibility for monitoring training on matters related to inappropriate sexual conduct.**

## 10. Conclusion

During the course of this Review, it became clear that one of the functions of the chain of command is to address problems before they reach the attention of senior leaders. While there may be logic to this structure in many areas of military life, in the case of sexual harassment and assault the unfortunate effect is to stifle complaints and leave problems unresolved. It also means that some senior leaders are genuinely unaware of the extent of the inappropriate sexual conduct that is occurring on the ground, the harm to individual members, and the damage to the CAF as a whole.

At the same time, the ERA found that there is an undeniable problem of sexual harassment and sexual assault in the CAF, which requires direct and sustained action. In particular, the CAF needs to engage in broad-based cultural reform to change the underlying norms of conduct that are giving rise to pervasive low-level harassment, a hostile environment for women and LGBTQ members, and, in some cases, more serious and traumatic incidents of sexual assault. Dismissive responses such as “this is just the way of the military” are no longer appropriate.

Cultural change is not an easy enterprise. Other organizations, including some which are historically male-dominated, are taking steps to meet this challenge, however. The CAF has a variety of tools at its disposal, including DAOD policies, training programs, administrative action, the disciplinary and military justice system, referral to local civilian authorities, and internal victim support services. The ERA has made recommendations about how to strengthen each of the policies that it was asked to review. In particular, important reforms can be accomplished through the creation of a center for accountability for sexual assault and harassment, which can serve not only as a hub for delivering services to victims and training for CAF members, civilian employees and senior leaders, but also as a meeting point for stakeholders. CASAH is therefore a point of departure for subsequent initiatives to reduce the prevalence of sexual harassment and assault in the armed forces.

Just as important, however, CAF leaders need to be prepared to use and implement the tools at their disposal strictly, fairly, and consistently. The failure to do so only exacerbates the perception of victims that their well-being is not a priority for the CAF, and the perception of aggressors that they can act with impunity. Responsibility for change therefore lies with CAF leaders. Not only must leaders serve as role models, but they must also intervene personally where inappropriate conduct occurs. Senior leaders, in particular, must drive the process of cultural reform by engaging in initiatives to prevent inappropriate sexual conduct, and to rebuild the trust of CAF members. As a modern military organization, the Canadian Armed Forces can no longer afford to accept lower standards for sexual conduct than those that apply to Canadians at large. On the contrary, more is expected from our Forces.

The willingness of the CAF to take a hard look at its own practices and procedures is just one indication that the organization has a strong future. Cultural change, improving the integration of women into the most senior levels of the organization, rebuilding the trust of members in the

chain of command, and reducing the prevalence of sexual harassment and sexual assault, will not be easy to achieve. Such goals require strong leadership and sustained commitment. But they are essential to the development of a modern military organization that not only embraces the principle of respect for human dignity, but is also able to optimize on the skills and talents of *all* its members. The Canadian public expects it, and CAF members deserve it.

March 27, 2015

Marie Deschamps C.C., Ad.E.

External Review Authority

## APPENDIX A - Example of a message sent to members before a visit

As you have probably heard, the Chief of the Defence Staff has asked me to conduct an independent external review of how the Canadian Armed Forces handles issues related to sexual harassment and sexual misconduct. As part of the review process, I will be meeting with a number of CAF members. The purpose of this letter is to invite you to participate in the external review when I visit the base in Halifax from August 21 to 23. I will be looking not only for information as to facts relating to sexual harassment and misconduct, but also for individual opinions and ideas on those subjects. Participation in the review is voluntary.

In order to benefit from as much input as possible, I will make myself available through focus groups (Wednesday afternoon), formal interviews on the base (Thursday and Friday) and off the base (Thursday evening)—as well as during an open session (Wednesday evening). If you would like to meet with me privately, either on or off the base, please do not hesitate to contact me at [forces@review-examen.com](mailto:forces@review-examen.com).

You are strongly encouraged to participate; my door will be open.

Marie Deschamps

## APPENDIX B – List of Acronyms

ADF	Australian Defence Force
ADR	Alternate Dispute Resolution
CAF	Canadian Armed Forces
CASAH	Center for Accountability for Sexual Assault and Sexual Harassment
CFNIS	Canadian Forces National Investigation Service
CF	Canadian Forces
CFHIS	Canadian Forces Health Information System
CHRC	Canadian Human Rights Commission
CO	Commanding Officer
COID	Central Organization of Integrity of Defence (Netherlands)
CSD	Code of Service Discipline
DAOD	Defence Administrative Order and Directive
DGMP	Director General, Military Personnel
DND	Department of National Defence
DPP	Director of Public Prosecution
ERA	External Review Authority
HA	Harassment Advisor
HI	Harassment Investigator
JAG	Judge Advocate General
MGERC	Military Grievance External Review Committee
MP	Military Police
NCM	Non-Commissioned Member
NCO	Non-Commissioned Officer
NDA	National Defence Act
PAG	Peer Assistance Program
QR&O	Queen's Regulation and Order
RMCC	Royal Military College of Canada
RO	Reporting Officer
SAPRO	Sexual Assault Prevention Office (United States)
SeMPRO	Sexual Misconduct Prevention and Response Office (Australia)
SHARP	Standard for Harassment and Racism Prevention
SIR	Significant Incident Report
TOR	Terms of Reference
VPD	Vancouver Police Department
WRA	Workplace Relation Advisor