

# **Report to the Secretary of Defense**

## **Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military**



### **Office of the Under Secretary of Defense (Personnel and Readiness) April 1998**

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#### **INTRODUCTION**

On February 28, 1994, after extensive hearings in Congress, the enactment of a federal statute, and coordination with Congressional Oversight Committees, the Department of Defense instituted its current policy on homosexual conduct in the military. As required by the federal statute (10 U.S.C. ? 654), the DoD policy provides that engaging in homosexual conduct is grounds for discharge from the military. Congress expressly found that service by those who have a propensity to engage in homosexual conduct creates an unacceptable risk to morale, good order and discipline, and unit cohesion, and that the long-standing prohibition of homosexual conduct therefore continues to be necessary in the unique circumstances of military service.

The DoD policy also provides, however, that sexual orientation is a personal and private matter that is not a bar to military service unless manifested by homosexual conduct. It was the sense of Congress that

applicants should not be asked about homosexuality as part of the processing of individuals for accession into the Armed Forces. Consequently, under the policy, applicants for military service may no longer be asked about their sexual orientation. Moreover, the services may not initiate investigations solely to determine a member's sexual orientation. Commanders may initiate an investigation only upon receipt of credible information that a service member has engaged in homosexual conduct, i.e., stated his or her homosexuality, committed a homosexual act, or entered into a homosexual marriage.

In April 1997, the Secretary of Defense tasked the Under Secretary of Defense for Personnel and Readiness to conduct a review of how well the Department's policies on homosexual conduct in the military are being applied and enforced. The Department of Defense periodically reviews many of its personnel policies. Since the homosexual conduct policy had been in place for three years, a review was appropriate. Part of the tasking was to review the issues raised in a 1997 report by the Servicemembers Legal Defense Network and issues which members of Congress and others had brought to the Department's attention. The purpose of the review was to assure ourselves that we are doing all we can to ensure that our policy is faithfully executed.

The Under Secretary of Defense directed the Principal Deputy Assistant Secretary of Defense for Force Management Policy to head the review. A working group was formed consisting of legal and personnel representatives from each of the Military Services and from the Office of the Secretary of Defense. The working group met several times to evaluate the range of matters raised concerning application and enforcement of the Department's policy on homosexual conduct in the military.

Subsequently, senior representatives from each of the Services met with senior legal and personnel officials in the Office of the Secretary of Defense on several occasions to discuss policy implementation details. In addition, discussions were held on the Services' handling of individual incidents, their conduct of individual investigations and their processing of individual separation cases which were cited to the Department of Defense as possibly non-compliant with the Department's policy. The Services provided Office of the Secretary of Defense staff with selected case files, including commander directed investigations, records of administrative discharge hearings, and Inspector General investigations. Each such matter was carefully reviewed. New issues and cases brought to the attention of the Department between April 1997 and February 1998 were also reviewed.

The Defense Manpower Data Center was also tasked to provide various statistics about discharges based on homosexual conduct for Fiscal Years 1980 through 1997. The complete Fiscal Year 1997 statistics provided in this report were not available and verified by the Services until February 1998.

Proper implementation of the policy on homosexual conduct has been a high priority at the Department of Defense since the policy was instituted. The balance that the policy strikes between the prohibition of homosexual conduct in the military and the privacy rights of our service members has posed a challenge to the Services. Commanders must enforce the statutory ban on homosexual conduct while at the same time respecting the limits that the policy imposes on investigations of such conduct. Secretary Cohen has strongly stated that harassment or threats of violence against service members will not be tolerated; that fact finding inquiries into homosexual conduct may be initiated only when a commander has received

credible information that there is a basis for discharge; that fact finding inquiries must be limited to the factual circumstances directly relevant to specific credible information received; and that fact finding inquiries must not be unduly intrusive.

This report presents the major conclusions of the review as well as a discussion of many of the matters considered in reaching those conclusions. In order to protect the privacy of current and former service members, this report does not discuss individual cases by name.

## **SUMMARY OF FINDINGS**

### **I. Data on Discharges for Homosexual Conduct**

The review examined the available statistical data concerning homosexual conduct discharges and found that the number of service members discharged for homosexual conduct has in fact risen since the new policy became effective in 1994. We believe that this increase is cause for some concern, although it continues to be an extremely small percentage of the total force. The review did not provide a complete explanation for the increase, but several facts did emerge upon closer analysis of the discharge data.

First, we found that the large majority of the discharges for homosexual conduct are based on the statements of service members who identify themselves as homosexual, as opposed to cases involving homosexual acts. The Services believe that most of these statement cases -- although not all of them -- involve service members who voluntarily elected to disclose their sexual orientation to their peers, supervisors or commanders. The increase in the number of discharges for homosexual conduct since Fiscal Year 1994 is attributable to this increase in statement cases. Discharges for homosexual acts and marriages have declined by 20 percent over the past three years. Second, most of those discharged under the policy are junior personnel with very little time in the military, and most of the increase in discharges for homosexual conduct has occurred in this sector. The number of cases involving career service members is relatively small. Third, the great majority of discharges for homosexual conduct are uncontested and are processed administratively. Finally, more than 98 percent of all members discharged in Fiscal Year 1997 under the policy received honorable discharges, general discharges under honorable conditions or uncharacterized discharges. (Separations of enlisted members in their first 180 days of military service are generally uncharacterized.) Discharges under other than honorable conditions or courts-martial for consensual homosexual conduct are infrequent and have invariably involved aggravating circumstances or additional charges.

### **II. Application and Enforcement of the Homosexual Conduct Policy**

As noted above, Department of Defense policy specifies that commanders may initiate investigations of suspected homosexual conduct only after receiving specific, credible information concerning the conduct of the service member in question. In the cases reviewed, we identified only isolated instances in which inquiries were made without the requisite factual basis, or in which the scope of an investigation was expanded in a way that was inconsistent either with the express terms of the policy or with its spirit. We concluded that concerns that there have been widespread "witch hunts" against suspected homosexuals

and that there have been numerous other abuses in the course of investigations are unfounded, and Secretary Cohen has strongly emphasized that such abuses will not be tolerated.

Although we conclude that the Department's policy on homosexual conduct is generally being implemented properly, a number of areas were identified in which the policy could be usefully clarified or implementation could be otherwise enhanced. Steps have already been taken to address some of these issues. For example, last March, former Under Secretary of Defense Dorn issued a directive providing guidance on how threats against alleged homosexuals in the Armed Forces should be investigated. As explained below, this guidance made clear that the report of a threat should result in the prompt investigation of the threat itself, that investigators must not solicit allegations concerning the sexual orientation of the threatened member, and that the report of a threat alone is not credible information and is not a basis to initiate an investigation against the victim. The Department has also eliminated obsolete enlistment forms that could have resulted in improper questions by military recruiters.

### III. Recommendations

We recommend that the Department take action in several areas to address other concerns that have been raised with the implementation of the policy. These areas include:

- the use of pretrial agreements, or "plea bargains," to obtain evidence of consensual homosexual conduct;
- the scope of investigations in "coming out" cases, including cases where recoupment of financial benefits is at issue;
- the importance of consultation with higher headquarters before initiating investigations into alleged homosexual conduct;
- the need to reissue and expand the directive guidance issued by former Under Secretary Dorn concerning threats against service members based on their alleged homosexuality; and
- the need to ensure that the training of those charged with enforcing the Department's homosexual conduct policy is effective.

We believe that these are areas in which clear guidance to the field will be of significant benefit in ensuring a fair and even-handed application of our policies.

## DISCUSSION

### I. Statistics on Homosexual Conduct Discharges

#### A. General Statistics

Statistics on homosexual conduct discharges both before and after the current policy was instituted were studied in detail. Table No. 1 sets out the total number of service members discharged for homosexual conduct in each year since 1980, and the percentage of the personnel strength of the Armed Forces that these numbers represent. Although the trend from the early 1980s to the early 1990s reflected gradually decreasing numbers and rates of discharges, culminating in a historic low in Fiscal Year 1994, both the number and rate of discharges for homosexual conduct have increased each year since that time. Whereas 597 service members were discharged for homosexual conduct in 1994, representing 0.037 percent of the total force, 997 members were discharged in Fiscal Year 1997, which represented 0.069 percent of the total force. While these numbers still remain much lower than the numbers prevalent in the early 1980s and represent a smaller percentage of the total military population than in the 1980s, the consistent upward trend from 1994 to 1997 raises questions about how our policy is working in practice.

Some of the increase in the number of individuals discharged for homosexual conduct, as compared to the pre-1993 numbers, is attributable to changes in counting methods instituted by the Air Force since the new policy was implemented. Under the former policy, Air Force recruits who answered "no" when asked if they were homosexual on the enlistment forms in use at that time, and then subsequently declared their homosexuality early in their service, were discharged for "fraudulent enlistment" rather than for homosexual conduct. Under the new policy, however, questions concerning homosexuality are no longer permissible and are no longer included on enlistment forms. Thus, Air Force members who during their first six months of military service, state that they are homosexual are now discharged on the basis of homosexual conduct, rather than on the basis of a "fraudulent enlistment." This change in counting methods by the Air Force makes the post-1993 numbers higher than they would have been under the old system. This change, however, does not explain the increase in homosexual discharges that has occurred since 1993.

In an effort to gain a better understanding of this issue, we closely studied the available information concerning the nature of homosexual discharge cases last year. This review revealed that more than 80 percent of the discharges for homosexual conduct in Fiscal Year 1997 were "statement" cases, i.e., cases where the service member made a statement that he or she was homosexual, as opposed to homosexual act or marriage cases. (See Table No. 2.) The Services believe that a large majority of the "statements" cases involve service members who voluntarily identify themselves to their commanders, supervisors or peers as homosexual. Moreover, 58 percent of those discharged for homosexual conduct in 1997 were junior enlisted personnel with less than one year of military service. (See Table No. 3.) The early discharges occurred most frequently in the Air Force, where 212 of the 309 discharges for homosexual conduct occurred in basic training. Only 68 of the 309 discharges involved members who had completed their first year of service. Across all the Services, more than 80 percent of those discharged had less than four years of service. Finally, most of the increase in the number of service members discharged for homosexual conduct in recent years has occurred among service members who are discharged early in their first term of service.

Thus, in the most common case, a discharge under the homosexual conduct policy involves a junior enlisted member who makes a statement declaring his or her homosexuality to a commander, supervisor or peer relatively early in the member's first term of service. This is the type of discharge that has been

increasing in recent years. Because extensive inquiries or investigations are not conducted in most of these cases, the reasons for this increase are not known and would be difficult to ascertain. It is possible that the number of discharges could have increased somewhat as a result of the fact that applicants are no longer asked about their sexual orientation when enlisting in the Armed Forces.

It bears mentioning that, notwithstanding the recent increases, the number of discharges for homosexual conduct is a very small percentage of total discharges. For example, in the first year of military service, where discharge for homosexual conduct is most frequent, such discharges represented only seven tenths of one percent of the total discharges of members in their first year of service in Fiscal Year 1997. Increasing involuntary discharge rates -- whether for homosexual conduct or for any other reason -- are a cause for concern. We saw no evidence, however, that the increases that have occurred in separations based on homosexual conduct indicate that our policy is not being properly or fairly implemented.

## B. Statistics on Women

The statistics on homosexual conduct discharges indicate that women have been discharged under the policy at rates that exceed their representation in the force. Women made up just over 13 percent of the military strength of the Services but accounted for 29 percent of homosexual conduct discharges in Fiscal Year 1996. In Fiscal Year 1997, the relative number of women discharged for homosexual conduct was down to 22 percent of the total, with the representation of women increasing to nearly 14 percent of the force.

The reasons for the gender disparity in homosexual conduct discharges are unknown. It has been argued that women are sometimes accused of being homosexual in retaliation for their reporting of sexual harassment or other misconduct, and therefore are discharged in greater numbers than men. In reviewing the complaints that were received last year, we found very few specific instances in which women were reportedly accused of being homosexual in retaliation for their reporting of sexual harassment or other misconduct, but could not substantiate any instance where a commander's investigation improperly targeted the victim of sexual harassment rather than the perpetrator.

Nonetheless, it is critical that military service women feel free to report sexual harassment or threats without fear of reprisal or inappropriate governmental response. As discussed below, we recommend that the Department reissue guidance to make clear that when sexual harassment is reported, the focus of the investigation must be on the harassment or threat.

## II. Investigations of Homosexual Conduct

Although extensive investigations of homosexual conduct are the exception rather than the rule, there are a significant number of cases in which such investigations have been conducted. Based on the cases reviewed, we concluded that the vast majority of investigations that have occurred have been properly initiated, i.e., an investigation has been opened only after the commander had determined that there was credible information that the member had engaged in homosexual conduct.

We concluded that many of the criticisms made last year about improper initiation of investigations reflect a misunderstanding of the Department's policy. In practice, credible information has sometimes been provided to commanders in ways that service members might not have expected would occur, or has been based on communications or behavior that the service member might have expected would remain private. For example, current or former partners, roommates, or unrelated third parties have sometimes come forward on their own to report information or evidence of homosexual conduct to commanders against the wishes of the service member in question. Photographs or written communications that evidence homosexual conduct have sometimes been revealed to civilians who then brought this evidence to the attention of a commander, without any inquiry having been conducted by the commander. Credible information has also been incidentally discovered in the course of proper, entirely unrelated criminal or disciplinary investigations of the member or of others. It is not a violation of Department policy for a commander to initiate an investigation when information has been reported in any of these circumstances, provided that the information received is credible. Indeed, because federal law requires that those who engage in homosexual conduct must be discharged from the military, commanders are obligated to investigate whenever they receive credible evidence of homosexual conduct.

We also concluded that, for the most part, the investigations that have been initiated have been conducted properly. Allegations of widespread abusive investigatory practices have not been substantiated.

However, in reviewing the cases referred to our attention, we concluded that three investigations did not fully comply with Department policy. In two of those cases investigators asked service members questions concerning their sexual orientation without credible information or without the requisite determination by a commander that credible information was present or an investigation against a service member was improperly expanded because investigators asked for the identities of others who may have engaged in homosexual conduct. In one of these cases, there was a failure to properly advise service members of their rights prior to being questioned. The recommendations set out below pertaining to consultation and to the training of investigators and others charged with implementing the homosexual conduct policy should help to preclude further errors of the type we noted.

We concluded, however, that the instances in which improper practices have been identified in homosexual conduct investigations were isolated occurrences. The few errors that were made were generally committed by investigators rather than by commanders. Still, such situations are unacceptable. The Services are committed to proper implementation of the policy and are working hard to ensure that both commanders and investigators understand and abide by the limits on homosexual conduct investigations.

The Military Service representatives on the working group indicated that it has become common practice for installation judge advocates to consult with more senior, more experienced judge advocates in higher headquarters legal offices for advice in those cases involving more complex issues or investigations. As noted, the Services reported that the vast majority of homosexual discharge cases involved no or minimal investigation. In many cases, where a service member had informed his or her commander or supervisor of his or her homosexuality, any ensuing investigation usually consisted of only limited questioning of the service member. As a result, installation-level attorneys have had little opportunity to build practical

expertise in providing advice on more complex investigations related to the homosexual conduct policy. We recommend that the Department issue guidance clarifying that consultation with higher headquarters legal offices is recommended before initiating investigations into alleged homosexual conduct.

### III. Threats Against Suspected Homosexuals

Perhaps the most troubling allegation addressed by the working group was reported threats against, or harassment of, suspected homosexuals in the military. Concerns have been expressed that suspected homosexuals in the Services have been harassed or threatened with violence by other service members and that service members have been reluctant to report such harassment or threats for fear that their commanders would launch investigations against them for homosexual conduct.

Of the cases we reviewed, we found four cases in which anti-gay threats or harassment directed towards specific individuals were reported by service members. We found that, in those cases in which service members complained to their commanders, the commanders promptly took appropriate actions in response to the reported threat or harassment and did not target the victim. In two cases the threats took the form of anonymous notes and investigators could not identify those who were responsible.

The Department has been concerned about the possibility that service members may sometimes not report anti-gay threats or harassment for fear of being targeted with an investigation. In March 1997, the Under Secretary of Defense for Personnel and Readiness issued directive guidance designed to make clear that service members must be able to report harassment or threats free from fear of harm, reprisal, or inappropriate or inadequate governmental response. The guidance provides that the report of harassment or a threat should result in the prompt investigation of the threat itself, and that investigators should not solicit allegations concerning the sexual orientation or conduct of the threatened person. If, during the course of an investigation, information is received that the service member has engaged in homosexual conduct, commanders are directed to consider carefully the source of that information and the circumstances under which it was provided in assessing its credibility. The fact that a service member reports being threatened because he or she is alleged to be a homosexual shall not in itself constitute credible information justifying an investigation of that service member. During the course of the review, it was discovered that there were instances where the effective dissemination of the Under Secretary's directive guidance could not be documented. Also, the Under Secretary's directive does not expressly make clear that, in addition to threats, harassment of service members based on their alleged or presumed sexual orientation is unacceptable, and that service members who engage in such conduct will be held accountable. Since harassment or threats of violence against our service members will not be tolerated, we recommend that the memorandum be reissued by the Under Secretary and widely distributed to the field.

### IV. Special Issues Concerning the Homosexual Conduct Policy

#### A. Selective Prosecution

It has been alleged that the Services have criminally prosecuted service members for consensual homosexual misconduct but have not prosecuted consensual heterosexual misconduct. We found no



evidence to support this allegation.

The Department's policy is that administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial, when appropriate. In accordance with this policy, the vast majority of homosexual conduct discharges have been processed administratively. Most cases have been uncontested and resulted in honorable discharges. According to the Services, the cases in which service members have been criminally prosecuted for homosexual conduct have involved aggravating circumstances such as fraternization, sex with minors or sex for compensation, lack of consent, or additional charges against the individual.

## B. Pretrial Agreements

One issue that has arisen concerns the use of pretrial agreements to obtain information concerning homosexual conduct. In what is, to our knowledge, a unique case a service member who was being prosecuted for homosexual rape offered, in exchange for a limitation on his sentence, to provide the names of others in the Armed Forces with whom he had engaged in consensual homosexual acts. The service member claimed to have information concerning an officer who had been engaging in homosexual acts with a number of young enlisted men under circumstances which also constituted fraternization. Both fraternization and the commission of the sexual acts are violations of the UCMJ. The convening authority accepted the offer of a pretrial agreement and obtained evidence concerning the officer as well as several others with whom the service member had engaged in homosexual acts. Investigations ensued, and the officer who had been identified resigned in lieu of facing a court-martial for fraternization and conduct unbecoming an officer. Other enlisted personnel were administratively discharged.

Complaints were made that this incident was a violation of the Department's policy limiting investigations of homosexual conduct. An inspector general investigation was conducted which concluded that no Department of Defense regulation or policy prohibited the convening authority from entering into a pretrial agreement and subsequently investigating those members who were alleged to have had engaged in homosexual acts.

Nonetheless, we concluded that agreeing to limit or reduce the sentence of a service member charged with serious criminal offenses in return for information concerning the consensual homosexual conduct of others is inappropriate in most cases. Pursuant to Department of Defense regulations, homosexual conduct cases are generally processed administratively and do not warrant criminal prosecution. Under our policy, we believe that it is generally inappropriate to agree to limit or reduce the sentence of a criminal defendant in order to obtain information that will not result in a court-martial. Moreover, Department of Defense regulations provide that criminal investigations of any type of adult private consensual sexual misconduct should be limited to the factual circumstances directly relevant to the specific allegations. Reducing a criminal sentence in order to obtain more allegations and thereby expand an investigation is inconsistent with the spirit of this policy.

For these reasons, we recommend that the Department issue additional guidance to make clear that pretrial agreements should generally not be used to obtain information on consensual sexual conduct. Our

view is that such agreements should not be employed unless the conduct that the accused offers to report would warrant criminal prosecution. In determining whether to accept such an agreement, the convening authority should take into account the seriousness of the crime with which the accused has been charged.

### C. Health Care Providers/Chaplains

Another matter we considered was the use of statements made by service members to military health care providers and chaplains. It has been alleged that Department of Defense doctors, psychotherapists and chaplains are required to, and do, disclose confidential communications concerning homosexual conduct to commanders.

We found that none of the Services require health care professionals to report information provided by their patients unless, in the judgment of the health care professional, it is necessary to do so in order to protect the patient or to ensure the safety or security of military personnel or the accomplishment of the military mission. Moreover, Service representatives were able to identify only one case in which a military doctor may have, without the patient's consent, reported to a commander that one of his patients had stated that he was homosexual.

It is, however, important to bear in mind that there is a fundamental distinction between the physician/patient relationship in the military context and that in the civilian context. There is currently no physician-patient privilege for communications of any kind between service members and their military doctors because military doctors must remain free to report information on military necessity grounds. Of course, the lack of a privilege does not mean that doctors must report information provided by their patients (including information concerning homosexual statements or acts) to commanders, but that they may do so if they deem it appropriate under the circumstances. Also, we note that the Department has proposed the issuance of an Executive Order that would change the Manual for Courts-Martial to recognize, for the first time, a limited psychotherapist-patient privilege in proceedings under the UCMJ, with exceptions for military necessity and other special circumstances.

A military chaplain's privilege already exists; we are aware of no case in which a military chaplain has improperly reported homosexual conduct of a service member in violation of the privilege.

### D. Recoupment/"Coming Out" Cases

We also considered the matter of the recoupment of benefits from service members who are discharged for homosexual conduct. It has been alleged that service members who acknowledged to their commanders that they were gay and were subsequently discharged were unfairly required to repay benefits that had been provided to them in connection with their service.

Several different statutes authorize recoupment when a service member does not serve the full period of active duty that he or she had agreed to as a condition of receipt of financial assistance or benefits. Pursuant to these statutes, the Services may seek to recover educational assistance (e.g., ROTC, military academy, or law or medical school tuition), bonuses (e.g., reenlistment bonuses), or special pays (e.g., for

medical officers) from service members who, for whatever reason, fail to complete obligated terms of service. These statutes authorize recoupment of funds from service members who are discharged for a wide variety of reasons, not just those processed under the homosexual conduct policy.

As a matter of policy, the Department has stated that homosexual conduct constitutes a basis for recoupment if it is punishable under the UCMJ or if an other than honorable discharge is authorized under the circumstances. Statements acknowledging homosexual orientation generally do not provide a basis for recoupment unless it is expressly determined that the service member made the statement for the purpose of seeking separation from the military. For example, there have been cases in which medical and law school students, whose education had been financed by the government in return for a commitment to military service, made statements of homosexuality shortly after graduation. In such circumstances, if it is determined that the service members who had received taxpayer funds were not acting in good faith, our policy authorizes recoupment in order to protect the public purse from abuse.

Allegations have also been made that commanders sometimes conduct unnecessary and intrusive investigations of service members who "come out" as gay and do not contest separation. In particular, it has been argued that commanders often conduct needless investigations for the purposes of seeking recoupment, rather than taking statements of homosexuality at face value.

The decision whether to initiate an investigation when a service member acknowledges his or her homosexuality and does not contest separation has generally rested with the individual commander. We concluded that, in most of these cases, little or no investigation should be conducted. As we have noted above, however, it is appropriate in some instances for a commander to undertake an investigation to determine whether recoupment of financial benefits is warranted. In other cases, commanders may properly initiate investigations of service members who "come out" because of a concern that the service member's statement was fabricated in an effort to avoid a deployment or a service obligation.

We believe that the decision to initiate an investigation in a "coming out" case inevitably depends to a large extent on the facts of the individual case. To ensure appropriate review of such cases, we recommend that the Department issue guidance specifying that prior authorization for investigations in "coming out" cases will be obtained from the Service Secretaries of the Military Departments if the investigation will involve anything other than asking questions of the service member or individuals whom the member names for the purpose of corroboration. This requirement should help ensure that such investigations will not be initiated without careful review and an appropriate basis.

## E. Enlistment Forms

There have been complaints that the Services (primarily the Coast Guard on the East Coast) continue to employ obsolete enlistment forms promulgated in 1989 that include questions on sexual orientation.

The Department had authorized the continued, temporary use of the older enlistment forms as a cost savings measure. Although recruiters were trained and instructed to mark through the questions on sexual orientation, it is possible that in some instances they neglected to do so. In August 1997, the Department

promulgated new recruiting forms, also used by the Coast Guard, that do not include questions on sexual orientation and directed the Services to discard all the old forms. Thus use of obsolete recruiting forms should no longer pose a problem.

## F. Training

It has also been alleged that the training of service members on the homosexual conduct policy is inadequate.

Each member of the Armed Forces is expressly informed of the Department's policy on homosexual conduct as part of the accession process. Moreover, each of the Services devotes substantial efforts to training their commanders and attorneys on the policy, and in particular, on the limits the policy imposes on investigations of homosexual conduct. Such training is a permanent module for judge advocate officer courses, and regular presentations are made at commander courses and the Service war colleges. It is also a part of many continuing professional military education programs for both officer and enlisted personnel.

In conjunction with the implementation of the homosexual conduct policy, the Department of Defense published training guidance to the Services to assist them in the education of personnel on the policy. The Department directed that the training focus towards commander/leader orientation programs, courses for legal and personnel staff, recruiting and accession programs and professional military education and training. The Office of the Secretary of Defense reviewed and approved the Services' training plans prior to their implementation. In April 1995, the Office of the Secretary of Defense requested Service assessments of the implementation of training programs. The Service assessments indicated full implementation of training objectives.

Notwithstanding these efforts, we found that some commanders, attorneys and investigators report that they have not received training on the homosexual conduct policy. A lack of familiarity with the policy has likely been a contributing factor in those cases in which the policy has not been fully followed. Proper training of commanders, attorneys and investigators is essential to ensure that the privacy rights of our service members are respected in accordance with the policy. We recommend that the Service Inspectors General make the training of those charged with implementing the homosexual conduct policy--commanders, attorneys and investigators--a specific item of interest for inspection.

## **CONCLUSION AND RECOMMENDATIONS**

This review was conducted by the Office of the Under Secretary of Defense for Personnel and Readiness in response to the direction of Secretary of Defense Cohen. The objective, as specified by the Secretary, was to determine how well the Department's policies are being applied and enforced.

We conclude that, while the balance that the policy strikes between the prohibition of homosexual

conduct in the military and the privacy rights of service members has posed a challenge to the Services, proper implementation of the policy has been a priority and that the policy has, for the most part, been properly applied and enforced. We also believe, however, that there are specific steps that are warranted to enhance the implementation of the policy. Two such steps have been taken in recent months?the directive on how threats against alleged homosexual in the military services are to be handled, and the elimination of obsolete enlistment forms that could have resulted in unwarranted questions.

We recommend the following additional actions:

- First, to help ensure that investigations fully comply with the policy, the Department should issue guidance specifying that consultation with higher headquarters legal officials is recommended before initiating investigations into alleged homosexual conduct.
- Second, the Department should issue additional guidance on the use of pretrial agreements to obtain information on consensual sexual conduct. Since Department of Defense regulations provide that criminal investigations of any type of adult private consensual sexual misconduct should be limited to the factual circumstances directly relevant to the specific allegations, reducing a criminal sentence in order to obtain more allegations and thereby expand an investigation is inconsistent with the spirit of this policy. Therefore, pretrial agreements should take into account the seriousness of the crime with which the service member has been charged and should generally not be employed unless the conduct at issue would warrant criminal prosecution.
- Third, in response to the concern that intrusive investigations have been conducted in "coming out" cases, our policy should provide that prior authorization for any substantial investigation in such cases should be established at the Service Secretary level in the Military Departments.
- Fourth, in reissuing the memorandum providing guidelines for investigating threats against service members based on alleged homosexuality, the Department should include language to make clear that harassment of service members based on their alleged or presumed sexual orientation is unacceptable and that service members who engage in such harassment will be held accountable.
- Finally, we recommend that the Department issue guidance directing that Service Inspectors General make the training of all those charged with implementing the homosexual conduct policy? commanders, attorneys and investigators?a specific item of interest for inspection.

As stated above, the Department's policy on homosexual conduct represents a balance of the competing interests of personal privacy and good order and discipline in our Armed Forces. The Office of the Secretary of Defense, the Military Departments and the Services must continue to monitor this policy carefully to ensure that it is implemented properly, effectively and fairly. We believe that the actions recommended above will help ensure that our policy is faithfully executed.

### **TABLE I**

**DISCHARGE FOR HOMOSEXUAL CONDUCT****FISCAL YEAR 1980-1997**

<b><u>FISCAL YEAR</u></b>	<b><u>TOTAL DISCHARGED</u></b>	<b><u>PERCENT OF END STRENGTH</u></b>	<b><u>APPROXIMATE NUMBER PER 10,000</u></b>
1980	1754	0.086%	9
1981	1817	0.088%	9
1982	1998	0.095%	10
1983	1815	0.086%	9
1984	1822	0.086%	9
1985	1660	0.078%	8
1986	1643	0.076%	8
1987	1380	0.064%	6
1988	1101	0.052%	5
1989	996	0.047%	5
1990	941	0.046%	5
1991	949	0.047%	5
1992	730	0.039%	4
1993	682	0.040%	4
1994	617	0.038%	4
1995	757	0.050%	5
1996	858	0.058%	6

1997

997

0.069%

7

**TABLE II****BASIS FOR HOMOSEXUAL CONDUCT SEPARATIONS BY GENDER****FISCAL YEAR 1997**

<b><u>STATEMENT</u></b>			<b><u>ACT/MARRIAGE</u></b>		
<b><u>MALE</u></b>	<b><u>FEMALE</u></b>	<b><u>TOTAL</u></b>	<b><u>MALE</u></b>	<b><u>FEMALE</u></b>	<b><u>TOTAL</u></b>
626	194	820 (82%)	147	30	177 (18%)

**TABLE III****SEPARATIONS IN FIRST YEAR OF SERVICE BY YEARS OF SERVICE (YOS)****FISCAL YEAR 1997**

<b><u>LESS THAN 1 YOS</u></b>	<b><u>LESS THAN 4 YOS</u></b>	<b><u>MORE THAN 4 YOS</u></b>	<b><u>TOTAL</u></b>
576 (58%)	816 (82%)	181 (18%)	997