

THE INVESTIGATION INTO ALLEGED SECURITY BREACHES BY THE LATE MERVYN JENKINS - OCTOBER 2000

Report of the Inquiry of Mr A S Blunn AO on behalf of the Inspector-General of Intelligence and Security

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Introduction

1. I am commissioned by the Inspector-General of Intelligence and Security (IGIS) to inquire into the propriety and proper conduct of the investigation of alleged breaches of security by the late Mr Jenkins. I am required to encompass the circumstances leading to the conduct of the investigation and whether the investigation was conducted in accordance with Commonwealth procedures. I am further asked to comment on any other relevant matters that come to my attention in the course of my inquiries, including matters raised by Mr Jenkins' widow.

2. The Inquiry involved scrutinising the relevant Department of Defence (Defence) and Department of Foreign Affairs and Trade (DFAT) files and records and interviewing those persons who either volunteered to provide information or who because of their close involvement with matters relevant to the Inquiry I sought to interview.

3. During the course of the Inquiry, in company with [REDACTED] of the Office of the Inspector-General of Intelligence and Security (OIGIS) I visited the Australian Embassy in Washington and there conducted a number of interviews with staff.

4. A list of all persons interviewed is at Attachment A.

5. I sought to interview Mr Andrew Peacock the Ambassador during the period covering the events which are the subject of this Inquiry. Unfortunately Mr Peacock was overseas and therefore unavailable. I do not consider his involvement, whilst undoubtedly valuable, to be critical to the Inquiry.

6. Relatively late in the Inquiry I became aware that at least one person based in Canberra had been the subject of taped interviews before the investigation moved to Washington. I sought to access any such tapes but unfortunately they cannot be found either in Defence or DFAT, each Department believing them to be in the possession of the other. The apparent loss of this material is regrettable.

7. The aim of the interviews I conducted during the Inquiry was, in addition to eliciting information, to achieve candour not collect evidence. Accordingly officers were informed of the protections provided by the IGIS Act and of the informal character of the interviews. I made it clear that I was not seeking to establish why Mr Jenkins committed suicide but rather to establish what was done by the Commonwealth and how it was done leading up to and during the investigation.

8. The death of Mr Jenkins is not an issue for the Inquiry. However the fact that Mr Jenkins did take his own life does highlight some aspects of the actions taken by the Commonwealth which were proximate to his suicide. Recognising that, I have attempted as much as possible to view these actions in the context of a situation in which a death was not involved.

9. I am grateful to all those who contributed. Their involvement often evoked painful memories and some considerable soul searching. I am particularly grateful to Mrs Sandra Jenkins who, despite her wish that the Inquiry had taken a form more akin to a royal commission, and for whom the involvement must have been an ordeal, gave the Inquiry willing and helpful cooperation.

10. As always it is easy to be wise after the event. To the extent that this Report is critical and reflects on organisations or individuals because of the advantage of hindsight I can only say that that is the almost inevitable result of an Inquiry such as this. To the greatest extent possible I have sought to focus on systemic issues rather than on the actions of individuals.

11. The other thing that must be said is that the Inquiry looked only at past events. Although the lessons drawn can in this context only be seen in relation to the future they pay no regard to what has already been done. I am aware that many of the matters commented upon

in this Report are already well in hand and a number, whilst historically relevant, have little or no relevance to the present. That too is inevitable with an Inquiry of this sort.

Findings

The Circumstances, Propriety and Proper Conduct of the Investigation

12. The allegations that Mr Jenkins had attempted to transmit classified AUSTEO material during the period February to June 1998 were serious and warranted investigation.

13. The allegations were brought to the attention of DIO in June 1998. They were not investigated and the response to them by DIO was inadequate.

14. Mr Jenkins was justified in his belief that those matters had been dealt with, a belief shared by DDDIO.

15. The allegations made in May 1999, which again put in issue the 1998 allegations and added the alleged events of January to May 1999, were serious and warranted investigation.

16. The decision of Defence and DFAT to that effect was timely and appropriate.

17. The allegations should have been referred to the Australian Security Intelligence Organisation (ASIO) in accordance with the standing government direction in relation to any "major security breach" and they should have been referred earlier than they were and certainly before any investigation was commenced.

18. ASIO was formally advised by letter from the Deputy Secretary Strategy and Intelligence in the Department of Defence dated 7th June 1999, after the investigation had commenced.

19. The question of ASIO involvement to one side, the decision to conduct the joint security investigation was appropriate.

20. The terms of reference were adequate but they can be read as directing too much emphasis into the possible disciplinary consequences of the investigation rather than on the security objectives.

21. When the decision was made in the very early stages to pursue the investigation in Washington insufficient regard was had to the possible implications and consequences of DIO involvement in the events of 1998.

22. Had the full extent of the DIO involvement in 1998 been appreciated by the Secretaries of Defence and DFAT and subsequently by the investigators it is quite possible that the investigation would have proceeded differently and with perhaps less emphasis on the disciplinary aspects.

23. There was nothing improper or contrary to Commonwealth procedures in the processes used by the investigators or in the way in which they were used.

24. The emphasis on the evidentiary requirements, seen as necessary to ensure the admissibility in any subsequent proceedings of confessions and or admissions, gave the investigation the character of a disciplinary proceeding. This impression was heightened by the use of, and confusion over the use of, confidentiality notices.

25. The implications of the involvement of DIO following the 1998 allegations were not adequately addressed during the investigation.

26. It is not clear that all the security management aspects of the issues investigated have been adequately addressed.

27. ASIO is satisfied that Mr Jenkins' actions involve no suggestion of espionage.

Other Matters

28. There are significant differences of view amongst persons interviewed during the Inquiry about the use of the AUSTEO caveat and the way in which that material can be used for intelligence purposes.

29. The protocols concerning the use of AUSTEO caveated materials should be uniform across agencies.

30. Similarly there are different understandings between agencies about the way in which classified material originated by other agencies should and can be used.

31. The protocols concerning the use of such materials should be uniform across agencies.

32. The arrangements for the management of DIO staff in Washington during 1998-1999 were ineffective.

The relationships between DIO staff in Washington during that period but particularly after June 1998 were dysfunctional.

34. The preparation and training of staff, particularly civilian staff, and accompanying persons prior to taking up duty in Washington, and the ongoing support they receive after taking up duty, were considered by a significant number of the persons interviewed during the Inquiry to be deficient.

35. There is an issue about the continued references to the Crimes Act provisions in situations where it is almost certainly not going to be applicable.

36. There is an issue about the different standards applied by departments in response to FOI requests, particularly where two or more departments are involved in an issue involving commonly held material.

RECOMMENDATIONS

37. That all manuals and instructions on investigations be reviewed to ensure that appropriate emphasis is placed on the characterisation of investigations and on the differences between different types of investigation.

38. The government directive requiring major security breaches to be reported to ASIO should be reviewed to provide guidance on what constitutes a major security breach, at what stage ASIO should be notified and some indication of the consequences of making such a report, for example, what action, if any, is to be taken by the agency after the report has been made and before advice is received from ASIO.

39. Any amended directive should be incorporated as quickly as possible into the PSM.

40. Departments and agencies should be forcefully reminded by the appropriate authority of their obligation to report major security breaches to ASIO in accordance with the provisions of the PSM.

41. The Attorney-General's Department be asked to review the provisions of the PSM with a view to emphasising the importance of properly characterising a security breach, and making the PSM the single source authority for protective security matters including identifying best practice models of the forms and processes to be used in security investigations.

42. The Attorney-General's Department, together with any other appropriate agency or agencies, be asked to review the forms and processes being used to achieve the protection and admissibility of evidence and the protection of the individual with a view to ensuring that those forms and processes are appropriate to the circumstances in which they are to be used and that as far as practical they would not, in subsequent proceedings, be open to challenge as oppressive in subsequent proceedings. Such a review should include a review of the appropriateness of the use of confidentiality notices.

43. That the issues involved in this case be reviewed by the Defence Security Branch to ensure that, from a security management view, all the relevant security issues have been adequately identified and that appropriate action has been taken.

44. That DIO review its staff management practices, including the processes by which persons are selected for overseas posts, with a view to ensuring that staff are working to directives which accurately reflect the jobs they are being asked to do, that staff have the skills and authority to match the requirements of those jobs, that roles and responsibilities are clearly defined, and that there are appropriate and continuing arrangements to support staff in their roles.

45. Against the background that a significant number of persons interviewed during the Inquiry believe that the existing arrangements are inadequate and unsatisfactory, Defence and DFAT (and any other department or agency affected who wishes to participate) review the preparation and training of non-DFAT officers (and accompanying persons) prior to them taking up a posting in Washington and review the arrangements for on-going support at the post including where appropriate the role of the Ambassador, HADS or other appropriate Washington based officers.

46. That the appropriate departments and agencies review the protocols governing the use of caveats, and particularly AUSTEO to ensure that that use, and the use of caveated material, is clear and is based on common understandings, procedures and applications.

47. That Defence and DFAT and any other relevant agency agree the criteria for the release of classified material, particularly DFAT cables.

48. That Defence, and particularly DIO in relation to Washington, review the procedures for handling and releasing classified and/or sensitive material.

49. That Defence and DFAT and any other agency involved, consider the implications of government receiving a consolidated Washington view on issues of concern which would be contributed to by the representatives of all departments and agencies at the post and agree on roles and responsibilities.

50. That the Attorney-General's Department be requested to further advise government on the review of the provisions of the Crimes Act 1914, as amended, following on the recommendations of the Gibbs Committee in 1991 but that until effective provisions are available references to the Crimes Act in investigations be confined to those cases where the reference is specifically agreed to by the AFP, the Attorney-General's Department or the Director of Public Prosecutions (DPP).

51. That investigating officers receive training in the different types of investigation that they may be involved in.

52. That the Ombudsman be encouraged to resume the role of auditing compliance with FOI legislation.

The Circumstances of the Investigation

53. The Inquiry arose out of the investigation into allegations that the Defence Intelligence Organisation Attache Washington (DIOA(W)) Mr Mervyn Jenkins, had:

“routinely and inappropriately handed to [REDACTED] and to representatives of other allied agencies Australian intelligence material of a highly sensitive nature.”

54. The allegations were made by [REDACTED] Defence [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

55. In particular it was alleged that during 1998 and 1999 Mr Jenkins had attempted to pass classified highly sensitive material, including AUSTEO material, originated by other agencies [REDACTED] and had also passed classified (but not AUSTEO) material to [REDACTED] and to [REDACTED]. It was also alleged that in 1998 Mr Jenkins had attempted to pass a copy of the classified AUSTEO [REDACTED] Report [REDACTED] to [REDACTED].

56. (paragraph fully redacted)

57. Mr Jenkins' attempts to pass this material first came to light in February or March 1998 when, as stated in his evidence to the investigators, [REDACTED] “accidentally opened an envelope” addressed by Mr Jenkins to [REDACTED] and found it to contain classified AUSTEO material. He reported his find to [REDACTED] who, as stated in his evidence, “believing it to have been a mistake” on the part of Mr Jenkins, directed [REDACTED] to destroy the material. No record of the destroyed material was kept. [REDACTED] directed [REDACTED] in future to open all mail from Mr Jenkins to ensure there was no inappropriate material transmitted. Mr Jenkins was not informed either that the material had been intercepted and destroyed or that his mail would be intercepted in future. The matter was not referred to the appropriate authority (eg DIO or HADS) at the time as would have been appropriate.

58. On a number of occasions between March and July 1998 Mr Jenkins' mail to [REDACTED] was opened and classified AUSTEO material was removed and destroyed. No record was made of the material destroyed. On at least two occasions, however, contrary to the arrangement put in place by [REDACTED] did retain the material. Some 9 items were subsequently produced to support the 1998 allegations.

59. (paragraph fully redacted)

60. (paragraph fully redacted)

61. By 9th July 1998 Mr Jenkins had become aware that his mail [REDACTED] was being intercepted. He then confronted [REDACTED] and claimed he had authority to transmit the AUSTEO material.

62. As a result of the report from [REDACTED] and apparently after an exchange of correspondence and some telephone calls between Mr Jenkins and the DDDIO, a letter was sent by the DDDIO apparently admonishing Mr Jenkins for his lack of judgement, particularly in relation to the [REDACTED] report, and directing him not to pass any more AUSTEO material, except in accordance with the appropriate procedures, but otherwise, at his judgement, to

resume transmitting appropriate material, at his judgement. The letter was hand delivered in late July 1998 by the DIOSA who was visiting Washington and who told the Inquiry that he advised Mr Jenkins that it was regarded as a serious matter and that he was confident that Mr Jenkins understood and accepted the instruction in the letter. Regrettably, despite exhaustive searches within DIO copies of this correspondence cannot be located. Drafts of two letters to Mr Jenkins from DDDIO have been reconstructed from electronic records, but, as advised by DDDIO, at least the second, and critical one, is not the same as the letter finally sent. In his evidence to the investigators Mr Jenkins acknowledged that he had received the letter and that it directed him not to pass AUSTEO material [REDACTED] but stated that he had destroyed his copies of the correspondence.

63. Contrary to their expectations, and to their dissatisfaction, neither [REDACTED] nor [REDACTED] were interviewed concerning the allegations concerning Mr Jenkins and they were not advised about any action taken, other than being informed by the DIOSA that Mr Jenkins had received a letter and instructed not to pass any more unauthorised AUSTEO material. In his evidence to the investigators [REDACTED] states that the DDDIO orally authorised [REDACTED] to continue to "vet all correspondence coming through the office" and in his statement to the Inquiry that he and [REDACTED] were "to act as gatekeepers and intercept all Mr Jenkins' outward correspondence addressed to [REDACTED]". The DDDIO has stated to the Inquiry that he has no recollection of giving such an authority but does not deny the possibility that he may have done so.

64. There is evidence to the Inquiry that after these events the already strained working relationships between Mr Jenkins and [REDACTED] worsened. Despite the fact that DIO management were aware of these already strained relations and I think could reasonably have anticipated a further deterioration no special arrangements to deal with such an eventuality appear to have been put in place.

65. As a result of continuing to open Mr Jenkins' mail [REDACTED] stated in his evidence to the investigation that in early May 1999 he discovered three AUSTEO documents in an envelope addressed by Mr Jenkins to [REDACTED]. In keeping with what he apparently still regarded as his instructions from [REDACTED] he shredded the documents without recording them and informed [REDACTED]

66. The attempted transmission of the three documents was not reported until after an incident on 13th May 1999 when [REDACTED] delivered to [REDACTED] an open safe hand bag handed to him by Mr Jenkins. The evidence indicates that there was no classified material in the bag. Suspicious that Mr Jenkins had hand delivered the bag to avoid his mail being intercepted [REDACTED] reported the occurrence to the DIOSA by email on 14th May 1999. The email was received at DIO at about midnight on Friday 14th and was not accessed until Monday 17th.

67. The report to DIO was received at the time of the arrest of a former DIO analyst, Mr Wispelaere, on espionage charges. This caused some delay in responding although a "holding" telephone call from the DIOSA to [REDACTED] was made on 19th May 1999 advising him that the DIOSA was busy but that he was working on [REDACTED] report. On 20th May 1999 the DIOSA sent an email to Mr Jenkins alerting him to the climate of concern about leaks and warning him to be careful. On 25th May 1999 [REDACTED] raised the matter with the DFAT Security Officer. The report to the DFAT Security Officer canvassed the 1998 and the 1999 events. On 28th May 1999 the Embassy reported to DFAT Canberra which responded on 31st May 1999 by raising the matter at Deputy Secretary level with Defence. This was apparently the first intimation of the allegations within Defence outside DIO.

68. The matter quickly escalated to Secretary level and by 3 June 1999 the decision was made to commission a joint investigation by two Canberra based officers, one from each of the departments. The speed of response and the composition of the investigating team reflected the seriousness with which the allegations were viewed. Of particular concern was the issue that it appeared that Mr Jenkins had not observed a previous direction not to pass AUSTEO

material.

69. When the team left to start the investigation in Washington it was known from a variety of sources that in relation to the 1998 events DIO management had been involved and that Mr Jenkins had been "spoken to" about passing AUSTEO documents. What was apparently not appreciated, at least according to the statements to the Inquiry by the investigating officers, was the nature and extent of DIO involvement.

70. The terms of reference for the investigation were:

"You are to ascertain whether there is any basis to the allegations that the DIO Attache in Washington, or any other DIO officer, provided classified Australian documents to the US or other countries that he/she was not authorised to provide. If so:

- You are to attempt to identify the documents in question.
- Were the documents marked AUSTEO or otherwise clearly marked as not releasable to the US or other countries.
- What was the source of the documents.
- What were the circumstances under which the documents were passed.
- Did the DIO Attache or any other DIO officer stand to make any personal financial or other personal gain from the transaction.

You are to advise on whether there has been any damage to Australia's national security interests.

You are to recommend any remedial or follow-up action that should be taken."

71. The DFAT officer effectively led the investigation which was conducted in accordance with the DFAT Investigations Manual but which, according to the A/S Defence Security Branch, parallel those used in fraud and disciplinary investigations in the Australian Defence Force (ADF). A copy of the DFAT Investigations Manual is attached (Attachment B).

72. In Washington the investigating team commenced work on 7th June 1999 in the absence of Mr Jenkins who was on leave following a visit to Canada. His absence was regarded by the investigators as "fortuitous" in that it gave them a week within which to conduct their investigation before seeing Mr Jenkins. Not surprisingly Mr Jenkins learned of the investigation, which despite attempts to limit knowledge of it was apparently widely known about within the Embassy. On Tuesday 8th June Mr Jenkins arrived unexpectedly at the Embassy. He was then formally advised of the investigation by the Deputy Chief of Mission (DCM) in the presence of the investigating team and after a brief discussion agreed to be formally interviewed the following Friday 11th June 1999.

73. At the request of Mr Jenkins [REDACTED] attended the interview which proceeded on very formal lines. The proceedings were recorded. Mr Jenkins was formally cautioned and advised of his rights and asked whether he was of Aboriginal or Torres Strait Islander descent in accordance with the provisions of Part 1C of the Crimes Act 1914, as amended (the Crimes Act). He was made aware of the provisions of section 70 of the Crimes Act.

74. From the material available to the Inquiry and particularly from listening to the tapes of the interview it appeared that Mr Jenkins was initially confident, having previously expressed the view to the investigators on Tuesday 8th June 1999 that the issues arose out of a misunderstanding and that it could all be cleared up. By the end of the interview he appears to have been despondent and concerned. Similar impressions are shared by the DFAT member of the investigating team. In subsequent comments to colleagues which were reported to the

Inquiry Mr Jenkins expressed the view that he was being “set up” and that they “were out to get him” (it is not clear who the “they” referred to) and that he would be “going to gaol”. His major concern was for his family but he was also concerned that he had “let people down”.

75. In assessing the genuineness of his concerns and fears it is important to record that as far as the Inquiry was able to discover Mr Jenkins was regarded as honest, intelligent, dedicated and extremely hard working. He was very frequently described as a patriot and all those interviewed were confident that he would not knowingly damage Australia’s interests. He was also described as assertive, confident (perhaps over confident) in the correctness of his views and actions and impatient to achieve results and therefore sometimes difficult to work with.

76. It is quite clear from the files and from statements made to the Inquiry by colleagues that Mr Jenkins was disillusioned and totally disenchanted with DIO management and was trying to find other employment. The Inquiry found nothing to support a rumour reported by some Washington colleagues that Mr Jenkins was actively seeking employment in the USA although there is [some] evidence that, [apparently] at an earlier stage, early in his posting, there had been the possibility of an opening with a US imagery company which was establishing a presence in Australia. According to evidence provided by Mrs Jenkins this was not pursued by Mr Jenkins.

77. On the evidence available to the Inquiry there seems no doubt that his fears concerning the way the investigation was proceeding and the nature of the allegations coupled with his general concern about his future would have been very much on his mind when he decided to commit suicide. This is supported by the notes he left.

78. Although not a focus of the Inquiry, nothing was found to substantiate any suggestion that “personal issues” were a factor, as reported in the press and, probably wrongly, attributed to Embassy officials.

79. On Sunday 13th June Mr Jenkins committed suicide.

80. The report of the investigating officers was completed following Mr Jenkins’ suicide and was formally issued on 30th June 1999. There is no evidence of any further investigation of these events outside the work of this Inquiry but that is not to say that further investigations may not be proceeding.

81. Apparently all the parties involved, but certainly and particularly ASIO, are satisfied that there were no suggestions of espionage in Mr Jenkins’ actions.

Consideration of the Issues

The Decision to Investigate

82. The investigation was commissioned at deputy secretary level with the authority of the Secretaries of Defence and Foreign Affairs and Trade.

83. Based on the information known to the deputy secretaries and the Secretaries at the time the decision that an investigation was required was made that decision was appropriate. That information indicated the probability of serious and continuing breaches of security.

84. There was considerable and understandable reaction within DFAT when it became aware of the allegations concerning as they did the events of both 1998 and 1999. The first reaction was that if there was any substance to the allegations Mr Jenkins should be immediately recalled. Whilst not suggesting that the allegations were not sufficient to warrant the concern shown it is probably significant that the allegations were reported at the time of the arrest of a former DIO analyst on espionage charges and in a climate of tension between Defence and DFAT over security issues. In the event, it was agreed that no action which might be perceived as disciplinary should be taken until the matter had been investigated. It was

agreed that the investigation should be conducted jointly.

85. In my opinion the possibility of bringing Mr Jenkins temporarily back to Australia had there been a way to achieve that result without it being interpreted as "disciplinary" action was a proposal worthy of consideration despite the imminence of his return on termination of posting. In all probability such a recall would have focussed the investigations initially in Canberra and could have made sure that the Canberra-based circumstances were known before any investigation was undertaken in Washington.

86. As already indicated, in relation to the allegations about the events in 1998, at the time the decision was taken to send the team to Washington both Defence and DFAT were generally aware that DIO had been involved and that Mr Jenkins had been told not to pass AUSTEO documents to foreigners. It seems however that they were not aware of the nature or the extent of DIO's involvement. Even on the basis of what was then known I think it is surprising that those aspects were not followed through before the team was despatched to Washington.

87. As it was the investigators arrived in Washington without, by their own statements to the Inquiry, a full understanding of the nature and consequences of the DIO involvement. Had they obtained that understanding it is, in my view, probable that the investigation would have been handled differently.

The Non Involvement of ASIO

88. Given the seriousness with which the allegations were regarded by both Defence and DFAT, and perhaps the possibility of espionage considerations arising, it would appear that, in accordance with the government directive on major security breaches, the matter should have been reported to the Australian Security Intelligence Organisation (ASIO).

89. The Commonwealth Protective Security Manual (PSM) reflects that directive by requiring that all major national security incidents that affect agencies are to be reported to ASIO.

90. Although both the government directives and the PSM are silent about the time at which the incident should be reported to ASIO, the requirement to report only makes sense if the intention is that it is done as soon as the decision has been made that the incident alleged or actual would constitute or is a serious security breach.

91. In the case of the allegation against Mr Jenkins it would appear that ASIO was not formally advised by Defence until 7th June 1999 by which time the investigation was well under way.

The Matters to be Investigated

92. The terms of reference approved for the investigation were wide enough to embrace both the 1998 and 1999 allegations. In summary the 1998 allegations significantly related to the attempts to pass to ██████████ classified AUSTEO material and the attempt to pass to ██████████ the ██████████ report. The 1999 allegations related to the three AUSTEO documents reported by ██████████ in May 1999 and the handing of the safe hand bag to ██████████. The investigation also investigated the more general allegations concerning the transmission of the classified (but not caveated) material to ██████████ and ██████████ and the failure to observe the security requirements concerning the transmission of classified material.

93. The terms of reference to the investigators were wide enough to embrace the relationships at the post, particularly those between Mr Jenkins and ██████████. Those relationships do not appear to have been considered relevant.

██████████

94. There are other aspects relevant to a security investigation such as the extent of the harm actually occasioned which do not seem to have been investigated or if they were there is no reference to them in the material passed to the Inquiry or referred to in the statements provided.

The Character and Conduct of the Investigation

95. Although the terms of reference characterise the process as a security investigation the investigation concentrated significantly on the potential disciplinary aspects of Mr Jenkins' actions and on securing evidence that would be admissible in any criminal or disciplinary proceedings.

As previously indicated the investigation was effectively led by DFAT and was conducted in accordance with DFAT procedures, which parallel ADF procedures for the investigation of fraud and disciplinary matters. DFAT consider that the procedures accord with the relevant Commonwealth legislation and guidelines as interpreted by the Courts.

The Relevant Legislation

96. The legislation cited by DFAT is the Commonwealth Crimes Act 1914, as amended, and in particular Part 1C of that Act which relates to the investigation of Commonwealth offences. The Part is generally predicated on the situation where the person under investigation has been arrested or is about to be arrested. However the critical consideration is that the person conducting the interview was intended to be a person with the power to arrest and the Part is intended to condition the powers of such a person.

97. The provisions of section 25V of Part 1C of the Crimes Act deal with the situation of a person being interviewed as a suspect (whether under arrest or not) and therefore more apparently apply to security investigations. Put simply, the section requires that for confessions and admissions to be admissible they must be tape recorded unless in the circumstances that is not possible. The evidence given to the investigators by Mr Jenkins and ██████████ was tape recorded and would therefore meet these conditions.

The Guidelines

98. The Commonwealth Fraud Investigation Standards Package (FISP) published by the Commonwealth Law Enforcement Board (CLEB) identifies a set of best practice standards for the investigation of fraud on the Commonwealth. These standards have been endorsed by the Heads of Commonwealth Law Enforcement Agencies (HOCLEA) as generally appropriate to all investigations, with the rider that agencies should use their judgement in applying them to non-fraud investigations. The FISP identifies one of the primary purposes of an investigation as being:

“the gathering of evidence which would be admissible in prosecutions”.

It also provides that interviews are, amongst other things, to have the following qualities:-

- I) The record of interview complies with...Part 1C of the Crimes Act(1914) if applicable...
- IV) if applicable, the correct caution is administered at the appropriate time... and
- V) the suspect has been told of their rights.

99. The PSM also provides guidance on security incidents and investigations. It adopts the FISP as providing best practice standards in investigation methodologies.

100. In the discussion which follows I have used as the reference the draft of the new PSM which has been widely circulated and which is, at last, about to be formally issued. However the current Manual is not significantly different in the guidance it provides.

101. In relation to security investigations the draft PSM, at paragraph 4.1 of Part G, identifies that “the main aim of a security investigation must be to establish the cause and extent of an incident that has or could have compromised the Commonwealth to:

- Find out exactly what happened
- Assess the amount of compromise or harm
- Help management to minimise the harm
- Make recommendations to minimise the possibility of recurrence”.

102. The draft PSM, paragraph 4.2 of Part G, makes it clear that the overall purpose of a security investigation is prevention and not necessarily to establish guilt or to aid the prosecution of an officer but that, if it [ie the investigation] could lead to a prosecution, effective and ethical investigative procedures need to be followed.

103. The PSM, paragraph 4.4 of Part G. also requires that agency procedures should clearly distinguish between a security investigation and remedies and investigations into incidents and matters not related to security, paragraph 4.4 of Part G.

104. The investigators, consistent with the DFAT procedures and probably having regard to their view as to the possible application of section 70 of the Crimes Act appear to have applied the processes identified in Part 1C of the Crimes Act in relation to an arrested person. The form of the caution and the other forms appear to be adopted from the ACT criminal jurisdiction which effectively applies the Commonwealth Crimes Act provisions.

105. There is perhaps little doubt about the evidentiary robustness of those forms. They are entirely appropriate to an investigation in which a person has been or is to be arrested and charged with a criminal offence. However their use in the early stages of a security investigation, the result of which in terms of any disciplinary action could only be in due course a recommendation that the matter be referred either to the AFP, the DPP or to the appropriate public service authority, could I think reasonably be described as oppressive and, given the objectives of a security investigation, for example to establish exactly what happened, even as being counter productive.

106. It is certainly true that the forms used should also clearly and appropriately protect the individual by alerting them to the gravity of the situation and in that context making them aware of their rights. The investigating officers consider that the forms used were effective for that purpose. I agree, but almost certainly those important objectives could be achieved by means which, without destroying the evidentiary value of any statements, could be less oppressive and more appropriate to the fundamental objective of a security investigation. The individual circumstances, including whether it is primarily a security or a disciplinary investigation and the stage of the investigation, should in my opinion determine the processes and the forms to be used.

107. These are matters on which the advice of the Attorney-General's portfolio should be sought.

108. However, in my opinion there was nothing improper or contrary to Commonwealth procedure about the processes used or the way in which they were applied during the investigation.

The Decision Not to Tell Mr Jenkins

109. As previously indicated Mr Jenkins was on leave when the investigation commenced and was not officially informed of the investigation until, having been told by some person or persons, he returned unexpectedly to the Embassy on Tuesday 8th June. The decision not to inform him was left to the post at the discretion of the investigators.

110. It was, in my judgement, inevitable that Mr Jenkins would be told about the investigation by one of his colleagues.

111. I am advised that it is DFAT practice that a person against whom allegations have been made which are under investigation "is only informed when necessary". Statements made during the course of the Inquiry indicated that the decision as to when to inform a person under investigation is made on a case by case basis and that Mr Jenkins' "fortuitous" absence made it possible to avoid making a decision whether to inform him or not.

112. There are certainly circumstances in which it is desirable and even necessary to commence an investigation without informing the person under investigation. For example, to protect evidence or to avoid the risk of witnesses being influenced. However although those possibilities are raised on the Defence Security Branch file, they do not seem to have been the reasons for not telling Mr Jenkins. Even if those factors had been serious considerations, and I don't think they were, there were other obvious and effective ways of achieving appropriate protections, for example by suspending Mr Jenkins on pay or granting leave, as had indeed been intended, if that was his preference.

113. On the basis of what is now known and what could, and perhaps should, have been known before the investigation in Washington commenced there appears to be no good reason why Mr Jenkins should not have been informed of the situation. The process that was followed could only have heightened his, and others' perception that he was being "set up".

The Use of Confidentiality Notices

114. In their statements to the Inquiry a number of persons expressed concern about the confidentiality notices they had been asked to sign after providing statements to the investigation. One of the issues was the selectivity of the material chosen from the information and views they had provided to the investigation and which was covered by the notice. There was also some confusion about what was permitted by the notice and what was not. Some persons believed they could speak only to Mr Jenkins and some believed Mr Jenkins was the only person they could not speak to about the matter. Some correctly, in my opinion, understood they should speak to no one but in some cases that was simply not possible, for example, in the case of the DIOSA or the DCM.

115. There needs to be at least a clear understanding on the part of the signatory of what such notices mean and why they are required before they are signed. Even more fundamentally I consider that their use should be reconsidered with a view to restricting it to situations where they really are required. In my opinion it is doubtful that they were needed and their use certainly added to the sense of drama and to the sense of isolation of Mr Jenkins.

116. Again this is a matter on which the opinion of the Attorney-General's Department might be sought.

117. However I do not consider the decision to commence the investigation in the absence of Mr Jenkins, or the use of the confidentiality notices, to have been improper or in breach of Commonwealth procedures.

OTHER RELEVANT ISSUES

118. There are a number of issues that warrant further comment. Some are elaborations on matters previously considered but which are, in my view, important enough to be elaborated upon. Some are relevant matters not otherwise considered which have come to my attention. A number are issues raised by Mrs Jenkins which I agree are relevant to the Inquiry. I have not sought to separately identify those raised by Mrs Jenkins.

119. I have grouped these matters under the following headings:

- the response to the allegations
- the management of DIO staff in Washington;
- the action taken within DIO in relation to the "1998 allegations";
- the level of awareness of those actions in DFAT and Defence when the joint investigating team was sent to Washington;
- ambiguities concerning the AUSTEO caveat;
- the characterisation of investigations;
- the unresolved problems with the Crimes Act;
- the selection and preparation of Defence officers to serve at overseas posts; and
- the aftermath.

The Response to the Allegations

120. I think it is important to place on this record Mr Jenkins' response to the allegations and to record that I believe it was a significant response in terms of any contemplated criminal or disciplinary proceedings [REDACTED]

121. In relation to the 1998 allegations concerning the attempts to pass AUSTEO material to Mr Jenkins claimed that he had authority to pass AUSTEO material from the then Director-General of National Assessments (DGONA). In his view that authority was given during a meeting in February 1998 at which DGONA, [REDACTED], had, according to Mr Jenkins, "approved the sharing of AUSTEO material on occasions.
[REDACTED]

122. In a statement to the Inquiry the then DGONA recalls the meeting and that, in the context of concerns [REDACTED] that some information was not getting through [REDACTED], the issue of caveated material arose in discussion. He recalls that he laid some emphasis on the fact that it was the job of a liaison officer to liaise and that they had to use their brains and their judgement if Australia was to get full value from its investment in them. The DGONA's view is that it was clear that the whole discussion proceeded from a start point that one did not release whole documents but that there were several ways to release information including releasing the relevant parts of a document where that was judged appropriate in the interests of the partnership. The DGONA states that he did not and indeed could not provide any general authority to release AUSTEO material.

123. The recollections of attendees as to what was said at the meeting differ. All except one of those interviewed recall the discussion on AUSTEO material. One view is that the DGONA was referring only to a particular [REDACTED] situation. However there is support for Mr Jenkins' view as to what was said. With the apparent exception of Mr Jenkins all attendees agreed that they would not have acted on the basis of what the DGONA had said without further authorisation. Mr Jenkins who had for some time been attempting to get agreement to provide the US with more information stated that he accepted and acted upon what he believed to be the authority given by DGONA.

124. The investigators considered that Mr Jenkins' belief that he acted with the authority of the DGONA was sufficient to negate any proposed action in relation to some of the AUSTEO material. However they considered that Mr Jenkins' belief was not a defence in relation to the bulk of the material. That was because the DDDIO and the DIOSA had stated to them that

they recalled Mr Jenkins claiming that he had specific authority to release that material from an officer in one organisation who had subsequently denied to the investigators that he had given any such authority. In the view of the investigators that “false statement” indicated that Mr Jenkins knew he was not authorised to pass the material. Accordingly they recommended that there is “sufficient evidence to pass to the DPP for consideration of prosecution.”

125. On the evidence available to the Inquiry I consider the aspect of what Mr Jenkins had claimed required more testing before reaching any conclusion that he had made a “false statement” which indicated that he knew he was not authorised. Regrettably the investigators were prevented from pursuing that line of investigation by Mr Jenkins’ death.

126. Mr Jenkins also raised the issue that these matters had been dealt with by DDDIO in 1998 but there is no evidence that the investigators considered the implications of that other than in connection with the [REDACTED] Report.

127. In relation to the [REDACTED] Report the investigators considered there was “sufficient evidence to place before the DPP for their consideration”. In forming that opinion they considered Mr Jenkins’ view that the matter had been dealt with in 1998 but decided that the “absence of any documentation from DIO precluded a judgement on this” despite the unambiguous and uncontested evidence to support Mr Jenkins’ view.

128. This is in contrast to the finding that Mr Jenkins attempted to pass at least three unspecified Secret AUSTEO DFAT (cables) which were intercepted and destroyed without record by [REDACTED] and in respect of which there is only the oral evidence of [REDACTED].

129. The investigation also found that Mr Jenkins had passed classified but non-AUSTEO material to [REDACTED] and [REDACTED] but, having regard to the view by DDDIO that he was entitled to do so, recommended no disciplinary action. No action against Mr Jenkins was recommended in relation to the improper handling of sensitive material or the handling of the unlocked safe hand bag to a non Australian citizen, although the observation was made that “this is a(n) additional matter that may have warranted the issue of a breach”. Given that there is no evidence that the bag contained any sensitive material it is not clear to me what would have constituted a breach.

130. Other than in relation to the question of authority the 1998 allegations were not in contention. Mr Jenkins made no effort to deny that at the time he was attempting to pass classified AUSTEO material to [REDACTED] or that he attempted to pass the [REDACTED] Report to [REDACTED]. As to the post 1998 allegations Mr Jenkins denied only that he had attempted to pass AUSTEO material after being instructed not to and could offer no insight into how the three cables might have got in the envelopes, if, from his point of view, they were there.

131. Thus, apart from the disputed allegations concerning attempts to transmit AUSTEO material in 1999, the only issues to be tested related to justification and that, as previously indicated, turned on the authority Mr Jenkins believed he got from DGONA, the authority inherent in his position, the effect of the actions of DIO in relation to the 1998 allegations, and the seriousness of the allegations concerning breaches of the guidelines for handling classified material and the matter of the safe hand bag. The disputed allegations would certainly have required significant further investigation. In the event they were not pursued but it is far from clear how any investigation into those specific allegations could have been pursued.

132. (paragraph fully redacted)

The Management of DIO Staff in Washington

133. Early in the Inquiry it was obvious there were serious unresolved problems in the working relationships between Mr Jenkins and [REDACTED]. Descriptions of it by persons at the post and within DIO range from "poisonous" and "hopeless" to dysfunctional".

[REDACTED]. This problem was reflected in, and compounded by, the out of date and inadequate directives which described the roles and responsibilities of each office.

(rest of paragraph redacted)

134. DIO senior management were aware of the problems but effectively nothing was done to resolve the issue. There is some evidence that both Mr Jenkins and the [REDACTED] were encouraged in their different views of their relationship by DIO management.

135. The extent to which this reflected an issue of the perceived differences between military and civilian roles is a matter for conjecture but it seems likely that it was a factor. This may be an issue that needs to be factored into team selection under the proposed future arrangements.

136. A major review involving [REDACTED] the HADS Review, has been underway since 1997.

(rest of paragraph redacted)

137. The delays and uncertainties surrounding the HADS review exacerbated the problem of the working relationship. Whilst those delays may have been unavoidable it would have been possible in the interim to clarify the working relationship, or alternatively to have replaced one or other of the officers. As previously indicated it is surprising that some special arrangements were not implemented to at least effectively moratorium [REDACTED] of June 1998. It would have been reasonable at least in my opinion to have expected a marked deterioration in the relationship following those events. I think it could also have reasonably been anticipated that the situation [REDACTED] was likely to need some attention. In my view, after the events of June 1998 the relationship had reached the point of dysfunctionality where decisive action was required.

138. In the event nothing was done and the situation was allowed to fester. One result was to confirm for Mr Jenkins his increasingly unflattering view of the competence of DIO management and reinforce his determination not to return to DIO at the end of his posting. His view about the management of DIO was influenced by the criticisms which he stated he heard expressed by very senior visiting officers, both civilian and service, what he saw as DIO's narrowness of vision, its inability to compete in what he saw as a competitive environment, and his view of its lack of vision and purpose as evidenced by what he saw as its inability to understand .

139. It would be easy to dismiss Mr Jenkins' views, which were relayed to, but not shared by, DDIO and other senior management, as typical of an outposted officer removed from Canberra and therefore from the big picture view of the organisation: but that would seem to miss the point that it is the responsibility of management to address issues, including issues of perception, not dismiss them. It would also miss the point that at least some of [REDACTED] Mr Jenkins' views were shared both at the post and apparently in Canberra.

140. It is also pertinent that DIO's management of Mr Jenkins contrasts with the supportive management techniques employed by some other intelligence agencies with officers in Washington.

141. It is inevitable and proper that officers at overseas posts will be significantly managed by their parent organisation. If that is to be done properly it requires the organisation to accept the significant responsibility for that function and exercise it effectively. The DIO

concept of an “advocate” for overseas officers is one good way of meeting that responsibility but fails, and therefore loses its credibility, if, as is the current situation within DIO, because of staff turnover, or resource pressures, it is not properly staffed. There is no one “right” answer and the response will properly depend on the capacity and needs of each organisation but the need was clearly and forcefully identified by several of the defence officers interviewed at the post whose views were echoed by some of the Canberra-based officers interviewed during the Inquiry.

142. Notwithstanding the relationship with Canberra there is, in the perception of the majority if not all the officers interviewed in Washington, the need for someone at the post who has a clear responsibility for the well being of defence staff. This is more pronounced in relation to civilian staff who usually lack the well-established support mechanisms available and familiar to service personnel. I am advised that HADS has that role. That was not clearly recognised by Defence intelligence staff in Washington. [REDACTED]

[REDACTED]

It would also appear that HADS was not involved by DIO or DIO staff in Washington in the events of 1998 or 1999. This could suggest different perceptions about the role of HADS even within DIO.

143. A related issue is the view, which appears to be being encouraged at the Embassy, that Defence officers at the post are part of the collective Australian presence in Washington and contribute to the “Washington assessment” to government on issues, as distinct from simply reporting to their parent organisation. Unless properly agreed (or disagreed), understood and managed both from Canberra and at the post, the development of this view has the potential for significant problems for the officers involved.

144. Most officers interviewed commented on the apparent failure of their parent organisations to understand or recognise the difficulties of working and living in and around Washington. The popular view is that Washington is regarded in Canberra as, or at least treated as if it were, culturally comparable to Australia, whereas in reality it is, language apart, a very foreign experience with quite special problems.

The Action Taken by DIO in relation to the “1998 allegations”

145. Part of the problem in trying to reconstruct the events leading up to the investigation of the allegations against Mr Jenkins is the lack of detail surrounding what was done by DIO about the “1998 allegations”.

146. As previously discussed, one of the disturbing aspects is the inability to locate any of the correspondence which passed between Mr Jenkins and DIO at the time. It would appear that there were at least four pieces of correspondence between Mr Jenkins and DDDIO. Drafts of two letters from DDDIO have been extracted from back-up electronic records. Despite an earlier view that the drafts were essentially the same as those addressed to Mr Jenkins in 1998 there is evidence from DDDIO that at least the second letter was different to the draft. That letter in final form was hand delivered in Washington to Mr Jenkins by the DIOSA. Mr Jenkins in his statement to the investigators acknowledged that he received at least the letter from DDDIO that directed him not to pass any further AUSTEO material. Mr Jenkins stated that he destroyed this letter.

147. That there was no investigation of the 1998 allegations is confirmed in statements to the Inquiry by both the DDDIO and the DIOSA. The letter from the DDDIO was, according to his statement to the Inquiry, written on the basis of his appreciation of the allegations by [REDACTED]. The DDDIO informed me that he believes that he was aware of Mr Jenkins' claim that he had authority from the DGONA but cannot recall how he knew. There is no record of the information and it is not referred to in the draft letter.

Despite some suggestions by the DDDIO that the DIOSA would somehow confirm the appropriateness of the letter before it was handed over to Mr Jenkins, according to the DIOSA that did not happen. Contrary to their expectations neither [REDACTED] nor [REDACTED] were interviewed by the DIOSA but they were advised by him to the effect that Mr Jenkins had been written to and would not be passing any more AUSTEO material. The DIOSA states that he did emphasize to Mr Jenkins the seriousness with which the matter was regarded in Canberra and is satisfied that Mr Jenkins understood that he should not pass AUSTEO material without the appropriate clearances and approvals. That understanding was confirmed by Mr Jenkins in his statement to the investigation.

148. Notwithstanding the above [REDACTED] states that [REDACTED] and he separately received oral instructions from the DDDIO to continue to intercept Mr Jenkins' mail. The DDDIO states that he has no recollection of giving such an instruction but does not discount the possibility that he did so.

149. The Defence Security Branch was not advised of the "1998 allegations" or the "1999 allegations" until the matter was formally raised with Defence by DFAT. Nor was it informed of the action taken by DIO. The then Director, Defence Intelligence Organisation (DDIO) states that he was not informed nor does the Deputy Secretary Strategy and Intelligence have any recollection of being informed. The then DDIO's statement to the Inquiry that he would not have expected to be informed suggests a surprisingly hands-off management style in an organisation which, on the evidence of the files, was facing some management problems.

150. Given that the allegations identified DFAT as the source of some of the AUSTEO material which was intercepted (and retained) and this was apparently reported to DIO by [REDACTED], it would have been appropriate for DFAT to have been informed.

151. It is perhaps relevant in this context that there is no hard evidence that any AUSTEO material other than the classified [REDACTED] released by [REDACTED] was actually compromised. However that very issue was not the subject of a security investigation as prescribed by the PSM. Nor, as previously identified at paragraph 91, was early consideration apparently given to reporting the allegations to ASIO as at least impliedly required by the government directions where there is a major breach of security.

152. What constitutes a serious breach of security obviously involves a question of judgement. The DDDIO in his statement to the Inquiry states that he believed at the time, and still believes, that his assessment that the allegations did not raise a serious breach of security and did not require investigation was correct. Given the nature of the allegations, unless the view is taken that in the circumstances passing AUSTEO material could not constitute a serious breach of security, I find it difficult to accept that assessment. Indeed, at least the draft of the letter to Mr Jenkins which was intended by the DDDIO to end the matter admonished Mr Jenkins for a "serious" lack of judgement in relation to [REDACTED]. There is also the statement to Mr Jenkins by the DIOSA that the matter was regarded as "serious" in Canberra. There can, of course, be a serious lack of judgement without it involving a serious breach of security.

153. However, even if the matter was not regarded as serious, that does not explain the failure to maintain appropriate records. The significance of that failure is underscored by the recommendation of the investigating team that Mr Jenkins' actions in relation to the transmission [REDACTED] be referred to the DPP for possible criminal prosecution because the absence of any documentation from DIO precluded a judgement on Mr Jenkins' claim that the matter had been dealt with in 1998. Whilst in my opinion that recommendation was inappropriate and unsupportable the issue remains that, because of the unavailability of documentation, the investigators were able to make that recommendation.

154. Apart from any other consequences I believe the actions taken in DIO in dealing with the allegations concerning the events in 1998 almost certainly of themselves precluded any

possibility of a successful criminal prosecution in relation to those events. However, it must be said that on the facts there would appear to have been little prospect of a successful prosecution, nor of the DPP launching a prosecution, even assuming that the Commonwealth had been prepared to disclose and support the allegations in open court. For similar reasons there would appear to have been significant problems facing serious public service "disciplinary" charges in relation to the 1998 allegations. It is in my opinion tragic that, in the absence of appropriate professional advice, Mr Jenkins believed, as he said according to a number of persons, including Mrs Jenkins, who made statements to the Inquiry, that he was going to be sent to gaol .

155. There is also to my mind an associated issue concerning the relationship between the two departments and the standards to be applied to the conduct of officers serving in overseas DFAT posts. I think there can be no argument with the DFAT view that it is responsible for security at its posts and that it also has responsibility where relations with foreign governments is in issue. That said, it is then important that non-DFAT officers know the standards and procedures that will apply to them. There is some evidence to the Inquiry that Defence officers at the Embassy were not conversant or comfortable with the DFAT procedures applied in the investigation of the allegations against Mr Jenkins, whereas I am advised that DFAT officers would have been aware of these matters because of the training they receive from the time they join the department. It is, in my opinion, important that the two departments (and any other departments that might be affected) reach a clear understanding concerning the standards and processes that will apply and who will be responsible and accountable for them and ensure that their officers understand the rules.

Ambiguities Concerning the Use and Significance of the AUSTEO Caveat

156. There can be no confusion that AUSTEO stands for "AUSTRALIAN EYES ONLY". That notwithstanding there do seem to be genuine differences of view about the latitude that officers have in dealing with the information contained in AUSTEO material but also in allowing access to AUSTEO material and finally in providing the material itself.

157. The view expressed by the Secretary, DFAT, and apparently rigidly enforced across the Department, is that under no circumstances can material bearing the caveat AUSTEO be supplied to foreign nationals. That applies even where foreign nationals are working in and with Australian departments in positions which would normally involve access to AUSTEO material.

158. Having regard to the views expressed by Dr Calvert I think it is worth noting that there are procedures that allow for the decision that material is to be seen by Australian eyes only to be varied to admit access by foreign nationals either generally or by designated class. One consequence would be that the material is then no longer AUSTEO and any indication that it was should be removed or clearly modified.

159. There are however more liberal views about dealing with information bearing the AUSTEO caveat. [REDACTED]

[REDACTED]. However, even the most liberal view did not extend to condoning handing over possession of AUSTEO material without the appropriate approval. [REDACTED].

160. A commonly held view amongst the people interviewed is that AUSTEO is often applied to material when it is not warranted. [REDACTED]

[REDACTED]. Leaving to one side the issue of how a judgement about overuse can be arrived at, the fact that there is a widespread perception that there is overuse is in itself a problem. Another

issue identified to the Inquiry related to the use of different and sometimes unique indicators by different departments. There would appear to be a case for reviewing the instruction protocols about the use of caveats and AUSTEO in particular and ensuring as far as possible a common approach to nomenclature and use.

161. The issue of foreign officers working in departments and agencies in positions in which the occupant would normally require access to and use of AUSTEO material also appears to be an issue where different attitudes and practices prevail. Again, such differences can lead to confusion about the significance of the caveat.

162. Attempting to distinguish different categories and standards within the caveat would not appear to be sensible. Indeed the proliferation of different conditions attaching to the use of material is already a matter of concern for many of the people interviewed. Simplification and reinforcement of the systems for approvals to access or release the material may be an option. On the evidence provided to the inquiry a rigidly enforced centralised approach is unlikely to be effective in the long run and may not even be in Australia's best interests.

The Characterisation of Investigations

163. One of the issues referred to earlier is the differences between the objectives and processes involved in different types of investigations and perhaps between different stages of investigations. Distinctions are drawn in the existing guidelines between processes applicable to security investigations and investigations into fraud or misconduct.

164. In my opinion the Jenkins case underlines the need to even more clearly distinguish between security and other types of investigation. As indicated by the guidelines the objectives of security investigations are broadly aimed at finding out what happened and presumably what damage has occurred, what remediation may be required and how management can be assisted to avoid any recurrence. It is not principally directed at establishing guilt or innocence although care is to be taken to avoid contaminating any evidence of wrongdoing but that is incidental. I think disciplinary investigations are generally understood to have as one of their primary objectives the establishment of evidence of wrongdoing or misconduct. Not infrequently they follow and build on other investigations.

165. In this investigation the principal focus appears to have been on the perceived disciplinary aspects of Mr Jenkins' actions and the evidence required to establish whether there was a case against him. In part the investigation was probably influenced, perhaps unconsciously, by the climate created by the arrest of a DIO analyst on espionage charges and the general concern about leaks and a view about who was responsible for them. The prevailing attitude was significantly focussed on catching culprits and punishing them. On the basis of the information available Mr Jenkins could have been seen as a useful exemplar of personal, and perhaps institutional, accountability.

166. It is likely that time spent on investigating the matter from a non-disciplinary point of view would have established the almost certain lack of a firm basis for the investigation of criminal and even perhaps disciplinary charges.

167. It would seem appropriate to consider a review of the current guidelines on investigations with a view to reinforcing APS-wide guidance emphasising that the different objectives require different investigative forms and processes and that the first task in any investigation is to properly characterise the investigation. As previously identified, Part 4 of the draft PSM in relation to security investigations does require that agency procedures should clearly distinguish between security investigations and investigations into matters not related to security. However it does not proceed to suggest how the form and processes used might differ or indeed what forms and processes would be appropriate. The processes of the FISP which it incorporates, do not in my view provide appropriate guidance to the circumstances of a security investigation. Such a review would be appropriately conducted by PM&C, Attorney-General's Department or perhaps the Public Service and Merit Protection Commission (PSMPC) and would necessarily involve a significant number of departments and agencies. One objective would be to establish the PSM as the authority on the forms, processes and

procedures for security investigations. An aspect that might be considered would be to reinforce the possible case by case involvement of the Attorney-General's Department to advise on and assist with the forms and processes used in investigations to ensure the appropriate balance between the interests of the Commonwealth and the individual. On balance I recommend that any such review be conducted by the Attorney-General's Department.

168. Whatever is done in this area would need to be considered by Defence as to its possible application to the ADF.

The Unresolved Problems with the Commonwealth Crimes Act

169. There is little that can be said about the inadequacy of the provisions of the Crimes Act dealing with the unauthorised disclosure of information gained in the course of Commonwealth employment that was not said in 1991 by the Gibbs Committee in the Review of Commonwealth Criminal Law. Little has changed since the Committee reported.

170. The threat of prosecution under the Crimes Act can have a significant "in terrorem" effect. However the reality is that any action against an officer is unlikely to succeed given the evidentiary problems of proving the elements of the offence, for example the duty not to disclose.

171. In the case of Mr Jenkins a significant issue was his stated belief that he was authorised to release the material other than ██████████, which was the subject of the 1998 allegations. In relation to ██████████ he stated that he believed as the principal author he could release ██████████.

172. In those circumstances I think the reference to the Crimes Act was inappropriate and as stated previously could be seen to be oppressive. I accept however that that was not the intention.

173. Any argument that Mr Jenkins' belief that he had authority was not known to the investigation seems to me to support the need for an investigation to establish the circumstances before raising the possibility of prosecution under the Crimes Act and the drama of formal caution etc.

174. In this case Mr Jenkins was made aware of the provisions of section 70 of the Crimes Act (but not in the context of section 7 which creates the offence of "attempting" to do that what is made an offence by another section of the Act) and there seems little doubt on the basis of the statements made to the Inquiry that he believed by the end of the interview process that he would be jailed – according to a statement made to the Inquiry by Mrs Jenkins he referred in a conversation with her to a sentence of between five to seven years. A major concern for him was how his family would cope.

175. To the extent that the processes used in the investigation were modelled on Part 1C of the Crimes Act they reflected provisions intended to be applied by officers having a power of arrest in a situation where the person addressed has either been arrested or is about to be arrested. To that extent their appropriateness to a security investigation is in my view questionable.

They are more appropriate for an investigation undertaken for the specific purpose of prosecution but even then it may be more appropriate to use processes more in keeping with the nature and stage of the investigation. This issue and the practicability of designing such processes would seem to be properly matters for the Attorney-General's portfolio.

176. In the event that it is decided to continue to refer to the Crimes Act to emphasise the seriousness of any proceedings there would appear to be a need at the same time to ensure that the provisions are at least workable and for the processes to be adapted to the role and powers of the investigators and the nature of the investigation. In the interim I propose that the

Crimes Act not be invoked in investigations, other than by the AFP, without the specific approval of the Attorney-General's Department or the Director of Public Prosecutions.

The Selection and Preparation of Officers.

177. Reference has already been made to the dysfunctionality of the relationship between Mr Jenkins on the one hand and [REDACTED] and [REDACTED] on the other in the section dealing with the management of staff. An issue is the extent to which that was a product of the working environment and the management of that environment both at the post and by DIO or how much it reflected on the initial selection of the individuals.

178. As previously indicated most of the problems appear to stem from the management of the offices and the officers by the DIO. Some of those problems may have been ameliorated by a clearer appreciation of responsibility for day to day management and 'pastoral care' at the post, but they could not have been resolved by the post.

179. That said it is open to question whether the separate and apparently unconnected arrangements for choosing the individuals to form the DIO team in Washington is optimal.

180. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Such arrangements would appear to do little to assist in the development of a compatible and effective team unless the selection process is properly informed of the make-up of the other members of that team and the requirements of the job. There is no evidence that the former was a consideration and as previously indicated the job descriptions were out of date and inaccurate. [REDACTED]
[REDACTED].

181. The choice of Mr Jenkins for the Attache position appears to have been made without any significant selection process being followed. Indeed it was suggested to the Inquiry that the appointment was seen as a reward for past service. There is documentary evidence of some process but DDDIO, the principal interviewer, suggested that it was largely a formality. It must be questioned whether, if it was a formality, that was appropriate, given the critical importance of the job. However that should not be taken to suggest that Mr Jenkins was not an appropriate appointment and indeed there is evidence that it would have been difficult to find a more appropriately qualified officer. The delay in identifying a successor to Mr Jenkins also raises doubts about the effectiveness of management in this area. It was certainly a matter of concern to Mr Jenkins and, as identified previously, was one of his reasons for disillusionment with DIO management.

182. From statements made during the course of the Inquiry it became obvious that there was also an issue about the preparation of officers for service in Washington. As previously mentioned there is a general perception amongst the officers interviewed that the problems of working and living in Washington were underestimated by departments and agencies in Canberra and that officers posted to Washington should be better prepared. The question of support for officers both at the post but perhaps more particularly by the parent organisation was seen as a major issue, in part, of course, as a result of the trauma of Mr Jenkins' suicide, but not entirely so.

183. Obviously these are significant issues which relate amongst other things to the management of selection and postings and which have wide ramifications both for Defence and DFAT and which almost certainly are not easily resolved and may not be capable of

resolution. However I think they are important and warrant some special consideration.

The Aftermath

184. There are issues concerning the aftermath of Mr Jenkins' suicide that warrant comment.

185. Some interesting work has been done by the US Air Force (USAF) into suicide profiles and the best way to handle situations which tend to fit those profiles. The work done also identifies ways of handling the impact of a suicide or attempted suicide. Although hopefully the incidence of suicide will not reach the US Service numbers it would seem worthwhile to learn from the US experience which could also have wider applications.

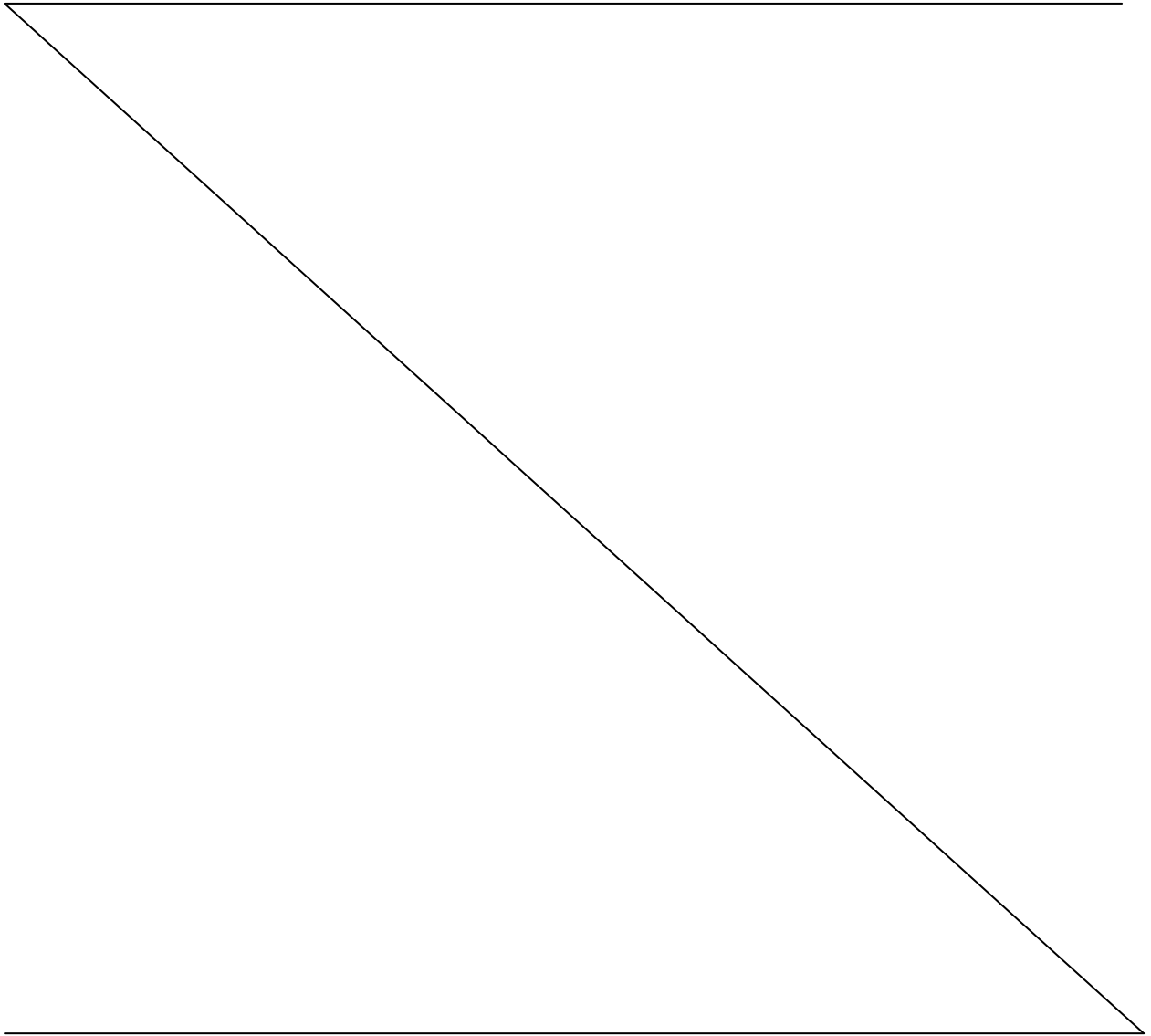
186. A number of the persons interviewed both in Canberra and in Washington expressed concern about the lack of clear leadership immediately after Mr Jenkins' death. In particular there was a sense that the official Defence presence was not sufficiently visible. The efforts of the Ambassador were by contrast much appreciated. This is one aspect perhaps of the issue of the role of HADS in particular in relation to the civilian defence personnel.

187. In the matter of the interests of Mrs Jenkins it does seem that the processing of Freedom of Information (FOI) requests was seen as unnecessarily complicated. The difference in the position adopted by Defence and DFAT was remarked upon and did expose the Commonwealth and particularly DFAT to criticism. It is questionable whether the protection sought for at least some of the material was appropriate. In the event the decision by Defence to release most of it resolved the issue.

188. The whole issue of the release of information needs to be seen in the light of recent criticisms by the Ombudsman in his recent report on FOI (Need to Know: 1999) to the effect that Commonwealth departments need to be reminded of the objectives of the freedom of information legislation and the need to keep under review their attitudes and practices. That need may be the greater in a climate when concern about leaks could be seen, wrongly in my view, to warrant a more restricted approach to FOI applications.

189. The recommendations of the Australian Law Reform Commission and Administrative Review Council in their joint 1996 report "Open Government – a Review of the Federal Freedom of Information Act" have apparently not yet been addressed by government. In the absence of any decision by government I propose that the Ombudsman be encouraged to resume the role of auditing compliance with FOI legislation.

Persons interviewed as part of the Inquiry



See file

GLOSSARY OF ACRONYMS

[REDACTED]	[REDACTED]
ADF	Australian Defence Force
[REDACTED]	[REDACTED]
AFP	Australian Federal Police
ASIO	Australian Security Intelligence Organisation
AUSTEO	Australian Eyes Only
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
CLEB	Commonwealth Law Enforcement Board
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
DCM	Deputy Chief of Mission
DDIO	Director, Defence Intelligence Organisation
DDDIO	Deputy Director, Defence Intelligence Organisation
DFAT	Department of Foreign Affairs and Trade

GLOSSARY OF ACRONYMS

DGONA	Director-General, Office of National Assessments
DIO	Defence Intelligence Organisation
DIOA (W)	Defence Intelligence Organisation Attache (Washington)
DIOSA	Defence Intelligence Organisation Security Adviser
DPP	Director of Public Prosecutions
FISP	Fraud Investigation Standards Package
FOI	Freedom of Information
HADS (W)	Head of Australian Defence Staff (Washington)
HOCLEA	Heads of Commonwealth Law Enforcement Agencies
IGIS	Inspector-General of Intelligence and Security
OIGIS	Office of the Inspector-General of Intelligence and Security
PM&C	Department of the Prime Minister and Cabinet
PSM	Protective Security Manual
PSMPC	Public Service and Merit Protection Commission
RAAF	Royal Australian Air Force
USAF	United States Air Force

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