

**SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES
COMMITTEE**

**PART II – INCIDENTS ONBOARD HMAS *SUCCESS* BETWEEN MARCH AND
MAY 2009 AND SUBSEQUENT EVENTS**

GOVERNMENT RESPONSE

December 2011

RESPONSES TO RECOMMENDATIONS

Recommendation 1

paragraph 7.85

The Committee recommends that:

- IGADF examine the inquiry processes from the initiation of the E&D health check through to the legal advice (and its consequences) provided by Colonel Griffin and Defence Legal in order to identify real or potential systemic failures in the inquiry processes and consider the practical measures needed to minimise the risk of future mistakes;
- concurrently, the Fairness and Resolution Branch examine independently the same processes in order to identify real or potential systemic failures in the inquiry processes and consider the practical measures needed that would minimise the risk of future mistakes;
- at the same time, Defence Legal examine the legal advice, in respect of HMAS *Success*, provided by legal officers to the senior Navy officers at that time, especially on initiating inquiries and procedural fairness, with a view to identifying any weaknesses, inconsistencies or errors in, and the overall quality of, this advice;
- having carried out their respective examinations, the IGADF, the Fairness and Resolution Branch and Defence Legal jointly consider their findings and together identify what needs to be done to rectify problems; and
- by 1 December 2011, provide the committee with a report on their findings, the lessons to be learnt and their joint recommendations.

The Committee requests that the IGADF, the Fairness and Resolution Branch and Defence Legal keep a written record of the notes taken during their separate examinations and also a record of the discussions held between them when producing their joint findings. The purpose in having these notes retained, is to ensure that they would be available to the Committee should it resolve to consider matters further.

The Committee notes that for a number of years it has expressed concerns about the standard of investigations undertaken by the Australian Defence Force Investigative Service (ADFIS). The most recent revelation about significant deficiencies in this investigative service is most disturbing. The Committee suggests to ADFIS that the shortcomings identified in the investigations that took place relating to incidents onboard HMAS *Success* in 2009 should not be treated as an 'aberration'. In the Committee's view, they should be considered in light of the committee's 2005 findings and ADFIS' continuing attempts to improve its investigations. It should be noted that the committee found in 2005 that the ADF had 'proven itself manifestly incapable of adequately performing its investigatory function'.

The Provost Marshal, through the Minister for Defence, has been providing the Senate Foreign Affairs, Defence and Trade Legislation Committee with periodic updates on the progress of reforms to the investigative service.

Response - Agreed In Part

The Government agrees with the intent of Recommendation 1, but there are practical considerations that apply to its implementation.

With specific reference to the sub-recommendation regarding IGADF, Mr Gyles is scheduled to deliver Part 3 of the HMAS *Success* Commission of Inquiry in the near future.

Part 3 is focused on examining Defence inquiry processes and the relationship of inquiries with administrative or disciplinary procedures.

As well, a number of broader cultural reviews are taking place in Defence, many of which may have implications for inquiry arrangements, complaint handling mechanisms and the roles that legal officers play in those processes. These reviews include the Inspector General of the Australian Defence Force's review into the management of incidents and complaints within Defence, again expected to be released in the near future.

As these reviews are Defence wide, they will clearly examine issues beyond HMAS *Success*. Consequently, the Government considers that any further specific HMAS *Success* focused review conducted in isolation from these broader efforts will be a duplication of those other reviews, be unlikely to significantly advance matters, and may complicate the current reviews underway. This broader focus (beyond HMAS *Success*) of the reviews should incorporate those matters at the heart of HMAS *Success* as well as other Defence related procedural strengths and weaknesses.

With specific reference to the sub-recommendation that Fairness and Resolution Branch (FRB) review the Equity and Diversity (E&D) Health Check and subsequent processes, the Government considers that the FRB is not an appropriate or competent authority to examine ADF inquiry processes and related legal advice: no valid construct (FRB or otherwise) exists in Defence for the HMAS *Success* related E&D health check. It was a Navy creation at the time.

As the subsequent inquiry processes that resulted from the 'health check' were under the Defence Inquiry Regulations, being an integral part of the Military Justice system, these do not fall within FRB expertise. FRB had no role to play in the technical detail of the Administrative Inquiries processes for the ADF or in their application as they applied to HMAS *Success* or more broadly.

With specific reference to Defence Legal and in particular the sub-recommendation *that Defence Legal examine the legal advice, in respect of HMAS Success, provided by legal officers to the senior Navy officers at that time, especially on initiating inquiries and procedural fairness, with a view to identifying any weaknesses, inconsistencies or errors in, and the overall quality of this advice*, Mr Gyles has already identified the weaknesses and deficiencies in the legal advice provided at Fleet Headquarters in relation to HMAS *Success*. Remedial actions are being considered as an element of those legal related recommendations of Parts 1 and 2 of the Commission of Inquiry Report. The Government considers that further examination of this legal advice is unlikely to realise any additional benefit.

Further, the Government asks the Committee to note that in implementing the Gyles recommendations, which included the comment that Navy Legal lacked candour in the manner in which it provided legal advice in the HMAS *Success* matter, and that Navy Legal needs a jolt, the CDF has already ordered a review of the command and control arrangements for all ADF legal officers. This will examine their structural and organisational independence from command, particularly in the context of being free from perceptions of inappropriate command influence. This broader review will look at the potential systemic issues that led to the failings in the Fleet Legal legal advice and what, if any, structural and organisational changes may be needed to ensure, as far as possible, the independence of legal officers from command across the ADF.

With specific reference to the sub-recommendation that *having carried out their respective examinations, the IGADF, the Fairness and Resolution Branch and Defence Legal jointly consider their findings and together identify what needs to be done to rectify problems; and by 1 December 2011, provide the committee with a report on their finding, the lessons to be learnt and their joint recommendations*, as detailed above, the FRB does not have a role in the Administrative Inquiry process. Noting this, the forthcoming Part 3 COI report and broader cultural reviews being undertaken, the Government cannot commit to provide the Committee with a report by 1 December 2011.

Notwithstanding the comments made, the Government has indicated it agrees with the intent of Recommendation 1 and proposes to consider it following the receipt of Part 3 of Mr Gyles' report and in the context of the results arising from the various cultural reviews that are currently underway.

Recommendation 2

Paragraph 9.10

The Committee recommends that the Provost Marshal in his next update to the Senate Foreign Affairs, Defence and Trade Legislation Committee on progress in reforming ADFIS include the lessons learnt from the investigations into matters relating to HMAS *Success*. The Committee is not interested in individual performances but the systemic shortcomings that allowed the mistakes to occur and importantly to go undetected for some time.

Response - Agreed

The Government agrees with Recommendation 2 and the Provost Marshal Australian Defence Force will provide a formal response as an integral part of his Annual Report to CDF and subsequently will report to the Chair of the Senate Committee for Foreign Affairs, Defence and Trade.