

The Senate

Foreign Affairs, Defence and Trade
References Committee

Equity and diversity health check in the Royal
Australian Navy—HMAS Success

Interim report

March 2010

© Commonwealth of Australia 2010

ISBN 978-1-74229-278-6

Printed by the Senate Printing Unit, Parliament House, Canberra.

Members of the committee

Core members

Senator Russell Trood, LP, QLD (Chair)
Senator Mark Bishop, ALP, WA (Deputy Chair)
Senator the Hon Alan Ferguson, LP, SA
Senator Michael Forshaw, ALP, NSW
Senator Helen Kroger, LP, VIC
Senator Scott Ludlam, AG, WA

Participating members who contributed to the inquiry

Senator the Hon. David Johnston, LP, WA

Secretariat

Dr Kathleen Dermody, Committee Secretary
Ms Erja Vanhalakka-Stephenson, Senior Research Officer
Ms Pamela Corrigan, Research Officer
Ms Angela Lancsar, Executive Assistant

Senate Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: + 61 2 6277 3535
Fax: + 61 2 6277 5818
Email: fadt.sen@aph.gov.au
Internet: www.aph.gov.au/Senate/committee/fadt_ctte/index.htm

Table of contents

Members of the committee	iii
--------------------------------	-----

CHAPTER 1

INTRODUCTION.....	1
--------------------------	----------

Referral of inquiry and terms of reference	1
Conduct of inquiry.....	2
Submissions	3
Progress of the inquiry.....	3
Scope of report.....	3
Acknowledgments	4

CHAPTER 2

HMAS <i>SUCCESS</i>—INQUIRY PROCESSES	5
--	----------

Media reports.....	5
Committee involvement—Estimates, 21 October 2009.....	6
First private briefing—3 February 2009.....	9
Second private briefing—23 February 2010	11
History of criticism of administrative inquiries	13
Response to committee's recommendations	16
Assessment of recent reforms.....	18
Conclusion— an ounce of prevention	19

APPENDIX 1

CHIEF OF THE DEFENCE FORCE COMMISSION OF INQUIRY INSTRUMENT OF APPOINTMENT	21
---	-----------

Chapter 1

Introduction

Referral of inquiry and terms of reference

1.1 On 26 November 2009, the Senate referred matters relating to incidents that occurred on board HMAS *Success* and subsequent events to the Foreign Affairs, Defence and Trade References Committee for inquiry and report by 18 March 2010. The terms of reference for the inquiry are extensive:

- (a) the nature, scope and purpose of an ‘Equity and Diversity Health Check’ in the Royal Australian Navy, and under what authority such an investigation is conducted;
- (b) the equity and diversity issues at large on board HMAS *Success* (Success) giving rise to the ‘Equity and Diversity Health Check’ which was carried out on board Success between 21 April and 9 May 2009 including *inter alia* all disciplinary issues, the transfer of a Royal Navy exchange sailor, the management of equity and diversity issues by the ship’s Commanding Officer and his Executive Officer both before and after the ‘Equity and Diversity Health Check’;
- (c) the nature and veracity of complaints and allegations made by a Petty Officer or any other person concerning equity and diversity issues on Success;
- (d) the reasons and factual evidentiary basis for the ship’s Commanding Officer resolving to land a Chief Petty Officer and two Petty Officers (the senior sailors) at Singapore on 9 May 2009 from Success and the circumstances of that landing and removal from the ship including whether the Commanding Officer acted under the direction of any superior officer;
- (e) whether the senior sailors were informed of the full nature of the allegations and factual evidentiary basis for the subsequent landing in a timely fashion or at all, and whether procedural fairness was provided to those senior sailors;
- (f) the circumstances and events that led to the Commanding Officer of Success addressing members of the crew in relation to the landing of the senior sailors, whether the Commanding Officer referred to the senior sailors by stating words to the effect of ‘there was a rotten core on this ship and the core has now been removed’ and if so, the extent that those comments may have prejudiced any subsequent inquiry;
- (g) whether the Inquiry Officer as appointed pursuant to terms of reference, dated 15 May, and as set out in Minute S1804843, dated 10 July 2009, declined to interview any relevant witnesses in circumstances where the

senior sailors were prohibited from attending Success and or contacting any of the ship's company;

- (h) the way in which the inquiry into the events on Success was conducted, whether the method of questioning witnesses and gathering evidence was conducted according to the principles of justice, whether the inquiry process 2830 No. 102—24 November 2009 was free from any perception of bias, and whether any witnesses were threatened with disciplinary or other action during the course of giving evidence;
 - (i) whether the senior sailors requested access to evidence gathered during the inquiry into the events on Success, whether any such request was denied, and whether any subsequent finding is reasonable in the circumstances;
 - (j) the facts and circumstances of the treatment of the Legal Officer (the lawyer) assigned to the management and defence of the case of the senior sailors including any threats, bullying, adverse conduct and prejudice generally, including any threat of posting to Western Australia, and whether any such conduct constituted an attempt to compromise the lawyer's capacity to represent the best interests of the senior sailors without fear or favour;
 - (k) the knowledge and awareness of the ship's Commanding Officer, the Australian Defence Force Investigative Service investigators and the broader naval chain of command of the facts and circumstances relating to the Channel 7 News reports on 4 July and 7 July 2009 (the media reports) and the dates and times of such personnel being availed of such knowledge and awareness;
 - (l) the knowledge and awareness of the media reports by the responsible Minister and the dates and times of the Minister being availed of such knowledge and awareness;
 - (m) all and any other matters relating to the justice and equity of the management of the senior sailors in their removal from the ship and the subsequent administrative process or processes, including their complaints as to the flawed process as set out herein; and
- (2) That the committee not conduct any hearings until after 1 February 2010.

Conduct of inquiry

1.2 The committee advertised its inquiry on its website, and in the *Australian*, calling for submissions to be lodged by 21 December 2009. During the first week in December, the committee also wrote directly to a range of people likely to have been involved in matters covered by the terms of reference, drawing their attention to the inquiry and inviting them to make written submissions. Naturally, because of the nature of the inquiry, they included serving Australian Defence Force (ADF) personnel.

1.3 To help the committee obtain necessary background information before starting the inquiry process in earnest, the committee wrote to the Minister for Defence (the Minister) requesting his assistance in obtaining documentation relevant to its inquiry. The committee also sought a timeline of events starting with the incidents that triggered the equity and diversity health check on HMAS *Success* and covering all relevant subsequent actions. Anticipating that some of this information may have to be treated in strict confidence, that committee suggested that any request for material to be received *in camera* should be clearly indicated.

1.4 Finally, the committee requested that, through the department, all persons known to be concerned with, or directly affected by, the findings of the equity and diversity health check on board HMAS *Success* and related events be notified of the committee's inquiry and of its call for submissions.

1.5 In mid-December, the committee was disappointed to learn that the Department of Defence had taken action that, in the committee's view, effectively deterred ADF personnel from contacting the committee about matters relating to its inquiry. This matter of parliamentary privilege and possible contempt of the Senate is considered in full in a separate report to the Senate.

Submissions

1.6 The committee received six submissions which it resolved for the time being to keep confidential. The Chief of the Defence Force (CDF), the Chief of Navy and the Head of Defence Legal also provided private briefings to the committee on 3 and 23 February 2009. No transcripts of these meetings were recorded but the secretariat took notes that have been used to produce some sections of the report.

Progress of the inquiry

1.7 This is an interim report. Before making a final report, the committee is awaiting the release of the report of a CDF's Commission of Inquiry to be conducted by a former judge of the Federal Court, the Hon Mr Roger Gyles AO QC. His report is not expected to be completed until 30 June 2010. The committee understands that the Minister may wish to consider the report before responding to it.

1.8 Thus, before taking any further action, the committee will allow time for the Commission to produce its report and for government to make its response. After examining the commission's findings and the government's response, the committee expects to be in a position to report to the Senate on or before 2 September 2010.

Scope of report

1.9 The committee uses this interim report to inform the Senate about the progress made with its inquiry. It records information and advice provided by Defence to the committee on actions it has taken following the equity and diversity health check on HMAS *Success*. The committee also takes this opportunity to recall the findings of previous inquiries into the ADF's administrative system in order to place the current

inquiry in a broader and important context. The need to achieve positive and lasting improvements in the ADF's administrative inquiry system was one of the most enduring messages coming out of these inquiries and one that should not be forgotten. The committee believes that an appreciation of the history of reforms to this system is central to understanding the matters now under consideration by the Commission of Inquiry and by the committee.

1.10 Thus, the committee provides this necessary background as well as detailing and explaining recent developments.

Acknowledgments

1.11 The committee thanks all those who contributed to the inquiry by making submissions and providing additional information.

Chapter 2

HMAS *Success*—inquiry processes

Media reports

2.1 In early July 2009, a number of Australian media outlets reported on an incident alleged to have occurred on board HMAS *Success*. This followed a story televised by Channel Seven on 3 July that several male sailors had 'been counselled and sent home after a ledger surfaced recording bets on how many of their fellow crew members they could sleep with'.¹

2.2 On 5 July, a number of reports suggested that a Defence spokesperson had confirmed that 'an unnamed number of sailors on HMAS *Success* were returned to Australia from Singapore in May' and that a formal investigation was under way. Most reports continued to refer to the betting book—'the Ledger'.² The ABC news reported that Chief of Navy, Vice Admiral Russ Crane, said that the alleged behaviours were being investigated and 'do not align with Navy values'. He was quoted:

Once these allegations were made known, Navy acted immediately by removing those sailors allegedly involved in the matter from the ship and referring the matter to the independent Australian Defence Force Investigative Service (ADFIS) for action.

Navy stands by its values and signature behaviours and will act swiftly and decisively to address allegations of unacceptable behaviour.³

2.3 According to the news report, Vice Admiral Crane said that the Navy was prepared to discipline staff after the results of the inquiry were made clear. He said:

Navy is awaiting the results of the ADFIS investigation and will act as quickly as possible to address appropriate findings and recommendations particularly should disciplinary or administrative action be warranted.⁴

2.4 The story was still running on 8 July, when the *Australian* introduced an article with the headline 'Sex bets will cost recruits'.⁵

-
- 1 See for example, National Breaking News, "'Sex plot' thickens as sailors sent home', 4 July 2009. Kerry-Anne Walsh, 'Navy mired in betting-on-sex scandal', the *Age*, 5 July 2009; Reports also appeared in overseas publications, for example in the *Straits Times*, 5 July 2009.
 - 2 See for example, Kerry-Anne Walsh, 'Navy mired in betting-on-sex scandal' The *Age*, 5 July 2009; "'sex plot' thickens as sailors sent home', The *Daily Telegraph*, 5 July 2009;
 - 3 ABC News, 'Navy "won't tolerate" sailor sex contests', Posted Sunday, 5 July 2009.
 - 4 ABC News, 'Navy "won't tolerate" sailor sex contests', Posted Sunday, 5 July 2009.
 - 5 Mark Dodd, 'Sex bets will cost recruits, says Navy', The *Australian*, 8 July 2009.

Committee involvement—Estimates, 21 October 2009

2.5 The committee did not become involved in the matter until 21 October 2009, when a participating member of the legislation committee raised it during an Estimates hearing. During that hearing, Air Chief Marshal Angus Houston, Chief of the Defence Force (CDF), and Vice Admiral Crane assured the committee that, should the Senate conduct an inquiry into these matters, it would receive 'full cooperation'.⁶ The Minister gave a similar undertaking but indicated:

...there is a 'but' here, and I hope you would acknowledge the 'but'—I would be mindful of any other processes that were taking place.⁷

2.6 On 26 November 2009, the Senate referred matters relating to incidents that occurred on board HMAS *Success* and subsequent events to the committee for inquiry and report. As noted in the introduction, the committee called for submissions through an advertisement in the *Australian* as well as writing to relevant ADF personnel inviting them to make submissions.

2.7 As a starting point for this report, the committee provides a timeline indicating the sequence of relevant events on board HMAS *Success*. It is based primarily on Vice Admiral Crane's evidence given during estimates on 21 October 2009:

- 21 April 2009—an incident occurred on HMAS *Success*;
- commanding officer (CO) HMAS *Success* initiated an internal investigation into equity and diversity issues on board;
- the investigation raised matters relating to inappropriate behaviour by members of the ship's company;
- the CO requested external assistance to address these matters and to provide an accurate assessment of the culture of equity and diversity on HMAS *Success*;
- 4–9 May—an equity and diversity health check was conducted on board HMAS *Success* which suggested that an administrative inquiry was warranted;
- 10 May—four personnel landed in Singapore for return to Australia (other evidence suggest they were landed on 9 May 2009);
- 13 May—a quick assessment commenced;
- 15 May—a fleet headquarters' administrative inquiry into inappropriate behaviour commenced (Inquiry Officer Inquiry);
- 20 August—the Inquiry Officer Inquiry was completed.⁸

6 *Committee Hansard*, Estimates, 21 October 2009, p. 22.

7 *Committee Hansard*, Estimates, 21 October 2009, p. 22.

2.8 As at 21 October, the following actions had been, or were being, undertaken:

Administrative action

- the inquiry officer had provided personnel potentially affected by the inquiry with a 'Notification of proposed inquiry findings'; (the inquiry officer would then complete his report and include information from the potentially affected personnel);⁹
- the inquiry initiating officer was considering action in response to the inquiry officer's recommendations (Vice Admiral Crane informed the legislation committee that he had not seen the report which was still under consideration by the initiating officer)—the initiating officer would then need to provide the full report to potentially affected people who would have an opportunity to respond to any allegations that may be contained within the report;¹⁰ (subsequent advice indicates that a legal review of this inquiry was completed on 2 September but in February 2010 the inquiry was set aside due to bias).

Disciplinary action

- under the Defence Force Discipline Act (DFDA), the Australian Defence Force Investigative Service (ADFIS) was conducting an investigation of elements of the allegations;
- a number of associated ADFIS [investigations] into alleged disciplinary offences on HMAS *Success* had been undertaken; and
- no charges under the DFDA had at that stage been laid.¹¹

2.9 According to the Vice Admiral, once all ADFIS investigations were completed, any briefs of evidence would be provided to the relevant authorities for consideration and, if appropriate, action under the DFDA would be initiated.¹²

Other investigations

2.10 On 21 October, Vice Admiral Crane also advised the committee that he was aware of allegations put to him by a committee member that:

- when the three petty officers, one of whom is a chief, were removed from the ship, the ship's company were instructed by the coxswain in a loud voice, as were other senior officers on board, 'Do not to look at these men; turn your backs on these men,' as they were marched off the ship in humiliation; and

8 *Committee Hansard*, Estimates, 21 October 2009, p. 17.

9 *Committee Hansard*, Estimates, 21 October 2009, p. 17.

10 *Committee Hansard*, Estimates, 21 October 2009, pp. 16 and 20.

11 *Committee Hansard*, Estimates, 21 October 2009, p. 16.

12 *Committee Hansard*, Estimates, 21 October 2009, p. 16.

- when the three sailors were tabled in the captain's cabin they were told to shut up and were given a document that said, 'Certain allegations have come to my attention'...they were given half an hour to pack their bags and get off the ship in the manner described above.¹³

2.11 Vice Admiral Crane said that he had become aware of these allegations 'perhaps six to eight weeks after the incident' and had taken action to 'ascertain the veracity' of the allegations.¹⁴ He said:

I commissioned, through the fleet command, a second inquiry to inquire into the treatment of those personnel who were landed, how they were landed and their ongoing treatment. That is an inquiry that is being run separate to the current inquiry into the alleged incidents. That inquiry is ongoing. It is due to deliver its report to the commissioning officer of the inquiry this week.¹⁵

2.12 In a written answer to a question taken on notice, Defence stated that this second inquiry conducted into complaints by three individuals into their removal from HMAS *Success* on 9 May 2009, commenced on 25 September 2009.¹⁶ Later advice shows that the report was completed on 23 October and the legal review finalised on 11 November.

2.13 Vice Admiral Crane also noted that he had that morning (21 October) become aware of an allegation that the lawyer for the defendants had had his requests for information ignored.¹⁷ He told the committee that his initial advice was that 'there was a professional discussion between the legal officer representing these individuals and the fleet legal officer on a professional basis, but I have asked for some more detail in relation to that to satisfy myself that there has not been anything inappropriate occurring'.¹⁸

2.14 On 26 October, Vice Admiral Crane issued a document—the Facts on HMAS *Success*—in response to an article by a journalist, Mr Andrew Bolt. In this publication the Vice Admiral stated that the administrative and disciplinary investigations into the issues associated with HMAS *Success* were yet to hand down their findings, but that the allegations being investigated 'continue to cause Navy serious concern'.¹⁹

13 *Committee Hansard*, Estimates, 21 October 2009, p. 19.

14 *Committee Hansard*, Estimates, 21 October 2009, p. 23.

15 *Committee Hansard*, Estimates, 21 October 2009, pp. 22–3.

16 Answer to written question on notice no. Q2, following Estimates hearing, 21 October 2009.

17 *Committee Hansard*, Estimates, 21 October 2009, pp. 21–22.

18 *Committee Hansard*, Estimates, 21 October 2009, p. 22.

19 R. H. Crane, 'The Facts on HMAS *Success*', 26 October 2009, http://www.navy.gov.au/The_Facts_On_HMAS_Success, (accessed 24 November 2009).

2.15 At this stage, the committee was aware of a number of relevant investigations or reviews—the initial equity and diversity health check, a number of investigations by ADFIS, an Investigating Officer Inquiry into allegations that came to light in the health check, a separate administrative inquiry into the circumstances of landing the three sailors in Singapore and another separate inquiry into the treatment received by the lawyer representing the three sailors.

First private briefing—3 February 2009

2.16 The committee did not receive a submission from Defence. The CDF, however, offered to provide a private briefing for committee members. It was held on 3 February 2009. The Chair of the committee started proceedings by noting that while the committee was grateful to Defence for the briefing, the meeting would not, of itself, alter the committee's course of action in relation to the inquiry including its normal procedures such as holding public hearings.

2.17 CDF explained that he looked forward to assisting the committee and answering any questions senators may have. He reiterated that Defence was fully supportive of the committee's inquiry and would afford every assistance. He emphasised that his first priority was the health and welfare of the men and women of the services and their families and that it was his responsibility to protect them. He was very concerned about the potential to compromise the privacy rights and reputation of ADF members.

2.18 At the time, CDF explained that there were numerous individuals who were subject to investigation and many witnesses involved in the various inquiries. He informed the committee that many of the issues addressed by the committee's terms of reference were the focus of ongoing defence inquiries. Moreover, that the investigations of these events would have ongoing repercussions for personnel on board HMAS *Success* and their families.

2.19 Given the sensitive nature of the terms of reference, one of his major concerns was how best to protect the privacy of personnel involved. He, therefore, asked the committee to give urgent consideration to deferring its inquiry until all Defence administrative processes and inquiries had been resolved. Given the number of inquiries that were taking place and any possible appeal processes, CDF suggested that it would be difficult to set a time but that the process may be long.²⁰ In this context, he explained that people have the right to avail themselves of processes and of the need to ensure that their rights are not compromised. He emphasised that the need for a fair and just process was imperative.

2.20 The committee indicated that it would consider the request to delay its proceedings. It also acknowledged the concerns raised by the CDF about the importance of protecting the privacy of those caught up in events on board HMAS

20 Based on notes taken of private meeting, 3 February 2009.

Success. The Chair then noted that the committee had the right to take evidence *in camera* and that that evidence would be kept private. He reiterated that the committee would be prudent and such evidence would not enter the public domain, unless the committee decided otherwise. The committee agreed that all involved should receive natural justice.

2.21 The Chief of Navy informed the committee about inquiries that had been, and were currently being, conducted. Committee members, however, were unsure about the exact number and nature of the inquiries that had resulted from the initial incident on HMAS *Success*. The Chair requested that Defence provide the committee with a list of all inquires that had been conducted and their current status.²¹

2.22 Following this briefing, the committee wrote to the Minister making clear that it was prepared to wait until April before beginning the formal process of taking oral evidence. It informed the Minister:

In the meantime, the committee is expecting to receive from the Chief of Navy a list of all inquiries that have been, or are being, conducted into any matter flowing from the incident that prompted the initial Equity and Diversity Health Check.²²

Investigating Officer's Inquiry found to be flawed

2.23 On 11 February 2010, CDF announced that he had directed that 'a fresh inquiry into a range of matters arising from equity and diversity issues on board HMAS *Success* be conducted'. He stated that he had taken this decision following legal advice that the initial administrative inquiry was flawed due to bias. He explained:

The flaws were identified during a review of a Redress of Grievance raised by a sailor involved in the initial inquiry. I am very disappointed that the inquiry was flawed; however, it is imperative that serious matters such as this are dealt with thoroughly.²³

2.24 Subsequently, CDF explained to the committee that, following the decision to set aside the Inquiry Officer's report due to bias, no administrative action against the three sailors had taken place. Chief of Navy noted further that on 11 February the three sailors were reinstated and offered an opportunity to return to HMAS *Success* or to take up an alternative posting.²⁴

21 Based on notes taken of private meeting, 3 February 2010.

22 Private correspondence, Chair of Foreign Affairs, Defence and Trade References Committee to the Minister for Defence, 4 February 2010.

23 Department of Defence, 'HMAS *Success* Inquiry', Defence Media Release, MSPA 035/10, 11 February 2010.

24 Based on notes taken of private meeting, 23 February 2010.

Second private briefing—23 February 2010

2.25 On 23 February, the committee met again with CDF, Chief of Navy and Head of Defence Legal in a private meeting. The Chief of Navy provided the committee with a table detailing the administrative inquiries that had been completed or were still under way. This table, reproduced on the following page, indicates that the initial equity and diversity inquiry generated ten subsequent ones.

2.26 It should be noted that this table does not record the inquiries conducted under the DFDA by ADFIS. As noted earlier, Vice Admiral Crane indicated that ADFIS was undertaking a number of inquiries (see paragraphs 2.3, 2.7–2.8). Nor does it include the newly established CDF's Commission of Inquiry (see below).

Establishment of CDF's Commission of Inquiry

2.27 During this second briefing, CDF noted that the initial inquiry had been set aside and that he had established a Commission of Inquiry which he was sure would produce a credible result. He told the committee that the former Federal Court and NSW Court of Appeal Judge, the Hon Roger Gyles AO QC, had been appointed to conduct the independent inquiry. Mr Douglas Campbell SC from the Queensland Bar had been appointed as the Counsel Assisting. According to the CDF, Mr Campbell had been in the Army reserves but was not currently active. Mr Gyles was yet to appoint other legal officers to his team. CDF advised the committee that there would be no naval involvement in the legal team.²⁵

2.28 The CDF also noted that Defence had consulted with Mr Gyles in relation to the appropriate type of inquiry and was advised that a Commission of Inquiry would be most appropriate. CDF pointed out that Commissions of Inquiry are usually established when there had been a death in the ADF but that he intended to use them more frequently in addressing other matters. He noted that the Commission of Inquiry process arose from a recommendation in the Senate report into military justice in 2005.

2.29 According to CDF, Mr Gyles had indicated his desire to conduct the inquiry in the public arena as much as possible. CDF noted, however, that he would like the details of the alleged types of behaviour to be kept confidential to protect the individuals but that such decisions would remain with Mr Gyles.

25 Based on notes taken of private meeting, 23 February 2010.

Serial Number	Activity	Started or Submitted	Report Completed	Legal Review Completed	Outcome	Actions taken	Remarks
1	E&D Health Check conducted into complaints of unacceptable behaviour in HMAS <i>Success</i>	4-May-09	9-May-09	N/A	CO <i>Success</i> submits Intended Course of Action to FHQ in relation to issues on board <i>Success</i>		
2	Quick Assessment into improper conduct by certain members of HMAS <i>Success</i>	13-May-09	13-May-09	N/A	unacceptable behaviours determined	Chief Combat Support Group appointed an Inquiry Officer(see Serial 3)	
3	Inquiry Officer Inquiry into the facts and circumstances surrounding allegations of Equity and Diversity issues in HMAS <i>Success</i>	15-May-09	20-Aug-09	2-Sep-09	Commander Surface Force accepted 37 Findings and agreed 7 of the 8 Recommendations (with one referred for advice)		Further legal advice re this administrative inquiry concluded that the inquiry was fundamentally flawed due to bias. Commander Surface Force has made a decision to set the administrative inquiry aside.
4	Routine Inquiry Officer Inquiry into the formal complaint by xxxxxxx from HMAS <i>Success</i>	25-Sep-09	23-Oct-09	11-Nov-09	Commodore Support accepted 19 Findings and adopted 5 of the 10 Recommendations		Commodore Support has found that the senior sailors' removal from <i>Success</i> and aspects of their subsequent administration were flawed. He can no longer rely on findings 7 and 12 from this inquiry, but the remainder of this inquiry is extant.
5	Inspector General Australian Defence Force Inquiry Issues relating to the provision of Legal Advice by xxxxxxx to members (not related to <i>Success</i>)	10-Nov-09	15-Dec-09	N/A	No inappropriate conduct by xxxxxxx for matters within the Inquiry	No Further Action	
6	Inquiry Officer Inquiry into allegations by xxxxxxx of inappropriate Command influence	25-Nov-09	15-Feb-10	-	CN initiated Inquiry Officer Inquiry		Awaiting legal review and CN consideration
7	xxxxxxx Redress of Grievance seeking, among other things, that the IO and RI Officer Inquiries be set aside	30-Nov-09	-	-	Redress Upheld	Sailor informed 11 Feb 10. No Further Action	
8	xxxxxxx Redresses of Grievance seeking, among other things, that the IO and RI Officer Inquiries be set aside	14-Dec-09	-	-	Redress Upheld	Sailors informed 11 Feb 10. No Further Action	
9	Quick Assessment into allegations made by xxxxxxx that Command improperly influenced one of the Senior Sailors to not provide a submission to the Senate Inquiry	27-Jan-10	27-Jan-10	N/A	Recommendation no further inquiry	No Further Action	
10	xxxxxxx Redress of Grievance regarding the E&D Health Check	1-Feb-10	-	-	Linked with conclusions at serial 11	No Further Action	
11	Quick Assessment into xxxxxxx Redress of Grievance regarding the E&D Health Check	3-Feb-10	8-Feb-10	N/A	QA concluded that the allegation of unprofessional behaviour is unsubstantiated	No Further Action	

Regarding the inquiry process, CDF explained that the Commission of Inquiry would involve a formal inquiry with legal representation, witnesses and formal hearings and testimonies. The sailors would have legal representation through the ADF Directorate of Defence Counsel Services. Mr Gyles also suggested to the CDF that he would like to complete gathering evidence by 15 April 2010 in order to finalise the report by 30 June 2010.²⁶

Terms of reference

2.30 CDF informed the committee that the terms of reference for the inquiry were not yet completed but, once finalised, would be forwarded to the committee.

2.31 Committee members discussed with CDF the possible terms of reference, including whether the matter dealing with the alleged interference in the work of the Defence lawyer for the three sailors would be included. A number of members expressed their view that this matter was 'absolutely crucial' to the Commission of Inquiry.

2.32 Another member suggested that Mr Gyles should take account of the original Senate committee report into military justice, in particular the recommendation to establish an independent administrative unit within the ADF to address administrative issues. He was also concerned about another initiative coming out of the committee's military justice report dealing with the role of the IGADF in conducting military justice audit checks. He suggested that the role, activities and processes of the IGADF's audits could be examined.

2.33 The terms of reference were provided to the committee on 5 March 2010.²⁷

History of criticism of administrative inquiries

2.34 As noted earlier, the committee believes that it is extremely important for the Commission of Inquiry to place its consideration of the administrative process involving incidents on board HMAS *Success* in a broader context that provides the necessary background for understanding the ADF's administrative system. The committee does so to highlight the importance of ensuring that any future changes to the ADF's inquiry system would make a lasting difference. Indeed, the number of inquiries flowing from the initial report on events on board HMAS *Success* and the recent announcement of the flawed Investigating Officer Inquiry are reminiscent of findings made years ago. The Commonwealth Ombudsman sounded the alarm twice about problems plaguing the ADF's administrative inquiry system. The committee raised similar concerns in 2005.

26 Based on notes taken of private meeting, 23 February 2010.

27 See Appendix 1.

Ombudsman 1998

2.35 In 1998 the Commonwealth Ombudsman found a number of commonly occurring problems in ADF investigations, particularly administrative investigations of personnel-related issues. They included:

- inadequate planning of investigations;
- failure to interview all relevant witnesses and assumptions made about the credibility of witnesses interviewed;
- pursuit of irrelevant questioning techniques and failure to put contradictory evidence to witnesses for a response;
- failure to record evidence properly, and possibly, preparation of witnesses and unauthorised questioning of witnesses;
- failure to analyse evidence objectively, and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made; and
- inadequate record keeping.²⁸

Ombudsman 2004

2.36 Six years later, the Defence Force Ombudsman was again highly critical of the poor standard of administrative investigations. He informed the committee that his office had seen instances in which investigations had been undertaken by people with inadequate training and, in some cases, the investigation was not as professional as it should have been.²⁹ He noted in particular the following deficiencies which, he said, in large measure reflected the poor training and lack of experience and expertise in investigations. Many of these had been identified six years earlier:

- investigations of serious allegations being carried out by officers with apparently inadequate training in investigations and approaches inappropriate for the allegations being investigated;
- an investigation being thorough but conclusions and recommendations not being drawn together logically from the evidence for the decision-maker;

28 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, pp. 168–169. Commonwealth Ombudsman, *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures*, Report of the Commonwealth Defence Force Ombudsman pursuant to section 35A of the Ombudsman Act 1976, January 1998, paras 37 and 5.54.

29 Inquiry into the effectiveness of Australia's military justice system', *Committee Hansard*, 9 June 2004, pp. 1–4; *Submission P28*, p. [3] to that inquiry.

- an investigation taking an inordinate length of time with changes in investigation officer and failure to address the substance of the complaint;
- investigations resulting in recommendations which appear never to have been considered by anyone with the appropriate authority;
- an investigation where the members of the public are questioned with little apparent thought for the potential consequences; and
- investigations which have taken so long it renders any outcome favourable to the member virtually meaningless.³⁰

Foreign Affairs, Defence and Trade Committee 2005

2.37 In its 2005 report on the effectiveness of Australia's military justice system, the committee also found that there were serious flaws in the investigation stage of administrative inquiries. The recurrent themes in the committee's report were lack of independence and impartiality, delay, failure to apply policy and poor quality decision making. It described a system where:

There were alarming lapses in procedural fairness: failure to inform members about allegations made about them, failure to provide all relevant information supporting an allegation, and breaches of confidentiality. Indeed, the committee heard numerous accounts of members suffering unnecessary hardships due to violations of their fundamental rights.

Poorly trained and on occasion incompetent investigating officers further undermined the effectiveness of administrative investigations. The committee found that missing or misplaced documentation, poor record keeping, the withholding of information, lack of support in processing a complaint and investigating officers who lack the necessary skills, experience or training to conduct a competent inquiry, contributed to unnecessary delays and distress. Many of those subject to allegations have endured long periods of uncertainty and anxiety.³¹

2.38 One of the most corrosive influences undermining the principles of natural justice and one of the most commonly cited concerns stemmed from conflicts of interest and the lack of independence of the investigator and the decision maker. Many witnesses in the 2005 inquiry called for an independent adjudicator so that a neutral and unbiased investigation could take place free from contamination by self-interest or third-party influence.³²

30 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. 170. Submission P28, p. [3] to that inquiry.

31 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. xxiii.

32 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. xxiii.

2.39 At that time, the committee found that any shortcomings or failings during an administrative inquiry had the potential to set the proceedings on a long and troubled course that could drag through the system for years. The committee made a number of recommendations to amend the Administrative Inquiries Manual to enhance transparency and accountability.³³ The government agreed to a number of these changes which have been implemented.

2.40 The committee also called for the establishment of a statutorily independent review authority, the Australian Defence Force Administrative Review Board (ADFARB), with appropriately qualified and trained staff equipped with the necessary resources to address and resolve administrative matters in the ADF. It believed that this independent body would provide the necessary oversight to ensure that any failure by investigating officers to observe the guidelines set out in the various ADF manuals would be brought to light and corrected. The proposed ADFARB would also assume responsibility for improving the training of investigating officers and for developing a database of administrative inquiries that would register and track grievances, including the findings and recommendations of investigations. It was the committee's view that such a body offered greater assurances that the review process of administrative action would be independent and impartial. It would go a long way towards instilling public confidence in Australia's military justice system.

Response to committee's recommendations

2.41 The government rejected the committee's recommendation to establish the ADFARB. Much of the hope for improvement in the administrative processes was placed in the hands of the Fairness and Resolution Branch and the Inspector General of the Australian Defence Force (IGADF).

The Fairness and Resolution Branch

2.42 In June 2006, the committee was informed that the Fairness and Resolution Branch, established in January 2006, was now the central management body responsible for overseeing the management of complaints in the ADF. The then Acting Director of the branch, Ms Diane Harris, told the committee that the branch had the capacity to look at a complaint when it was submitted and to determine whether the best process was being used to resolve the matter. She explained that the branch had an enhanced advisory role:

As of 1 July it will be mandated that all COs, on receiving a complaint, have five days to do their quick assessment to determine what their course of action is going to be and then to submit all of that to the Fairness and Resolution Branch where it will be reviewed. We will have our legal officer look at it, we will have an experienced case officer look at it and we will

33 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, Recommendations 26, 27, 28, 31, 32 and 33. See Appendix 1.

then provide advice to the CO in terms of the approach that has been proposed.³⁴

We would expect that in most cases that approach will be fairly sound, but in some cases it will not be. We might go back, for example, and say: 'You have nominated Lieutenant Smith to be the inquiry officer. In this case we believe the issues are too complex for a junior officer. We recommend that you appoint a more senior officer to do it.' We might also, for example, say: 'This is a very complex issue. It will be quite involved.' So we might recommend a different inquiry officer altogether and we may put forward to the CO the name of somebody else from outside the unit who might be able to be the inquiry officer for the purposes of that complaint.³⁵

2.43 Ms Harris explained that in the future, with the change to the regulation, the Fairness and Resolution Branch would be empowered to intervene if a decision is made that a complaint is best managed by the Branch rather than at the unit level.³⁶

IGADF

2.44 In June 2006, Mr Geoffrey Earley, IGADF, acknowledged that the conduct of administrative inquiries had been criticised in the past in large part because of a lack of suitable training for inquiry officers. He informed the committee that a course to address this shortcoming was now conducted four times a year by his office.³⁷ He informed the committee that the next stage would be to adopt a similar sort of oversight or audit of some agencies and how they operate, including the Fairness and Resolution Branch in Canberra.

Audit program

2.45 Mr Earley also explained how his office intended to audit the health of the military justice system. He indicated that an audit would examine the unit disciplinary and administrative records for compliance. It would discuss any problems with relevant personnel and conduct focus group discussions across a range of representative rank groups 'to obtain an unattributable impression of how military justice in that particular unit is operating'.³⁸ He described the conduct of a typical audit:

...the leader will go in...and meet with the commanding officer. We will ask for any questions and explain. There is then a headquarters group with the executive team of the unit. They get a chance to tell us what they do. We get 20 minutes or so to tell them why we are there and what we do. Then the group splits up. There is always a lawyer in each group. One part

34 *Committee Hansard*, 19 June 2006, p. 17.

35 *Committee Hansard*, 19 June 2006, p. 17.

36 *Committee Hansard*, 19 June 2006, pp. 17–18.

37 *Committee Hansard*, 19 June 2006, p. 12.

38 *Committee Hansard*, 19 June 2006, p. 12.

of the team will go off and look at the disciplinary records. Another part of the audit team will go off and look at the administrative records—and by that I mean the grievances, inquiries, routine inquiries, quick assessments and so on...³⁹

...A considerable amount of work is done prior to an audit by interrogating fairness and resolution branch agencies, for example, as to how many complaints have come out of that unit. We talk to...the equity hotline people—about whether there have been any particular problems noted...⁴⁰

2.46 Mr Earley also noted that the audit is followed up with a report outlining the outcomes.⁴¹ The report includes any recommendations that the audit team 'might have for improvement, and that goes to the CO of the unit and to other relevant authorities higher up in the chain of command'.⁴²

2.47 On 27 November 2009, he informed the Foreign Affairs, Defence and Trade Legislation Committee that an IGADF military justice audit had been conducted on board HMAS *Success* in May 2006 and was assessed as satisfactory.⁴³

Assessment of recent reforms

2.48 The committee has outlined the history of shortcomings in administrative inquiries and the failure to rectify them to amplify the message that any measures taken to improve the administration system must produce lasting effects. The long list of inquiries that flowed from the equity and diversity report on HMAS *Success* and the final assessment that the initial Investigating Officer Inquiry was biased further highlights the need to repair the system. The recent statement by the CDF that the findings of the flawed inquiry had 'reinforced my concern that aspects of the system need to improve' indicate that systemic problems remain deeply embedded in the ADF's administrative system.⁴⁴

2.49 Despite the 1998 and 2004 Ombudsman's findings and the reform program implemented after the committee's 2005 report, it seems as though Defence has not achieved the much anticipated progress.

2.50 A number of disciplinary inquiries also resulted from the initial equity and diversity health check on board HMAS *Success*. Although to date the committee has

39 *Committee Hansard*, 19 June 2006, p. 25.

40 *Committee Hansard*, 19 June 2006, p. 26.

41 *Committee Hansard*, 19 June 2006, p. 12.

42 *Committee Hansard*, 19 June 2006, p. 12.

43 Geoff Early, ADF Inspector General, Committee Correspondence to Foreign Affairs, Defence and Trade Legislation Committee, 27 November 2009.

44 The CDF's statement about his concerns that 'aspects of the system need to improve' was in Department of Defence, 'HMAS *Success* Inquiry', Defence Media release, MSPA 035/10, 11 February 2010.

had no cause to question them, it notes that in previous reports it had identified problems with ADFIS and the quality of its investigations.⁴⁵ At the moment, however, the committee has no reason to seek to broaden its inquiry to examine inquiries covered under the DFDA. It reserves the right to do so should concerns come to light.

Conclusion— an ounce of prevention

2.51 The committee is most concerned that the recent handling of events on board HMAS *Success* has damaged the reputation of a number of senior sailors, caused them and their families unnecessary stress and embarrassment, called into question the integrity of the ADF's administrative system and placed a significant drain on the time and resources of ADF personnel, including the ADF's most senior officers. Such a situation should never have developed but unfortunately is not an unfamiliar occurrence. As the committee found in its 2005 report, 'an ounce of prevention is worth a pound of cure'.⁴⁶

2.52 For this reason, the committee raises a number of matters that need to be considered carefully by Defence. They not only duplicate the findings of the Commonwealth Ombudsman in 1988 and again in 2004 and the 2005 committee's report, but add to them. They relate to long standing concerns about the ADF's administrative inquiry processes. In general, they go to issues such as the skills, qualifications and experience of those conducting inquiries or who are asked to review or report on incidents likely to be complex. They also include the standard of inquiries including: basic requirements such as interviewing all relevant witnesses and testing exculpatory evidence; conflicts of interests in the inquiry process; failure to follow due process; the independence and objectivity of an inquiry; undue command influence or interference; and the effectiveness and robustness of the legal review of such inquiries.

2.53 The administrative processes associated with the recent events on HMAS *Success* raise in particular: the matter of matching appropriately the skills and experience of investigating officers with the seriousness of the complaints; the adequacy of the legal review; conflicts of interest in having the officer who assisted in the equity and diversity health check also engaged as an assistant to the Investigating Officer Inquiry; and the influence of command on the defence lawyer in carrying out his legal responsibilities. There are also issues related to procedural fairness particularly with regard to the information provided to the accused; the opportunities for them to defend allegations; and measures taken to protect privacy.

45 See for example, Standing Committee on Foreign Affairs, Defence and Trade, *Reforms to Australia's military justice system*, First progress report, August 2006, pp. 11–18; Second progress report, March 2007, pp. 5–18; and Fourth progress report, September 2008, pp. 31–41.

46 Mr Neil James, Executive Director, Australian Defence Association, used this phrase. *Committee Hansard*, 9 June 2004, p. 32.

2.54 From past experience, the committee is familiar with shortcomings in the ADF's administrative inquiry processes and the reforms intended to remedy them. Recent events, however, call into question the success of ADF's reform program implemented after the committee's 2005 report, notably the effectiveness of the Fairness and Resolution Branch and the IGADF in their respective functions to uphold the integrity of the inquiry processes. In this recent case, the committee would like to know why the deficiencies in the HMAS *Success* inquiries were not picked up much earlier in the process by those charged with the responsibility for the health of the system. The committee suspects that there may have been a series of failures and would like them clearly identified. If these systemic problems are not identified and rectified, then similar damaging failures will continue.

2.55 As noted in the introduction, the committee awaits the findings of the newly appointed Commission of Inquiry and the government's response to those findings, before it decides how it will proceed with its own inquiry.

SENATOR RUSSELL TROOD
CHAIR

Appendix 1

Chief of the Defence Force Commission of Inquiry Instrument of appointment



DEFENCE (INQUIRY) REGULATIONS

CHIEF OF THE DEFENCE FORCE COMMISSION OF INQUIRY

INSTRUMENT OF APPOINTMENT

Pursuant to Regulation 109 of the Defence (Inquiry) Regulations 1985 (the Regulations), I, Air Chief Marshal Allan Grant Houston, AC, AFC, Chief of the Defence Force, appoint a Commission of Inquiry constituted by the Honourable Roger Gyles AO QC, as President. The inquiry will have the following terms of reference:

to inquire into the alleged incidents of unacceptable behaviour, as defined in applicable Defence Instructions, or other behaviour which could compromise the safety and effectiveness of the crew onboard HMAS *Success* that were brought to the attention of command between March and May 2009, and issues associated with the subsequent management of such allegations and of personnel allegedly involved.

Pursuant to Regulation 115 of the Regulations:

- (i) I direct the Commission to adopt practices and procedures consistent with those Regulations and which promote the impartial, fair, expeditious and efficient collection of information relevant to the Commission's inquiries in light of the Inquiry Context attached at Annex A;
- (ii) I authorise the President to issue Practice Notes in respect of practices and procedures proposed to be adopted in respect of the Commission's inquiries;
- (iii) I direct that Commission records may not be publicly released outside of the Commission's hearings other than in accordance with Regulations 62 and 63 of the Regulations;

Pursuant to Regulation 117 of the Regulations, hearings of the inquiry shall be in public subject to the power of the President to determine that part of the inquiry is to be conducted in private where the President is satisfied that it is necessary to do so in the interests of the defence of the Commonwealth or of fairness to a person who the President considers may be affected by the Inquiry;

Pursuant to Regulation 119 of the Regulations, I direct that all oral evidence to be given before the Commission shall be on oath or affirmation; and

Pursuant to Regulation 51 of the Regulations, I appoint legal practitioners, Mr Douglas Campbell SC, Mr Mark Johnston, and Flight Lieutenant Janine Fetchik as Counsel Assisting the Commission. Mr Douglas Campbell SC will be lead counsel.

A.G. HOUSTON, AC, AFC
Air Chief Marshal
Chief of the Defence Force
Appointing Authority

9 March 2010

INQUIRY CONTEXT

1. The essential purpose of the Commission is to determine the facts and circumstances that fall within the scope of the terms of reference and make recommendations based on its findings.
2. The Commission's Report will also enable members of the Australian Defence Force (ADF), and the senior leadership of the ADF and the Department of Defence, the Minister, the Parliament and the public to be confident that the alleged incidents of unacceptable behaviour in HMAS *Success* have been fairly and properly inquired into.
3. It is envisaged that the findings of the Commission will be used to assist the senior leadership concerning:
 - a. the nature and extent of any unacceptable behaviour, as defined in applicable Defence Instructions, or other behaviour which could compromise the safety and effectiveness of the crew onboard HMAS *Success* that was brought to the attention of command between March and May 2009;
 - b. whether such behaviour was condoned by supervisors or command;
 - c. whether the management of any allegations of unacceptable or other behaviour, including the management of personnel associated with those allegations, was lawful, in accordance with policy and appropriate in all the circumstances; and
 - d. whether there was any disclosure of personal information related to this matter to the media and, if so, by whom and whether it was authorised or unauthorised.
4. The Commission should be aware that there are currently several related matters which are the subject of investigation by the ADF Investigative Service and referral to the Director of Military Prosecutions for consideration of possible disciplinary action under the *Defence Force Discipline Act 1982* and the need to ensure that the Commission does not unduly prejudice these matters.
5. The Commission is, so far as is practicable, to:
 - a. have regard to the Terms of Reference of the Senate Foreign Affairs, Defence and Trade Committee 'Inquiry into an equity and diversity health check in the Royal Australian Navy – HMAS *Success*' at Appendix 1, and address when considered appropriate any matters more fully described within that document;
 - b. obtain and consider investigation and inquiry reports relating to matters before the Commission (unless to do so would be considered prejudicial to the conduct and integrity of this inquiry);
 - c. identify the sufficiency of any actions and decisions taken by personnel which are materially relevant to the management of the alleged unacceptable behaviour in HMAS *Success*; and
 - d. identify any substantial weaknesses or deficiencies (isolated or systemic) in applicable systems, policies, practices, procedures and training which have arisen in connection with matters before the Commission.

Recommendations

6. Without limiting the scope provided for by Regulation 110, I am particularly interested in considering recommendations regarding actions that the Commission believes should be taken with respect to identified substantial weaknesses or deficiencies (isolated or systemic) in systems, policies, practices, procedures and training—with a view to reducing the chance of similar recurrence.

Interim reporting

7. The President is to provide me with reports on matters he believes require my urgent attention or action. Such issues might include significant matters affecting the conduct of the Commission's inquiries, the safety, security, operational effectiveness or the welfare and wellbeing of personnel, or persons otherwise potentially affected by the Commission of Inquiry.

Identification of other issues

8. Should the Commission identify any issue it believes is sufficiently closely connected to the matters before the Commission but fall outside the terms of reference, the Commission is requested to bring that issue to my attention with a recommendation in relation to it.

Documentation

9. In addition to the requirements of sub-regulation 123(5), the following are to accompany the Commission's report:

- a. imagery of articles (other than documents) tendered as exhibits before the Commission and a record of the location of those articles;
- b. notices sent to, and any responses from, individuals against whom it is contemplated adverse findings may be made (unless the Commission believes that doing so would be unfairly prejudicial to the interests of a person sent such a notice);
- c. any external legal advice obtained by the Commission (such advice is to be handled in such a way as to maintain any client legal privilege which attaches to that advice);
- d. the Instrument of Appointment;
- e. any written communications between the Commission and the Appointing Authority; and
- f. a succinct executive summary of the report.

Representation of potentially affected persons

10. Where the President of the Commission determines that a person may be affected by the inquiry pursuant to Regulation 121, arrangements for the representation of that person by a particular ADF Legal Officer will be coordinated by the Director of Defence Counsel Services (DDCS). Accordingly, the President is to notify DDCS of any person that may be affected.

No findings of criminal/disciplinary offences

11. It is not the function of the Commission to conclude or find that a disciplinary or criminal offence has been committed by any person. Accordingly, the Commission should not use the language of the criminal law when describing particular conduct or behaviour. If during the course of the inquiry the view is formed by the President that a person is likely to have committed a serious criminal or serious disciplinary offence, such offences are to be reported to the Provost Marshal of the ADF, and also notified to me, as soon as it is practicable to do so. Care needs to be taken to ensure that continuing with the Inquiry does not unduly prejudice any criminal or disciplinary investigation.

Conduct

12. Counsel assisting, counsel representing and all personnel tasked to provide support to the Commission are to refrain from any conduct that raises reasonable doubts as to the impartiality or fairness of the inquiry process.

Appendix:

1. Terms of Reference of the Senate Foreign Affairs, Defence and Trade Committee 'Inquiry into an equity and diversity health check in the Royal Australian Navy – HMAS *Success*'.