

Chapter 5

Seeking answers

5.1 Since 9 May 2009, the senior sailors had been left completely in the dark about the reasons they were removed from *Success*. Even after the distress caused by media reports of their involvement in a so-called sex scandal, they still could not obtain information on why they were landed and returned to Sydney. In this chapter, the committee considers their continued attempts to obtain a statement of reasons for their landing and the unfolding of events which increased their fervour to gain access to information relevant to the circumstances in which they found themselves.

15 July—request for statement of reasons

5.2 On 15 July, LCDR Bainbridge wrote to CMDR Bowers stating that he appeared to be 'going around the buoy for the umpteenth time' seeking information on the removal of the senior sailors.¹ He noted that after almost three months they had still not been notified as to the reason they were landed. He continued:

Advice from you was that the generic issues (which I am told should be contained somewhere within the current inquiry) were the reasons, however, there is no particularisation of what the issue was at the time...

What I find troubling is that our own Navy website directly contradicts the advice I have received to date that the three senior sailors were removed for matters contained within the administrative inquiry:

'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 for action,' VADM Crane said...

Sir, with respect, my boys have been more than patient with this whole process. This is particularly so considering the way they were cast aside by their chain of command and later identified by the media.²

5.3 In turn, CMDR Bowers emailed CMDR Rayner, the new CO *Success*, explaining that the legal officer representing the three sailors had asked for information on the reasons for the sailors' landing. CMDR Bowers explained further that he had obtained advice, dated 15 July, from a Barrister of the Sydney legal panel, LEUT Brad Jones, about providing reasons in these circumstances.

Refusal to disclose reasons

5.4 It should be noted that the advice sought from LEUT Jones was narrowly defined asking only for the grounds for withholding information. LEUT Jones made

1 Gyles Report, Part Two, paragraph 3.17.

2 Gyles Report, Part Two, paragraph 3.17.

this intention clear when he stated that he had been instructed to advise whether there was 'legal foundation for declining to provide those particulars' of the reasons for landing'.³ Mr Giles observed that the framing of this question was significant—LEUT Jones was 'not asked whether there was a proper basis for providing particulars'.⁴

5.5 The committee agrees that the wording of the request for legal advice was noteworthy. In effect, it was slanted toward producing an argument that would support the continuing non-disclosure of information to the senior sailors.

5.6 In his advice, LEUT Jones stated that 'in certain circumstances procedural fairness requires that persons adversely affected by a decision be given reasons for that decision'.⁵ The advice continued:

In my opinion, in the present circumstances there are two strong grounds why particulars of the allegations underlying CMDR Brown's decision to land the sailors ought not be given, quite apart from the absence of a legal obligation to do so.

First, there is currently an administrative inquiry underway which is investigating the allegations. In my opinion the giving of particulars of the allegations could undermine the integrity of the inquiry process. I understand each of the sailors have been given a notice of possible adverse findings. Consequently, should the report contain adverse findings in respect of these allegations the sailors will have an opportunity to respond before any adverse findings are made in respect of them. If the Inquiry Officer considers that the particular allegations are made without foundation (and have not therefore given the sailors notices in that regard) then revealing the particulars of the allegations to the sailors could be seen as undermining the outcome of the inquiry.

Second, the decision to land the sailors was made in the interests of the safety and welfare of the ship's company. In particular I understand that there were concerns that members had been intimidated and physically threatened by one or more of the sailors about reporting their behaviour. If this allegation is true then by revealing particulars of the allegations certain members may therefore be at risk from one or more of the sailors. If this were to occur it could conceivably affect not only the safety of particular individuals but also the morale and safe operation of *Success*.

I therefore recommend that consideration be given to making a circumspect response to LCDR Bainbridge in the form of Annex A.⁶

5.7 The draft proposed response to LCDR Bainbridge which was Annex A to LEUT Jones' legal opinion follows:

3 Gyles Report, Part Two, paragraphs. 3.19–3.20.

4 Gyles Report, Part Two, paragraph 3.21.

5 Gyles Report, Part Two, paragraph 3.21.

6 Gyles Report, Part Two, paragraph 3.21.

On 9 May 2009 the former CO *Success* CMDR S T Brown RAN wrote to each of the sailors to inform them that they were being temporarily landed from *Success* as certain allegations had come to his attention that were of great concern to him regarding the operations of *Success*. In particular, I understand those allegations included matters that were considered to be of sufficient gravity that they could affect the safety and welfare of personnel on board and the effective operation of the ship. I understand that it was CMDR Brown's belief that the temporary landing was necessary for both the welfare of the ship and her company and to allow a thorough and expeditious inquiry to be conducted.

As you are aware, an Inquiry Officer's Inquiry is currently being conducted by CMDR Work RAN. That inquiry will, among other things, examine those allegations. As I do not wish to prejudice the integrity of the Inquiry process (including its outcome) or the sailors' right to address any findings that may affect them, it would be inappropriate for me to provide any further particulars of the allegations. However, I understand that the sailors have seen the terms of reference for the IO's inquiry and have been advised of matters relating to them in 'notices of possible adverse finding'. The sailors will therefore have an opportunity to respond to those matters before any Command decisions are made that adversely affect them.⁷

5.8 At that time, CMDR Bowers' explanation for maintaining the position of not providing reasons for the temporary landing was:

...to let the administrative inquiry take its course with its own timeframe and parameters given the matters in common between the reasons for landing and the matters which were subject of the administrative inquiry.⁸

5.9 CMDR Bowers told the Commission that they were dealing constantly with the issue of reasons or the issue of whether or not to provide reasons to the sailors. He then explained:

I received advice that reasons might not be given and in fact ought not to be given, given the inquiry process, while the inquiry was underway, but then later when the inquiry was concluded that changed everything.⁹

5.10 LEUT Jones and CMDR Bowers' opinion on refusing to disclose the reasons for landing the senior sailors was based on their understanding that the Inquiry Officer's Inquiry was investigating the circumstances of the sailors' removal. In this regard, CMDR Bowers indicated that based on LEUT Jones' legal advice and his own thoughts:

7 Gyles Report, Part Two, paragraph 3.22.

8 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 23 June 2010, p. 68.

9 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 68.

...the inquiry ought to get on and conduct the inquiry without interference or any sort of insertion of the command structure...so to my mind the matters which were the subject of the landing were also the subject of the inquiry. And I didn't know what happened until the inquiry had concluded.¹⁰

5.11 CMDR Bowers requested CMDR Rayners to consider the advice and the attached draft response, suggesting that 'in the interests of providing a way ahead, you might consider the attachments'.¹¹

5.12 Having considered LEUT Jones' legal advice, CMDR Rayners was of the view that it gave two good reasons for not providing additional clarification for landing the sailors. Even so, he informed CMDR Bowers on 15 July 2009 that he could sympathise with the sailors' claims that they have not been told specifically as to why they have been landed. He stated:

I do not think the proposed draft response will particularly relieve their consternation in respect to this matter. I actually think it will only cause more frustration as it does not really tell them any more than they already know and it will probably be seen as disingenuous. The advice indicates any further amplification beyond that recommendation would be inappropriate.¹²

5.13 CMDR Rayners explained further that he was not the CO at the time of the sailors' removal and had very little knowledge of what the commanding officer's specific deliberations were in coming to his decision. Consequently, he noted that he was not in a position 'to validate or question the veracity of this decision'. He also pointed out that he had not been provided with any reason why he needed to review or change the decision that had been taken.¹³ In his view, the present circumstances should remain unchanged until the inquiry was completed and then decisions could be made 'based on the findings with a degree of knowledge available to all'.¹⁴

5.14 Clearly, CMDR Rayner could not offer a solution that would resolve the current dilemma satisfactorily. He told CMDR Bowers that he could not see how they could improve the sailors' understanding nor discern any benefit to the Navy by responding as outlined in the attachment. He then stated:

I think the issue here is the frustration being generated by an inability to repudiate a decision when the reasons for that decision have not been clearly articulated. I do not think that this situation can change until the

10 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 72.

11 Gyles Report, Part Two, paragraph 3.19.

12 Gyles Report, Part Two, paragraph 3.23.

13 Gyles Report, Part Two, paragraph 3.23.

14 Gyles Report, Part Two, paragraph 3.23.

inquiry findings are known...I think any opportunity for clarifying the decision on 9 May has passed.¹⁵

5.15 The next day, following a conversation with CMDR Bowers, CMDR Rayner wrote to him acknowledging that a response to LCDR Bainbridge's inquiry was required and that he had prepared a written response based on the previously provided legal opinion. By minute dated 17 July, CMDR Rayner wrote to LCDR Bainbridge along the exact lines of LEUT Jones' drafted response cited above (paragraph 5.22)¹⁶ CMDR Rayner told the Commission:

Every request I received from those sailors was through their lawyer and I, on every occasion, approached Fleet Legal to assist because I had...no information myself. I had no capacity or access to the Wark Inquiry even when it was complete. So...I was in no position to answer those questions. So I sought the guidance and support from Fleet Legal to try and get an answer out of COMASSURFOR [CDRE Middleton] to provide that response.¹⁷

5.16 Consistent with the views he expressed to CMDR Bowers, he told the Commission that he had great sympathy for the senior sailors' situation, and 'empathy for the problems' that they were facing. According to CMDR Rayner, he was trying 'very hard' to get some answers for the senior sailors and to support them as best he could but the information was not available to him.¹⁸

5.17 Having received CMDR Rayner's response to his application for information, LCDR Bainbridge then made a number of subsequent requests. By minute dated 28 July, he asked the CO *Kuttabul* to provide a copy of the document from the CO *Success* that contained the reasons for the landing of the senior sailors. He wrote that they were yet to be informed of the reasons for their removal from *Success*, other than a vague reference by the CO *Success* to some 'serious allegations' yet to be disclosed. He stated further:

As the legal representative of the three members, I have made several attempts to obtain a statement of reasons for the removal from *Success* (through the Fleet Legal Officer), however, I am yet to receive any information other than vague, non-specific, inferences to the matters which have featured in the media and/or matters which are subject to inquiry.¹⁹

15 Gyles Report, Part Two, paragraph 3.23.

16 Minute, CMDR Rayner to LCDR Bainbridge, 17 July 2009. Committee-in-confidence document.

17 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 21.

18 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 28.

19 Gyles Report, Part Two, paragraph 3.27.

5.18 LCDR Bainbridge enclosed the LAM Signal raised at the time the sailors were returned to Australia. He observed that the CO *Success* 'did, or did intend to, send a statement of reasons' for the sailors' removal from HMAS *Success* to CO *Kuttabul* and requested a copy of that document containing the reasons.²⁰ The next day, CMDR Clarke informed LCDR Bainbridge that she had not received such a statement and was unable to pass on any information.

5.19 In response to an earlier request for a statement of reasons, CMDR Clarke received correspondence from CMDR Bowers on 10 August. It enclosed the minute of 17 July 2009 from CO *Success* which, as noted above, indicated that it was 'inappropriate to provide further particulars to allegations as the Commanding Officer did not wish to prejudice the integrity of the inquiry process'.²¹

Importance of providing reasons

5.20 The committee does not accept the argument that withholding a statement of reasons from the senior sailors had the potential to jeopardise the Inquiry Officer Inquiry. The legal advice at that time for non-disclosure provides no indication of how the senior sailors' knowledge of the reasons for their landing would 'undermine the outcome of the inquiry'. In the committee's view this argument is muddled. In respect of posing a threat to crew members, the committee notes that the sailors had effectively been quarantined from any contact with crew members and they were in no position to influence witnesses to the Inquiry Officer Inquiry.

5.21 In the committee's view, the refusal to explain to the senior sailors why they were removed from *Success* goes against all practical reasoning. The Administrative Review Council takes the sensible approach that 'even if there is a prima facie exemption from a statutory obligation to give reasons, it is good administrative practice to provide reasons unless there are good grounds for not doing so'.²² The Council recently produced a consultation paper which highlighted the significance of providing reasons for making a decision that will adversely affect another:

Informing people about their rights and responsibilities can prevent disputes from occurring and escalating. The earlier a dispute is resolved, the less risk of adverse impact on the applicant and the less cost to the taxpayer is likely to occur.²³

5.22 Defence's Decision-Makers' Handbook similarly recognises the importance of applying procedural fairness to decision-making, including the right to know and be

20 Gyles Report, Part Two, paragraph 3.27.

21 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 78.

22 Administrative Review Council, *Judicial Review in Australia—Consultation Paper, 2011*, paragraph 4.118.

23 Administrative Review Council, *Judicial Review in Australia—Consultation Paper, 2011*, paragraph 4.108.

heard. It advises that a person subject to a decision must have full access to the rule and any criteria on which the decision is to be made, so that they can make their case and respond to any problems. In addition, they have 'the right to be heard before their application is refused'. It directs the decision maker:

You must not shut your ears to the applicant during the process of deciding the matter.

5.23 The CO *Success* at the time of their landing not only closed his ears to the sailors request for reasons but for months after no one thought to consider seriously the arguments for disclosing information to the senior sailors. The focus was on maintaining the wall of silence and finding justification for doing so.

Freedom of Information

5.24 As a means to gain access to information on the reasons for their landing, the sailors decided to exercise another option and lodge Freedom of Information (FOI) requests. On 4 August 2009, one of the senior sailors submitted such a request which it would seem included obtaining a copy of the E&D report. Yet again, their attempts were frustrated. On 11 September, the sailor was told that due to an administrative oversight his request had passed the statutory deadline of thirty days and was 'currently overdue'. He was further informed that the relevant people would endeavour to provide the sailor 'with an outcome as soon as it is available'. On 4 November, the sailor put in writing his disappointment at the delay in his FOI request:

It has been 3 months since our request was considered valid and my patience has been well and truly tested. I also informed you that the Inquiry has completed (final report completed 20th August and 2 months has elapsed and therefore the Inquiry cannot be re-opened) and that any request denied on the grounds of 'an on going inquiry' should be queried by FOI.²⁴

5.25 One of the sailors indicated that through an FOI request, he received a copy of the E&D report, six months after it was written.²⁵ Another explained that he eventually received a copy through an FOI request in November 2009 which took 'some 120 days from the application'.²⁶ The Gyles Report noted that on 16 November the three senior sailors were given interim decisions in relation to their FOI requests which included the provision of some documents.²⁷

5.26 While the senior sailors were struggling to obtain information on why they were landed, the Wark inquiry had been interviewing crew members from *Success*.

24 In camera correspondence.

25 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 July 2010, p. 63.

26 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 8 July 2010, p. 32.

27 Gyles Report, Part Two, paragraph 3.54.

The Wark inquiry—progress

5.27 On 15 May 2009, soon after the landing of the senior sailors, CDRE Bates, as Chief of Combat Support Group, appointed CMDR Niel Wark as an Inquiry Officer to inquire into the facts and circumstances of allegations of equity and diversity issues in HMAS *Success*. CDRE Bates directed CMDR Wark to submit a report no later than 26 June 2009, after being satisfied that all information relevant to the inquiry had practicably been obtained. CDRE Middleton, who assumed responsibility for *Success*, amended the instrument of appointment on 17 July, which then superseded the earlier one.²⁸ It directed the report be submitted no later than 31 July 2009. If the inquiry were not completed by that date, CMDR Wark was to present an interim report by 31 July setting out the circumstances. Both instruments directed CMDR Wark to ensure that a notice of adverse findings was issued in the event that such findings were contemplated. This instrument was superseded by another issued on 10 August 2009.²⁹

5.28 After two months of inquiry, CMDR Wark was ready to issue notices of possible adverse findings. In this chapter, the committee considers the events that flowed from this action.

Notification of potential adverse findings

5.29 On 10 and 13 July 2009, CMDR Wark gave notification of proposed inquiry findings to 11 people, including the three senior sailors. In part the notice stated:

I have gathered information relevant to the inquiry and have commenced analysing that information with a view to making findings as required by the Terms of Reference. The purpose of this Minute is to inform you that, based on the information available, I am inclined to make findings and recommendations which you may regard as adverse to your interests. Attached at enclosure 2, is a list of those proposed findings.

In order to provide you with procedural fairness, you are invited to make any statement and/or provide material in relation to the proposed findings contained in Enclosure 2. Such statement and/or further material will be considered when I make my final report.³⁰

28 On 1 July 2009, Navy underwent a restructure that abolished the position of CCGS and created Commodore Support. CDRE Ian Middleton, the Commander of the Australian Surface Force was now responsible for all the major fleet units and larger ships, which included *Success*. See paragraph 4.12.

29 Defence (Inquiry) Regulations, Inquiry Officer Instrument of appointment, dated 15 May, 17 July and 10 August 2009.

30 HMAS *Success*, Notification of Proposed Inquiry Findings, in Gyles Report, Part Two, Annex B.

5.30 According to CMDR Rayner the notices were initially emailed directly to some sailors from the Wark inquiry. He intervened in this process and had the notices forwarded to him, which he then issued on behalf of CMDR Wark. He explained:

All of these notices required the recipients to respond to evidence and this was part of the due process of the inquiry. When I issued the notices I offered each of the recipients legal assistance should they require it.³¹

5.31 This action was consistent with the *Defence Administrative Inquiries Manual*, which directs that an Inquiry Officer is to put possible findings to a person who will be potentially adversely affected by the findings of the inquiry. Importantly, the Manual also requires the Inquiry Officer to provide that person with opportunity to respond to those potential findings and the evidence on which those findings are proposed to be made.³²

Access to evidence

5.32 On 15 July 2009, LCDR Bainbridge wrote to CMDR Wark expressing concern that the notifications served on the senior sailors did not, in a majority of cases, contain the full transcript of interviews. Among other things, he noted that some of the extracts began with a reference to previously undisclosed material and several transcripts contained references to other documents that had not been disclosed. He gave an example. To save time and effort in identifying deficiencies in the extracts, he sought to obtain the full transcripts. If this request were not acceptable, he indicated that he could provide reasons for each transcript as required. LCDR Bainbridge also noted that transcripts from several 'key personnel onboard *Success* had not been provided and references to other documents mentioned in the transcripts had not been disclosed'. He therefore also requested to be provided with all the remaining transcripts in full and copies of all supplementary evidence gathered during the inquiry.³³

5.33 LCDR Bainbridge wrote again on 18 July, providing justification for seeking to obtain the additional material and identifying numerous specific examples of, what he held to be, incomplete evidence. He submitted that the obligation to disclose evidence should not be limited to that evidence which may be considered adverse but 'exculpatory evidence which may tend to contextualise, disprove or discredit the adverse evidence should also be disclosed.'³⁴

5.34 Six weeks later, LCDR Bainbridge wrote to CDRE Middleton, as the Appointing Authority, about potentially affected persons being entitled to know the

31 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August, 2010, p. 9.

32 *Administrative Inquiries Manual*, ADFP 06.1.4, June 2006, paragraph 6.37.

33 Correspondence to CMDR Wark, 15 July 2009. Committee-in-confidence document.

34 Correspondence to CMDR Wark, 18 July 2009. Committee-in-confidence document.

substance of the case against them and to receive the evidence relied on in contemplating any action or decision that may adversely affect them. He maintained:

Although some evidentiary material was disclosed to my clients as enclosures to their respective notices of potential adverse findings, there was a substantial amount of evidence that was not provided. Despite making formal objections to the Inquiry Officer and requesting access to the evidence, a considerable amount of material remains hidden from my clients.³⁵

5.35 He then identified a number of documents and requested that they be provided to him, including the E&D report and the missing evidence identified in his earlier request for documentation dated 15 July and 18 July. He explained:

As a result of my restricted access to the evidence that was relied upon by the Inquiry Officer, I have been unable to offer my clients the requisite standard of legal support.³⁶

5.36 LCDR Bainbridge persisted with such requests including seeking permission from CO *Success* to come aboard the ship for the purpose of speaking to witnesses who may have given evidence under duress or eyewitnesses who were not interviewed.³⁷ He also requested the Inquiry Officer's Report in its entirety and all enclosures, annexes, appendices and other related material attached or included in the report. In all, after 18 July 2009, LCDR Bainbridge made seven separate, yet unsuccessful, requests to CDRE Middleton in an attempt to obtain access to what he termed 'the hidden evidence'.

15 July—joint complaint

5.37 While, the senior sailors' legal representative was actively seeking access to material that would assist them to respond to their notifications of potential adverse findings, they were pursuing a grievance about their treatment. On 15 July 2009, they lodged a joint formal complaint with CO *Kuttabal*, CMDR Clarke, in which they argued that the initial E&D health check was conducted under the 'deceptive guise of 'multicultural awareness training'. In addition, the senior sailors claimed that:

- they were shocked and humiliated by the way the CO of *Success* had treated them from the time they were summoned to his cabin until their landing;
- they had not been interviewed, either formally or informally, about the allegations against them; and
- had not been informed about the allegations or given the opportunity to make representation against them.

35 Gyles Report, Part Two, paragraph 3.75.

36 Gyles Report, Part Two, paragraph 3.75.

37 Correspondence to commanding officer *Success*, 7 October 2009.

5.38 By this time, the sailors had also become aware that, shortly after their landing, the CO of *Success* had made statements to the Heads of Departments, Wardroom, CPOs and POs to effect that a rotten core had been removed from the ship. Furthermore, they had been told that the Supply Officer used this statement when briefing the supply department on the removal of personnel. The senior sailors included this reference to them as a rotten core in their complaint, arguing that:

The use of this statement gave the entire ship the presumption of guilt before we have even been given a chance to defend ourselves or even been made aware of the allegations. These personnel who were briefed in this way were later to become the witnesses to the inquiry. This abuse of power can only lead to bias when the inquiry conducted interviews with the ship's company.³⁸

5.39 Overall, their complaint covered: the conduct of the E&D health check; the way the CO informed them of his decision to remove them; and the manner in which they were removed from the ship including the CO's reference to a rotten core, which, in their view, could jeopardise the Inquiry Officer Inquiry. Their complaint also referred to the lack of support on their arrival in Sydney and during the media reports. The senior sailors concluded their joint complaint by stating:

Our treatment by the Commanding Officer of HMAS *Success* and other senior members has been biased and unfair during the removal from the ship and the subsequent inquiry. We feel the Navy has a duty of care in protecting our reputation within Navy and from the Media. We have received no such protection and feel let down by an organisation that we have been proud to serve in.³⁹

5.40 On receipt of the joint complaint, CMDR Clarke directed LEUT Pymble, a legal officer attached to *Kuttabul* to carry out a quick assessment of the matter. In this assessment, LEUT Pymble noted that the sailors had made serious and numerous complaints regarding their treatment on *Success*, and to a lesser degree their treatment by the RAN more generally. It went on to state:

The allegations made against CO *Success* and members of Command onboard *Success* are particularly concerning and warrant thorough and careful investigation as they allege a concerted and deliberate use of Command influence which may potentially compromise the ongoing IOI into the 'sex scandal' matter. These sailors also raise significant allegations over whether or not they have been treated in line with the concept of natural justice and whether procedural fairness has been afforded to them.⁴⁰

5.41 LEUT Pymble formed the view that:

38 Three senior sailors to Commodore C.A. Clarke Commanding Officer HMAS *Kuttabul*. Committee-in-confidence document.

39 Three senior sailors to Commodore C.A. Clarke Commanding Officer HMAS *Kuttabul*. Committee-in-confidence document.

40 Gyles Report, Part Two, paragraph 3.130.

...it is prima facie appropriate that consideration be given to appointing an Inquiry Officer's Inquiry into the matter. It is important to note that the relevant Appointing Authority should be independent and removed from the matter so as to avoid any allegation of real or perceived bias in directing the inquiry. In the first instance the matter should be referred by CO *Kuttabul* to the Fleet Commander for consideration of appropriate action.⁴¹

5.42 On 17 July, CMDR Clarke forwarded LEUT Pymble's quick assessment report and the joint complaint to CDRE Middleton, Commander Australian Surface Forces. Ten days later, CDRE Middleton wrote to RADM Gilmore advising him of the joint complaint and, to ensure impartiality and independence, asking him to take responsibility for investigating the complaint, if deemed necessary.⁴²

5.43 RADM Gilmore did not reply until 25 August when he wrote back to CDRE Middleton stating that, having read the quick assessment and the complaints, the matter appeared to 'be quite constrained and well within the power of Fleet Command to address'. He felt obliged to refer the matter back to CDRE Middleton so that he could refer it to another of the Force Commanders to initiate an inquiry.⁴³

5.44 For almost a month the matter simply gathered dust. On 21 September, LCDR Bainbridge wrote to CO *Kuttabul* seeking an update on the joint complaint. Clearly frustrated by the delay, he stated:

On the one hand, my three clients were removed from their ship on the basis of unsubstantiated rumours and without procedural fairness. This action took place immediately and command spared no expense in setting up disciplinary and administrative inquiries in short time. On the other hand, when it comes to investigating the matters raised by my three clients, it appears that there is a substantial lack of urgency in investigating the complaint.⁴⁴

5.45 Promptly, CMDR Clarke wrote to CDRE Middleton 'respectfully requesting' a progress report on the status of the complaint. She was informed that a Routine Inquiry was due to start.

The Routine Inquiry—Houston inquiry

5.46 On 25 September 2009, Commodore Support, CDRE van Balen, appointed CMDR Houston to conduct a routine inquiry based on the complaints raised by the senior sailors. Five days later, on 30 September, CMDR Clarke wrote to LCDR Bainbridge acknowledging that the issues raised in the complaint were of a serious

41 Gyles Report, Part Two, paragraph 3.130.

42 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 77.

43 Royal Australian Navy, Minute, RADM Gilmore to COMAUSSURFOR, 25 August 2009.

44 Correspondence to CO HMAS *Kuttabul*, 16 September 2009. Committee-in-confidence document.

nature and informing him that a Routine Inquiry had commenced on 28 September.⁴⁵ She again indicated that the senior sailors were 'to receive the full divisional support of *Kuttabul*.'⁴⁶

5.47 The senior sailors would not learn of the results of the Routine Inquiry until November.⁴⁷ The committee considers this inquiry in the following chapter.

Request to rescind order not to contact members of the ship's crew

5.48 When the three sailors sought to rejoin *Success* on 27 July 2009, which was the first working day after the ship came alongside in Sydney, they were directed not to approach the ship or associate with any *Success* personnel.⁴⁸

5.49 On the same day, LCDR Bainbridge wrote to the CO *Success* requesting that he rescind the order banning the sailors from contacting by any means members of the ship's company.⁴⁹ In his view, this order was 'oppressive'.⁵⁰ For their information, the CO of *Kuttabul* and the Fleet Legal Officer were included in the correspondence. LCDR Bainbridge argued that the direction prevented the landed sailors, and even him on their behalf, contacting the CO of *Success*, and they risked imprisonment if they were to do so. He stated:

The order preventing the three sailors from contacting members of the ships' company, which even prevents the members writing to you via formal correspondence, is oppressive. The order is preventing the members from exercising their statutory rights and other rights conferred by Defence Instruction and/or other ADF policy documents.⁵¹

5.50 On the following day, 28 July, CMDR Bowers informed CMDR Rayner that LCDR Bainbridge had indicated to him that he had a signal from *Success* dated in May directing the senior sailors to return to *Success* on 22 June. As a result, the sailors had turned up to the ship's gangway yesterday and were turned away. CMDR Bowers stated further that:

LCDR Bainbridge asked what the status of the personnel was and I stated that they continued to be temporarily landed from *Success*. In light of the

45 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 80. Correspondence, 30 September 2009, committee-in-confidence document.

46 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 80.

47 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 80.

48 Various Royal Australian Navy Minutes, Request for Statement of Reasons, 19 August 2009.

49 Minute, LCDR Bainbridge to commanding officer, *Kuttabul*, 27 July 2009.

50 Minute, LCDR Bainbridge to commanding officer, *Kuttabul*, 27 July 2009.

51 Gyles Report, Part Two, paragraph 3.111.

signal however, he asked for further direction as to where they should report for duty.⁵²

5.51 In responding to CMDR Bowers, CMDR Rayner indicated that he was unaware of the LAM signal or the direction for the sailors to return to the ship and that he would investigate and advise accordingly. Each of the relevant 3 signals stated 'request [named sailor] be administered by Roberts Division HMAS *Kuttabul* until *Success* returns 22 June 2009'.

5.52 Correspondence continued throughout the following weeks.⁵³ On 19 August, LCDR Bainbridge wrote to CO *Kuttabul* noting his previous request to have the order preventing the senior sailors from contacting members of the ship's company revoked. He enclosed separate requests from each of the three senior sailors seeking a written statement of reason for the decision to remove the sailor from the ship and preventing him from rejoining *Success* as instructed.

5.53 That same day, LCDR Bainbridge also informed CMDR Bowers that he had previously asked CMDR Rayner to revoke the order preventing the senior sailors from contacting the ship's company and was yet to receive a response.

5.54 CMDR Rayner understood that the senior sailors had been directed 'not to access the ship or talk with members of the ship's company'. He believed that the directive was given 'to prevent collusion of witnesses to the Wark inquiry'. CMDR Rayner told the Commission that he sought legal opinion from CMDR Bowers, who informed him that once the Wark inquiry had completed evidence, then this requirement would no longer apply.⁵⁴

5.55 By minute dated 31 August 2009, CMDR Rayner wrote to LCDR Bainbridge with regard to, among other things, the landed sailors' access to the ship. The minute stated that the divisional support for the sailors' LAM posted to *Kuttabul* remained extant but the senior sailors were:

- not to speak to anyone about any matters under investigation/administrative inquiry; and
- not to proceed onboard HMAS *Success* except where they have a work purpose to do so.⁵⁵

5.56 With regard to the senior sailors, CMDR Rayner explained further:

It should be noted that the Engineer, CMDR Kemp, provided this clarification to the members via Telecon, and for three of them in person

52 Gyles Report, Part Two, paragraph 3.112.

53 Gyles Report, Part Two, pp. 100–101.

54 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 9.

55 Gyles Report, Part Two, paragraph 3.115.

later when they came onboard the ship. This advice was reiterated and Legal counselling and Divisional support provided again while the ship was alongside. I believe that in my command...all members have had access at all times to Divisional support and as advised, access to the ship, when requested or needed.

To date, every known request has been dealt with promptly, no member has requested access to, or an audience with, the Commanding Officer. There have been several requests and communication made by the members with other members of ship's company, and those requiring action have been passed through the divisional chain for action. I am not aware of any requests where a response has not been afforded.

The ship will continue to provide support to the members within the constraints imposed by distance and subsequent communications challenges brought about from being deployed overseas.⁵⁶

5.57 LCDR Bainbridge persisted with the request to have the order prohibiting the senior sailors from contacting members of the ship's company lifted. On 2 October, he wrote again to CMDR Rayner seeking an update in relation to his request to rescind the order.⁵⁷

5.58 Although, the CMDR Wark finished his report on 19 August, it would appear that the order remained in force.⁵⁸

Conclusion

5.59 By mid August 2009, the senior sailors and/or their legal representative had with great persistence:

- continued their efforts to receive a statement of reasons for their landing, including submitting an FOI request;
- endeavoured to obtain evidence that they believed was central to the Inquiry Officer's findings and necessary for them to mount a response to their respective notifications of possible adverse findings;
- pursued their grievance concerning the manner in which they were removed from *Success* and returned to Sydney culminating in a formal joint complaint; and
- requested the revocation of an order preventing them for contacting crew members of *Success*.

56 Gyles Report, Part Two, paragraph 3.115.

57 Gyles Report, Part Two, paragraph 3.116.

58 Gyles Report, Part Two, p. 103. According to one of the senior sailors, the restriction was lifted in September, Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 8 July 2010, p. 49.

5.60 Even after repeated attempts, their position and entitlement to know the reasons for their return to Australia had changed little from the day they were removed from the ship on 9 May. They were still denied access to the ship and the ship's crew and were under the impression that crucial evidence related to their notifications of proposed adverse findings was being withheld. Their thwarted efforts to obtain information and to have restrictions lifted coupled with the uncorrected media reports deepened their frustration and suspicions. As noted by Mr Gyles their circumstances at this time 'ensured that the sailors would harbour a serious sense of grievance and a determination to pursue their rights'.⁵⁹

5.61 The completion of the Routine Inquiry that was addressing their formal complaint and the Wark inquiry appeared to offer the only solution whereby the senior sailors would finally obtain details on the reasons for their landing. Hopefully for the senior sailors, the inquiries would also allow the order preventing them from contacting crew members to be rescinded. In the following chapter, the committee considers the Wark inquiry which reported on 20 August and the Routine Inquiry which reported on 25 September 2009.

59 Gyles Report, Part Two, p. 68.