

Chapter 6

Inquiry Officer Inquiry and Routine Inquiry

6.1 By mid August 2009, the senior sailors' right to procedural fairness had been suspended for over three months. This exception to the procedural fairness rule was based on the understanding that the senior sailors posed a threat to the safety and welfare of the ship's crew and that informing them of the reasons for their removal may prejudice the integrity of the Wark inquiry. The Fleet Legal Officer advising the CO *Success* relied heavily on this incomplete inquiry to justify continuing the order disallowing the sailors to contact the ship's crew. The sailors were also waiting for a response to their joint complaint about their treatment lodged on 15 July which was dependent on the Routine Inquiry finalising its work.

6.2 In this chapter, the committee considers the findings of the Wark inquiry and the Routine Inquiry and their implications for the senior sailors.

Wark report findings—20 August 2009

6.3 Although originally set at no later than 26 June, the reporting date for the Inquiry Officer Inquiry was extended and CMDR Wark did not hand down his final report until 20 August 2009.

6.4 It should be noted that the committee has not had access to this report or supporting documentation. It has read a redacted version of the executive summary contained in Part Two of the Gyles Report.

6.5 According to Mr Gyles, the body of the report contained 15 chapters and ran to more than 160 pages. It presented a detailed examination of the basis for its findings, including references to the evidence.¹ Apart from formal matters, the enclosures contained 88 records of interview and some documentary exhibits.²

6.6 CMDR Wark made 37 findings and 8 recommendations. Many of the findings relate to a specific incident. Some, however, are general in nature and include:

- Finding 1—there is no inappropriate culture onboard *Success* as evidenced by attitudes toward inappropriate relationships;
- Finding 6—there is no evidence that female sailors onboard *Success* harbour the view that they feel pressured by male sailors to have sex and that it is easier to give in to the pressure than to resist;
- Finding 10—there is no practice amongst sailors onboard *Success* to place bounties for sex on female sailors;

1 Gyles Report, Part Two, paragraph 2.28.

2 Gyles Report, Part Two, paragraph 2.28.

- Finding 14—the random breath testing regime in *Success* is not truly random because 100% of duty watch is tested on every change-over of duty watch;
- Finding 15—mandatory 'random' breath testing of 100% of duty watch in *Success* has promoted binge drinking;
- Finding 17—at the time of the inquiry there was an inappropriate culture amongst a significant group of Marine Technical sailors comprising an inappropriate attitude towards sexual behaviour and a disrespect of female sailors;
- Finding 25—the phrase 'f...ing WRAN' and 'WRAN' was often said to female sailors onboard *Success* and from time to time it was used in a derogatory way;
- Finding 30—there existed, at the time of the inquiry, a culture of intimidation, bullying and coercion amongst a group of Marine Technical sailors against those who did not agree with that group's culture;
- Finding 34—without strong proactive leadership, the Divisional System is at risk of being diluted because personnel are going to the ship's warrant officer (SWO), Chaplain, E&D Advisors and medical staff, thus increasing the likelihood that the Divisional Officer may not be aware of all the issues and concerns impacting on individuals;
- Finding 35—it is appropriate that *Success* trial a period of mixed rate messing;
- Finding 36—the messing arrangements on *Success* are such that a significant number of female sailors are required to walk up two decks to access their heads and showers; and
- Finding 37—there is a perception among members of the ship's company that a concept of 'bounties' or 'challenges' exists across the Navy.

6.7 As mentioned above, CMDR Wark made findings of wrongdoing against various crew members. The following findings, which do not relate to the senior sailors, convey some sense of the nature of unacceptable or inappropriate behaviour identified in the report:

- Finding 4—on about 9 April 2009 in a bar in Manila, an unidentified sailor said to [named person] 'I wonder if there'll be a bounty on your head like the rest of the girls?';
- Finding 7—[named person] had sexual intercourse with [another named person] onboard the ship during the night of 21–22 April 2009;
- Finding 11—During the evening of 25 April 2009 in a public house in Qingdao, China, [two named persons] engaged in sexual intercourse on a lounge in a place and in circumstances where members of the public and members of the ship's company of *Success* were able to witness this and this act was inappropriate:
 - (a) in the sense that it could offend public decency; and

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- (b) because it could tend to reduce the reputation of the Royal Australian Navy;
- Finding 18—on a day in late April/early May 2009 [named person] passed [another named person] in a passage way and said to her words to the effect of 'Best fuck ever'; and
 - Finding 19—on or about 13 April 2009, when *Success* was in Manila and in the presence of other sailors in the Junior Sailors' Café [named person said] 'Shut up, you f...king whore' and this was inappropriate behaviour because it amounted to sexual and gender harassment.

6.8 In respect of the three senior sailors, CMDR Wark found that one had said to a female sailor 'you know, if you don't do the right thing or whatever then I'll put a bounty out on your head, then the boys won't leave you alone'. This sailor was also found to have provided poor advice to a female sailor who had been racially abused and to have threatened a male sailor.

6.9 Another of the senior sailors was found to have spent a night in a hotel room with a female sailor. He was also found to have witnessed two sailors engaging in sexual intercourse in a public house and acted inappropriately by making light of the actions and not correcting the sailors. This same sailor was found to have encouraged sailors to evade a breath test and was involved in one of the fancy dress incidents.

6.10 The third sailor was also found to have spent a night in a hotel room with a female sailor. He similarly witnessed two sailors engaging in sexual intercourse in a public house and acted inappropriately by making light of the actions and not correcting the sailors. He was involved in the fancy dress incidents and was found to have on two occasions neighed like a horse at a female sailor as he passed her in the passageway.³

Legal review

6.11 On 14 August 2009, the Fleet Legal Officer, CMDR Bowers, engaged LCDR Felicity Rodgers, a Reserve legal officer, to conduct a legal review of the Wark report, in anticipation of the report's completion. According to Mr Gyles, a 'substantial review was contemplated since LCDR Rodgers' engagement was for five days'.⁴

6.12 The legal officer completed her review and reported on 2 September 2009. She found that the Inquiry was established and conducted according to the relevant Defence regulations and manual and that the procedure for dealing with potentially affected persons complied with the relevant Defence manual and the Instrument of

3 Commodore Niel Joseph Wark, Inquiry Officer, 'Inquiry Officer's Report into the Facts and Circumstances Surrounding Allegations of Equity and Diversity Issues in HMAS *Success*', 30 August 2009, The Wark report: summary, findings and recommendations, Gyles Report, Part Two, Appendix C.

4 Gyles Report, Part Two, paragraph 2.30.

Appointment. In her opinion, the findings and recommendations did not exceed the TOR and were reasonably open to the evidence and further that there were no procedural irregularities in the inquiry process. She noted however, that while the report addressed the TOR adequately, there were two exceptions which are discussed later. LCDR Rodgers also noted that WO Harker was an assistant to the Inquiry. Overall, she considered the validity of the instrument of appointment and took the view that it should not cause the Wark report to be invalid.⁵ She concluded that there was no reason at law why the Appointing Authority could not act on CMDR Wark's findings and recommendations.⁶

6.13 The committee considers the Wark inquiry in greater detail in the following chapter including its terms of reference and WO Harker's appointment. The senior sailors were not made aware of some of the findings and recommendations of the Wark inquiry until the end of November.

Statement of reasons—11 September 2009

6.14 On 11 September 2009, soon after the legal review of the Wark inquiry was completed, CMDR Brown finally provided to each senior sailor a separate statement of reasons for his removal from *Success*. They were common in substance and read:

3. The specific allegations that were brought to my attention and referred for further investigation were:
 - a. That you made and were aware of threats of physical violence and physical intimidation towards members of the ship's company should they talk to investigators and did not take appropriate action as a Senior Sailor or inform Command.
 - b. That you were aware of a predatory culture that existed primarily within the MT department onboard HMAS *Success*, which included coercing and/or bullying female junior sailors into having sex and did not take appropriate action as a Senior Sailor or inform Command.
 - c. That you were aware of a 'sex act' that was alleged to have occurred in a public bar in Qingdao and did not take appropriate action as a Senior Sailor or inform Command.
 - d. That you were aware of alleged bounties placed on female members of the ship's company which were to be claimed for having sex with those members and did not take appropriate action as a Senior Sailor or inform Command.
 - e. That you were involved in or aware of activities that contravened my direction in relation to the 'safe spirit' program by taking action to

5 Gyles Report, Part Two, pp. 14–15.

6 Gyles Report, Part Two, p. viii; Commodore Niel Joseph Wark, Inquiry Officer, 'Inquiry Officer's Report into the Facts and Circumstances Surrounding Allegations of Equity and Diversity Issues in HMAS *Success*', 30 August 2009, The Wark report: summary, findings and recommendation, Gyles Report, Part Two, Appendix C.

ensure those within your department suspected of being 'above the limit' were not tested.

4. As a result of these allegations and in consultation with Fleet Command, I in my capacity as Commanding Officer made the decision to temporarily land you to FSU for the following reasons:

- a. I had concerns for the safety, health and wellbeing of some of the members of the ship's company while further investigations were conducted,
- b. The requirement for further investigations and the potential for the ship's company to feel intimidated and not talk freely with investigators with you onboard was untenable,
- c. Given the allegations and the requirement for further investigation with regards to your alleged knowledge and activities mentioned above my trust in you to act upon and report such issues to Command could no longer be justified until the outcomes of the investigations were known, and
- d. You were temporarily landed to FSU so that you were not disadvantaged financially pending the outcome of the further investigations, that is you retained sea going allowances.

5. With regards to you being prevented from rejoining HMAS *Success* on the 27 June 09, given that further investigations were ongoing at the time it was considered inappropriate for you to rejoin until the investigations were complete given the reasons above. Furthermore the date in Reference C was a date provided to CO HMAS *Kuttabul* by me to assist in the administration of your temporary landing to FSU and reflected my understanding of the timeframe involved at the time of drafting. There was no variation or alteration of the decision to temporarily land you.⁷

6.15 The reasons given to the sailor, the CPO, who was alleged to have threatened another sailor with putting him through the wall differed slightly from the other two statements in that 3(a) states simply:

Threats of physical violence and physical intimidation by you towards members of the ship's company should they talk to investigators.⁸

6.16 According to CMDR Rayner, it was through this process, whereby the sailors were provided with the statement of reasons, that he saw a draft copy of those reasons. At that point, it became apparent to him that CMDR Brown relied on administrative instructions and concerns over safety issues to suspend due process.⁹

7 Gyles Report, Part Two, paragraph 3.43.

8 Statement of Reasons for Temporary Removal of [name redacted] from HMAS *Success*, signed S.T. Brown, 11 September 2009.

9 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 27.

6.17 The sailors' legal representative was not satisfied with this statement of reasons and continued his efforts to elicit, what he believed to be, an accurate account of the reasons. It should be noted that the senior sailors were not disputing the authority of a CO under the Defence Act to remove people from his ship if he believed they posed a danger to the safety and welfare of the crew. The senior sailors' grievance was with the actions that then flowed from the decision to land them.¹⁰

Inadequate explanation

6.18 On 8 October 2009, LCDR Bainbridge wrote to the Fleet Legal Officer giving his interpretation on the application of section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR) which deals with obtaining reasons for a decision. He referred to previous correspondence in which he had sought reasons for the landing of the senior sailors, noting that CMDR Brown's response 'did not provide any information regarding the evidential basis of the specified allegations'. He argued that, notwithstanding any disagreement on the application of the ADJR Act, the provision of a statement of reasons, together with reference to the evidence relied on in making the decision, is provided for by internal Defence policy documents. On behalf of the senior sailors he then requested further information regarding the reasons for their landing. He wanted the particulars of, among other things, the allegations regarding:

- 'threats of physical violence and who made the allegations';
- the 'predatory culture, including which members of the MT department were alleged to have coerced female junior sailors into having sex';
- the public 'sex act, including the identity of the informant, whether he or she named the senior sailors and how the senior sailors were alleged to have been aware of such an act';
- 'bounties', including who made the allegations and whether the informant specifically identified the senior sailors; and
- the 'safe spirit program' including who made the allegations and whether the informant named the senior sailors specifically.

LCDR Bainbridge also wanted to know why the senior sailors were not afforded procedural fairness once the circumstances relating to the safety and welfare argument had changed.¹¹

6.19 On 25 November 2009, LCDR Bainbridge requested an update as to when his requests contained in the correspondence of 8 October 'might be forthcoming'. He wrote again on 10 December. This matter carried over into the new year, when LCDR Bainbridge wrote to CMDR van Stralen about his outstanding request for information.

10 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 80.

11 Correspondence to Fleet Legal Officer, 8 October 2009. Committee-in-confidence document.

Continued efforts to obtain evidential basis for potential adverse findings

6.20 Although CMDR Wark had completed his inquiry and the legal review had found no reason at law preventing the Appointing Authority from acting on CMDR Wark's findings and recommendations, the senior sailors were yet to receive any notifications stemming from that inquiry. Thus, as noted in the previous chapter, LCDR Bainbridge, on behalf of his clients, continued his endeavours to obtain more of the evidence that was relied on for issuing the notices of likely adverse findings. During October, he stepped up his efforts.

6.21 On 7 October, he wrote once again to CDRE Middleton reminding him of his earlier request for information, dated 31 August. He sought to add the Wark inquiry report to this list of material. On the same day, he wrote to CMDR Rayner seeking permission to conduct witness interviews onboard *Success*. He stated:

Potentially affected parties to an administrative inquiry are entitled to know the substance of the case against them and are further entitled to receive access to the evidence relied upon in the process of contemplating any action or decision that may affect them. The rationale behind such a principle is that adverse material must be disclosed to the affected party in order to allow the affected party to controvert it.

I have received information that some of the evidence given by witnesses was supplied to the inquiry officer under duress and, for that reason, the evidence was not corrected or is otherwise unreliable. I have also discovered that several eyewitnesses to certain allegations were not interviewed by the inquiry officer at all, despite those witnesses giving a prima facie contrary account of the incident.

The majority of the aforementioned witnesses remain members of your crew. I therefore seek your permission to come aboard HMAS *Success* at a convenient time for the purpose of speaking with those witnesses.¹²

6.22 Also, on 7 October 2009, CMDR Bowers wrote to his Deputy Fleet Legal Officer, LCDR Swanson, with regard to LCDR Bainbridge's request to conduct witness interviews of *Success* personnel. He directed LCDR Swanson to provide advice to CMDR Rayner indicating that in his view the request should be denied. He stated:

I am not sure what mechanism LCDR Bainbridge proposes to use for these interviews—he has no capacity as counsel representing to conduct interviews himself. Any interview of any member in a formal setting would require command sanction in some form or another...With respect to the Wark inquiry, LCDR Bainbridge has raised an allegation'...that some of the evidence given by witnesses was supplied to the inquiry officer under duress and, for that reason, the evidence was not correct or is otherwise unreliable.' He also alleges that several eyewitnesses to certain allegations were not interviewed by the IO when they have, prima facie, contrary

12 Gyles Report, Part Two, paragraph 3.117.

accounts of the incident. I propose that, through the CO you ask LCDR Bainbridge to report particulars of his allegations so that they may be examined and taken further if need be.¹³

6.23 By early November, LCDR Bainbridge's request to interview crew members of *Success* remained outstanding. At that time, CMDR Rayner indicated that he did not intend to respond to LCDR Bainbridge's request and that he 'needed to digest what had transpired during his absence'.¹⁴

6.24 On 10 November, CDRE Middleton wrote to the senior sailors to inform them that the Wark inquiry was completed. He explained further that he had considered its findings and recommendations, most of which he accepted. Some of recommendations, however, were still subject to advice and decisions were yet to be finalised. CDRE Middleton then explained:

Ministerial authorisation is being sought and will need to be granted before the Inquiry Officer's report, or any evidence relied upon, will be released to any persons affected. The anticipated timeframe for the release of the Inquiry Officer's report is in the order of one month, due to the nature of the report and the necessity for privacy deletions to be undertaken.¹⁵

6.25 By minute dated 24 November, LCDR Bainbridge wrote to CMDR Rayner reminding him of his previous request to conduct witness interviews onboard *Success*. He noted he was yet to receive a response:

Whilst there may be reasonable grounds for such a delay, the appearance that such inaction generates is of great concern. On the one hand, [redacted] were removed from your 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 providing any assistance to [the sailors] it appears that there is a considerable lack of urgency.¹⁶

6.26 On 24 November 2009, LCDR Bainbridge also wrote to CDRE Middleton again seeking access to documentation that precipitated the Wark inquiry and reminding him of his repeated requests. He wrote:

13 Gyles Report, Part Two, paragraph 3.119.

14 Gyles Report, Part Two, paragraph 3.125. CMDR Rayner explained that one of the factors that influenced the turnaround response of correspondence was his personal movements and presence onboard to respond to correspondence. After the ship returned to Australia he took leave from 9 October 2009 to relocate his family from Perth to Canberra and returned to the ship on 2 November 2009. Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 6.

15 Gyles Report, Part Two, paragraph 3.84.

16 Gyles Report, Part Two, paragraph 3.126.

It is now approximately three months since my initial request for disclosure was made, however, I am yet to receive a single document. I request an update on the progress of my request and whether ministerial authorisation has been sought and/or granted.¹⁷

6.27 LCDR Bainbridge's requests for documentation, including the Wark report, and to conduct independent interviews of personnel in *Success* to broaden the witness base from the Wark inquiry was not completely resolved before it was overtaken by the senior sailors' redresses of grievance (ROGs).¹⁸ The first ROG was lodged on 30 November 2009, four days after the senior sailors were issued with notices to show cause.

6.28 The senior sailors and their legal representatives were also awaiting some definite action on their joint complaint which was lodged on 15 July 2009. At the end of September they had been informed that a Routine Inquiry was to be undertaken.

Rescinding the order preventing the senior sailors accessing *Success*

6.29 While, the senior sailors and their legal representative continued their efforts to obtain information to assist them to respond to the notification of potential adverse action, the ban on contacting crew members remained under consideration.

6.30 By minute dated 8 October 2009 CMDR Rayner wrote to each of the senior sailors in materially the same terms. It referred to LCDR Bainbridge's request of 27 July to rescind the order preventing them from contacting crew members in *Success* (see paragraph 5.49). CMDR Rayner went on to indicate that command understood that the Wark inquiry had been completed and the final report had been forwarded to the appointing authority for consideration. He went on to explain:

The actions that may result from this report remain outstanding and to date this Command has not been informed of what, if any, actions may be recommended or undertaken against any individual. While the actions remain outstanding, it is considered fair that [redacted] remain LAM posted so as to prevent him being financially disadvantaged, to provide an open and effective workplace, as well as maintaining the support and care for him and the remainder of the Ship's Company.¹⁹

6.31 The CO *Success* indicated, however, that with the inquiry now complete, it was 'reasonable that [the senior sailor] be given the opportunity to access the ship for his daily work from the area where he has been LAM posted to as is deemed reasonable'. Furthermore, that [the sailor] be 'afforded the continued availability of the Divisional support from his Divisional Officer, and should continue to utilise CDRE

17 Gyles Report, Part Two, paragraph 3.85.

18 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 7.

19 Gyles Report, Part Two, paragraph 3.120.

Kemp to provide this service and that he utilise the administrative support from the ship'. While the sailor remained LAM posted, however, he would 'not share the privileges of the Mess facilities, similar to any visiting member from another organisation or establishment'.²⁰

6.32 On 12 October 2009, CMDR Kemp, the MEO in *Success*, emailed LCDR Swanson seeking clarification on the steps that needed to be taken with regard to the sailor as he was currently at FSU and would like to return to the ship. CMDR Kemp was seeking to determine whether there was a timeframe for a resolution to the sailor's posting. For example:

Should he come to this ship or be posted to another ship to progress his task book? Can I ask DSCM [the Directorate of Sailor Career Management] to post him to a new platform?

...is there a timeframe for resolution? Can the member be gainfully employed in this ship? Can he be posted ashore or to another ship?²¹

6.33 On 15 October, LCDR Swanson responded:

Fleet legal have no vision of what is happening to [named senior sailor] as he is not subject to any administrative inquiries but is subject to investigation by ADFIS and they are your best point of contact to determine what if anything they are doing with this matter.²²

6.34 This reference to an ADFIS investigation is curious as no such investigation was taking place. Nonetheless, LCDR Swanson stated further that he was consciously aware of the effect that delays had on individuals and that his Office moved these matters as fast and as quickly as it possibly could. According to him:

Fleet has the best interests of the individuals at heart and the matter is currently with the CO and CDRE Middleton who are making a decision as to what they want to happen with the members.²³

6.35 At this time, the Routine Inquiry that was instigated in response to the senior sailors' joint complaint was drawing to a close.

23 October 2009—Routine Inquiry (Houston report)

6.36 CMDR Houston completed his one month Routine Inquiry with a report dated 23 October 2009. He reached a number of conclusions including that:

- the conduct of the E&D Health Check did not constitute an Open Inquiry;

20 Gyles Report, Part Two, paragraph 3.120.

21 Gyles Report, Part Two, paragraph 3.121.

22 Gyles Report, Part Two, paragraph 3.122.

23 Gyles Report, Part Two, paragraph 3.122.

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- no deliberate effort was made to disguise the E&D Health Check as 'multicultural awareness training';
 - the CO *Success* was within his authority when he suspended the sailors' right to procedural fairness; and when he gave his directive restricting their communication in that he had concern that they could undermine those inquiries without the restriction imposed;
 - the CO *Success* failed to adequately notify the senior sailors of the circumstances for their landing and that 'this failure was a significant contributing factor to the poor management of the sailors once landed;
 - the advice of Fleet Legal Officer regarding the senior sailors' suspension of their right to procedural fairness is considered appropriate—however, no advice was provided in relation to resumption of that right;
 - the removal of the senior sailors can be interpreted as a change in circumstances and therefore their entitlement to procedural fairness resumed, practically, on return to Australia—once the threat had been removed the sailors should have been provided a Statement of Reasons clarified the situation as soon as possible;
 - the letter issued to the senior sailors on 9 May was insufficient and that a statement of reasons should have been issued as soon as practicable;
 - CO *Success* did address the members of the Wardroom, Chief Petty Officers and Petty Officer messes after the senior sailors had been removed to the effect that 'there was a rotten core on this ship and the core has now been removed;
 - these statements meant that there was potential for bias in Inquiry Officer Inquiry statements, and that this should be considered by the Inquiry Officer;
 - the media release that there was a sex scandal onboard *Success* and that those responsible had been removed and were under investigation naturally inferred that the senior sailors were part of this scandal. Without formal advice from Navy to the contrary, the sailors were unable to defend themselves amongst their families and peers, which caused a great deal of hurt;
 - the sailors' situation had been aggravated by the failure of CO *Success* to provide adequate reasons for their removal; and
 - there was nothing untoward with Navy Public Affairs not being familiar with the sailors' situation and noting that, no guidance is available for assisting Defence personnel under media scrutiny, the response of *Kuttabul* was appropriate.²⁴

6.37 CMDR Houston also commented on the time it took to act on the sailors' joint complaint. He stated:

24 Houston Report, paragraphs 27, 28 and 53; Gyles Report, Part Two, paragraphs 3.150–3.151.

...the delay in taking any action is contrary to the principle of making early resolution of complaints. The lack of effective communication between Commands has prevented the complainants from receiving any worthwhile response.

It should be noted that the current CO *Success*, who remains [the senior sailors'] administrative authority was not privy to the content of the complaint until this investigation commenced onboard. Failure to inform the current CO *Success* has prevented any resolution of grievances at the lowest level. This highlights the breakdown in communication at various levels of command and further highlights the need for case managers whose purpose is to ensure the administrative and divisional needs of individuals is met.²⁵

6.38 The committee was particularly interested in the attention that CMDR Houston gave to procedural fairness matters. The Houston report noted that the decision to land the senior sailors was an exception to procedural fairness in that 'the principle of the hearing rule was not observed'. It recognised that it was acceptable for a CO to temporarily waive the requirements when a genuine and real urgency existed to protect the safety and welfare of his crew. CMDR Houston stated that the key element to whether the sailors were provided with adequate support after their removal 'lies in the resumption of procedural fairness'. In his view, this point cannot be over emphasised. He found that:

Consideration of the sailors' welfare, namely the resumption of their right to procedural fairness has not been adequately managed and the demands of the situation required much more than what was done. The sailors had real concerns for their rights and despite a number of requests for action, or at least status notification, were being ignored.²⁶

6.39 The Houston report also quoted from ABR 10 Chapter 4 which requires:

Units landing personnel at short notice must appropriately notify the gaining unit of the sailors' movements, reasons for landing and any outstanding administrative action. The losing unit must make every effort to complete any necessary administrative action, but if operational imperatives prevent this the gaining unit, and the individual concerned, are to have a clear understanding of what remaining actions must still be completed.²⁷

6.40 Against this advice, the Houston report found that:

This action was not taken with the consequence that with the exception of Fleet Legal, no authority in *Kuttabul* or Garden Island was adequately prepared to meet any divisional or administrative needs of [the three senior sailors]. Of particular note the receiving unit, *Kuttabul*, was not aware that the sailors' right to procedural fairness had been suspended. Further, they

25 Houston Report, paragraphs 51–52.

26 Gyles Report, Part Two, paragraph 38.

27 Gyles Report, Part Two, paragraph 26.

had no knowledge of the situation and were not prepared to manage the media exposure that occurred on 5 July.²⁸

6.41 The Houston Routine report noted that:

At the time of authorising this report the restriction placed on [the senior sailors] was still extant. Noting that the IOI report is complete and that the sailors are not under further ADFIS investigation, it is the view of this Inquiry that the restrictions are no longer justified. Therefore, it is recommended that this restriction should be reviewed at the first available opportunity, and if no longer justified removed.²⁹

6.42 On 11 November, LEUT Kelly Allan completed the legal review of the Houston inquiry, finding that there were no legal impediments to accepting its findings and recommendations.³⁰ Six days later, CDRE van Balen provided a written brief to the Fleet Commander on the Houston Routine Inquiry noting that of the ten recommendations he agreed with the following five:

- that the restriction on access issued on 9 May should be reviewed at the first available opportunity, and if no longer justified removed (recommendation b);
- that further legal advice be sought to clarify the requirements of the exemption for the ADF provided in Section 13 *Administrative Decisions (Judicial Review) Act 1977* in respect to the principle of procedural fairness and the obligation to provide a statement of reasons in ADFP 06.1.3 Chapter 5 (recommendation c);
- that the temporary status of the senior sailors' postings be resolved as a matter of priority (recommendation e);
- that with the agreement of the senior sailors and relevant crew members of *Success* that a mediation session be held in which the senior sailors can appreciate the genuine concern these senior sailors had for their welfare in the expectation that this resolves the aspect of their grievance related to being marched off the ship (recommendation f); and
- that pending any adverse outcomes from the IOI that the senior sailors be provided with career counselling and be afforded the opportunity to resume their career (recommendation j).³¹

6.43 CDRE van Balen found that:

...the issues of procedural fairness and personnel management go to the core of the complaints by the three sailors. The RIO considered that the sailors were not adequately managed and their requests for further

28 Houston report, paragraph 26.

29 Gyles Report, Part Two, paragraph 3.124.

30 Gyles Report, Part Two, paragraph 3.155.

31 Houston Report, paragraph 54; Gyles Report, Part Two, paragraphs 3.151 and 3.157.

information were not actioned. This situation developed in part due to the suspension of procedural fairness required to effect the temporary landing of the sailors from *Success*. While legal advice on the suspension of procedural fairness was obtained, the suspension of the sailors' rights to procedural fairness was not notified to them, was not effectively managed and was not restored upon the sailors' return to Australia. The same lack of explanation and detail surrounding the temporary landing of the sailors contributed to the initial lack of effective management and provision of support for the sailors on their arrival at *Kuttabal*.³²

6.44 On 27 November 2009, CMDR Clarke contacted the senior sailors and told them CDRE van Balen had received a response in relation to the manner in which they were landed. According to one of the senior sailors, they were provided with correspondence dated 27 November that outlined 15 of the 19 findings but only four of the ten recommendations.³³ He stated further that he was unaware of the recommendations that were adopted though the correspondence indicated that all were accepted. He noted further that the findings not disclosed to him were ones 'favourable to me and would have assisted in the preparation of my response to the Notice to Show Cause.'³⁴

6.45 On 9 December CDRE van Balen wrote to CDRE Middleton seeking assistance with implementation of recommendation b—that the restriction on the sailors' access be reviewed and removed if no longer justified.³⁵

6.46 The Houston report did not make any adverse findings against the senior sailors. It did, however, provide them with fuel to continue to pursue their grievances. In particular they used the findings of the Routine Inquiry to support their argument that the commanding officer failed to provide adequate reasons for their removal. Further, that their landing constituted changed circumstances which meant that their entitlement to procedural fairness should have been restored. The senior sailors also drew support from the report's finding that the CO did refer to a 'rotten core' which consequently had potential to bias statements to the Wark inquiry. The report suggested that CMDR Wark should consider this matter.

6.47 By this time, however, the Wark inquiry and its legal review, which had reported on 2 September, had long finished. Importantly, the senior sailors did not receive any definite indication of the findings of the Wark inquiry until 26 November and the Houston report on the following day.

32 Gyles Report, Part Two, paragraph 3.157.

33 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 8 July 2010, p. 33; Gyles Report, Part Two, paragraph 3.158.

34 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 8 July 2010, p. 34; Gyles Report, Part Two, paragraph 3.159.

35 Gyles Report, Part Two, paragraph 3.162.

26 November—Notices to show cause

6.48 After considerable delay, on 26 November 2009, the Commander Australian Surface Forces, CDRE Middleton, issued to each of the senior sailors a notice to show cause why certain adverse consequences should not follow from the findings of the Wark report.³⁶

6.49 One of the senior sailors received a notice to show cause why a censure should not be imposed, citing findings 9, 23, 28 and 29 of the Wark report.³⁷ Another senior sailor was issued with a notice to show cause why he should not be reduced in rank to [redacted] on the basis of findings 3, 12, 16 and 32 of the Wark report. The third senior sailor received a notice to show cause why he should not be reduced in rank to [redacted] on the basis of findings 2, 13, 21, 27, 31 and 32 of the Wark report.³⁸ See Appendix 2.

6.50 After reading the selected extracts from the Wark inquiry and accompanying evidence provided to him, one of the senior sailors told the Commission that, it became clear that the material was intended for one of the other sailors. He then goes on to explain that 'it took a further six weeks for the correct material to be provided'.³⁹

30 November—ROGs

6.51 For over six months, the senior sailors' careers had been in abeyance, their reputations tarnished and all attempts to obtain information frustrated. Finally, by the end of November, the senior sailors had a clearer understanding of the events that had transpired since the allegations of unacceptable behaviour surfaced onboard their ship. Although still without access to evidence they regarded as critical to their defence, they were able to mount an offensive in the form of a redress of grievance (ROG).

6.52 Thus, on 30 November 2009, four days after the notices to show cause were issued, one of the senior sailors presented a ROG purporting to relate to the findings of CMDR Houston's Routine Inquiry. One grievance concerned the unreasonableness of the Wark inquiry and the flawed nature of the subsequent adverse findings that were made. The redress sought included the following:

- f. an acknowledgement that the method in which CMDR Wark and/or his assistants gathered evidence and/or spoke to witnesses during the Inquiry Officer's Inquiry demonstrated a bias towards implicating me in the allegations, and that the evidence is subsequently tainted or otherwise unreliable;

36 The legal review of the Wark inquiry was completed on 2 September 2009.

37 Gyles Report, Part Two, paragraph 2.48.

38 Gyles Report, Part Two, paragraph 2.49.

39 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 July 2010, p. 62.

- g. an acknowledgement that the failure to disclose evidence to me during the Inquiry Officer's Inquiry constitutes a failure to accord me with procedural fairness;
- h. an acknowledgement that the failure to interview all relevant witnesses during the Inquiry Officer's Inquiry constitutes a failure to adhere to the requirements of ADFP 06.1.4; and
- i. an acknowledgement that, for the reasons specified above, the findings by CMDR Wark are unreasonable in the Wednesbury sense
- j. that the Inquiry Officer's Inquiry conducted by CMDR Wark be set aside....⁴⁰

6.53 That redress was supplemented on 14 December 2009, and on the same day, the other two senior sailors also submitted redresses of grievance, seeking the same relief.

6.54 CMDR Rayner explained that he followed the required process governing ROGs—he reported receiving them and advised the complaints resolution people in Canberra who provided guidance on how it should be managed. On 1 December 2009, he appointed LCDR Daniel Allan to conduct a quick assessment on the ROG submitted by the CPO. The quick assessment was carried out the same day and concluded:

Based on the anecdotal evidence [the senior sailor] has provided, there seems to be sufficient justification for his ROG, however, further evidence is required to ensure a proper outcome for this issue.

Recommendations—[the senior sailor] is required to provide further evidence to support his ROG. There is insufficient information and evidence provided that could be used to make an informed decision in regards to this issue.⁴¹

6.55 A similar process was followed for the ROGs lodged by the other two senior sailors. It was through this process that the CO *Success*, CMDR Rayner, obtained full access to the information contained in the Wark inquiry and other subsequent investigations.⁴²

Establishing the merit of the ROGs

6.56 CMDR Rayner acknowledged his responsibility to determine whether that redress had merit. In his words:

To achieve that I needed to get all the information that was available that they reported in there and raised in their ROG, assess that information and

40 Gyles Report, Part Two, paragraph 2.49.

41 Gyles Report, Part Two, paragraph 2.50.

42 Gyles Report, Part Two, paragraphs 2.54–2.55. Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 5.

then provide an understanding as to whether I felt that their redress had merit. To do that I clearly couldn't do that on my own...we had the Inquiry, we had the E&D report, we'd had the two subsequent inquiries, the one by CMDR Houston and we had a couple of little QAs conducted on the side. So it was, to my mind, pretty complex and a huge magnitude of stuff...my responsibility was to do this job properly and make sure that I actually got to the bottom of the answers as best I could...so I sought all the documentation they [Fleet Legal] had...and someone to help me read all that stuff and then put the arguments as to what I thought from the reading of that—it took me two months to do it.⁴³

6.57 Fleet Legal provided the information and a lawyer, Colonel Michael Griffin.⁴⁴ The committee has not had access to Colonel Griffin's legal advice and relies solely on Mr Gyles' report to obtain an understanding of the legal findings and the justification for them. According to Mr Gyles, Colonel Griffin was a Reserve Officer, engaged initially for 20 sessional days. He had a complete copy of the Wark report and its appendices, as well as CMDR Houston's report. He did not receive a copy of the legal review.⁴⁵

6.58 Although no time was wasted in taking action on the ROGs, the results of such action were not known until the new year. In the meantime, LCDR Bainbridge continued his efforts to obtain access to evidence and to draw to the attention of various authorities his views on the veracity of the Wark inquiry.

Continuing efforts to access evidence

6.59 Replying to LCDR Bainbridge's request to speak to members of the ship's company, dated 7 October and 24 November, CMDR Rayner wrote to LCDR Bainbridge on 30 November:

The delay in providing a response to your requests at the references is regretted. As this matter is currently under review by a Board of Inquiry, I will provide you with a response once I have received advice from Fleet Legal on this matter.

6.60 Mr Gyles noted that the reference to a board of inquiry is obscure: that both the Wark and Houston reports had been completed.

6.61 LCDR Bainbridge continued to request access to evidence he believed was central to CMDR Wark's findings in respect of the senior sailors. On 14 December 2009, he wrote directly to the Minister seeking access to evidence used against the

43 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 22.

44 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 22.

45 Gyles Report, Part Two, paragraph 2.75.

sailors. On 18 December, he wrote to the Deputy Fleet Legal Officer, LCDR Talbot, stating that:

I was just going through the Routine Inquiry findings of CMDR Houston, particularly his finding that the evidence gathered during the Inquiry Officer Inquiry (by CMDR Wark) is potentially biased. I thought I should check with you as to whether the appointing officer intends to do something about this or whether the intention is to continue pushing through the adverse admin action regardless.⁴⁶

6.62 In two emails sent 20 January 2010, LCDR Bainbridge asked CMDR van Stralen to clarify a number of things

With respect to Commander Houston's findings that the comments of CO *Success* (that the three senior sailors were a rotten core) potentially prejudiced the evidence in the Wark Inquiry Officer's Inquiry; that there is (as a result of the comments) a potential for bias in the evidence of the Inquiry, what action (if any) has been taken as a result of that finding?

6.63 And

whether anyone has taken action with respect to the Houston Routine Inquiry recommendation that the claims regarding LEUT McArthur advising [name redacted] that she would have [name redacted] removed from *Success* if [name redacted] made a formal complaint, and the possibility of collusion between LEUT McArthur and CO *Success* should be further considered

Whether CMDR Brown has considered writing a 'letter of regret to [names redacted] as recommended by CMDR Houston and if so, what was the outcome. (if any)

whether COMSURF has written (or intends to write) to the three senior sailors etc.⁴⁷

The findings of the legal advice in respect of the sailors' ROGs and the response by CO *Success*, CMDR Rayner, and his superiors would change the course of events significantly.

Findings based on ROGs

6.64 According to Mr Gyles, Colonel Griffin considered a number of points in the redress of grievance that allege bias or lack of impartiality. In particular, he took account of a number of paragraphs taken from the transcripts of interviews by CMDR Wark to support his argument that the Inquiry Officer lacked objectivity. Colonel Griffin concluded that 'a fair-minded lay observer might reasonably apprehend that the Inquiry Officer did not bring an impartial mind to the resolution of the matters he was required to decide'. The following is the preface to that advice:

46 Gyles Report, Part Two, paragraph 3.163.

47 Gyles Report, Part Two, paragraph 3.164.

...the aggregation of the matters described...gives rise to a whole that is greater than the sum of its parts and paints a process flawed from the outset by the appointment of WO Harker and then coloured by the deviations from neutrality in the IO's dealings with certain witnesses, certain relevant issues and the PAP [potentially affected person]. As to the second step, the totality of this material demonstrates a loss of neutrality leading to preparedness on the part of the IO to depart from impartial decision making and to disregard relevant evidence through prejudgement. That is, the praise of certain witnesses and the acceptance of their evidence (even when they were quite drunk) before it was put to the PAP, the decision not to pursue sexual misconduct by others, the finding that the PAP had lied even before they were interviewed, and the other matters above, give rise to a real possibility of apprehended bias...⁴⁸

6.65 In his decision, dated 5 February 2010, CMDR Rayner upheld the redresses of grievance and, among other things, found that the Wark report was void because of apprehended bias.⁴⁹ The decision was based substantially on the legal advice he had obtained. In his reasons, he said:

I have accepted the claims concerning lack of impartiality in the [Inquiry Officer Inquiry] and unreasonableness in the IO report findings. I have decided that there is sufficient evidence to give rise to a reasonable apprehension of bias in the IO inquiry. I have decided that the findings of the IO cannot be relied upon.⁵⁰

6.66 In relation to [the senior sailor] the proposed course of action and conclusions were as follows:

I intend to inform [the senior sailor] of my decision and findings and counsel him about them.

I fully expect to reach the same decision in respect of the [others senior sailors'] ROG and will advise them of this likelihood.

Conclusion

I recommend that consideration be given to setting aside the IO Report and withdrawing the administrative action against [the senior sailor].

I am of the preliminary view that it would not be in his best interests for him to rejoin the ship in the short term and I will discuss this with him over the coming days.⁵¹

6.67 On 10 February 2010, he made similar decisions and recommendations in relation to the other senior sailors.⁵² In the meantime, extensions of time to respond to

48 Gyles Report, Part Two, paragraph 2.79.

49 Gyles Report, Part Two, p. viii.

50 Gyles Report, Part Two, paragraph 2.56.

51 Gyles Report, Part Two, paragraph 2.56.

52 Gyles Report, Part Two, paragraph 2.58.

the notices to show cause had been sought and granted to the senior sailors.⁵³ CMDR Rayner provided CDRE Stephen McDowall, acting commander of the Australian Surface Force, with his decisions and accompanying legal advice on the ROGs. CDRE McDowall read the advice and the commanding officer's covering minute and then sought legal advice from fleet legal and an audience with the fleet commander.⁵⁴ He also sought advice from the Head of Defence Legal, Mr Mark Cunliffe.⁵⁵

6.68 In order to provide advice, Mr Cunliffe had before him a copy of the Wark report, the 9 May 2009 minute from LEUT McArthur concerning equity and diversity health workshops held on *Success*, and a related quick assessment of 13 May 2009. He also had the senior sailor's redress of 30 November 2009, an addendum of 14 December 2009, and further supporting materials submitted on 10 December 2009. Mr Cunliffe was not provided with full transcripts of all interviews undertaken by the Inquiry Officer nor the Annex to the Inquiry Officer's Report.⁵⁶

6.69 Mr Cunliffe received this material on 8 February 2010 and provided advice on 10 February 2010. According to Mr Gyles, Mr Cunliffe took the view that the Inquiry Officer's report should be treated as void and that no part of the report was to be treated as reliable or to be relied on. His advice was that all notices to show cause issued to the landed senior sailors were fatally flawed and should be withdrawn. Mr Cunliffe explained:

Notwithstanding that I have not had access to—and therefore, have not reviewed—the transcripts of all interviews. I take no issue with Col Griffin's findings of 'bias'. The paragraphs which Col Griffin has excerpted would lead a fair minded lay observer to conclude that the IO did not bring an impartial mind to the inquiry but instead was looking to bolster a predetermined case against the three sailors.⁵⁷

Wark inquiry found to be flawed

6.70 Having received Mr Cunliffe's advice, CDRE McDowall then determined to:

...indicate to the fleet commander that it was my opinion on the basis of Mr Cunliffe's advice, together with the advice of the fleet legal officer, together with the advice of Col Griffin to commanding officer of *Success*, that the Wark Report was indeed flawed.⁵⁸

53 Gyles Report, Part Two, paragraph 2.57.

54 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 68.

55 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 69.

56 Gyles Report, Part Two, paragraph 2.147.

57 Gyles Report, Part Two, paragraph 2.148.

58 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 69.

6.71 Even so, CDRE McDowall was of the view that certain recommendations that did not relate to individuals but to practice and policy should be implemented.⁵⁹ He made clear that he set aside the Wark Report and did not consider initiating a fresh investigation.⁶⁰ CDRE McDowall stated that he was briefed by the fleet commander and told that the matter had been referred to the strategic headquarters level to strategic command for decision.⁶¹

Revocation of notices to show cause

6.72 On 11 February, CDRE McDowall advised the Chief of Navy of his decision in relation to the redresses of grievance in the following terms:

I have carefully considered the legal advice CO *Success* has relied upon to make his findings. I have also received confirmation from Head Defence Legal that, on the basis of the legal advice to CO *Success*, the Inquiry Officer's Report is fundamentally flawed.

For the reasons stated above, I have decided that the Inquiry Officer's report is no longer valid, and therefore, I cannot rely on the findings and recommendations contained within it. I have directed cessation of all pending administrative actions against [names redacted] immediately. In addition, I will advise all persons associated with this inquiry that has had adverse findings made against them of this decision.⁶²

6.73 On the same day, CDRE McDowall revoked the notices to show cause issued to the senior sailors based on the same reasoning in each case. He wrote to the senior sailors:⁶³

The consequences of my decision is that there is no longer a basis for administrative action to be taken against you, as this action is entirely upon the findings and recommendations in the report. Effectively immediately, I revoke the Notice to Show Cause issued to you at reference B and this Notice will be expunged from the record.⁶⁴

6.74 That day, the Chief of the Defence Force (CDF) directed that a fresh inquiry into a range of matters arising from equity and diversity issues on board HMAS

59 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 70.

60 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 70.

61 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 71.

62 Gyles Report, Part Two, paragraph 2.59.

63 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 70.

64 Gyles Report, Part Two, paragraph 2.60.

Success be conducted. He explained that he had taken this step following legal advice that the Inquiry Officer's Inquiry was flawed due to bias. According to the CDF:

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.⁶⁵

6.75 The fresh inquiry referred to by the CDF was the Commission of Inquiry with Mr Gyles as president.

Conclusion

6.76 Following the removal of the senior sailors from *Success*, numerous inquiries and investigations were conducted in an endeavour to establish the facts of what happened during *Success*' deployment between March and May 2009. They did so in an atmosphere where rumour and innuendo were allowed to run rampant and the senior sailors were kept in the dark about the reasons for their landing. Their persistent efforts to obtain information were frustrated.

6.77 The Inquiry Officer's report was intended to bring an end to the speculation about the events onboard *Success* during the first half of May 2009. It was to find evidence and report on whether an inappropriate culture existed in the ship, and if so, the nature and extent of this culture and how it came into existence. In large measure, the inquiry's findings did just that. It found at the time of the inquiry there was an inappropriate culture amongst a significant group of Marine Technical sailors comprising an inappropriate attitude towards sexual behaviour and a disrespect of female sailors. The inquiry also found a culture of intimidation, bullying and coercion amongst a group of Marine Technical sailors against those who did not agree with that group's culture. The report also made findings specific to individuals including the senior sailors.

6.78 Rather than go some way to putting an end to this troubled process, the findings of the inquiry prompted the senior sailors to lodge ROGs which argued that the inquiry was biased, conducted improperly, and its findings unreasonable. The subsequent legal advice, which called into question the integrity of the inquiry, was conveyed up the command chain and eventuated in the CDF and Chief of Navy declaring the Inquiry Officer Inquiry void.

65 Defence Media Release, MECC 35/10, 'HMAS *Success* Inquiry', 11 February 2010, <http://www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=9960>