

Chapter 8

Sailors' legal representation and chain of command

Alleged undue influence on the senior sailors' legal representative

8.1 Under its terms of reference the committee is to consider the facts and circumstances of the treatment of the Legal Officer (the lawyer) assigned to the management and defence of the case of the senior sailors. The committee is to include in its consideration, any threats, bullying, adverse conduct and prejudice generally, including any threat of posting to Western Australia, and whether any such conduct constituted an attempt to compromise the lawyer's capacity to represent the best interests of the senior sailors without fear or favour.

8.2 On 21 October 2009, an article critical of Navy's handling of the *Success* matter appeared in the Sydney Morning Herald. It reported claims that the lawyer for the landed sailors had been called aside by his superiors and told that he worked for the navy command and should not consider the senior sailors his 'clients'. The article also suggested that the lawyer had since been posted to Western Australia, even though his wife worked in NSW.¹ The same matters were raised that day during a Senate Estimates hearing.²

8.3 The contents of the newspaper report were referred for a quick assessment. The assessment recommended that a suitably qualified independent person be formally appointed as an investigating officer to review certain matters relating to whether LCDR Bainbridge was the subject of improper influence from his chain of command. That recommendation was accepted. Subsequently on 25 November, Mr John Weber was appointed an Inquiry Officer to inquire into the reports of improper influence from the chain of command on LCDR Bainbridge in respect of the assistance he provided to the senior sailors.³ Mr Weber, who was the Chief Executive partner of MinterEllison Lawyers, reported on 15 February 2010.⁴

8.4 Before considering this inquiry, the committee outlines the main matters connected with the possible undue exercise of influence over the senior sailors' legal representative, LCDR Bainbridge.

1 <http://www.smh.com.au/national/navy-went-overboard-on-sex-claims-20091020-h6yr.html>

2 Senate Foreign Affairs, Defence and Trade Legislation Committee, Estimates *Hansard*, 21 October 2009, p. 21.

3 Gyles Report, Part Two, p. xv and Report of Inquiry Officer John Weber pursuant to Terms of Reference of 25 November 2009, appendix D in Gyles Report, Part Two.

4 Report of Inquiry Officer John Weber pursuant to Terms of Reference of 25 November 2009, appendix D in Gyles Report, Part Two.

Disagreement with Fleet Legal over role

8.5 LCDR Bainbridge was posted as the Legal Officer Advocacy and Counselling (LOAC), a standalone legal billet located at HMAS *Kuttabul*. His direct supervisor was the Fleet Legal Officer (FLO) who was CMDR Bowers during 2009 up til October 2009. LCDR Swanson was the Deputy Fleet Legal Officer for most of that year and the acting FLO between October and December 2009.⁵

8.6 According to LCDR Bainbridge there was 'a genuine risk of a conflict of interest in the LOAC position as it was then structured within the chain of command. In his view, the Fleet Legal Officer is the adversary of the LOAC in a legal sense:

The conflict arises because the FLO is responsible for advising the Fleet Commander, Fleet staff and Commanding Officers, whereas the LOAC position is responsible for advising individual Defence members (usually against the actions of command).⁶

8.7 In his view, the *Success* case illustrated the issue of conflict where he perceived 'a certain level of antagonism'. Fleet Legal provided advice in respect of the decision to remove the sailors from *Success*, the quick assessment, the appointment of the Inquiry Officer, the preparation of the TOR and the drafting of the adverse administrative notifications against the senior sailors. On the other hand, LCDR Bainbridge was providing legal advice and services to the senior sailors which entailed among other things:

- seeking a statement of reasons for their landing;
- seeking to obtain disclosure of any evidence which was relied upon in resolving to land the senior sailors;
- making Freedom of Information (FOI) requests;
- making a formal complaint to the CO of HMAS *Kuttabul* regarding the treatment of the senior sailors;
- assisting with the drafting of redress of grievances and other correspondence;
- advising in relation to media reporting and the media's access to their personal contact details;
- legal representation during recorded interviews with ADFIS;
- seeking rescission of an order that the senior sailors were not to have contact with any member of the ship's company; and

5 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 66.

6 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 66.

- responding to notices of potential adverse findings from CMDR Wark and other matters concerning the Wark inquiry.⁷

8.8 Before the Commission, LCDR Bainbridge described one such instance of tension between himself and FLO. On 8 October, he met CMDR Bowers and LCDR Swanson to discuss CMDR Brown's statement of reasons that had been provided to the senior sailors. LCDR Bainbridge was concerned that the reasons did not 'appear to be based on any evidence that was logically available at the time the senior sailors were landed.' He suggested to CMDR Bowers that perhaps the statement was 'invented after the fact; that the statement of reasons was based 'on information that could not have possibly been known to CMDR Brown at the time'.⁸

8.9 They went through the allegations raised in the notices of potential adverse findings and CMDR Bowers attempted to correlate them with the purported reasons for landing the sailors.

8.10 After approximately 10 to 15 minutes, CMDR Bowers left to attend another meeting and LCDR Swanson and LCDR Bainbridge continued the discussion during which LCDR Bainbridge referred to the senior sailors as his 'clients'. LCDR Bainbridge recalled that LCDR Swanson took exception to the term and said to him something along the lines of: 'they're not your clients, be careful about calling them your clients, they're not'.⁹ According to LCDR Swanson, during that meeting he said to LCDR Bainbridge words to the effect that he should not be referring to the senior sailors as being his clients:

I indicated to him that he should understand and make sure that his language was correct, that they were not his clients, but rather, they were members that he provided advice and guidance to at the best of his ability.¹⁰

8.11 In his view, no solicitor/client relationship existed.¹¹ LCDR Swanson later told the Commission that, while there is no issue with legal privilege existing, there is no solicitor/client relationship between ADF members and the advocacy and

7 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 84.

8 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 115.

9 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 69.

10 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 127.

11 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 22.

counselling lawyer.¹² In his words, 'it is almost quasi legal aid in that you provide guidance and direction as to what options they might have open'.¹³

8.12 LCDR Bainbridge disagreed with LCDR Swanson and sensed that LCDR Swanson felt that he was 'going too far'.¹⁴ At the meeting, LCDR Bainbridge suggested to LCDR Swanson that if he thought that LCDR Bainbridge 'was overstepping' his position, he should put it in writing. LCDR Bainbridge informed the Commission that he did not receive any written correspondence to that effect.¹⁵

8.13 According to LCDR Bainbridge, while the exchange was 'certainly a disagreement' it was not an argument.¹⁶ LCDR Swanson was of the view that the conversation with LCDR Bainbridge was not a heated discussion nor did he recall LCDR Bainbridge taking exception to what he was told.¹⁷

8.14 LCDR Bainbridge accepted that some level of tension was 'a natural occurrence within an adversarial system and, in the circumstances, can be an indication of a healthy and productive relationship between opposing advocates'. He explained:

...there's always some level of tension that I've seen between fleet and myself. I mean, even today, you know, there's always a bit of toing and froing between advocates. But at that time I could sense by phone calls with the fleet legal officer that there was underlying tension. And clients when they come would often, you know, say to me just in passing, 'You're not a popular person at fleet at the moment'.¹⁸

8.15 LCDR Bainbridge indicated that during 2010, 'the level of tension between the FLO and the LOAC appears to have returned to normal'.¹⁹

12 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 128.

13 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 22.

14 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 97.

15 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, pp. 69 and 97.

16 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 97.

17 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 128.

18 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 94.

19 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 69.

8.16 Mr Weber acknowledged there may be 'an amount of tension between the Fleet Legal Office and the person who occupies the LOAC role, because of the likelihood of the LOAC's representation of people who are in adverse interest to those whom Fleet legal officers are advising.' In his view, LCDR Bainbridge stood in a solicitor/client relationship with the three sailors explaining:

Such a relationship is categorised by personal trust and confidence as well as the capacity of the sailors to claim legal professional privilege over any communications (including documents evidencing communications) entered into for the purpose of LCDR Bainbridge providing legal advice to them.²⁰

8.17 He formed the view that on 8 October 2009 LCDR Bainbridge and LCDR Swanson had 'a frank and even tense discussion' about whom the LOAC position owes primary duties and the scope and extent of LCDR Bainbridge's representation of the three sailors'. In his view:

That discussion was nothing more than an exchange of different views by two officers of the same rank. There is no evidence that Lieutenant Commander Swanson acted in any way that was improper or attempted in his discussion to improperly influence Lieutenant Commander [Bainbridge] in his representation of the three sailors.²¹

8.18 According to Mr Weber, it appeared that LCDR Bainbridge was frustrated with the length of time taken to respond to some of his requests. He also noted the frustration within the Fleet Legal Office, 'concerning the zeal with which LCDR Bainbridge represented the sailors'. Nevertheless, he concluded that 'save that some correspondence sent by Lieutenant Commander Bainbridge used an emotional tone which may not have been warranted in the circumstances', he did not consider any of the communications to be improper.²²

Proposed posting to Western Australia

8.19 LCDR Bainbridge informed the Commission that on or around 12 October 2009, he received a phone call from LCDR Mark Bunnett, his career manager at the Directorate of Naval Officers Postings (DNOP). This directorate is generally responsible for the postings and promotions of RAN officers. LCDR Bunnett suggested the possibility of a posting to HMAS *Stirling* in Western Australia because of a short posting of the incumbent on compassionate grounds. LCDR Bainbridge

20 Report of Inquiry Officer John Weber pursuant to Terms of Reference of 25 November 2009, in Gyles Report, Part Two, p. 18 of Appendix D.

21 Report of Inquiry Officer John Weber pursuant to Terms of Reference of 25 November 2009, in Gyles Report, Part Two, p. 20 of Appendix D. There may have been a misquote in this paragraph—it has LCDR Swanson as the officer representing the senior sailors.

22 Report of Inquiry Officer John Weber pursuant to Terms of Reference of 25 November 2009, in Gyles Report, Part Two, p. 11 of Appendix D.

indicated that he was not keen on the posting because it would have required him to leave his family in Sydney and proceed unaccompanied to Perth.

8.20 Later on, LCDR Bunnett contacted LCDR Bainbridge and explained that it may be possible to have the posting reduced to 12 months. LCDR Bunnett noted that there were limited options available to fill the billet and it was likely LCDR Bainbridge would be posted.

8.21 At that time, LCDR Bainbridge advised the senior sailors of the likelihood that he would have to find them alternative representation and informed his friends and family of the possible posting to Western Australia. He told the Commission that he did not speak to the media about the proposed posting.²³

8.22 About ten days later, CAPT Rob McLaughlin, Director, Naval Legal service, called LCDR Bainbridge in relation to the media articles which stated that the navy legal officer running the *Success* case had been posted to Western Australia. LCDR Bainbridge recalled that the media articles 'were implying that the posting may have been an attempt to compromise the representation of the senior sailors'.

8.23 CAPT McLaughlin informed LCDR Bainbridge that there was no correlation between the proposed posting to Perth and his representation of the senior sailors. He told LCDR Bainbridge of the decision not to post him to Western Australia. According to LCDR Bainbridge, CAPT McLaughlin stated that the decision had been made prior to the publication of the media articles. CAPT McLaughlin told the Commission that there was 'absolutely no pressure' on him, nor on DNOP as far as he was aware 'to contemplate posting LCDR Bainbridge for reasons other than normal operational requirements'.²⁴ LCDR Bainbridge informed the Commission:

I have seen no evidence to establish that the proposal to post me to Western Australia was linked to my representation of the senior sailors. I accept that this may simply be an unfortunate coincidence.²⁵

8.24 LCDR Bunnett's account is consistent with LCDR Bainbridge's: that is, that he spoke with LCDR Bainbridge on 12 October about a possible posting to Western Australia because of the requirement of short notice posting:

While it was initially contemplated that LCDR Bainbridge may be posted to *Stirling*, on or about 16 October 2009 a decision was made within the then DNOP that he would not be posted to WA.

This decision was made due to LCDR Bainbridge's personal circumstances and family situation. DNOP did not support the transfer of LCDR

23 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 81.

24 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 26 July 2010, p. 25.

25 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 81.

Bainbridge to WA and another officer was subsequently posted to this position.²⁶

8.25 In complete accord with CAPT McLaughlin's account, LCDR Bunnet indicated that LCDR Bainbridge's proposed move to Western Australia and the subsequent decision not to post him to this position was taken in the course of normal operational requirements.²⁷

8.26 Mr Weber accepted the evidence of CAPT McLaughlin and LCDR Bunnett:

The possibility of the transfer of LCDR Bainbridge to HMAS *Stirling* arose in normal operational circumstances. That he was at one stage considered for that posting was reasonable and appropriate, as was the final decision not to post him. Nothing arising from that matter constituted an attempt to improperly influence LCDR Bainbridge in his representation of the three sailors.²⁸

8.27 He also accept the evidence of LCDR Bainbridge that he did not believe there was any correlation between his possible posting to Western Australia and the discussions he had with CMDR Bowers and LCDR Swanson on 8 October 2009.

8.28 Overall, Mr Weber found no conduct on the part of the Navy 'constituted an attempt to improperly compromise Bainbridge's capacity to represent the best interests of the landed senior sailors without fear or favour'. Mr Gyles agreed with the conclusions reached by Mr Weber about the conversation between Bainbridge and the Deputy Fleet Legal Officer on 8 October 2009 and about the potential posting to Western Australia (which did not occur). In his opinion, neither suggested an attempt to improperly influence LCDR Bainbridge.²⁹

8.29 Mr Weber made four recommendations designed to give 'greater clarity to the following aspects relating to the LOAC position:

- the duties of the occupant of the position;
- supervision of and peer support for position;
- the reporting chain for the position; and

26 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 26 July 2010, p. 10.

27 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 26 July 2010, p. 10. This evidence is supported by that given by CAPT Robert McLaughlin, Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 26 July 2010, pp. 24–5.

28 Report of Inquiry Officer John Weber pursuant to Terms of Reference of 25 November 2009, in Gyles Report, Part Two, p. 20 of Appendix D.

29 Gyles Report, Part Two, paragraph 5.27.

- the nature of the legal relationship between the LOAC officer and the members he or she advises.³⁰

Media report—October 2009

8.30 On 23 October 2009, Mr Andrew Bolt, a journalist, wrote an article that was extremely critical of the handling of the sailors. It stated that one of the sailors was a family man and holder of several commendations from the Navy for his leadership and 'devotion to duty'. In part, it then went on to say:

Why he and the two petty officers with him were now being thrown off their ship, after a cursory 'equity and diversity health check', was a mystery to him, and a savage humiliation.

The officers herding them off were yelling at the crew to 'clear the passageways and do not look at this person'. Their captain later said 'a rotten core' had been 'removed'.

...

Even worse was to follow, in an extraordinary saga that shows how some allegations are too politically loaded now for even sensible people to question, let alone laugh off.

For weeks the Navy would not tell the men their alleged crimes. But in July, and to the trio's astonishment, Channel 7, clearly briefed by a Navy source, announced they'd run a 'sex ledger'.

...

The Navy, asked to comment, refused to confirm or deny the allegation, but gave the media all that was needed to assume the story was spot on.

It's not just that the three men deny there was any 'sex ledger,' and that no proof of one has ever been produced.³¹

8.31 The Chief of Navy (CN) responded by way of a letter to the editor that was drafted by Defence Public Affairs. He maintained that the article was 'misleading, emotive and inaccurate'. He also indicated that the CO had landed the sailors to ensure the welfare and safety of his crew, whilst ensuring that subsequent inquiries would not be prejudiced and procedural fairness was afforded to all personnel involved. The Chief of Navy then went on to say among other things:

...it is also important to note that the existence of a 'sex ledger' was speculation generated by the media from late June 2009, well after the positive actions taken in HMAS *Success*. Navy made that point quite clear when responding to these media inquiries, advising that the veracity of such

30 Report of Inquiry Officer John Weber pursuant to Terms of Reference of 25 November 2009, in Gyles Report, Part Two, Appendix D.

31 Andrew Bolt, 'Navy credibility in the balance as three deny sex ledger claim', *Herald Sun*, 23 October 2010, <http://www.heraldsun.com.au/opinion/navy-credibility-in-the-balance-as-three-deny-sex-ledger-claim/story-e6frfhqf-1225790222376>

allegations was yet to be confirmed and that all issues raised were being considered in the investigations that were underway at the time.³²

8.32 LCDR Bainbridge wrote to the Chief of Navy asking him to consider the effect that any further media comment would have on the three senior sailors. He said:

The purpose of my letter is to appeal to you to remain cognisant of the fact that the three senior sailors at the centre of this matter are in an increasingly vulnerable position whilst the morality of their conduct is debated in a public forum.

As I have informed command previously, the media has obtained the private mobile phone numbers of all three members and has approached them for comment on their treatment throughout this ordeal. At all times these men have acted with the integrity and loyalty to the Service that one would expect from personnel of their rank and experience; and despite the tremendous urge to comment publicly in order to defend their honour they have maintained their composure and declined to comment.

...

Whilst I accept that the recent media coverage has been reasonably critical of the conduct of the RAN, with somewhat adverse comments made by the public on both talk back radio and certain internet forums/blogs, I would point out that the navy's reputation is not the only reputation that has been adversely affected throughout this proceeding.³³

8.33 LCDR Bainbridge explained that he sent the letter to the Chief of Navy because he felt that certain comments by the CN to the media 'put my clients in a difficult position'.³⁴ In response to LCDR Bainbridge's letter, the Chief of Navy wrote:

My letter was written to correct misleading, emotive and inaccurate information that was contained within Andrew Bolt's article of 23 October 2009. I have a responsibility to Navy's people and to the Australian public more generally, and it is entirely appropriate for me to respond to articles of this sort in a careful and measured manner in order to ensure inaccuracies are properly corrected.³⁵

8.34 Mr Gyles observed that the approach evident in the Chief of Navy's statement should have governed the Navy's position on this matter from the first communication from Mr Greene onwards. In his view, 'It did not'.³⁶ The committee agrees with this statement.

32 Navy website, http://www.navy.gov.au/The_Facts-On_HMAS_Success

33 Gyles Report, Part Two, paragraph 5.14 and. LCDR Bainbridge to Vice Admiral Russ Crane, 28 October 2009. Committee-in-confidence document.

34 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 111.

35 Gyles Report, Part Two, p. xiv and paragraph 5.15.

36 Gyles Report, Part Two, paragraph 5.16.

Inspector General ADF inquiry

8.35 Within a matter of weeks, in November 2009, the Chief of Navy requested the Inspector General ADF (IGADF) to inquire into aspects of legal advice that LCDR Bainbridge had given in the course of his duties. According to LCDR Bainbridge, the inquiry was to consider in particular, allegations that he 'engaged in inappropriate discussion of current legal processes with other Navy lawyers'. In addition, it was to inquire into an allegation that LCDR Bainbridge had 'given inappropriate advice to members by encouraging them to take their grievances to external authorities'.³⁷ LCDR Bainbridge told the Commission:

I am aware that a person in Canberra, whose identity was not divulged to me, raised an allegation regarding my involvement in the *Success* case and, in particular, that I may have leaked information regarding the case outside of Defence. I believe that this allegation may have been one basis for CN to refer my conduct to IGADF for inquiry.³⁸

8.36 On 15 December 2009, the IGADF found that LCDR Bainbridge 'did not discuss any matters with other legal officers that were inappropriate in the circumstances'. Further, that he 'did not give inappropriate advice to members by encouraging them to take their grievances to external authorities'.³⁹

8.37 Despite the closeness in time to his letter to the Chief of Navy, LCDR Bainbridge's indicated that he had seen 'no evidence to suggest that CN's decision to refer his conduct to IGADF for inquiry was linked to that correspondence'. He accepted that the initiation of the IGADF's inquiry may simply have been 'an unfortunate coincidence'.⁴⁰ With regard to LCDR Bainbridge's correspondence to the Chief of Navy, Mr Gyles observed:

This letter from LCDR Bainbridge illustrates the breadth of his understanding of his role in acting for the senior sailors and the strength of his determination to take on all comers, including the Chief of Navy, in that endeavour. He was far from intimidated by the discussion with LCDR Swanson and the potential posting to Western Australia. And he was, without doubt, a thorn in the side of Navy in general, and Fleet Legal in particular, and had been for some time.⁴¹

37 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 81.

38 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 82.

39 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 82.

40 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 82.

41 Gyles Report, Part Two, paragraph 5.17.

8.38 Overall, Mr Gyles formed the view that 'no conduct on the part of Navy constituted an attempt to improperly compromise LCDR Bainbridge's capacity to represent the best interests of the landed sailors without fear or favour.'⁴²

Conclusion

8.39 Both Mr Weber and Mr Gyles came to the conclusion that there was no attempt to improperly influence LCDR Bainbridge in respect of his assistance to the senior sailors. The committee agrees with this finding. It notes, however, Mr Weber's finding that 'there may be an amount of tension between the Fleet Legal Office and the person who occupies the LOAC role, because of the likelihood of the LOAC's representation of people who are in adverse interest to those whom Fleet Legal Officers are advising'. He made recommendations addressing the need for greater clarity relating to the LOAC position.⁴³ The committee endorses the recommendations.

42 Gyles Report, Part Two, p. xvi.

43 Report of Inquiry Officer John Weber pursuant to Terms of Reference of 25 November 2009, in Gyles Report, Part Two, pp. 21–22 of Appendix D.

