

The Senate

---

Foreign Affairs, Defence and Trade  
References Committee

---

Part II

Incidents onboard HMAS *Success* between  
March and May 2009 and subsequent events

September 2011

© Commonwealth of Australia 2011

ISBN 978-1-74229-521-3

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

# **Members of the committee**

## **Core members**

Senator Alan Eggleston, LP, WA (Chair) from 7.7.2011  
Senator the Hon Ursula Stephens, ALP, NSW (Deputy Chair) from 7.7.2011  
Senator Mark Bishop, ALP, WA (Deputy Chair until 7.7.2011)  
Senator David Fawcett, LP, SA – from 1.7.2011  
Senator Helen Kroger, LP, VIC (Chair until 7.7.2011)  
Senator Scott Ludlam, AG, WA

Senator the Hon Alan Ferguson, LP, SA – until 30.6.2011  
Senator Michael Forshaw, ALP, NSW – until 30.6.2011  
Senator Russell Trood, LP, QLD – until 30.6.2011

## **Participating members who contributed to the inquiry**

Senator the Hon David Johnston, LP, WA

## **Secretariat**

Dr Kathleen Dermody, Committee Secretary  
Ms Jane Thomson, Principal Research Officer  
Mr Michael Klapdor, Senior Research Officer  
Ms Alpana Modi, Research Officer  
Ms Angela Lancsar, Administrative Officer

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

Phone: + 61 2 6277 3535  
Fax: + 61 2 6277 5818  
Email: [fadt.sen@aph.gov.au](mailto:fadt.sen@aph.gov.au)  
Internet: [www.aph.gov.au/Senate/committee/fadt\\_ctte/index.htm](http://www.aph.gov.au/Senate/committee/fadt_ctte/index.htm)



# Table of contents

Members of the committee .....	iii
Acronyms and abbreviations .....	ix
Committee recommendations .....	xi

## CHAPTER 1

### INQUIRY INTO INCIDENTS THAT OCCURRED ONBOARD HMAS *SUCCESS*.....1

Referral of inquiry and terms of reference .....	1
Conduct of inquiry .....	1
Part One—HMAS <i>Success</i> Commission of Inquiry .....	2
Unanticipated revelations .....	3
Part Two—HMAS <i>Success</i> Commission of Inquiry .....	4
Limitations to the committee's inquiry .....	5

## CHAPTER 2

### THE LANDING OF THE SENIOR SAILORS IN SINGAPORE .....7

Reports of unacceptable behaviour—a cultural issue .....	7
Outside assistance .....	8
Equity and diversity (E&D) team .....	8
E&D Health Check Report .....	10
Decision to land sailors in Singapore .....	13
Circumstances and manner of the landing .....	14
Conclusion .....	17

## CHAPTER 3

### INQUIRIES AND INVESTIGATIONS FOLLOWING LANDING OF SENIOR SAILORS.....19

Quick assessment into alleged improper conduct .....	19
Investigations and inquiries in Singapore .....	21
Formal E&D complaints .....	21
ADFIS investigations .....	23
Inquiry Officer Inquiry—the Wark inquiry .....	31
Conclusion .....	34

## CHAPTER 4

### THE SENIOR SAILORS IN SYDNEY .....35

Return to Garden Island, Sydney .....	35
Sailors status unchanged, new CO <i>Success</i> .....	36
CDRE Middleton assumes responsibility for HMAS <i>Success</i> .....	38
Reports of a 'sex scandal' .....	38
Media release .....	42
Journalist contacts the senior sailors .....	46
Media access to mobile phone numbers of senior sailors .....	46

Correcting the record .....	49
Upholding Navy's reputation .....	53
Conclusion .....	54

**CHAPTER 5**

<b>SEEKING ANSWERS.....</b>	<b>55</b>
15 July—request for statement of reasons.....	55
Refusal to disclose reasons .....	55
Importance of providing reasons .....	60
Freedom of Information .....	61
The Wark inquiry—progress .....	62
Notification of potential adverse findings .....	62
Access to evidence.....	63
15 July—joint complaint .....	64
The Routine Inquiry—Houston inquiry .....	66
Request to rescind order not to contact members of the ship's crew.....	67
Conclusion .....	69

**CHAPTER 6**

<b>INQUIRY OFFICER INQUIRY AND ROUTINE INQUIRY .....</b>	<b>71</b>
Wark report findings—20 August 2009 .....	71
Statement of reasons—11 September 2009.....	74
Inadequate explanation .....	76
Continued efforts to obtain evidential basis for potential adverse findings .....	77
Rescinding the order preventing the senior sailors accessing <i>Success</i> .....	79
23 October 2009—Routine Inquiry (Houston report) .....	80
26 November—Notices to show cause.....	85
30 November—ROGs .....	85
Establishing the merit of the ROGs.....	86
Continuing efforts to access evidence .....	87
Findings based on ROGs .....	88
Wark inquiry found to be flawed.....	90
Revocation of notices to show cause.....	91
Conclusion .....	92

**CHAPTER 7**

<b>WARK INQUIRY SET ASIDE .....</b>	<b>93</b>
Administrative inquiries .....	93
Wark inquiry .....	94
Terms of Reference .....	94
Conflicts of interest and the independence of the inquiry .....	96
The E&D report as a source document.....	96
An assistant to the Inquiry and perceived conflict of interest .....	98
CO's statement that a rotten core had been removed.....	101
Procedural fairness .....	102
Right to know allegations or adverse comment .....	103

Impartiality .....	106
<b>CHAPTER 8</b>	
<b>SAILORS' LEGAL REPRESENTATION AND CHAIN OF COMMAND .....</b>	<b>115</b>
Alleged undue influence on the senior sailors' legal representative.....	115
Disagreement with Fleet Legal over role .....	116
Proposed posting to Western Australia .....	119
Media report—October 2009 .....	122
Inspector General ADF inquiry .....	124
Conclusion .....	125
<b>CHAPTER 9</b>	
<b>CONCLUSION .....</b>	<b>127</b>
Disciplinary system—ADFIS.....	127
Administrative system .....	129
What went wrong.....	131
<b>APPENDIX 1</b>	
<b>TERMS OF REFERENCE .....</b>	<b>135</b>
<b>APPENDIX 2</b>	
<b>SELECTED FINDINGS FROM THE WARK INQUIRY .....</b>	<b>137</b>





## Acronyms and abbreviations

ABMT	Able Seaman Marine Technician
ADF	Australian Defence Force
ADFIS	Australian Defence Force Investigative Service
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977</i>
CAPT	Captain
CCSG	Chief Combat Support Group (Fleet Headquarters)
CDF	Chief of the Defence Force
CDRE	Commodore
CMDR	Commander
CN	Chief of Navy
CO	Commanding Officer
CPO	Chief Petty Officer
DFC	Deputy Fleet Commander
DFDA	<i>Defence Force Discipline Act 1982</i>
DI(G)	Defence Instruction (General)
DLO	Defence Legal Officer
E&D	equity and diversity
FLO	Fleet Legal Officer
FSU	Fleet Support Unit
HMAS	Her Majesty's Australian Ship
HOD	Head of Department
IGADF	Inspector General Australian Defence Force
IOI	Inquiry Officer Inquiry
LAM	Local Area Move
LEUT	Lieutenant
LOAC	Legal Officer Advocacy and Counselling
MEO	Marine Engineering Officer
MT	marine technical
PAP	Potentially Affected Person

PO	Petty Officer
POMT	Petty Officer Marine Technician
QA	quick assessment
RADM	Rear Admiral
RAN	Royal Australian Navy
RBT	random breath test
RI	Routine Inquiry
ROG	Redress of Grievance
SEA–FC	Senior Equity Adviser—Fleet Command
TOR	Terms of Reference
WO	Warrant Officer
XO	Executive Officer

E&D Report Results of Equity and Diversity Health Check Workshops held in HMAS Success during the period 4 May–9 May 2009, prepared by D. J. McArthur, LEUT RAN, Senior Equity Adviser Fleet Command, 9 May 2009.

Gyles Report *HMAS Success Commission of Inquiry, Allegations of Unacceptable Behaviour and the Management Thereof, Part One: The Asian Deployment and Immediate Aftermath*, redacted report made available to the public following authorisation by the Minister for Defence under Regulation 63(3) of the Defence (Inquiry) Regulations 1985 on 18 February 2011, President, the Hon Roger Gyles, AO QC, January 2011.

Gyles Report *HMAS Success Commission of Inquiry, Allegations of Unacceptable Behaviour and the Management Thereof, Part Two: The Management of the Allegations and Personnel Involved*, May 2011. Redacted report made available to the public following authorisation by the Minister for Defence under regulation 63(3) of the Defence (Inquiry) Regulations 1985 on 5 July 2011

## Committee recommendations

During HMAS *Success*' deployment between March and May 2009, the commanding officer (CO) of the ship became aware of reports of a number of incidents of unacceptable behaviour that eventually caused him to contact Fleet Headquarters for support and guidance. The response from Fleet Command set in motion a series of events that eventually culminated in the landing of three senior sailors in Singapore on 9 May 2009. Rather than resolve problems, this action attracted widespread and sensational publicity; damaged the good standing and character of certain crew members; cast doubt on the reputation of the ship's company; and more broadly damaged Navy's image.

In part one of its report, the committee looked at the circumstances that caused the CO to seek outside help to deal with problems that had been brought to his attention. It considered the Equity and Diversity (E&D) team that was sent to assist the CO; the veracity of its damning report on the conduct of some crew members; and the subsequent landing of three senior sailors in Singapore. In this second part of its report, the committee focuses on the administrative and disciplinary processes that followed the removal of the sailors from *Success*. The committee finds that both processes were deficient.

Although the committee suggests that Navy should endeavour to do its utmost to assist the senior sailors and the company of *Success* to put the events of 2009 behind them, there can be no doubt that Defence must learn important lessons from *Success*' experience. The lessons go to the importance of due process, duty of care, procedural fairness and of complying both in word and spirit with the various Defence Manuals on managing unacceptable behaviour and subsequent inquiry processes.

From its monitoring of reforms to Australia's military justice system, the committee is aware that the Inspector General of the ADF (IGADF) and the Fairness and Resolution Branch have critical roles in assisting others to manage reports of unacceptable behaviour in the ADF. Their apparent absence, particularly in an advisory capacity, from the administrative processes dealing with unacceptable behaviour in respect of *Success*, is noteworthy.

Overall, the committee is strongly of the view that Defence must take responsibility for what the committee believes was an organisational failure. It makes only one recommendation in this regard. In light of the multiple breakdowns in procedure and breaches of standard practice in the management of reports of unacceptable behaviour in *Success*, including the mishandling of media reports, the committee recommends that Defence look carefully at its internal control mechanisms including those for handling media requests and reports.

The committee recommends that:

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

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

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

The Provost Marshal, through the Minister for Defence, has been providing the Senate Foreign Affairs, Defence and Trade Legislation Committee with periodic updates on the progress of reforms to the investigative service.<sup>1</sup>

**Recommendation 2**

**paragraph 9.10**

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

---

1 The most recent was received in February 2011.



# Chapter 1

## Inquiry into incidents that occurred onboard HMAS *Success*

### Referral of inquiry and terms of reference

1.1 On 26 November 2009, the Senate referred matters relating to incidents that occurred onboard HMAS *Success* and subsequent events to the Foreign Affairs, Defence and Trade References Committee for inquiry and report by 18 March 2010. The terms of reference for the inquiry are extensive and available on the committee's website. They are also at Appendix 1.

1.2 By and large, the terms of reference deal with: allegations of unacceptable behaviour by a number of sailors onboard HMAS *Success*; an equity and diversity health check of the ship; the subsequent removal of three senior sailors from the ship; and the many administrative and disciplinary investigations that followed.

### Conduct of inquiry

1.3 The committee advertised its inquiry on its website, and in the *Australian*, calling for submissions to be lodged by 21 December 2009. During the first week in December, the committee also wrote directly to a range of people likely to have been involved in matters covered by the terms of reference, drawing their attention to the inquiry and inviting them to make written submissions.

1.4 The committee received 10 submissions which it has resolved to keep confidential for the time being. The Chief of the Defence Force (CDF) and the Chief of Navy also provided private briefings to the committee on 3 and 23 February 2010 and 22 February 2011. No transcripts of these meetings were recorded.

1.5 In March 2010, the then Chief of the Defence Force, Air Chief Marshal Angus Houston, commissioned a former judge of the Federal Court, the Honourable Roger Gyles AO QC, to conduct an independent commission of inquiry to inquire into the alleged incidents of unacceptable behaviour onboard HMAS *Success* (the Commission). The committee resolved to monitor the Commission's progress and to wait until it had completed its work before deciding on how it would proceed. The committee tabled an interim report on 18 March 2010.

1.6 The Commission took longer than expected to deliver its findings. In light of this delay and with the prorogation of the House of Representatives, the committee tabled a second interim report on 20 August 2010 notifying the Senate of its intention to present a final report as soon as possible in the 43<sup>rd</sup> Parliament. On 30 September, two days after the new Parliament sat for the first time, the Senate resolved that the committee continue its inquiry with a reporting date of 12 May 2011.

## Part One—HMAS *Success* Commission of Inquiry

1.7 In September 2010, the CDF proposed that the Commission take account of a report, not then available, of a working group into Defence Administrative Inquiries. He did not want to prolong completion of the Commission's work on the events that happened during *Success*' deployment of March to May 2009. Consequently, they agreed that Mr Gyles would produce a report in two parts. The first would deal with substantive matters arising from events onboard *Success* and the second with the general Defence processes that followed the decision to land the three senior sailors in Singapore on 9 May 2009.

1.8 Mr Gyles did not finalise the first part of his report until the end of December 2010. The Minister tabled a redacted version of this report on 22 February 2011 entitled *HMAS Success Commission of Inquiry, Allegations of Unacceptable Behaviour and the Management Thereof, Part One: The Asian Deployment and Immediate Aftermath*.<sup>1</sup> The CDF stated that he expected to receive the balance of Mr Gyles' report in the middle of the year.

1.9 In Part One of his report, Mr Gyles made clear that he assembled and presented evidence with regard to HMAS *Success* 'in order to establish a factual narrative of events in which many individuals played a part.'<sup>2</sup> In doing so, Mr Gyles effectively addressed six of the committee's terms of reference either in full or in part, including:

- (a) the nature, scope and purpose of an 'Equity and Diversity Health Check' in the Royal Australian Navy, and under what authority such an investigation is conducted;
- (b) the equity and diversity issues at large onboard HMAS *Success* (*Success*) giving rise to the 'Equity and Diversity Health Check' which was carried out onboard *Success* between 21 April and 9 May 2009 including inter alia all disciplinary issues, the transfer of a Royal Navy exchange sailor, the management of equity and diversity issues by the ship's Commanding Officer and his Executive Officer both before and after the 'Equity and Diversity Health Check';
- (c) the nature and veracity of complaints and allegations made by a Petty Officer or any other person concerning equity and diversity issues on *Success*;

---

1 *HMAS Success Commission of Inquiry, Allegations of Unacceptable Behaviour and the Management Thereof, Part One: The Asian Deployment and Immediate Aftermath*. Redacted report made available to the public following authorisation by the Minister for Defence under Regulation 63(3) of the Defence (Inquiry) Regulations 1985 on 18 February 2011. President, the Honourable Roger Gyles AO QC, January 2011 (Gyles Report, Part One).

2 Gyles Report, Part One, paragraph 5.2.



- 
- (d) the reasons and factual evidentiary basis for the ship's Commanding Officer resolving to land a Chief Petty Officer and two Petty Officers (the senior sailors) at Singapore on 9 May 2009 from *Success* and the circumstances of that landing and removal from the ship including whether the Commanding Officer acted under the direction of any superior officer;
  - (e) whether the senior sailors were informed of the full nature of the allegations and factual evidentiary basis for the subsequent landing in a timely fashion or at all and whether procedural fairness was provided to those senior sailors;
  - (f) the circumstances and events that led to the Commanding Officer of *Success* addressing members of the crew in relation to the landing of the senior sailors, whether the Commanding Officer referred to the senior sailors by stating words to the effect of 'there was a rotten core on this ship and the core has now been removed' and if so, the extent that those comments may have prejudiced any subsequent inquiry.

1.10 The committee notes the comprehensiveness of Mr Gyles' inquiry. In all, 102 individuals appeared before the Commission to give evidence with 12 people providing affidavits. The transcript of the hearings runs to 4866 pages with 376 exhibits received—many containing multiple documents.

1.11 The release of Part One of the Commission's report provided the committee with the first opportunity to read and examine Mr Gyles' findings. The committee considered carefully the report and formed the view that, given that it dealt thoroughly with six of the committee's terms of reference, the committee should pay close regard to its findings. Thus, conscious of the scope of the Commission's inquiry and the passage of time, the committee resolved to adopt Mr Gyles' approach and also produce a report in two parts.

1.12 In May 2011, the committee tabled Part One of its report on incidents onboard HMAS *Success* between March and May 2009.

### ***Unanticipated revelations***

1.13 It should be noted that the Gyles Report revealed matters that were not anticipated in the committee's terms of reference but which have been of longstanding concern to the committee. The most disturbing revelation was that a culture of silence existed onboard *Success* which meant that members of the ship's crew were reluctant to report wrongdoing or unacceptable behaviour. In particular, that the most vulnerable members of the crew, young female sailors, were subjected to verbal abuse but were reluctant to report such conduct.

1.14 The committee was alarmed further by the disclosure during the Commission's work that an inquiry in 2004 on the same ship had raised similar concerns about sexual harassment of female sailors. Indeed, the issues raised regarding HMAS *Success* in 2004 and more recently have all the hallmarks of those

considered by the committee as far back as 1994 onboard HMAS *Swan*. Because of the committee's work with the ADF in trying to promote a culture of responsible reporting of wrong doing, especially of unacceptable behaviour, and of stamping out bullying and harassment in the ADF, it was of the view that it must again draw attention to this broader cultural issue in the ADF. This matter was discussed fully in Part One of the committee's report.

## **Part Two—HMAS *Success* Commission of Inquiry**

1.15 On 7 July 2011, the Minister for Defence tabled in parliament a redacted version of Part Two of the Gyles' report—*The Management of Allegations and Personnel Involved*.<sup>3</sup> The Minister explained that the redactions were made on legal advice 'to prevent the identification of individuals who may be subject to disciplinary procedures.'<sup>4</sup>

1.16 This second part deals with Navy's administrative inquiries; management of the three landed senior sailors on their return to Australia; and Navy's response to media queries and reporting. The report also looks at the treatment of the legal officer representing the landed senior sailors and the relevant investigations undertaken by the Australian Defence Force Investigative Service (ADFIS). Effectively, Part Two of the Gyles Report addresses the committee's terms of reference that are still outstanding including:

- (g) whether the Inquiry Officer as appointed pursuant to terms of reference, dated 15 May, and as set out in Minute S1804843, dated 10 July 2009, declined to interview any relevant witnesses in circumstances where the senior sailors were prohibited from attending *Success* and or contacting any of the ship's company;
- (h) the way in which the inquiry into the events on *Success* was conducted, whether the method of questioning witnesses and gathering evidence was conducted according to the principles of justice, whether the inquiry process was free from any perception of bias, and whether any witnesses were threatened with disciplinary or other action during the course of giving evidence;
- (i) whether the senior sailors requested access to evidence gathered during the inquiry into the events on *Success*, whether any such request was denied, and whether any subsequent finding is reasonable in the circumstances;

---

3 The full citation is *HMAS Success Commission of Inquiry, Allegations of Unacceptable Behaviour and the Management Thereof, Part Two: The Management of the Allegations and Personnel Involved*, May 2011. Redacted report made available to the public following authorisation by the Minister for Defence under regulation 63(3) of the Defence (Inquiry) Regulations 1985 on 5 July 2011.

4 The Hon Stephen Smith, House of Representatives *Hansard*, 7 July 2011, p. 7976.

- 
- (j) the facts and circumstances of the treatment of the Legal Officer (the lawyer) assigned to the management and defence of the case of the senior sailors including any threats, bullying, adverse conduct and prejudice generally, including any threat of posting to Western Australia, and whether any such conduct constituted an attempt to compromise the lawyer's capacity to represent the best interests of the senior sailors without fear or favour;
  - (k) the knowledge and awareness of the ship's Commanding Officer, the Australian Defence Force Investigative Service investigators and the broader naval chain of command of the facts and circumstances relating to the Channel 7 News reports on 4 July and 7 July 2009 (the media reports) and the dates and times of such personnel being availed of such knowledge and awareness;
  - (l) the knowledge and awareness of the media reports by the responsible Minister and the dates and times of the Minister being availed of such knowledge and awareness;
  - (m) all and any other matters relating to the justice and equity of the management of the senior sailors in their removal from the ship and the subsequent administrative process or processes, including their complaints as to the flawed process as set out herein.

1.17 Because of the thoroughness of the Commission's inquiry and its direct relevance to the committee's terms of reference, the committee is of the view that Mr Gyles has done much of the work covered by the above terms of reference. Taking the same approach as it took with its first report, the committee sees no real gain in duplicating Mr Gyles' work. The committee, however, has read the transcript of the Commission's hearings and has considered confidential submissions and additional information. Furthermore, for many years the committee has been monitoring the implementation of reforms to Australia's military justice system with a particular interest in the ADF's investigatory capability as well as the effectiveness of the ADF's administrative system. As such, while drawing heavily on Mr Gyles findings, the committee presents its own views and identifies areas that it may wish to pursue further with Defence.

### **Limitations to the committee's inquiry**

1.18 At this stage, the committee draws attention to a number of difficulties it had in preparing and presenting this report. The first significant limitation was producing a factual and balanced report from incomplete and potentially misleading evidence. The committee did not have access to material central to its inquiry including the Inquiry Officer's report cited in terms of reference (g) and (h) and the supplementary material accepted by the Commission as evidence in the form of exhibits.

1.19 The committee was also conscious of the importance of protecting the privacy of the many individuals caught up in events during *Success'* deployment in the first half of 2009 and used the redacted copy of Mr Gyles' report as a guide. While the

committee also had access to other material not on the public record, it resolved to use this evidence in accordance with the principle adopted by Defence and not disclose the identity of a number of sailors.

1.20 In this report, the committee, by and large, traced events from May 2009 as they unfolded. This chronological approach was not always possible where developments overlapped. The report provides a summary of events that culminated in three senior sailors being removed from HMAS *Success*. It then considers:

- the disciplinary and administrative processes that followed the removal of the senior sailors from *Success* and whether they were afforded procedural fairness;
- the circumstances surrounding the senior sailors' employment in HMAS *Kuttabul*; their persistent endeavours to obtain information about the allegations made against them, the inaccurate and sensational media reports of their removal from *Success* and Defence's response; and
- concerns about the relationship between the legal officer representing the senior sailors and the chain of command and whether there were attempts to unduly influence him.

1.21 This second part of the committee's report builds logically on the first, but for ease of reading, the committee starts by briefly outlining the events that led to the landing of the senior sailors in Singapore and the committee's findings on those matters. It then focuses on their return to Australia and the inquiries and investigations that took place.

## Chapter 2

### The landing of the senior sailors in Singapore

2.1 During *Success'* deployment between March and May 2009, the commanding officer (CO) of the ship became aware of reports of a number of incidents of unacceptable behaviour that eventually caused him to contact Fleet Headquarters for support and guidance. The response from Fleet Command set in motion a series of events that eventually culminated in the landing of three senior sailors in Singapore on 9 May 2009. Rather than resolve problems, this action attracted widespread and sensational publicity; damaged the good standing and character of certain crew members; cast doubt on the reputation of the ship's company; and more broadly damaged Navy's image.

2.2 In its first report, the committee looked at the circumstances that caused the CO to seek outside help to deal with problems that had been brought to his attention. It considered the Equity and Diversity (E&D) team that was sent to assist; the veracity of its damning report on the behaviour of some crew members; and the subsequent landing of three senior sailors from the ship in Singapore. In this chapter, the committee provides a summary of events and of the committee's findings which drew heavily on the contents of Part One of the Gyles' Report.

#### Reports of unacceptable behaviour—a cultural issue

2.3 On 26 April 2009, three members of the ship's company—the executive officer (XO), who was the most senior female officer, and the two senior female sailors—met the CO, CMDR Simon Brown, to discuss a serious issue that had come to their attention concerning the general management of *Success*. The allegations included 'bullying, the existence of bounties for having sex with junior sailors, encouragement of female sailors to get drunk and, therefore, be more susceptible to sexual approaches and predatory behaviour towards female sailors—specifically being undertaken by some members of the engineering department.'<sup>1</sup> Without doubt, the CO of the ship placed a great deal of weight on their accounts. According to CMDR Brown, this information 'was not firsthand, but had been reported or told to these members by junior female sailors'.<sup>2</sup> At this time, the alleged perpetrators were not named as the information had been provided in confidence, but the CO was told that this behaviour had been going on for some time and that it was getting worse.

---

1 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 12 March 2010, pp. 4 and 62–63.

2 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 12 March 2010, p. 4.

2.4 CMDR Brown was of the view that the problem onboard his ship was a cultural issue 'not just an unacceptable behaviour issue—there was potential sexual-related activities, potential criminal activities'.

### **Outside assistance**

2.5 Alarmed by these accounts of unacceptable behaviour and believing that he had a significant cultural issue onboard *Success*, CMDR Brown contacted Fleet Headquarters and outlined the equity and diversity issues of concern. In an email, dated 30 April 2009, he wrote about his belief that there was currently a number of 'bounties' placed on very junior female members of his ship's company, including the one involved in a consensual sex act that took place onboard *Success* while in Qingdao. CMDR Brown then went on to say:

There have been instances of junior female sailors being abused, intimidated and threatened ashore. The sailors in question are currently not willing to come forward due to the potential for incrimination and potential recrimination. This has been brought to my attention through a number of the more senior females onboard. I believe much of the action/issues that are occurring are condoned by some [redacted] onboard. A recent incident which came to light after sailing from Qingdao involved a junior female sailor and [redacted] in a night club ashore where a sexual act was committed on the pool table in the bar in the full view of POs and other members of the ships company. My executive officer has been approached by junior sailors who have stated that there is a predatory element [redacted] onboard that has been onboard for a number of years, it has only been brought to commands attention because there is an understanding that something will now be done about it.

Sir, it is my firm belief that there is a predatory element onboard that focuses on junior inexperienced females which is led by the [redacted] department onboard. I am convinced that this has been going on for some time and is condoned by members of [redacted]. I am also convinced that there are a [redacted] number of junior sailors onboard who are confident that their actions are condoned thinking that they have the 'consent' of the senior sailors onboard, the junior females that are implicated feel that they have very little recourse and feel that if they speak up there will be consequences. The members who have brought this to my attention feel they are very much at risk, but feel that enough is enough.<sup>3</sup>

2.6 This email was the first document recording the allegations.

### **Equity and Diversity (E&D) team**

2.7 After some consideration at Fleet Headquarters, CDRE Daryl Bates, Chief Combat Support Group (CCSG), decided to send an equity and diversity team, made up of two personnel, to come onboard to conduct workshops. The team comprised the

---

3 The Gyles Report, Part One, paragraphs 1.117 and 2.237.

---

senior equity adviser of Fleet Command, Lieutenant Diane McArthur, and the Assistant Equity and Diversity Coordinator of Fleet Command, Warrant Officer (WO) Melville Harker. They were directed not to conduct an investigation or a quick assessment. According to CDRE Bates, he made clear to the CO that the team was being provided to:

- assist him informally in exploring whether he did in fact have any inappropriate behaviour or culture occurring in the ship; and
- provide E&D presentations in order to assist him in rectifying a poor E&D culture should that exist.<sup>4</sup>

2.8 Even so, uncertainty surrounded the role and function of this team. Crew members were informed that the team had arrived 'to conduct cultural awareness and Equity and Diversity presentations'.<sup>5</sup> The E&D Health Check had no clear terms of reference or Defence regulations or instructions to guide its conduct. This confusion contributed to a breakdown in communication with those onboard *Success* who had no reasonable understanding of the purpose of the so-called 'cultural awareness and Equity and Diversity presentations'. Furthermore, Mr Gyles described their activity as a 'quasi-investigation' which was undertaken by people with no training or experience in conducting such inquiries. Clearly, the appointment of the E&D team and the tasks assigned to it meant that its report provided a potentially dubious foundation for any future actions.

2.9 The E&D team joined the ship in Hong Kong on 4 May 2009 prior to the vessel sailing for Singapore and conducted their workshop onboard during that period.<sup>6</sup> Lieutenant McArthur and WO Harker agreed to present separately to different groups simultaneously.<sup>7</sup> These group E&D sessions encouraged 'open discussion about instances of unacceptable behaviour'. In some instances, alleged perpetrators were named.<sup>8</sup> The E&D team noted:

As the workshops were conducted within peer groups, some of the ship's crew felt comfortable enough to openly talk in the group format. Most groups raised similar issues, including the use of steroids and drugs onboard, the closed off cultur[e] within the MT branch, inequality in

---

4 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 July 2010, p. 8.

5 Gyles Report, Part One, paragraph 4.70 and also evidence from WO Harker, Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 26 March 2010, p. 331.

6 Gyles Report, Part One, paragraph 1.119 and Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 25 March 2010, p. 214.

7 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 25 March 2010, p. 215.

8 Gyles Report, Part One, paragraphs 4.103–4.104.

punishments when it came to the MT branch, and the level of inappropriate relationships that occur onboard.<sup>9</sup>

2.10 The team also held private sessions that provided an opportunity for individuals or small groups to speak to the E&D team in confidence about what they perceived as the unacceptable behaviour of fellow crew members.<sup>10</sup> In this hot house environment, it was only natural that rumours spread throughout the ship about the purpose of the E&D team and what was being reported to them.

### **E&D Health Check Report**

2.11 On 8 May 2009, after conducting its so-called 'health check', the E&D team presented its report to the CO. In compiling the E&D report, the authors recorded the comments or observations made to them about the type and level of unacceptable behaviour. The report referred to allegations about the use of drugs, inappropriate relationships, sexual act in public, the use of alcohol ashore, random breath testing (RBT), equality of punishment, leadership and mentoring, and predatory culture, particularly within the marine technical department.<sup>11</sup> In more detail, the E&D team recorded that:

- most groups raised the issue of the use of steroids and recreational drugs by some junior sailors and it appeared common knowledge throughout the ship that steroids were found in the trash onboard *Success*;
- a common perception existed that random drug testing was not conducted as it was too hard and therefore culprits continued to use drugs—a number of individuals had come forward and provided the names of those allegedly using steroids, some of the users were experiencing steroid rages;
- female junior sailors 'almost unanimously agreed that it was easier to give in and agree to have sex with a sailor, than continually fight off their persistent attention'—when asked why they gave in, the common response was that 'some of the sailors were big and scary, and they intimidate to the point where you just give in to get it over and done with, particularly some of the MT sailors';
- it appeared to be no secret that some of the female sailors were having inappropriate relationships with male sailors and a number of individuals stated they were aware of inappropriate relationships between female junior sailors and male junior officers;
- it appeared to be common knowledge across the ship that some sort of public sex act occurred recently in a bar in Qingdao;

---

9 The equity and diversity team's report, paragraph 4.

10 Gyles Report, Part One, paragraph 4.184.

11 The equity and diversity team's report and Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 12 March 2010, p. 6.



- a number of individuals came forward and provided the names of two POs who were present when the public sex act was alleged to have occurred and the name of the ABMT [able seaman, marine technician] who allegedly had sex with an unknown female;
- most of the groups acknowledged that the consumption of alcohol while ashore was excessive and unhealthy and that it was a major contributing factor towards the unacceptable behaviour that goes on ashore;
- female junior sailors admitted that they drank too much when ashore, and get caught up in drinking games;
- some of the male junior sailors admitted that 'depth charging' female sailors' drinks without their knowledge was common practice and was used to get them drunk more quickly;
- a number of individuals stated that when RBTs were being conducted, one POMT 'told his boys to stay down the hole' if they thought they were going to blow over, and he would cover for them;
- individuals stated that on two occasions two personnel had blown over and the paperwork has been mysteriously misplaced;
- some of the groups referred to an incident that was alleged to have occurred in Cairns, where two *Success* sailors assaulted police officers and the perception amongst the ship's crew was that the two sailors did not receive a punishment as they belonged to the 'protected pack' of MT sailors;
- there was a common perception among junior ranks that not all senior sailors and officers set a good example or act as good role models, particularly in the areas of alcohol consumption, inappropriate relationships and dress and bearing while ashore;
- a number of individuals came forward and explained how they had on occasions escorted officers to bed because they were too intoxicated to get to their messes; and
- there was a general consensus among Petty Officers (POs) that some Chief Petty Officers (CPOs) were missing in action in that they were neither available as mentors, nor set an example as mentors. This view was also shared by officers but not apparently so by the POMTs.<sup>12</sup>

2.12 The report also provided detailed information on what the E&D team termed predatory behaviour in the MT department, including the use of stand over techniques, intimidation and bullying, even threats of physical violence.<sup>13</sup>

2.13 Relying on the contents of the discussions in the group and private meetings, Lieutenant McArthur concluded in her report that:

---

12 The equity and diversity team's report, paragraphs 9–24.

13 The equity and diversity team's report, paragraphs 25–31.

- it was difficult to confirm if the bounty theory...was true and that although people talked about it, there was no real evidence to suggest that it existed;
- a predatory culture existed within the marine technical department whereby some of the male senior sailors and junior sailors actively sought out young female junior sailors and coerced or bullied them into having sex while ashore;
- a sexual act between a female junior sailor and a male junior sailor took place in a public area and marine technical senior sailors watched on and encouraged marine technical junior sailors to also watch on; and
- threats had been made against certain members of the crew if they spoke out about the nature of the unacceptable acts being carried out.<sup>14</sup>

2.14 The report did not make any recommendations.<sup>15</sup>

2.15 Although supposedly an E&D health check, in some places, the report recorded allegations as though proven. Thus, despite the E&D team not undertaking an investigation and operating outside any legal or administrative framework, they drew conclusions that clearly elevated some allegations to the level of fact: individuals were named as though guilty of unacceptable behaviour. For example, the report stated that 'the two members had been threatened with physical violence and with being posted off this ship'.<sup>16</sup> This statement is not couched in terms of an allegation yet to be tested but as a matter of fact. Furthermore, as noted by Mr Gyles, the evidence did not support the conclusion that two crew members had indeed made such an allegation. The report named the Chief Petty Officer (CPO) who was alleged to have made the threats. Somehow, the CO gained the impression from Lieutenant McArthur that two Petty Officers (POs), who were identified, were also involved with these threats of physical violence. The information provided to the E&D team made no such connection.

2.16 Based on their accounts, the members of the E&D team made no attempt nor intended to substantiate the truth or otherwise of the allegations. Those said to be involved in the alleged incidents were not approached to give their version of events. Indeed Lieutenant McArthur assumed that an investigation would follow.

### ***Committee view***

2.17 In part one of its report, the committee concluded that the E&D team was correct to record the views, observations and concerns of crew members to enable it to inform the commanding officer and Fleet Command about possible or even likely inappropriate conduct. In the committee's view, however, the E&D team went well

---

14 The equity and diversity team's report, Summary.

15 Evidence of WO Harker, Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 26 March 2010, p. 340.

16 The equity and diversity team's report, paragraph 30.

---

beyond its remit by naming individuals as though guilty of unacceptable behaviour. It is irrelevant that the members of the E&D team insist that they did not conduct an investigation, because whatever way the report is read, it presented some of its most critical findings as though proven.

### **Decision to land sailors in Singapore**

2.18 Despite the deficiencies in the E&D report, no one in authority appeared to question the basis for its findings with both the CO and Fleet Command accepting the report's assumptions at face value. They did not question or seek to corroborate the information contained in the report.

2.19 At that time, the CO's knowledge of events derived mainly from the discussions he had had prior to the arrival of the E&D team, for example, the conversation he had with the three senior female officers on 26 April; the E&D report; and his brief exchange with Lieutenant McArthur on 8 May. The CO's decision to remove the three sailors on 9 May rested principally on those sources, especially the E&D report. Moreover, the CO stated that he formed the view that the sailors should be removed from the ship because they posed a threat to the safety of the ship's company.

2.20 CMDR Brown made clear that he landed the sailors not because of the sex, or the drugs—'it was about my concern for the safety of the ship's company based on threats of physical violence and in accordance with my direction to maintain a safe working environment'.<sup>17</sup> In his statement on his intended course of action sent to Fleet Command on 9 May, he stated:

The report has highlighted a number of issues that have reinforced my belief that a number of my ship's company are in potential danger, particularly if they speak about the incidents that have occurred. This is indicated by the threats of physical violence from [redacted] should they talk to the E&D team or 'spill the beans'. There is a real fear onboard that if anything is raised while the main protagonists are onboard then nothing will be done and they would be in danger of physical violence.<sup>18</sup>

2.21 It should be noted that in the case of the three senior sailors, the evidence that they were involved in threatening two members of the crew with physical violence if they spoke to the E&D team was erroneous. Yet it was on these grounds that they were removed from the ship. Furthermore, to convey his concern about the leadership

---

17 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 24 March 2010, p. 151.

18 Gyles Report, Part One, paragraph 4.263 and S.T. Brown, Commanding Officer, HMAS *Success*, Intended Course of Action in relation to issues onboard HMAS *Success* relating to recent concerns by Commanding Officer HMAS *Success*, 9 May 2009. Copy provided to the committee in confidence and Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 12 March 2010, p. 83.

of this alleged unacceptable behaviour, the CO used highly emotive language. For example, in his intended course of action he suggested that:

...there is a small group at the centre of these activities, who feel they are untouchable because of their position onboard. They have resorted to Mafia style actions to carry out their activities which are in some cases criminal in nature.

...

It is my strong opinion and that of the E&D team that with the 'ring leaders' removed there will be a flood of information put forward to substantiate the concerns held by Command.<sup>19</sup>

### **Circumstances and manner of the landing**

2.22 Fleet Command fully supported the CO's proposal to land the three sailors. Thus, on 9 May 2009, he ordered the three senior sailors to appear individually before him in his cabin where he provided each with a letter. The CO addressed each sailor by reading from the letter and providing him with the flight details of his return to Australia. The letter was brief and to the point. It stated that certain allegations had come to the CO's attention that were of great concern to him 'in terms of the operation of HMAS *Success*, including matters possibly affecting the safety and welfare of personnel'. The letter went on to state:

These matters concerning you have been reported up the chain of command for further investigation and lead me to land you temporarily from HMAS *Success* immediately.

You will be returned to Australia as soon as possible and be employed at HMAS *Kuttabul*. You are to report to OIC FSU SYDNEY ... [The CPO's letter had different wording that allowed for him staying in Singapore to holiday with his family].

As soon as you leave my office I direct you not to contact by any means or to return contact by any means with any member of the ship's company of HMAS *Success*, except the MEO [the marine engineering officer], as required.<sup>20</sup>

2.23 Although, at least two of the sailors sought further information from the CO, nothing was forthcoming and all three remained in the dark about the nature of the allegations against them. According to the coxswain, the CO did not elaborate on the

---

19 Gyles Report, Part One, paragraph 4.263 and S.T. Brown, Commanding Officer, HMAS *Success*, Intended Course of Action in relation to issues onboard HMAS *Success* relating to recent concerns by Commanding Officer HMAS *Success*, 9 May 2009. Copy provided to the committee in confidence.

20 Letter dated 9 May 2009 and signed by S. T. Brown provided to the committee in confidence and Gyles Report, Part One, paragraph 4.270. The draft letter in the Gyles Report, has a slightly different wording—the last paragraph begins: 'As soon as you are landed'.

---

nature of the allegations responding with words to the effect of 'certain allegations'. The CO then directed them to return to their mess.<sup>21</sup>

2.24 Once they left CMDR Brown's office, the sailors were escorted to their mess decks 'to ensure that they didn't interact with the ship's company on the way...and to ensure that mess members did not come and disturb them while they were packing their bags'.<sup>22</sup> The MEO, the only crew member permitted to speak to the sailors, could offer them no further information on the reasons for their removal.

2.25 One of the sailors was given the opportunity to remain in Singapore because he had planned a holiday there with his family over that period. He was directed to arrange accommodation for himself. The CO approved his request to make a phone call to do so.<sup>23</sup>

2.26 The decision to remove the three sailors from the ship had far reaching and damaging implications for them. They had no forewarning of the CO's intentions, no knowledge of the allegations made against them except that that they were serious and possibly affected the safety and welfare of the ship. One sailor stated that he did not have any idea why such serious actions were being taken against him, 'especially with the tone and manner in which the CO notified me'.<sup>24</sup> All three were shocked, confused and distressed by the decision to land them in Singapore.<sup>25</sup>

2.27 The sailors were given 30 minutes to pack their belongings and were then escorted from the ship to a taxi waiting alongside. While being escorted from the ship, the coxswain 'walked aft in K passageway and said words to the effect of 'Clear the area,' in a raised but clear voice'. He stated that he had made arrangements for the gangway to be cleared to provide a degree of privacy to the members.<sup>26</sup> Two of the sailors, however, were of the view that they were shown neither dignity nor respect. According to one, the coxswain shouted, 'clear the passageways and do not look at this person'.<sup>27</sup> The other told the Commission that the coxswain:

---

21 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 24 March 2010, pp. 105–106.

22 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 24 March 2010, p. 107.

23 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 24 March 2010, p. 108.

24 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 8 July 2010, p. 24.

25 See for example, Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 8 July 2010, p. 24 and 9 July 2010, p. 60.

26 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 7 April 2010, p. 56.

27 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 8 July 2010, p. 24.

...was shouting at members of the ship's company words to the effect of, 'Clear the passageway,' and 'Don't look at these people.' I found this to be extremely humiliating as I felt that I was being treated as guilty before I even knew what the allegations were against me.<sup>28</sup>

2.28 The third sailor, however, told the Commission that he did not believe that the coxswain was saying this 'in any derogatory way but in an attempt, albeit rather clumsily, to protect our dignity and privacy'.<sup>29</sup>

2.29 According to one of the POs, no one from the ship stayed with them or contacted them after the taxi dropped them at the airport. He stated further that on arrival in Sydney no representative from the Navy was there to meet them and he arranged and paid for a taxi to take him home. Furthermore, he indicated that when they reported for duty at Fleet Support Unit (FSU), no one there was aware of their landing. He said:

To compound our embarrassment and the indignity of being landed, no-one at FSU was able to answer our inquiries...<sup>30</sup>

2.30 The committee found that the senior sailors were denied natural justice by not being informed about the allegations against them in a timely way; that their landing from the ship and transfer arrangements to HMAS *Kuttabul* in Sydney showed a disregard for their mental well-being, legal situation and professional standing in the Navy. They were not provided with the protections that should have been afforded to persons yet to undergo due process that would determine guilt or innocence. Clearly, they did not receive appropriate support in the period immediately after their removal from the ship and their welfare had not been taken into account properly. It should be noted that the three sailors did not receive an account of the allegations relied on to remove them from the ship until September 2009, four months after they were landed in Singapore.<sup>31</sup> This delay is discussed in chapter 4.

2.31 Finally, while crew members gave different versions of the exact words used by the CO when informing them of the sailors' removal, The committee accepted the evidence that he used words to the effect that 'there was a rotten core on this ship and the core has now been removed'. In this regard, it is difficult to determine whether the various addresses by the CO to the ship's company prejudiced any subsequent inquiries. Even so, the committee believes that CO's reference to the removal of a rotten core certainly had the potential to bias future inquiries.

---

28 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 July 2010, p. 61.

29 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 1 July 2010, p. 47.

30 Commission of inquiry into alleged incidents onboard HMAS *Success*, transcript, 1 July 2010, p. 48.

31 Confidential submission.

---

## Conclusion

2.32 The E&D report and the subsequent landing of the senior sailors triggered a series of administrative and disciplinary processes that are the focus of this report. Before considering the events that followed the removal of the sailors from *Success*, the committee notes the following decisions and actions that would influence future developments:

- although the ship's company were informed that an E&D team had joined the ship to conduct 'cultural awareness and Equity and Diversity presentations', the presentations or so-called workshops took on a very different form and actively encouraged crew members to report cases of unacceptable behaviour;
- even though not 'an investigation' and conducted outside any recognised or formal legal or administrative process, the E&D health check went beyond merely recording allegations of unacceptable behaviour, and in some instances presented them as fact: as though proven;
- some of the allegations could be categorised as notifiable incidents such as the sexual act that took place in a public area; steroid use and physical assaults;<sup>32</sup>
- the CO of *Success* made clear that he had landed the senior sailors because he feared for the safety and wellbeing of members of the ship's company and not about the sex and drugs matters;
- aside from a general reference to concerns about the safety and welfare of the ship's crew, the sailors, despite requests for information, were not provided with reasons for their removal; and
- the sailors were left with a strong sense that they had been denied the right to know the allegations against them, that they had not been not appropriately supported during their removal from the ship and return to Australia; and overall were treated poorly by the CO, including his reference to the removal of 'a rotten core'.

---

32 The equity and diversity team's report, Summary.





## Chapter 3

### Inquiries and investigations following landing of senior sailors

3.1 On 7 May 2009, LCDR David Swanson, Deputy Fleet Legal Officer, referred to events on HMAS *Success* as 'a bit of a storm in a teacup'. He explained later that 'the nature of these sorts of incidents occur quite regularly, and they're issues that fleet legal would be aware of, different inquiries, different chain'.<sup>1</sup> According to LCDR Swanson:

...people had started to spin a little out of control and that what needs to be done is rather than letting it get out of control, follow your processes, follow the procedures. We have an inquiry mechanism that makes sure that we'll get to the bottom of what these problems are.<sup>2</sup>

3.2 In this chapter, the committee looks closely at the disciplinary and administrative procedures that followed the landing of the senior sailors in Singapore. But as already noted by the committee, even at this early stage, the flawed E&D health check and its subsequent report had strayed from the path of established process. Nonetheless, with the return of the sailors to Sydney, Navy was in a position to get the process on track: to put in train proper procedures to ensure that the allegations raised in the E&D report would be examined thoroughly and objectively. There was also the opportunity for Navy to ensure that all associated with grievances or complaints would be treated fairly, reasonably and in accordance with the principles of natural justice.

3.3 The first step was to conduct a quick assessment.

#### Quick assessment into alleged improper conduct

3.4 On 13 May 2009, the Deputy Fleet Legal Officer directed LCDR Anthony Whiting to conduct a 'desktop' quick assessment based on the E&D health check only. In his report, LCDR Whiting made no direct reference to the three senior sailors although he did refer to allegations of violence by some sailors against crew members, in particular from the MT department. He also referred to the allegation about a sex act in a public place which in his view was 'disturbing and warrants further inquiry'.

3.5 Overall, he largely agreed with the summary provided in the E&D health check report namely that a sexual predatory culture existed within a group of the crew. He went on to state, however, that:

---

1 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 7.

2 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, pp. 7 and 37.

...there have been numerous examples of coercion of junior female sailors to have sex with older male crew members. From the evidence the culture on board HMAS *Success* is dysfunctional and requires immediate action.<sup>3</sup>

3.6 It should be noted that the E&D report did not provide any examples of older male crew members coercing junior female sailors to have sex. The only specific example of sexual misconduct cited in the E&D report was the public sex act involving two junior sailors and without any suggestion of coercion or the existence a predatory culture. The quick assessment went beyond the broad conclusions reached in the E&D report to suggest that specific cases existed.

3.7 The uncritical acceptance of the conclusions reached by the E&D team follows the same approach taken by the CO, *Success*, and Fleet Headquarters and underscored the importance of having a formal, properly instituted inquiry capable of distinguishing fact from supposition.

3.8 There was also at this time a tendency to use emotive language when referring to the allegations, such as the CO's reference to 'mafia style actions'. Similarly, the inclination apparent in the quick assessment of reading too much into an already flawed document, such as assuming that there were indeed numerous examples of coercion was unhelpful. Clearly, there was a need for a balanced, well-reasoned and objective approach to establishing the factual basis for the various allegations. Some of the recommendations in the quick assessment would assist in this way.

3.9 LCDR Whiting suggested that the decision maker could decide as follows:

- refer the matter to naval police for investigation;
- Defence Force Discipline Act (DFDA) charges;
- increased drug and alcohol testing, perhaps even 'whole of ship' testing;
- further administrative inquiry such as a Routine Inquiry or Inquiry Officer Inquiry; and/or
- consider the removal from the ship of the apparent ringleaders.<sup>4</sup>

3.10 By 13 May 2009, however, events had already overtaken the quick assessment. CMDR Bowers, the Fleet Legal Officer, was in no doubt that the matters raised in the E&D report were 'sufficiently serious to warrant an Inquiry Officer's Inquiry'. Indeed, the decision to initiate such an inquiry was probably taken around 9 May. On 12 May CDRE Bates requested CMDR Bowers to 'take the necessary steps to instigate an Inquiry Officer Inquiry'.<sup>5</sup> Also, by this date, four sailors, including the

---

3 Quick assessment Brief for Chief Combat Support Group, Quick Assessment into alleged improper conduct by certain members of crew of HMAS *Success*, 13 May 2009.

4 Quick assessment Brief for Chief Combat Support Group, Quick Assessment into alleged improper conduct by certain members of crew of HMAS *Success*, 13 May 2009.

5 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 23 June 2010, pp. 66 and 125 and 5 July 2010, p. 12.

---

senior sailors, had been removed from the ship; identifiable incident reports sent to ADFIS; an E&D complaint raised; and a subsequent quick assessment in respect of that matter was underway. The following section considers these processes.

### **Investigations and inquiries in Singapore**

3.11 When outlining his proposed course of action, dated 9 May 2009, CMDR Brown stated that he intended to have the senior sailors landed and returned to Australia at the first available opportunity pending further investigation. He was of the view that with the ringleaders removed there would be 'a flood of information' put forward to substantiate the concerns held by command'. Although he believed that the problems identified in the E&D report had been a cultural issue within *Success* for a number of years, he was of the view that there was strong evidence of 'unacceptable behaviour, indecent acts and potentially criminal acts'.<sup>6</sup>

#### ***Formal E&D complaints***

3.12 In his statement, CMDR Brown also noted that after the E&D report had been finalised, two members of the ship's company had come forward and made E&D complaints.<sup>7</sup> One of the complaints included a threat of physical violence while the other involved two alleged assaults. CMDR Brown acted on both allegations promptly. The E&D matter was raised on 8 May, when a sailor lodged a complaint against the CPO (one of the senior sailors) in relation to a threat that the CPO would put him through the wall if he took a complaint to the Ship's Warrant Officer (SWO). CMDR Trevor Evans, Head of the Supply Department, conducted a quick assessment which was completed on 15 May 2009.<sup>8</sup> He interviewed both the sailors involved in the alleged incident.

3.13 In his evidence, CMDR Evans stated that he made an assessment based on what he was told, noting that there were two sides to the issue. He suggested that the complainant saw the behaviour as intimidating while the CPO maintained that it was a question of perception. Further, CMDR Evans was concerned that, in speaking to the complainant, 'the true nature of the complaint as it was presented 'didn't appear to be the issue.'<sup>9</sup> He explained further that to his mind, the real purpose of the complaint was—'potentially substantially different to what had actually been said and that he

---

6 S.T. Brown, Commanding Officer, HMAS *Success*, Intended Course of Action in relation to issues onboard HMAS *Success* relating to recent concerns by Commanding Officer HMAS *Success*, 9 May 2009, paragraph 16. Copy provided to the committee in confidence.

7 S.T. Brown, Commanding Officer, HMAS *Success*, Intended Course of Action in relation to issues onboard HMAS *Success* relating to recent concerns by Commanding Officer HMAS *Success*, 9 May 2009, paragraph 8. Copy provided to the committee in confidence.

8 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, pp. 8 and 143; 14 July 2010, p. 136; and 16 July 2010, pp. 1 and 5.

9 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 August 2010, pp. 59–60.

hadn't really felt threatened at all, he hadn't taken that literally'.<sup>10</sup> The committee has not seen the report of the quick assessment but it would appear that no administrative inquiry or disciplinary investigation followed as a result of the assessment.

3.14 The alleged assaults were raised as a notifiable incident through the coxswain for further investigation. CMDR Brown also indicated that he was raising a notifiable incident report for the ADF Investigative Service (ADFIS) requesting immediate investigation of the more general issues covered in the E&D report.<sup>11</sup> Fleet Command supported CMDR Brown's intended course of action.

3.15 That same day, 9<sup>th</sup> May, the Deputy Legal Officer, LCDR Swanson, informed the CO *Success* that the Fleet Legal Officer was working to assist with the notifiable incident and would liaise with ADFIS in order to initiate an investigation onboard in Singapore, commencing as soon as possible. He also suggested that CMDR Brown should conduct a 100% Prohibited Substance Testing Program (PSTP) test of the entire ship's company while alongside in Singapore.<sup>12</sup>

3.16 Within three days of the landing of the senior sailors, a number of Notifiable Incidents reports had been sent to ADFIS in respect of:

- an incident in Darwin on 4 April 2009—sent 12 May;<sup>13</sup>
- the discovery of drug paraphernalia onboard *Success*—sent 27 April;
- two alleged assaults involving a throat grab and a headlock—sent 9 May;<sup>14</sup> and
- potential criminal activity, inappropriate behaviour, unacceptable culture, indecent acts, standover tactics and predatory behaviour—sent 9 May.<sup>15</sup>

3.17 The military justice system has two distinct but interrelated elements: the discipline system and the administrative system. Both are designed to support the command and organisational structure of the ADF. The discipline system provides a framework within which disciplinary and criminal offences are investigated and prosecuted. The administrative system deals with the decisions and processes

---

10 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 August 2010, p. 60.

11 S.T. Brown, Commanding Officer, HMAS *Success*, Intended Course of Action in relation to issues onboard HMAS *Success* relating to recent concerns by Commanding Officer HMAS *Success*, 9 May 2009, paragraph 10. Copy provided to the committee in confidence.

12 LCDR David Swanson to Simon Brown, email, 9 May 2009.

13 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, pp. 97–98.

14 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, pp. 113 and 117.

15 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, pp. 97–98.

---

associated with the control and administration of the ADF. Similar to structures in many organisations, it is designed to encourage Service personnel to maintain high standards of professional judgement, command and leadership.<sup>16</sup>

3.18 The committee considers the disciplinary matters first before looking at the administrative measures taken in the wake of the E&D report.

### *ADFIS investigations*

3.19 The E&D report provided the starting point for both the disciplinary investigations and the administrative inquiries that followed. On the last page of the E&D report, LEUT McArthur identified the names of certain crew members who were the subject of allegations. She explained the reason for doing so:

I (and/or WO Harker) had received information from and about persons which, to my understanding, may have constituted 'notifiable incidents' as covered by the definitions in DI(G) 45-2 (specifically, par 2, point h—'illegal drugs' and point j—'Sensitive Matters that may attract undesirable attention by the public, media or other agencies'). I believed I had an obligation, as a member of the ADF, to report the matter to command.<sup>17</sup>

3.20 At the time, an incident was defined as a 'Notifiable Incident' if it raised a reasonable suspicion that an offence may have been committed against the DFDA, the criminal law of the Commonwealth, states or territories, or the criminal law of another country and involved a Defence member. The definition covered not only criminal offences such as theft, fraud, assaults, sexual offences, the use and possession of illegal drugs but also matters that may be regarded as sensitive, serious or urgent including the likelihood that an incident:

- would bring the Australia Defence organisation (ADO) into disrepute;
- would attract media or Parliamentary attention; and
- may adversely affect the efficiency of the ADO.<sup>18</sup>

3.21 On 12 May, WO2 David Clarke, ADFIS, was tasked to investigate a number of matters related to incidents in HMAS *Success*.<sup>19</sup> The initial information he obtained from his headquarters was that an E&D team had gone onboard the ship at a previous port and raised a number of notifiable incidents. He was to proceed to Singapore from his base at Butterworth and make an assessment from what the E&D team could tell

---

16 For a more detailed description of both systems see, Standing Committee on Foreign Affairs, Defence and Trade, *The effectiveness of Australia's military justice system*, June 2005, pp. 7–22.

17 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 29 July 2010, p. 62.

18 Defence Instructions (General) ADMIN 45-2, 30 October 2001, paragraphs 7–10.

19 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 6 August 2010, p. 46.

him.<sup>20</sup> The investigating officer was shown a number of notifiable incident reports but was not provided with them. LTCOL Stephen Vokes, Director of Operations, ADFIS, stated, however, that he would be surprised if the investigation officer did not have copies of the notifiable incidents to assist him in his investigation.<sup>21</sup>

3.22 When the ADFIS investigator arrived in Singapore he spoke first to the chief coxswain and the CO before the E&D team.<sup>22</sup> WO2 Clarke informed the CO that he was going to analyse the initial information he had received, identify the witnesses that he needed to interview and determine any other avenues of investigation he should take.<sup>23</sup> CMDR Brown took the investigator through all the issues that had come up in the discussion on the 26<sup>th</sup> April and the E&D report including the matter of alleged bounties.<sup>24</sup> In addition, the coxswain provided the investigating officer with a brief overview of the likely offences that had occurred. WO2 Clarke did not take notes of either conversation.

3.23 LCDR Swanson had encouraged WO Clarke to speak to the E&D team headed by LEUT McArthur as 'a key starting point for consideration of any potential wider offences.'<sup>25</sup> He explained:

Certainly from the point of view of speed and simplicity and assisting him, and not attempting to influence what investigations they did or did not do, but it makes logical sense that an inquiry team has already identified particular individuals. If you go to the equity and diversity inquiry team you could start your chain of questioning from there and then feel free to go where you need to go.<sup>26</sup>

3.24 WO2 Clarke recalled that during his meeting with the E&D team, he was shown a copy of the E&D report and provided with a list of names with an asterisk against particular key people. He recorded a statement from the team which he used as a basis for his investigation.

---

20 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 6 August 2010, pp. 47–48.

21 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 10 August 2010, p. 4.

22 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 6 August 2010, p. 52.

23 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 6 August 2010, p. 53.

24 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, pp. 100 and 102.

25 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 19.

26 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 19.

3.25 Two other non-commissioned officers joined the investigating officer towards the end of the week for their initial visit.<sup>27</sup> The investigators conducted all the inquiries off the ship at a naval base in Singapore and spoke to 50 people during the first stay in Singapore.<sup>28</sup>

3.26 LTCOL Vokes, the Director of Operations ADFIS, indicated that he gave broad advice to one of the investigating team to:

...firstly identify all the DFDA offences we can, sift them out and crystallise them and then attack them as DFDA matters. Those matters which are...inquiry style matters that involve hearsay or innuendo is to do the best we can with those but attack the matters that we know that we're going to have a substantial chance of proving something beyond a reasonable doubt.<sup>29</sup>

3.27 He explained further that ADFIS' initial approach carried right through the investigation: that ADFIS concentrated 'on the investigation of DFDA offences...with a view to being able to prove to a requisite standard. In response to the question whether this vague guidance could result in matters falling between two stools, LTCOL Vokes indicated that the investigator and the chain of command on the ship could have managed this uncertainty. He then acknowledged, however, that matters were neglected and that 'things did indeed slip between the cracks or were incorrectly referred'.<sup>30</sup>

3.28 Two particular allegations—the public sex act and the drug incidents—highlight the disarray that prevailed at the time.

#### *Public sex act*

3.29 As noted earlier, the E&D report concluded that a sexual act did take place between a female junior sailor and a male junior sailor in a public area. The quick assessment based on the E&D report stated clearly that the alleged public sex act was disturbing and warranted further inquiry. CMDR Brown was under the impression that the ship had sent a Notifiable Incident report that related to the public sex act.<sup>31</sup>

---

27 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, p. 88 and 9 August 2010, p. 38.

28 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 6.

29 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 10 August 2010, p. 5.

30 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 10 August 2010, p. 6. See also comments by the ADFIS investigating officer, Commission of Inquiry into alleged incidents onboard HMAS *SUCCESS*, transcript, 6 August 2010, p. 54.

31 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, p. 90.

3.30 Thus, by 20 May CMDR Brown had done nothing with this matter because he believed that it was being investigated by ADFIS and he was waiting for information on the next step.<sup>32</sup> CMDR Donna Muller, the executive officer (XO), was under the same impression. She noted:

I thought it had been handled as a notifiable incident, but I don't believe it actually ended up that way, and so by Hong Kong there were questions being asked [by the captain and XO] on where we were at with this particular incident.<sup>33</sup>

3.31 Asked whether he was receiving updates from his coxswain about the public sex act, CMDR Brown could not recall. With regard to steps taken in respect of the public sex act and indeed other matters, he explained:

These things happened extremely quickly and started to be overtaken by passing them up to ADFIS and reporting them up through Fleet Headquarters.<sup>34</sup>

3.32 Although the coxswain agreed that there was an instruction for an investigation to take place, he could not remember the XO or CO asking him to conduct an investigation. He did not interview any person about the incident on the voyage between Qingdao and Hong Kong and could not recall when he first heard about it. He stated that investigations were conducted when ADFIS arrived in Singapore.<sup>35</sup>

3.33 The ADFIS investigating officer accepted that he should have taken carriage of this matter but had handed it back to the ship's coxswain and somewhere along the line 'dropped the ball' on it again until it was finally picked up by the investigation office in Sydney.<sup>36</sup> LTCOL Vokes stated that he could not offer a satisfactory explanation for the delay in investigating this matter. He noted that for an unknown reason the ADFIS investigator handed this matter back to the ship's coxswain. He stated that this matter slipped by them altogether and ADFIS did not become aware that it had not been addressed at all until later in the year. He stated that the situation 'was completely unsatisfactory'.

---

32 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, p. 90.

33 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 83.

34 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, p. 95.

35 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 95.

36 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 21.



3.34 LTCOL Vokes informed the commission that when finally discovered the matter was quickly taken back to investigate and finalise.<sup>37</sup> Both sailors alleged to have engaged in the act were interviewed in late August 2009.

#### *Steroid use*

3.35 In respect of the discovery of material related to drug use, LTCOL Vokes directed the investigating officer to:

Travel to Singapore, conduct investigations into the assault of [name redacted] and assess the situation with the location of syringe and drug paraphernalia onboard *Success* on or about 28 April.<sup>38</sup>

3.36 The ADFIS investigating officer was shown the notifiable incident that dealt with the drug offence which he did not investigate in Singapore. He decided to leave the evidence onboard, which, in his words, had been bagged, tagged and stored correctly, until the ship returned to Australia so that the ADFIS office at Garden Island could take charge of that evidence.<sup>39</sup> When asked about ADFIS' approach to the notifiable incident in respect of the drug paraphernalia found in *Success*, CMDR Muller stated that:

...at that point in time, there was a lot of confusion over who was taking what, and ADFIS were quite slow in responding on some matters<sup>40</sup>

3.37 It was not until 2 July 2009 that the scenes of crime action took place. LTCOL Vokes could not explain the two-month delay in examining the exhibits.<sup>41</sup>

#### *Sex act onboard Success*

3.38 CMDR Rayner, who assumed command of *Success* on 25 June 2009, informed the committee that he dealt with the incident involving the two sailors who were alleged to have engaged in sexual intercourse onboard *Success*.<sup>42</sup> He stated that the charge against the female sailor was initially referred to CMDR Brown but he was

---

37 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 10 August 2010, p. 21.

38 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 10 August 2010, p. 7.

39 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 6 August 2010, p. 48.

40 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 79.

41 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 10 August 2010, pp. 8 and 10.

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

unsure exactly of the time that CMDR Brown had heard the matter.<sup>43</sup> The charge was handed on to him when he took command of the ship and eventually heard a month later on 25 July.<sup>44</sup>

*Threats, intimidation and bullying, bounties and sex ledger*

3.39 The E&D report raised a number of allegations of unacceptable behaviour including the suggestion of bounties and a sex ledger, though it recognised that there was 'no real evidence'. Even so, the ADFIS investigator was to investigate the alleged existence of a sex ledger, mentioned by the E&D team during their discussions in Singapore, and which he included in his initial 'scope of investigation'.<sup>45</sup>

3.40 According to ADFIS, preliminary investigations found insufficient evidence of the existence of a sex ledger. The ADFIS investigator stated that his only information on the ledger came 'from the equity and diversity team and one person who allegedly heard about its existence but had never seen it'.<sup>46</sup> He indicated that he had no information to support the proposition that 'the ledger or bounties ever existed, or it was happening'—that 'no-one knew anything about that'.<sup>47</sup> The investigator stated that he informed the CO that the allegations regarding the sex ledger appeared to be unfounded.<sup>48</sup> Similarly, he received no evidence to suggest the existence of a bounty placed on the heads of females. LTCOL Vokes also understood that the matter of bounties did not get past the level of rumour.<sup>49</sup>

3.41 With regard to the allegations of sexual coercion, the investigator told the Commission that, as a result of the conversation he had with the E&D team, a number of females onboard had been identified in connection with the allegations. He explained, however, that:

When I arranged to speak with them individually none of them provided me with anything that related to those allegations...I took no statements in relation to this topic because I had no information. The witnesses they

---

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

44 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, pp. 9 and 15.

45 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 12.

46 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 12.

47 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 26.

48 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 13.

49 See LTCOL Vokes comments about dealing with allegations of prejudicial conduct. Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 10 August 2010, p. 23.

---

[E&D team] identified were unwilling or unable to provide any information.<sup>50</sup>

3.42 The senior sailors were not associated in any way to the allegations discussed so far—the two physical assaults, the public sex act (except two were alleged to have watched and encouraged others to watch), steroid use, bounties or the sex ledger. The ADFIS investigator did, however, interview the complainant who raised the allegation concerning threats made by the CPO against certain members of the crew if they spoke out about unacceptable behaviour.<sup>51</sup> According to the investigator, the complainant declined to make a statement in regards to that matter. As he had no further information, the investigator did not interview the CPO, explaining that he needed information if he were to proceed.<sup>52</sup> He also stated that he did not receive any information on any alleged threats made by either of the other senior sailors.<sup>53</sup> As noted earlier, the Supply Officer had conducted a quick assessment into the E&D complaint which he completed on 15 May.<sup>54</sup>

#### *Confusion and investigation shortcomings*

3.43 Three of the four notifiable incidents involved particular allegations. Despite dealing with a specific incident, there was confusion over what was being investigated and, if so, how far the investigation had progressed. The fourth notifiable incident, the referral to ADFIS of 'potential criminal activity', was very broad and general in nature and only further complicated an already hazy situation. Furthermore, there can be a degree of overlap or blurring in what constitutes a disciplinary and an administrative matter. While some of the allegations raised in the E&D report were clearly ADFIS matters such as those relating to physical assaults and drug use, others under the broad rubric of inappropriate behaviour and unacceptable culture were less clear.<sup>55</sup>

3.44 Accordingly, one of the immediate tasks for the administrative inquiry officer was to have a clear understanding of the allegations, and to separate them into those

---

50 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, pp. 3–4.

51 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 24.

52 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, pp. 25 and 34.

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

54 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, pp. 8 and 143 and 14 July 2010, p. 136 and 16 July 2010, p. 1.

55 See LTCOL Vokes comments about dealing with allegations of prejudicial conduct. Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 10 August 2010, p. 24.

coming under ADFIS's jurisdiction and those under the administrative system.<sup>56</sup> LCDR Swanson explained that 'the criminal side of it was for ADFIS to decide and for our side if there's this nebulous general culture that was going on then that lends itself to an inquiry to find out what was going on...'<sup>57</sup>

3.45 The ADFIS investigator stated that on leaving the ship in Singapore, he briefed the commanding officer on the matters that he was investigating and those that seemed unfounded at that time or for which he had no evidence, including the sex ledger.<sup>58</sup> As noted earlier, the CO and XO were by no means certain about what was and was not being investigated.

3.46 CMDR Brown indicated that he was expecting ADFIS to investigate the allegations raised in the E&D report about the use of threats, intimidation and bullying. He thought that ADFIS would provide feedback to the ship 'as to what they were going to carry and what they were going to pass back.'<sup>59</sup> He explained that sometimes ADFIS refer matters back to the ship to investigate. If it comes back to the ship then he would, through the ship's coxswain, take further action to investigate.<sup>60</sup> In his email of 20 May to LEUT McArthur, CMDR Brown stated:

I intend to investigate further the threats of physical harm under the DFDA. Once I've been given a clear understanding of what ADFIS will carry after the interviews back in Sydney. These relate directly to the E&D issues recently raised onboard.<sup>61</sup>

3.47 CMDR Brown waited to receive a report back from ADFIS informing him of what they were doing and where they were at but had not received any such advice by the time he left the ship in June 2010.<sup>62</sup> As of 11 August 2010, CMDR Brown had not been informed by 'either ADFIS or the coxswain or anyone else as to what matters ADFIS didn't intend to investigate'.<sup>63</sup>

---

56 See for example, Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 35.

57 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 35.

58 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 12.

59 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, p. 91.

60 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, p. 92.

61 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, p. 91.

62 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, p. 103.

63 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, p. 92.

3.48 Overall, by the time the administrative inquiry was to begin, confusion still surrounded the work being done by ADFIS. Moreover, evidence suggests that there were serious shortcomings in the ADFIS' investigations and that communication between the commanding officer and the ADFIS investigator was poor. Indeed, ADFIS' Director of Operation, LTCOL Vokes, accepted that the investigations were inadequate. He summarised :

I would like to suggest that the *Success* matters were an aberration in terms of how ADFIS should be doing business and we fully accept that that was a poor investigation and we've taken steps and have been taking steps since the inception of ADFIS to improve the general quality of our investigations.<sup>64</sup>

3.49 On 15 January 2010, the Deputy Provost Marshal of the ADF arranged for a quick assessment to be made of allegations of poor investigation standards. Following that assessment on 27 January 2010, a Routine Inquiry Officer was appointed to inquire into the matter. The report of that inquiry, issued in March 2010, found significant deficiencies with the ADFIS investigations. Those failings were not separately investigated by the Commission. Nevertheless, Mr Gyles noted the extent of the deficiencies, the narrow scope of the matters investigated by ADFIS, and the very conservative approach to instituting disciplinary proceedings.<sup>65</sup>

3.50 Since 2005, the committee has raised concerns about the poor standard of the ADF investigative service. It comments further on ADFIS in the final chapter.

#### ***Inquiry Officer Inquiry—the Wark inquiry***

3.51 On 12 May 2009, CDRE Bates told the Fleet Legal Officer that they needed to know what ADFIS was investigating so they would then know what was left to do. In response, the Legal Officer informed CDRE Bates that Fleet Legal would exert all the pressure that it could on ADFIS to obtain information on how far its investigation would extend.<sup>66</sup> He indicated that the Deputy Fleet Legal Officer, LCDR Swanson, would liaise closely with the ADFIS investigator to extract an answer quickly.

3.52 LCDR Swanson held discussions with LTCOL Vokes, to ascertain, 'from a logistics and administrative point of view', what ADFIS were doing.<sup>67</sup> According to LCDR Swanson he:

...simply wanted to know what ADFIS were doing in terms of we'll be doing these investigations. I don't get involved in what they might look at,

---

64 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 10 August 2010, p. 22.

65 Gyles Report, Part Two, p. xvi.

66 Gyles Report, Part Two, paragraphs 2.5– 2.6.

67 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, pp. 16–17.

what they might do, that's their prerogative for what they want to investigate.<sup>68</sup>

3.53 At that stage, he understood that an ADFIS investigator would 'join the ship immediately 'with a view to interviewing persons concerning the assault on a female sailor (incident not related to senior sailors).

3.54 By email, LTCOL Vokes informed LCDR Swanson that ADFIS was 'not intending to investigate the other matters raised' in the E&D report. LTCOL Vokes noted further that 'with reference to the historical incidents of unlawful activity aboard *Success*, ADFIS are not prepared to dispatch an investigative team'.<sup>69</sup> Consequently LCDR Swanson, as the officer responsible, drafted the terms of reference for an inquiry into the remaining issues raised in the E&D report.<sup>70</sup> Yet as noted above, it was still not clear what investigations ADFIS were following and people held different assumptions about what was or was not being considered.

3.55 On 15 May 2009, the Chief of the Combat Support Group, Commodore Bates appointed CMDR Niel Wark as an Inquiry Officer for the purpose of inquiring:

...into the facts and circumstances of allegations of equity and diversity issues in HMAS *Success* raised as a result of the equity and diversity health check that was undertaken in *Success* during the period 04–09 May 2009.

3.56 Under the terms of reference, the Inquiry Officer was to seek evidence and report on the existence of inappropriate culture onboard HMAS *Success* including:

- (a) Whether there exists, or existed, onboard *Success* generally, or more specifically in the Engineering Department, an inappropriate culture as evidenced by attitudes towards:
  - (i) inappropriate relationships including specific incidents with details of who was involved or otherwise aware of any such relationships;
  - (ii) sexual behaviour including, but not limited to, any predatory culture towards members of Ship's Company by any person, including specific incidents;
  - (iii) the consumption and use of alcohol, including specific incidents;
  - (iv) the use of random breath tests and attempts to avoid its proper use; and

---

68 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 16.

69 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 17.

70 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 33. Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 129. LCDR Swanson was acting Fleet Legal Officer late October, November and December 2009.

- 
- (v) the use of drugs/steroids.
  - (b) The extent of any culture of assault, intimidation, bullying or coercion that has occurred towards any individual who has not agreed with any of the above identified culture with details of who was involved and otherwise aware of such action.

3.57 The Inquiry Officer was also to seek evidence and report on how any identified inappropriate culture came into existence and:

- (c) Whether the adverse culture was developed as a result of either fully or partially:
  - (i) a break down in the divisional system;
  - (ii) the rotational system/manning process on HMAS *Success* and the time individuals serve on the one ship; or
  - (iii) staff messing arrangements and whether they are generally different to other RAN ships;
- (d) Whether the chain of command up to and including the Commanding Officer were aware of such an inappropriate culture and what steps were taken to address it or the degree to which such practices were permitted;
- (e) The level and kind of support provided to complainants and respondents involved in inappropriate behaviour incidents;
- (f) Whether there was any non-conformance with any Defence or RAN policy, directive or instruction and if so by whom; and
- (g) Any perceived bias in treatment towards any particular group, including specific examples.<sup>71</sup>

3.58 It should be noted that under these very broad terms of reference, CMDR Wark was to have regard to two key documents—the E&D health check report and the associated quick assessment.

3.59 LCDR Matthew Vesper (a reserve legal officer who acted in effect as counsel assisting CMDR Wark) and WO Melville Harker were appointed Inquiry assistants.

3.60 CMDR Wark had 33 years of service and was experienced in conducting and reviewing quick assessments and producing inquiry reports. LCDR Vesper was a member of the Naval Reserve who had been a legal practitioner since 1991 and was a barrister in private practice at the NSW bar, and was also experienced in Defence inquiries. WO Harker had been part of the two member E&D team that had produced the E&D report which subsequently formed the basis for the work of the proposed Inquiry. The appropriateness of this appointment is discussed later.

---

71 The Wark report: summary, findings and recommendations, Gyles Report, Part Two, Appendix B.

3.61 As the ADFIS personnel were leaving Singapore, the administrative inquiry team arrived to conduct an Inquiry Officer's Inquiry.<sup>72</sup> LCDR Vesper and WO Harker joined HMAS *Success* on 20 May 2009 in Singapore as it was about to embark on a joint naval exercise. The ship returned to Singapore on 29 May. During that voyage the inquiry team held 62 interviews. Some witnesses were interviewed more than once. Subsequent interviews were held in late June and early July making a total of 70 crew members who were interviewed. Each signed a statement of impartiality and independence, and there was a record of interview for each. The interviews were taped and accounted for over 100 hours of recordings.<sup>73</sup>

## **Conclusion**

3.62 Although flawed, the E&D report raised allegations that could now be investigated properly, thoroughly and objectively by appropriate authorities using formal and recognised processes. But confusion about what was being investigated; break downs in communication; and in some cases poor investigation practices served only to complicate an already complex process. The very broad terms of reference under which the Inquiry Officer Inquiry was instituted did not help to clarify the matters that it was considering. It is against this backdrop of uncertainty that the committee now looks at the circumstances of the landed sailors.

---

72 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 11 August 2010, p. 88.

73 Gyles Report, Part Two, paragraphs 2.11–2.12.



# Chapter 4

## The senior sailors in Sydney

4.1 On their return to Australia, the senior sailors were entitled to feel aggrieved. Without warning and any satisfactory explanation, they had been ordered to pack their bags and then marched off the ship in a public and humiliating way into a waiting taxi. Their landing carried a stigma and had far reaching implications for their careers as well as their personal lives. There was an opportunity, however, for Navy to repair some of the damage that had already occurred. Indeed, with regard to landed sailors, LCDR Swanson stated 'we follow the appropriate steps and make sure that everyone's interests are well looked after.'<sup>1</sup>

4.2 In this chapter, the committee considers the treatment of the senior sailors following their landing. Given that the decision to withhold information from the senior sailors on the reasons for their removal was an exception to procedural fairness rules, the committee is especially interested in when this exemption was lifted.

### Return to Garden Island, Sydney

4.3 At the time of their removal from *Success*, the CO issued an order that the senior sailors were not to contact by any means any member of the ship's company with the exception of the Marine Engineer.<sup>2</sup> As directed, on arrival in Australia they reported to the OIC of FSU Sydney where they were employed. Soon after the CPO, who had remained in Singapore to holiday with his family, returned to Sydney, the three senior sailors meet LCDR Dean Bainbridge who began acting as their legal representative. LCDR Bainbridge had no official documentation or direction from a superior that assigned the senior sailors to him for assistance.<sup>3</sup>

4.4 One of the most pressing issues for the sailors was to gain some understanding of the basis for their removal. They knew that an inquiry was being conducted as a result of the E&D report but had no knowledge of the terms of reference. According to LCDR Bainbridge, at that time the senior sailors:

---

1 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 52.

2 Letter dated 9 May 2009 and signed by S. T. Brown provided to the committee in confidence and Gyles Report, Part One, paragraph 4.270. The draft letter in the Gyles Report has a slightly different wording – the last paragraph begins: 'As soon as you are landed'. Routine Inquiry into the Formal Complaint by [names redacted] from HMAS *Success* (the Houston report), 23 October 2009, p. 6. Committee-in-confidence document.

3 Gyles Report, Part Two, paragraph 3.10.

...were trying to figure out why they were landed...they were searching for answers at that stage, so they'd certainly discussed that at length, trying to figure out what the basis was.<sup>4</sup>

4.5 While the sailors received sufficient divisional access from the OIC Fleet Support Unit (FSU) Sydney and from personnel at the Amphibious Afloat Support Sustainment Project Office in Sydney, they were highly critical of the support they received regarding the allegations made against them and their removal from *Success*. They complained that their divisional personnel and legal representative were unable to obtain any information regarding their removal.<sup>5</sup>

### **Sailors status unchanged, new CO *Success***

4.6 According to the senior sailors, 6 weeks had passed after their removal from the ship before they had any communication with anyone involved in the Wark inquiry, which was when their interviews were concluded on 18 June.<sup>6</sup>

4.7 It should be noted that the Local Area Move (LAM) signals from HMAS *Success* to HMAS *Kuttabul* noted that the period of LAM for the senior sailors was from 11 May to 22 June 2009.<sup>7</sup> The signals also indicated that the reasons for landing the sailors would be forwarded to CO *Kuttabul* by separate correspondence.<sup>8</sup> But by the end of June, despite being interviewed by the CMDR Wark, they still had not been provided with a statement of reason for their landing and were still prevented from contacting crew members from *Success*. These restrictions were to 'ensure that the ADFIS investigation and the Inquiry Officer Inquiry would not be prejudiced'. The Fleet Legal Officer instructed that the three senior sailors were not to speak to anyone about any matters under investigation or inquiry and that they were not to proceed onboard HMAS *Success* unless for work purposes, and then only with the express approval of OIC FSU-S. CMDR Kemp, the new MEO *Success*, relayed this information to the senior sailors.<sup>9</sup>

4.8 On 25 June 2009, CMDR Anthony Rayner assumed command of *Success*. During the handover, he was told that the senior sailors had been landed for administrative purposes which were then the subject of the Wark inquiry. He was led

---

4 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 16 July 2010, p. 119.

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

6 Three senior sailors to Commodore C.A. Clarke, Commanding Officer HMAS *Kuttabul* and Houston Report, p. 3. Committee-in-confidence document.

7 HMAS *Success* to HMAS *Kuttabul*, 11 May 2009.

8 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 75.

9 Gyles Report, Part Two, paragraph 3.107; Houston report, p. 6.

to believe that the inquiry was expected to be completed in 'short order' which would then 'resolve the status of the sailors'. CMDR Rayner understood that the sailors:

...were landed because of safety issues, for safety concerns about members of the ship's company based on...an E&D report or parts of that E&D report which indicated that people were at risk.<sup>10</sup>

He was given a copy of the E&D report, which to him did not seem 'very factual' in a 'critical way'.<sup>11</sup>

4.9 CMDR Rayner told the commission that he struggled to get information because the Wark inquiry was underway'.<sup>12</sup> He also indicated that he 'did not get a lot of detail on the circumstances of those sailors' because of the number of ADFIS investigations going on.<sup>13</sup> CMDR Rayner explained that while 'the catalyst for the landings remained under investigation', he had 'no basis or information on which to change their posting arrangement'.<sup>14</sup> He noted further that although he was the CO of *Success*:

...in this circumstance the IOI [Inquiry Officer Inquiry] and subsequent actions were being directed by the higher Headquarters COMSURFOR (CDRE Middleton) and I was also responsive to this process. It was only when I commenced action on the Redresses of Grievance [30 November 2010] that I had full access to the information contained in the Wark IOI and other subsequent investigations'.<sup>15</sup>

4.10 Also, according to CMDR Rayner, he was 'reliant on the services of the Fleet Legal Officer' as some correspondence he received sought information which he could not access. He noted that the nature of some requests was such that 'legal guidance and advice' was required before he could respond.<sup>16</sup>

4.11 With regards to the landed sailors' welfare, CMDR Rayner understood that they were being administered by CO *Kuttabul* and he confirmed through the Fleet

---

10 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 20.

11 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, pp. 23 and 38.

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

13 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 20.

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

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

16 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, pp. 6–7.

Legal Officer that they had independent legal advice.<sup>17</sup> He also tasked the Engineer, CMDR Kemp, to talk with the sailors, to maintain regular contact with them and respond to their divisional needs.<sup>18</sup>

### ***CDRE Middleton assumes responsibility for HMAS Success***

4.12 On 1 July 2009, Navy underwent a restructure that abolished the position of CCGS and created Commodore Support. While Commodore Support subsumed some of the duties and responsibilities of the CCGS position, it did not include the duties and obligations that CDRE Bates had with regard to *Success*. CDRE Ian Middleton, the Commander of the Surface Force was now responsible for all the major fleet units and larger ships, which included *Success*.<sup>19</sup>

### **Reports of a 'sex scandal'**

4.13 In late June 2009, Mr Andrew Greene, a reporter with Channel 7, had a chance meeting with a female in a bar in Canberra. The woman identified herself as a member of the Royal Australian Navy and someone who was familiar with events on HMAS *Success* but would not say whether she had been on the ship. Mr Greene questioned her extensively and at that time she conveyed information that would form the basis of questions he would put to the Department of Defence (Defence). Following the meeting, he sent a 'media request' to Defence seeking answers to five questions.<sup>20</sup>

4.14 On 3 July 2009, COL Mark Elliott, Acting Director-General Public Affairs Operations for Defence, received an email from Mr Greene relating to 'an incident onboard *Success* in May'.<sup>21</sup> In the preamble to this request for information, Mr Greene referred to crew members of *Success* being accused of 'drawing up a ledger challenge to try to sleep with as many onboard, female colleagues as possible'. He wrote:

During its visit to Singapore a number of sailors, five or six, were disciplined and returned to Australia for misconduct. The men were accused of drawing up a ledger challenge to try to sleep with as many onboard, female colleagues, as possible. The men involved were then

---

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

18 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 8.

19 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 6 August 2010, p. 2.

20 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 30 July 2010, p. 2.

21 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2009, p. 31.

---

ordered back to Australia. I seek answers to the following questions within the next few days.<sup>22</sup>

4.15 COL Elliott informed the Commission that he could not recall whether he was aware of any such incident in *Success* at that time. He noted that the only area that would have known about the allegations against the landed sailors would have been 'the subject matter expert and most likely the commander of the vessel at the time'.<sup>23</sup>

4.16 Normally, the Public Affairs Operations Centre takes an enquiry from any source around Australia, including the media, and refers it to a line area such as Navy, Army or Air Force or inter-headquarters JOC for specific information. Subject matter experts in that area would formulate a response which is returned to the Centre where it is 'synchronised' to make sure it is current with other previous advice. The response is then conveyed back to the person making the request.<sup>24</sup> Thus, according to COL Elliott, he would have sent the request 'down to Navy straightaway'.<sup>25</sup> He explained that:

On behalf of Navy, they'd go to, in this case, fleet headquarters and fleet headquarters would coordinate the material, knowing the matter in detail, and then it would come back up the chain.<sup>26</sup>

4.17 At that time, CAPT Anthony Aldren, the Director of Navy Communications and Coordination based in Navy Headquarters, would normally have managed Navy's response to such a request from a journalist. He would have identified the area best placed in Navy to provide the subject matter expertise to answer queries.<sup>27</sup>

4.18 In this case, CMDR Paul Doble, Commander of the Fleet Personnel Service, provided information in response to the journalist's questions.<sup>28</sup> CMDR Doble made clear that he did not have any contact with COL Elliott or any direct contact with

---

22 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 32.

23 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 22.

24 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 14.

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

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

27 He was specifically tasked to deal with matters relating to Navy, Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, pp. 16 and 21; 6 August 2010, p. 19.

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

CAPT Aldren.<sup>29</sup> Based on information that he had obtained from the Fleet Legal Officer (FLO) and from Defence policy documents, CMDR Doble drafted answers to Mr Greene's questions. He explained that he would have drawn up the answers, consulted and prepared them for clearance by CDRE Michael van Balen, Commodore Support Group, before they were dispatched to Canberra.<sup>30</sup>

4.19 The Fleet Legal Officer, CMDR Bowers, was the main source of information for CMDR Doble on the action taken against the sailors.<sup>31</sup> Indeed, CMDR Bowers, as the key legal adviser to the CO *Success* at the time of the E&D health check and the removal of the sailors, was well placed to provide sound and accurate advice. He agreed with the observation that at that time the sailors had not been disciplined and there was no mention of them being involved in a sex ledger.<sup>32</sup> Although listed as being the subject matter expert, he could not, however, recall being consulted in the preparation of the response.

4.20 Having gone through the normal channels, COL Elliott provided Mr Greene with answers to the five questions. This response, however, did nothing to discount the false assumption contained in Mr Greene's preamble to his request that the sailors were landed because of their involvement in a sex ledger. Indeed, the silence on this matter in Navy's response seemed to give credence to this assertion.

4.21 CMDR Doble acknowledged that the response to the media request did not in any way deny that the sailors were landed as a disciplinary measure because they had drawn up a ledger challenge: it made no reference to it.<sup>33</sup> He concurred with the proposition that if he had known it was wrong it would have been appropriate to correct it.<sup>34</sup> He added, however, that he was not in a position to say whether or not the premise underpinning Mr Greene's request for information was correct because 'it was still under investigation.'<sup>35</sup>

---

29 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 50.

30 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 50.

31 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 48.

32 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, pp. 58 and 59.

33 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 50.

34 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 51.

35 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 50.

4.22 Mr Greene anticipated that his report on *Success* would be a main story with 'headline status'.<sup>36</sup> COL Elliott was also alert to the potential for this story to be a major news item. Noting that Mr Greene was 'a populist journalist', he recommended to CAPT Aldren, that 'they should look towards a release of information if this situation got some ground'. But at this preliminary stage and despite the likelihood for adverse publicity, it appears that relevant Defence personnel paid little attention to establishing the facts. As a result, they were ill-equipped to correct the record or temper exaggerated reporting.

4.23 It is no surprise then, that on 4 July Mr Greene presented a segment on Channel 7 news which focused on a 'sex scandal' onboard HMAS *Success* whereby four sailors were removed. This news item sparked widespread media interest. One such report from the *Age* captured the tone and content of the news reports which read:

Several male sailors have been counselled and sent home after a ledger surfaced recording bets on how many of their fellow crew members they could sleep with.

...

Concerns about the betting book, known as 'The Ledger', were raised by female crew members. Dollar values were placed on the female crew, with higher amounts to be won if sailors had sex with a female officer or a lesbian.

Channel Seven news reported last night that the men also challenged each other to have sex in different locations, including on top of a pool table.

The sailors allegedly detailed their bets and the various dollar values on the female targets in The Ledger, which was discovered while HMAS *Success* was visiting Singapore in May.

Sailors were formally interviewed by their captain, Commander Simon Brown, and a number were immediately returned to Australia.

4.24 The report indicated that a Defence spokesperson had confirmed that an unnamed number of sailors in HMAS *Success* were returned to Australia from Singapore in May. It noted that a formal investigation was under way and Defence said it would be inappropriate to discuss details of the complaints or investigation while the inquiry was continuing.

4.25 It also stated that the Navy had a strict 'equity and diversity' policy which was regularly monitored and so-called 'health checks' were conducted in workplaces at sea and on land to ensure it was being enforced. According to the newspaper account, the

---

36 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 30 July 2010, p. 18.

sailors at the centre of the new allegations were removed from the ship after such a 'health check'.<sup>37</sup>

4.26 Most major news outlets in Australia broadcast similar misinformed and highly embellished stories on 5 July.

### ***Media release***

4.27 In response to the publicity about sexual misconduct, Navy produced a written reply. Having neglected initially to correct the underlying premise of Mr Greene's request for information, Navy now had a chance to put right the misleading media reports. CDRE Michael van Balen, Commodore Support Group, explained that the subject matter experts within the headquarters in consultation with the public affairs people developed a media release. It was then presented to him as a 'reflection of the status of where the issue was at the time' and accordingly he released it.<sup>38</sup>

4.28 According to CDRE van Balen, he made clear that at the time he had not been provided with any information with regard to events in *Success* or a copy of the E&D report.<sup>39</sup> He explained Navy's approach:

...the concern is that you make a statement which suggests a certain course of action or a certain undertaking without having any facts. Then you're presupposing an outcome. Certainly there was strong intent to ensure that that did not occur.<sup>40</sup>

4.29 CDRE van Balen also discussed the release with CMDR Doble, as the head of the Human Resources organisation, about the E&D health check. In CDRE van Balen's view, Navy's response reflected the answers given by CMDR Doble.

4.30 On 5 July, Defence issued the following statement regarding the allegations of bad behaviour onboard *Success*:

In May 2009, the Navy was made aware of allegations of misconduct by members of HMAS *Success*. These allegations were identified during the conduct of a proactive Navy equity and diversity health check program which had been initiated by the Commanding Officer of HMAS *Success*.

Four members of the ship's company were returned to Australia from Singapore as a result of the allegations.

---

37 Kerry-Anne Walsh, 'Navy mired in betting-on-sex scandal', *The Age*, 5 July 2009, <http://www.theage.com.au/national/navy-mired-in-bettingonsex-scandal-20090704-d8ha.html>

38 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 6 August 2010, p. 2.

39 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 6 August 2010, pp. 2 and 9.

40 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 6 August 2010, p. 6.



Chief of Navy, Vice Admiral Russ Crane, said the alleged behaviours under investigation do not align to Navy values or the recently articulated signature behaviours developed by our Navy people and implemented through our New Generation Navy program. Our Navy people will not tolerate this type of behaviour.

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

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

'Navy has stringent policies and education programs in place to support Navy people who rightly demand and deserve a working environment free from unacceptable behaviour'.

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

Navy people are briefed regularly on their responsibility to treat others fairly and know that unacceptable behaviour will be dealt with. A regular, Navy wide, equity and diversity education program proactively reinforces these principles and immediate action is taken to address any concerns raised by individuals.<sup>41</sup>

4.31 Media reports began quoting from the Chief of Navy's statement that the alleged behaviours were being investigated and do not align with Navy values. They noted that 'Navy is awaiting the results of the ADFIS investigation and will act as quickly as possible to address appropriate findings and recommendations particularly should disciplinary or administrative action be warranted.'<sup>42</sup>

4.32 Clearly Defence's media release was designed to portray Navy as a decisive and responsible organisation that acted promptly to stop unacceptable behaviour while promoting a safe and healthy workplace. It did nothing, however, to counter the misinformation already disseminated widely about the existence of a sex ledger and 'dollar values being placed on the female crew'. Similar fanciful assertions such as the challenge 'to have sex in different locations, including on top of a pool table', were left uncorrected. The E&D report and CMDR Brown's correspondence with Fleet Command before landing the sailors mentioned no such activity. The reference to a 'proactive Navy equity and diversity health check program' was also misleading because, as noted in the previous chapter, the E&D health check onboard *Success* was the first of its kind.

---

41 Defence website, Media Release, MECC 202/09, 5 July 2009, <http://www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=9236>

42 ABC News, <http://www.abc.net.au/news/2009-07-05/navy-wont-tolerate-sailor-sex-contests/1342272>

4.33 Importantly, the media release did not clarify what the Chief of Navy was referring to when he stated that 'Navy acted immediately by removing those sailors allegedly involved in the matter from the ship'. In using such language, the release conveyed a definite message that the allegations related to the sex ledger that had figured so prominently in media reports. But the sailors were not returned to Australia for sexual misbehaviour and definitely were not connected in any way with a sex ledger. At the time, the closest association that could be drawn with any sexual misconduct was that two of the sailors were alleged to have watched and encouraged others to watch a public sex act. Mr Gyles stated that although the media release did not expressly mention the sex ledger allegations, it 'implicitly accepted the truth of them'. The committee agrees.

4.34 Further, Defence's response stated categorically that the matter had been referred to ADFIS for action and was waiting for results. While in Singapore, ADFIS investigators had struggled to gather evidence to support any case for bounties let alone a sex ledger or the other type of activities detailed in the media reports. Clearly the sex ledger and the matter of bounties were not being investigated. The FLO or other subject matter experts must, or should, have been aware of the findings of the ADFIS investigation that took place in Singapore immediately after the sailors had been returned to Australia. His office should also have known that the E&D report had stated that there was no real evidence to suggest that a sex ledger existed. Furthermore, that the senior sailors were landed because of complaints of threats of physical violence with no connection whatsoever to a sex ledger.

*7 July 2009*

4.35 Reports about the alleged incidents continued to run as a live issue for the rest of the week. On 7 July 2009, RADM Stephen Gilmore and CDRE Tim Barrett launched a submariner recruiting package at the National Press Club in Canberra.<sup>43</sup> The launch was followed by a question-and-answer session. According to Mr Greene, there was intense interest at that press conference and people were there basically to ask questions about this [*Success*] story rather than submariners.<sup>44</sup>

4.36 COL Elliott stated that because of the publicity around *Success*, there were concerns that members of the press might ask questions at this event.<sup>45</sup> He told the Commission that a document of contingency talking points was compiled to help the presenters should they be asked about the *Success* matter. The briefs had come from the subject matter experts at the time.<sup>46</sup>

---

43 The event was a Head of Navy People and Reputation launch of a high end digital product.

44 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 30 July 2010, p. 25.

45 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 16.

46 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 18.

4.37 CAPT Aldren, whose primary duties covered reputation management, media advice and ministerial support, was also involved in preparing RADM Gilmore for the launch on 7 July. The contingency talking points prepared for the Admiral were very similar to the ones that were cleared on or about 5 July.<sup>47</sup> Predictably, during this session, a journalist asked about the allegations concerning *Success* and their probable effect on Navy recruitment. In answering, Rear Admiral Gilmore appeared to lend some credence to the allegations by stating that the potentially 'abhorrent' behaviour of four sailors aboard *Success* could harm future recruitment efforts.<sup>48</sup> An article in at least two major newspapers also reported that:

Rear Admiral Gilmore wouldn't pre-empt the *Success* inquiries under way but said the future of the four sailors was in doubt.<sup>49</sup>

4.38 This response provided yet another opportunity to enliven media interest in the allegations that sailors on *Success* had been sent home for allegedly staging a contest to see how many female sailors they could bed and detailing their contest in a ledger. The Gyles Report was of the view that RADM Gilmore's response 'implicitly accepted the truth of the allegations—namely that the sailors had been landed for their involvement in a scandal related to a sex ledger'.<sup>50</sup> The reference to the sailors' future being in doubt was particularly unfortunate in that it conveyed a message of their assumed guilt and punishment.

4.39 When asked about RADM Gilmore's statement about the sailors careers being in doubt, COL Elliott suggested that 'if we'd picked up on that contextually where it's mentioned we would have fired it back down the chain...'<sup>51</sup> He could not recall, however, the statement being made.<sup>52</sup> Clearly, no one in Navy, or Defence more broadly, noticed or thought to mention to the relevant Public Affairs area that the media was reporting on RADM Gilmore's reference to the sailors' careers being in doubt.

---

47 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 6 August 2010, p. 45.

48 'HMAS *Success* scandal could harm recruitment: Navy', 7 July 2009, *The Age*, <http://www.theage.com.au/national/hmas-success-scandal-could-harm-recruitment-navy-20090707-db9n.html>

49 *The Age*, <http://www.theage.com.au/national/hmas-success-scandal-could-harm-recruitment-navy-20090707-db9n.html>; *Sydney Morning Herald*, 7 July 2010, <http://news.smh.com.au/breaking-news-national/sex-scandal-could-harm-navy-recruitment-20090707-db9h.html>

50 Gyles Report, Part Two, p. xiii.

51 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, pp. 40–41.

52 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 40.

### ***Committee view***

4.40 There is no doubt that the media reports on the landed sailors in the early part of July contained a number of errors—the sailors were not removed because of their involvement with a sex ledger and at the time there was no ADFIS investigation in connection with the sex ledger and the senior sailors. Indeed, at this stage, it would appear that ADFIS was not investigating any matter at all dealing with the senior sailors. Finally, Navy's E&D policy did not involve E&D health checks—the E&D health check on *Success* was the first of its kind.

### ***Journalist contacts the senior sailors***

4.41 It is difficult to imagine the effect that this publicity had on the landed sailors and those close to them. Their families and many in the Navy including the ship's company would have known of their identities.<sup>53</sup> Also, the sailors were yet to be informed about the reasons for their landing and must have been totally bewildered by the reports associating their removal from the ship with a sex ledger. They explained, 'Our families now believe that we are all involved in some sex scandal, even though that does not appear to form part of the [Wark] inquiry.'<sup>54</sup> They wrote of their concerns:

I believe that we were entitled to support from the Navy regarding our welfare after the media reports but we received nothing.<sup>55</sup>

4.42 To add to their concerns, without warning Mr Greene contacted them seeking information.

### ***Media access to mobile phone numbers of senior sailors***

4.43 Within days of the first media report, a different person phoned Mr Greene in his office in Canberra endeavouring to clarify some of the allegations that had been broadcast and published. The unidentified caller indicated that a number of his crewmates thought that there were some inaccuracies in what had been reported.<sup>56</sup> During the conversation, the man provided the private telephone numbers of the senior sailors. Mr Greene used this information to contact them.

4.44 According to the senior sailors, on the night of Monday 6 July they received phone calls on their private mobile numbers from the media. All three refused to

---

53 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 36.

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

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

56 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 30 July 2010, p. 4.

comment.<sup>57</sup> Mr Greene explained that he spoke to the CPO, who gave him one word answers, followed by 'I'm not talking to you'. The CPO then hung up. The two Petty Officers showed the same unwillingness to engage with the journalist and responded with a 'no comment' in one way or another.<sup>58</sup>

4.45 The senior sailors were concerned about the media obtaining their personal details and how such a situation could have eventuated.<sup>59</sup> The day following the phone calls, they 'arrived at the office of CMDR Christine Clarke, CO *Kuttabul*, seeking support and advice on how to deal with the media contact. They complained about the contents of the media reports, indicating that this was the first time that they had information on the reasons for their landing and further that they did not believe the accounts to be accurate.<sup>60</sup>

4.46 At that time, CMDR Clarke had not yet met the sailors and had no knowledge of the reasons they were removed from the ship.<sup>61</sup> She explained:

I took command in June and they were already located in *Kuttabul* prior to me taking command and I was advised at the time that further information would be made available to me, that they had been landed and, as the signals indicated, that further reasons for their landing would be provided.<sup>62</sup>

4.47 CMDR Clarke noted that the sailors were 'quite concerned about how their mobile phone numbers had been provided to the media'.<sup>63</sup> Arrangements were made for them to meet with personnel from Fleet Public Affairs who advised the senior sailors that they were not to make comment or otherwise discuss the situation.<sup>64</sup> CAPT Aldren also spoke to CMDR Clarke and WO Donlan to ensure that the sailors

---

57 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, pp. 76, 83.

58 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 30 July 2010, p. 11.

59 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 76 and three senior sailors to Commodore C.A. Clarke Commanding Officer HMAS *Kuttabul*.

60 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, pp. 76, 83.

61 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, pp. 81–82.

62 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 83.

63 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 82.

64 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 76.

not only understood their responsibilities dealing with the media and were de-briefed on them but that they were being properly supported at the time.<sup>65</sup>

4.48 On the sailors' return to her office, CMDR Clarke talked to them about the help that was available including legal assistance through the Legal Officer Advocacy and Counselling at Garden Island and support for them and their families through the Defence Community Support Organisation. She also informed them of the resources offered through a psychologist if they needed stress management assistance or related help.<sup>66</sup> In addition, she appointed WO Donlan as their Divisional Officer. CMDR Clarke explained:

The initial incident was to assist them with their ability to deal with media enquiries in the first instance and then the progression of documents that we went through was to try and find the reasons that they were landed.<sup>67</sup>

4.49 According to the senior sailors, they were very disappointed to find out that for almost seven weeks the XO of *Kuttabul* and the Navy Public Affairs Officers were unaware of who they were and that they had been landed ashore.<sup>68</sup>

4.50 Before the Commission, COL Elliott was asked whether Public Affairs provided the senior sailors with guidance on how to manage the publicity. He stated that normally as part of a brief they would have provided advice to relevant Navy personnel that they 'must be aware of their duty of care of information, so we'd ask that Navy brief them accordingly'.<sup>69</sup> He also indicated that Public Affairs would expect 'the divisional chain to support and look after those families'.<sup>70</sup> Furthermore, he explained that he was not informed that the senior sailors had been contacted by the journalist and only found out months later.<sup>71</sup>

4.51 On 7 July, LCDR Bainbridge informed the FLO, CMDR Bowers, that the media had contacted the senior sailors. According to CMDR Bowers, he then directed his staff to speak to ADFIS and LCDR Bainbridge to ascertain if there were sufficient information to undertake a DFDA investigation into the possible leaking of personal

---

65 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 6 August 2010, p. 35.

66 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, pp. 76–77 and 84.

67 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 83.

68 Three senior sailors to Commodore C.A. Clarke Commanding Officer HMAS *Kuttabul*.

69 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2009, p. 33.

70 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 36.

71 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 39.

information. ADFIS formed the view that there was insufficient evidence to proceed without further inquiry. On that basis, CMDR Bowers decided that he would not pursue the matter.<sup>72</sup>

4.52 About three weeks later, after 'further information was received in a Ministerial Representation' from a relative of one of the senior sailors, CMDR Bowers reviewed the situation. A discussion followed between ADFIS and the Defence Security Agency about which agency should take carriage. CMDR Bowers understood that ADFIS took charge but was not aware of the result.<sup>73</sup>

### ***Correcting the record***

4.53 Personnel were drawn from various areas within Defence and Navy to deal with the media reporting on *Success*. Yet despite the number of people involved, there was no genuine attempt to establish the veracity of the reports, and little consideration was given to the sailors publicly maligned.

4.54 CMDR Clarke was of the view that it was not her role to correct the errors in the media reporting.<sup>74</sup> She explained that she took the concerns to the Commander Australian Surface Forces, CDRE Middleton, as this was the immediate, next level up.<sup>75</sup>

4.55 Similarly, COL Elliott explained that the Public Affairs area was not the subject matter expert. He noted that Public Affairs did not know that the ADFIS investigation had nothing to do with a sex ledger and that the landed sailors had not been accused of being involved personally in any sex ledger accusations. In response to a question on correcting errors such as this, COL Elliott stated:

...the subject matter expert should come back up and say this is inaccurate and if we need to refute something like that, that would be, you know, the case.<sup>76</sup>

4.56 The subject matter expert for the media release was CAPT Aldren. COL Elliott explained that the captain was not a legal officer: that he would have acquired material from his line area. He stated that CAPT Aldren would:

---

72 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 23 June 2010, p. 67.

73 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 23 June 2010, p. 67.

74 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 84.

75 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 84.

76 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, pp. 35–36.

...turn to Fleet to ensure that the information provided by Fleet was accurate, and if there was any change because of a quick assessment or some condition inside the information area he would have to reflect that in the talking points coming up.<sup>77</sup>

4.57 CAPT Aldren agreed with the proposition that it was obvious by 7 July that the sailors had been identified in the public arena as having been involved in a sex scandal. When asked whether he realised he could have corrected that impression with a proper answer to the journalist concerned, he replied:

I did not have at the time clear advice from any source that a ledger existed or didn't exist. I had no completed administrative or disciplinary investigations. I had no formal advice that the sailors at that point in time had not been given any statement of reasons. The first occasion was this, on 7 July where it's suggested—that allegation was they didn't know why they'd been landed. All of the other information I've had through the fleet chain indicated that the right processes, divisionally, legally, psychologically, chaplaincy support were in place.<sup>78</sup>

4.58 He did not speak specifically to CMDR Bowers, Fleet Legal Officer, about the existence of a sex ledger.

4.59 According to LEUT McArthur, the author of the E&D report, as soon as she saw that article in the paper she and WO Harker went up to see CMDR Bowers and made it known that they did not agree that such an article should be published and asked what was going to be done. The matter of the sex ledger associated with the landed sailors was part of a whole conversation. Her suggestion was that 'somebody should advise the people who have put that out that that is incorrect'. In evidence, LEUT McArthur stated that CMDR Bowers' response to that was 'Well, Navy doesn't do that. We don't do that'.<sup>79</sup> CMDR Bowers could not recall this discussion or his response.<sup>80</sup> He stated that he would be surprised at making such a statement and might have 'referred her on to the Public Affairs people who manage Public Affairs'.<sup>81</sup>

4.60 LEUT McArthur did not know whether CMDR Bowers looked into the matter or not. She again told the Commission that he just said 'that that's the media or something that would have to be dealt with through—we have public relations/media

---

77 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 23.

78 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 6 August 2010, p. 36.

79 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 29 July 2009, p. 80.

80 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 67.

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



---

people that deal with that'.<sup>82</sup> LEUT McArthur stated that she also had a conversation with CMDR Wittwer, the group equity coordinator, about how the media could inaccurately report things.<sup>83</sup>

4.61 CMDR Doble stated that LEUT McArthur expressed concerns about the media reports and told him that there was no ledger. He did not pass this information on but understood that the concerns had been reported to the highest levels. He did not know by whom. In his words:

...there was a lot of organisations of ADFIS, a lot of organisations involved in this...I know that LEUT McArthur had made that clear...I wasn't in a position to say that, I was not there. But I doubt that it was not aware at the highest level.<sup>84</sup>

4.62 He was under the impression that LEUT McArthur had spoken to CMDR Bowers about it. As noted earlier, CMDR Bowers did not recall being consulted on the matters raised by Mr Greene in his request for information.<sup>85</sup> He was, however, involved in preparing contingency talking points. Again, however, he could not recall the points being put to him, but accepted that he was consulted because the document recorded this fact, noting that there is no indication of the nature of that consultation.<sup>86</sup>

4.63 CMDR Bowers knew about the lack of evidence on the existence of a sex ledger and the reasons for landing the sailors. He had read the E&D report, CMDR Brown's statement of intention dated 9 May and provided legal advice on the grounds for landing the senior sailors in Singapore. Indeed, he helped to frame the document setting out the reasons for removing the sailors.<sup>87</sup> CMDR Bowers told the Commission that although he had read the E&D report on 9 May he did not refer back to it when the media began referring to a sex ledger and the landing of the sailors in Singapore. He noted that a lot of allegations of a general nature were made and the reason he did not do anything was that he did not know what happened.<sup>88</sup>

---

82 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 29 July 2009, p. 81.

83 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 29 July 2009, p. 81.

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

85 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 57.

86 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, pp. 59–60.

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

88 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 76.

4.64 When asked whether any action was taken at a command legal level to try to set the record straight, CMDR Bowers replied that he did not see that as his role.<sup>89</sup>

...Navy's response to the press is a matter for the public affairs people, and I wasn't keeping tabs on it. What I was focused on as the legal officer, [responsible] for legal issues, was the matters raised to me by the commanding officer and our response to them.<sup>90</sup>

4.65 Later, he told the Commission that he saw the matter of correcting media reports damaging to both individual sailors and to Navy as a command question. In his view:

...the commanders are cognisant of what is written here and presumably also cognisant of what's said in the media. I didn't see it so much as a legal issue to deal with media assertions.<sup>91</sup>

4.66 During the Commission's hearing, CMDR Bowers was asked directly if CDRE Bates and CDRE Middleton were not aware of the minutiae or intricacies of the matters and whether he, knowing the reports to be incorrect, should have alerted command or public affairs. He responded by stating that they had access to the same documents—the E&D report and the CO's document.<sup>92</sup>

4.67 Around 6 July 2009, CMDR Bowers drafted a document providing background information on allegations of inappropriate behaviour onboard HMAS *Success*. In this document, he suggested that he was careful to make sure that 'we didn't say that ADFIS investigations were underway in relation to the four sailors'. He stated:

I suggested a framing that would say that there is a DFDA investigation into one of the sailors [not one of the senior sailors] by ADFIS and another one by *Success* itself. So I was keen not to sleight all of the sailors with all of the ADFIS investigations and try to distinguish it along those lines...it was also pretty important to state that the allegations were not proved in any forum, that the administrative action of removal from the ship was taken on the basis of preliminary findings.<sup>93</sup>

4.68 It should be noted that CMDR Bowers agreed that 'finding' was not the right word to use in this case.

---

89 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 23 June 2009, p. 111.

90 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 61.

91 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 66.

92 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 76.

93 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 64.

4.69 This document, however, must be read in the context of the media reporting which implied that the sailors were being disciplined for their involvement with activities related to a sex ledger. In response as to why he did not correct such impressions, CMDR Bowers stated that his role was to address the allegation that he knew of and not to rely on media as a reliable source of allegations.<sup>94</sup>

4.70 At the time of the media accounts, CDRE Middleton had only recently taken responsibility for matters relating to HMAS *Success*. His predecessor, CDRE Bates, who had been actively involved in discussions about the removal of the sailors, could not recall having a specific conversation with CDRE Middleton when the allegations of a sex ledger became news.<sup>95</sup> He told the Commission that he 'would not have talked detail of what he knew' with his successor for fear of influencing him, indicating that CDRE Middleton was to receive the Inquiry Officer's inquiry'.<sup>96</sup>

### ***Upholding Navy's reputation***

4.71 Clearly, no one in Defence generally or Navy in particular was prepared firstly to establish the veracity of the assertions made in the press and secondly attempt to correct them where required. Indeed, the prevailing attitude toward bad publicity meant that the focus was on protecting Navy's reputation. COL Elliott stated:

Any allegation, that's put into the public space such as this...if you can't deny it straightaway because the media runs on a principle of if it bleeds, it leads. So if you can't stop that straightaway, then put in place something that actually shows we're actually doing something about it, such as an investigation.<sup>97</sup>

4.72 This statement clearly shows the approach taken by Defence which was primarily to limit the reputational damage to Navy by showing that it was taking decisive steps through the ADFIS investigation. By doing so, no consideration was given to the harm caused to the senior sailors and indeed it strengthened the perception that they were landed because of their alleged involvement in the sex ledger. But it also perpetuated a falsehood about an investigation when, in fact, there was no ADFIS investigation underway at that time into the sex ledger.

4.73 Those in Defence managing the publicity at that time should have made it their business, at the very least, to acquaint themselves with the facts as best they

---

94 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 66.

95 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 July 2010, p. 79.

96 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 July 2010, p. 80.

97 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 22.

could. The responsibility for correcting the errors also resided with those who knew that the reports were incorrect. Apparently no one bothered.

4.74 This detachment from, and lack of concern for, the sailors wellbeing in the glare of adverse publicity, was a continuation of the attitude shown toward them during their removal from *Success* and return to Sydney. The management of the sex scandal reports simply fuelled their sense of grievance.

## **Conclusion**

4.75 Mr Gyles found that from Mr Greene's first inquiry, the Public Affairs Office personnel 'should have sought from command a clear, unequivocal statement as to the truth or otherwise of the allegations made'. He argued that:

Command should have provided that statement. A denial should then have been issued to the journalist, and any subsequent media report should have been firmly and clearly corrected rather than pursuing the course of obfuscation that proceeded from 3 July onwards.

Naturally, the effect of the media reports on the senior sailors and those close to them was devastating. One thing is clear: there is no hint that anyone gave any consideration to the interests of the landed sailors and their families. The divisional system failed them.<sup>98</sup>

4.76 The committee agrees that no other conclusion can be drawn from the evidence presented to the Commission. The committee is not convinced, however, that even if the Public Affairs Operation Centre had sought assurances on the facts of the case, it would have received a clear and accurate account. The confusion surrounding the various inquiries and investigations underway coupled with poor communication between HMAS *Success* and Fleet Command meant that unsound assumptions went unquestioned. Also, those who were aware of the circumstances of the sailors' landing and in a position to correct false information appeared to detach themselves from any responsibility to do so, assuming that job rested elsewhere.

4.77 Furthermore, Defence's response to the adverse media reports concentrated on containing damage to Navy's reputation. This approach meant that efforts were directed toward promoting a favourable image of Navy and away from establishing the truth or otherwise of the media reports. Thus, Navy focused on its decisiveness in immediately removing the sailors allegedly involved in the sex scandal from the ship and referring the matter to ADFIS for action. Attention was also given to the New Generation Navy program and its proactive equity and diversity education program. As a result, the reputation and personal wellbeing of the senior sailors was placed in jeopardy.

# 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.<sup>1</sup> 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.<sup>2</sup>

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'.<sup>3</sup> 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'.<sup>4</sup>

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'.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup>

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'.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup> 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'.<sup>14</sup>

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.<sup>15</sup>

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)<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

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.<sup>19</sup>

---

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.<sup>20</sup> 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'.<sup>21</sup>

### *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'.<sup>22</sup> 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.<sup>23</sup>

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 20<sup>th</sup> 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.<sup>24</sup>

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.<sup>25</sup> Another explained that he eventually received a copy through an FOI request in November 2009 which took 'some 120 days from the application'.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup>

---

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.<sup>31</sup>

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.<sup>32</sup>

### *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.<sup>33</sup>

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.'<sup>34</sup>

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.<sup>35</sup>

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.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup>

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.<sup>40</sup>

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.<sup>41</sup>

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.<sup>42</sup>

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.<sup>43</sup>

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.<sup>44</sup>

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.<sup>45</sup> She again indicated that the senior sailors were 'to receive the full divisional support of *Kuttabul*.'<sup>46</sup>

5.47 The senior sailors would not learn of the results of the Routine Inquiry until November.<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup> In his view, this order was 'oppressive'.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup>

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.<sup>55</sup>

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.<sup>56</sup>

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.<sup>57</sup>

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

## 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'.<sup>59</sup>

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.

## 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.<sup>1</sup> Apart from formal matters, the enclosures contained 88 records of interview and some documentary exhibits.<sup>2</sup>

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

- 
- (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.<sup>3</sup>

#### *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'.<sup>4</sup>

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.<sup>5</sup> She concluded that there was no reason at law why the Appointing Authority could not act on CMDR Wark's findings and recommendations.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>

---

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.<sup>10</sup>

### ***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.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup>

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'.<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup>

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).<sup>18</sup> 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.<sup>19</sup>

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'.<sup>20</sup>

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?<sup>21</sup>

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.<sup>22</sup>

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.<sup>23</sup>

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.

- 
- 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.<sup>24</sup>

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.<sup>25</sup>

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.<sup>26</sup>

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.<sup>27</sup>

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.<sup>28</sup>

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.<sup>29</sup>

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.<sup>30</sup> 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).<sup>31</sup>

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*.<sup>32</sup>

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.<sup>33</sup> 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.'<sup>34</sup>

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.<sup>35</sup>

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.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup> 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'.<sup>39</sup>

## 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....<sup>40</sup>

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.<sup>41</sup>

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.<sup>42</sup>

### ***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.<sup>43</sup>

6.57 Fleet Legal provided the information and a lawyer, Colonel Michael Griffin.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup>

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.<sup>47</sup>

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...<sup>48</sup>

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.<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup>

6.67 On 10 February 2010, he made similar decisions and recommendations in relation to the other senior sailors.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> He also sought advice from the Head of Defence Legal, Mr Mark Cunliffe.<sup>55</sup>

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.<sup>56</sup>

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.<sup>57</sup>

### ***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.<sup>58</sup>

---

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.<sup>59</sup> He made clear that he set aside the Wark Report and did not consider initiating a fresh investigation.<sup>60</sup> 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.<sup>61</sup>

### ***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.<sup>62</sup>

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:<sup>63</sup>

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.<sup>64</sup>

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.<sup>65</sup>

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>

# Chapter 7

## Wark inquiry set aside

7.1 In the previous chapter, the committee provided a condensed account of the various steps taken by the senior sailors and their legal representative to achieve some form of redress for perceived wrongs. These included the manner of the sailors' removal from *Success*, the suspension of procedural fairness, and the harm caused by allowing incorrect media reports to go unchallenged. It considered:

- the senior sailors' endeavours to obtain a statement of reasons for their landing in Singapore;
- the findings of the Inquiry Officer Inquiry (the Wark inquiry) and the Routine Inquiry (the Houston inquiry);
- the senior sailors request for additional material following receipt of their notification of proposed adverse findings, their joint complaint, their efforts to have the order preventing them from contacting members of the ship's crew rescinded, and finally their ROGs; and
- the legal advice that found the Inquiry Officer Inquiry flawed that resulted in the report being set aside and the subsequent revocation of the senior sailors' notices to show cause.

7.2 A key consideration for the committee is how a situation could arise whereby the Wark inquiry, intended to establish the facts and circumstances of allegations raised in the flawed E&D report, was itself found to be flawed.

### Administrative inquiries

7.3 The inquiry process is of central importance to the overall effectiveness of the ADF's administrative system. In its 2005 report on Australia's military justice system, the committee highlighted the importance of ensuring that the preliminary stages of an inquiry are conducted in accordance with Defence regulations and guidelines. It recognised that any shortcomings or failings at the beginning of an inquiry could drag through the system for years. The integrity of the inquiry process and its ability to protect the fundamental rights of those involved in the process are crucial to its credibility and its effectiveness.

7.4 As an introduction to chapter 3, the committee quoted an observation from LCDR Swanson on the importance of putting in place proper procedures. On 7 May 2009 as Fleet Command was considering its options, he said:

...what needs to be done is...follow your processes, follow the procedures. We have an inquiry mechanism that makes sure that we'll get to the bottom of what these problems are.<sup>1</sup>

7.5 The committee has noted that while the E&D health check report on HMAS *Success* set the administrative process on the wrong track, the subsequent ADFIS investigations and Inquiry Officer Inquiry provided an opportunity to correct that process. It now turns to consider what went wrong with the process. Its main concern is with identifying the weakness or deficiencies in the administrative system that allowed such an unsatisfactory situation to develop and to have them corrected. It examines the Wark inquiry and considers whether it was a fair and proper process that adequately protected the interests of all parties involved in the inquiry and, at the same time, effectively gathered and analysed the evidence, producing recommendations designed to remedy identified problems.

### **Wark inquiry**

7.6 The committee considers the Wark inquiry in light of the ADF's *Administrative Inquiries Manual*, ADFP 06.1.4. The purpose of this publication is to provide advice and guidance to all personnel who may be required to appoint or conduct or otherwise be involved in an administrative inquiry. The committee starts with the Inquiry Officer Inquiry's terms of reference.

### ***Terms of Reference***

7.7 The Administrative Inquiries Manual recognises the importance of having concise and specific terms of reference (TOR). It suggests that poorly drafted terms of reference are 'likely to prove highly problematic'.<sup>2</sup> The Manual states that if the terms are too narrow or too wide, they will attract criticism and may cause the inquiry to be flawed.<sup>3</sup>

7.8 The Wark inquiry was to inquire into the facts and circumstances of allegations of equity and diversity issues in *Success* raised as a result of the E&D health check. The terms of reference required the Inquiry Officer to seek evidence and report on the existence of inappropriate culture onboard the ship and how any identified inappropriate culture came into existence. The terms of reference were imprecise, wide-ranging and definitely invited a fishing expedition.

7.9 The committee does not suggest that the wide terms of reference would or should invalidate the inquiry's findings. The terms of reference did, however, create confusion over exactly what matters came under its purview and created difficulties

---

1 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, pp. 7 and 37.

2 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 5.59.

3 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 1.42.

---

for CMDR Wark and LCDR Vesper in managing this complex and highly charged inquiry.

7.10 For example, LCDR Felicity Rodgers, the Reserve legal officer who reviewed the Wark report, noted that while the report addressed the terms of reference adequately, there were two exceptions 3(d) and (f):

Whether the chain of command up to and including the Commanding Officer were aware of such an inappropriate culture and what steps were taken to address it or the degree to which such practices were permitted (3d); and

Whether there was any non-conformance with any Defence or RAN policy, directive or instruction and if so by whom 3(f).

7.11 It should also be noted that one of the reasons put forward for refusing to provide the senior sailors with the reasons for their removal from *Success* was the very existence of this inquiry. CMDR Bowers stated that to his mind the matters were connected: that the subject of the landing was also the subject of the inquiry. He stated:

I can't recall whether the terms of reference refer to the landing but...the way I saw it was there was a connection because the reason it [the landing] was temporary was that it was subject to the conclusions of the inquiry.<sup>4</sup>

7.12 CDRE Bates also told the committee that to his mind the reasons for the sailors being landed were included in paragraph 3(b), which dealt with any culture of assault, bullying or coercion. He explained that in drafting the terms of reference he would 'be very careful not to be specific in identifying individuals or trying to steer the inquiry'. Nonetheless, before the Commission, he made clear that his intention in 3(b) was to investigate why the sailors were landed.<sup>5</sup>

7.13 CMDR Wark, however, believed that his appointment and terms of reference did not cover the circumstances of, and the reasons for, landing the four sailors in Singapore.<sup>6</sup> According to Mr Gyles, the correctness of CMDR Wark's view is debatable. In his view, it could be argued that terms of reference 3(b), 3(d), 3(e) and 3(f) encompassed those matters.<sup>7</sup> Indeed, there was a degree of overlap in the terms of

---

4 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 9 August 2010, p. 71.

5 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 July 2010, p. 74. For TOR see paragraph 3.55. TOR 3(b) The extent of any culture of assault, intimidation, bullying or coercion that has occurred towards any individual who has not agreed with any of the above identified culture with details of who was involved and otherwise aware of such action.

6 Gyles Report, Part Two, pp. vii and 12.

7 See paragraph 3.55–3.56 for the inquiry's terms of reference and also Gyles Report, Part Two, p. 12 and paragraph 3.61. Term of reference 3(e)—the level and kind of support provided to complainants and respondents involved in inappropriate behaviour incidents.

reference cited by LCDR Rodgers and Mr Gyles that could include the reasons for and the circumstances of the landing. Even so, Mr Gyles formed the view, consistent with CMDR Wark, that the terms of reference did not encompass the landing of the sailors.<sup>8</sup>

7.14 The committee notes that the circumstances and reasons for the removal of the senior sailors is not expressly referred to in any term of reference. It accepts, however, the view that a number of the terms appear to contemplate inquiry into the landing of the sailors especially 3(b) and (d). The latter required the Inquiry Officer to determine, among other things, whether the CO was aware of an inappropriate culture and the steps taken to address it.

7.15 In the committee's opinion, the terms of reference were open to interpretation which understandably created confusion at the time about what matters were being considered. Also, as observed in the legal review, not all the terms were addressed adequately. Finally, the Wark inquiry made a finding about the public sex act and named the two sailors engaged in the act. The committee understood that this incident was investigated as a notifiable incident and, although badly mishandled initially by ADFIS, was an ADFIS responsibility, and correctly so.

#### ***Committee view***

7.16 The committee considers that the breadth of the inquiry's terms of reference and their propensity for varying interpretations was an unnecessary source of uncertainty in an already complicated and confused process.

#### ***Conflicts of interest and the independence of the inquiry***

7.17 The credibility of any inquiry process rests heavily on the actual and perceived impartiality of those conducting the inquiry. The *Administrative Inquiries Manual* recognises the importance of upholding the no bias rule. The committee notes that three main aspects of the inquiry had the potential to influence the views and opinions of the inquiry officers or of witnesses. Firstly, the terms of reference required the Inquiry Officer to have regard to two central documents—the E&D Health Check Report and the associated quick assessment—which the committee has noted assumed the guilt of some particular individuals or groups. Secondly, WO Harker, who was part of the two member E&D health check, was appointed as an inquiry assistant. Thirdly, soon after the senior sailors were removed from the ship, the CO *Success* maligned them in front of some crew members by referring to them as a rotten core.

#### ***The E&D report as a source document***

7.18 The inquiry's terms of reference directed the Inquiry Officer to have regard to relevant Defence Manuals and also the E&D report and the quick assessment

---

8 Gyles Report, Part Two, p. 82.

---

reviewing that report.<sup>9</sup> The committee has noted that the E&D report was not the result of any formal or recognised Defence procedure and had many deficiencies.

7.19 CDRE Bates informed the Commission that it would be common for an Inquiry Officer Inquiry to include whatever information was available. He believed that the task of the Inquiry Officer was to 'check the veracity—the truth, the evidence, the fallacy or whatever of the information contained therein'. LCDR Swanson, who drafted the TOR, cannot remember turning his mind to the issue of providing the Inquiry Officer with a report that had already drawn conclusions adverse to a number of people including the senior sailors. LCDR Swanson responded:

It probably goes to the degree to which you believe that CMDR Wark or his assistants are incapable of paring apart and are susceptible to being influenced by those sorts of reports.<sup>10</sup>

7.20 In his report, CMDR Wark acknowledged that he began with only a few 'leads' in determining where to start his inquiry—CMDR Brown's email to CDRE Bates of 30 April 2009 and the E&D report. He explained:

I did not, and do not, consider that I could/can place any reliance on the statements in this material and I have not done so. I merely used this material to find a starting point for my investigation.

7.21 He gave the example of asking sailors about what statements were made at the E&D health check group meetings. He then sought to investigate the basis of those statements:

Whilst pursuing those leads, I did not set out to specifically refute or corroborate any assertion in that material and I have not sought to specifically do so in this report. The extent that my report may refute or corroborate that material is not my concern.<sup>11</sup>

7.22 The committee notes, however, that during her appearance before the Commission, LEUT McArthur referred to an email, dated 27 May 2009, that she had received from CMDR Wark. In this email, CMDR Wark stated that he thought that WO Harker had 'some concerns re us doubting your report'. He wanted to reassure LEUT McArthur that this was 'not the case'.<sup>12</sup> The committee has highlighted the shortcomings of the E&D report and the uncritical acceptance of its contents by senior personnel.

---

9 Inquiry Officer Inquiry Terms of Reference pursuant to the Instrument of Appointment of 17 July 2009.

10 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 28 July 2010, p. 26.

11 Gyles Report, Part Two, paragraph 2.13.

12 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 29 July 2010, p. 74.

7.23 In this regard, Mr Gyles found that before beginning his inquiry, CMDR Wark would have been aware that the CO *Success* and LEUT McArthur, the E&D senior advisor, 'accepted the substance of the allegations to be investigated.' He stated further that in each case, they went 'well beyond expressing the view that there was sufficient substance in the allegations to warrant an investigation'. According to Mr Gyles:

It would naturally be assumed that the Commanding Officer of the vessel had a good background against which to assess the matter, and it was known that the Senior Equity Advisor had been on board the vessel for some days and had conducted a review on the ship before forming her opinion. Furthermore, [names redacted] are readily identifiable in the Commanding Officer's email and the E&D report as the ringleaders of an unsavoury Marine Technical culture. The actual quick assessment that preceded the appointment of the Wark inquiry was a desktop exercise that was little more than a formality.<sup>13</sup>

7.24 The committee found that the documents cited by CMDR Wark as the ones he used as a starting point—the E&D report and the CMDR Brown's email to CDRE Bates of 30 April—contained, without any evidentiary basis, inbuilt assumptions about the guilt of some people including the senior sailors. Moreover, they used highly emotive terms such as 'pack mentality' and 'mafia style actions' and labelled a CPOMT and at least two POMTs (the senior sailors) as 'the untouchables'. The CO *Success*, Fleet Command and the subsequent legal review accepted the assertions made in the report at face value.

### ***Committee view***

7.25 The Inquiry Officer had the opportunity to test the veracity of the allegations contained in the E&D report and relevant correspondence. CMDR Wark made clear in his report that he did not place any reliance on the statements in this material. Even so, it cannot be ignored that the E&D report, supported by the CO's correspondence to Fleet Command, had already carried great weight with senior navy officers in Fleet Command who accepted the reports without question. The quick assessment of the E&D report was not only uncritical of the report's contents but, as noted in chapter 3, in some cases overstated some of the report's conclusions.

### ***An assistant to the Inquiry and perceived conflict of interest***

7.26 Defence's Inquiry Manual requires that an Inquiry Assistant be impartial and independent in relation to what is to be examined. It directs that a person selected 'must be free from bias and conflict of interest' and makes quite clear that:

Personnel selected to participate in an inquiry must be free, to the maximum extent feasible, from any suggestion of bias or conflict of interest

---

13 Gyles Report, Part Two, paragraph 2.18.



---

involving any issue or witness...inappropriate appointments may result in the termination of an inquiry and the appointment of a new one.<sup>14</sup>

7.27 WO Harker, who was appointed assistant to the Inquiry, was also the second member of the E&D health check team that produced the E&D report. The terms of reference directed CMDR Wark to have regard to this document. At first sight, this appointment should have been considered in light of WO Harker's role in the E&D health check.

7.28 In his report, CMDR Wark acknowledged that WO Harker had been a member of the E&D team. He explained:

Given his involvement in the E&D process and that there was a likelihood that I would ask witnesses about what was raised with the E&D team. I deemed it appropriate that WO Harker not participate or be present in any of the interviews undertaken by myself and LCDR Vesper. I also excluded WO Harker from any deliberations during my decision-making phase. He has taken no part in the preparation of this report. Rather, WO Harker's assistance was limited to facilitating the attendance of witnesses and to liaise between myself and the Ship.<sup>15</sup>

7.29 It should be noted that during the so-called E&D health check, considerable hostility developed between WO Harker and some groups in *Success*, notably one such group included two of the senior sailors. Indeed, in their joint complaint the sailors stated that the E&D team:

...in an aggressive tone accused members of 'not doing their jobs' and stated that 'they were only here because we were not doing our job'.

7.30 WO Harker told the Commission that he did not make such a statement. He did, however, recall that his meeting with the POs MT was heated and that they were upset and 'quite rude' to him; trying to belittle him and using some profanities. He could remember saying to the sailors words to effect:

You people are not special and because you're on this ship...you can be taken off the ship if it's deemed necessary and other people can come and take your place.<sup>16</sup>

7.31 The Defence Manual identifies 'strong personal animosity' as one of the circumstances that has the potential to give rise to bias.<sup>17</sup>

7.32 LCDR Rodgers in her legal review noted that WO Harker's previous involvement in the E&D health check and report could 'base an argument of

---

14 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 1.37.

15 Gyles Report, Part Two, paragraph 2.13.

16 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 26 March 2010, p. 366.

17 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 5.30 (a).

apprehended bias or conflict of interest. Indeed, WO Harker could possibly have become a witness in this Inquiry'. She was satisfied, however, that the measures taken by CMDR Wark to manage his assistant's role in the inquiry were 'sufficient to address any perceived conflict of interest'.<sup>18</sup> WO Harker told the Commission that he did not take part in any interviews.

7.33 Mr Gyles observed that the appointment of WO Harker 'did give rise to a problem that was implicitly recognised in the steps CMDR Wark took to isolate him from the substance of the inquiry'. Mr Gyles also noted that although WO Harker was not an author of the equity and diversity report, he was 'very much involved' in the 'health check' and the report, which he 'had seen, and effectively approved' before it was handed over.<sup>19</sup> Moreover, according to Mr Gyles the problem was exacerbated by the form and tone of the equity and diversity report.<sup>20</sup>

7.34 In Mr Gyles' view there were good practical reasons for WO Harker's appointment. He noted that an administrative assistant was needed for the interviews onboard and later and, given the nature of the allegations being investigated, it would have been difficult to find a suitable person from among the crew of *Success*. Furthermore, WO Harker had background knowledge and he was in Singapore and was prepared to remain there. Mr Gyles acknowledged that those involved in the appointment might not have had any real knowledge of the part WO Harker played in the E&D health check or, indeed, of what a 'health check' was.<sup>21</sup>

7.35 He found that in retrospect WO Harker's appointment can be seen as 'an error of judgment' and drew attention to the fact that WO Harker had played a role in the E&D health check beyond that of mere administration. Also, WO Harker had conducted or participated in many of the sessions with the crew; had expressed strong views about the conduct of Marine Technical sailors; and importantly was at least consulted about the form of the E&D report.<sup>22</sup> Mr Gyles concluded:

The involvement of WO Harker as an Inquiry Assistant might have made the conduct of the Inquiry Officer's vulnerable to challenge on administrative law grounds. But the appointment was not made by CMDR Wark. I was satisfied that, in the events that ensued, it had no influence on CMDR Wark that proved adverse to the senior landed sailors.<sup>23</sup>

7.36 One of the senior sailors concerned about the appointment of WO Harker was of the view that irrespective of whether or not WO Harker participated in the interviews or the formal decision making process, his involvement in the inquiry was

---

18 Gyles Report, Part Two, paragraph 2.33.

19 Gyles Report, Part Two, paragraph 2.15.

20 Gyles Report, Part Two, paragraph 2.15.

21 Gyles Report, Part Two, paragraph 2.117.

22 Gyles Report, Part Two, paragraph 2.117.

23 Gyles Report, Part Two, pp. ix-x.

---

a conflict of interest.<sup>24</sup> The committee also notes the correspondence between LEUT McArthur and CMDR Wark, cited above, in which CMDR Wark refers to WO Harker's concerns about the Inquiry Officer doubting the E&D report but wanting to offer reassurance that that was not the case.

***Committee view***

7.37 In this case, it cannot be denied that WO Harker was closely involved in a process that produced a report containing adverse findings against the senior sailors. As noted earlier, CMDR Wark was required to have regard to this report. Moreover, during the E&D health check, WO Harker and some of the senior sailors had a nasty altercation.

7.38 LCDR Swanson and CMDR Wark were not to know of the rancour that had developed between WO Harker and some of the senior sailors. The committee also notes Mr Gyles' observation that CMDR Wark did not make the appointment and it had no influence on the Inquiry Officer that 'proved adverse to the senior sailors'. Even so, the committee is of the view that irrespective of WO Harker's understanding of events and availability, greater consideration should have been given to his appointment especially the potential for conflict of interest. The committee is of the view that his appointment as an assistant to the Inquiry was unwise and would certainly have played on the minds of those talking to CMDR Wark.

***CO's statement that a rotten core had been removed***

7.39 The circumstances that preceded the Wark inquiry must have had a profound effect on the ship's company. A so-called E&D health check team had come onboard and held public meetings during which people were encouraged to, and did in fact, raise concerns about unacceptable behaviour. Soon after, the CO had the senior sailors removed from the ship. This act alone sent a signal to the rest of the crew that something was seriously amiss and that the senior sailors were at the centre of it. This message was reinforced when the CO of the ship made reference to a rotten core in an address to some members of the crew. The statement must surely have made an impression on people who would provide evidence to the Wark inquiry.

7.40 Taken by itself, this reference, although prejudicial to the senior sailors' reputation, could not be accepted as a major impediment to the Wark inquiry. It was, however, one of a number of factors that had the potential to influence the neutrality of the proceedings.

***Committee view***

7.41 The committee makes no judgement about whether the independence of the inquiry was compromised or unduly influenced by the E&D report; the appointment of WO Harker as an inquiry assistant; or the CO's statement about a rotten core. It is

---

24 Confidential submission.

clear, however, that they certainly provided solid grounds for a perception of bias. This was especially so for the senior sailors who had sound reasons for being deeply suspicious, and rightly so, of the process.

### **Procedural fairness**

7.42 Recommendations coming out of an administrative inquiry may form the basis upon which adverse administrative action may follow. Moreover, adverse administrative action is not merely about warnings, fines and extra duties: it may have severe consequences for an individual including discharge from the ADF. Thus the fundamental principles underpinning the notion of a fair trial offer a sound and sure guide on important matters that should be observed during an administrative inquiry.

7.43 Indeed, administrative inquiries have particular features that require an Inquiry Officer to be particularly alive to situations that may give rise to conflicts of interest or perceptions of bias. These features include:

- an Inquiry Officer Inquiry is not conducted in public;<sup>25</sup>
- a person who is subject to adverse comment does not have the right to call or examine people giving evidence, nor does he or she have the right to be present during the taking of evidence; and
- the report itself may not, as a matter of course, be made available to interested parties<sup>26</sup>—the Defence Manual makes clear that members affected by the report of an investigating officer do not have an automatic right to access the report and the report can only be released with Ministerial approval.<sup>27</sup>

7.44 Also, members of the ADF must, unless they have a reasonable excuse for declining to do so, answer all questions put to them by the investigating officer and produce any documents or articles.<sup>28</sup>

7.45 Undoubtedly, an investigating officer is in a position of great influence in the management and direction of an inquiry. He or she determines whether a particular fact or piece of evidence is relevant to the inquiry and the weight that should be assigned to it. The investigating officer has the responsibility to test the veracity of

---

25 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraphs 1.51 and 6.33.

26 Paragraph 6.86 of the *Administrative Inquiries Manual*, ADFP 06.1.4, states that 'with the consent of the Minister and subject to the limitations of secrecy and privacy, members who are likely to be affected by the inquiry are to be provided with a copy of the report or that part of the report that relates to them.'

27 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, Annex F to chapter 6, paragraph 8.

28 *Administrative Inquiries Manual*, Annex C to Chapter 6, paragraph 19. Their evidence is not to be taken on oath. Annex E to chapter 6, paragraph 4.

evidence and ensure that all relevant material has been considered.<sup>29</sup> Furthermore, keeping in mind that it is the investigating officer who will be possession of the information, the onus falls on him or her to ensure that all parties are treated fairly, their privacy respected, and that all people involved in the proceedings are afforded procedural fairness.

7.46 The Manual identifies the critical importance of having confidence in decision-makers and their decisions. Thus, the importance of appointing an impartial, well-trained, competent and experienced investigating officer is heightened when considering the degree of discretion held by that person and the lack of transparency and accountability of the administrative inquiry process—particularly, the closed nature of its proceedings and the limited distribution of its report. Without doubt, one of the main challenges for an Inquiry Officer conducting closed proceedings is to satisfy all engaged in the process, particularly those adversely affected, that the inquiry has been fair and impartial.

### ***Right to know allegations or adverse comment***

7.47 To ensure that the process is just and proper, it is critical for potentially affected persons to be in a position to defend themselves against an allegation or complaint. Thus, any member against whom an allegation or complaint has been made is entitled to know the substance of it and have the right to respond.<sup>30</sup>

### ***Context and perceptions***

7.48 Before considering the senior sailors' endeavours to access what they believed was the evidence relevant to their adverse findings, the committee looks at the context within which they sought to gain access to this material. Their main grievance stemmed initially from the CO's failure to provide a statement of reasons for their landing. This original grievance only intensified as their attempts over many months to gain information proved futile.

7.49 In order to have faith in the system, the senior sailors needed to be convinced that the process would allow them to put their case; to be in a position to defend their interests and to have their arguments taken seriously and considered impartially. To do so effectively, they would need to have full knowledge of the allegations made against them and the evidence that supported the allegations. Without access to such information, they would not be in a fair position to rebut allegations or evidence damaging to their interests.

7.50 But from the very start, the senior sailors' confidence in the decision-making process was undermined. The commanding officer *Success* not only refused to provide

---

29 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, Annex E to Chapter 6, paragraph 2.

30 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 1.50.

the senior sailors with a credible explanation for landing them, he then refused outright to listen to them. By the time they appeared before CMDR Wark, the sailors' initial sense of grievance had intensified and their confidence in the system was severely eroded. Whether justified or not, it is understandable that their suspicions and deep distrust over the decision to land them transferred to the Inquiry Officer Inquiry.

7.51 Indeed, one of the senior sailors noted his sense of abandonment by Navy on his return to Sydney. The CO's direction preventing him from contacting any member of the ship's company other than the MEO increased that sense of 'alienation and loneliness'. By the time CMDR Wark was to interview him he felt as though the Inquiry Officer 'was trying to ambush me and at no time did I feel that I was being afforded procedural fairness during the inquiry process'.<sup>31</sup>

7.52 The senior sailors and their legal representative were strongly of the view that important evidence was withheld from them. From their perspective, they were not granted access to all relevant material associated with the inquiry and hence were unable to reveal what they believed to be inconsistencies and gaps in the evidence and the Inquiry Officer's failure to take account of exculpatory evidence. The sailors argued that they were not afforded the fundamental right to know the allegations being made and were denied access to material central to the accusations made against them.

7.53 One of the senior sailors told the Commission that there were transcripts that the Inquiry Officer relied on to make his findings that were withheld from the senior sailors.<sup>32</sup> Another of the senior sailors stated that the transcripts of the Wark inquiry that he received were 'so heavily redacted' that he was unable to fully understand the context of the statements. The senior sailors also noted that their repeated requests for a copy of the E&D report, which they held to be a 'foundation' document for the inquiry, was refused.<sup>33</sup>

7.54 Procedural fairness dictates that a person who is the subject of adverse comment has the right to know the substance of the allegation and the evidence supporting the allegations. The Defence Manual states clearly that the affected person is 'to be provided with the substance of the proposed finding(s) and the evidence relied on by the Inquiry Officer in order to make that finding'.<sup>34</sup>

7.55 There are, however, many other people involved in an inquiry process, who have a right to expect that their personal and professional reputations would be

---

31 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 1 July 2010, p. 49.

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

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

34 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 6.44.

respected during and following an inquiry.<sup>35</sup> Thus, administrative inquiries require high standards of sensitivity and discretion, particularly when personnel matters are involved. The Defence Manual recognises that information contained in inquiry reports is 'often private and sensitive'.<sup>36</sup> It states:

What disclosure is necessary must depend upon the circumstances of the particular case. It may not, and often would not in an ordinary case, involve disclosing the identity of witnesses or the disclosure of transcripts. Confidentiality may be essential, not only for the success of the inquiry, but also to preserve the integrity of the system itself.<sup>37</sup>

7.56 The Defence Manual also states that during the decision-making phase, persons who are the subject of an inquiry and witnesses are entitled to 'expect that any information relating to them will be treated discreetly and to have their privacy respected'.<sup>38</sup> It states, however, that 'Generally, the need for confidentiality does not exclude procedural fairness, but only reduces its content'.<sup>39</sup>

7.57 The Inquiry Officer therefore must strive to strike the right balance between procedural fairness and the need for confidentiality.

7.58 The committee is not in a position to analyse and assess whether the information provided to the senior sailors accorded with procedural fairness and was in accordance with the advice provided in the Defence Manual. Clearly, the senior sailors and their legal representative were not entitled to all the evidence before the Wark inquiry including the E&D report. Large sections of this material had no bearing on the allegations against the senior sailors. They were entitled to know the substance of the proposed findings against them and the evidence relied on in making those findings. They should also have been provided with the opportunity to respond to the findings. In this regard, the committee notes the findings of both Colonel Griffin and Mr Gyles. Mr Gyles found:

...the landed senior sailors did request access to all the evidence gathered during the Wark inquiry; their request was denied. Col Griffin rejected the sailors' complaint about that, and I respectfully agree. The complaint reflects the misconception about the nature of an Inquiry Officer's Inquiry that I have already noted. The conduct of the Inquiry was the prerogative of CMDR Wark—not witnesses, including potentially affected persons. A potentially affected person is entitled to be afforded procedural fairness by being apprised of the substance of the case that might be made against them. That can be done in various ways. CMDR Wark chose to extract relevant portions of the evidence given, which goes further than the

---

35 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 1.63.

36 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 5.93.

37 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 6.46.

38 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 6.44.

39 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 6.45.

minimum that would be required and was a fair way of proceeding. Denial of the request for access to all the evidence does not affect the reasonableness of the findings.<sup>40</sup>

7.59 The senior sailors have a very different perspective.

### *Committee view*

7.60 The committee understands that the senior sailors believe that important evidence relevant to their defence was not disclosed to them. It also accepts that the senior sailors' right to privacy had been violated and they justifiably felt aggrieved by their public humiliation. They, however, could not expect to have their blanket request for material satisfied. The evidence before the Wark inquiry and the E&D report dealt with sensitive and personal issues relating not only to the senior sailors but to many other individuals. Those responsible for this material had a duty of care to protect the privacy of all individuals. This right to privacy does not necessarily sit comfortably with the right of a person to know the allegations against them.

### *Impartiality*

7.61 A fundamental principle underpinning the right to a fair hearing is that everyone is entitled to have a competent, independent and impartial body established by due process to conduct the proceedings. No one has criticised the qualifications or experience of the Inquiry Officer. The senior sailors have, however, raised concerns about the impartiality of the inquiry.

7.62 The Manual directs investigating officers to 'avoid being improperly influenced by particular witnesses' and advises that, 'regardless of personal feelings, an Investigating Officer must keep an open mind at all times'.<sup>41</sup> The manual also provides specific advice on inquiries into unacceptable behaviour. It recognises that such matters require particular skills and approaches. It suggests that maturity and sensitivity are necessary but most notably that the inquiry should be seen to be and actually be free from bias.<sup>42</sup>

7.63 In their ROGs, the senior sailors raised concerns about CMDR Wark's partiality, his failure to investigate or take account of exculpatory evidence, and in some cases the soundness of his reasoning. Convinced that the inquiry was biased, one of the senior sailors submitted that much of the evidence gathered during the inquiry was 'tainted'. He stated:

---

40 Gyles Report, Part Two, paragraph 2.135.

41 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 6.49.

42 *Administrative Inquiries Manual*, ADFP 06.1.4, paragraph 1.37. This paragraph states, 'In particular complex matters concerning personnel issues, selection of personnel to conduct the inquiry should be on the basis of their ability to undertake the inquiry discreetly and sensitively'.



The conclusions drawn by the Inquiry Officer are so unreasonable that no right-minded decision maker could possibly have made the same findings.

The evidence gathered by CMDR Wark during the Inquiry Officer's Inquiry indicates a preconceived view with respect to the allegations made against the senior sailors. From the small amount of evidence that I have managed to obtain access to, it is clear that there is unambiguous predisposition to gathering unfavourable evidence against the senior sailors whilst, at the same time, ignoring or avoiding any exculpatory evidence.<sup>43</sup>

7.64 One of the senior sailors provided the Commission with examples taken from the transcript of interviews which, he believed, demonstrated the Inquiry Officer's bias against him.<sup>44</sup> In one instance, he used an extract from a transcript of interview to demonstrate that CMDR Wark had attacked his character when addressing a junior sailor during her interview. CMDR Wark was recorded as saying:

You are one of the most impressive people we have spoken to so far. You were absolutely right and it didn't even sound to me like you were that rude. You called him a Chief; you told him the truth. That man had no respect for you, he should have stepped up and pulled that Able Seaman aside.<sup>45</sup>

7.65 The sailor also noted that the Inquiry Officer did not interview personnel identified by the senior sailor as being relevant and further:

In fact the Inquiry Officer asked us to obtain a statement from those personnel and supply them to him. I pointed out to the Inquiry Officer that I was still under order from the CO *Success* not to contact any personnel except the MEO, which would make it impossible to do even though it was his responsibility to interview all witnesses.<sup>46</sup>

7.66 In support of the senior sailors, LCDR Bainbridge argued that regardless of the number of relevant witnesses he did or did not identify, the Inquiry Officer was under an obligation to seek out evidence and determine which witnesses to interview. According to LCDR Bainbridge, CMDR Wark did not do so to the required standard. Furthermore, in his view, CMDR Wark was not interested in uncovering anything that might support the claims of the senior sailor or discredit their main accusers: that he failed to investigate and consider exculpatory evidence. Finally, he suggested that much of the evidence collected was tainted and the conclusions drawn so

---

43 Confidential submission.

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

45 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 8 July 2010, p. 32. See also Gyles Report, Part Two, paragraph 2.84.

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

unreasonable that no right-minded decision maker could possibly have made the same findings.<sup>47</sup>

7.67 Colonel Griffin also cited a number of selected parts of the transcripts of interviews upon which he relied to reach a similar conclusion that 'the fair minded observer might perceive bias' in the inquiry's approach.<sup>48</sup> As noted in the previous chapter, Colonel Griffin formed the view that the inquiry was flawed because of bias and the unreasonableness of some of the findings. He drew a number of conclusions that caused him to find that:

...a fair-minded lay observer might reasonably apprehend that the IO did not bring an impartial mind to the resolution of the matters he was required to decide. There is a legal basis to uphold this ground of complaint.<sup>49</sup>

7.68 Paragraph 158 of Colonel Griffin's advice stated further:

I will not address any of the other findings, as the unreasonableness of these matters and the apprehension of bias are sufficient to uphold the ROG of [name redacted] on these grounds of complaint.<sup>50</sup>

7.69 In response to Colonel Griffin's findings, Mr Gyles stated that he could understand that some of the comments made by CMDR Wark and LCDR Vesper to people being interviewed during the investigation 'might cause a red light to flash for an administrative lawyer contemplating a quasi-judicial paradigm and suggest bias'. Even so, he had a different perspective:<sup>51</sup>

Some of the comments made to witnesses in the course of questioning might appear surprising and suggestive of bias to those accustomed to judicial proceedings or proceedings akin to them, such as the hearing of disciplinary charges. That perception of bias does not remain, however, when the true nature of an Inquiry Officer's Inquiry and the circumstances in which the inquiry in question took place are taken into account. Generally speaking, the inquiry proceeded along conventional lines and procedural fairness was afforded the potentially affected persons.<sup>52</sup>

7.70 Mr Gyles disagreed with the criticisms made of the conduct of the Wark inquiry and of its content. He rejected any claim of lack of impartiality or bias by prejudgement: that CMDR Wark's report was 'infected by bias on the ground of prejudgement'.<sup>53</sup> According to Mr Gyles, in order to find bias on the basis of the

---

47 Confidential submissions.

48 Gyles Report, Part Two, paragraph 2.105. See also paragraphs 2.88–2.116.

49 Gyles Report, Part Two, paragraph 2.143.

50 Gyles Report, Part Two, paragraph 2.144.

51 Gyles Report, Part Two, paragraph 2.83.

52 Gyles Report, Part Two, paragraph 2.134.

53 Gyles Report, Part Two, paragraphs 2.114–2.146.

material Col Griffin identified, one must conclude that CMDR Wark had a closed mind. Mr Gyles could not come to that conclusion in the present case.<sup>54</sup> In his view CMDR Wark's findings were 'very moderate and did not reveal evidence of any bias against the landed senior sailors.'<sup>55</sup> He stated:

In my opinion, the general conduct of the Wark inquiry, including the method of questioning witnesses and gathering evidence, was in accordance with the principles of justice and Part 6 of the Defence (inquiry) Regulations 1985 and Chpt 6 of the ADFP 06.1.4.<sup>56</sup>

7.71 In Mr Gyles' opinion there was no suggestion that CMDR Wark or LCDR Vesper had any interest in, personal association with or animus towards the landed senior sailors. He noted that CMDR Wark was a very experienced naval officer who interviewed crew members in a highly charged atmosphere'.<sup>57</sup> He explained further:

He was bound to bring to bear all his experience and knowledge when assessing the situation as it unfolded. He would undoubtedly have insights and perceptions that would not be those of a lawyer. Furthermore, an investigator such as CMDR Wark in this case is not limited to evidence in the conventional sense: he was entitled to inform himself as he thought appropriate. (Regulations 50 and 78 of the Defence (Inquiry) Regulations 1981), subject to procedural fairness being accorded where that was necessary.<sup>58</sup>

7.72 With regard to LCDR Vesper, Mr Gyles stated that he was an independent legal practitioner with experience in military inquiries. According to Mr Gyles, LCDR Vesper would have been 'well aware of the need to keep an open mind until the completion of the inquiry'. As with CMDR Wark he had 'nothing to gain or lose'. Mr Gyles formed the view that it was 'unlikely that these two people would lose objectivity so completely as to exhibit the bias Colonel Griffin perceived'.<sup>59</sup>

7.73 In his opinion, CMDR Wark and LCDR Vesper carried out 'a difficult assignment well in trying circumstances'. Although he noted that his conclusions differ from those of CMDR Wark in some respects, he attributed this difference to the evidence before the Commission which was 'more extensive than the information available to the Inquiry Officer'. Mr Gyles also accepted that there was room for legitimate differences of opinion about the effect of some evidence.<sup>60</sup>

---

54 Gyles Report, Part Two, paragraph 2.112.

55 Gyles Report, Part Two, paragraph 2.112.

56 Gyles Report, Part Two, paragraph 2.134.

57 Gyles Report, Part Two, paragraphs 2.79 and 2.82.

58 Gyles Report, Part Two, paragraph 2.82.

59 Gyles Report, Part Two, paragraph 2.114.

60 Gyles Report, Part Two, p. ix.

7.74 Mr Gyles also considered the legal advice provided by the Head of Defence Legal, concluding that:

It is clear enough that the Head of Defence Legal could not himself have concluded a de novo review of the review of the material: he simply did not have the material to do so and did not spend the time necessary for reviewing it. In the time available he could do little more than read the Griffin opinion in relation to [name redacted]—the other opinions had not at that time been provided—and form a view as to whether the opinion proceeded along the right lines. There could be no serious critical analysis of the conclusions without the underlying material and a full appreciation of the relevant circumstances. The opinion of the Head of Defence Legal therefore cannot rise above the Griffin advice and stands or falls with it.<sup>61</sup>

7.75 In his assessment, the position of the landed sailors appeared 'to have hijacked the later consideration of the Inquiry Officer's report'. He stated:

The report considered much more than the conduct of the sailors. It is difficult to avoid the conclusion that this was the result of the high degree of political interest in, and sympathy for, the sailors' position.<sup>62</sup>

7.76 Mr Gyles made recommendations to minimise the damage to the reputations of CMDR Wark and LCDR Vesper.<sup>63</sup> He also recommended that the Chief of Navy make a properly framed apology to the three landed senior sailors for the failure to accord them proper process, and an offer to make a payment of monetary compensation for each of them.

#### *Committee view*

7.77 ADF personnel should be confident that when adverse action is proposed against them, they would be provided with reasons for the action. They should also expect that they would receive a fair hearing. Any failure to do so may sour their perceptions of the administrative processes. The inquiries and investigations into the allegations levelled against the senior sailors is a sorry example of what can go wrong when not properly managed. The huge expenditure of resources and the damage inflicted on the reputation of Navy and some of its personnel may have been avoided or contained if close attention had been paid to proper process and to the advice and guidance provided in the relevant Defence Manuals.

7.78 Currently, opinion is divided on the validity of the Inquiry Officer Inquiry. The arguments and counter arguments about the merits and findings of this Inquiry in large measure reflect the nature and veracity of the evidence before it. The committee has only seen fragments of the Wark inquiry transcripts which, in some cases, and consistent with that before the Commission, was contradictory, unreliable, self-serving

---

61 Gyles Report, Part Two, paragraph 2.149.

62 Gyles Report, Part Two, p. ix.

63 Gyles Report, Part Two, p. ix.

---

petty and occasionally vexatious. Some of the evidence is drawn from the recollections of people who were heavily intoxicated at the time of an alleged incident. Mr Gyles found:

Even with the powers and resources available to this Commission of Inquiry, it was very difficult to obtain full and frank evidence from crew members.<sup>64</sup>

7.79 The committee cannot see any value in reassessing or reviewing the evidence before the various inquiries or prolonging this matter in any way. Clearly the senior sailors and their families have undergone a truly unwarranted and dreadful ordeal. Some members of *Success*' company have also been exposed to unnecessary and in some cases distressing public scrutiny and comment. For a number of individuals, the damage caused to their reputation, personal relationships and career prospects, far outweighs any likely adverse action that could be taken against them. In this regard, the committee believes that the time for healing and making amends is well overdue.

7.80 Thus, the committee agrees with Mr Gyles' recommendation that the senior sailors should be compensated for the hardships they have experienced. This compensation should also take account of Navy's failure of duty of care toward the senior sailors during the difficult months after they were removed from the ship especially as they were being pilloried in the media for something they did not do. The committee believes that it is particularly important for Navy to put every effort into helping the sailors to resume their careers and to rise above the experiences of the last two years.

7.81 The committee is also particularly cognisant of the importance of providing the ship's company with the support needed to restore *Success*' reputation. In this regard, the committee notes the view of the CO *Success*, CMDR Rayner, who was left to deal with the aftermath of this unfortunate process. He stated:

We've made changes and I think when I joined the ship I felt it didn't feel right. There was a lot of mistrust and because of the move of the senior sailors that had caused great rifts within the ship and it continues to this day with things going on, but that had caused a lot of heartache, a lot of mistrust within the ship and a lot of friction and we've moved on from that and we've resolved a lot of those cultural/personal issues.<sup>65</sup>

7.82 Although, the committee recommends that Navy should endeavour to do its utmost to assist the senior sailors and the company of *Success* to put the events of 2009 behind them, it must learn important lessons from this experience. The lessons go to the importance of due process and of complying both in word and spirit with the various Defence Manuals on managing unacceptable behaviour and subsequent inquiry processes.

---

64 Gyles Report, Part Two, paragraph 2.83.

65 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 39.

7.83 From its monitoring of reforms to Australia's military justice system, the committee is aware that the Inspector General of the ADF and the Fairness and Resolution Branch have critical roles in assisting others to manage reports of unacceptable behaviour in the ADF. Their apparent absence, particularly in an advisory capacity, from the administrative processes dealing with unacceptable behaviour in respect of HMAS *Success*, is noteworthy.

7.84 The committee is strongly of the view that Defence must take responsibility for what the committee believes was an organisational failure. It makes only one recommendation in this regard. In light of the multiple breakdowns in procedure and breaches of standard practice in the management of reports of unacceptable in HMAS *Success*, including the mishandling of media reports, the committee recommends that Defence look carefully at its internal control mechanisms including those for handling media requests and reports.

### **Recommendation 1**

**7.85 The committee recommends that:**

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

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

7.87 In the committee's view, it is of the utmost importance for Defence, and Navy in particular, to take responsibility for the series of failures that took place in respect of *Success* and to show a commitment to remedy identified systemic problems. The committee is not interested in the failings of individuals: they have already come under the glare of public scrutiny. The committee is asking Defence and Navy to examine the systems and structures which allowed not one but multiple failures.





# 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.<sup>1</sup> The same matters were raised that day during a Senate Estimates hearing.<sup>2</sup>

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.<sup>3</sup> Mr Weber, who was the Chief Executive partner of MinterEllison Lawyers, reported on 15 February 2010.<sup>4</sup>

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.<sup>5</sup>

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).<sup>6</sup>

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.<sup>7</sup>

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'.<sup>8</sup>

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'.<sup>9</sup> 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.<sup>10</sup>

8.11 In his view, no solicitor/client relationship existed.<sup>11</sup> 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.<sup>12</sup> In his words, 'it is almost quasi legal aid in that you provide guidance and direction as to what options they might have open'.<sup>13</sup>

8.12 LCDR Bainbridge disagreed with LCDR Swanson and sensed that LCDR Swanson felt that he was 'going too far'.<sup>14</sup> 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.<sup>15</sup>

8.13 According to LCDR Bainbridge, while the exchange was 'certainly a disagreement' it was not an argument.<sup>16</sup> 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.<sup>17</sup>

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'.<sup>18</sup>

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

---

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.<sup>20</sup>

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.<sup>21</sup>

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.<sup>22</sup>

### **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.<sup>23</sup>

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'.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

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.<sup>27</sup>

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.<sup>28</sup>

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.<sup>29</sup>

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.<sup>30</sup>

### 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.<sup>31</sup>

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.<sup>32</sup>

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.<sup>33</sup>

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'.<sup>34</sup> 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.<sup>35</sup>

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'.<sup>36</sup> The committee agrees with this statement.

---

32 Navy website, [http://www.navy.gov.au/The\\_Facts-On\\_HMAS\\_Success](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'.<sup>37</sup> 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.<sup>38</sup>

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'.<sup>39</sup>

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'.<sup>40</sup> 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.<sup>41</sup>

---

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.'<sup>42</sup>

### **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.<sup>43</sup> 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.



# Chapter 9

## Conclusion

9.1 In Part One of its report, the committee found that the management of unacceptable behaviour onboard HMAS *Success* demonstrated:

- an absence of leadership;
- serious errors of judgements starting with the lack of proper attention given to early warning signs of alcohol abuse in Darwin;
- a failure to exercise duty of care especially toward young female sailors who did not receive the protection or mentoring that was required; and
- scant regard for, or at best ignorance of, defence's legal procedures.

9.2 The committee was of the view that although personnel at all levels through the chain of command should take responsibility for unacceptable behaviour, those in the position of highest authority must accept that their inattention, poor judgement and lack of courage meant that the safety and wellbeing of those under their charge was put at risk. It found this situation intolerable.

9.3 To that stage, the committee had only considered events leading to the landing of the senior sailors in Singapore in May 2009 and their return to Sydney. It had identified a number of major concerns—the flawed E&D report that the CO had relied on to justify landing the senior sailors in Singapore; the failure to provide the sailors with reasons for their removal from *Success*, and the CO's reference to the sailors as 'a rotten core' to some groups of the ship's company shortly after the sailors were landed.

9.4 With the senior sailors return to Sydney, there were opportunities to rectify these initial failings. The committee has found, however, that rather than correct the mistakes they were compounded.

### **Disciplinary system—ADFIS**

9.5 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.

9.6 The arrival of an ADFIS investigator in Singapore heralded the first step toward putting in train proper procedures to ensure that the allegations raised in the E&D report would be examined thoroughly and objectively. But overwhelming evidence from the investigator on the ground through to the Director of Operations, LTCOL Vokes, show that the ADFIS investigations were well below standard. Before the Commission, LTCOL Vokes acknowledged that the investigations were inadequate: that, in his words, they were 'an aberration in terms of how ADFIS should be doing business'. He explained:

The headquarters of the ADFIS was by and large very unsatisfied with the methodology and approach that the lead investigator took with regards to all of that series of *Success* investigations. It ranged from everything from diligence and application to duty to application of knowledge and procedure.<sup>1</sup>

9.7 To add to the myriad inquiries taking place, the Deputy Provost Marshal 'saw fit to strike a routine inquiry investigating the ADFIS issues in relation to *Success*.<sup>2</sup> The committee has not seen this inquiry's report which apparently identified clear failures. Mr Gyles has, however, and noted that the report found the following significant deficiencies:

...serious allegations were not investigated or not properly investigated; in some instances investigation files were not opened or adequately maintained; important witnesses were not interviewed or signed statements were not taken; adequate searches were not conducted and evidence seized; important documents (such as Notifiable Incident reports) were not considered; and there was a general failure in communication between the ADFIS investigation team, the Chief Coxswain, the command of *Success* and Fleet Headquarters as to precisely what was to be investigated and by whom.<sup>3</sup>

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

9.9 The Provost Marshal, through the Minister for Defence, has been providing the Senate Foreign Affairs, Defence and Trade Legislation Committee with periodic updates on the progress of reforms to the Australian Defence Investigative service.<sup>4</sup> With this in mind, the committee makes the following recommendation.

## **Recommendation 2**

**9.10 The committee recommends that the Provost Marshal in his next update to the Senate Foreign Affairs, Defence and Trade Legislation Committee on**

---

1 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 10 August 2010, p. 14.

2 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 10 August 2010, p. 14.

3 Gyles Report, Part Two, paragraph 6.8.

4 The most recent was received in February 2011.

---

**progress in reforming ADFIS include the lessons learnt from the investigations into matters relating to HMAS *Success*. The committee is not interested in individual performances but the systemic shortcomings that allowed the mistakes to occur and importantly to go undetected for some time.**

### **Administrative system**

9.11 On their return to Australia, the senior sailors were entitled to feel aggrieved. Without warning and any satisfactory explanation, they had been ordered to pack their bags and then marched off the ship in a public and humiliating way into a waiting taxi. Their landing carried a stigma and had far reaching implications for their careers as well as their personal lives. Also, at the time of their removal from *Success*, the CO issued an order that the senior sailors were not to contact by any means any member of the ship's company with the exception of the Marine Engineer.<sup>5</sup>

9.12 For six weeks after their removal, they remained in the dark as to the reasons for their removal. Then without warning, headline news items reported that sailors from *Success* had been counselled and sent home after a ledger surfaced recording bets on how many of their fellow crew members they could sleep with.

9.13 It is difficult to imagine the effect that this publicity had on the landed sailors and those close to them. Their families and many in the Navy including the ship's company would have known of their identities.<sup>6</sup> Also, the sailors were yet to be informed about the reasons for their landing and must have been totally bewildered by the reports associating their removal from the ship with a sex ledger. They explained, 'Our families now believe that we are all involved in some sex scandal, even though that does not appear to form part of the [Wark] inquiry.'<sup>7</sup> They wrote of their concerns:

I believe that we were entitled to support from the Navy regarding our welfare after the media reports but we received nothing.<sup>8</sup>

9.14 There is no doubt that these media reports contained a number of errors, but most importantly the sailors were not removed because of their involvement with a sex ledger. Defence's response to the adverse media reports concentrated on

---

5 Letter dated 9 May 2009 and signed by S. T. Brown provided to the committee in confidence and Gyles Report, Part One, paragraph 4.270. The draft letter in the Gyles Report has a slightly different wording – the last paragraph begins: 'As soon as you are landed'. Routine Inquiry into the Formal Complaint by [names redacted] from HMAS *Success* (the Houston report), 23 October 2009, p. 6. Committee-in-confidence document.

6 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 3 August 2010, p. 36.

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

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

containing damage to Navy's reputation. This approach meant that efforts were directed toward promoting a favourable image of Navy and away from establishing the truth or otherwise of the media reports. As a result, the reputation and personal wellbeing of the senior sailors was placed in jeopardy.

9.15 To make matters worse within days of the first report of the sex scandal, a journalist rang the three sailors on their mobile phones.

9.16 In the committee's view, those in Defence managing the publicity at that time should have made it their business, at the very least, to acquaint themselves with the facts as best they could. The responsibility for rectifying the errors also resided with those who knew that the reports were wrong. Apparently no one bothered. The reports went uncorrected.

9.17 This detachment from, and lack of concern for, the sailors wellbeing in the glare of adverse publicity was a continuation of the attitude shown toward them during their removal from *Success* and return to Sydney. The management of the sex scandal reports simply fuelled their sense of grievance.

9.18 By mid August 2009, the senior sailors' right to procedural fairness had been suspended for over three months. Despite their persistent efforts to obtain information, 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. 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.

9.19 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 Inquiry Officer Inquiry. The Fleet Legal Officer advising the CO *Success* relied heavily on this incomplete inquiry, which was established in May, to justify continuing the order disallowing the sailors to contact the ship's crew.

9.20 The Inquiry Officer's report, finally completed on 20 August, was intended to bring an end to the speculation about the events onboard *Success* during the first half of May 2009. 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 on the ROGs called into question the integrity of the inquiry which eventuated in the CDF and Chief of Navy declaring the Inquiry Officer Inquiry void.

9.21 A key consideration for the committee was how a situation could arise whereby the Inquiry Officer Inquiry, intended to establish the facts and circumstances of allegations raised in the flawed E&D report, was itself found to be flawed.



---

## What went wrong

9.22 Based on years of experience, Defence have promulgated regulations, issued instructions and published manuals and handbooks to assist decision-makers, commanding officers and those responsible for inquiries. They provide advice and guidance on statements of reasons, on managing complainants and respondents, on procedural fairness, avoiding perceptions of bias and protecting privacy.

9.23 In this report the committee has quoted from Defence instructions and manuals. But during the administrative processes relating to events on *Success*, they seem to have been ignored. The sailors were not provided with a statement of reasons for their landing until September; the terms of reference for the Inquiry Officer Inquiry were broad and 'invited a fishing expedition'; not all the terms of reference were addressed adequately; and its final report was delayed. Also, an assistant to the Inquiry Officer Inquiry should not have been appointed due to the potential for bias; the CO *Success* had publicly maligned the senior sailors conveying a message to potential witnesses of assumed guilt; and the senior sailors' right to privacy had been abused. Moreover, the senior sailors were publicly vilified for something they had not done but there was no attempt to correct the errors. The list goes on.

9.24 In chapter 7, the committee noted that ADF personnel should be confident that when adverse action is proposed against them, they would be provided with reasons for the action. They should also expect that they would receive a fair hearing. Any failure to do so may sour their perceptions of the administrative processes. The inquiries and investigations into the allegations levelled against the senior sailors is a sorry example of what can go wrong when not properly managed. The huge expenditure of resources and the damage inflicted on the reputation of Navy and some of its personnel may have been avoided or contained if close attention had been paid to proper process and to the advice and guidance provided in the relevant Defence Manuals.

9.25 The committee also found that currently opinion is divided on the validity of the Inquiry Officer Inquiry. The arguments and counter arguments about the merits and findings of this inquiry in large measure reflect the nature and veracity of the evidence before it. The committee has seen only fragments of the Wark Inquiry transcripts which, in some cases, and consistent with that before the Commission, was contradictory, unreliable, self-serving, petty and occasionally vexatious. Some of the evidence is drawn from the recollections of people who were heavily intoxicated at the time of an alleged incident. Mr Gyles found:

Even with the powers and resources available to this Commission of Inquiry, it was very difficult to obtain full and frank evidence from crew members.<sup>9</sup>

---

9 Gyles Report, Part Two, paragraph 2.83.

9.26 The committee cannot see any value in reassessing or reviewing the evidence before the various inquiries or prolonging this matter in any way. Clearly the senior sailors and their families have undergone a truly unwarranted and dreadful ordeal. Some members of *Success*' company have also been exposed to unnecessary and in some cases distressing public scrutiny and comment. For a number of individuals, the damage caused to their reputation, personal relationships and career prospects, far outweighs any likely adverse action that could be taken against them. In this regard, the committee believes that the time for healing and making amends is well overdue.

9.27 Thus, the committee agrees with Mr Gyles' recommendation that the senior sailors should be compensated for the hardships they have experienced. This compensation should also take account of Navy's failure of duty of care toward the senior sailors during the difficult months after they were removed from the ship especially as they were being pilloried in the media for something they did not do. The committee believes that it is particularly important for Navy to put every effort into helping the sailors to resume their careers and to rise above the experiences of the last two years.

9.28 The committee is also particularly cognisant of the importance of providing the ship's company with the support needed to restore *Success*' reputation. In this regard, the committee notes the view of the CO *Success*, CMDR Rayner, who was left to deal with the aftermath of this unfortunate process. He stated:

We've made changes and I think when I joined the ship I felt it didn't feel right. There was a lot of mistrust and because of the move of the senior sailors that had caused great rifts within the ship and it continues to this day with things going on, but that had caused a lot of heartache, a lot of mistrust within the ship and a lot of friction and we've moved on from that and we've resolved a lot of those cultural/personal issues.<sup>10</sup>

9.29 Although, the committee recommends that Navy should endeavour to do its utmost to assist the senior sailors and the company of *Success* to put the events of 2009 behind them, it must learn important lessons from this experience. The lessons go to the importance of due process and of complying both in word and spirit with the various Defence Manuals on managing unacceptable behaviour and subsequent inquiry processes.

9.30 From its monitoring of reforms to Australia's military justice system, the committee is aware that the Inspector General of the ADF and the Fairness and Resolution Branch have critical roles in managing reports of unacceptable behaviour in the ADF. Their apparent absence, particularly in an advisory capacity, from the administrative processes dealing with unacceptable behaviour in respect of HMAS *Success*, is noteworthy.

---

10 Commission of Inquiry into alleged incidents onboard HMAS *Success*, transcript, 5 August 2010, p. 39.

9.31 In this regard, the committee recommended that the IGADF, the Fairness and Resolution Branch and Defence Legal look closely at the processes that were followed after reports of unacceptable behaviour were made to the CO *Success* (see Recommendation 1, paragraph 7.85).

9.32 The committee is strongly of the view that Defence must take responsibility for what the committee believes was an organisational failure. There were multiple breakdowns in procedure and breaches of standard practice in the management of reports of unacceptable behaviour, including the mishandling of media reports. Defence must look closely at its internal control and monitoring mechanisms to ensure compliance with its instructions and Manuals.

SENATOR ALAN EGGLESTON  
CHAIR



# Appendix 1

## Terms of reference

That the following matters be referred to the Foreign Affairs, Defence and Trade References Committee for inquiry and report by 18 March 2010:

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

- (h) the way in which the inquiry into the events on Success was conducted, whether the method of questioning witnesses and gathering evidence was conducted according to the principles of justice, whether the inquiry process was free from any perception of bias, and whether any witnesses were threatened with disciplinary or other action during the course of giving evidence;
  - (i) whether the senior sailors requested access to evidence gathered during the inquiry into the events on Success, whether any such request was denied, and whether any subsequent finding is reasonable in the circumstances;
  - (j) the facts and circumstances of the treatment of the Legal Officer (the lawyer) assigned to the management and defence of the case of the senior sailors including any threats, bullying, adverse conduct and prejudice generally, including any threat of posting to Western Australia, and whether any such conduct constituted an attempt to compromise the lawyer's capacity to represent the best interests of the senior sailors without fear or favour;
  - (k) the knowledge and awareness of the ship's Commanding Officer, the Australian Defence Force Investigative Service investigators and the broader naval chain of command of the facts and circumstances relating to the Channel 7 News reports on 4 July and 7 July 2009 (the media reports) and the dates and times of such personnel being availed of such knowledge and awareness;
  - (l) the knowledge and awareness of the media reports by the responsible Minister and the dates and times of the Minister being availed of such knowledge and awareness;
  - (m) all and any other matters relating to the justice and equity of the management of the senior sailors in their removal from the ship and the subsequent administrative process or processes, including their complaints as to the flawed process as set out herein; and
- (2) That the committee not conduct any hearings until after 1 February 2010.

## Appendix 2

### Selected findings taken from the Wark Inquiry

Paragraph 6.49 of the report listed the findings against the senior sailors. They are given in more detail below.<sup>1</sup>

#### *First sailor*

Finding 9—On a day in 2009 prior to *Success* sailing from Sydney on about 21 Mar 09, [name redacted] had a conversation with [name redacted] whilst they were in a taxi in which he said words to the effect of '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'...

Finding 23—On or about 20 April 2009, whilst ashore and at a public house in Qingdao, China, it was reported to [name redacted] that someone had called [name redacted and expression used] and [name redacted] erred by:

- (a) limiting his consequential action to speaking to [name redacted] and not inquiring as to whether she wished to pursue a complaint in respect of this matter; and
- (b) not suggesting to [name redacted] that she ought to consider making an Equity & Diversity complaint in respect of the matter.

Finding 28—On 6 May 2009 at about 1615 [name redacted] had a discussion with [name redacted] during which [name redacted] said to him that if he took a complaint to the Ship's Warrant Officer (SWO) about the apparent misconduct of [name redacted] 'I'll have to post you off' ...

Finding 29—On 6 May 2009 at about 1615 [name redacted] had a discussion with [name redacted] during which [name redacted] referred to [name redacted] threatening to have him posted from the ship to which [name redacted] responded with words to the effect of, 'If you ever f...ing say that again outside this room I'll put you through the bulkhead' ...

#### *Second sailor*

Finding 3—On or about 14 April 2009 whilst in Manila, the Philippines [name redacted] spent a night alone in a hotel room with an Able Seaman [name redacted] ...

Finding 12—During the evening of 25 April 2009 in a public house in Qingdao, China, [name redacted]

---

1 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.

- (a) witnessed [names redacted] engaging in sexual intercourse on a lounge;
- (b) held a traffic cone to his mouth as if it were a megaphone and, in the presence of at least one other *Success* sailor, [name redacted] yelled towards [names redacted] in a joking tone, 'get out of it, get out of it'
- (c) failed to order [names redacted] to cease having sexual intercourse, rather he encouraged others in the bar to observe the activity;
- (d) failed to direct [names redacted] that their behaviour was inappropriate, indecent and likely to diminish the reputation of the RAN; and
- (e) [name redacted] failed in his duty to correct and direct junior sailors who behaved inappropriately ashore.

Findings 16—On or about 28 March 2009, as *Success* was sailing from Darwin, [name redacted] was present at the base of the stairs leading to the Cargo Control Room (CCR) whilst Random Breath Testing was occurring in the CCR and said to crew members present words to the effect of, 'Look, if you're going to blow over, or you think that there's a risk, don't come up here'...

Finding 32—On or about 2 May 2009 in Hong Kong, in the company of other *Success* sailors, [names redacted] went to a public house where further *Success* sailors were present and while wearing a child's size school girls' costume which, due to its small size and body-hugging nature, effectively only covered the torso and thereby did not conform with the Executive Officer's directive 30/09 which provided at paragraph 19 that 'changing into unacceptable clothing once stepping ashore is not to occur' and that 'all Officers and Senior Sailors are to take appropriate action if they observe any member of *Success* inappropriately dressed'.

### ***Third sailor***

Finding 2— On or about 14 April 2009 in a hotel room in Manila, the Philippines [name redacted] slept on the same bed as a female junior sailor [name redacted] albeit while another female sailor was sleeping in another bed in the same room ...

Finding 13— During the evening of 25 April 2009 in a public house in Qingdao, China, [name redacted]

- (a) witnessed [names redacted] engaging in sexual intercourse on a lounge;
- (b) was present when [name redacted] held a traffic cone to his mouth as if it were a megaphone and, in the presence of at least one other *Success* sailor, [name redacted] yelled towards [names redacted] and [name redacted] in a joking tone, 'get out of it, get out of it';
- (c) failed to order [names redacted] to cease having sexual intercourse;
- (d) failed to direct [names redacted] that their behaviour was inappropriate, indecent and likely to diminish the reputation of the RAN;
- (e) failed to direct [name redacted] that he should not act in the way referred to in (b) above; and



- (f) failed in his duty to correct and direct the behaviour of [names redacted] by counselling them that their behaviour was inappropriate.

Finding 21—On two occasions during April 2009, after *Success* sailed from Manila, the Philippines, [name redacted] neighed like a horse towards [name redacted] as he passed her in a passageway...

Finding 27—On or about 2 May 2009 in a public house known as 'Amazonias' in Hong Kong, the following events occurred:

- (a) [name redacted] was in [redacted] 'party' that night in the sense that he and [names redacted] decided amongst themselves to wear fancy dress, [names redacted] travelled together to Amazonias and they are friends;
- (b) Late in the evening, [name redacted] walked over to [name redacted] and said words to the effect of, [redacted] is on the dance floor and has taken off his Snow White outfit so he's just in a pair of boxer shorts';
- (c) [name redacted] did not respond to [name redacted] other than by looking at him and shaking his head;
- (d) [name redacted] indicated to [name redacted] that they should go to a quiet part of the bar area in order to talk and [named redacted] walked to that area;
- (e) [name redacted] eventually walked over to where [name redacted] was;
- (f) [name redacted] said words to the effect of, 'Look, when you guys got here it was funny; if it was just the juniors it probably would still be funny but we're all in enough shit as it is, grab [name redacted] and take him home';
- (g) [name redacted] said, 'F...off, don't talk to me about this shit or I'll f...g kill you';
- (h) [name redacted] then turned around and walked off;
- (i) [name redacted] ought to have looked to see whether or not [name redacted] concerns about [name redacted] were well founded;
- (j) [name redacted] should have appreciated that [name redacted] was raising his concerns with him because he felt that [name redacted] was best placed, by reason of his friendship with [name redacted] to direct [name redacted] to at least put back on his fancy dress costume;
- (k) [name redacted] should have directed [name redacted] to put back on his fancy dress costume;
- (l) [name redacted] failed to correct and direct [name redacted] in respect of his inappropriate behaviour, (wearing only boxer shorts in a public house in a foreign country);
- (m) [name redacted] acted inappropriately by telling [name redacted] to 'F... Off' particularly given that he was doing no more than attempting to

regulate what he perceived as inappropriate behaviour of a junior sailor;  
and

- (n) [name redacted] acted inappropriately by saying to [name redacted] 'don't talk to me about this shit or I'll f...ing kill you.'

Finding 31— On or about 30 April 2009 in Hong Kong, in the company of other *Success* sailors [names redacted] went to a public house where further *Success* sailors were present and while wearing a hotel dressing gown and slippers, being dress which did not conform with the Executive Officer's directive 30/09 which provided at paragraph 19 that 'changing into unacceptable clothing once stepping ashore is not to occur' and that 'all Officers and Senior Sailors are to take appropriate action if they observe any member of *Success* inappropriately dressed'.

Finding 32— On or about 2 May 2009 in Hong Kong, in the company of other *Success* sailors, [names redacted] went to a public house where further *Success* sailors were present and while wearing a child's size school girls' costume which, due to its small size and body-hugging nature, effectively only covered the torso and thereby did not conform with the Executive Officer's directive 30/09 which provided at paragraph 19 that 'changing into unacceptable clothing once stepping ashore is not to occur' and that 'all Officers and Senior Sailors are to take appropriate action if they observe any member of *Success* inappropriately dressed'.