

Appendix 1

Chief of the Defence Force Commission of Inquiry Instrument of appointment



DEFENCE (INQUIRY) REGULATIONS

CHIEF OF THE DEFENCE FORCE COMMISSION OF INQUIRY

INSTRUMENT OF APPOINTMENT

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

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

Pursuant to Regulation 115 of the Regulations:

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

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

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

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

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

9 March 2010

INQUIRY CONTEXT

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

Recommendations

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

Interim reporting

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

Identification of other issues

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

Documentation

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

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

Representation of potentially affected persons

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

No findings of criminal/disciplinary offences

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

Conduct

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

Appendix:

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