

# 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their joint complaint, their efforts to have the order preventing them from contacting members of the ship's crew rescinded, and finally their ROGs; and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

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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

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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

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8 Gyles Report, Part Two, p. 82.

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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.

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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

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13 Gyles Report, Part Two, paragraph 2.18.

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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

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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

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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.



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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

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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

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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

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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

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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

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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:

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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

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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

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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>

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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

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61 Gyles Report, Part Two, paragraph 2.149.

62 Gyles Report, Part Two, p. ix.

63 Gyles Report, Part Two, p. ix.

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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.

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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.

