Executive summary and recommendations

There was a good deal of poor behaviour during HMAS *Success*'s Asian deployment from March to May 2009, and there was little restraint from the chain of command, from petty officers up. This failure by individuals in the command structure contributed to the problems that arose. It might, however, reflect a more general breakdown in respect for rank and command, accompanied by reluctance on the part of those in command to exercise that command.

Have the many reforms connected with military decision making in the last 10 to 15 years over-reached their mark? Has the pendulum swung too far towards individual rights? Even if the pendulum has not swung too far, do those in command think it has, and are they consequently 'gun-shy' when it comes to taking action to maintain discipline? Has the 'civilianisation' of the military gone too far and happened too fast?

A series of topics is examined in this part of the report. In each case the traditional role of command has been impinged upon in various respects in recent times; none of it has been revolutionary, but the combined effect is significant. To some extent the changes reflect trends in civilian society that cannot be ignored by the military. Nonetheless, line commanders' loss of morale would not be surprising. If implemented, the recommendations made in this part of the report might help restore morale without turning back the clock.

What is command?

Paragraphs 2.3 to 2.9 of this part of the report analyse the nature of command of the Defence Force and the arms of the Defence Force and the fundamental distinction between command and administration. It is suggested that this distinction might have become obscured in recent years.

Military discipline

Paragraphs 2.10 to 2.28 discuss the military discipline system, the cornerstone of which is the *Defence Force Discipline Act 1982* and legislative instruments cognate with it, as outlined in ADFP 06.1.1, *Discipline Law Manual.* The system is modelled on civilian criminal justice, even though, to a major extent, it deals with disciplinary offences rather than criminal offences.

Note: This executive summary does not expand, contract, vary or modify any part of the report and does not purport to be comprehensive. It should be read only in conjunction with the report. Terms are used in the same sense as in the report.

The consequences of this for investigation of offences are considered in paragraphs 2.12 to 2.18. The constraints on investigation, as set out in Part VI of the Defence Force Discipline Act, are considerable, making investigation of even a minor matter a difficult task. Particular attention is drawn to the effect of s. 101B of the Act, which provides (in part) that a person who is asked a question by an investigating officer is not required to answer the question, regardless of whether the person is believed to have committed the offence or otherwise. In paragraph 2.16 of this part of the report it is **recommended** that the substance and the form of s. 101B of the Defence Force Discipline Act be reconsidered).

Attention is also drawn to paragraph 24 of Annex A to Chapter 4 of Volume 3 of ADFP 06.1.1, which provides that procedural fairness must be afforded throughout an investigation to individuals affected by the investigation. It is suggested that this guidance is not the law and is not good policy. Many investigations will be thwarted if there is such an obligation. In paragraph 2.18 of this part of the report it is **recommended** that paragraph 24 be omitted from Annex A to Chapter 4 of Volume 3 of ADFP 06.1.1.

The effect of the constraints in the Defence Force Discipline Act on the prosecution of discipline offences is dealt with in paragraphs 2.19 to 2.28. The original form of the Act provided that the prosecution of offences was to be governed by the law relating to civilian criminal prosecutions—even in the case of prosecution of minor matters before summary authorities. This resulted in a tendency to avoid prosecution under the Act and to either the imposition of unauthorised punishments (sometimes known as 'extras') or the taking of no disciplinary action at all.

Introduction of the discipline officer's jurisdiction in Part IXA of the Defence Force Discipline Act in 1995, and the freeing of summary authorities from the need to comply with the rules of evidence with the introduction of s. 146A in 2008, are steps in the right direction, although the discipline officer jurisdiction can be exercised only when the member charged admits the offence. In paragraph 2.28 it is **recommended** that the discipline officer jurisdiction be extended to suitable cases where the member elects for that option but does not admit to the charge.

Redress of grievance

Paragraphs 2.29 to 2.44 deal with redress of grievance

The obligation of a member of the Defence Force to obey lawful orders given by a superior officer and to comply with a lawful general order is crucial to the operation of command of a disciplined service. A correlative of that obligation is that, if a member of the Defence Force considers that a decision, act or omission in relation to the member's service is adverse or detrimental to him or her and the adverse or detrimental effect of that decision, act or omission is

capable of being redressed by (among others) a member of the Defence Force, the member may make a complaint under Part IV of the Defence Force Regulations 1952 for redress of grievance.

The conduct and findings of an Inquiry Officer's Inquiry arising out of events occurring on *Success*'s March–May 2009 deployment were the subject of complaints for redress of grievance by witnesses who gave evidence to this Inquiry. This is anomalous. In paragraph 2.36 it is **recommended** that there be a further exception in r. 75(2) of the Defence Force Regulations 1952 for 'the conduct or report of any inquiry under the Defence (Inquiry) Regulations 1985'.

A joint formal complaint made by some members of the crew of *Success* was in substance a complaint for redress of grievance but was not dealt with as such. This produced inappropriate results. In paragraph 2.38 it is **recommended** that DI(G)PERS 34-1 be revised so as to ensure that complaints that are in substance complaints within Part IV of the Defence Force Regulations 1952 are processed as such.

The redress of grievance procedure was developed at a time when the present many and varied external and internal avenues for complaint by members of the Defence Force did not exist. A complainant is not called on to choose between the ROG procedure and the alternatives, and it is difficult to see why an aggrieved member should be able to pursue all other remedies and, if unsuccessful, return to the ROG procedure. This is resource intensive and presents an opportunity for 'gaming' the system and for vexation of the target of the complaint. In paragraph 2.43 it is **recommended** that the interplay between the redress of grievance system and alternative avenues for redress be examined and rationalised and that attention be given to dealing with vexation by redress of grievance.

Certain recommendations on this topic made by the Inspector General Australian Defence Force in his 2011 review are agreed with.

Command decisions and administrative law

Paragraphs 2.45 to 2.60 deal with command decisions and administrative law. This includes discussion of the effect of Australian Defence Force publication 06.1.3, *Guide to Administrative Decision Making*, on command decisions. Although there is some room for debate about its effect, the guide would generally be understood to suggest that the dictates of administrative law—including natural justice and procedural fairness—apply to command decisions unless they are expressly excluded by a series of gateways of uncertain width. This is not required by law and is inappropriate and unnecessary, particularly when taken together with the various avenues for redress of grievance that are available to a member of the Defence Force and with the express requirements of many Defence instruments.

In paragraph 2.60 it is **recommended** that ordinary command decisions be excluded from the operation of ADFP 06.1.3 and that the guide be clarified so that the requirements of administrative law apply only to the imposition of identified administrative sanctions.

Equity and diversity and unacceptable behaviour

A feature of the evidence about allegations of unacceptable behaviour on the *Success* deployment of March–May 2009 is that some incidents were characterised as equity and diversity matters or reported as equity and diversity complaints and were subsequently treated as such. There seemed to be a degree of misunderstanding about what is an equity and diversity matter and what is not and about how such matters are reported and managed. The misunderstanding was not limited to those on *Success*: it reached into Naval Headquarters.

Paragraphs 2.61 to 2.175 discuss equity and diversity policy, the Defence Equity Adviser Network, the Defence policy on unacceptable behaviour, the policy on reporting and managing unacceptable behaviour, the history of Defence policy on equity and diversity, the history of Defence policy on unacceptable behaviour, and other policy matters associated with equity and diversity.

The policy on unacceptable behaviour has changed from a policy aimed at dealing with unacceptable sexual behaviour to the present stance, which covers behaviour that is belittling, abusive or threatening to another person, that might have adverse consequences for morale, discipline or workplace cohesion, or that is otherwise not in the interests of Defence. The policy is now so wide that it effectively covers most sub-standard conduct between members of the Defence Force. At much the same time, equity and diversity have expanded from an equal opportunity base to general anti-discrimination, to anti-harassment and bullying, and finally to imprecise notions of fairness in general between members of the Defence Force.

On the *Success* deployment of March–May 2009 some behaviour that should have been the subject of disciplinary or administrative action was not dealt with accordingly because it was classified as relating to equity and diversity. This—together with the emphasis on alternative dispute resolution and resolution at the lowest level—meant that unacceptable behaviour was swept under the carpet. Failure to act in the absence of a formal complaint had the same result.

The use of equity advisers as part of the mechanisms for managing complaints of unacceptable behaviour—rather than as confidential advisers—has the tendency to create a structure that is alternative to and outside the ordinary command structure in relation to unacceptable behaviour. Commanders and personnel in positions of responsibility with respect to unacceptable behaviour

and disciplinary matters were all too ready to classify conduct as an equity and diversity matter and avoid the appropriate disciplinary response.

Some aspects of confidentiality of communications with equity and diversity advisers are discussed. In paragraph 2.167 it is **recommended** that the confidentiality of communications with equity and diversity advisers be reviewed and the obligations of confidence imposed on an equity adviser who is also in a position of command or has a supervisory role be clarified.

The centre of gravity needs to return to the chain of command when it comes to reporting and managing unacceptable behaviour. That ought to be made clear in training and in practice.

There has been much emphasis on encouraging Defence Force members experiencing unacceptable conduct at the hands of their superiors to come forward with complaints and on supporting those members. The evidence to this Commission confirmed the reluctance of some members to make complaints for fear of reprisals.

The other side of the coin is that the system for dealing with complaints of unacceptable conduct offers another powerful institutional avenue for complaint by a disaffected member against the actions, decisions and orders of those in command. There is little protection against malicious, vexatious or misguided complaints against those in command, particularly as a 'tit for tat' response by those subject to disciplinary action. This avenue of complaint is distinct from, but can be exercised in tandem with, the redress of grievance procedure. There has been no rationalisation to prevent duplication and the capacity for vexation.

In paragraph 2.175 it is **recommended** that:

- equity and diversity principles and training return to their roots and concentrate on countering disadvantage and discrimination
- management of complaints of unacceptable behaviour be clearly distinguished from equity and diversity principles in training and in practice
- steps be taken to ensure that equity advisers and senior equity advisers do not become involved in making, receiving or managing complaints
- that the making and management of complaints of unacceptable behaviour not overlap with other complaint mechanisms—particularly the redress of grievance system
- steps be taken to identify and deal with vexatious complaints.

Quick Assessments and Routine Inquiries

Quick Assessments and Routine Inquiries are related aspects of the exercise of command; they are discussed in paragraphs 2.176 to 2.192.

The purpose of a Quick Assessment is to quickly assess the known facts and identify what is not known about an occurrence, so that a decision can be made about the most appropriate course of action to be taken in response to the occurrence. A Quick Assessment is not an investigation. The procedure was recently reviewed by a Working Group convened by the Chief of the Defence Force; the group identified some problems and made some recommendations. By and large those recommendations are agreed with, although reservations are indicated about one of them. In addition, no reason can be seen as to why a third party other than the decision maker should do a Quick Assessment if the decision maker has enough knowledge of the facts and circumstances to make a sound decision about what should be done. If a Quick Assessment is necessary there is no reason why the decision maker should not do it in those circumstances. In paragraph 2.182 it is **recommended** that these views be taken into account in redrafting the relevant instruction.

Routine Inquiries are inquiries conducted within units pursuant to command in order to determine facts and circumstances surrounding an incident or situation. It is intended that these inquiries be conducted with as little formality as possible, free of the constraints and legal requirements applying to inquiries under the Defence (Inquiry) Regulations. The guidance as to the conduct of such an inquiry contained in Chapter 4 of ADFP 06.1.4 is, however, appropriate for an inquiry where the rules of natural justice and the other constraints of administrative law apply, rather than for an informal inquiry such as that envisaged in the preamble of ADFP 06.1.4. Those constraints should not apply to a Routine Inquiry. In paragraph 2.192 it is **recommended** that the conduct of Routine Inquiries be reconsidered and that the guidance in ADFP 06.1.4 be adapted accordingly.

Inquiries pursuant to the Defence (Inquiry) Regulations

Inquiries pursuant to the Defence (Inquiry) Regulations 1985 are discussed in paragraphs 3.1 to 3.37. Several such inquiries were examined during the hearings. No systematic or endemic failure or problem associated with the conduct of those inquires was detected. The Working Group the Chief of the Defence Force convened in 2010 noted perceived problems with Inquiry Officer Inquiries. The experience of this Commission did not expose the types of problems outlined, so no firm recommendations are made in relation to the options canvassed in the Working Group's report, although some observations are noted.

The experience of conducting this Commission of Inquiry led to the following recommendations for reform in relation to Chief of Defence Force commissions of inquiry.

In paragraphs 3.26, 3.30 and 3.31 respectively it is **recommended** that:

- r. 121 of the Defence (Inquiry) Regulations be amended so as to achieve the following:
  - make it clear that the relevant potential adverse effect on a person must be the result of the findings or recommendations of the commission on the career or military reputation of the member, not the conduct of the inquiry
  - provide that appearances and representation should be at the discretion of the inquiry president, along the lines of the situation pursuant to r. 15 of the Defence (Inquiry) Regulations in the case of a general court of inquiry. Consideration could be given to the same course in relation to courts of inquiry
  - provide that the right of appearance may be general or limited, at the discretion of the president
- the president of a Chief of Defence Force commission of inquiry be given express power to control who may be present when evidence is given
- r. 117 of the Defence (Inquiry) Regulations (and cognate Regulations in relation to other inquiries) be redrafted to expressly grant discretion to preserve the confidentiality of evidence and of witnesses for proper cause.