

## 7 Conclusion

- 7.1 The essential purpose of this Commission of Inquiry has been to determine the facts and circumstances that fall within the scope of the terms of reference and then make recommendations based on the findings. The main focus of both this second part of the report, and of Part One, has been to outline and explain the facts and circumstances. That narrative is available to help the Chief and senior leadership of the Defence Force understand the issues to be confronted. They can bring their own expertise and experience to bear on consideration of them. In order to comply with the Inquiry context, however, it is necessary to go further than simply recording a narrative of facts and circumstances. Opinions about the lawfulness or appropriateness of action or inaction have been expressed from time to time and some recommendations have been made. What more can be learnt and what further recommendations should be made?
- 7.2 One topic for this part of the report has been the subsequent management of the allegations that are the subject of Part One of the report—principally in Chapter 2 here, dealing with the Wark inquiry, and Chapter 6, dealing with the Australian Defence Force Investigative Service. Much of the primary decision making in relation to those allegations is detailed in Part One. The other topic of this part of the report is the subsequent management of the personnel allegedly involved. This focuses on the landed sailors, particularly the senior landed sailors, and is discussed directly in Chapter 3, dealing with management, and Chapter 4, dealing with media repercussions. The treatment of the Legal Officer Advocacy and Counselling, as discussed in Chapter 5, is a spin-off from those chapters.
- 7.3 Those matters that affect the landed sailors in the broad sense are dealt with in this chapter, which looks at aspects of the processes by which both the allegations and the personnel were managed. [REDACTED] is left out of consideration in what follows. For relevant purposes he is in a different position: there are not the same doubts about his landing as there are about the landing of the three senior sailors, and he was not part of the ‘campaign’ waged by LCDR Dean Bainbridge.
- 7.4 The backdrop to what follows is that [REDACTED] occupied an important position in relation to the culture of the Marine Technical sailors and as such was guilty of sins of commission and omission. One of his sins of commission was he lent an umbrella of protection to [REDACTED] came

under the umbrella of protection with his friend [REDACTED]. They each abused that protection.

- 7.5 Nonetheless, the decision to land the senior sailors at the time, in the manner and in the circumstances outlined in Part One of this report (see paragraphs 4.259 to 4.304) was, at best, dubious. On the other hand, there might have been a proper basis to land the senior sailors once an inquiry had been constituted or at least a firm decision had been taken to constitute an inquiry—namely, that their presence on board HMAS *Success* would impede the efficacy of the inquiry. It is arguable that this could not have been done without giving the senior sailors a chance of meeting the case against them, although that argument was unlikely to prevail because a wide view of paragraphs 2.39 and 2.40 of ADFP 06.1.3 (the *Guide to Administrative Decision Making*) would be taken. Even if the sailors were given the chance to argue against the landings, it is difficult to see what could have been advanced that would have changed the decision. The reason for landing should, however, have been given at the time of landing, or very soon thereafter, in order to comply with paragraph 2.41 of ADFP 06.1.3. Furthermore, it would have been difficult to justify continuing the exclusion of the sailors from *Success* beyond 29 May 2009, by which time the bulk of the evidence had been collected by CMDR Niel Wark or, at the latest, 13 July 2009, when the notices of potential adverse findings were issued.
- 7.6 Therefore, at one level any deficiencies in the decision to land the sailors had little practical effect since they might possibly have been landed properly. The timing and manner of the landing, however, amounted to a very public humiliation, which was intended to have a salutary effect on other members of the crew. This was correctly described at the time as ‘immediate and dramatic action’ (paragraph 4.268 of Part One of this report). The explanation given to the landed sailors at the time was simply that ‘certain allegations have come to my attention which are of great concern to me in terms of the operations of HMAS SUCCESS, including matters possibly affecting the safety and welfare of personnel’.
- 7.7 The rest of the crew and those who knew the landed sailors, including their families, would have naturally assumed that the sailors were implicated in serious wrongdoing. The reference in the briefings the Commanding Officer issued following the landings—to the removal of a ‘rotten core’ from the ship—would have done nothing to correct that assumption (see paragraph 4.318 of Part One). The precipitate nature of the landing and return to Sydney also led to the confusion on the sailor’s arrival in Sydney. The effect on the senior sailors is discussed in Chapter 4 of Part One of this report.

- 7.8 The failure to provide to the sailors any reasons for the landings until 18 September 2009, despite numerous requests (as outlined in Chapter 3 here) and the sailor's continued exclusion from *Success* without explanation could only have exacerbated the uncertainty and consequent tension, for the sailors themselves and for their families. The consequences for them were escalated to extraordinary proportions by the frenzy of media allegations about a connection between the landing of the sailors and a sex ledger or sex scandal of some sort, first published on 4 July 2009 and not denied at all in the media by the Navy until one letter was sent to one newspaper on 27 October 2009. It was far from an unequivocal denial of the alleged connection. All this led to the senior sailors, particularly [REDACTED] becoming actors in a public saga involving parliament, the media and this Commission of Inquiry.
- 7.9 As can be expected, that saga has had a serious impact on each of the landed sailors and those close to them. The personal consequences have been more dire than if their wrongdoing had been dealt with through the normal processes. They have suffered an injustice.
- 7.10 Amends should be made to the senior sailors for the adverse consequences they have suffered through no fault of their own. Counsel for [REDACTED] submitted as follows:

129. It is my submission that this COI ought to find that [REDACTED] has been grievously wronged by the actions of the RAN in:
- a. landing him from *Success* on 9 May 2009 without proper investigation,
  - b. subjecting him to the humiliation and degradation associated with his landing and his continued exclusion from his posted workplace without proper justification,
  - c. failing to provide him with procedural fairness at the time of his landing and in the months following,
  - d. failing to provide him with physical or emotional support at the time of his landing,
  - e. failing to appoint a suitable inquiry officer and assistant inquiry officer or alternatively consequently failing to properly check whether their inquiry was so fundamentally flawed that its findings could not stand,
  - f. failing to protect his private information so that such information could be improperly leaked to the media in contravention of Section 11 Principle 14 of the Privacy Act 1988, and
  - g. failing to properly answer incorrect allegations that had a devastating effect on [REDACTED] the members of his family and all that knew him.

130. It is my submission that this COI recommend to the CDF that appropriate apologies be provided to [REDACTED] and his family and that damages be paid to him insofar as it is possible to compensate him and his family for the unnecessary anguish that they have been put through as a result of the above failings including damages pursuant to the provisions of the Privacy Act 1988.

- 7.11 I agree with the substance of (c) and (g) just cited. I disagree with the substance of (e), save for the involvement of WO Melville Harker, and in my view that had no adverse effect on the sailors. Leaving aside any consideration of the effect of the legislation, I cannot see that (f) is made out, at least on the material before this Commission. It is not apparent how the personal actions of [REDACTED] would bind the Commonwealth. It is not established that his access to the mobile telephone numbers of fellow Marine Technical sailors was due to any relevant fault of the Navy. There is merit to (a), (b) and (d), although they need to be qualified by the fact that the landed sailors were wrongdoers, and separation of the senior landed sailors from the rest of the crew of HMAS *Success*, pending the completion of an Inquiry into the allegations that had been made could have been justified if carried out in the appropriate way.
- 7.12 In these unusual circumstances I agree that the Chief of Navy should offer a properly framed apology to the senior landed sailors. I also agree that payment of ex gratia monetary compensation is appropriate and propose that this be done. Those two measures would go some way to redressing the unnecessary damage caused to the reputation of the landed senior sailors and to compensating them for their humiliation. The effect of what has occurred goes well beyond the normal consequences of maladministration, for which there would be no redress of this kind.
- 7.13 One of the unusual factors to be taken into account is that the Navy's failure to properly answer the query from journalist Mr Andrew Greene and to put right the early media reports would very much complicate any defamation action the landed sailors might contemplate against media organisations. In any case, it is hardly appropriate that someone in the position of these sailors should have to resort to litigation to try to restore their reputation, even in the unlikely event that they could afford the risk of doing so. In default of agreement on the amount of compensation (assisted by mediation, if necessary) the Navy should propose that agreement be reached with the sailors as to a third party who could make a binding informal decision on the appropriate amount to be paid.
- 7.14 I am assuming that the senior sailors will be called to account quite separately for their wrongdoing. Two wrongs do not make a right.

- 7.15 How did this happen? What lessons are to be learnt? The approach by the Executive Officer and two senior female sailors to the Commanding Officer of *Success* late on the evening of 26 April 2009 created a situation that was both serious and unusual. Action was required, but the concerns did not neatly lend themselves to established procedures. A judgment call was necessary. The Commanding Officer was sensible in referring the matter to command.
- 7.16 The decision to despatch the equity and diversity team was crucial to what followed. In retrospect, it can be seen to be a mistake that led to the problems that have been analysed in detail in the first part of this report—including the basis for and the manner of landing the sailors. The next crucial decision was to fail to give reasons for the landings to the sailors until some time after the completion of the Inquiry Officer's Inquiry, leaving the sailors in the dark about their future at the same time. That, again, was a judgment call that can be seen in retrospect to have been a mistake. The third crucial decision was to fail to correct the misapprehension linking the senior sailors with a sex ledger or sex scandal of some sort, which was the basis for the questions Mr Greene asked of the Navy and for the subsequent media reports. That was another judgment call that in retrospect can be seen to be a mistake.
- 7.17 The adage that 'honesty is the best policy' should have been applied. If the information CMDR Simon Brown had received had been subjected to a quick assessment in the normal way, an Inquiry Officer's Inquiry should have followed. The informants were experienced personnel of senior rank. There was nothing incredible about their information. If, as his email dated 30 April 2009 to CDRE Cullen suggests, the CMDR Brown had identified [REDACTED] as ringleaders of the alleged 'culture' and as likely to impede the proper progress of an inquiry if they remained part of the crew, then a proper basis for excluding them from *Success* during the inquiry would have existed. An administrative decision of that type does not depend on the existence of admissible evidence or anything like it. What is more, the sailors could have been given the true reason for their exclusion from the vessel very simply. They would have had little, if any, chance of having the decision overturned. The record would have been clear when the request from the journalist came in for attention and in the event of any other media interest.
- 7.18 It is easy to be wise after the event, and all judgment calls cannot be seen to be correct in retrospect. But lack of candour is a common thread in these decisions and their implementation. The mission of the equity and diversity team was misrepresented. In addition, I am far from satisfied that I was told the truth about the decision to send that team, the role the team played and the consequent decision to land the sailors. In the case of the subsequent failure to supply reasons for the

landing and give information about the sailors' future, and the failure to correct media misapprehensions about the reason for the landings, the response was to withhold the information rather than give it. Those decisions involved command at high levels, as well as Navy Legal and Defence Public Affairs. It is difficult to explain each of them as a one-off mistake. The same culture underlies each.

- 7.19 The need for security of information with operational implications is uncontroversial. Perhaps that mind-set is being carried over as a kind of reflex into areas where it is not appropriate. A desire to avoid publication of material damaging to the Navy can be understood, but the result here was precisely the opposite. It might be that the extensive obligations that call for decision makers to comply with administrative law principles and the opportunities for redress by sailors have created among the ranks a 'rights' culture that has caused decision makers to resist by providing as little information as possible, and then only in a sanitised form, to avoid challenge. If that was the case, the proper response is to review the rights-based system, rather than to avoid it by other means.
- 7.20 The number of relatively high ranking officers involved in each of these decisions complicates the making of any recommendation. Obviously, both Defence Public Affairs and Navy Legal need a jolt. The same can be said of the higher echelons of Fleet Command. The impetus for change must come from the highest level. I therefore recommend that the Chief of the Defence Force take steps to improve the candour with which decisions are made and implemented.
- 7.21 Various administrative inquiries have been examined in both parts of this report. Wider considerations have arisen—such as the interplay between enforcement of the *Defence Force Discipline Act 1982*, administrative decisions, redresses of grievance, the role of equity and diversity policy, the operation of the *Administrative Decisions (Judicial Review) Act 1977*, and freedom of information principles. The conduct of administrative inquiries and these wider matters warrant examination. In this connection I have been asked to take into account some recent material—namely, CDF Directive 04/2010, 'Interim Arrangements—Quick Assessments and Administrative Inquiries', which the Chief of the Defence Force issued on 23 April 2010; the 19 November 2010 report of the Review of the Australian Defence Force System of Administrative Inquiries by a working group chaired by the Inspector General of the ADF; and the Chiefs of Service Committee consideration of that report. That report cannot be understood without having regard to a series of earlier reports dealing with aspects of the military justice system (in the broad sense). Analysis of that body of material should not hold up the completion of this report dealing with the treatment of the personnel

involved. The administrative matters of general concern will be covered in a later and final Part Three.

