

# Appendix C Part Two of the report: executive summary

## Executive summary

### The Inquiry Officer's Inquiry

On 15 May 2009 CMDR Niel Joseph Wark CSC was appointed Inquiry Officer for the purpose of:

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

LCDR Matthew Terence Vesper (a Reserve legal officer) and WO Melville John Harker were appointed to be Inquiry Assistants. WO Harker had been a member of the equity and diversity health check team.

CMDR Wark and the Inquiry Assistants joined HMAS *Success* when she left Singapore on 20 May 2009 for a joint naval exercise, returning to Singapore on 29 May 2009. They interviewed crew members during the voyage and conducted some further interviews later. LCDR Vesper acted, in effect, as counsel assisting CMDR Wark.

The Inquiry Officer's report, referred to as the Wark report, was dated 20 August 2009. CMDR Wark made findings of wrongdoing against various crew members, among them [REDACTED]

[REDACTED] He found there was an inappropriate culture among a sizeable group of Marine Technical sailors—'comprising ... an inappropriate attitude toward sexual behaviour and a disrespect of female sailors'. He made a number of recommendations.

CMDR Wark did not inquire into the circumstances of and the reasons for the landing of four sailors in Singapore: he did not regard that matter as coming within his terms of reference.

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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.

A legal review of the Wark report pursuant to paragraph 6.78 of ADFP 06.1.4 (the *Administrative Inquiries Manual*) was carried out by a Reserve legal officer, who reported on 2 September 2009. She concluded there was no reason at law why the Appointing Authority could not act on CMDR Wark's findings and recommendations, although she did note that two aspects of the terms of reference had not been addressed.

The Wark report noted the following in relation to the involvement of WO Harker:

WO Harker was a member of the E&D team. He was also appointed as an assistant to this Inquiry. 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 did 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.

As to that matter, the following was said in the legal review:

24. WO Harker's previous involvement in this matter could base an argument of apprehended bias or conflict of interest. Indeed, WO Harker could possibly have become a witness in this Inquiry. However, I am satisfied that the steps taken by CMDR Wark to manage WO Harker's role in the Inquiry were sufficient to address any perceived conflict of interest.

The Commander Australian Surface Forces, CDRE Ian Middleton, considered the findings and recommendations of the Wark report with the assistance of Fleet Legal. After considerable delay, on 26 November 2009 he issued to each of [REDACTED] notices to show cause why certain adverse consequences should not follow from the findings of the Wark report.

On 30 November 2009 [REDACTED] presented a redress of grievance, including a claim that the Wark report should be set aside as unreasonable and flawed. That redress was supplemented on 14 December 2009, and on the same day [REDACTED] also submitted redresses of grievance, seeking the same relief.

On 5 February 2010 CMDR Anthony Rayner decided to uphold [REDACTED] redress of grievance and found the Wark report void for apprehended bias because of lack of impartiality and unreasonableness in its findings. That decision was based on legal advice CMDR Rayner had obtained from a Reserve legal officer. Similar decisions were made in relation to [REDACTED] on 10 February 2010.

On 11 February 2010 the then Commander of Surface Forces, CDRE SRW MacDowall, having received confirming legal advice from the Head of Defence Legal, decided that the Inquiry Officer's report was fundamentally flawed and that all pending administrative actions against [REDACTED] were to cease immediately. The notices to show cause were revoked. On that day a Defence media release in the name of the Chief of the Defence Force referred to legal advice that the initial administrative inquiry, by CMDR Wark, was flawed as a result of bias.

The advice on which CMDR Rayner acted, the confirming advice of the Head of Defence Legal, and matters to do with the Wark inquiry and report, as raised in the terms of reference of a Senate Committee, were examined. I do not agree with the criticisms made of the conduct of the inquiry and of the content of the Wark report and reject any claim of lack of impartiality or bias by prejudgment. In my opinion CMDR Wark and LCDR Vesper carried out a difficult assignment well in trying circumstances. My conclusions differ from those of CMDR Wark in some respects. That is because the evidence before this Commission was more extensive than the information available to him. There is also room for legitimate differences of opinion about the effect of some of the evidence. I make recommendations to minimise the damage to the reputations of CMDR Wark and LCDR Vesper.

I concluded that the position of the landed sailors seems to have hijacked the later consideration of the Inquiry Officer's report. 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.

There appears to have been no examination by anyone in the Defence hierarchy of the very unusual procedure that resulted in the Wark report being treated as void. There is no mention of the legal review that had taken place and, indeed, no explanation of why that reviewer had not been chosen to deal with the matters that arose subsequently. There is no examination of the question of how a redress of grievance directed to the Commanding Officer of HMAS *Success* could, or should, set aside a formal Inquiry Officer's Inquiry and report, whether with or without the benefit of legal advice. There is no examination of how it was that the proper process for dealing with administrative action against the three sailors was diverted by the tactic of lodging a redress of grievance, the result of which was to purport to send decision making back to the Commander of the vessel, rather than to the Commander of Surface Forces, whose role was to decide the appropriate administrative action to follow the Wark report. The general recommendations made by CMDR Wark are still available for consideration.

The involvement of WO Harker as an Inquiry Assistant might have made the conduct of the Inquiry Officer's Inquiry vulnerable to challenge on administrative law grounds. But that 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.

### **Management of the landed sailors**

The focus of this aspect of the Inquiry was the landed senior sailors rather than [REDACTED]. After some initial hiccups, administrative and legal support was afforded the senior landed sailors. The Legal Officer Advocacy and Counselling at HMAS *Kuttabul*, LCDR Dean Bainbridge, acted for each of the landed senior sailors in that capacity.

No substantive reasons for landing were provided to the landed senior sailors at the time of their landing, 9 May 2009. Despite a number of requests, reasons were not provided until 18 September 2009, when reasons dated 11 September 2009 from CMDR Simon Brown were provided to LCDR Bainbridge. The justification for that stance was that the reasons for and the manner of landing the sailors were to be investigated on the merits by CMDR Wark. CMDR Wark did not investigate those matters: he did not see them to be within his terms of reference. I agree with his view. It is strange that Fleet Legal did not apparently know that CMDR Wark was not investigating those matters. Further, even if they were within his terms of reference and he was to investigate them, that was not a sound reason for refusing to disclose the true reasons for the decision to land in fulfilling the duty to afford procedural fairness to the landed sailors as soon as practicable.

The manner of landing and the briefings given at the time by the Commanding Officer—referring to the removal of a 'rotten core' from the ship—would naturally lead to an assumption by the rest of the crew and those who knew the landed sailors, including their families, that they had been implicated in serious wrongdoing. The lack of reasons meant that they were unable to offer any explanation. This problem was exacerbated when media reporting, beginning on 4 July, linked their landing with a 'sex ledger' or sex scandal of some sort.

The reasons that were eventually provided differed somewhat from the reasons CMDR Brown had given in a memorandum to Fleet Command immediately before the decision to land.

When the reasons were received, LCDR Bainbridge was able to compare them with the notices of potential adverse findings the landed senior sailors had received from CMDR Wark, although at that stage they were not aware of the conclusions of the Wark report. LCDR Bainbridge set about trying to obtain the material that had been available to the Commanding Officer at the time of the landings to support the reasons that were given in September, his thesis being that the reasons had been drafted with the benefit of hindsight and were based on material that was not available at the time. He was not successful in his efforts, and the matter was overtaken by events.

In the meantime the sailors continued to be in professional limbo—still posted to HMAS *Success* but temporarily located at HMAS *Kuttabul*. Attempts by them and on their behalf to rejoin the ship or obtain a clear statement of their future position were unsuccessful. The basis for their continued exclusion from the ship was never stated.

On 15 July 2009 the landed senior sailors jointly made a formal complaint to the Commanding Officer of HMAS *Kuttabul*, mainly concerning their removal from *Success* and related matters but including the media reports that had been published by then. A quick assessment completed on that day recommended an Inquiry Officer's Inquiry. The assessment report was forwarded to the Commander Australian Surface Forces, CDRE Middleton, on 17 July 2009. It was not, however, until 25 September that action was taken, and then a Routine Inquiry Officer was appointed. That delay was unfortunate, and the appointment of a Routine Inquiry Officer, rather than an Inquiry Officer Inquiry, was a doubtful response.

The Routine Inquiry report is dated 30 October 2009. It upheld some of the grievances and rejected others. The substance of the grievances is dealt with in the body of this Commission of Inquiry report. A legal review of the Routine Inquiry Officer's report was completed on 11 November 2009; the conclusion was that there were no legal impediments to accepting the findings and recommendations of the report.

By the end of November 2009 the senior sailors had received the substance of the result of the Routine Inquiry. [REDACTED] submitted a redress of grievance to the Commanding Officer of *Success* on 30 November, dealing with the manner in which the complaint of 15 July had been handled and the findings of the Routine Inquiry, seeking for the inquiry to be set aside and for the matter to be inquired into afresh. [REDACTED] followed suit on 14 December. The redresses of grievance were upheld in part by the Commanding Officer of *Success*, although the report was not set aside. The Commanding Officer had relied on legal advice from the same member of the legal Reserve who had advised on that aspect of the redresses of grievance about the Wark report. The appropriateness of a redress of grievance against a Routine Inquiry Officer's decision on what was, effectively, the same grievance is a question for consideration.

LCDR Bainbridge had made requests pursuant to the Freedom of Information Act when confronted with the cone of silence in response to his various pleas for information. There is a question about the use of that Act in the context of a disciplined service.

### **Media repercussions**

In late June 2009 Mr Andrew Greene, a reporter with Channel 7, had a chance meeting with a female in a bar in Canberra. Following that meeting he sent a

'media request' to the Department of Defence, seeking answers to five questions based on the following premise:

I write in reference to an incident on board HMAS Success in May this year.

During its visit to Singapore a number of sailors (five or six) were disciplined and returned to Australia for misconduct.

The men were accused of drawing up a 'ledger' challenge to try to sleep with as many on board female colleagues as possible.

The men involved were then ordered back to Australia.

On 3 July 2009 he received a response that gave answers to the five questions. The answers assume the truth of the premise: there was certainly no correction of it.

A report by Mr Greene appeared on Saturday 4 July 2009. It contained a slightly embellished version of the alleged link between the landed sailors and sexual misconduct involving a 'ledger'. The story was picked up by other media outlets that evening and the following day. On 5 July the Department of Defence issued a press release in response; it did not expressly mention the sex ledger allegations, but it implicitly accepted the truth of them.

On or about 6 July 2009 Mr Greene received a telephone call from an unidentified male who, it is clear, was [REDACTED] colleague on *Success* who had made a complaint about being threatened by him. That complaint had been influential in the decision to land [REDACTED]. The stated purpose of the call was to say that the men on the ship were adamant that there was no sex ledger in operation. The caller did raise other matters and in the course of the discussion gave Mr Greene the mobile telephone numbers of [REDACTED]. Mr Greene telephoned each of them using the numbers provided, but each refused to comment. Mr Greene reported on the substance of that conversation.

There is no doubt that the landed sailors would have been easily identified by the crew of *Success*, their friends and family, and other members of the Australian Defence Force as the subject of the media stories, even though their identity might not have been apparent to the general public.

The senior sailors approached the Commanding Officer of *Kuttabul* about the media reports and the approach on their telephones and were referred to Fleet Public Affairs. They were given strict advice not to speak to the media in any capacity. It is of note that at this time the landed sailors had still not been given any reasons for their landing and return to Australia. On the other hand, they had received notices of potential adverse findings by CMDR Wark, and there was no potential finding involving any association between any of them and a sex scandal involving a ledger or otherwise.

In July 2009 Mr Ben Packham, a reporter for the *Herald Sun* newspaper, made a freedom of information request for documents:

The Herald Sun seeks all relevant documents setting out the finding of ADF equity and diversity health checks where such checks have revealed, or raised questions of, discrimination or any form of inappropriate behaviour.

He was told there was no formal equity and diversity health check process and hence there were no documents, so he withdrew the request. He had also sent a media request to Defence Public Affairs, asking a series of questions about how the inappropriate activities aboard HMAS *Success* had come to light and about equity and diversity health checks. The answers given were misleading. They gave the impression that an equity and diversity health check was a routine process, whereas it was a term devised to describe the unique role played by LEUT Di McArthur and WO Harker on HMAS *Success* in May 2009. The answers also gave the impression that the inappropriate activities came to notice during the course of the health check and that the Commanding Officer's initiation of the health check was not based on any such allegations. Having noted the inconsistency between those answers and the initial answer he had received, Mr Packham revived his freedom of information request. Ultimately, documents and other material, along with explanations, were provided. Again, however, the response implied that an equity and diversity health check was an existing, recognised process but that it had only been used once. That was misleading and deceptive.

On 7 July 2009 RADM Stephen Gilmore and CDRE Tim Barrett launched a submariner recruiting package at the National Press Club in Canberra. The launch was followed by a question-and-answer session. A question was asked about the allegations concerning HMAS *Success* and their probable impact on Navy recruitment. RADM Gilmore's response implicitly accepted the truth of the allegations—namely, that the sailors had been landed for their involvement in a scandal related to a sex ledger.

The Navy's refusal to deal with the allegation that the landing of the sailors was connected to a sex ledger was finally abandoned under intense political and media pressure, when the *Herald Sun* published a letter from the Chief of Navy on 27 October 2009. The pressure stemmed from a media release by Senator David Johnston, the shadow Defence Minister, on 20 October 2009. The release contained the following:

Senator Johnston said the Navy knew in May that claims of a ledger were not backed up with any evidentiary support yet they allowed three Petty Officers to be the subject of derogatory and potentially defamatory media reporting two months later, without correcting the record.

The story was picked up by the media.

On 23 October 2009 Mr Andrew Bolt wrote in the *Herald Sun* an article that was extremely critical of the handling of the landing of the sailors and what ensued. The article contained the following:

The Navy, asked to comment, refused to confirm or deny the allegation, but gave the media all that was needed to assume the story was spot on.

No, what caps it all off is that when grilled in a Senate estimates hearing this week by Opposition defence spokesman David Johnson, senior Navy officers said the Navy had *never* suggested the sailors ran a competition with a 'sex ledger', and that the claim had been made by the media and was not part of the current investigation.

So why hadn't the Navy, when asked about this fabled ledger in July, immediately cleared the sailors of this stain on their reputation? Why hadn't it spared Rudd and Gillard from commenting on something that didn't actually exist, and from commenting to the detriment of three innocent men?

The Chief of Navy responded by way of a letter to the editor (drafted by Defence Public Affairs) that said, among other things, 'It is also important to note that the existence of a "sex ledger" was speculation generated by the media from late June, well after the positive actions taken regarding HMAS Success'. This was the first reference in the media on behalf of the Navy, or Defence, to the sex ledger controversy. Even then, it was far from an unequivocal denial. It does not clearly state that the sailors were not landed for that reason. It was accompanied by a defence of the 'positive and forthright' actions of the Commanding Officer. That could only be read as a defence of the landing of the sailors, since that was the essence of the charge being answered.

The letter to the editor carried the implication that, sex ledger or not, the landed sailors were involved in misconduct serious enough to warrant their being landed and disciplined before inquiries were complete. That is incorrect. The letter is disingenuous in purporting to respond to one article by one journalist in one paper on 23 October 2009. The matter had been public in all forms of media all around Australia since 4 July 2009. Any correction, no matter how belated, should have been made by means of an official statement from the Chief of Navy, if not the Chief of the Defence Force.

When LCDR Bainbridge challenged the Chief of Navy about this response, the Chief of Navy replied, in part:

I have a responsibility to Navy's people and to the Australian public more generally, and it is entirely appropriate for me to respond to articles of this sort in a careful and measured manner in order to ensure inaccuracies are properly corrected.



The approach outlined in that sentence should have governed the Navy's position on this matter from the first communication from Mr Andrew Greene onwards. It did not.

Chapter 4 traces the internal evidence on how this debacle developed in the Navy, and in Defence. Fleet Command, Fleet Legal and Public Affairs all contributed.

To sum up, on the first inquiry from Mr Greene, the Public Affairs Office personnel should have sought from command a clear, unequivocal statement as to the truth or otherwise of the allegations made. Command should have provided that statement. A denial should then have been issued to the journalist, and any subsequent media report should have been firmly and clearly corrected rather than pursuing the course of obfuscation that proceeded from 3 July onwards.

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

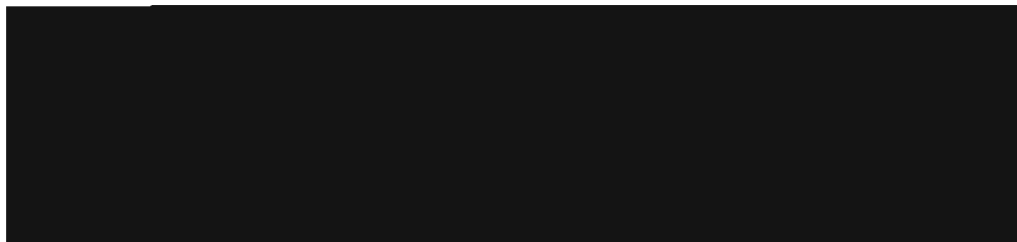
### **The treatment of the legal officer**

On 21 October 2009 there appeared in the *Sydney Morning Herald* an article critical of the Navy's handling of the HMAS *Success* matter. It reported claims by Senator Johnston that the lawyer for the landed sailors had been told he worked for Fleet Command and should not consider the men to be his 'clients' and that he had since been posted to Western Australia, even though his wife worked in New South Wales. On the same day Senator Johnston issued a press release that contained an allegation that the lawyer had been shut out and bullied by his colleagues. It was ascertained that LCDR Bainbridge had met with Senator Johnston on 13 October, accompanied by the three landed sailors.

On 21 October 2009 the media report was subject to a quick assessment, and it was recommended that a suitably qualified independent person be formally appointed as an investigating officer to review certain matters—principally a conversation held on 8 October between LCDR Bainbridge and the Deputy Fleet Legal Officer, a potential posting of LCDR Bainbridge to Western Australia, and LCDR Bainbridge's chain of command. That recommendation was accepted, and on 25 November Mr John Weber, the Chief Executive partner of Minter Ellison Solicitors, was appointed an Inquiry Officer for the purpose of inquiring into the reports of improper influence on LCDR Bainbridge.

Mr Weber reported on 15 February 2010. He rejected the claims of improper influence on LCDR Bainbridge. He made a very useful analysis of the Legal Officer Advocacy and Counselling position at *Kuttabul* in 2009, including the lack of a job description, the impact of various Defence Instructions on the position, and problems with the chain of command. I agree with Mr Weber's

recommendations relating to those things. Having considered the evidence myself, I agree, too, with the conclusions Mr Weber came to about the conversation between LCDR Bainbridge and the Deputy Fleet Legal Officer on 8 October 2009 and about the potential posting to Western Australia (which did not occur)—neither of them suggestive of an attempt to improperly influence LCDR Bainbridge. I also considered some circumstances additional to those that were before Mr Weber but possibly bearing upon that question.



Second, in early December 2009 Australian Defence Force Investigative Service investigators approached LCDR Bainbridge, seeking access to his files as part of ADFIS investigations into documents leaked to the media. He refused them access and the matter ended there.

All in all, in my view no conduct on the part of the Navy constituted an attempt to improperly compromise LCDR Bainbridge's capacity to represent the best interests of the landed senior sailors without fear or favour.

### **The ADFIS Investigations**

Some aspects of the early investigations by the Australian Defence Force Investigative Service of the allegations concerning personnel onboard *Success* during the Asian deployment of March–May 2009 are considered in Part One of this report. A summary of the result of the investigations ultimately completed by ADFIS is set out in Chapter 6 of the present part.

The ADFIS Director of Operations accepted that the investigations were poor. On 15 January 2010 the Deputy Provost Marshall of the Australian Defence Force arranged for a quick assessment to be made of allegations of poor investigation standards. Following that assessment, on 27 January 2010, a Routine Inquiry Officer was appointed to inquire into the matter. The report of that inquiry, issued in March 2010, found significant deficiencies with the ADFIS investigations. Those deficiencies were not separately investigated by this Commission. Nevertheless, the extent of the deficiencies, the narrow scope of the matters investigated by ADFIS, and the very conservative approach to instituting disciplinary proceedings are noted. -

### **Conclusion**

Accepting that each of the landed sailors had been found guilty of wrongdoing and might possibly have been landed and returned to Sydney if proper process

had been followed, the sailors nonetheless suffered injustice and serious personal consequences. The timing and manner of the landing amounted to a very public humiliation. The natural assumption by others would be that the landed sailors had been implicated in serious wrongdoing. The precipitate nature of the landing and return to Sydney also led to confusion on arrival in Sydney.

The failure to provide to the sailors any reasons for their landing until 18 September 2009, despite numerous requests, and their continued exclusion from *Success* without explanation consigned them to a limbo that was serious enough. The consequences were, however, escalated to extraordinary proportions by the frenzy of media allegations of a connection between the landing of the sailors and a sex ledger or a sex scandal of some sort, first published on 4 July 2009 and not refuted at all by the Navy in the media until one letter was written to one newspaper on 27 October 2009. The senior sailors—particularly ██████████—became actors in a public saga involving parliament, the media and this Commission of Inquiry.

In those unusual circumstances I recommend that the Chief of Navy offer a properly framed apology to the landed senior sailors and that payment of ex gratia monetary compensation be made to each of them. Nonetheless, the senior sailors should be called to account for their wrongdoing. Two wrongs do not make a right.

In retrospect, it is apparent that there were three crucial incorrect decisions. The first was to despatch the equity and diversity team, rather than follow the usual path through quick assessment to inquiry. The second was to fail to provide reasons for the landing of the sailors until some time after completion of the Wark inquiry, all the while leaving the sailors in the dark as to their future posting. The third was not to refute the misapprehension linking the senior sailors with a sex ledger or sex scandal of some sort, which was the basis for the questions asked of the Navy by journalist Mr Andrew Greene and for the subsequent media reports.

Lack of candour was a common thread in those 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 the team, the role the team played, and the consequent decision to land the sailors. The subsequent failure to supply reasons for the landing and to provide information about the future of the sailors and the failure to redress the media misapprehension about the reasons for landing the sailors were each conscious decisions to withhold information rather than to release it.

The number of relatively high ranking officers involved in each of these decisions complicates the making of any recommendation. Obviously, Defence Public Affairs, Navy Legal and Navy Command need a jolt. 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.

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, and the operation of freedom of information principles. The conduct of administrative inquiries and these wider matters warrant examination. This will be done in Part Three of my report.