

Appendix A Instrument of appointment



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DEFENCE (INQUIRY) REGULATIONS

CHIEF OF THE DEFENCE FORCE COMMISSION OF INQUIRY

INSTRUMENT OF APPOINTMENT

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

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

Pursuant to Regulation 115 of the Regulations:

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

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

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

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

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

9 March 2010

HMAS Open ID - 638673

Annex:

A. Inquiry Context

INQUIRY CONTEXT

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

Recommendations

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

Interim reporting

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

Identification of other issues

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

Documentation

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

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

Representation of potentially affected persons

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

No findings of criminal/disciplinary offences

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

Conduct

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

Appendix:

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



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Inquiry into an equity and diversity health check in the Royal Australia Navy— HMAS Success

Terms of Reference

That the following matters be referred to the Foreign Affairs, Defence and Trade References Committee for inquiry and report by 18 March 2010:

- a. the nature, scope and purpose of an 'Equity and Diversity Health Check' in the Royal Australian Navy, and under what authority such an investigation is conducted;
- b. the equity and diversity issues at large on board HMAS Success (Success) giving rise to the 'Equity and Diversity Health Check' which was carried out on board Success between 21 April and 9 May 2009 including inter alia all disciplinary issues, the transfer of a Royal Navy exchange sailor, the management of equity and diversity issues by the ship's Commanding Officer and his Executive Officer both before and after the 'Equity and Diversity Health Check';
- c. the nature and veracity of complaints and allegations made by a Petty Officer or any other person concerning equity and diversity issues on Success;
- d. the reasons and factual evidentiary basis for the ship's Commanding Officer resolving to land a Chief Petty Officer and two Petty Officers (the senior sailors) at Singapore on 9 May 2009 from Success and the circumstances of that landing and removal from the ship including whether the Commanding Officer acted under the direction of any superior officer;
- e. whether the senior sailors were informed of the full nature of the allegations and factual evidentiary basis for the subsequent landing in a timely fashion or at all, and whether procedural fairness was provided to those senior sailors;
- f. the circumstances and events that led to the Commanding Officer of Success addressing members of the crew in relation to the landing of the senior sailors, whether the Commanding Officer referred to the senior sailors by stating words to the effect of 'there was a rotten core on this ship and the core has now been removed' and if so, the extent that those comments may have prejudiced any subsequent inquiry;
- g. whether the Inquiry Officer as appointed pursuant to terms of reference, dated 15 May, and as set out in Minute S1804843, dated 10 July 2009, declined to interview any relevant witnesses in circumstances where the senior sailors were prohibited from attending Success and/or contacting any of the ship's company;
- h. the way in which the inquiry into the events on Success was conducted, whether the method of questioning witnesses and gathering evidence was conducted according to the principles of justice, whether the inquiry process 2830 No. 102—24 November 2009 was free from any perception of bias, and whether any witnesses were threatened with disciplinary or other action during the course of giving evidence;
- i. whether the senior sailors requested access to evidence gathered during the inquiry into the events on Success, whether any such request was denied, and whether any subsequent finding is reasonable in the circumstances;
- j. the facts and circumstances of the treatment of the Legal Officer (the lawyer) assigned to the management and defence of the case of the senior sailors including any threats, bullying, adverse conduct and prejudice generally, including any threat of posting to Western Australia, and whether any such conduct constituted an attempt to compromise the lawyer's capacity to represent the best interests of the senior sailors without fear or favour;

- k. the knowledge and awareness of the ship's Commanding Officer, the Australian Defence Force Investigative Service Investigators and the broader naval chain of command of the facts and circumstances relating to the Channel 7 News reports on 4 July and 7 July 2009 (the media reports) and the dates and times of such personnel being availed of such knowledge and awareness;
- l. the knowledge and awareness of the media reports by the responsible Minister and the dates and times of the Minister being availed of such knowledge and awareness; and
- m. all and any other matters relating to the justice and equity of the management of the senior sailors in their removal from the ship and the subsequent administrative process or processes, including their complaints as to the flawed process as set out herein.

2. That the committee not conduct any hearings until after 1 February 2010.

For further information, contact:

Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: +61 2 6277 3535
Fax: +61 2 6277 5818
Email: fadt.sen@aph.gov.au

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Comments to: web.senate@aph.gov.au
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