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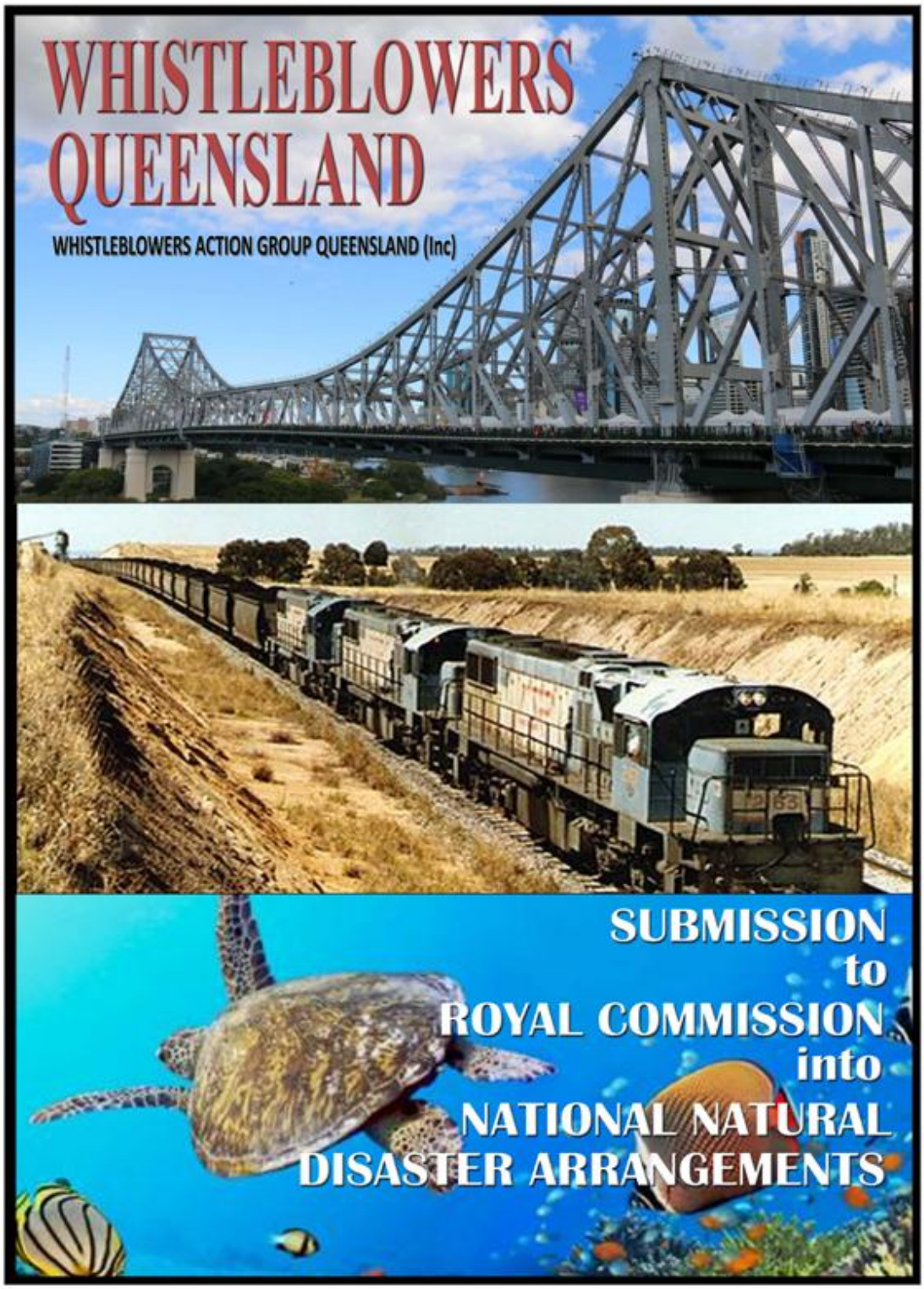

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Air Chief Marshall Mark Binskin (Rtd) - Chair
The Honourable Dr Annabelle Bennett AC SC – Commissioner
Professor Andrew Macintosh - Commissioner

Royal Commission into National Natural Disaster Arrangements
Locked Bag 2000
MANUKA ACT 2603

Dear Commissioners,

Please find our submission addressing the deployment of the Australian Defence Force with emphasis on the related use of Reserve military forces in future natural disasters, and probably, pandemics.

The submission is focussed on the treatment that Reserves should receive as effective contributors to such special national efforts and to the effectiveness and capability of military contributions to all aspects of the Australian Defence Force on deployment [TOR c iv, and TOR d]. In particular, the submission seeks fair pay and conditions, and a safe workplace for Reservists during their training so as to achieve and maintain readiness for such deployments, and also during those deployments, whether undertaken on 'calls for' fulltime or part-time Defence Reserve service, or whether on 'call-out' on these same Reserve service conditions or on Continuous Full Time Service [CFTS]. The actions discriminating against Reservists are largely systemic and top down, so the legal framework for the involvement of the Commonwealth in responding to national emergencies, using Reservists, may need amendment. Queensland Whistleblowers requests that the Royal Commission recommend

1. that Reservists be brought to the same pay and conditions as Regular Forces,
2. that management and disciplinary amendments be made to the Defence Act to cover situations special to the circumstances faced by Reservists,
3. that new justice systems be established for the protection of Reservists and their leaders, to overcome the deficiencies in the independence of the Office of the Inspector General [OIG], and in the powers, capacities and workplace beliefs of the Commonwealth Ombudsman Office [COO], and,

All wrongs described in this submission are allegations, and are not wrongs already proven.

4. that consideration be given to the following avenues in developing a new justice system for Reservists
    - specific mention of part-time Defence service in Anti-discrimination legislation, with withdrawal of any exemptions given to Defence in this regard
    - group forms of disclosure and complaint with respect to unfair treatment, discrimination and bullying, to an authority outside of Defence, free of Defence staffing and ex-Defence staffing, and free of Defence input about appointments
    - a facility for running test cases without an individual Reservist involved
    - a support office for Defence or non-Defence persons, disclosing unfair treatment, discrimination or bullying of Reservists in their military workplace, with the types of support and assistance provided to Reservists by the Defence Reserve Support in protecting their civilian employment
    - a legal advisory and representational service, to Reservists making disclosures of unfair treatment, discrimination or bullying, to assist such Reservists in the same way that the OIG advises and represents the interests of commanders
    - the option of outsourcing such supports to a professional association or industrial organisation
    - the provision of a hearing with representation support to Reservists before an the authority outside of Defence, regarding the complaints of unfair treatment, discrimination, bullying and reprisal..

The recent first use of the Call-out provisions of the Reserve Forces highlights that now Reservists are liable to provide defence service at any time in any emergency. The flexibility that Reserve Forces bring to ADF output has also been demonstrated, where different Reservists were able to contribute to the Bushfire effort as fulltime Reservists taking different forms of leave from their employment, and from their businesses. Reserve forces were also brought to service by use of the call-out provisions, for which Reservists should have enjoyed Continuous Full Time Service [CFTS] conditions of pay, leave, medical treatment and superannuation, not available as yet to other Reservists.

Queensland Whistleblowers request a longitudinal study be conducted concerning the forms of service provided by Reservists during the national bushfire disaster, to gauge the conditions in which their service was provided. The first survey should be conducted as a part of this Royal Commission, of both Reservists and their employers /business partners, with a second survey in 18 months, to assess the impacts that service had on their lives. Special attentions should be paid to the effectiveness of the Call-out procedures, and to the effectiveness of the Defence Reserves Support infrastructure, the legal assistance for Reservists in protecting their employment where problems occurred, and the Employer Support Payment Scheme designed to assist employers with the costs accompanying the loss of their employee to defence service.

Queensland Whistleblowers also brings to attention inequities between usual service conditions for Reservists, and conditions when Reservists are on Continuous Full Time Service. The submission also follows up on earlier studies about unfair treatment, discrimination and bullying of Reservists in areas other than pay and conditions. A guide is provided regarding the inabilities of current military justice authorities, principally the Office of the Inspector General and the Commonwealth

Ombudsman (in its Defence Force Ombudsman role), to protect Reservists against occurrences of such mistreatment.

The solution for these problems, when they occurred repeatedly to Regular service persons in the disciplinary proceedings system, was to take control of that discipline system out of the hands of the 'uniformed' Defence authorities.

This may have also to be done to deal with unfair treatment of Reservists regarding pay and conditions, and in the protection of them regarding discrimination and bullying, and protection of those Reservists who lodge disclosures and complaints against '*rough justice*' and other forms of reprisal.

Any wrongdoing described in this submission are allegations that in the opinion of Queensland Whistleblowers merit investigation - they are not facts already proven.

Queensland Whistleblowers believe that reforms will ensure a Reserve that is larger, better led, better prepared and more effective in assigned roles which benefits our nation overall. Fairness and justice to all service persons will assist in developing what the Bushfire Natural Disaster demonstrated was needed, an integrated and cooperative response across all forms of contributions being made to avert disaster.

It is expected that the pay and conditions or similar applicable to other contributors in the Bushfire natural disaster will also arise during the Royal Commission, and may require national coordination for events that cross state borders (and floods on border rivers).

This Royal Commission should be aware that Presiding Commissioner Binskin may have a conflict of interest in undertaking his commission, in particular considering this topic and in any submissions from myself, for reasons that I have respectfully explained to him by separate correspondence.

We would be happy to appear before any public hearing to speak to this submission.

We agree to the publication of this submission against our name. It has been prepared to provide anonymity regarding persons, ships/units, locations and dates.

Yours sincerely

Greg McMahon
President
Queensland Whistleblowers

All wrongs described in this submission are allegations, and are not wrongs already proven.

1. Forms of Unfair Treatment and/or Discrimination by Defence Force against Defence Reservists?

BACKGROUND

Service.

The Australian Defence Force [ADF] has a strength (Army, Air Force and Navy) of about 60,000 Permanent members of the ADF, 20,000 active Reservists and 20,000 full time equivalent Australian Public Servants (ref 1). Since 1999, when the ADF landed forces in East Timor, approaching 80,000 members have deployed on domestic, border security, humanitarian or international military operations, and approaching 20,000 of these contributions to the ADF and its purposes and capabilities were made by active Reservists (Refs 1,2). Most, but not all, of these contributions by Reservists were carried out with the Reservists having been placed on Continuous Full Time Service [CFTS].

During my service as an active Reservist and Standby Reservist, 1973 to 2016, I performed two periods of CFTS (for the 2000 Sydney Olympics and for an International five armies joint exercise in 2015), and I worked in what were termed National Postings (Reservists filling Regular positions and responsibilities) in 1988-89, 1997-2008, and 2010-2016.

Unfairness and/or Discrimination.

Reservists can suffer disadvantage and / or discrimination at both their place of civilian employment and at their place of military employment.

In their civilian employment, the wrongs to Reservists arise because of their absences on Defence Service and the associated costs to employers. The situation can be similar to other 'employee absence' situation in the workforce, such as with women having a family and persons on longer periods of jury service. Legislative protections (e.g. *Defence Reserve Service Protection Act 2001*, Legal Assistance program, Office of the Defence Reserve Service Protection) and compensation schemes for employers (e.g. Employer Support Payment Scheme) are available to Reservists in protecting their civil employment.

In their military employment, Reservists have the protections of the military justice processes. These processes, however, have essentially been designed for full time service members (who need permission from Defence before undertaking any work for civilian agencies). They are not designed for part time Reservists who need approval from their employers to engage in defence service and/or the agreement of their employers to save their civilian jobs and/or to protect them from discrimination in their civilian workplace.

A study by the Australian National University (Ref 2), conducted with Defence support, has identified the rationale for any unfairness and/or discrimination affecting Reservists in their military employments, as arising from:

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- An intention to put Permanent Military Force [PMF] members first - **'Regulars First'**

> **Key Finding 5**
> *The culture of the ADF (one favouring full-time immersion and commitment) creates an environment that systematically and structurally marginalises Reserves through*
> *a. system of entitlements designed for Permanent/Regular members; and*
> *b. standard or expectation of **'Permanents/Regulars first'**; and which is reinforced through*
> *c. active discrimination against and bullying of the Reserve,*

and

- A notion that Reservists have a deficit in skill base and capability - **'Reservist Deficit'**

> **Key Finding 2**
> *Reserve identity operates on two distinct dimensions, their institutional/professional orientation (where their identity is based on either military or civilian skills) and their difference/deficit orientation (where their identity is based on a perceived deficit or difference in their skills base by their full-time counterparts).*

From surveys and experience, **'Regulars Only'** needs to be added to this list as another form of discriminatory attitude that may be related to either or both of the above.

The Proposed Reforms.

The reforms proposed herein, as first ideas to seed more survey and discussion, are for protecting Reservists from forms of discrimination in their military employments. In particular, this section of the submission is seeking to put an end to any underpayment of active Reservists and Standby Reservists, who, firstly:

a. are not on CFTS (Continuous Full Time Service), but are serving under the lower pay and conditions applied to active Reservists, since the date that they became active Reservists, whether the individual Reservist **is on 'Call-out' or is not** on 'Call-out'; and, secondly
b. are on CFTS

This aim requires that an effective military justice regime is operating for those Reservists who disclose and complain that discrimination (and other forms of military injustice) may have been imposed on them in their military workplace.

Pay and conditions is one area where, on mass, Reservists appear to have a strong case of discrimination. The discrimination is coming top-down from Defence authorities, who stand to have a major reworking of the Defence budget if pay and conditions are placed on a par with Regular Defence personnel. Reservists, who must disclose and complain individually rather than as a group, can find themselves in difficulties in their military employment if the top levels of Defence seeks to dissuade the individual Reservist from pursuing what appears to be a fair and reasonable complaint for fair treatment.

The descriptions and explanations below set out the strength of the Reservists' case.

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PAY & CONDITIONS

Annual Pay

When soldiers moved from National Service (full time) to the Army Reserve (ARes) (part time service in 1973 (also then called the Citizens Military Force or CMF), their annual pay rate as a soldier was reduced by 15%. Parallel disadvantages were imposed regarding pay increments and allowances, and university graduates such as qualified engineering officers, lost seniority and time in rank.

The justification for this across the board reduction in pay appeared to come under the Reserve Deficit (in skills) rationale for treatment of Reserves. The Committee of Reference for Defence Force Pay examined the matter in 1975 and 1984. The Committee found that there was a disparity between the efficiency and skill of Reserves and permanent members (termed herein the '1975/84 View'). In the cases of thousands of soldiers who had completed National Service, most of whom had fought for a year in Vietnam, there was no reasonable basis for attributing any deficit in military skills to such new Reservists. A similar case against the '1975/84 View' existed for the many Regular members who transferred to the Reserves, as they were routinely requested to do by the Regular authorities, when those experienced soldiers and officers came to an end of their Regular service in the Permanent Forces.

On 4 April 1974, a House of Representatives Committee of Inquiry tabled its Report (Ref 4), titled 'The Citizens Military Forces'. It recommended that ***'members of the Reserve be paid at the same rates as members of the Regular Army, with appropriate adjustments to allowances'*** (para 12.16.22)**.** The Committee reasoned several advantages for the Defence Force from this and other recommendations, including giving ***'the Citizens Military Forces (Army Reserve) ... greater dignity within the Army in peace time, ...'*** In 1995, the Glenn Report (Ref 5) recommended a closer alignment of conditions for full time and part time members, and in 2001, the Australian National Audit Office [ANAO] Review, titled 'Australian Defence Forces Reserves', questioned whether the '1975/84 View' should still prevail (ref 3, pare 6.61).

From 1999, thousands of Reservists returned to the Reserves after completing operations mostly under Continuous Full Time Service (CFTS) pay & conditions. The CFTS conditions were largely equal to those of Regular members. This weight of contributions, achieved without 'Call-out', caused the legitimacy of the 1975/84 View to be challenged, and the recognised inequity of the pay and conditions to be questioned. In the period 2006-2015, the inequity was addressed by a series of Defence Force Remuneration Tribunal Determinations (Refs 6 and 7 are first and last of these decisions), which have now established equity in pay and pay increments (I do not know about the situation with allowances). The first of these in 2006 addressed the inequity with respect to former members of the Permanent Forces.

That reform took 30 to 40 years to be achieved, depending on the situations for different Reservists, after the recommendation for this reform was made in 1974 by a Parliamentary Committee. I am not aware of any Reservists receiving 30 years (or other long period) of back payments for any categories of or situations for Reservists, as a part of this overdue reform. Recent civilian claims about 'wage theft' by employers, relating to full time and part time employees, may provide a guideline as to what should have been provided by Defence in the way of back payments of wages unreasonably withheld.

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Daily Pay

The Reservist's daily pay rate is calculated by dividing the annual pay rate by 365. This means that a Reservist has to work 365 days in order to receive their annual salary. By comparison, Regular members and public service members of Defence only need to work for a minimum 230 days (52 of 5 day weeks minus 4 weeks Recreational Leave and minus 10 Public Holidays) to 290 days (assuming 6 months absences from home on training or operations).

Many Reservists within National Postings in Regular Army environments, which units locked their offices on the weekend. The Regular members and the public service officers received one week's pay for their five days of work, where, by comparison, Reservists have to come to work on the following Monday and Tuesday before the Reservist could be paid for one week's work. Reservists in this situation are required to work a 56 hour week. That is another forty percent (40%) additional work that Reservists are required to complete in order to obtain their one weeks pay

The 1995 Glenn Report recommended that daily rates of pay for Reservists be calculated by dividing the annual pay by 261, as is used in many industrial awards (Ref 3, para 6.65). This figure accords with the middle-of-the-range of working times for Regular Army members that I have estimated above (230 to 290 days per year).

Defence have defended the 365 day devisor, on the basis that Regular members are required to be available for duty 24 hours a day, 365 days per year - Regulars do not work these hours, but they are paid because they are available for service on all those days. Regular members, too, have their daily pay rate calculated by dividing their annual pay by 365, but Regular members get paid for all 365 days in each year, not just for the days that they work. This is because, Defence argues, Regular members and Reserve members are not paid on a basis of working hours, but on a basis of days available for duty (Ref 3, paras 6.63 -6.65; PACMAN 3.2.6).

This claim by Defence, however, may be a deceit, a deceit of no consequence to the pay received by Regular members, but a deceit imposing a 40% pay reduction (or 40% 'tax') on Reservists. The information tending to show that Defence may be deceiving Reservists (and the Parliament) are the rules applied by Defence to Regular members (or Reserves on CFTS) when these members gain approval for service on a part time leave without pay basis (PACMAN 5.8.15&16 and 3.2.7). For each day the Regular member is absent on approved part time leave without pay, the Regular member loses one fifth of a week's pay (or gains one fifth of a week's pay for each day worked, not one-seventh of a week's pay (or one-fourteenth of a fortnight's pay, respectively). The basis for reducing pay for periods of part time leave without pay is clearly based on work days, not ***'days available for duty'.***

Further, the 'Call-out' provisions within the Defence Act have been in place for approximately 20 years. The recent employment of 'Call-out' of 3000 Reservists to supplement 1100 Regulars, in support of the bushfire emergency, and the likelihood of further 'Call-outs' in response to the coronavirus pandemic, demonstrates clearly that Reservists too are ***'available for duty'*** 365 days per year.

Lastly, the deaths of two Reservists, Corporal Neville Hourigan and Captain Ian Kerr, acting without 'call-out' during the 1974 Brisbane Flood, demonstrate that the tasks given to Reservists, whether they be on usual Reserve service (Call for) or on 'Call-out', can lead to their death or to serious injury.

All wrongs described in this submission are allegations, and are not wrongs already proven.

Tax Free Pay

Reservists do not have to pay tax on pay received for service in the active Reserve (Reservists do pay tax for CFTS, as do Regular members). This tax free benefit is diminished by the consequence that Reservists are not able to claim work expenses for service as active Reservists.

During the time The Hon Paul Keating MP was Federal Treasurer, Reservists were required to pay tax, and this gave the government figures and experience of Reservists claiming work expenses. For example, compliance with the military dress code (haircuts, dry cleaning, laundering - those doing two hour night time parades needed to clean their uniforms three times in order to gain one day's pay), travel costs from place of civil employment to place of military employment for night time parades, and evening meals. The government went back to making the pay for active Reserve service tax free.

The advantage of tax free pay after nil tax deductions is well below the 15% loss to annual pay plus the 40% loss to weekly pay plus other losses in conditions described below. 'Tax free pay', additionally, is advertised as an incentive for young men and women to join the Reserve Forces. It is not, however, advertised as a partial reimbursement for any 'wage theft' or sub-standard conditions imposed upon those who join to serve their communities and their country.

Long Service Leave [LSL]

Ref 3 claims that LSL is not available to Reservists, but that claim requires detailed explanation. I did receive part, but not all, of LSL to which I was entitled, in the form of cash-in-lieu.

The rules for calculating LSL entitlements for Reservists are set out in PACMAN 5.3.14. The only service that counts towards LSL entitlement for active Reservists are full days of service. Part days do not count, and are not accumulated into an equivalent number or full days.

Depending on the type and pattern of service provided, that is, the number of part days required by that type of service, Reservists may have to serve 365 to 500 days and day equivalents of work in order to accumulate one year of LSL entitlement.

This compares unfavourably with the rules applied to Regular members (and Reservists on CFTS), for whom the rules allow:

- 1 year of accrued service from which LSL entitlement is calculated from 365 days of availability for duty, though this may require only 230 to 290 days of work; and
- where the Regular member (or Reservist on CFTS) is approved for part time leave without pay, or under other approved forms of 'flexible service', part days are to be included in the calculation of accrued service by Regulars for LSL purposes.

When the Australian National Audit Office [ANAO] (Ref 3) claimed that LSL is now available to Reservists, this is therefore not true with respect to accumulating LSL entitlements through service given in the Active (and Standby) Reserve. It is true, however, with respect to making a claim for that accrued LSL entitlement. This is because the rules only allow applications for LSL or cash-in-lieu to be made by Regular members (and Reservists while they are serving on CFTS). Thus, I might have ten

years accrued service for LSL reasons, (in my case including two years National Service) but unless I can win a CFTS position or gain admission back into the Regular Army, I will not be able to claim that LSL entitlement. That entitlement will then be lost to me when I am terminated, resign or reach compulsory retirement age.

My experience is that Defence can refuse an application for a Reservist's LSL entitlement, even when the Reservist is making the claim while on CFTS. This has been done on the basis that Defence authorities argued and decided that the Reservist is young enough to undertake another CFTS period of service later on in their career, before their service is terminated, and the Reservist can apply for their LSL on that next CFTS period. If that next CFTS does not occur, the LSL entitlement is lost.

This is one of a number of situations where an entitlement is denied the part-time (or temporary) member in order to induce the part-time member to continue serving or to rejoin the Regulars.

Recreation leave

Reservists have no entitlement to Recreation Leave on either an annual or an accrued basis. Thgere is no holiday leave loading. The Australian National Audit Office Review (Ref 3) describes this situation as different **'from almost all segments of the Australian workforce'.**

Sick leave

Reservists have no entitlement to Sick Leave on either an annual and/or an accrued basis. The provision of health care has undergone significant change during the last three decades, and may have done so further since 2016. The changes appear to have been cost saving measures for Defence, with Defence having to make further changes when the unreasonableness of the measures have been shown by Reservists suffering injury and illness. The military medical services unit at any barracks can be just a point for stopping bleeding and applying packs to head or limbs before the Reservist is then transported to a civilian medical centre or to a civilian hospital, where they are then registered as a civilian. Those who have maintained full readiness (for 'Call-outs') also received $600 per year to cover medical and dental expenses. Military dentists examined teeth but then required the Reservist to seek specified treatments from the Reservist's own civilian dentist.

Emergency leave

Reservists on active service have no entitlement to Emergency Leave (say, for an accident to or death of a family member), either on a paid basis or on an unpaid basis.

Superannuation

Reservists have no entitlement to Superannuation and its benefits. They may have superannuation in the military superannuation system because of contributions made during previous service in the Regular Forces or as a Reservist on CFTS. The Australian National Audit Office Review (Ref 3, para 6.68) states that Reserves are exempt from the provisions of the superannuation guarantee legislation that required employers to pay a specified percentage of an employee's income into a superannuation fund. ANAO expresses some emotion in criticising the situation for Reservists as appearing to be ***'anomalous'***.

Approximately, that is another 9% loss of total financial benefit to the active Reservist.

Summary impact

The losses then are in daily pay rates (40% more work or 30% pay loss), recreation leave (9% loss including the holiday loading), sick leave and emergency leave (4% loss), and superannuation (9% loss).

The gain from a 'Tax free pay' benefit (minus loss of tax deductions), is not likely to be above a 10-15% gain.

Reservists may only be getting 60% of the pay and conditions that they should receive from Defence.

Reservists acting to disclose these losses were acting reasonably, it is submitted, following statements from Parliament, the ANAO and Inquiry Reports which were advancing the same cause. Defence has held off the initiatives for reform in these efforts. Perhaps it is time for equity in pay and conditions for Reservists to be established. The reality of future service by Reservists in homeland natural disasters, on top of the thousands of tours conducted on a voluntary basis since 2000, may spark that change

ADDITIONAL MATTERS

There are other matters that can affect payment to Reservists, and may show unfair treatment and/or discrimination by Defence in Defence's leadership of Reserve Forces and Reservists. Two examples are provided involving appointment and advancement processes.

Now that the public interest in the use of Reservists is focused on domestic emergencies, rather than overseas operations, the Royal Commission may wish to consider forms of return to temporary defence members (such as National Service and the Ready Reserve) as well as part-time defence members in order to amass the necessary Commonwealth response.

The first example is a historical example relevant only if temporary forms of defence service are again contemplated.

Rank on Appointment as an Officer

Rank on first appointment of Reservists can be lower than the rank given to less qualified and equally qualified members of the Permanent Forces.

For officers gaining appointment after completion of an officer training course delivered by the Reserve Forces (the situation since the end of national service) and for those with university qualifications in engineering, they were disadvantaged by being appointed Temporary Lieutenants rather than Substantive Lieutenants. This again delayed their eligibility for promotion to Substantive Lieutenant and then to Captain and then to Major.

This appeared also to be the case for tertiary qualified scientists, surveyors, economists, and commerce / business graduates. Lawyers, doctors, and dentists appear not to have received the

same disadvantages, but I am not knowledgeable about the details of the treatment received by Reservists in these disciplines, either in absolute terms or in relative terms, vis-a-vis their Regular colleagues.

Seniority

All reservists are junior to all Regulars of the same substantive rank - Military Regulation 45 stated that ***'An officer of the Reserve Forces ... shall be junior to all officers of his (sic) rank on the Active List'***. Thus a Regular who joins the Reserves after, say, a three year service period at a particular rank is junior to a Regular member who has just achieved that rank in the Regulars. The disparity is increased when these two members are in a technical profession, where additional years of service, particularly in the beginning of their career, provides a marked lift in capability.

BASIS IN LAW

Defence argue that employment in the military is governed by the *Defence Act* (which attempts to exclude contract law), and by exemptions to the provisions of other legislation, such as Anti-Discrimination Law and Superannuation and Fair Work type legislation. The Defence system turns these legal restrictions into what are sometimes termed a 'Command discretion'. I am arguing that there should be a reasonable limit to the exercise of any command discretion with respect to pay and conditions of service members, while they all are achieving and maintaining readiness to engage in the challenges of deployments, as well as managing group and individual risks during such deployments in both community and operational settings, both in Australia and overseas.

It used to be the case that common law also put restrictions on legal actions that could be taken by Regulars against Defence - precedents that had grown in the law from the days of the British Empire. So, when HMAS Melbourne collided with HMAS Voyager, public servants on board Voyager could sue for negligence, but Defence sailors could not sue for damages. The difficulty was overthrown by Australia's High Court in *Groves v The Commonwealth*, where Justice Murphy made his famous remark,

> ***"Servicemen are not outlaws".***

This submission strongly suggests for the Commission's deliberations that a further truism be added to Australia's civil and military law, namely that,

> **'Reservists are not outlaws either'.**

2. Forms of Discrimination against Reservists other than alleged 'Wage Theft'

PAY & CONDITIONS

The alleged 'wage theft' practices of Defence against Reservists is addressed in another part of this submission.

That said, an important distinction across various forms of discrimination affecting Reservists is the forms that are systemic and/or ensconced permanently in the Defence leadership and management, versus the forms of the discrimination that are occasional or 'local' within particular corps, formations, barracks, ships or units, etc., and/or are person(s) to person(s), including commander(s) to subordinate(s).

The alleged 'wage theft' (and certain rank-on-appointment and seniority structures) is a major systemic discrimination, introduced top-down upon Reservists from the highest levels of Defence, either never to be addressed or addressed only after decades of Parliamentary committees, quasi-judicial inquiries and/or external commissions and inspectorial national offices admonishing Defence for Defence's poor countenance.

This submission is advancing the proposition that such wrongs upon Reservists should not be part of their training for reaching and maintaining readiness for deployments on natural disasters. Pay and conditions are not the only aspect of discrimination, unfair treatment and bullying faced by Reservists, for which they deserve relief.

This part of the submission focuses on aspects of discrimination that can be systemic and everlasting, like 'wage theft', but can also be occasional and / or 'local'.

ADMINISTRATION

EMPLOYMENT

Performance Reporting

The completion of annual performance reports, supported by early feedback from interim performance interviews and reports, are critical to the career management of Regulars and Reservists. An example of an occasional and local form of 'Regulars First' discrimination comes from a staff officer's report following a complaint from a Reservist that the Reservist had not received interim interviews or an annual performance report for two years:

> ***Around that time I was responsible to the*** [commander] ***for ensuring the numerous Performance Appraisal Reports [PAR] for all personnel were raised and processed in accordance with extant policy. At that time most of the PARs for the*** [Regular] ***officers had been processed or near to completion. A number of PARs had not been raised, and these were primarily*** [Reserve] ***PARs.***

This is one of a myriad of cases where Regulars came First, with Reservists sometimes not at all.

All wrongs described in this submission are allegations, and are not wrongs already proven.

Qualification Course Gradings

An example of a 'local' (at Command level) but long-lasting discrimination against Reservists nationally within one service, was the practice of refusing trainees on the course for Reservists the same treatments given to trainees on the same course for Regulars. Specifically -

- Gradings. There was a special process initiated part way through the courses for Regulars which allowed the best performed Regulars to be assessed for the highest grading of the qualification gained from the course. This special process was not employed during the courses for Reservists, thus preventing them from being considered for the highest grading. This 'Regulars only' form of alleged discrimination was applied to talented Reservists, to Reservists recently returned from operational deployments on CFTS, and to Reservists who were ex-Regulars. An ex-Regular Reservist disclosed the practice using a comparison of gradings given to three Reservist trainees whose assessments were better that twelve Regular trainees who did obtain the highest grading - this comparison was gained from researching, off the database, the results from courses conducted for both Regulars and Reservists during previous years;
- Weightings. Weightings of individual results, so as to determine an overall rating given to a trainee on a particular subject, were mathematically favourable to trainees on courses for Regulars, and these weightings were incorporated into the computerisation of the results database. For trainees on the course for Reservists, however, a direction was given for individual results given to trainees to be reduced until the overall result provided by the computer was not mathematically favourable. This is allegedly a form of 'Regulars only' discrimination
- Practice with Feedback. A trainer, who was in the Regulars of another country, sought to have a female trainee on a course for Reservists assessed for the highest grading. A new process was decided for the female trainee, based on her results for one of the coming activities. The female trainee was required to perform the activity without any practices, where trainees on the courses for Regulars were given such practice with feedback from the assessors to assist a better outcome in the final form of the activity.

The disclosure about gradings was rejected as a form of discrimination by the highest levels of Defence because:

> ***'... there was a credible, alternative inference to be drawn from the comments made by (course manager), being that (the course manager's) direction was given on the basis that*** [Reservists] ***would generally not be suitable for a (high) grading given their background and experience'***

This defence to the direction appears to be an example of the 'Reservist Deficit' form of discrimination being used by the highest levels of Defence to rebut a disclosure of the 'Regulars only' form of discrimination. This may indicate that discriminatory practices are so inculcated into the thinking of Defence that its commanders may be unaware that they are, in fact and outcome, being discriminatory.

The 'Weightings' and 'Practice with Feedback' disclosures were refused investigation by the highest levels of Defence.

Employability

A direct example of the 'Reservist Deficit' form of discrimination may be found in the words used by a superior to a subordinate, where the subordinate was an ex-Regular who had been an instructor

on the relevant Regular courses for six years, and, during that six years, as a Reservist, had completed a 5-month period completing operational duties on CFTS:

> ***'... is unlikely that a Reserve officer would have the experience, knowledge and the background to be employable as an instructor on an*** [for Regulars] ***course, for example.'***

> ***'Those are*** [for Regulars] ***courses, 6 weeks long, 5 weeks on*** [one subject]***. I dont think you have the credibility as a Reserve Officer to be able to instruct on the*** [for Regulars] ***courses. I would not be looking to put any Reserve Officers onto the*** [for Regulars] ***courses. Quite apart from you, there are very few Reserve Officers who could carry that off.'***

Supervisory responsibilities

Defence through the media made much of the saying when addressing military justice and unacceptable behaviour issues involving Regular members of Defence. (Quote)

> ***"The standard you walk past, is the standard you accept"***

A different philosophy, however, has been used in responses by the highest levels of Defence to disclosures made by an ex-Regular about unacceptable behaviour towards Reservist trainees for whom the ex-Regular was the training facilitator:

> [The unacceptable behaviour] ***is not a matter concerning your service. To the extent that any discriminatory grading practices existed, these would have affected*** [Reservist] ***members being graded at the*** [course]***.***

HEALTH SUPPORT

The September 2013 ANU Report, 'Exploring future service needs of Australian Defence Force Reservists', is extensive in its analysis and identification of health issues affecting Reservists, concluding, in part, that there was a need for a longitudinal study into Reservist health and wellbeing: (Quote)

> ***The potential study should be developed to include variables associated with organisational climate, job satisfaction, family, relationships and civilian employment over time. In addition it should be developed to capture members throughout their Defence career and beyond, transferring from Reserve to Permanent / Regular or Permanent/Regular to Reserve.***
>
> ***...***
>
> ***Evidence based policy changes in Defence and DVA will enhance Reservists' ability to access support when it is needed and improve their health and well being, and will help retain an important component of the Total Force capability***

'Call-out' for many Reservists may increase the difficulties with employment related (and other areas of) transition imposed as a result of national or regional emergencies. Pandemics may now add to

the natural disaster scenarios that led to this Royal Commission. Studies are needed, and are needed to incorporate these recent scenarios not in evidence at the time of the ANU study.

The analysis of the Reservists' situation is relevant. The analytical framework provided by the ANU study has wider application than just to health support. Examples of insights provided by the ANU Report, that should be kept in mind when considering other aspects of Reserve service, include:

a. The extent of heterogeniety in the situations faced by Reservists - ***'ADF Reserves are heterogeneous populations'*** - including special mention of Reservists serving without being part of a formed unit (or ship's crew).
b. The diversity and the uniqueness of the issues faced by Reservists ***'because of the added factor of civilian employment and their "part-timer" status in the Defence organisation'***. [Thus Reservist veterans should be regarded not as a subgroup of Regulars but as a 'distinct group with particular needs'].
c. The need to understand ***'the complexity of triggers for service and deployment-related stressors and the resultant impact on mental health for Reservists'***.
d. Defence systems, policies and norms ***'impose ADF standards of life and service-life balance to those with competing civilian lives, rather than treating Reserve services as a unique form of service which balances the two cultures' expectations, obligations, and norms'***.
e. The culture of the ADF (one favouring full time immersion and commitment) ***'creates an environment that systematically and structurally marginalises Reserves ... and which is reinforced through active discrimination against and bullying of the Reserve'.***

MILITARY JUSTICE

OVERVIEW

The above conclusions by ANU (2013) give rise to three considerations when evaluating the access available to Reservists to fair treatment in the military justice system:

a. Whether or not problems develop for Reservists because military law designed for Regulars in the service circumstances experienced by Regulars, have been imposed upon Reservists, without regard to the unique and/or complex and/or diverse circumstances faced by Reservists - the, say, 'insufficiencies in military law' issues;
b. Whether or not problems develop for Reservists because of the marginalisation, active discriminatory and bullying that is alive in the ADF cultural response towards Reservists - the, say, 'anti-Reservist applications of military law' issues;
c. Whether or not problems develop for Reservists because the military justice system, including the Defence Chiefs, Office of the Inspector General [OIG] and Office of the Defence Force Ombudsman / Commonwealth Ombudsman [COO], participate themselves, by omission or commission, in that unacceptable behaviour towards Reservists - the, say, 'bias in decision-making issues' regarding complaints by Reservists.

Actual events may contain a mixture of these three categories of disadvantages faced by Reservists in military justice matters, and this mixing may show up in examples given below of events that may demonstrate a primary form of one type of issue.

All wrongs described in this submission are allegations, and are not wrongs already proven.

This submission is looking at what needs to be reformed about the treatment of Reservists, for the reserve effort, in preparing for deployment and in the deployments made, can be optimised. If Reservists are not worthy of equal pay, are Reservists worthy of proper justice procedures? If Defence retaliates when Reservists dare to disclose and complain about their pay and conditions, does Defence also retaliate when Reservists also demand to have their disclosures and complaints properly processed according to the justice system provided to Regulars?

That is why the submission is considering the situation for reservists in the military justice system.

INSUFFICIENCIES OF MILITARY LAW FOR RESERVISTS - INSIDE THE BARRACKS

Continuity of Service

Regulars are continuously employed in Defence, whereas Reservists are only continually employed. Military law may be designed for ensuring fairness under an assumption of continuous employment of service persons, with less explicit orders and regulations for the diversity, complexity and uniqueness of the situations that can arise for Reservists in continual employment. One set of assumptions may not suit the diversity of situations Reservists bring to the airstrip, the barracks or the ship.

An example of the situations that can occur for the Reservist is with the order given below. An example of such an order (words similar) and some responses from Defence authorities applicable to all Reservists, may demonstrate the alleged discrimination and / or abuse:

> ***I have been advised by the*** [higher HQ] ***Legal Officer that this Headquarters is not permitted to become involved with issues concerning your*** [complaint] ***due to the nature of your complaint.***
>
> ***The concerns you have espoused to*** [higher authority] ***towards the decisions I have made regarding your employment within*** [this formation] ***have been noted. Based on information provided by the*** [higher HQ] ***Legal Officer relating to these concerns, I have determined that to maintain an appropriate level of distance between you and*** [the formation] ***I command, you are not required to parade at this or at any*** [part of the formation] ***until I direct otherwise.***
>
> ***Your directed point of contact at this Headquarters is the Chief of Staff on*** [phone number]

An Order not to parade until a commander directed otherwise (in one case lasting for 16 months), places the relevant Reservist at risk of several disadvantages:

- Loss of income, where the Reservist is dependent on Reserve employment to any extent;
- Loss of continuity of service necessary to maintain an entitlement for long service leave;
- Loss of efficiency rating and readiness, by non-completion of fitness tests, non-completion of weapon skills and proficiency tests, and non-attendance at compulsory annual administrative briefings (safety, acceptable behaviours, fraud controls, and similar);
- Loss of one or two Annual Performance Appraisal Reports, the last five of which are used to determine postings and promotion;

- Vulnerability to disadvantageous transfer, as teams reorganise and reallocate for the Reservist's long absence;
- Vulnerability to termination or other disadvantage if the Reservist complains about the order;
- (with an order to the Reservist only to contact one officer), loss of all computer records at the Reservist's computer work station, if that one contact does not act to protect those documents.

The issue here is the loss of the right or entitlement to serve, where such a break in service is readily identified for Regulars under military law, which requires formal procedures for such a break to be forced upon a Regular. The Reservist, by comparison, is always starting and finishing periods of service, and can raise circumstances where the break can be ordered without any formality.

Military law could define the processes for starting and finishing periods of service for Reservists, after a consideration of some of the debated issues arising from the above example.

Right to Service

Reservists may not be entitled to any expectation or right to service, except by the direction of their commander, the highest levels in Defence have held.

> ***Again, the situation might be different if*** [she/he] ***was a permanent ADF member deprived of his everyday job, but Reservists are employed 'as required' by their commanders. I find that the order not to parade by*** [the commander] ***was not a reprisal or a form of unacceptable behaviour, but entirely reasonable in the circumstances.***

and

> ***A*** [commander] ***is not legally obliged to provide training or duty to*** [a Reservist***, and it therefore follows that a member can be directed not to parade (perform duty).***

and

> ***it would have been preferable if the reason for the direction that the member was not required to parade was on the basis that there was no duty or training requirement for*** [him/her]***. However the reasons contained in the letter do not render the decision not to allow*** [her/him] ***to parade improper or unlawful.***

and

> [The member] ***has claimed the direction that*** [he/she] ***was not required to parade was an improper or unlawful suspension from duty, regardless of the reasons put forward for its imposition. The implication from this characteristic is that*** [the member] ***has an entitlement to perform duty and is being unlawfully suspended or prevented from performing that duty. ... However, this Inquiry is of the view a direction given to*** [a Reservist] ***that*** [the member] ***is no longer required to parade is simply informing the member*** [she/he] ***is not being authorised to perform any further duties, and within the authority of the COMD/CO. Accordingly, this Inquiry finds a direction to*** [a Reservist] ***that*** [he/she] ***is not required for duty is not a 'suspension from duty', because*** [she/he] ***has no right to perform duty, and is not on duty unless authorised by the chain of command.'***

After the above order was given, a similar order was given to Regular servicepersons on HMAS Success, and the military and Parliamentary processes arose within days to ensure that such an order and the associated processes were fair and legal.

It is not here argued whether these reasonings are correct or incorrect, only that they were put into force.

Military law may need a rule or benchmark of a minimum entitlement for Reservists for service if none exists, such that the losses to the Reservist from such an order are reasonably contained, protecting LSL entitlements, efficiencies, readiness status, posting, computer records and natural justice.

Vulnerability to suspension from duty

DI(G) PERS 35-3 Management and Reporting of Unacceptable Behaviour, at para 69 titled Suspension of an ADF member, states that:

> ***Sections 98 and 99 of the Defence Force Discipline Act*** *empower a military commander to suspend a member from duty when the member is suspected of committing an offence that is being investigated or when the member has been charged with a civilian or Service offence or other conviction, pending the decision of a reviewing authority.*

This rule appears to have been applied to Regulars on HMAS Success when sailors were ordered off their ship.

It has, however, been held by the highest levels in Defence that Reservists, who are not being investigated for an offence and who have not been charged with a civilian or Service offence, can be lawfully ordered out of their unit/ship when they have made a disclosure about their treatment by a commander:

> ***The direction that there was no requirement to parade was not a 'suspension from duty', which is provided for under the DFDA for a suspected offence.*** [Higher HQ Legal Officer] ***rejected*** [the member's] ***contention that because DI(G) PERS 35-3 did not provide for other forms of suspension when handling complaints of unacceptable behaviour, the direction must be unlawful.***

Military law may need a definition of ***'suspension'*** that can be applied to Reservists if this definition is different to that applied to Regulars, with a clear statement of the circumstances when they can be suspended. Limits to the periods of suspension that can be applied, and explicit measures and responsibilities for protecting the LSL entitlements, efficiencies, readiness status, posting, and computer records, also need definition in forms of military law publications that are well known, respected and followed by the highest levels in Defence.

Provision of natural justice

Reservists may be treated as 'exceptions', thereby justifying Reservists being treated outside of the provisions of military law applied to Regulars:

All wrongs described in this submission are allegations, and are not wrongs already proven.

> ***While correct administrative procedures must generally be followed at all times (even more so when dealing with difficult members), as with most legal rules there are usually exceptions for "exceptional circumstances", The question then, is whether these are 'exceptional circumstances'***

and

> ***In any event,*** [Higher HQ Legal Officer] ***did not agree with the characterisation of the direction as a 'suspension'. Nor was it a form of 'administrative' suspension, as the issue is simply not applicable to*** [a Reservist]***. The direction was that as a part time member*** [she/he] ***was not required to perform further duty (which is different to the situation of a full time member).***

and

> ***However, on the subject of providing procedural fairness to*** [the member]***,*** [Higher HQ Legal Officer] ***believed it was not necessary, but not as an 'exception to the general rule' which would normally require the issuing of a 'notice to show cause'. Rather*** [Higher HQ Legal Officer] ***stated that treating the direction as an exception to the general rule invited its characterisation as an 'administrative action' against*** [the member] ***which was incorrect. Rather it was a direction*** [she/he] ***was not required to parade, not a suspension, made for the benefit of*** [the member] ***and to assist*** [the formation] ***to allow*** [his/her] ***complaints to be investigated.***

Military law may need to be clear as to exceptions/exemptions to the military law that are to be applied to Reservists. Clarity may need to take this issue out of the realm of opinions casually given by legal officers and described instead in publications of military law that the highest levels of Defence will respect and follow, and to which legal officers can refer. The black and white situations faced by military law in dealing with Regulars requires interpretations to stretch over to Reservist situations (such as they have another civil job), and such interpretations are vulnerable to abuse.

Providing a safe workplace

The example order raises the issue as to what a commander can do to a Reservist who complains that he/she has been denied natural justice. Another issue that arose from the example, during the justification of the order not to parade, was the rights of a Reservist to a safe workplace:

> [The member] ***was effectively saying*** [he/she] ***was fearful of continuing to work at*** [the higher headquarters]***, it became untenable for*** [her/him] ***to remain there***

and

> [Member's] ***continued presence was likely to exacerbate the situation and interfere with the investigation of his complaints.***

Reservists who face or who are held to face an unsafe workplace can simply be sent home without pay. This is both different, and thus demonstrably unfair, when measured against the types of protection given to Regulars facing unsafe workplaces, who are entitled to receive protections including security escorts, case managers and interventions.

DI(G) PERS 45-5 - Defence Whistleblower Scheme at para 34, and Annex A para 14 b, set out that:

All wrongs described in this submission are allegations, and are not wrongs already proven.

> ***There may also be a requirement for the provision of physical security of the whistleblower and special security provisions may be considered on a case-by-case basis. For example, security escorts may be provided***

or more moderately

> ***In these circumstances*** [whistleblower whose identity may be known]***, specific measures to protect the whistleblower against reprisals and discrimination will be taken if necessary.***

and

DI(G) PERS 35-3 Management and Reporting of Unacceptable Behaviour at para 106 'Victimisation and recurrence', placed the onus on commanders to provide any intervention:

> ***If the commander or manager becomes aware of recurrence or victimisation, immediate intervention should occur in accordance with this instruction.***

The intervention options in that instruction included Temporary Transfer but did not include the option of being sent home without pay until directed otherwise.

For Reservists, the purported protective measure, such as to be sent home without pay for extended periods, including periods in excess of a year, can be or reasonably perceived to be part of the victimisation or retribution. The measures that can be taken against Reservists can thus be unreasonable, where the Defence Instruction on Unacceptable Behaviour required commanders

> ***... to take reasonable steps to ensure there is no victimisation or retribution during the course of any investigation or prosecution and beyond***

Military law may need to make clear whether Reservists can be sent home to ensure a safe workplace for the Reservist, or to prevent any future disclosures or complaints by the Reservist about future decisions or actions that might be taken against the Reservist's employment.

Standard of Proof

Another difference imposed by Defence (without stating it is correct or incorrect) regarding disclosures and complaints of discrimination concerns the standard of proof required to demonstrate discrimination.

Table 1 shows the results of research conducted by an ex-Regular into the allocation of gradings to Reservist and Regular trainees on courses that were discussed earlier under the heading ***'Qualifications course gradings'***. The highest levels of Defence have determined that these comparisons may be evidence of unfair treatment, but not of discrimination.

In making this determination, the highest levels of Defence required that, for disclosures and complaints against Defence commanders, the standard of proof required is that any disadvantages imposed must be based solely on the members status as a Reservists.

> ***There was no policy or direction that*** [high grading] ***would not be given to students on the*** [Reservist] ***course solely based on their status as*** [Reservists].

For Defence public service managers, however, and for all other employers of persons providing Defence Service in the Active Reserves, the standard of proof required is that the employee's status as a Reservist forms only part of the reasons for any disadvantage imposed on their employment [Defence Reserves Service (Protection) Act 2001, eg Part 4 Division 3 clause 16]

> ***An employer must not, ,,, for reasons that include a prohibited reason, do or threaten to do any of the following*** [underlining added]***:***
>
> ***(b)* discriminate against an employee in his or her terms and conditions of employment**

TABLE 1: THE COMPARISON OF RATINGS AND GRADINGS ARA and ARES ... ON ... COURSES						
Grouping	Name & Service	**Given a 'HIGH' Grading**	High Performances		Ordinary Performances	
			Rating for 'Analysis'	Rating for 'Demonstrate Analysis'	No. of Satisfactory Results	No. of Re-sits fm Unsatisfactory Results
	Max Result→		Well Developed	Effortlessly	NIL	NIL
Band 1	Reservist	**NO**	Well Developed	Effortlessly	3	1
	Reservist	**NO**	Well Developed	Easily	NIL	NIL
	Reservist	**NO**	Developed	Effortlessly	1	NIL
	Regular	YES	Developed	Effortlessly	2	1
	Regular	YES	Developed	Effortlessly	3	NIL
Band 2	Regular	YES	Developed	Easily	2	NIL
	Regular	YES	Developed	Easily	2	NIL
	Regular	YES	Developed	Easily	3	NIL
	Regular	YES	Developed	Easily	3	NIL
	Regular	YES	Developed	Easily	5	NIL
	Regular	YES	Well Developed	Usually	2	1
Band 3	Regular	YES	Developed	Usually	3	NIL
Band 4	Regular	YES	Developed	Generally	3	NIL
	Regular	YES	Developed	Generally	3	1
	Regular	YES	Developed	Generally	4	NIL
Notes	1. 'HIGH' is the highest grading for future employment - '...'					
	2. 'Band 1' describes results only one rating below the max results possible for 'Analysis' and 'Demonstrate Analysis', 'Band 2' describes results only two ratings below the max results, etc					
	3. Results within any Band are ordered according to lower number of ordinary performances					

Military law may need to set out in one authorised publication, respected and followed by the highest levels of Defence, what behaviours towards Reservists constitute unacceptable behaviours, the standards of proof to be applied in situations that can be faced by Reservists, what exemptions, if any, have been gained by Defence for temporary and part-time service members, and when those exemptions may be applied to Reservists, in order to raise this matter from the casual opinions of commanders and their legal advisers into such publications able to be referenced by all.

If the anomaly in standards of proof is real, military law may need to bring laws affecting discriminations against Reservists in their military employment up to modern standards expected by the community in preventing discrimination.

Again, we remind that this submission is looking for any evidence that military justice is giving Reservists access to only, say, 60% of the law that the military system gives to Regulars, in the same way that Reservists may only be getting 60% of their proper pay - is there 'justice-theft' as well as 'wage-theft'?

Credibility of evidence

Discrimination can act to reduce the credibility of evidence from Reservists, versus the higher credibility given to Regular members of the same rank and to members of higher rank.

The issue becomes critical where the records relevant to disclosed discrimination go missing, or worse, are destroyed. In the case of the separate Regular and Reservist courses in Table 1, the ex-Regular who researched the records and then made the disclosures was told by letter that the records no longer existed. When the ex-Regular demonstrated that he/she had the relevant information from those records, Defence claimed that the records had been recovered, but would not allow the ex-Regular controlled access to those purportedly recovered records so that the ex-Regular could show the Inquiry where evidence existed of discrimination against two female Reservist trainees.

Further, Regular superiors do not lose credibility before their commanders for the actions taken by those Regular superiors against Reservists after the disclosure is made, actions that impact upon the Reservist and/or upon any investigation of the disclosure and complaint. So an ex-Regular was required to submit the disclosure and complaint to the commander against whose actions the disclosure and complaint about discrimination against Reservists was made. Thereafter:

- the commander properly referred the disclosure to higher headquarters, but immediately moved to an acting position at that higher headquarters, in which acting position the commander interviewed the ex-Regular and rejected acceptance of the disclosure and complaint;
- the commander directed a performance report about the ex-Regular that found the ex-Regular guilty of civil and military offences, the commander's subordinate destroying the notes on these offences purportedly made by witnesses;
- when the disclosure and complaint was resurrected by the ex-Regular to higher command, the commander accepted the role of Quick Assessment Officer [QA] into the disclosure and complaint, despite the conflict of interest the commander had in investigating herself/himself;
- in the QA role, the commander breached the scope of the QA procedure and conducted an investigation into the disclosure and complaint, interrogating the ex-Regular about the disclosure and complaint made about the commander; and then
- recommended the disclosure and complaint be dismissed.

Ultimately, the ex-Regular was removed from the national Defence entity and marked never to be return by a higher Commander who advised the commander; (Quote)

> ***There are no adverse findings against you or your staff, however it seems that the correct administrative decisions were not always followed. While I acknowledge the difficulties of this particular matter, I ask that even in such cases you and your staff pay particular attention to the processes in references [on 'Inquiries', 'Performance Reporting', 'Redress' and 'unacceptable Behaviour'***

Military law may need to provide processes where disclosures and complaints about discrimination are determined on the relative merits of the evidence rather than on relative rank. Any claim that this is being achieved now has not been demonstrated for Reservists in these examples.

INSUFFICIENCIES OF MILITARY LAW FOR RESERVISTS - OUTSIDE THE BARRACKS

'Charging' Reservists with Attendance Offences

This situation can arise between the Reservist and their chain of command when the employment or private circumstances (e.g. serious medical issue for a family member) prevents the Reservist from attending a particular parade, or a serious private circumstance requires a temporary absence from a continuing parade.

The first case demonstrates a commander extending her/his command authority into times when the Reservist is not on duty but the Reservist may have responsibilities to the Reservist's employer, business, or family or community.

The second case shows the bias in the system against Reservists where they are not entitled to emergency leave on either a paid or an unpaid basis.

Attendance and AWOL matters for Reservists can be well managed in Reserve units that employ a system of parade cards (program of training dates - obligatory, non-obligatory and / or voluntary parades) and appropriate leave application forms. Regular units, however, to which Reservists can be posted in what have been termed 'national postings' (Reservists filling Regular establishment positions or roles on a quasi-full time or part time basis), have tried to manage the attendance of these Reservists without using or having parade cards and appropriate leave application forms. Processes used can be announced to be informal. The risk to Reservists subjected to bullying, discrimination, personal abuse or retribution is that work carried out under standing informal arrangements can be turned into military offences by the Regular chain of command who announce a requirement, after the work is done, that formal procedures had to have been followed.

Typical work that can be subject to such reversals includes annual requirements for meeting 'readiness' criteria, such as completing annual performance reports, undertaking basic fitness tests, passing annual weapon practices, and attendances at periodic medical and dental tests. One informal approach is to brief reservists beforehand that they are to meet these requirements independently as best suits them, sometimes with a stated allowance of paid time for these activities, but then turn on the Reservists afterwards for not formally getting prior approval for each activity.

Additionally, Regular members are properly charged with AWOL or attendance offences under the Defence Forces Discipline Act [DFDA], in which the Regular members are given the particulars of any

evidence against them, a disciplinary hearing for which they are given representation, a finding with reasons, and a review by legal officers. Reservists, however can be found guilty using an administrative performance report without (a) being given the particulars, (b) a hearing, (c) reasons, and (d) any legal check, capped off by a statement condemning of the Reservist that he/she ***'should have been DFDA'ed'***.

It is recommended that Military law needs to do three things here if it is to be applied closer to 100% to Reservists rather than 60%:

a. The ability of the chain of command to extend beyond times when the Reservist is on duty and for locations other than 'the base, the ship or the barracks' needs to be defined with comprehensive examples;
b. Entitlements to emergency leave need to be provided with guidance on circumstances for which leave needs to be provided (with appropriate forms and processes developed to suit);
c. Regular units and ships provide a parade card for their Reservists or a written policy with procedures to be followed where freestyle arrangements are used for specified activities, both signed by the relevant commander, which can only be varied by production of a new card or policy applicable only to events occurring after dissemination by signature of the new card or policy to Reservists.

Paid Parades outside of 'the Barracks'

A routine example here is the completion of an agreed scope of work at a Reservist's home as well may be happening now during the CAVID 19 pandemic. In my experience, this aspect does not encounter many problems.

An example that does encounter difficulties is where Reservists are subject to disciplinary action, and paid parade time is restricted to limited meetings with legal officers, formal interviews with Inquiry Officers and/or any hearings.

A Reservist was found guilty within an 18 month period of breaches of duty, fraud, being AWOL, insubordination, misuse of the Defence complaint process (constituting, it was found, that the Reservist was a perennial complainant), and disobeying a lawful command. The Reservist was also subject to allegations not put to him/her that the he/she had made threat, false accusations, and had engaged in blackmail. None of the findings were made by disciplinary (DFDA) processes, but by using administrative processes that did not entitle the Reservist to particulars of the offences, a hearing with legal representation, or detailed reasons for the findings. After 8 years of demonstrating bias and other defects in the findings and processes, and taking matters to the highest levels of Defence, all of the findings were reversed or put aside. See Table 2 for a summary.

TABLE 2: FINDINGS - OFFENCES BY RESERVIST DETERMINED BY USING MANAGEMENT TOOLS - Performance Appraisal Report [PAR] & Quick Assessments [QA]		
Finding	**Wording of Finding**	**Inquiry Outcome**
1. Month 2 **<u>Misuse of paid parade hours (fraud)</u>** - Findings made in 2 PARs and 2 QAs - denied particulars (date, times, locations, specifics of activities, contents) - denied a hearing	[The Reservist] ***was ... found to be reviewing paperwork unrelated to the training*** [the reservist] ***was observing;*** - - ***Though I cannot remember the topic of the material written on that pad I remember confirming it was not military related;*** ***- The QA ... found the PARs to be accurate;***	***Month 63.*** The PARs were set aside as ***'defective'*** because the Reservist was not given ***'the opportunity to address those alleged concerns'***; and because the formation ***'failed to fully investigate and finalise any of the complaints submitted'*** **during** months 1 to 10. QA ***'was procedurally defective in a number of areas'*** - (***'was flawed as it took the form of a de-facto*** [inquiry] ***and ... probably lacked ... independence'***);
2. Month 2 **<u>Breaches of Duty</u>** - Findings made in 2 PARs and a QA - denied particulars (date, times, locations, specifics of activities, contents) - denied a hearing	***... missed activities*** [the Reservist] ***was expected to attend (conference and recon), and turned up and departed as*** [the Reservist] ***saw fit;*** ***You cannot meet timings. DFDA action should have been taken against you;***	***Month 63.*** The PARs were set aside as ***'defective'*** because the Reservist was not given ***'the opportunity to address those alleged concerns'***; and because the formation ***'failed to fully investigate and finalise any of the complaints submitted'*** during months 1 to 10. QA ***'was procedurally defective'*** - (***'was flawed as it took the form of a de-facto*** [inquiry] ***and ... probably lacked ... independence'***);
3. Month 6 **<u>Breach of duty</u>** - Finding made in a PAR -denied confirmation of approved leave) - denied a hearing	***... falling asleep ... when*** [the Reservist] ***was observing the conduct of*** [night time training in the Reservist's accommodation / meal area]	Month 102 The PARs were set aside as ***'defective'*** because the Reservist was not given ***'the opportunity to address those alleged concerns'***; and because the formation ***'failed to fully investigate and finalise any of the complaints submitted'*** during months 1 to 10.
4. Month 6 **<u>AWOL</u>** - Finding made in a PAR - denied confirmation of approved leave) - denied a hearing	***... Fails to adhere to timings and arrives and departs when it suits*** [the Reservist]*;*	***Month 63.*** ***This matter is linked to allegations of*** [the Reservist] ***being AWOL and also that*** [he/she] ***was fraudulently claiming compassionate leave.*** ... ***found that*** [the Reservist's] ***'absence from duty' during*** [parade days in month 6] ***was approved by*** [the Reservist's] ***chain of command..***
5. Month 6 **<u>Fraud</u>** - Finding made in a PAR - denied a hearing	***You are disingenuous. Your submission of a leave application requesting COPAS as a member of the*** [Reserves] ***defies logic. It is reasonable to assume that you are aware of your conditions of service.***	***Month 63.*** ***... the Inquiry found no evidence of fraud to*** [the Reservist] ***request for*** [payments] ***... it was incorrect and not appropriate for the unsupported inferences to 'borderline fraud' being included***

6. Month 10 **Misusing the complaint process** - Finding made in a PAR - denied a hearing	***... Some of your grievances may be legitimate, but some are not. To this effect you are querulous by nature. ... I will also recommend that you not be paid ... for any further*** [complaint] ***action taken by you*** ... [the Reservist] ***general style and manner is that of a perennial complainant. ...*** [a member] who ... sees the [Reserves] ***as a source of income. ...*** [The Reservist] ***should be issued with a Notice to Show Cause*** [and] ***be issued with a termination notice. He can still resolve his outstanding administrative issues as a non-defence member***	***Month 102.*** The commander believed the Reservist ***'was misusing the*** [complaint] ***process to his own detriment'.*** ***The evidence is insufficient to substantiate the allegation'*** regarding the alleged attempt to dissuade the Reservist from making a complaint, and an allegation of reprisal
7. Month 10 **Insubordination** - Finding made in a PAR - denied a hearing	[The Reservist's] ***lack of desire to see me and discuss*** [the Reservist's] ***grievances is insubordinate***	***Month 102.*** The PARs were set aside as ***'defective'*** because the Reservist was not given ***'the opportunity to address those alleged concerns'***; and, because the formation ***'failed to fully investigate and finalise any of the complaints submitted*** [during months 1 to 10].
8. Month 18 **Disobeying Lawful Order** - Finding made in a QA - denied a hearing	***... I note that ...*** [the Reservist] ***was directed not to submit any further submissions in support of*** [the Reservist's] ***complaints as they were already well documented. ...***	***Month 102.*** ***This review confirms ...*** [that the Reservist's] ***complaint that he was never formally ordered by*** [a commander] ***... to stop submissions can be sustained.***

ADDENDUM: ALLEGATIONS ALSO MADE ABOUT THE RESERVIST

Finding	Wording of Finding	Inquiry Outcome
7. Month 19 **Making a threat** - denied a hearing		***Month 102.*** ***The ... Inquiry found 'there is no evidence that*** [the Reservist] ***chose the manner of complaint through the PAR process as any form of threat***
8. Month 18 **Making false accusation** - denied a hearing	***I note that*** [the Reservist] ***has been actively involved in ... complaint-making regimes ... papers for*** [making disclosures]***, ...*** [chapter] ***for a book on 'bullying'. Therefore I find that it is unlikely that the delay in complaint was due to fear more likely*** [the Reservist] ***did not in fact believe that what happened ... was unacceptable behaviour.***	
9. Month 18 **Blackmail** - denied a hearing	***While it is possible to interpret this letter, which purposely only refers to the allegations ... as a form of blackmail, where a demand for a favourable PAR is made in exchange for not taking the matter further, I do not find that this was what was intended***	

Defence, however, found that the Reservist was not entitled to payment for the days he/she logged and progressively reported in seeking justice properly through the chain of command. The commanders, against whose findings the Reservist had taken defensive action according to Defence Instructions, had determined that such defensive actions were not an activity that contributed to Defence combat capability.

The highest levels of Defence found that it was **not** an unreasonable use of a commander's discretion to refuse payment for time spent by a Reservist in defending against such findings and actions by those commanders, on this ***'combat capability'*** rationale.

As matters stand, the time taken to gather and collate evidence, obtain documents and detailed reasons from commanders, overcome defective processes and prepare all submissions and other reasonable activities undertaken in defence of adverse findings and allegations, can be expected to be completed by Reservists without payment. Regulars, by comparison, are paid for all times spent in service, including times expended in defending against allegations and findings against them.

A parallel issue is whether Reservists, who are ordered not to parade at their place of posting for reasons of his/her own safety, or to prevent any further disclosures and complaints, are in fact on parade during these times, acting on orders purporting to be in the interests of Defence.

It is recommended that military law may need to address these rationale and these outcomes, and provide processes that allow related remuneration decisions to be made by authorities that are independent of the parties involved in the defensive actions/orders not to parade, and by authorities who, unlike the commanders, may not be perceived as having a conflict of interest in the remuneration decisions.

The submission is continuing to list situations where military laws designed for the circumstance of the Regular soldier have been written without a mind to the Reservist circumstance. The submission wants to show that military justice, too, like pay, is being denied Reservists. Then the submission proposes that such wrongs in the treatment of Reservists need to be reformed by the Commonwealth, which is seeking to train its Reserve forces to achieve and maintain readiness for deployment, and then plans to deploy those well trained and well led forces into natural disaster situations.

The list can be very long, but the submission only needs to be long enough to show the breadth of the failings in military law, at least regarding how it is applied by commanders. Some more examples are useful.

Orders affecting Private Activities, Civilian Employment or Civilian Business

An 'in barracks' example of a Defence commander extending her/his authority over the private life, employment and/or business of a Reservist has already been presented in this submission. That is, charging a Reservist with being AWOL when private issues or work issues prevent the Reservist reasonably from attending, say, a weekend parade. Under this new heading, examples of Defence commanders extending their authority over the private life, civilian employment and/or commercial business of a Reservist are offered to assist the Royal Commission.

All wrongs described in this submission are allegations, and are not wrongs already proven.

Travelling Overseas

Commanders have criticised Reservists in performance reporting processes for travelling to ***'communist China'*** during the period when China was undertaking preparations to host the Olympic Games. The Reservists had taken a group of exporters to various countries in Asia to train them in the logistics and marketing of goods into Asia. The commander ordered the Reservist to notify the commander in advance of all future trips overseas.

The Reservist then advised the commander that the Reservist was going to UK. The commander ordered the Reservist not to make that trip because she/he was using an United Emirates aircraft.

[redacted] in a written advice to the [redacted], titled: ***'Legality of Active Reserve Members in Designated Australian Areas of Operation (AO)',*** stated:

> ***'There is no legal impediment preventing Active Reserve members from entering a designated Australian AO in their civilian capacity. As such, there is no requirement for them to:***
>
> ***a. formally seek clearance into that AO through their designated chain of command; or***
>
> ***b. adhere to the CDF's Directive on Leave in the Middle East'***
>
> ...
>
> ***'Importantly, the prohibitions on overseas travel contained in this DEFGRAM [DEFGRAM 675/2003] do not apply to Reservists travelling overseas in their civilian capacity.'***

The highest levels of Defence, more than a decade later, noted that this written advice (as it presents on the Defence intranet) from the Defence Legal Service was not signed, and would confirm only that Defence's own legal advice only ***'appears to support'*** the argument that the Reservist ***'should not have been obliged to cancel and rebook'*** their travel.

The matter thus appears to be unsettled. The Reservist sought a decision that he/she had received an illegal order, but this decision, legal or illegal, has been consistently refused.

Military law may need to be clear as to the circumstances, if any, where a commander can give a lawful order to a Reservist affecting his/her private life, civilian employment or civilian business. Clarity may need to take this issue out of the selective opinions casually made by commanders, to be described instead in publications of military law that the highest levels of Defence respect and will follow, and to which legal officers can refer.

Note: A likely area where this issue may develop, if the Commonwealth and/or State Governments and this Royal Commission prefer a standing role for Reserve forces in assisting the community during and after bushfires, floods and other natural disasters, involves holidays. The Meteorology Services have, for example, banned selected staff from taking holidays during the cyclone season. Commanders of Reserve units or Regular units or ships with Reservist members, may extend their authority to direct Reservists not to take holidays during the bushfire season and/or during the cyclone season so as to ensure a maximum response (in quantity of resources and speed of employment) if a 'Call-out' is effected. Will this be a lawful order?

All wrongs described in this submission are allegations, and are not wrongs already proven.

Disclosing wrongdoing by a Reservist

Some offences against military law are also offences in civil law. Allegations or findings against the Reservist that are described in Table 2, that may have this dual 'criminality', include blackmail, fraud, and threats. In particular, dishonesty by the Reservist in obtaining leave from the civilian employer for Defence service, with claiming payment from Defence for Defence service, when Defence service has not been performed, is wrongdoing towards both the civilian employer and towards Defence. The further complexity is that the individual Regular or Reservist who has suspicions reasonably held that a Reservist has been dishonest with their civilian employer, is entitled under law to report that suspicion to civil authorities.

These complexities may have been settled by military law where offences by Defence members are against individuals (e.g. assault), against entities (e.g. theft) or against the community (e.g. selling illicit drugs). Military law, however, may need to define the conditions under which a commander in his/her role can lawfully disclose to civilian entities (e.g. employer organisations) or civilian authorities (e.g. police) wrongdoing by a Reservist against an employer - for example:

a. What appointments or ranks are authorised to disclose on behalf of Defence;
b. Are command authorities approved to disclose allegations, or only findings by commanders; and
c. What processes need to have been conducted before any derived finding(s) are approved to be disclosed.

Sufficiency of Damages

The system for providing redress to service persons may be limited to forms of redress expected from the management of situations faced by Regular members. The redress system may not be ‘open’ sufficiently to include impacts on private life, civilian employment and/or commercial business arising from commanders acting in extension of their authorities to make directions affecting Reservists.

The highest levels in Defence, for example, have informed one Reservist:

> ***With respect to your grievance concerning your Dubai travel, I found that there was no appropriate redress available through the redress of grievance system, even if the grievance was upheld.***
>
> ***... I cannot approve compensation or retrospectively approve travel you did not take.***

Defence authorities can only suggest that the matter be taken elsewhere. In requiring the 'redress' to be taken elsewhere than to the highest levels of Defence, Defence has refused to assist by making findings on the facts, and a finding that the order, requiring the Reservist not to use tickets already paid for, was an illegal order or order made outside of authorities held by the commander making the order, and/or an order made outside of authorities held by Defence.

The alternatives recommended by Defence include:

- the Director of Entitlements, which can reimburse Regular members ordered to cancel travel or to return from recreational leave, for operational purposes - such orders are legal (made within authorities actually held), and the compensation may be limited to reimbursement of cancelled travel, and not include additional costs, say, of rebooking with a different airline that does not refuel in Dubai; and
- the Director of Special Financial Claims, which administers a scheme known as 'compensation for detriment caused by defective administration' – but

    - the application for redress must be downgraded from an application for redress for an illegal order, to an application for redress for defective administration;
    - the Directorate ***'may need some further information'*** that Defence refused to gather as part of the Redress procedure;
    - the requirement upon the highest levels of Defence to give detailed reasons, placed upon Defence by the Defence Instruction on the Redress, does not apply to the Directorate of Special Financial Claims; and,
    - the Directorate will not investigate any alleged wrongdoing in giving the Reservist an illegal order.

Military law may need to provide Defence with the authorities, or accept that Defence already has the necessary authorities, with which to make findings when illegal orders have been given to Reservists, and to provide for the full scope of damages suffered as a result of obeying the illegal order.

Alternatively, military law may need to change the proper protocol for Defence members to follow where they believe that they have been given an illegal or improper order (namely, ask for clarification, obey the order if confirmed, and disclose concerns after the order has been obeyed). Defence may need to include a new protocol for Reservists receiving orders that they reasonably believe are improperly impacting their private life, civilian employment and/or commercial business, to seek clarification and to refuse the order if it is confirmed. Guidelines with many examples assisting Reservists and their commanders in resolving such situations should be introduced and well publicised.

ANTI-RESERVIST APPLICATIONS OF MILITARY LAW

In describing the above insufficiencies in military law, this submission has not necessarily described what the military law truly is regarding the examples of Reservist situations used in those descriptions. It has been describing what the military law **has been held to be** for Reservists by the highest levels in Defence.

Administrative processes as an alternative to disciplinary procedures

Recent decades have also included a 21-year period where 21 inquiries were conducted by government into aspects of military justice. One primary outcome from this repetition of embarrassments to Defence was that Defence 'uniforms' lost the conduct and control of principal disciplinary processes. A particularly concerning disclosure in the lead up to that loss was that a senior officer received an adverse performance report (and resulting career impacts) because of the decision that the senior officer had made when serving on a court martial.

Defence 'uniforms' may now only have measures of control over service persons by using alternative administrative (rather than disciplinary) processes. Those alternative administrative processes can be more efficient to serving the purposes of commanders, by removing or limiting the rights of the accused to receiving the particulars of wrongdoing, the rights to a hearing, sufficient legal representation, copies of the evidence relied on by the accusers, copies of statements made by witnesses and any opportunity to call witnesses. Other primary justice procedures that can be removed when using alternative administrative processes include receiving decisions with detailed reasons, and the benefit of a legal review.

These conditions, as experienced by the Reservist from Table 2, encourage the making of false accusations against Reservists who make disclosures and/or complaints about any unfair or discriminatory or bullying treatment that they receive in their military employment. Such treatment might be expected to occur to Reservists, given the outcomes in Table 2 and the descriptions in the ANU Report.

The highest levels in Defence have been developing these 'efficiencies' in alternative (to disciplinary) administrative processes, so as to overcome the type of 'fight-backs', obtained after eight (+) years of struggle, demonstrated in Table 2. For example, the Reservist in Table 2 was only able to achieve some measure of 'fight-back' because a Reservist was allowed to lodge a disclosure and complaint (termed a Redress) about wrongdoing in the use of performance reporting, and because one of the Regular Officer whistleblowers who assisted the Reservist early in the history of the disclosure history, was ultimately appointed as a Service Chief. Recently, however, Defence has moved to ban any entitlement by a Reservist (or Regular) to lodge a 'Redress' about their Annual Performance Report. Already, Defence have been able to keep from the Reservist any statement made by the Service Chief about what had been imposed on the Reservist prior to the serials in Table 2.

The possible circumstances that might cause, as with pay, only 60% of military law to be applied to a Reservist in a way that would disadvantage or harm a Reservist, appear to include:

a. Under ANU's ***'Regulars First'*** notions, commanders may exercise preferences:

    1) to save resources needed for court martials, public inquiries and other actions at the high end of disciplinary / military justice processes for cases involving Regulars. So, the Reservist in Table 2 did not receive a 'DFDA' (disciplinary) process before findings were made that payment had been claimed when, firstly, military duties had not been performed and, secondly, non-military work had been performed (fraud);
    2) to provide training and development for members who carry out inquiries for Defence, by assigning inexperienced and / or low rank investigators to cases involving Reservists. So, the first inquiry into the Table 2 scenario was by an officer with rank four levels lower than the commander identified by the Reservist's disclosure - the inquiry never interviewed that commander nor the subordinate to that commander;

b. Under a ***'soft landing assumption'*** applied to Reservists (they have the fallback of their civilian employment), commanders may exercise preferences

    1) to cover-up instances where the Reservist has been unfairly treated or subjected to discrimination and / or bullying (an example of 'cover-up' will follow);

All wrongs described in this submission are allegations, and are not wrongs already proven.

2) to use cases involving Reservists to practice Defence in the conduct of procedures seldom occurring, such as 'bombings', 'war crimes', and alternative (to disciplinary) administrative procedures, such as achieving banishments from their base/ship/ unit by a commander's simple order, and processes for dismissing whistleblowers as 'chronic complainers';

c. Reprisals, occurring because the Reservist has made disclosures, and/or has continued to use proper Defence procedures to 'fight-back' against processes denying the Reservist natural justice against false accusations. We may not have an example of this, because the highest levels of Defence did not consider that the matter in Serial 6 of Table 2 was a case of dissuading a Reservist from lodging a 'Redress'.

   The commander at serial 6 had relied upon the 'Redresses' used by the Reservist in defending against accusations made in serials 1 to 5, to decide that the Reservist was a 'perennial complainant', misusing the 'Redress' process, and thus was deserving of 'termination'. The highest levels of Defence, however, found that this commander may really have believed these things, and therefore could not be held accountable for any attempt to dissuade or prevent the use of the 'Redress' process by the Reservist, or any reprisal for the Reservist so using the 'Redress' process.

   Misusing the 'Redress' system is an offence under military law, so perhaps this was another matter (like the fraud matters) that should have gone to a disciplinary procedure (if such a belief was so strongly held). A formal disciplinary process, where the Reservist had legal representation and an opportunity to test this 'commander's belief' logic and this defensive legal construct, by cross-examination and counter argument, before an independent adjudicator. The outcomes for serials 1 to 5 in Table 2 may have been reached 8 years earlier if the Reservist was formally disciplined for misuse of the 'Redress' system. The notion that a commander's belief overrides evidence of proper use of this system, if real law, may need to be codified.

It is recommended that military law needs to adopt provisions that will ensure that military justice processes will still be effective when commanders have ill intentions towards Reservists, and are acting in breach of those military justice processes.

Cover-up

This example is similar to that in Table 2, but with important differences pertinent to whether or not the justice system recognises cover-ups applied to Reservists as any abuse of a commander's authority. If commanders have the power under law to send Reservists into harm's way during deployments, surely commanders must have the power to affect the Reservist's service in any way, the command culture might hold. Any mistreatment of Reservists, it is submitted, during training to achieve and maintain readiness for deployment on natural disasters, that is covered-up by the chain of command, needs to be addressed by the justice system, not simply 'walked past'.

In this example, Defence had found the Reservist guilty of multiple instances of multiple dishonesty offences against civil law, and had kept these findings secret from him/her, but had told some military commanders and civil authorities about them. One of the commanders stated that the Reservist should have been court-martialled.

A senior manager at the Reservist's employer informed the Reservist that the manager knew about ***'the trouble'*** that the Reservist had had in Defence, and threatened the Reservist that if he/she did not withdraw from administrative action about Defence service leave, the senior manager would inform the authorities about that ***'trouble'***. The Reservist wrote to Defence asking what was this trouble that could be taken to civil authorities. Defence 'uniforms' identified what that trouble was, but decided to keep the information from the Reservist.

A whistleblower and a Minister for Defence broke from the action taken by the Defence 'uniforms', and the Reservist was informed about the secret findings made more than a decade earlier. At that earlier time, the Reservist had responsibility for administration of money operations, and an ADFIS investigation was being undertaken into events concerning those moneys. The Reservist went to the principal staff officer and asked why the Reservist, given his/her responsibilities, was not being interviewed by ADFIS. The staff officer informed the Reservist of the dishonesty findings that had been made against the Reservist (another term was used), but when the Reservist then wrote to the higher commander about the findings, the findings were denied and he/she was criticised for making a frivolous complaint. [**Note**: the principal staff officer and a second staff officer also showed the Reservist a document recommending a junior member to be promoted over the Reservist. The document was signed by the same commander who had made the dishonesty findings. The document gave a false statement about whether or not the recommended promotion would involve the supersession of the Reservist, thus avoiding the need to justify the supersession, which justification was required by the form and the process.]

After the secret findings had been disclosed, the Reservist made disclosures and complaint on these two *'rough justice'* issues (false accusations in secret findings, and falsification of an official record document) to the highest levels of the Service, with related disclosures. On the papers, the Service Chief **did not investigate** for the facts on these two 'rough *justice'* disclosures, did not interview the principal staff officer, and did not provide detailed reasons for the Chief's one page decision. The Reservist then made a disclosure and complaint against the Service Chief for breach of Defence Instructions in these regards. Even when the principal staff officer, and whistleblower witness from those earlier times, became the Service Chief, neither the '*rough justice*' issues nor the failure to investigate them by the Service Chief, have never been investigated; or, if investigated, the highest levels of Defence have never had the findings on the facts of these two instances of '*rough justice*' by the same commander (and one instance by the Service Chief), provided to the Reservist.

It is recommended that military law needs to adopt provisions that will ensure that military justice processes will still be effective when higher commanders cover-up any wrongdoings against Reservists by lower level commanders, or by predecessor commanders or by those ordained to succeed existing commanders.

Protection of Reservists who have or may make disclosures against commanders

Disclosures by Reservists regarding wages and conditions applied to them bring sunlight to matters most significant for Defence budgets. Defence successfully withstood parliamentary efforts to remove the 15% reduction in annual pay for 30 to 40 years, depending upon the type of Reservist. Defence has successfully withstood the admonishment from the Australian National Audit Office for twenty (20) years regarding superannuation for Reservists. Whistleblower [redacted] has demonstrated that Defence will even pursue auditors who make findings adverse to Defence (in that

case, about other budget factors, procurements and waste). False accusations made within Defence and findings made in secret without any hearing, against a Reservist, were provided to the Reservist's employer, as described above.

A recent example, in this regard, was action taken in secret by the headquarters of a Service Chief to find that a Reservist had misused resources. The accusation was false. This time though, the finding was used, not to attack the Reservist directly, but was used to admonish the public servant manager who was employing the Reservist (for poor supervision) and who had made application for the employment of the Reservist to be extended. The Reservist had, at that time, disclosures and complaint before the highest levels of Defence about actions taken and decisions made against the Service Chief's predecessor.

Disclosures about military injustice occurring under the signature and officers of the highest levels of Defence also bring the spotlight on reputational issues for Defence that Defence has been attempting to deny. The alleged cover-up described above of the findings made in secret about actions constituting civil offences by a Reservist, and the alleged cover-up involving the highest levels of Defence, are examples demonstrating that 21 inquiries in 21 years has worsened the state of military justice in Australia, by lifting involvement in the injustices up the chain of command.

The vulnerability of Reservists making disclosures do not just lie with the above.

Former Federal Member for Brisbane, the Hon Arch Bevis MP, held a variety of ministerial, shadow ministerial, and parliamentary leadership positions during his time in Parliament. They included Parliamentary Secretary for Defence, Shadow Minister for Homeland Security, the Chair of the Parliamentary Joint Committee on Intelligence and Security, and Chair of the Defence Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade.

When Shadow Minister for Defence, he is recorded in *Hansard* as making disclosures to the Parliament about the negative attitudes that Defence authorities may have to Reservists taking actions to defend their employment against discrimination, imposed because of their obligations for Defence Service: (Quote)

> ***I also have a concern that those powers for remedy contained in the bill*** [Defence Reserves Protection Bill] ***will not be used in any event. I have some experience with this. When I was Parliamentary Secretary to the Minister for Defence, I had a case of a reservist who claimed that he had been disadvantaged in his employment solely because of his reserve service. He had evidence that satisfied me that it was worth pursuing. I can tell the House that the Department put every conceivable obstacle they could find in the way of that matter ever being taken on. There was every reason advanced as to why they did not want to do it.***

It is recommended that military law needs to adopt provisions and processes that will ensure that the protection of Reservists, who make disclosures about discrimination and/or other unfair treatment or bullying behaviours identified by the ANU study, will still be effective when higher commanders take the course to cover-up any wrongdoings against Reservists by higher level commanders.

All wrongs described in this submission are allegations, and are not wrongs already proven.

RESOLUTION

Good leadership that provides fairness to Reservists in the services is the antidote to developments in discrimination and bullying. In the absence of good leadership, where and when discrimination and bullying occurs to Reservists, it is recommended that the options of strategy for correcting these occurrences within the command system be adopted including:

a. Independent investigation of claims and counter claims;
b. Early interception of unjust procedures; and
c. An adversarial contest for which both sides are fairly resourced.

Where any wrongs have been suffered, full 'redress' of direct and indirect disadvantages suffered as a result of the wrongdoing need to be provided both in the best interests of Defence and the national interest itself.

Current attempts at providing independence in dealing with disclosures and complaint, within the command system, lies with the Office of the Inspector General of the ADF [OIG].

Current attempts at providing interceptions to improper, unfair, or partial processes within the command system lies with the Defence Force Ombudsman role, within the Commonwealth Ombudsman's Office [COO].

It is to be expected that Defence will express great confidence in the effectiveness of the OIG, espousing OIG as being independent of the chain of command, and claim that the Reservist can always go to the COO. Defence are unrelenting in making and remaking these claims, whatever controversy is before the public and the Parliament. Immediately prior to certain examples provided in this submission, a Parliamentary Committee stated:

> ***Against this background of almost ten years of rolling inquiries into the military justice system, the Chief of the Defence Force (CDF) recently expressed his view that 'The military justice system is sound, even if it has sometimes not been applied as well as we would like...I have every confidence that on the whole the military justice system is effective and serves the interests of the nation and of the Defence Force and its people'.***
>
> ***... In view of the extensive evidence received, the committee cannot, with confidence, agree with this assessment. It received a significant volume of submissions describing a litany of systemic flaws in both law and policy and believes that the shortcomings in the current system are placing the servicemen and women of Australia at a great disadvantage. They deserve a system that is fairer, with rules and protections that are consistently applied. The committee has recommended a series of reforms that would constitute a major overhaul of the military justice system in Australia.***
>
> ***The submissions made to this inquiry, which number well over 150 and although canvassing a wide range of personal circumstances, contain a number of recurring themes which echo many of the complaints made in previous inquiries. Despite the six inquiries in the last ten years and the subsequent reforms described by CDF and the Service Chiefs, certain types of complaint continue to be made.***
>
> ***Complaints were made to this inquiry about recent events including suicides, deaths through accident, major illicit drug use, serious abuses of power in training schools and cadet units, flawed prosecutions and failed, poor investigations. Some of these complaints raise serious concerns about sub-standards of justice meted out within the ADF.***

This submission needs to build on these reservations by Parliamentary voices about purported reform in the military justice system. Returning the allegations made in this submission and future

allegations of similar nature (all descriptions in this submission are allegations which merit investigation in the opinion of Queensland Whistleblowers, they are not matters already proven) to OIG or to COO will be to surrender any initiative for reform to the processes of Defence that have been achieved to defeat reform and maintain a command culture that has been dismissive of the entitlkement of Reservists to fairness and justice while preparing for deployments and involvement in deployments on natural disasters or on other missions.

The performances of OIG and COO regarding military justice for Reservists is described in the next two sections.

3. PERFORMANCES:
OFFICE OF INSPECTOR GENERAL ADF
ENSURING FAIR TREATMENT OF RESERVISTS

The Office of the Inspector General Australian Defence Force [OIG] has shown itself to be adversarial in favour of the interests of commanders in Defence, rather than independent, when dealing with disclosures and complaints made by Reservists for fair and just treatments in their military employment.

Below are offered examples from matters that OIG did inquire into, where the information available shows that OIG may have conducted the investigation in an adversarial manner, defensive of senior officers, and not objectively as may be required of a statutory body like the OIG.

Note that references to OIG actions will include past actions by bodies that have now been incorporated into or absorbed by OIG.

The Cover-up

The primary disclosure and complaint by this Reservist was about ***'rough justice'***. In particular:

1. Findings made by senior officers, in secret, that the Reservist had committed multiple instances of offences against military law and civil law, and the covert distribution or publication of those findings to select command authorities, and also to the Reservist's civilian employer. The findings had been withheld from the Reservist for more than a decade;
2. Supersession in rank by a junior member, which supersession was effected through false information given on the Official Record of the Recommendation for Promotion of that junior member. The Official Record had been shown to the Reservist by two Regulars, who did not allow the Reservist to copy the signed original;
3. Findings that the disclosures and complaints about these matters were used by the highest levels of that Service as evidence of psychological problems held by the Reservist (obsession, irrationality, mental imbalance, and similar);
4. Failure by the Service Chief to provide the Reservist with detailed reasons for the Chief's Determination of the Reservist's disclosure and complaints, regarding these secret-findings-and-falsification-of-an-Official-Record matters, with the Service Chief dismissing the above (and related) complaints, both when issuing the Chief's Determination and also upon multiple requests thereafter by the Reservist. A Defence Force Instruction stipulated what constituted detailed reasons, and what did not constitute detailed reasons, and Military Justice Review (2008) emphasised the importance of commanders giving reasons for decisions so as to ensure accountability -

   '... commanders ... must provide a clear Statement of Reasons'.

OIG has refused, on multiple occasions since its beginnings and formation, to investigate these particular complaints, and may have joined with Defence in similar tactics of tricks and falsehoods that may have been used to deny the Reservist any investigation of these four particular complaints (among others):

- When OIG was the Military Justice Audit in the Burchett Inquiry, OIG claimed that the Terms of Reference [TOR] disallowed such investigation. Those TOR indicated, however, that an

investigation of some events were allowed, and that an investigation of other events was allowable;

- OIG claimed that it did not investigate the same matters when they were handed over to the OIG by the Burchett Inquiry, for the reason that the Reservist's Service was investigating the matter. This claim was contradicted by COO [in the Defence Force Ombudsman role] which forgave the Service for not investigating these matters because the OIG was investigating the matters. Both the Service and OIG claimed that they did not investigate the '*rough justice'* disclosures because the other authority was investigating them, when in both instances the claims were false. No investigation was being conducted or ever was;
- The Service Chief again refused to investigate the matters but suggested that the Reservist make application to OIG to expand their investigation into related matters to include the four primary disclosures. OIG, however, decided to limit its investigation to the matters requested for inquiry by the Service Chief.

Also, OIG's Directorate of Military Redress and Review, through one of its ancestor agencies, may have shown decisions tending to prevent any investigation of the above four particular complaints:

- The Reservist asked that the disclosure and complaint about the Service Chief (failing to give detailed reasons) be referred to the Chief of the Defence Force (CDF), and this application for referral was accepted by OIG. One year later, however, OIG denied that it had accepted this application, and referred the disclosure and complaint by the Reservist back to his/her Regular commander to investigate any offences by the CDF;
- OIG recommended that any further investigation be limited to boundaries that excluded complaints from before a particular year. The reason given was ***'in order to prevent the "mission creep" that adversely complicated the original investigation'*** - this was recommended in circumstances where the original inquiry had used the four primary disclosures and complaints as evidence of the Reservist's mental imbalance, which in turn had been used to support recommendations to the highest levels of the Service that the Reservist be removed from the Service as a ***'serial querrulent' (sic)***.

The OIG most recently has stated that the highest levels of Defence have thoroughly inquired and decided the Reservist's complaints. The Reservist's evidence is that this claim by the OIG is a false statement, and that, regarding the four primary rough justice matters described above:

- The Reservist has never received a determination from any inquiry, with or without reasons, as to whether or not the Official Record recommending the junior member for promotion included a false statement, namely, that the recommended promotion did not involve a supersession of another member in the unit. The matter has special evidence because the commander who signed that Recommendation was the commander who made the secret findings of military and civil offences against the Reservist;
- The Reservist has never received a hearing and determination, with or without reasons, as to whether or not the findings that the Reservist had committed multiple instances of military and civil offences, made in secret by a commander, that were briefed to a subsequent commander, and that were reported to a senior commander, as to whether the Reservist was wronged by those findings and/or by the processes used to arrive at those findings, with detailed reasons giving the particulars of those offences;
- The Reservist has never received a hearing and determination, with or without reasons, as to whether or not the Official Record of Determination of the disclosures and complaints to the Service Chief was or was not a breach by the Service Chief of Defence orders, regulations and/or

Defence Instructions regarding the requirements of a commander to provide, with the Determination, detailed reasons for any dismissal of the disclosure and complaint;

- The Reservist has never received a determination, with or without reasons, as to whether or not the Reservist was acting rationally, reasonably and properly when the Reservist submitted to superior authorities that the above matters may give rise to valid grievances and may merit investigation, correction and/or other form of 'redress'.

The circularity of the adversarial position by OIG against a Reservist, who has made disclosures about commanders, was demonstrated in this cover-up where:

a. The Reservist disclosed and complained to the CDF, through the Reservist's immediate commander that the OIG had not investigated these matters (amongst other matters);
b. The immediate commander forwarded the disclosure and complaint to the OIG using the Official Record for such referrals;
c. The CDF refused to accept the referral as a 'redress', claiming falsely that the disclosure and complaint had not gone through the Reservist's immediate commander;
d. The Reservist disclosed to the Minister that this claim by the CDF was a false claim supported by documentary evidence from the immediate commander;
e. The Minister referred the allegation (of the CDF making a false claim in an official record) to the OIG. The OIG, holding the Official Record of the referral sent to it by the immediate commander, withheld this information and dismissed the Reservist's disclosure; and
f. The Reservist disclosed to the Minister that the OIG had joined the CDF in the false statement.

These actions by the OIG do not entitle OIG to the trust of Reservists that OIG is independent of the chain of command. OIG has acted as an adversarial to the Reservist, iy is here submitted.

The Order not to Parade

Table 3: A Comparison of Words and Meanings for the Order not to Parade

Ser	ACTUAL Wording	Meaning from Finding by IGADF
1.	The concerns you have espoused to [command] towards the decisions I have made regarding your employment within [this formation] have been noted	The potential for further allegations of unacceptable behaviour and subsequent complaints being made by you has been noted
2.	I have determined that to maintain an appropriate level of distance between you and the formation I command,	I have determined that to ensure a safe working environment for the benefit of yourself , myself and [the formation], with the separation of the parties in both a physical and command & control sense
3.	you are not required to parade at this unit or any [formation] unit	you are not required to parade at this unit or any [formation] unit
4.	until I direct otherwise	while the current ROGs are being investigated and resolved

An order was given to a Reservist not to parade for an unspecified period that turned out to be between 14 to 16 months, depending on the endpoint selected. Table 3 [Left hand side] compares the statements made in giving the order with the findings made by OIG as to what was meant by the commander who used those words in giving the order. There are significant differences across the two columns in the Table 3 – for example:

- whether the order was given by the commander having in her/his mind the Reservist's past complaints about his/her past conduct, versus, whether the order was given with future unspecified complaints from the Reservist about the commander's future conduct in her/his mind;
- whether disadvantaging a junior member because of future disclosures and complaints that the junior member will or may make is a reprisal, let alone reasonable. Is the disadvantage still being imposed because of a disclosure and complaint expected to be made by the junior member?

This submission suggests that an independent inquiry may give more weight to the written reasons for a decision given at the time of the order, and give less weight, if any, to claims made, after a complaint was received concerning the order, that what was meant by the written order was something opposite to or at wide variance from the plain fact meaning of the words actually used in the written order. Only an approach adversarial towards the Reservist and defensive of the commander would allow any substantial rewrite of the written order.

Previously, orders given within and outside of bases/barracks/ships have featured in descriptions of controversial treatment of Reservist already given in this submission. If OIG is allowing commanders to reword such orders by commanders, OIG is not independent enough for Reservists to trust OIG to investigate disclosures and complaints against commanders, it is submitted. OIG may be useful to commanders in dealing with disclosures and complaints from Reservists, but Reservists need a similar apportionment of resources with legal representation to make any contest between commanders and Reservists about what has happened to be a fair contest.

Mobbing

Mobbing is bullying by a group or by an organisation, not by an individual.

As described earlier, a Reservist asked that the disclosure and complaint about the Service Chief (failing to give detailed reasons) be referred to the Chief of the Defence Force (CDF), and this application for referral was accepted by OIG. One year later, however, OIG denied that it had accepted this application, and referred the disclosure and complaint by the Reservist back to the Reservist's Regular commander to investigate any offences by the CDF.

Referring back this potentially career ending investigation to a career Regular commander put the Reservist at risk of retaliation by immediate commanders in a position to greatly disadvantage the Reservist's military employment, rather than find fault in the CDF. The Reservist was not given any protections with this decision, and when he/she asked for whistleblower protection, none was forthcoming.

The basis of the Reservist's disclosure was mapped out on a blackboard. The breach of the Defence Instruction by the CDF was clear from the mapping, and indicated to immediate commanders what

the CDF sought to achieve. OIG's decision to retract their earlier acceptance of the disclosure and avoid dealing with a matter properly put to OIG in accordance with its role, foreseeably indicated that OIG too was not going to follow procedures. These two wrongdoings by the highest levels in Defence indicated the risk of retaliation that the commanders themselves carried if they found for the Reservist and against the CDF and the OIG.

The first immediate commander who completed the blackboard mapping did nothing further known to the Reservist about the investigation of the CDF. Neither did the second (short term acting commander), nor the third. No document has been sighted of OIG seeking a result from the investigation by the immediate commanders. The second immediate commander, however, initiated and directed the performance reporting processes that reduced the Reservists rating 'score' from 51 down to 16, and that led to serials 1 and 2 in Table 2. The third commander directed the administrative processes outlined in serials 1 to 7 of Table 2, processes that sought eventually (at serial 6) to have the Reservist

> '***issued with a termination notice.*** [She/he] ***can still resolve*** [his/her] ***outstanding administrative issues as a non-defence member'.***

The Reservist made disclosures and complaints as each serial in Table 2 occurred. The Reservist claimed that he/she was the subject of mobbing - bullying not by an individual but by a group, namely, a group of inter-reliant commanders and senior officers.

The OIG, however, came to the support of the third immediate commander, in two ways that were allegedly disadvantageous to the Reservist:

a. **'Redress' versus 'Representation'.** OIG endorsed the actions by the third immediate commander to delay processing of the Reservist's disclosures and complaints ('Redresses') about the false accusations in the performance reports [PARs]. OIG also endorsed the commander's attempts to get the Reservist to agree, voluntarily and later by coercion, to having the disclosures and complaints dealt with as representations about the performance reports rather than as 'Redresses' against wrongs done to the Reservist
b. **Quick Assessment [QA] versus Inquiry Officer [IO].** OIG knew that the administrative QA process was being misused to complete the Investigation, but was prepared to let the benefits from those improper procedures flow to those using the QA improperly, without a thought to the possibility that the improper practices may have been an indication of ill-intent towards the Reservist. OIG wrote:

> > ***Essentially, a QA is a management tool for advising the*** [immediate commander] ***on the circumstances surrounding the complaint and how best to proceed with investigating the complaint. A QA should not make a finding, ... Having said this, in these circumstances, it now appears that the*** [immediate commander] ***should be able to make a decision with minimal additional work required.***

OIG was not only promoting the conduct of PARs as an alternative to disciplinary or DFDA procedures. OIG here was also promoting the Representation process, used when individuals are dissatisfied with a performance report [PAR], to displace the processes in the Defence Instructions for 'Redress' by members who seek to make a disclosure and complaint.

The reason why the QIG's advocacy is adversarial is because the PAR process does not require that the Reservist, who is the subject of the PAR assessment, be given particulars about criticisms (or

accusations) made about him/her. Further, the Representation procedure within the PAR process does not require that the decision on the Representation be accompanied by detailed reasons. Both the disciplinary process and the 'Redress' process in Defence Instructions do require that the particulars and detailed reasons be provided to the Reservist. The evidence appears to indicate that OIG went against military law. This brings about serious adverse morale and disciplinary/grievance process consequences when Reservists are training to achieve and maintain readiness for deployments. It opens up space for commanders to make false accusations of military and civil offences against Reservists with impunity.

It is therefore strongly open to suggest that these conditions, as experienced by the Reservist from Table 2, encourage the making of false accusations against Reservists who make disclosures and/or complaints about any unfair or discriminatory or bullying treatment that they receive in their military employment. Such treatment might be expected to occur to Reservists, given the outcomes in Table 2, the descriptions in the ANU Report, and the 'gall' of Reservists to complain about the 40% 'wage theft' imposed upon them by the highest levels of Defence.

Belief-about-law versus facts-about-law

When the Reservist came under coercive pressures from OIG and the third immediate commander to participate in the PAR Representation process without the particulars and without any investigation, so as to 'resolve' his/her disclosure and complaint ('Redress'), the Reservist made a disclosure and complaint to the higher commander about this coercion. He/she was ordered not to parade at the ship/unit commanded by the third immediate commander. This order not only isolated him/her, but, to all intents and purposes, identified him/her to others in the same ship/unit.

The immediate commander then completed serial 6 on Table 2, a performance report on the Reservist criticising him/her for making disclosures and complaints ('Redress' or 'ROG') and recommending his/her termination.

> [The Reservist's] ***lack of desire to see me and discuss*** [the Reservist's] ***grievances is insubordinate.***
>
> ***... Some of your grievances may be legitimate, but some are not. To this effect you are querulous by nature. ... I will also recommend that you not be paid ... for any further*** [complaint] ***action taken by you***
>
> ... [the Reservist] ***general style and manner is that of a perennial complainant. ...*** [a member] who ... sees the [Reserves] ***as a source of income. ...*** [The Reservist] ***should be issued with a Notice to Show Cause*** [and] ***be issued with a termination notice.*** [She/he] ***can still resolve*** [his/her] ***outstanding administrative issue as a non-defence member.***

The author of the PAR was the immediate commander who refused the Reservist particulars of offences which the commander had already found to be 'accurate', refused the Reservist copies of 'evidence' relied upon, refused the Reservist an opportunity to be heard, failed to complete a full investigation of the Reservist's disclosures and complaints, considered AWOL charges for leave the commander had approved, and made unfounded findings of fraud against the Reservist. It was OIG who determined that, even given these behaviours, the commander held a belief that the disclosure and complaint about these actions by the Reservist was a misuse of the 'Redress' disclosure and complaint system by the Reservist. Such a claim by OIG can only be understood, it is submitted, if

OIG saw itself as acting in an adversarial role for the commander, not as an independent decision-maker interested in the facts behind and the reasonableness of competing arguments.

The Reservist lodged another disclosure and complaint about being disadvantaged in these ways (false accusation, finding of being insubordinate, psychological vilification, pay loss, loss of reputation, recommendation for termination) because he/she had made and sought to continue with a disclosure and complaint ('Redress') process rather than a performance report 'Representation' process. The Reservist had made a further disclosure and complaint when this preference by the Reservist, allowed by military law, was bring denied to him/her.

OIG, however, dismissed the complaint of dissuading the Reservist from lodging disclosures and complaints and of reprisal against him/her. OIG opined that the commander was on an 'unwise path' when referring to the disclosure and complaints in the PAR, that recommending a termination notice in a PAR was 'not appropriate', and that changing the performance rating of the Reservist from an acceptable rating to 'termination' because the Reservist had insisted on the 'Redress' and declined the PAR Representation process, was unreasonable. OIG, however, held that the statements made in the PAR only held an 'inference' that the PAR was an attempt to dissuade, to prevent the Reservist from making further disclosures and complaint, or that the PAR was an action to punish the Reservist for making a disclosure and complaint ('Redress'), rather than statements to this effect.

As already described, OIG gave greater weight to an alternative inference that the third immediate commander *"believed*' that the Reservist was 'misusing the process' for making disclosures and complaints ('Redress'). The 'belief' was '

> ***primarily based on*** [the Reservist's] ***failure to engage with*** [her/him] ***over issues and resorting to ROGs as an alternative to such engagement***.

It was not possible for the Reservist to be ***'misusing the process'*** where the grounds used for making disclosure and complaint were reasonable, and the alternative processes (the PAR Representation and the QA) had not and did not ensure that particulars, evidence and a hearing would be afforded the Reservist.

OIG do not make a finding that the Reservist was misusing the process, or identify any instances or particulars consistent with the military offence of misusing the 'Redress' process. OIG only found that the commander *"believed*' the process had been misused by the Reservist. The last column of Table 2 for serials 1 to 5 indicate that the misuse of all processes was by the actions and decisions of this third immediate commander, rather than by the Reservist.

The use of beliefs to avoid culpability for breaches of the law has long been rejected by the courts, and would be expected to be known by OIG:

> ***'Ignorance of the law is no excuse'***

OIG only was required to assess whether, in the words of the third immediate commander, it was an offence to recommend the termination of a Reservist because the Reservist:

> ***'resorted to*** ['Redress'] ***as an alternative to such engagement*** [with the Reservist's immediate commander]'

This is compelling evidence too significant to ignore, not 'by inference', but nonetheless OIG ignored such admissions.

It is open to suggest that OIG has acted in an adversarial way, showing belief in their client (i.e. the commander) and proceeded to construct a defence for the commander outside of the precedents in law about the relevance of '*belief*' in determining whether or not a breach of the law has occurred. Therefore, OIG has allegedly not shown independence or impartiality in deciding the matter by reference to the undisputed facts, fully recorded and in accord with obedience to the requirements of military law, and thus, leaving its conclusions, at the very least, *prima facie* unsafe, if not a nullity at law.

The practice of law gives lawyers in adversarial contests a wide latitude to present only the elements in any facts that favour their client. This mindset better fits OIG's approach to its role, than does the mindset of an independent reviewer.

The Inappropriate Fist Strike.

Before writing the PAR, the immediate commander ordered the Reservist not to parade at the base/ship/unit again. The immediate commander advised that the Reservist was to be employed at the headquarters of the higher commander, and stated in writing.

> ***This will allow you time to settle your affairs in the limited time you have left in the*** [Service].

The Reservist's then former immediate commander visited the Reservist at the Reservist's new workspace at the higher headquarters. The commander held the Reservist to attention, and stated words similar to

> ***You wouldn't come and see me, so I've come to see you.***

The commander informed the Reservist that the investigation of his/her disclosure and complaint had been completed by the commander who organised the PAR referred to in Serials 1 and 2 on Table 2, and added:

> ***I will be doing your PAR for this year, and that will be the end of it***

The third commander, holding the Reservist to attention, then raised a fist and struck the furniture beside the Reservist's person.

OIG decided that a commander, raising a fist and striking with a fist the furniture immediately beside the Reservist's person, while held at attention, showed ***'inappropriate communication skills'*** on the part of the commander. OIG failed to interview the two other Defence members who were working with the Reservist and were in the same workspace immediately before, during (one was, the other was just outside the door) and immediately after the striking of the fist.

An independent inquiry would have taken evidence from those two other Defence members, it is submitted, while an adversary to the Reservist would not be interested in their evidence. It is strongly open to suggest that an independent inquiry would have found that, at the moments when

the fist of the commander was raised level to and within reach of the Reservist's head, the physical position adopted by the commander constituted threatening behaviour towards the Reservist. Only an approach adversarial towards the Reservist and partial towards the commander, it is submitted would have held that a raised fist and then a fist strike immediately close to a Reservist constitutes only ***'inappropriate communication skills'***. The Reservist considered that the communication was clear and effective, and when the promised PAR recommended the termination of the Reservist, although reprehensible, it was hardly surprising.

Further, OIG held that the reference in an email to the Reservist's limited time left in the [Service] was a reference to the Reservist's three years remaining until compulsory retirement age. In the latter decision, the OIG informed the Reservist that there was evidence in writing that retirement age was what the commander had in mind, not termination - it was later that the commander turned his/her mind to terminations.

The supporting evidence was notes and notations made at OIG of topics that the third immediate commander sought to discuss with OIG about the management of the Reservist. The first note described requests for advice on what happened if a member with outstanding disclosures and complaints reached retirement age, and thus supports what OIG had claimed. But the note also requested advice on what happens if a member with outstanding disclosures and complaints was due to be discharged. The advice on both these aspects was requested 7 days **before** the email on ***'limited time left'*** was sent. But, one day before the ***'limited time left'*** email was sent to the Reservist, the immediate commander sought and received further advice from OIG about discharging Reservists, **not about their retirement**. This information is given on a notation by an OIG person on the same record that provided the information about the earlier advice sought from OIG.

An independent investigation would not find that that OIG document provided evidence that the commander was envisaging the Reservist's retirement. Both advices sought were about discharging the Reservist, not his/her retirement, and the advice given on the eve of the ***'limited time left'*** email to the Reservist was only about discharging the Reservist.

OIG has again acted in an adversarial manner for the client they were advising, being selective in considering evidence so as to serve the commander. In this case, the OIG report on this aspect may be open to be considered a *prima facie* contrivance to achieve a predetermined outcome (i.e. termination) in spite of the facts, hence also a *prima facie* fraud against the administration of justice (as it pertains within military law and procedures).

Discrimination in assessments of Reservist and Regular trainees

It was OIG that determines that:

> ***While it is possible that one or more of the three*** [Reservists] ***cited by*** [the Reservist] ***may have been unfairly treated on an individual basis, there is no corroborating evidence to support the inference that these comparative differences resulted from any explicit and intended discrimination against*** [Reservists] ***individually or as a group based on their*** [Reserve] ***status, by the different*** [course managers and course principals].

Table 1 is repeated here:

All wrongs described in this submission are allegations, and are not wrongs already proven.

TABLE 1: THE COMPARISON OF RATINGS AND GRADINGS ARA and ARES ... ON ... COURSES						
Grouping	Name & Service	**Given a 'HIGH' Grading**	High Performances		Ordinary Performances	
			Rating for 'Analysis'	Rating for 'Demonstrate Analysis'	No. of Satisfactory Results	No. of Re-sits fm Unsatisfactory Results
	Max Result→		Well Developed	Effortlessly	NIL	NIL
Band 1	Reservist	**NO**	Well Developed	Effortlessly	3	1
	Reservist	**NO**	Well Developed	Easily	NIL	NIL
	Reservist	**NO**	Developed	Effortlessly	1	NIL
	Regular	YES	Developed	Effortlessly	2	1
	Regular	YES	Developed	Effortlessly	3	NIL
Band 2	Regular	YES	Developed	Easily	2	NIL
	Regular	YES	Developed	Easily	2	NIL
	Regular	YES	Developed	Easily	3	NIL
	Regular	YES	Developed	Easily	3	NIL
	Regular	YES	Developed	Easily	5	NIL
	Regular	YES	Well Developed	Usually	2	1
Band 3	Regular	YES	Developed	Usually	3	NIL
Band 4	Regular	YES	Developed	Generally	3	NIL
	Regular	YES	Developed	Generally	3	1
	Regular	YES	Developed	Generally	4	NIL
Notes	1. 'HIGH' is the highest grading for future employment - '...'					
	2. 'Band 1' describes results only <u>one</u> rating below the max results possible for 'Analysis' and 'Demonstrate Analysis', 'Band 2' describes results only <u>two</u> ratings below the max results, etc					
	3. Results within any Band are ordered according to lower number of ordinary performances					

The evidence of the Reservist, that Regular trainees were assessed for the highest grading, but that the Reservists were not assessed for the highest grading, was not seen by OIG to be corroborated by the totality of results in Table 1, where no Reservists were given the highest grading, even when the Reservists were outperforming the well-performed Regular trainees who were given the highest grading.

This again is OIG acting in an adversarial manner, mounting arguments in defence of the relevant commanders without any interest about notions of unfairness disadvantaging the Reservists. The refusal to inspect the results from the purportedly recovered database for two female Reservists, as further corroborating evidence of discrimination against them for being Reservists, powerfully illustrates as a pattern of conduct, a defensive attitude towards the commanders. That adversarial purpose was to limit disclosures and complaints reasonably made and genuinely put forward by the Reservist, for the future benefit of Reservist trainees, let alone the ADF as a whole.

As it occurred, there was some 'storming' amongst the professionals using informal exchanges based on the research undertaken behind Table 1, and there was some 'norming'. The course principle and the course manager recommended a Reservist(s) for the highest grading on the next courses.

Redress - false accusations

As listed in Table 2 (last column), OIG followed earlier criticisms that the Reservist had not been given particulars, opportunities to contest the findings, an independent assessor or a full investigation. OIG in its Inquiry, however, also decided not to give the Reservist these aspects to natural justice, aspects that the Reservist would get if DFDA procedures had been initiated. OIG turned these findings about defective processes that were favourable to the Reservist into reasons for discontinuing any investigation into the disclosures about those processes - the principal disclosure by the Reservist was that the [she/he] had been the victim of false accusations:

> ***Whether evidence exists in support of*** [the third immediate commander's] ***criticisms of*** [the Reservist] ***in the PAR is not the subject of examination by this Inquiry. This Inquiry has concluded that the ... PAR was flawed for failing to provide procedural fairness to*** [the Reservist] ***on a number of issues.***

There is a well-known liability under military legislation and regulation which a member will incur ***'if he (sic) knowingly makes a false accusation or a false statement affecting the character of a member'.***

Whether or not evidence existed, say, in support of the Reservist's allegations that Table 2, Serials 1 and 2, contained false accusations, this was not going to be examined by OIG. The only particular given to the Reservist to this PAR, about where and when duty had been breached and paid Defence time had been spent on non-military matters, was that these things occurred ***'while observing syndicate discussion on a*** [exercise]'. In that PAR year, however, both preparation and assessment on such exercises were all run on a students-doing-individual-work format, rather than on a 'walk-thru' or 'talk-thru' syndicate-discussion-with-the-instructor format. This was the case for the practice exercises. There were thus no syndicate discussions during preparation or during presentation of exercise product, except for briefs undertaken immediately on arrival at the exercise activity.

The events thus never took place, and the accusations were false.

OIG, however, presented the decision not to investigate the claims, as something that would benefit the Reservist. In fact, OIG were being clever, in their continuing adversarial approach, to deny investigation of the Reservist's complaints. OIG allowed that commander to avoid any examination that may have been merited on what was the only particular provided. Any risk in giving the Reservist any more particulars that identified dates, locations and natures, was not thereafter being taken.

OIG thus treated the findings made in the PARs and the QA as if they may be true. This significantly disadvantaged the Reservist most when it came to claims by certain commanders that the Reservist was ***'querulous'*** and a ***'perennial complainant'***.

OIG put aside those PARs. OIG then falsely claimed that putting aside the PARs met the redress that the Reservist requested. The Reservist did want the PARs put aside, but also requested that

replacement PARs be provided. This was refused for five consecutive years. Career management uses the last five PARs on a member in order to decide promotions and postings. OIG thus established a foreseeable significant obstacle to the Reservist's future career, outperforming the commander who authored serial 6 in Table 2 in this respect.

The Reservist also sought, amongst other remedial actions, that:

> ***'That particular statements ... directed at*** [the Reservist] ***<u>be determined to be incorrect and not supported by the evidence</u>, in particular, those statements which purport -***
> ***a. that the disclosures and submissions made in*** [disclosures and complaints by the Reservist] ***constitute or contain evidence of a certain irrationality and mental imbalance, and hysteria,***
> ***b. that all of the claims for*** [disclosures and complaints by the Reservist] ***in the past were groundless, and***
> ***c. that by submitting such*** [disclosures and complaints by the Reservist] ***claims that*** [the Reservist] ***was a serial complainant'***

These aspects of 'redress' were not being considered by OIG, as if Reservists were only entitled to have wrongs against them discontinued, as if Reservists did not have an entitlement to have impacts upon the Reservist's reputation and career addressed and then redressed. This appeared to be part of a '60% only' approach to giving justice to Reservists, as it was with pay and conditions.

Redress - Vilification

OIG, in its Inquiry, plainly stated:

> ***... not all the allegations contained in the complaints were the subject of further IGADF Inquiry. ... Incidents supplanted or overtaken by later events, including matters where no redress was now available, were not subjected to further inquiry.***

While stating this, OIG admitted that the Reservist

> ***'does not agree with limitations placed on the extent of the IGADF Inquiry'.***

One such complaint, dropped from the inquiry by OIG, concerned a commander reporting directly to a Service Chief, who recommended that the Reservist's case be used to:

> ***'generate a discussion on ... whether in exceptional cases a member's history of complaining can be considered in relation to their general ability to perform their role as required of them by Defence.'***

The Reservist claimed that this recommendation was one of a number of actions taken to disadvantage him/her because the Reservist had made disclosures and complaints about the treatment of him/her, as set out in summary in Table 2.

OIG just put aside the action taken by this commander, and, in doing so, failed to investigate the alleged reprisal. OIG **<u>did not find</u>**, on the basis of their other findings summarised on Table 2 (last

column), that the Reservist had grounds for reasonably suspecting that he/she had been receiving unfair treatment and/or defective administration. OIG **did not find** that it was rational for the Reservist to submit a disclosure and complaint about such reasonably held suspicions that he/she experienced *'rough justice'* in those PAR findings outlined in Table 2. OIG **did not decide** whether or not there was evidence of the Reservist being querulous or a perennial complainant.

A subsequent Review, authorised by OIG, found, not that the Reservist was rational, mentally balanced and reasonable in making the disclosures and complaints about matters summarised in Table 2, but that it was inappropriate for the commander to use information about the number of disclosures and complaints to vilify the Reservist about the his/her mental health. The Reservist, however, submitted that it was not only inappropriate, it was a reprisal, but OIG would not investigate this allegation.

The Reservist stated:

> ***I am accepting the finding that the vilifications showed bias and were irrelevant to*** [a disclosure and complaint] ***on the discrimination matter. I am not accepting that these aspects were the only wrongs done to me by this vilification, and by the results and actions that flowed from this vilification. I am also not accepting that dismissing the ... Report is sufficient redress for these wrongs, nor that the vilification is irrelevant to the complaint that I am making about the actions of the*** [Investigation Officer]***.*** [underlining added]

In an attempt to close down the issue after the Reservist was retired from Defence, OIG claimed that all matters about which the Reservist remained dissatisfied had been '***thoroughly inquired into and decided'.*** On the face of available evidence, this was a false statement by OIG. It again demonstrated an adversarial approach being adopted in favour of commanders against Reservists, seeking to protect the good name and reputation of commanders among other aspects held precious by commanders, but not the indignities imposed by commanders on Australia's serving Reservists.

Detailed reasons

Under Defence Instruction (Personnel) 34-1 (now withdrawn), a Reservist was entitled to detailed reasons for any adverse decision made regarding a 'Redress'. The detailed reasons were to accompany the decision, not delayed for five years or provided after the timeline expired for seeking a referral of the decision up the chain of command. That Defence Instruction [DI] defined what was meant by ***'detailed reasons'***:

> ***Facts, evidence and other documents or factors relied upon in reaching a decision, including***
> - ***Findings on relevant facts, that are supported by the evidence***
> - ***Legal authorities, such as Defence Regulations and Ministerial Determinations***
> - ***Specialist advice, such as engineer, medical or legal advice***
> - ***Policy, such as contained in Defence Instructions and the ADF Pay and Conditions Manual***
>
> ***Weight given to each of the material factors and***
> ***Reasoning – the links between the facts or evidence, and the decision***

The DI also explained what did not constitute ***'detailed reasons'***:

> ***... it is not sufficient to simply state 'no grounds for complaint', 'redress sought is not upheld' or the like.'***

This is an example of a binding provision (of conduct) that recognises that some ADF commanders may act to cover-up wrongdoing against service persons. This provision thus sets up a disclosure and complaint regime that can overcome cover-ups, or dissuade commanders from this course:

- If commanders base decisions on false or mistaken evidence or bad or mistaken law or [etc], they are required to set out those bases, thus allowing counter-evidence on review;
- If commanders do not give detailed reasons for the disclosure and complaint, or give detailed reasons only for a selection of wrongs disclosed, the commanders are in breach of the DI;
- If commanders 'stonewall' by not giving reasons, they are in breach of the DI (and other military laws, regulations and orders);
- If commanders give no reasons other than, say 'no grounds for complaint', the commanders are in breach of the DI; and
- If commanders give the findings on facts, but not the statements by witnesses, or the legal authorities or the specialist advice relied upon, the commanders are in breach of the DI.

The problem has arisen as to who is going to correct commanders, if and when they happen to engage in breaches of the DI (or any other military justice procedures), as Service Chiefs and Chiefs of the Defence Force.

Defence did set up an interception process for breaches of procedures, in establishing a Defence Force Ombudsman, and the performance of this interceptor is described in the next section of this submission. Interceptions, however, if they achieve their role, only replace the breach of process with the proper process.

But who would bring the errant commander to correction, and protect the service person from further breaches of the 'detailed reasons' requirement? Who is going to ensure compliance with military law requiring that the detailed reasons be given with the decision, not five years later to those Reservists prepared to fight for the detailed reasons? It is the classic question of who shall guard the guards?

In one case, it was a Defence Minister who assisted a Reservist, disclosing to the Reservist what were the secret findings of military and civil offences made against the Reservist, when the highest levels of the Service withheld that information from the Reservist. Servicepersons otherwise needed to go to Parliament, media or the courts.

Defence sought to neutralise the force of the DI requirement for detailed reasons by claiming that the Freedom of Information Legislation and Privacy legislation overrode the DI made under the *Defence Act*.

The main instrument for overcoming the DI (before it was withdrawn and its provisions only partially replaced) was the OIG:

- The DI required the investigation of the disclosures and complaints made by the Reservist, and any adverse decision had to detail the detailed reasons for dismissing each disclsoure and complaint.

  OIG can get around that requirement.

  OIG can settle disputed facts (and findings) by putting the preferred fact or finding in the OIG's terms of reference. So, the order to the Reservist in Table 3 not to parade ***'until I direct otherwise'*** led to terms of reference requiring an investigation into an order not to parade ***'pending the outcome of the ... Inquiry into*** [the Reservist's] ***complaint'.*** The finding determined that the order was given not to parade ***'while the current*** [disclosures and complaints] ***are being investigated and resolved.***

- The scope of investigations under the DI was all disclosures and complaints made by the Reservist.

  OIG can also get around that requirement

  OIG gets to write its own terms of reference, which can exclude selected disclosures and complaints. This trick was used against a Reservist regarding the secret findings of offences informed to the Reservist by the Minister. When the Reservist disclosed about the failure to investigate the secret findings and the DI required that it be investigated, Defence simply responded that that matter was not in the Terms of Reference;

- OIG can decide not to interview the two members present when the third immediate commander raise [her/his] fist towards a Reservist, not to investigate complaints of false accusations by superior officers against Reservists, and not to inspect training results database for evidence of discriminatory treatment of two female trainees

- The DI defined 'detailed reasons' to include ***'evidence and other documents ... relied upon in reaching a decision'.***

  OIG can get around that requirement.

  OIG can redact all names for privacy reasons, and refuse copies of witness statements relied upon for an adverse decision, because under OIG's rules OIG need only provide documents to the authority for whom the inquiry was conducted.

When a Reservist complained to the CDF about such and other actions by the OIG, under the DI, the CDF falsely stated that The Reservist had not made the complaint through the proper chain of command, and used this false claim to exclude the Reservist's disclosure and complaint against OIG from the operation of the DI. The CDF considered the Reservist's disclosure and complaint under the CDF's command authority, dismissed the disclosure and complaint, and did not give detailed reasons for that dismissal. The CDF had invented a new strain of complaint for which no reasons needed to be given, and falsely claimed that the complaint under the command authority applied to the Reservist's disclosure and complaint.

While the Reservist's experience shows the OIG to be untouchable within the Ministry of Defence, it also demonstrates the power that the DI had in pressuring commanders towards avoiding cover-up.

That power was overcome, because:

- firstly, the OIG agency, with responsibilities for forcing the commanders to comply with the DI, by providing consequences to commanders who acted in breach of the DI (and supporting military laws and regulations), was behaving in an adversarial manner in favour of commanders, and,
- secondly, because the interception role for bringing errant and corrupted procedures back to the requirements, was not being conducted.

That interception role was the responsibility of the Commonwealth Ombudsman's Office [COO], through its role as the Defence Force Ombudsman. The submission now addresses the performance of COO in protecting Reservists from unfair treatment, discrimination and bullying, to judge whether COO can be trusted to ensure a safe workplace for Reservists training to achieve and maintain readiness for deployment on natural disasters and other purposes of the Defence Department and of Australia.

4.PERFORMANCES:
DEFENCE FORCE OMBUDSMAN/COMMONWEALTH OMBUDSMAN'S OFFICE ENSURING FAIR TREATMENT OF RESERVISTS

RECAP OF SUBMISSION's PURPOSE

The submission this far has demonstrated a literal 40% 'wage shortfall' for Reservists and a figurative 40% 'justice shortfall' for Reservists in their defence service, training to achieve and maintain readiness for deployments on natural disaster and other Defence missions for Australia.

The same wage losses apply during any assigned deployments, unless the Reservists gain CFTS positions, when their pay and conditions is improved from 60% to 95% of the pay and conditions received by Regular members.

Regarding the 'justice shortfall', the submission is about to describe the performance of the Office of the Commonwealth Ombudsman [COO] in its Defence Force Ombudsman, as an integrity body or watchdog body for Defence Reservists.

Is it reasonable for Reservists to trust the COO to ensure fair treatment of Reservists during the preparations for and the conduct of deployments that the Royal Commission has in mind for the ADF.

PERFORMANCE AT A STRATEGIC LEVEL

Overview

It is submitted that the Commonwealth Ombudsman's Office [COO] is not fit-for-purpose regarding the interceptor role, also termed the Office of Last Resort, especially regarding Defence.

In its work history, the COO has made or adopted particular philosophies and derived practices that work against its performances as an integrity body for government administration. Those philosophies and practices are described below in the context of three studies prominent in that work history:

a. The COO performance studies by Professor Anita Stuhmcke;
b. The Whistleblower study, Whistle While They Work [WWTW], for which COO was a principal initiator, sponsor and member of the Steering Committee; and
c. The Unreasonable Complaint Conduct Project, for which COO was a participant together with Ombudsmen Offices from some State jurisdictions.

All wrongs described in this submission are allegations, and are not wrongs already proven.

Research by Professor Stuhmcke

Justifying referrals of received complaints back to the agencies

UTS Professor Anita Stuhmcke completed her PhD at the Australian National University. Her thesis was titled *'An Empirical Study of the Systemic Investigations Function of the Commonwealth Ombudsman From 1977-2005'*. The thesis develops an original methodology to explore the relationship between the dual roles of system-fixer and individual complaint-handler performed by the Commonwealth Ombudsman. This empirical research provides insight into the operation of the Ombudsman institution as an instrument of democratic accountability and allows for assessment of the operation and effectiveness of the Commonwealth Ombudsman in terms of the citizen, government agencies and the wider legal system.

Professor Stuhmcke's paper, ***'The Commonwealth Ombudsman: How to balance an individual's right to fair treatment with issues of wider public interest such as ensuring administrative efficiency?***' reports that approx 3 out of every 4 complaints received by the Commonwealth Ombudsman are either not investigated (exercising a discretion power) or are referred back to the agency against whom the complaint has been made for investigation.

These statistics demonstrate an inordinate belief that:

- agencies either have done the right thing up to the point of the COO's decision, and need not be investigated

Or

- agencies will do the right thing when investigating the complaint made against the agency, in the case where the complaint was made by an employee who attempted to go outside the agency to an external integrity agency (namely, COO) in order to obtain fairness, which complaint COO is directing back to the agency.

The WWTW Study

This was a procedurally biased research project into whistleblowing within seventeen Federal and State Government agencies. Only one of the agencies is known, namely Defence, as the names of the others were kept confidential.

The procedural bias rested in the fact that the study's research was based on a transverse questionnaire survey (taken across an agency at one point in time) rather than a longitudinal survey (taken repeatedly over a relevant period of time for the phenomenon being studied). Thus figures on the termination of whistleblowers were determined by asking, at one point in time across an agency, whether or not they had been terminated for making a disclosure. Of course, those who had been terminated were not there to answer the survey, and those who did answer the survey had not been terminated (at least by their current agency). It is a disreputable survey technique for processes that happen over time, and was used years ago by some to 'prove' that smoking does not kill - dead smokers could not answer the questionnaire either.

The study used these results to misinform the public about the impacts of whistleblowing, creating what was termed by that study**, 'The Bad Treatment Myth' –**

The age-old adage of most public sector whistleblowers being shunned and tormented by their peers has been disproved.

The research results were more relevant for aspects of whistleblowing that continuing employees could answer. These results were destructive of COO's belief that *Agencies are well intentioned towards whistleblowers:*

- *71% of respondents witnessed wrongdoing, [61% witnessed serious wrongdoing] in the last 2yrs*. Serious wrongdoing, it appeared, was occurring uncontrolled in agencies
- *57% or 61 % of public servants did not report wrongdoing they observed.* Employees lacked confidence in the management of agencies, as also indicated by the figures that-
- *80% public servants remained silent because nothing would be done / no protection would be given*. Why were they fearful is a question answered by the figures that-
- *82% to 91% of public servants, with fear of reprisal, were referring to reprisals from senior managers*
- *78% of reprisals are initiated by managers, against 25% being initiated by colleagues,*
- *51% public servants, 61% selected whistleblowers, who made a first disclosure, did not disclose a second time*

[Plus there were results relevant to OIG's performance

- *81% of disclosures which were investigated, and did detect wrongdoing - no effective action was taken,* and,
- *44% of selected whistleblowers 'believe' disclosures were <u>not</u> investigated (as 68% not told outcome)]*

Regarding COO's practice of directing disclosures and complaints back to the agency that was the subject of the disclosure, the WWTW study (for which COO was on the Steering Committee) found that:

- Risk of bad treatment increased by a factor of 4.5 if the investigation progressed to external bodies, and,
- 31% selected whistleblowers held CEO's mainly responsible for deliberate bad treatment and harm received.

These results are less than they would be if employees who had been terminated had also been sought out and surveyed. Further, these are average figures for all agencies - where Defence has had 21 inquiries into its military justice system in 21 years, it is reasonable to expect that the figures for Defence alone would be much higher than those given above.

Importantly, even these lower than expected figures should have awakened COO to the problems that COO was creating for whistleblowers, where COO effectively 'dobbed in' whistleblowers to their agencies, letting the agencies know that their whistleblower was going to an external integrity bodies with their disclosures.

A particular argument developed in the WWTW reporting raised the issue as to whether or not agencies were well intentioned or ill-intentioned towards whistleblowers and their disclosures.

All wrongs described in this submission are allegations, and are not wrongs already proven.

WWTW reported one ***'perverse result'***, that managers preferred weak Whistleblower procedures, suggesting that senior managers are more satisfied when whistleblowers are less well protected. The study, however, did not vary from their assumption, when explaining this result and all the results cited above, that agencies were (indeed) well intentioned towards whistleblowers.

It is submitted that this conclusion is wilful blindness by COO, as well as a failure to accept, even from COO's own sponsored research, the harm that COO has been doing to whistleblowers, and the risk that COO's procedures for dealing with its workload of complaints, have for current and future whistleblowers.

Querulants and Unreasonable Complaint Conduct

A high level commander recommended to the headquarters of his/her Service, referring to a Reservist, that it consider:

> ***whether in exceptional circumstances a member's history of complaining can be considered in relation to their general ability to perform their role as required of them by Defence.***

An earlier inquiry had found that the Reservist was mentally imbalanced, irrational, obsessed, hysterical and similar wordings of a psychological and psychiatric nature.

Even earlier, the ombudsman offices in Australasia initiated a two stage project that would provide criteria for identifying querulants or chronic complainants, as well as methods for handling such difficult people engaged in what was termed ***'unreasonable complaint conduct'*** or UCC. An Interim Practice Manual was produced in a year later and the Manual was then ***'piloted'*** and ***'road tested'*** in ombudsman offices around Australia over a 12 month period during the next year.

Whistleblowers are not described as being participants in focus groups for 'this UCC project'. Staff in Commonwealth agencies including Defence have thereafter been trained in the guidelines and methods set out in the final Manuals.

The UCC project, as with the WWTW research on whistleblowers, simply assumed that agencies were well intentioned rather than ill-intentioned towards whistleblowers. The ***'observed behaviours'*** that may be seen to be irrational or unreasonable when the agency and or the ombudsman are themselves behaving with good intentions, may be perceived to be rational and reasonable when the complainant (or whistleblower) is facing an ill-intentioned agency or an ombudsman office engaged in cover-up or closedown or reprisal.

While the UCC Manual may have value where behaviours are rude, abusive and or threatening, the UCC Manual then mixes these poor behaviours with actions that would be expected to be used, rationally by whistleblowers, when dealing with difficult agencies and DFO offices engaged in cover-ups, or reprisals.

When the agency is involved in cover-up, the UCC Manual can be used by the ill-intentioned agency to:

- authenticate and hide the true nature of adverse actions, taken against disclosures and whistleblowers;

All wrongs described in this submission are allegations, and are not wrongs already proven.

- assist in the psychological vilification of rational, good faith complainants;
- assist in giving momentum to bad faith efforts to cover-up disclosed wrongdoing; and
- assist COO offices to defend cover-ups by personal attack directed against reasonable complaints about underperformance / poor performance.

Examples of ***'observed behaviours'*** that are used by DFO offices and agencies to justify closedown (termed 'declining and discontinuing') of disclosures and complaints, reasonably made, include:

- **persistence,** including actions to go to more than one watchdog authority and/or to the Minister and/or to an Inquiry (denigrated by the term, 'forum shopping'), and decisions not to accept the determinations made by an agency and by the ombudsman office;
- **make disclosure and complaint about the agencies** and ombudsman office and/or other organisations, which fail to act on the disclosures made or take action to reprise the complainant;
- **establishing blogs and websites and social media processes** about alleged wrongdoing;
- **making Freedom of Information applications** (and other forms of self-investigation); and
- **experiencing unemployment, marriage breakdown, and severe financial trauma.**

Perhaps alarmingly, even where COO accept that any disclosure and complaint has ***'substance or value'***, this does not mean that the above actions by whistleblowers will be regarded by COO as reasonable, according to the UCC doctrine adopted by COO and Defence

This submission proposes that:

- This assumption held by COO, that agencies are well-intentioned towards employees (including Reservists) who make disclosures and complaints,

and

- derived policies and advocacies by COO within those agencies, that vilify employees who act to overcome stonewalling and cover-ups by their agencies (including Defence),

render COO **unfit for the purpose** of intercepting stonewalling and cover-up procedures adopted by agencies against Reservists who make disclosures and complaints.

This includes COO's role as the DFO, and the interception of stonewalling and cover-up by Defence against disclosures and complaints by Reservists regarding 'wage theft' and 'justice shortfalls' concerning discrimination and bullying in their military employment.

Designed to fail

COO may have been designed to fail in its interception role.

On the one hand, as was explained to a Reservist:

> ***Our main concern is to determine whether an agency has acted reasonably and within the boundaries of its policies and any applicable legislation,***

and, on a second time:

> ***... before we begin, it may be helpful to explain the role of the Commonwealth Ombudsman's office is to assess whether it appears that an agency:***
> - ***has acted in accordance with the relevant legislative and administrative requirements,***
> - ***has given appropriate consideration to all relevant information when making a decision, and***
> - ***in all of the circumstances, has made decisions or taken actions that are not unreasonable.***

But the problem emerges as soon as a breach of legislative or administrative requirements is identified:

> ***The Ombudsman cannot require or direct that an agency take a specific action or make a specific decision. It is not our role, nor do we have the power to substitute a new decision or compel an agency to take any action.***

and

> ***the Ombudsman does not look at the merits of a decision but the administrative processes surrounding a decision, for example, ensuring that procedural fairness was observed, and that the decision was not unreasonable in the circumstances. Accordingly. we did not look at the issues contained in your initial*** [disclosure and complaint]***, or the merits of*** [the Service Chief's] ***decision, but the processes surrounding it.***

It is not unreasonable to suggest therefore that the COO is not fit for purpose, because it can only identify breaches in processes, it cannot correct those breaches in processes or require Defence to make corrections. Defence knows this. COO has to negotiate with Defence, to which COO needs to allocate resources and time. What the Reservist gets, if anything, is a compromise.

Out-negotiated by Defence

Defence negotiated the following arrangements with COO in its DFO responsibilities:

Defence would complete its full complaint procedures up to the top of the chain of command in 28 days, and if this was not possible, Defence would provide an explanation.

In return, COO undertook

- not to investigate a complaint unless a member
    - could demonstrate that a reasonable attempt had been made to correct the grievance, and,
    - had used the chain-of-command system in this reasonable attempt
- not to investigate any complaint where the circumstances giving rise to the complaint had been overtaken by events,
- not (or rarely) investigate a complaint where a complaint is undergoing active investigation by Defence, and,

- not to refer to the contents of official documents related to an investigation, including personal files except where it is absolutely vital to COO's report to do so, and then only to the minimum extent necessary.

COO had surrendered to Defence an unhindered use of delay in order to overcome disclosures and complaints by Reservists about the unfair treatment, discrimination and bullying identified in the ANU study. COO had also committed itself to believing Defence about the contents of Defence documents. Completing a complaint process up the chain of command to its top was always going to be impossible, so that negotiation 'win' by COO left all the 'possible' timings in going up the chain of command to the exception procedure agreed to by COO for when 28 days was impossible, namely

> **Defence** [only] **had to supply an explanation**

So, for one Reservist whose disclosure and complaint had reached the Service Chief, where the Service Chief was required to provide detailed reasons with her/his decision but had not done this, and COO was asked to investigate this breach, COO provided the following excuse for the five years that it took COO to obtain detailed reasons for part only of the disclosure and complaint:

> [The Service] ***has acknowledged that there were delays and confusion in handling your*** [disclosures and complaints]***. We note, however, that*** [OIG] ***did apologise for the delays in (sic) at the time, did keep you up to date, and did write to you in*** [3.5 years after the decision] ***to clarify how your*** [disclosures and complaints] ***were being handled. While this does not alter what occurred at the time, or any stress this may have caused you, we do not consider that there is any further remedy available. We note also, the improvements to the*** [disclosure and complaint] ***system since that time as a result of the ... Review. This office will however, continue to monitor*** [disclosures and complaints] ***processing issues***.

and

> ***... given the length of time which has now elapsed since the inquiry was conducted, we do not consider that any meaningful remedy can be gained by pursuing this issue further.***

COO will not interfere with a continuing Defence investigation, Defence delay for years until remedy is not available, Defence gives COO an explanation of the delay, and COO terminates any further involvement in the failed investigation process - this is a system designed to fail.

This was an example from the variety of processes that Defence uses against Reservists, without any effective interceptions from a purported 'watchdog authority', the COO. COO also benefitted, with Defence, from this outcome. That is, COO saved itself a lot of work, reducing the workloads for its workforce resources.

Another relies upon the arrangement that COO will not investigate disclosures and complaints that have not been made by Reservists up the chain of command. This is an enticement to commanders engaged in cover-up of wrongdoing to claim that Reservists did not make their disclosures and complaints up the chain of command, when in fact they did. Other tricks include where

- the Reservist went over the head of their immediate commander when the disclosure and complaint was about the Reservist's immediate commander. This was allowed by DIs, but commanders claim the chain of command was not followed;

- a staff officer from the higher headquarters asked the Reservist to make the Reservist's disclosure and complaint to the higher commander's headquarters, and then informs the Reservist that [he/she] nad not followed the chain of command.

So, a Reservist disclosed and complained to his immediate commander about actions by OIG. The commander forwarded the document to the OIG for a decision by the CDF. The CDF falsely claimed that the Reservist had not forwarded the disclosure and complaint first to the Reservist's immediate commander, even where the Reservist, his/her immediate commander and OIG held documentary evidence that the Reservist had made the referral to his/her immediate commander. The OIG failed to correct the CDF to the Minister, and declared that further communication from the Reservist would not be entered into.

The benefits from the false statement by the CDF that the Reservist breached the chain of command rule had two obvious benefits according to the CDF:

a. Firstly, the CDF did not have to treat the disclosure and complaint under the procedures Defence has set up for disclosures and complaints; in particular, the CDF did not have to give detailed reasons for the decision to dismiss the complaints against OIG: and
b. Secondly, the Reservist would not be able to refer thereafter the disclosure and complaint to the COO, which had agreed not to investigate disclosures and complaints that had not gone up the chain of command.

These examples come from shortcomings and flaws in COOs approach to its DFO role at a strategic level, its beliefs about the good intentions of agencies, its wilful blindness about cover-up, and its poorly negotiated position with Defence that destined COO to fail in its DFO role

PERFORMANCE ON INDIVIDUAL CASES

Tricking Reservists – Rights

It took 5 years for the Reservist to obtain one of the above parts to ***'detailed reasons'*** for the Service Chief's decision to dismiss the rough justice matters (secret findings of offences; falsification of a Official Record). The item received was the legal opinion.

But COO, having obtained the release of that legal opinion, then withdrew from obtaining the other parts to the above definition of ***'detailed reasons'***, including the ***'findings on relevant facts'*** with respect to the secret findings and falsification matters - these matters were just listed and not discussed in any detail in the legal opinion. This lack of detail about the secret findings and falsification matters in the released legal opinion rendered the legal opinion useless on these primary matters, and may be the reason why COO was able to negotiate its release by Defence.

In responding to the disclosures and complaint by the Reservist, additional failures by COO included a trick played on [him/her] about whether [she/he] could then refer the disclosure and complaint to the CDF. COO stated to the Reservist:

> ***While the provision of the internal advice at this late stage response falls short of the full statement of reasons you were seeking, it does provide you with the legal basis for its decision and allow you to better prepare your ROG to the Chief of the Defence Force.***

COO was justifying its withdrawal from getting the rest of the detailed reasons, on the basis that the Reservist had recourse to a referral of [his/her] disclosure and complaint to the CDF, and that, by having the legal opinion, it allowed the Reservist better preparation for the referral.

The COO were insistent on this benefit of a useless legal opinion to the Reservist:

> ***I consider that you have been provided with sufficient information to reasonably allow you to further your*** [disclosure and complaint] ***to the CDF. In my opinion, it would not be reasonable to continue to suggest that a barrier exists which prevents you from putting your case against that already established by Defence.***

and

> ***As I advised you in my previous letter, it is the policy of this office to review a case once only.***

and

> ***You are concerned by*** [a COO employee's] ***view that after the provision of the legal advice to you there was no barrier preventing you from escalating your*** [disclosure and complaint] ***to the CDF. I have considered the material on file and have discussed this point with*** [a COO officer]**.** [She/He] ***does not believe that the comment should be withdrawn as it represents*** [his/her] ***view of your case at the time that*** [she/he] ***conducted the review. Similarly I do not believe that the comment should or even can be withdrawn.***

The CDF, however, ten years later, determined that the secret findings and falsification matters could not be considered by the CDF.

> ***At the time this*** [disclosure and complaint] ***application was submitted, the*** [disclosure and complaint] ***process was governed by the*** [... Regulations]**.** ***The*** [... Regulations] ***did not provide for a complaint to be referred to CDF.***

The COO may have got past a difficulty by stating that the Reservist had rights to refer the disclosure and complaint to the CDF, and the CDF got past the same difficulty by stating that the Reservist did not have those rights. That constitutes a trick, known to both authorities, with neither stepping forward to resolve their beautifully executed checkmate on the Reservist.

Tricking Reservists – Investigation

A Reservist complained about '*rough justice*' to the Burchett Inquiry, which refused to investigate the disclosure and complaint. The Reservist had made the disclosure and complaint to the Reservist's immediate commander, refusing to hand it as requested to a staff officer from higher headquarters. The immediate commander immediately handed the disclosure and complaint to the staff officer from higher headquarters, but the Reservist had a signature from the commander.

The Service never responded to the disclosure and complaint.

The Reservist took the failure of the Service to investigate and report on the disclosure and complaint to the COO, which replied:

> ***We did not investigate the following issues in your complaint. I have provided a brief explanation as to why in each case.***
> - ***Your submission to the Burchett Inquiry***
>
> ***... We consider that***[the Service] ***has responded adequately to your concerns in this regard, advising you to pursue the matter with*** [OIG]

OIG subsequently advised the Reservist as follows:

> ***... You may not be aware that at the completion of the Burchett Inquiry all matters were automatically passed onto the newly created*** [OIG] ***... .*** [OIG] ***did not inquire into your submission to Burchett ... because the matters were being dealt with and were still the subject of your ongoing*** [disclosure and complaint] ***with*** [the Service Chief]***, which continued ... with*** [COO's] ***involvement.***

Both COO/the Service and OIG were blaming the other for not doing the investigation, with COO knowing that neither the OIG nor the Service had done/were doing any investigation, and knowing that it had properly been taken to the Reservist's immediate commander. To complete the trick and gain the result, COO decided that:

> ***... given the length of time which has now elapsed since the inquiry was conducted, we do not consider that any meaningful remedy can be gained by pursuing this issue further.***

Misleading Parliament

Table 2 described a history of events affecting a Reservist by numbering the months, starting with findings against the Reservist of criminal and military offences based on false accusations made in a performance report in Month 2, going up to Month 102 when the performance report was put aside as defective - but there was no opportunity for the Reservist to address the findings, and no investigation of the alleged false accusations was conducted.

In Month 30, a senior uniformed officer gave evidence to a Parliamentary Committee that, while adverse administrative action was available to commanders responding to a service person's performance, it should not be used in the place of disciplinary proceedings where the latter were merited.

A team from COO also gave evidence to that same committee. COO declared that:

> ***... we do not have any complaints that a person has suffered reprisal or victimisation by reason of using the complaint system. Defence has moved a long way in trying to instil faith and confidence in the defence system.***
>
> ***...***
>
> ***Our impression is that Defence is doing all the right things at the moment, ...***

and

> ***Defence does have an effective complaints system for managing complaints of unacceptable behaviour. Briefly, it was a well-structured system. ...***
> ***...***
> ***... the quality of any complaints system ultimately depends on matters of fine detail, on how adequately records are kept and how quickly there is a response to complaints. ...***
> ***...***
> ***... There are no particularly serious problems that have arisen in the complaints. ...***

That was stated to that Parliamentary Committee on Month 30.

Regarding the disclosure and complaint about the refusal of the Service Chief to provide detailed reasons, the Reservist who suffered the use of performance reports (and Quick Assessments) to find the Reservist guilty of criminal and military offences, in Months 2 to 18, lodged a disclosure and complaint to COO in Month 1. The Reservist wrote:

> ***I am being denied, in breach of DI(G) 34-2 and thus in breach of the Defence Act, full and proper reasons for the*** [disclosure and complaint] ***I made to the*** [Service Chief]***.***
>
> ***The breaches may be deliberate tactics by the CDF,*** [Service Chief] ***and / or the*** [OIG]***, having the character, timing, direction and result so as to lead to the conclusion that the separate acts may be part of a continuing intention to frustrate the progress and completion of my*** [disclosures and complaints] ***against very senior officers including*** [the CDF]***.***

COO found against the Service Chief in Month 12, with respect to failing to provide the Reservist with the legal opinion, but in Month 5 stated to the Reservist by phone that:

> **(COO) won't be saying Defence are wrong. ... (COO) won't be taking this higher ... (COO) are taking the long term on improving things, (CO) won't do this just for you [words similar]**

In Month 12, COO secured the release of a legal opinion, but wrote to the Reservist stating:

> ***... . I do not consider that further action would be likely to elicit a different response from Defence.***
> ***... you request that this office 'intervene' and direct*** [the Service] ***and CDF to take various actions. This office has recommendatory powers only and generally works with agencies to provide appropriate remedies and improve administrative processes. It would not be appropriate, or within the powers of this office, to take any of the actions you request.***

In Month 14, the Reservist stated to COO by letter:

> ***The Chief of the Defence Force [CDF] is at the top of that chain of command, and may be preventing me from making a complaint ... against the*** [Service Chief]***.***

All wrongs described in this submission are allegations, and are not wrongs already proven.

> ***That act to prevent me from making a complaint may be in breach of Defence Force Regulation 80.***
>
> ***Commanders subordinate to the CDF, at ... , may also currently be acting in breach of DFR 80. Recommendations to terminate my service, justified principally by reference to*** [disclosures and complaints]***, may be attempting to dissuade me from making complaints.***
>
> ***The recommendations to terminate my service are stating that I will be able to resolve my 'outstanding administrative issues as a non-defence member'. My*** [disclosure and complaint against the CDF ***(with associated matters) is the major outstanding administrative issue that I have with the Defence Force.***

COO replied in the same Month 14:

> ***The broader*** [disclosure and complaint] ***system issues were not dealt with in this office's investigation of your complaint. ... This office ... continues to monitor and discuss*** [disclosure and complaint] ***processing issues with Defence. In light of this, we do not intend taking any further action in relation to this aspect of your complaint.***

About Month 15, COO and other ombudsman offices in Australia began a trial on the use of the 'chronic complainant' procedures (later Manual on Unreasonable Complaint Conduct}.

The Reservist started meeting the criteria for becoming rated as a chronic complainant when, in Month 17, the Reservist wrote to COO a second time, and stated:

> ***The CDF has not, however, accepted the*** [disclosure and complaint] ***as*** [a disclosure and complaint]***, and this is a continuing procedural non-compliance with the DI 34-1. The CDF has given part of the redress sought while refusing to acknowledge that the CDF has a*** [disclosure and complaint] ***on the issue before him.***
>
> ***The CDF has effectively refused other parts of the*** [disclosure and complaint]***, without providing a Statement of Reasons for refusing these parts of a legitimate*** [disclosure and complaint]***. This latter refusal is also a continuing procedural non-compliance with the DI 34-1***
>
> [COO] ***should not turn its eyes away from the substantial set of continuing procedural non-compliances with the governing Defence Instruction by the highest officers in the Defence Force ... by the guardians of the*** [disclosure and complaint] ***system.***

In Month 19, COO responded, confirming COO's Month 12 decision, and adding:

> ***It is the normal practice of this office not to investigate complaints while a relevant internal process remains unused or not fully established. In your case this means the referral of your [D&C] to the CDF.***
>
> ***As I advised you in my previous letter, it is the policy of this office to review a case once only.***

The Reservist was demonstrating persistence, on a matter that had some substance - these aspects are both indicators to COO that [he/she] was a chronic complainer.

From Month 17, COO was also having to deal with a new disclosure and complaint:

> ***I lodged a*** [disclosure and complaint against a higher commander]***, alleging unacceptable behaviour and efforts to force me into a resolution of the matter using Performance Appraisal Reporting procedures rather than*** [disclosure and complaint (D&C)] ***procedures [hence*** [D&C] ***1].***
>
> [Commander Higher HQ] ***decided to initiate a routine inquiry and appoint an investigating officer, meeting several of the procedural matters that I was requesting***
>
> [The immediate commander]***, however, the officer about whose decisions and behaviour I complained, decided to order me not to parade at any*** [ship / unit] ***that he commanded, so as to establish distance between*** [him/her] ***and I given my*** [disclosure and complaint] ***against*** [the decisions by the immediate commander]***.***
>
> ***I lodged a redress against that decision by*** [the immediate commander] ***to effectively suspend me from my military duties because I had aired a complaint against the*** [immediate commander] ***[hence*** [D&C] ***2]. I also reported a notifiable incident of an alleged action to disadvantage me because I had made a*** [disclosure and complaint].
>
> ***It appears that the investigating officer is to continue with an investigation of*** [D&C] ***1, but not include the*** [D&C] ***2 matters.***
> ***...***
> ***I submitted in*** [D&C] ***2 that the treatment may be ... Prejudicial with respect to my complaint, in that it denies me access to my*** [Service] ***records and computerised emails and documents that may be relevant to the investigation***
>
> ***Proper protections are missing from my military workplace at the moment, I submit, where the fact that I lodged an*** [D&C] ***is made the focus of my Performance Appraisal Report. Lodgement of*** [a D&C] ***is not a valid matter for performance appraisal. ..., I have been suspended from duties by the*** [immediate commander] ***because I lodged a complaint against*** [her/his] ***actions to resolve my*** [D&C] ***using a review officer function under the PAR procedures.***

In particular, the Reservist wrote repeatedly up the chain of command, and to a Reserve forces authority, seeking access to the Reservist's [Service] ***records and computerised emails and documents that may be relevant to the investigation.*** The Reservist's immediate commander never replied on this issue, and the Reserves Force authority referred the Reservist's letter straight to the Reservist's immediate commander.

COO did not reply either, a tactic that was under trial for chronic complainants.

In Month 22, the Reservist tried again, seeking the COO to intercept processes on the grounds of 'exceptional circumstances'

Defence Instruction (General) PERSONNEL 34-1, at paragraph 26, stipulates that the [COO] ***may investigate a*** [disclosure and complaint] ***[hence*** [D&C]***] before the*** [D&C] ***has exhausted the ADF*** [D&C] ***System, if - there are exceptional circumstances***

I have been directed not to parade at my posting until the investigation of my [D&C] ***has been completed.***

I allege that this order constitutes an illegal punishment of suspension without pay, now of six months duration, imposed upon me without any disciplinary action or investigation having been initiated against me.

I have been advised or warned that if I provide any more documentation in support of my [D&C]***, that action by me is likely to further delay the investigation.***

Such a delay would act to extend the period of my effective suspension without pay, thus increasing the severity of the illegal punishment being imposed upon me. The advice or warning is thus of a further detriment to me, and thus may constitute a threat.

... It is, I submit, an exceptional circumstance to impose a suspension upon [a member] ***using the*** [D&C] ***process in place of the DFDA***

...

The action to victimize or penalize or prejudice me in any way for lodging [a D&C] ***and / or to prevent or dissuade me from lodging or referring an*** [D&C] ***is a breach of Defence Force Regulation 80. The wording of DFR 80 is repeated in annex H to DI(G) PERS 34-1 [ref A]. This alleged breach of DFR 80 is being imposed by the*** [higher commander]***, and thus has the imprimatur of very senior officers of the*** [Service]***. The involvement of very senior officers in this alleged illegal punishment is an exceptional use of the rank of these officers outside of powers given them by the DFDA***

...

The [higher commander] ***is claiming that I have been ordered not to provide any further documentation in support of my application for*** [D&C]***. A Quick Assessment of the 'effective suspension' elements of my*** [D&C] ***has criticized me for sending documents to the QA officer in breach of this purported order. The documents that I sent were the written answers that I made to questions put to me by the QA officer (as is allowed me by ...) and a response requested of me to an interim report by a second investigation officer assigned to the other parts of my*** [D&C]***. The purported breach of the purported order was then used to justify the effective suspension.***

I have the need to provide further documentation in support of my [D&C]***, because:***

- ***The QA by one officer made 'findings' against part of my*** [D&C]***, and these findings may be used in the consideration of the other parts of the*** [D&C] ***by a different officer – I should be allowed to rebut the act of using a QA to make findings, and to rebut those findings***
- ***The*** [higher commander] ***is denying me access to my records and documents at my posting, denying me access to witnesses to relevant matters, and denying me a copy of documents relevant to actions by officers which actions are the subject of my*** [D&C]

...

All wrongs described in this submission are allegations, and are not wrongs already proven.

> ***I submit that these are exceptional circumstances, constituting contempt for my rights both under refs ... and also under natural justice, threatening me with substantial losses in service, salary and continuity relevant to long service entitlements, and imposing a punishment against me without any disciplinary procedure.***
>
> ***In summary, I have been placed outside the operation of Defence law and procedures by officers of the rank as high as*** [direct reportees to the Service Chief]***, and in that position these officers are exacting severe penalties against me and my service.***
>
> ***Any delay in removing my fate from the direction and discretion of such*** [Service] ***authorities may bring irreversible harm to me and my*** [Defence] ***career. It is in these exceptional circumstances that I seek the intercession of the*** [COO]***, as per para 26 of ref A, to return my service to within the controls of Defence law and procedures.***
> ***...***
> ***Summary***
>
> ***I believe on reasonable grounds that I am being 'outlawed' by senior*** [Defence] ***authorities.***
>
> ***I am being placed outside the normal operation of*** [Defence] ***orders and regulations and Defence Instructions for the single reason that I disclosed certain behaviours unacceptable to the Service according to the writings of the Defence Department.***
> ***...***
> ***I further submit that the circumstances are sufficiently exceptional as to merit the intercession of your Office to have my complaints investigated on their merits by an officer of sufficient rank to facilitate a proper, fair and thorough investigation of my complaints***

COO replied this time, acknowledging receipt of the letter from the Reservist, noting the page count (35) for the Reservist's letter (a page count is another COO criterion in the UCC framework for identifying chronic complainers), and explaining that the Reservist would be contacted again after COO had had an opportunity to read the letter.

About Month 26, Defence destroyed all the Reservist's computer records including emails stored for the Reservist's computer workstation.

[Note re Month 27: COO claimed in Month 39 that COO had sent a letter in Month 27, stating that it was pre-emptive of COO to investigate the order not to parade while it was being investigated by Defence]

In month 28, an inquiry found that the disclosures and complaints about the secret findings of criminal and military offences, disclosed to the CDF, and disclosures and complaints about the findings of further criminal and military offences made in performance report, disclosed to the higher commander, showed the Reservist to be mentally unbalanced, obsessive, paranoid, and other terms psychologically vilifying the Reservist because of the number of complaints that had been made and the fact that all were found to be groundless.

In Month 29, any trial of the chronic complainant processes being conducted within COO and/or Defence was completed with respect to the Reservist, when the higher commander removed the

Reservist from all roles in a national entity within that Service, marked the Reservist as not to return, and wrote to the Headquarters of the Service Chief, recommending that a discussion be:

> ***'generate***[d] ... ***on ... whether in exceptional cases a member's history of complaining can be considered in relation to their general ability to perform their role as required of them by Defence.'***

In Month 30, COO made the claim to the Parliamentary Committee:

> ***... There are no particularly serious problems that have arisen in the complaints. ...***
> ***... we do not have any complaints that a person has suffered reprisal or victimisation by reason of using the complaint system. Defence has moved a long way in trying to instil faith and confidence in the defence system.***

COO misled the Parliamentary Committee on the very issue for which the Parliamentary Committee had been formed.

Regulatory Capture?

The reasons for the groupthink about the good intentions of Defence towards its service persons making disclosures and complaints, and the non-existence of cover-up, plus the individual instances as to where this groupthink has been applied to Reservists, will be of interest to other Commissions of Inquiry.

For this Royal Commission, concerned with the commitment by the Commonwealth Government of Reservists to service to train to achieve and maintain readiness for deployments during natural disasters (and probably pandemics) in either a 'call-out' operation and/or in a "Call for" arrangement (usual defence service conditions), it is proposed that, at a strategic level and at an individual case level, COO is not fit-for-purpose in intercepting unfair treatment, discriminatory practices and bullying by Defence towards its Reservists.

5. CONCLUSION & RECCOMMENDATIONS

Fair pay and conditions, and a safe workplace should be provided to Reservists during their training to achieve and maintain readiness for deployments, including deployments into natural disaster events. The same should be provided during such deployments, whether those deployments are undertaken on 'call for' fulltime or part-time Defence Reserve service, or on a 'call-out' with pay and conditions being on a Continuous Full Time Service [CFTS] basis.

Reservists experience a approx 40% loss when on usual Reserve pay and conditions, and 5% when on CFTS

The actions discriminating against Reservists are largely systemic and top down, so the legal framework for the involvement of the Commonwealth in responding to national emergencies, using Reservists, may need amendment.

Queensland Whistleblowers requests that the Royal Commission recommend

1. that Reservists be brought to the same pay and conditions as Regular Forces,
2. that management and disciplinary amendments be made to the Defence Act to cover situations special to the circumstances faced by Reservists,
3. that new justice systems be established for the protection of Reservists and their leaders, to overcome the deficiencies in the independence shown by the Office of the Inspector General [OIG], and in the limited powers, capacities and unreal workplace beliefs of the Commonwealth Ombudsman Office [COO], and,
4. that consideration be given to the following avenues in developing a new justice system for Reservists
    - specific mention of part-time Defence service in Anti-discrimination legislation, with withdrawal of any exemptions given to Defence in this regard
        - this will give greater prominence to the issue affecting Defence, a priority public interest concern
    - group forms of disclosure and complaint with respect to unfair treatment, discrimination and bullying, to an authority outside of Defence, free of Defence staffing and ex-Defence staffing, and free of Defence input about appointments
        - this will give more authority to claims of wrongdoing in matters being wrongfully imposed by the highest levels of authority in Defence
    - a facility for running test cases before adjudicators, rather than on a complaint from an individual Reservist
        - forcing matters to be dealt with by individual Reservists brings a strong risk of reprisal against the Reservist, and coercive pressures upon the Reservist's immediate commander to effect those reprisals
    - a support office for Defence or non-Defence persons, disclosing unfair treatment, discrimination or bullying of Reservists in their military workplace, with the types of support and assistance provided to Reservists by the Defence Reserve Support in protecting their civilian employment

- the problems that can be imposed upon the Reservist at their civilian workplace can be more than matched by the detriments that can be imposed upon Reservists in their military workplace

- a legal advisory and representational service, to Reservists making disclosures of unfair treatment, discrimination or bullying, to assist such Reservists in the same way that the OIG advises and represents the interests of commanders
  - currently Reservists are not allowed representation by legal officers when Reservists are facing adversarial legal opinion and tactics from OIG and command legal officers, so this will provide a more even contest as to what is the law
- the option of outsourcing such supports to a professional association or industrial organisation
  - military law has already lost OIG, COO, ADF Investigation Service and Defence Whistleblower Scheme (possibly also the Defence Reserves Support Office to command influence, so it may not be practicable to obtain reasonable justice for Reservists from any body within the reach or influence of Defence
- the provision of a hearing for adjudication with representation support to Reservists before an the authority outside of Defence, regarding the complaints of unfair treatment, discrimination, bullying and reprisal
  - Defence has processes that provide a hearing and processes that do not, and this provision will assist Reservists who are being denied particulars and a hearing when a hearing is deserved, such as with secret findings of offences, and findings of offences made without particulars of the offence and without a hearing.

The recent first use of the Call-out provisions of the Reserve Forces highlights that since 2001, now and into the future, Reservists are liable to provide defence service at any time in any emergency. The flexibility that Reserve Forces bring to ADF output has also been demonstrated, where different Reservists were able to contribute to the Bushfire effort as fulltime Reservists taking different forms of leave from their employment, and from their businesses. They also contribute by allowing Defence assets to maintain positions in overseas operations needing continuity, as Reservists move into Regular positions to fulfil roles at home.

Queensland Whistleblowers request a longitudinal study be conducted concerning the forms of service provided by Reservists during the national bushfire disaster, to gauge the conditions in which their service was provided. The first survey should be conducted as a part of this Royal Commission, of both Reservists and their employers /business partners, with a second survey in 18 months, to assess the impacts that service had on their twin careers and on their lives. Special attentions should be paid to the effectiveness of the Call-out procedures, and to the effectiveness of the Defence Reserves Support infrastructure, the legal assistance for Reservists in protecting their employment where problems occurred (the authors were involved when this assistance was negotiated in bipartisan arrangements when the call-out was established, but this assistance appears not to be now heralded on Defence websites), and the Employer Support Payment Scheme designed to assist employers with the costs accompanying the loss of their employee(s) to defence service.

All wrongs described in this submission are allegations, and are not wrongs already proven.

The Royal Commission should allow consideration of taking the task and responsibility for addressing unfair treatment, discrimination and bullying towards Reservists out of the hands of Defence, as happened with court martials. This may have also to be done to deal with unfair treatment of Reservists regarding pay and conditions, and in the protection of them regarding discrimination and bullying, and protection of those Reservists who lodge disclosures and complaints against '*rough justice*' and other forms of reprisal.

Any wrongdoings described in this submission are allegations that in the opinion of Queensland Whistleblowers merit investigation - they are not facts already proven.

Queensland Whistleblowers believe that reforms will ensure a Reserve that is larger, better led, better prepared and more effective in assigned roles which benefits our nation overall. Fairness and justice to all service persons will assist in developing what the Bushfire Natural Disaster demonstrated was needed, an integrated and cooperative response across all forms of contributions being made to avert disaster. Any 'burn, bash and bury' mentality towards the careers and lives of Reservists needs to be arrested from Defence preparations and conduct of deployments.

It is expected that the pay and conditions or similar matters applicable to other contributors in the Bushfire natural disaster, will also arise during the Royal Commission, and may require national coordination for events that cross state borders (and floods on border rivers).

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All wrongs described in this submission are allegations, and are not wrongs already proven.

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