

Pleading Positive Reform: An analysis of suicide risk, self-harm, and reputational peril impacting serving Australian Defence Force (ADF) members.

by

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Defence and Veteran Suicide: Prevention through Understanding

Research Symposium Wednesday 10 - Thursday 11 March 2021



Office of the National Commissioner
for Defence and Veteran Suicide Prevention



Resetting our moral compass- to achieve best practice

“Mateship can’t exist without trust and reliability and we elevate mateship, but it must be built on the fundamental obligation felt by the individual to keep his or her word.”

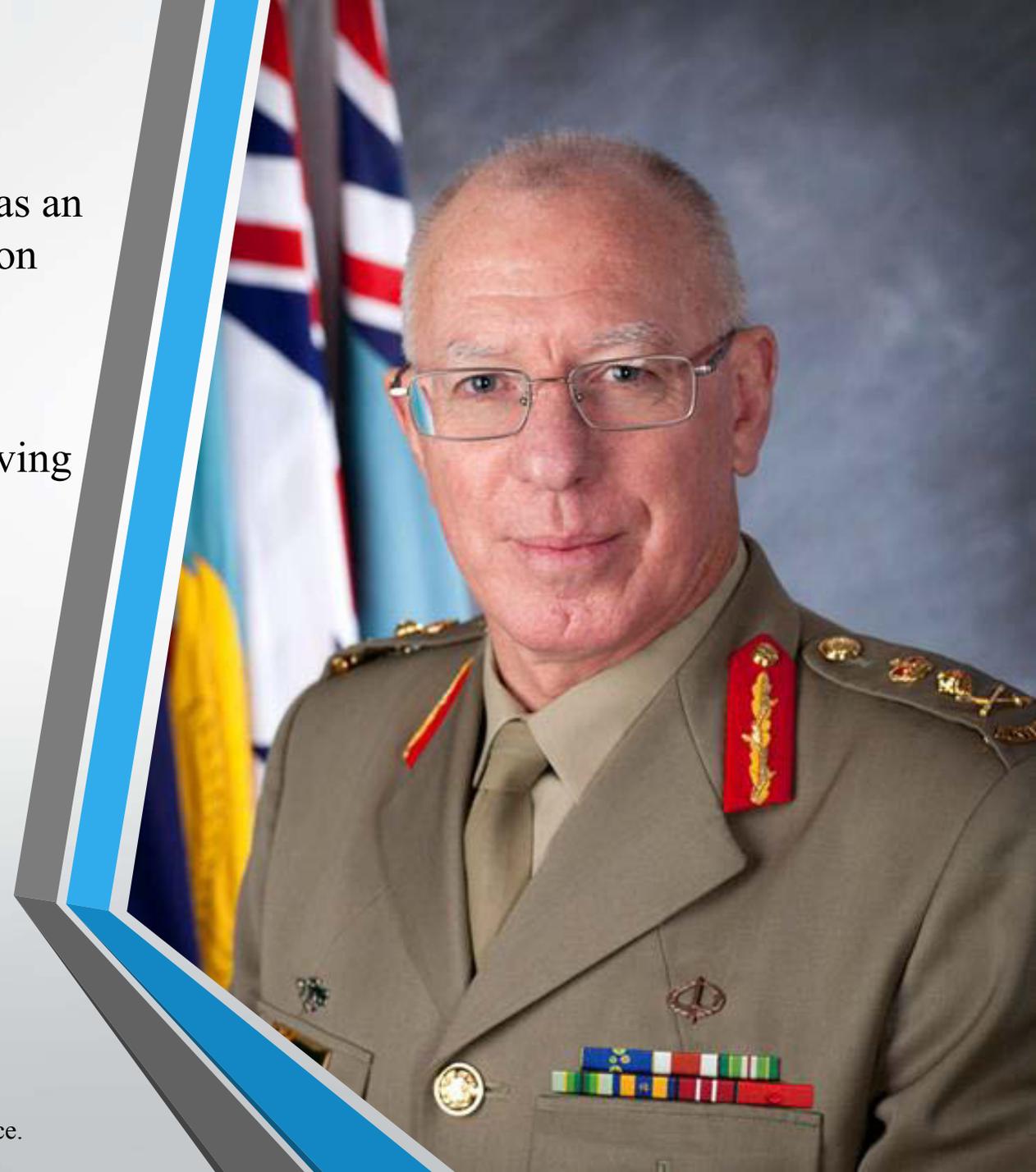
Former General Peter Cosgrove

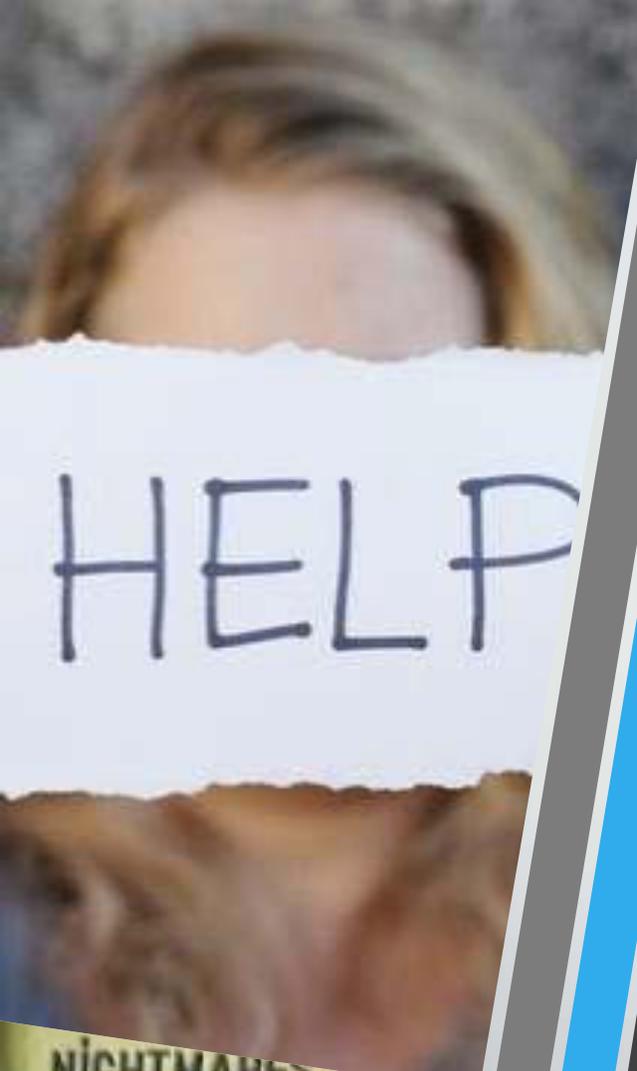


“I want the Australian Defence Force to be recognised as an employer of choice; a fair, just and inclusive organisation that sets the benchmark for other employers.

“Everyone at every level has an active role to play in living the Defence values and meeting this intent.”

Then Chief of the Defence Force,
now Governor General David Hurley





The overwhelming amounts of stress this causes an ADF member and their family, can exceed their ability to cope and lead to devastating consequences.

NIGHTMARES
Anxiety avoidance
Trauma
Re-Experiencing
Intrusive Thoughts

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ENCLOSURE A: DEFENCE INQUIRY FAILINGS

Presently, Defence Inquiries:

1. **are not mandatory.** If a Defence member has a complaint, it is only heard at the Chain of Command's discretion.
2. **are not independent.** Officers conducting the inquiries are not independent as they are all under the same command.
3. **lack of transparency:** Freedom of Information can be obtained but is heavily redacted. Transcripts of evidence are contradictory as oral evidence does not match written transcripts.
4. **are conducted in secrecy.** ADF members who participate in a Defence Inquiry are not permitted to make public the outcome of these complaints or disclose the findings, (similarly witnesses). This may be seen to conflict with the principle of open justice, a fundamental rule of common law that binds to the content that allows fairness when undertaken.
5. **involve evidence that is selective.** Witnesses are consulted on a specific condition where the terms of evidence are decided by the service chiefs. The full extent of a complaint can never be heard.
6. **involve exclusion of evidence.** Defence Inquiry officers are not technically obliged to submit evidence provided by the ADF member.
7. **are founded upon permissible hearsay.** Evidence is not taken under oath. By allowing these Defence Inquiry officers that do continue to take into account circumstantial evidence and hearsay, there is no possibility that ADF members can expect to access a *fair or just hearing* of their complaint.
8. **allow witness collusion.** Some Defence Inquiry officers have been known to consult witnesses on the terms of evidence and give witnesses running updates over the course of the inquiry.
9. **allow witness bias.** In some cases, witnesses are offered the promise of immunity. Therefore, they can say anything they like and are given guarantees that anything they say, or documents they provide to a Defence Inquiry officer, are protected from possible prosecution or civil suit. (See Afghanistan Report.)
10. **permit false witness testimony.** Evidence from previous cases, including the findings of a 2019 Senate Committee investigation (Report on Military Justice Procedures in the ADF, Chapter 5, Administrative Action) and Defence administrative actions, have shown there have been incidents where witnesses have deliberately provided false information, false statements and misleading statements to Defence Inquiry officers.²⁶

²⁶ IGADF, 'Afghanistan Inquiry Report' (2020) <https://administrativeaction.defence.gov.au/sites/default/files/2020-10/IGADF-Afghanistan-Inquiry-Public-Release-Version-041>
²⁷ Senate 2019 Macfarlane, 2019, Chapter 5, Report on Military Justice Procedures in the Australian Defence Force, (Administrative Action) Inquiry into the Honours (in the Defence Annual Report 2018-2019, <https://www.defence.gov.au/annual-report/2018-2019>)
²⁸ Senate 2019 Macfarlane, 2019, Chapter 5, Report on Military Justice Procedures in the Australian Defence Force, (Administrative Action) Inquiry into the Honours (in the Defence Annual Report 2018-2019, <https://www.defence.gov.au/annual-report/2018-2019>)
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Policy reforms are urgently needed ...

40 inequities found in Defence (Inquiry) Regulations 2018

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11. **are undermined by unreliable witnesses.** Some Defence Inquiry officers have been known to cherry-pick witnesses who give testimony that best serves Defence interests, and discount credible witnesses who give testimony in support of the complainant.
12. **are not timely.** A Defence Inquiry is a long and painful drawdown process, resulting in significant anxiety and emotional trauma for the ADF member and their family.
13. **are conducted with lack of governance.** Defence Inquiry Officers are protected from prosecution and other civil proceedings.
14. **are conducted by untrained Defence Inquiry Officers.** Defence Inquiry Officers are selected because they have "operational management, oral research and analytical skills, communication and report writing skills". They may undergo [four days of an unaccredited training](#). They are not legally trained officers by the Commonwealth Ombudsman and other external organisations have found recurring problems that are not remedied despite recommendations.²⁹ Inquiry Officers were:
 1. inadequate in planning investigations;
 2. failed to interview relevant witnesses and assumptions made about the credibility of witnesses interviewed;
 3. pursued irrelevant questioning techniques and failed to put contradictory evidence to witnesses for a response;
 4. failed to record evidence properly, and possibly, preparation of witness and unauthorised questioning of witnesses;
 5. failed to analyse evidence objectively and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made; and
 6. inadequate record keeping.
15. **allow Inquiry Officer bias.** The no bias rule requires the Defence Inquiry Officer to be neutral and act impartially, honestly and without prejudice, and to be above suspicion that they are interested in the outcome of the matter or have prejudiced it. On the contrary, several reviews of Inquiries have shown that military members can seem overly investigate military members because of the inherently hierarchical nature of the ADF.³⁰ (See an example where two very experienced investigating officers looked to hear of evidence and considered their findings carefully, only to have all their findings that were in the ADF member's favour overturned by the Appointed Officer, whilst the same individual underwent all their conclusions that protected their office of the Chief of the Air Force or the Commonwealth's interests.)³¹
16. **are conducted by unqualified Defence Inquiry Officers.** IGADF is staffed by some career service lawyers and some barristers who are not trained in the requirements of open justice, nor are they given evidence in court or deal with serious crime, and are rarely held accountable for their actions or investigations (i.e., by an independent court, the media or experienced external investigators), or career public service lawyers who have never been in a courtroom. The

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17. **are conducted by some Defence Inquiry Officers who ignore policy directives.** In legal terms, administrative inquiries may not *simulate* criminal conduct. Suppose an inquiry involves conduct which may be criminal. In that case, the regulations state that the Inquiry Officer *must* raise the issue, *immediately* and *hand over to the lawful authorities*. The Administration Inquiry Manual states at Annex 40 at paragraph 50 "It, at any time during an inquiry, you conclude that an offence may have been committed in breach of other civil or criminal law or the Defence Force Discipline Act 1982 (DFDA), this aspect of the inquiry must be immediately suspended and the issue reported to the Appointed Officer or Authority in writing. This *must* happen. Defence authority information to protect itself from justice.
18. **enable inaccurate interpretation.** Defence Inquiry officers can *overstep* their authority to their own opinion and not as events actually occurred. They have the freedom to use their own discretion to decide what information shall inform their proposed findings. This is true, regardless if it is founded heavily on unsubstantiated hearsay and discredited credible witness testimony, as is often the case.
19. **allow defective investigation conduct.** Poor record-keeping and communication, lack of support, conflict of interest, and privacy breaches can exacerbate the Inquiry of a complaint, and impact mental health risk.
20. **encourage withholding of evidence.** Some Defence Inquiry officers select only certain parts of a complainant's evidence to inform the final findings. They prevent full disclosure from the complainant.
21. **are unethical.** Defence Inquiries are not independent or ethical because they allow complainants to be victimised and publicly humiliated (See David McBride Case³² and Lawyer and former ADF soldier Mark Handberg's story³³.)
22. **lack procedural fairness.** Defence Inquiry Officers are not obliged to accept or report any written, adversarial evidence at their final findings. ADF members are rarely given full access to evidence that Inquiry officers have relied upon in concluding their findings.
23. **rely on expert evidence and lower standard of proof.** Defence Inquiry Officers assume an "investigative" role to determine whether there is a sufficient amount of evidence to meet the "standard of proof". In civil cases, the standard of proof is the balance of probabilities, a lower standard than the proof required (beyond reasonable doubt) in criminal matters. The balance of probabilities is determined by whether an alleged event is "more probable than not" or "highly" versus "of an allegation is more probable". Inquiry Officers make recommendations that are not legally admissible as evidence in a court or tribunal. In most cases the findings are flawed because they are not always supported by evidence that establishes

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24. **force a waiver of Constitutional Rights.** The Defence Inquiry process forces ADF members to waive their Constitutional right to protections, as Australian citizens under Commonwealth Law, despite that they are not legally obliged to waive such protections. Excluding civilian police and court involvement in areas where they have the expertise and structures to better handle such matters and maintain a court that reflects protection enshrined in the Commonwealth Constitution, ADF members could enjoy the same rights and have the same safeguards as all Australians. This, provide ADF members with a process that will provide impartial, rigorous and fair outcomes and one that is transparent and accountable.
25. **are immune to scrutiny by a system of self-protection.** ADF uses the full weight of its resources, human, legal and financial (taxpayer funds), to minimize liability and reputational harm to itself. Adverse comments are often left on the Inquiry findings even when proven to be false. This is to dissuade the complainant to validate the flawed Inquiry findings.
26. **is a process generally concerning Commonwealth Law violations?** Defence Force Discipline Act 1982 (DFDA) 1982 is an act of Parliament - A decree proclaimed the law passed by the Legislature and given Royal Assent by the Crown. Defence Inquiry officers must follow Defence policies, instructions and directives in a "general sense" (DFDA 1982 Part 1, Sect 3 - "general order"). If they do not follow the policy or instruction (Defence (Inquiry) Regulations 2018, then they are failing to comply with a general order (DFDA 1982, Part 3, Division 3, Sect 29) and should be subjected to disciplinary action, as stated in the DFDA, 1982. Defence Inquiry Officers have concluded findings based on comments not supported by facts or documents.
27. **often misleads Ministers in Defence findings.** Defence Ministers are not always fully informed with an accurate account of the complaint. Inquiry findings frequently and appear to deliberately omit key evidence. Inquiry findings have been known to contain false evidence.
28. **lack of corrective action:** Current policy failures compound existing deficiencies because the ADF does not have any corrective action policy.
29. **creating financial detriment.** A Complainant Officer can issue an ADF member with a Notice To Show Cause.³⁴ The ADF member has only 14 days to respond when they should not be the subject of the proposed administrative action by way of a written reply. That representation is then submitted to the same individual who issued the Notice to Show Cause. The person who believes there is a problem is also the investigator and authorized decision maker. This allows for complete abuse of power in ability and malfeasance. This is a significant contributor to why there are so many young Veterans prematurely out of the ADF and being managed by DVA. This point is frequently overlooked. Some Veterans are too young to access their Superannuation which creates a financial detriment on top of emotional and financial liability.
30. **allow unequal access to financial resources.** Past reviews have shown a distinctly unequal position to the party making the allegation.³⁵ The ADF member responding to a notice to show

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31. **create an unfair legal advantage.** The role of a legal officer requested to assist the member at the preparation of their complaint is to provide specialist advice concerning the grounds for complaint. The legal officer is not there to conduct an inquiry or investigation into the complaint or make resolutions on behalf of the member, expressly without authorisation from the legal officer, which will only be given in exceptional and complex cases.³⁶
32. **exclude external collaboration.** Independent decision-makers almost always invariably default to the ADF's decision (e.g., Commonwealth Ombudsman, IGADF, Defence Minister, Attorney General, DVA). This is despite key evidence substantiating that Defence Inquiry Officers may not have adhered to Defence policy or common law. External decision-makers have no legal authority to enforce any of the recommendations they make as the ADF is governed by its own statutes.
33. **lack independence.** The Australian Government established the IGADF as a statutory appointment outside the Chain of Command to independently monitor and assess the military justice system's health and effectiveness. Typically, IGADF are former Army officers who hold a range of military justice roles. All appointed under the IGADF are also typically ADF officers. Many are of the opinion that this could create doubts over the legitimacy of a Defence Inquiry being independent.
34. **have been subjected to policy reform over decades.** Past Senate inquiries into Australia's military justice system's effectiveness have consistently recommended administrative reform, to not just policy in place that gives greater independence, transparency and accountability to ADF members.³⁷ Recommendations are seldom implemented in their entirety.
35. **institutional abuse:** Institutional mismanagement, failure to provide due process, military suicide self-harm, vindictive behaviours, and ADF administrative failures to hand-in-hand. A petition was submitted to the House of Representatives in 2001, asking the House to support changes to the Defence (Inquiry) Regulations 2018 so that Defence inquiries be subject to legal techniques, rules of evidence, principles of open justice and common law. Defence Inquiry officers undertake legal training, witness testimony taken under oath/affirmation; introduce a neutral process outside the Chain of Command and corrective action policy to ensure procedural fairness, and access to genuine mediation for ADF members to resolve workplace complaints. The Petition EN226 - Apply ADF Policy Reform to include corrective action collected 2015 signatures over four weeks.³⁸ The petition was passed to the Defence Minister for response on February 10, 2021.
36. **are conducted with intimidation.** Former Defence legal officer responsible for conducting Defence Inquiries, David McBride, is on the record upholding that ADF attorneys and prosecutors who-blowers. He has been threatened with long prison terms for exposing alleged ADF misconduct in Afghanistan. McBride is on the record, publicly expressing grave concerns about the inequality and over-appeal culture set by defence leadership. For that reason, he is ridiculed and victimised. It seems absurd to continue politically-motivated charges against the

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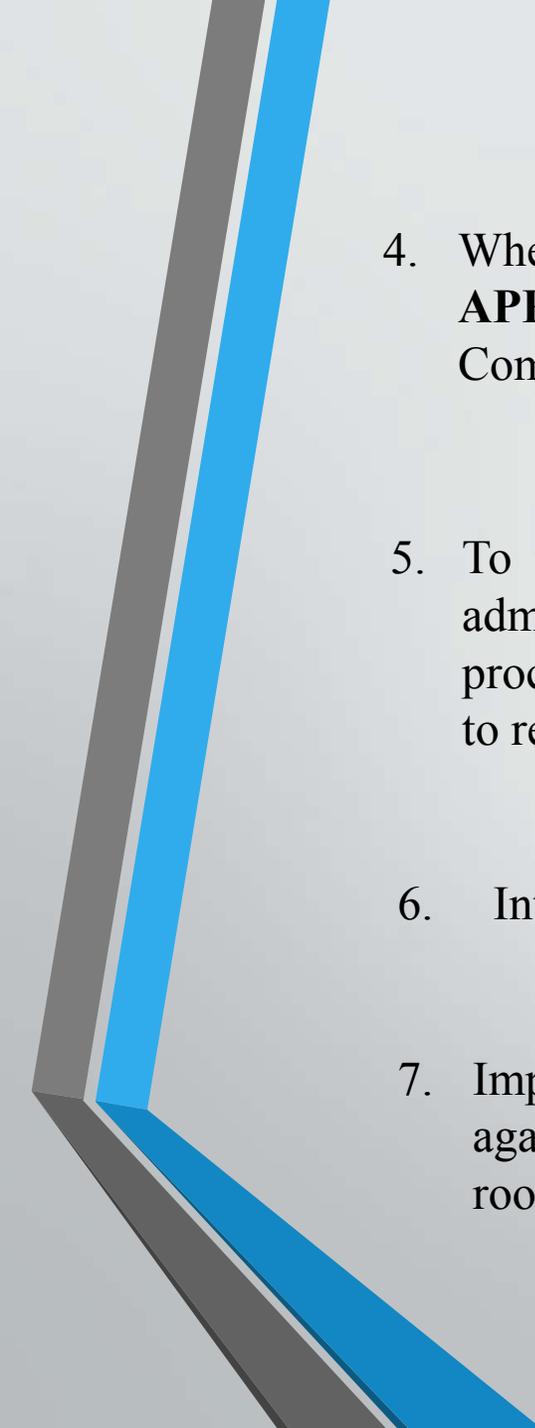
37. **are not accessible.** The complaint process should be easy to access and understand, and everyone should participate equally. For example, an ADF member may require a lawyer to help them prepare their complaint. Often Defence Inquiries are complex matters that require a fuller understanding of the law. In some circumstances, ADF members may be entitled to assistance from an ADF Legal Officer (even for out of the Army reserve budget) when seeking to endorse a grievance. Still, such are not permitted to prepare complex legal defences the ADF members is a process.
38. **is not free from victimisation.** ADF members who raise a complaint are often falling their perceived inquirer from within the workforce, often *placating their abuser*. Absent, associated or missing file notes resulted in all the responsibility being placed on the person who believed they were the victim rather than on the alleged aggressor/victimiser. (See [Conscience Hazard](#), 28 April 2004, pp. 28-30, and [Substance P214](#), p. 2) which states medical information obtained in a hearing was not placed on a file (See [Substance P22](#), pp. 2-3) refers to an event not reported but which left long-term effects on one of the witnesses. ADF members say they have suffered reprisals for completing or providing evidence, leaving them feeling ostracised and without support. (See statement by Mr Scotland "These have caused me to be medically discharged as a result of psychological issues, and I have attempted suicide along the way after some three years of trying to find some resolutions in relation to these submissions". [Conscience Hazard](#), 09 Jan 2004, p. 64, [Substance P50](#).)
39. **fail to adequately provide duty of care to ensure well-being and mental health.** Duties in inquiry, many cases show that the ADF fails to meet its duty of care administratively, as reflected in the increased number of complaints and suicide and self-harm cases relating to ADF members and Veterans.
40. **have ramifications whereby adverse findings impact civilian identity.** ADF members who are qualified in a particular profession may incur additional professional ramifications. For example, medical officers may incur reputational harm if Inquiry Officer or Commanders influence contact between Joint Health Command to the Australia Health Practitioners Regulation Agency. Similarly, legal officers could be disbarred, which could have serious revalued.

Not an exhaustive list.

7

Steps to Policy Reform

1. For **RULES OF EVIDENCE** to form the basis of all Defence Inquiries, providing a fair and transparent process to ensure complainants can assert their rights, under equal opportunity law, and that the hearing of their complaint adheres to the principle of open justice and common law,
2. Defence Inquiry Officers **BE TRAINED INVESTIGATORS** with a thorough understanding of applicable civil and military law,
3. Witnesses shall be required to **GIVE EVIDENCE UNDER OATH OR AFFIRMATION**, and Inquiry Officers prevented from relying on evidence that has not been cross-examined to ensure its **AUTHENTICITY**. Those found to be acting negligibly or providing misleading or false information should **FORFEIT** any right to protections otherwise afforded to them under legal privilege,

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4. Where any complaint is not resolved during service, there must be an **INDEPENDENT APPEAL MECHANISM** to assess the fairness of the decision, *outside* of the Chain of Command and *entirely independent* from Defence influence,
 5. To put in place access to **GENUINE MEDIATION** and early resolution of complaints administratively by pursuing negotiated solutions for ADF members, before a grievance is processed, and if necessary, establish **FUNDING** to ensure ADF members have equal access to resources as the ADF,
 6. Introduce a **CORRECTIVE ACTION POLICY** to ensure procedural fairness; and
 7. Implement a **REPARATION POLICY** in acknowledgement that violations were committed against the ADF member, to repair the damage done by these violations, and to identify the root causes of the violations—to prevent them from occurring again in the future.



Let us advance towards a fairer, more just and mentally robust workplace.

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Enclosure A: Defence Inquiry Inequities

Enclosure B: Case Study1 —Affected ADF Member

Enclosure C: Case Study 2—Affected ADF Spouse