

FEDERAL COURT OF AUSTRALIA

Gaynor v Chief of the Defence Force (No 3) [2015] FCA 1370

Citation: Gaynor v Chief of the Defence Force (No 3) [2015] FCA 1370

Parties: **BERNARD GAYNOR v CHIEF OF THE DEFENCE FORCE**

File number(s): NSD 692 of 2014

Judge(s): **BUCHANAN J**

Date of judgment: 4 December 2015

Catchwords: **DEFENCE AND WAR** – applicant commissioned officer in Australian Defence Force – applicant had served overseas – applicant Army Reservist – applicant made comments on social media not in accordance with Australian Defence Force policies – comments regarded as “inappropriate” by the Australian Defence Force – applicant given show cause notice – applicant’s commission terminated – applicant pursued multiple review, Redress of Grievance, processes – termination date delayed – reviews undertaken of decision to terminate commission – decision to terminate commission upheld – applicant’s commission terminated

ADMINISTRATIVE LAW – applicant applied for judicial review against termination of commission as Army Reservist in the Australian Defence Force – applicant applied for judicial review of three “decisions” of the respondent – one “decision” not a decision for the purpose of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) – broad claims under *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5 – respondent claimed the application to review two decisions was time-barred under *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 11 – one decision held to be time-barred – time extended for the other decision, no prejudice to the respondent – applicant brought proceedings within 28 days of termination – subject to constitutional grounds no substance in any of the applicant’s challenges to the decision to terminate commission – implied freedom of

political communication requires the decision to terminate be set aside – sections 5(1)(d), (e) and (j) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) set aside the decision to terminate

CONSTITUTIONAL LAW – applicant alleged comments on social media protected under the Constitution – applicant claimed protected by s 116 of the Constitution, freedom of religion – no basis to claim comments were protected through freedom of religion – no evidence applicant acting under religious compulsion – applicant claimed comments protected by implied freedom of political communication – *Lange* ((1997) 189 CLR 520) test applied – *McCloy* ([2015] HCA 34) applied – applicant’s comments on social media were political communication – applicant’s comments made whilst not on duty – respondent claimed any burden on freedom reasonably appropriate and adapted, or proportionate – respondent claimed legitimate end of maintaining efficacy, efficiency and morale of, and confidence in, the Australian Defence Force – decision to terminate not referable to the fact the applicant identified himself at particular times as Army Reservist – decision to terminate the applicant’s commission based on the fact applicant expressed view publicly, while a member of the Australian Defence Force – respondent’s actions disproportionate to the power afforded by regulation 85 of the *Defence Force (Personnel) Regulations 2002* (Cth) – termination set aside

Legislation:

Constitution, s 116

Administrative Decisions (Judicial Review) Act 1977 (Cth), ss 3, 3(3), 5, 5(1)(d), 5(1)(e), 5(1)(j), 5(2)(d), 11, 13, 13(1)

Defence Act 1903 (Cth), ss 8, 9, 9(2), 9A, 9A(1), 9A(2), 16, 50, 124(1)(a)

Defence Force Discipline Act 1982 (Cth), ss 3, 14, 27, 29, 60, 60(1)

Judiciary Act 1903 (Cth), s 39B

Sex Discrimination Act 1984 (Cth), ss 14, 38, 38(1)

Defence Force Regulations 1952 (Cth), regs 75, 82, 87,

91, 93

Defence (Personnel) Regulations 2002 (Cth), regs 6, 6(1)(g), 7, 82, 83, 84, 85, 85(1)(d), 85(1)(d)(ii), 85(4)(b)(ii), 85(1A), 85(1A)(b), 85(1A)(c), 85(2), 85(4), 85(5), 85(6), 119, 119(1)

Cases cited:

Ansett Transport Industries (Operations) Pty Ltd v Wraith [1983] FCA 187; (1983) 48 ALR 500

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106

Buck v Bavone (1976) 135 CLR 110

C v Commonwealth of Australia [2015] FCAFC 113

Canwest Global Communications Corp v Australian Broadcasting Authority [1997] FCA 540

Church of the New Faith v Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120

Coleman v Power (2004) 220 CLR 1

The Commonwealth v Welsh (1947) 74 CLR 245

Coutts v The Commonwealth (1985) 157 CLR 91

Graham v Deputy Chief of Air Force [2004] FCA 1377

King v Chief of Army [2012] ADFDAT 4; (2012) 269 FLR 452

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

Marks v The Commonwealth (1964) 111 CLR 549

McCloy v State of New South Wales [2015] HCA 34; (2015) 89 ALJR 857

Millar v Bornholt (2009) 177 FCR 67

NBMZ v Minister for Immigration and Border

Protection (2014) 220 FCR 1

Shand v Chief of the Army [1998] FCA 265

*Treasurer of the Commonwealth of Australia v Canwest
Global Communications Corp* [1997] FCA 578

Unions NSW v State of New South Wales (2013) 252
CLR 530

Wotton v State of Queensland (2012) 246 CLR 1

Date of hearing: 17, 18 and 19 August 2015

Date of last submissions: 18 August 2015 (Respondent)
26 August 2015 (Applicant)

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 292

Counsel for the Applicant: Mr P King

Solicitor for the Applicant: Robert Balzola & Associates

Counsel for the Respondent: Mr J Kirk SC with Mr D Robertson

Solicitor for the Respondent: Clayton Utz

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY

GENERAL DIVISION

NSD 692 of 2014

BETWEEN: BERNARD GAYNOR

Applicant
AND: CHIEF OF THE DEFENCE FORCE

Respondent
JUDGE: BUCHANAN J
DATE OF ORDER: 4 DECEMBER 2015

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The decision of the Chief of the Defence Force on 10 December 2013, that the service of the applicant in the Australian Defence Force be terminated, is set aside.
2. Any application by the respondent, that an order different from Order 4 below should be made, must be made on or before 15 December 2015 and, if made, will be listed for directions at 9.30 am on Friday 18 December 2015.
3. If no application by the respondent is made in accordance with Order 2 above, Order 4 shall take effect and Order 2 will lapse.
4. The respondent is to pay the applicant's costs, as taxed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
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Respondent

JUDGE: BUCHANAN J

DATE: 4 DECEMBER 2015

PLACE: SYDNEY

REASONS FOR JUDGMENT

Introduction

1 This judgment deals with an application for judicial review of decisions by which the applicant's commission as a Major in the Australian Army Reserve was terminated by the Chief of the Defence Force ("CDF").

2 The applicant's commission with the Army Reserve was terminated by CDF on 10 December 2013. After a later final rejection by CDF of a "Redress of Grievance", the applicant's service with the Australian Defence Force ("ADF") ceased on 11 July 2014.

3 The right of review engaged by the applicant is given by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("the ADJR Act"). In aid of its particular provisions (to which reference will be made in due course) two constitutional arguments were advanced which relied upon provisions contained, or to be implied, in

the Australian Constitution concerning freedom of religion and protection of political communication.

4 The reasons which follow explain why I would reject all of the challenges based only on the particular provisions of the ADJR Act, but I uphold the argument concerning protection of political communication. That protection, operating together with specific provisions of the ADJR Act, mandates that relief be granted to the applicant.

5 I propose, in the first instance, to address the applicant's case, and the reasons for the termination of his commission, without regard to the constitutional issues and upon the basis that the only limitations upon the power of CDF (and other officers) were those arising from the immediate statutory sources for their actions, and for the authority which they exercised or to which they referred. I will deal separately and independently with the constitutional arguments.

The foundation of the proceedings

6 The applicant commenced proceedings in this Court on 8 August 2014. Despite some uncertainties arising from the way in which he pleaded his case (initially and by later amendment), it was made clear in proceedings on 11 December 2014 that the applicant's case consisted of claims to relief under the ADJR Act supported by the constitutional arguments. That provides the legal and practical framework against which the evidence must be assessed.

7 The applicant set out, in that framework, to challenge three asserted "decisions" to which, he contended, the ADJR Act applied.

8 The first was the decision by CDF dated 10 December 2013 to terminate the applicant's commission and service ("the Termination Decision"). The second was a decision on 30 June 2014 by CDF to finally reject the applicant's Redress of Grievance (which had earlier been rejected by the applicant's Commanding Officer and a delegate of the Chief of Army) ("the Redress Decision"). The third "decision" challenged was an earlier report dated 24 January 2013, prepared for the applicant's Commanding Officer, which that officer endorsed with remarks of his own ("the Quick Assessment Report").

9 The respondent contended that the challenges to the Termination Decision and the Quick Assessment Report are time-barred. Section 11 of the ADJR Act requires a challenge to a decision (to which the ADJR Act applies) to be made within 28 days or such further time as the Court allows. I will not accept the respondent's challenge to the Termination Decision based on any limitation arising from s 11 of the ADJR Act. It was reasonable for the applicant to use, and exhaust, his opportunities for internal review and challenge before resorting to litigation. The proceedings were commenced within the 28 days after termination of the applicant's appointment took effect, and I see no prejudice to the respondent if I extend time for a challenge to the Termination Decision.

10 For reasons given later, I will not extend time for a challenge to the Quick Assessment Report.

Background

11 The applicant has strong views which he attributes to the teachings and doctrines of the Roman Catholic Church. As they relate to the events which led to the termination of his commission, those views were expressed as an antipathy to overt tolerance or support of homosexuality or transgender behaviour as well as statements critical of adherents of Islam. There were three issues in particular, with respect to the first aspect of his personal views, which provoked public statements by the applicant which ultimately led to the termination of his commission.

12 Before I identify those matters in a general way, it will be useful to identify the applicant's background and (briefly only) his passage through the military hierarchy in the years which preceded the events which led to the termination of his commission.

13 The applicant enlisted in the Australian Army Reserve on 14 June 1997. The following year he applied to the Australian Defence Force Academy and was appointed as an Officer Cadet in the Australian Regular Army ("the Army") in January 1999. In December 2002, he graduated from the Royal Military College of Australia, Duntroon.

14 The applicant served in Iraq in 2006-7, 2008-9 and 2009 and also briefly in Afghanistan in 2006. He was awarded the United States of America Meritorious Service Medal in October 2009. His general competence is not in issue. He transferred to the Australian Army Reserve in July 2011 and was promoted to the rank of Major in January 2013.

15 As a member of the Army Reserve the applicant was part of the Australian Intelligence Corps ("AUSTINT Corps") and was posted to the Defence Intelligence Training Centre ("DIntTc"). His Commanding Officer was Lieutenant Colonel Buxton ("CO DIntTc").

16 Before the applicant transferred to the Army Reserve he became involved in the establishment of a political party in around mid-2010, named "The Queensland Party". In 2011, The Queensland Party merged with "Katter's Australian Party" and the applicant became the National General Secretary of that political party. According to the applicant's evidence he resigned that position on 1 January 2013 and nominated to be endorsed as a Katter's Australian Party Senate candidate in Queensland at the next Federal elections due in 2013.

17 On 20 January 2013, the applicant launched a webpage, Twitter page and Facebook page to promote his candidature. It was the publication of statements on those social media which, shortly thereafter, brought him into conflict with his superiors in the Army and in the ADF.

18 With that information I may return to outline, at this stage, the three issues which were, it seems, at the heart of the decision to terminate the applicant's commission.

19 The first issue arose in connection with the establishment, on 21 November 2012, of a Senate committee of enquiry into an "exposure draft" of a bill to consolidate Commonwealth anti-discrimination legislation. Debate ensued about provisions of the

Sex Discrimination Act 1984 (Cth) (“the SD Act”). There were proposals to extend the categories protected from discrimination to “sexual orientation” and “gender identity”, as well as the then existing categories of “sex, marital status, pregnancy or potential pregnancy, breastfeeding or family responsibilities”. There was also debate about whether the exemption of religious educational institutions from aspects of the SD Act should be retained.

20 At that time, s 38(1) of the SD Act provided:

38 Educational institutions established for religious purposes

(1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person’s sex, marital status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

21 The effect of some of the proposed amendments (which were later substantially enacted) had the potential, in the applicant’s view, to cause s 14 of the SD Act to compromise the position of Roman Catholic schools if the exemption in s 38 was also removed. On the applicant’s evidence, he became convinced that changes proposed by some groups to the anti-discrimination laws “would limit the right to publicly oppose homosexual activity” and he was “also concerned about pressure applied by various homosexual groups to change the laws further to effectively force Christian schools to hire homosexual teachers”.

22 On 23 January 2013, the applicant tweeted on his Twitter page:

I wouldn’t let a gay person teach my children and I am not afraid to say it

23 At the same time this statement was published on Twitter, the applicant’s newly established webpage identified him as having served in the Iraq War and contained a photo of him receiving his United States of America Meritorious Service Medal arising from that service. The applicant denied publishing any statement at that time referring to his then current Army Reserve status, but that soon became evident and, within a short time, the applicant began to publish the connection openly when he made further public statements.

24 I shall deal later with the more detailed course of events which followed within the ADF. The applicant’s Twitter statement quoted above, however, provoked media and other interest to which he contributed with a press release the following day.

25 The press release prominently identified the applicant as a nominee to be a Katter’s Australian Party candidate in Queensland for the Senate. The press release said, in part:

Julia Gillard and Tony Abbott would both support the right of parents to choose who teaches their children, says Katter's Australian Party Queensland Senate nominee, Bernard Gaynor.

"The Prime Minister of Australia and Opposition Leader would both agree that parents should be able to choose who teaches their children," Mr Gaynor said.

"I'm sure both of them would 100 per cent back the rights of parents if they had concerns over the values of teachers. This includes concerns over teachers who promote homosexual lifestyles, either actively or by example, to children."

"This is not controversial. Any society with a basis in common sense would support parental responsibility."

"Furthermore, considering both Tony Abbott and Julia Gillard oppose gay marriage it makes perfect sense that they would also be uncomfortable with teachers promoting a lifestyle that has serious negative health consequences and is opposed to the values of the majority of Australians."

26 That day the applicant was suspended from membership of Katter's Australian Party and from that time he was no longer a nominee to be a Senate candidate for that party. However, as will be seen, he continued to proclaim his personal, political, social and religious views in a variety of ways.

27 As I have said, I will refer in due course to the events which followed those publications. It suffices, at present, to indicate that the applicant was interviewed by Lt. Col. Buxton, counselled and instructed to make no further comment of a similar kind which might associate him with the ADF.

28 The second issue concerned permission by CDF on 11 November 2012 for members of the ADF to march in uniform at the Sydney Mardi Gras on 2 March 2013. A recommendation to CDF, on 1 November 2012, by a senior officer that this be approved informed CDF:

1. I am writing to provide you with background on the request for Australian Defence Force (ADF) members to wear uniform at the Sydney Mardi Gras parade, and to seek your approval for an Administrative Instruction to be prepared by the Chairperson of the Defence Gay, Lesbian, Bisexual, Transgender and Intersex Information Service (DEFGLIS), to be approved by yourself, for ADF members' attendance at the Sydney Mardi Gras parade.

2. There are already a number of Australian uniformed organisations participating in the Sydney Mardi Gras parade including Federal and NSW State Police Forces, NSW Fire Brigade, NSW Rural Fire Service, NSW Ambulance Service, and the NSW State Emergency Service. By granting permission for ADF members to attend in uniform, the Department of Defence will join these other Australian uniformed agencies in support of their Lesbian, Gay, Bisexual and Transgender (LGBT) communities.

3. The Sydney Mardi Gras parade is Australia's largest event for the LGBT community. The parade seeks to raise visibility of the LGBT communities, and promotes a sense of inclusiveness for members. A growing number of ADF members and their families and friends attend this parade each year, with attendance coordinated through DEFGLIS.

...

8. I recommend that you agree participation in the Sydney Mardi Gras parade be authorised on the condition that participating ADF members change out of uniform at the end of the parade in order to allow Defence members and employees to freely participate in post parade celebrations as individuals rather than as identified representatives of Defence.

29 The approval by CDF was in the following terms (addressed to the chair of Defence Lesbian, Gay, Bisexual, Transgender, and Intersex Information Service ("DEFGLIS")):

I write with regard to your request on behalf of the Defence Gay, Lesbian, Bisexual, Transgender and Intersex Information Service (DEFGLIS) for ADF members in uniform to participate in the forthcoming Sydney Mardi Gras parade.

I have engaged with the Vice Chief of the Defence Force and Head People Capability on this issue and advise that the attendance of ADF members in uniform at the Sydney Mardi Gras parade is authorised with the following conditions.

The first condition is that ADF members participating in the parade do so in accordance with Service and Defence protocols, these include formed body marching according with Service traditions and customs.

The second condition is that you liaise with the parade organisers to ensure that participating ADF members are positioned near to the front of the parade and at the rear of the NSW Police.

The third condition is that participating ADF members change out of uniform at the end of the parade.

Since ADF members' attendance at the parade is voluntary I confirm that Defence will not pay travel expenses to facilitate participation.

Finally, I ask that you prepare an Administrative Instruction for ADF member's attendance at the parade. The draft Administrative Instruction should be discussed with the Vice Chief of Defence Force prior to obtaining my final authorisation. Warrant Officer 1 Lynne Foster, RSM - Ceremonials - ADF is available to assist in the preparation of this guidance.

30 On 21 December 2012, the Department of Defence issued a media release stating:

ADF participation in Mardi Gras

21 December 2012 | Media Release

Australian Defence Force members will march in uniform at the Sydney Mardi Gras in 2013.

Defence personnel have participated in the Mardi Gras since 2008 but the volunteer contingent of soldiers, sailors and airmen and airwomen will march as a formed body for the first time in the Mardi Gras parade on 2 March 2013.

The decision coincides with the 20th anniversary of the removal of the ban on homosexuals serving in the military and demonstrates the ADF's desire to reflect the community it serves.

Diversity is a strength and asset for today's employers, and Defence is no exception. Workplace inclusion for all ADF members is a high priority for the organisation as it undergoes cultural change through the Pathway to Change strategy.

Defence is working on a number of initiatives to further enhance and support diversity in the ADF workforce, including an Ambassador Network and Diversity Strategy.

In addition, Air Force has recently introduced diversity handbooks for lesbian, gay and bisexual members and commanders, and Defence will look to roll this out for the rest of the organisation.

Twenty years after the removal of the restrictions on homosexual members, Defence continues to support and improve diversity in the Australian Defence Force.

Media Contact:

Defence Media Operations: (02) ...

31 Commencing on 8 March 2013, the applicant issued a series of press releases, reflecting material published on his webpage, which criticised the decision, published his own association with the Army Reserve and complained about his earlier counselling. The initial press release included the following:

Press Release: Defence shows hypocrisy with gay officer

...

"Defence is bending over at every opportunity to help gay members but has hauled me over the coals for expressing my religious and political beliefs," Mr Gaynor said.

"I never ever spoke in my capacity as a Reservist but the Army still called me into my unit and ordered me to stop my political activities if I wanted to remain in the Reserves, contrary to Defence policy."

"Defence even publicly stated that it was taking legal advice over potential administrative action against me, simply because I said that I would not allow my children to be taught by a homosexual."

“It is clear from this that Defence is happy to accommodate the views of gay members but is actively discriminatory against Christian members who make public comments about their faith, even if it is not in uniform and has nothing to do with Defence policy.”

“Well, now I’ve had enough. If other officers are allowed to speak about Defence policy while they are in uniform, with the protection of the Chief of Defence Force, I deserve the same protection, especially when I am now just a Reservist.”

“I am happy to say what others believe privately but won’t mention because they are smarter than me and won’t jeopardise their careers. Defence’s policy directions on sex-change operations, the Mardi Gras and women serving in front-line combat roles are wrong.”

“The decision to pay for sex change operations should be overturned. It does not enhance Defence’s ability to protect Australia and most people would describe it as a completely unnecessary ‘capability cut’.”

“No soldier wants to be led by a commander that has voluntarily decided to have his balls cut off. No amount of politically-correct propaganda will change this fact. Unfortunately, Defence is deliberately putting soldiers in an uncomfortable position.”

“Australians would be appalled if they knew their taxes were being wasted by Defence in this way. They would be even more shocked if they knew Defence’s policy allowed gender-benders access to females showers and change rooms.”

“I imagine most women would be uncomfortable changing in front of a confused man who had protected, free access to their bathroom. It is a recipe for disaster.”

“Furthermore, the decision to allow soldiers to march in the Mardi Gras was offensive to many, many Australians. If Defence is truly equitable, it will now allow members to wear their uniform to any activity that promotes natural marriage.”

“Finally, the decision to allow women to serve in front line combat positions is a joke. It is nothing more than the use of Defence to engineer radical social change in society.”

“Unfortunately, former general, Jim Molan, confirmed today that this is exactly what Defence is doing. He said on Adelaide radio that the Defence hierarchy are trying to change human nature. I can only thank Jim Molan for letting the cat out of the bag,” he said.

Mr Gaynor added that it was not surprising that the wars in Afghanistan and Iraq had largely failed when Western armies across the world were preoccupied with such radical social engineering and were so politically correct.

“I am an intelligence officer. Not once, in my 15 year career, have I ever seen a Koran in a intelligence detachment. Anytime I have suggested it might be worthwhile understanding why Islamic beliefs lead to violence I have been ridiculed and rebuked.”

“Defence believes Islam is a religion of peace. That is why it has been more concerned about building schools in Afghanistan than trying to change what is taught inside them.”

“It is also why Defence has been silent about the growing Islamic population in Australia while its own soldiers are dying fighting adherents of Islam in Afghanistan.”

32 On 14 March 2013, the applicant issued another press release in a similar vein which said, in part:

Defence’s gender-bending preoccupation comes at the cost of a real equity issue: fair indexation

First came the news that Defence was funding sex-change operations. Of course, this could not go ahead without the all-encompassing bureaucratic machine springing into action. Now commanders have official policy advising them that those fearlessly embarking on ‘gender reassignment surgery’ are to have access to their affirmed ablution facilities.

Defence, struggling to deal with negative publicity surrounding years of alleged sexual assault has now opened the door for males to shower in the ladies bathroom – whether they like it or not.

Then Defence gave approval for its proud uniform to be paraded through the streets of Sydney during the Mardi Gras, sharing the road with pimps, prostitutes and purveyors of moral decadence. Good call.

The supposedly apolitical Australian Defence Force is now marching to the beat of a very political tune, drummed up by those who demand gay marriage and take pleasure in ridiculing Christianity.

...

Here is some cheap advice for Defence hierarchy that might free up time and money to address a real equity issue: fair indexation of military pensions.

Stop wasting resources trying to recruit women. They are not as strong as men and generally don’t want to join. Focus on the target audience – young blokes. You’ll get more bang for your recruiting dollar.

Also, if someone wants to go from Molly to Mandy let them do it in their own time and at their own expense. And it will stop scaring the soldiers.

Ditto for those who wish to attend the Mardi Gras.

Finally, it would be useful for Defence hierarchy to publicly support efforts to fairly index military superannuation. It is an issue that not only affects retired soldiers but today’s serving military personnel.

If the Defence leadership is really committed to fairness, equity and mateship, it will sort out military superannuation and leave gender-bending affirmative action to fringe loony groups, like the Greens.

I don't hold my breath though. If the last decade has taught us anything, it is that Defence is able to embark on military operations without knowing what the mission is, what the objectives are, or even who the enemy is.

Common sense is missing.

That is why I am sure the next time we hear anything from Defence leadership about an unfair playing field, it will have nothing to do with increasing pensions and everything to do with reducing physical fitness standards for women.

33 On 22 March 2013, the Deputy Chief of Army wrote to the applicant in the following terms:

It has come to my attention that recent comments made by you in the public domain, are in direct contravention of a number of Defence policies and potentially, wider Commonwealth regulations and laws. Specifically, I refer to your comments of 23 January, 8 March and 14 March 2013. Such comments run counter to the significant efforts made by the ADF over recent years to eliminate discrimination and to encourage a diverse, harmonious workplace that reflects contemporary Australian society.

In short, Army does not share your views, which are both offensive and divisive, and not in the interests of Army or our people. I am disappointed that a Commissioned Officer, or indeed any Army member, would express such blatant disregard for the values and ethos that underpin our organisation. As the Deputy Chief of Army, I have a responsibility to protect Army's long term interests and it is from this basis that I am compelled to act.

Effective immediately, you are to cease posting material in the public domain that identifies you as an Army Officer and which directly seeks to, or can be reasonably expected to, breach Defence policy, contravene ADF values, or which is otherwise not in the interests of Army. Further, you are to remove any such material from your website and social media sites insofar as it can be linked, in any way, to your military service.

By linking your military service to your comments, not only have your actions brought Army into disrepute at a time when the ADF is progressing a number of major policy reforms in the areas of equity and diversity, but your failure to heed the counsel provided to you by your chain of command in response to your comment on 23 January 2013 indicates to me that your personal values are not in line with those of Army, or the wider ADF. It is not my intention to prevent you from having an opinion, but when that opinion is linked to your military service and is fundamentally inconsistent with Defence policy and values, you should reconsider your employment options. I offer to you that, under these circumstances, the appropriate course of action may be for you to tender your resignation.

(Emphasis added.)

34 The applicant then commenced a series of internal review procedures within the Defence Force. His thesis was that the decision to permit uniformed participation in the Sydney Mardi Gras was “unlawful” and that, in any event, he could not be restricted from publishing what he saw fit while not in uniform and not on duty. His complaints extended to the conduct of those who marched in the Sydney Mardi Gras on 2 March 2013, those who sought the permission to do so, his Commanding Officer, the Deputy Chief of Army and CDF himself. The detail of those complaints does not require examination in the present proceedings but I shall mention them again briefly later.

35 The third issue arose from an acrimonious public exchange on social media in May 2013 with a transgender officer on the staff of the Chief of Army. I shall refer to the exchange in due course. Its intemperate, vitriolic and personally offensive character did not do credit to either of the participants. On the applicant’s evidence, the other officer was “formally counselled for unacceptable behaviour” in September 2013. As I shall discuss, the applicant’s public contribution to this unseemly fracas figured, with the other two issues, in the decision ultimately made to terminate his commission.

36 Apart from the three issues I have mentioned, which arose from the applicant’s personal resistance to acceptance of homosexuality or other sexual preferences of which he disapproved, the applicant also published material strongly critical of Government and ADF policy with respect to the conflict in Afghanistan in which he made statements linking the practice of Islam, historically and currently, with a culture of violence which directly threatened Australia. Those publications also featured in the decision to terminate his commission.

37 The formal process of termination was commenced by a Notice to Show Cause issued by the Chief of Army on 30 May 2013 and concluded with the Termination Decision issued by CDF on 10 December 2013. The applicant invoked a “Redress of Grievance” (“ROG”) procedure (the nature of which I shall discuss further) against the decision of 10 December 2013. That ROG commenced with the applicant’s Commanding Officer and, at the applicant’s request, was progressively referred up the Army and ADF hierarchy as it was successively unsuccessful to, finally, CDF himself. CDF dismissed that ROG (there were many others which need no detailed discussion) by the Redress Decision on 30 June 2014.

The nature of military service

38 The most recent case in this Court to examine the nature of military service is *C v Commonwealth of Australia* [2015] FCAFC 113 which applied a well-established principle that, in Australia at least, military service is not based upon a contract of employment (see e.g. *The Commonwealth v Welsh* (1947) 74 CLR 245 per Dixon J at 268).

39 Originally, members of the armed services held their entitlements or offices at the pleasure of the Crown (see *Marks v The Commonwealth* (1964) 111 CLR 549; *Coutts v The Commonwealth* (1985) 157 CLR 91 (“*Coutts*”). However, military service in

Australia is no longer based only on the notion of Crown prerogative (see e.g. *Coutts per Deane J* at 108-109). That service is regulated also (and now decisively) by statute, but not by any of the statutes which deal with the relations of employers and employees. It is subject to its own statutory code, which has been progressively expanded.

40 Section 16 of the *Defence Act 1903* (Cth) (“the Defence Act”) when that Act was first made, provided:

16. Officers shall hold their appointments during the pleasure of the Governor-General, but the commission of an officer shall not be cancelled without the holder thereof being notified in writing of any complaint or charge made and of any action proposed to be taken against him, nor without his being called upon to show cause in relation thereto. ...

41 The position is now governed in much more detail by the *Defence (Personnel) Regulations 2002* (Cth) (“the Personnel Regulations”) made under the Defence Act (see s 124(1)(a) of the Defence Act).

Termination of an officer’s commission

42 Regulation 6(1)(g) of the Personnel Regulations provides:

6 Service

(1) An officer serves in the Defence Force in accordance with the following requirements:

...

(g) the officer’s service in the Defence Force may be terminated;

...

43 Chapter 9 of the Personnel Regulations deals with “Completion of the service obligation” and makes provision, first, for retirement or completion of a period of service. Part 2 of Chapter 9 deals with “Compulsory termination of service”.

44 Division 1 of Part 2 (regs 82 and 83) deals with situations where a member of the ADF becomes a permanent resident in another country, and redundancy. In each case the Chief of a member’s service may terminate the member’s service in the ADF.

45 Regulation 84 in Division 2 of Part 2 provides that, in the case of an officer absent without leave for more than three months, the Governor-General may terminate the officer’s service.

46 Regulation 85 then deals with termination of the service of an officer for other reasons. A number of such reasons (including medical unfitness, incompetence etc) are identified. Relevantly, for present purposes, reg 85 provides:

85 Termination of service of officer for other reasons

(1) The service in the Defence Force of an officer may be terminated, in accordance with this regulation, for any of the following reasons:

...

(d) the Chief of the officer's Service is satisfied that the retention of the officer is not in the interest of:

(i) the Defence Force; or

(ii) the Chief's Service;

...

(1A) Without limiting paragraph (1)(d), the Chief of the officer's Service may be satisfied for that paragraph for reasons relating to the officer's:

(a) ...

(b) behaviour; or

(c) conviction of an offence or a service offence.

(2) The Governor-General may give the officer a termination notice:

(a) stating that it is proposed to terminate the officer's service in the Defence Force; and

(b) stating the reason for terminating the service; and

(c) setting out particulars of the facts and circumstances relating to the reason for terminating the service that is sufficient to allow the officer to prepare a statement of reasons why the service should not be terminated; and

(d) inviting the officer to give the Governor-General a written statement of reasons why the service should not be terminated; and

(e) specifying a period of at least 28 days after the date of the notice as the period in which the officer may give the statement of reasons.

...

(4) If:

(a) the officer gives the Governor-General a statement of reasons in the specified period; and

(b) having considered the statement, the Governor-General is of the opinion that the reason for terminating the officer's service:

(i) has been established; and

(ii) has not been affected by a change in circumstances since the termination notice was given to the officer;

the Governor-General must terminate the officer's service in the Defence Force.

(5) The Governor-General must not terminate the officer's service under this regulation in any other circumstances.

(6) If a delegate gives a termination notice to an officer, the delegate must not himself or herself terminate the officer's service under this regulation.

47 Regulation 119 allows the Governor-General to delegate powers to officers of the three services above a stated rank. Regulation 85(6) operates in those circumstances.

48 The relevant delegations, made under s 119(1) of the Personnel Regulations in 2012, were in evidence. Only the Chief of Army or CDF could issue a termination notice under reg 85(2) to a person holding office at the rank of Major. The other of those same persons could terminate that officer's service under reg 85(4).

49 In the present case, on 30 May 2013 the applicant was given a termination notice by the Chief of Army. Under the regime established by reg 85(1)(d), the Chief of the applicant's service was required to be satisfied that the retention of the applicant was not in the interest of the ADF or not in the interest of the Army. In the present case, the Chief of Army personally formed the required satisfaction under reg 85(1)(d) and (1A) and, as delegate of the Governor-General, gave the termination notice permitted by reg 85(2).

50 Regulation 85(6) had the effect, therefore, that the Chief of Army could not act as the delegate of the Governor-General under reg 85(4). As the functions under reg 85(2) and (4) could not be performed by the same delegate, once the Chief of Army issued a termination notice to the applicant only CDF could terminate the applicant's commission.

51 In the Termination Decision, CDF stated that he was satisfied about the matters in reg 85(1)(d)(ii) and reg 85(4)(b)(ii) – namely, that the retention of the applicant was not in the interest of the Army and that there had been no relevant change of circumstances since the termination notice was given to the applicant.

52 Regulation 7 imposes some further requirements when determinations under the Personnel Regulations are required. It states:

7 Criteria

(1) This regulation applies to a person who is required to make a determination or decision under these Regulations.

...

(2) The person must have regard to the following matters when determining the matter or making the decision:

(a) the ability of the relevant Service to carry out operations that it is carrying out or may be required to carry out;

(b) the size and composition of the relevant Service;

(c) the organisational effectiveness of the relevant Service;

(d) the training of the relevant Service;

(e) the need to ensure the availability of an adequate supply of suitable officers and enlisted members in the relevant Service;

(f) the skills, experience and standards of behaviour and conduct required for the proper performance of duties in the relevant Service;

(g) the management of officers and enlisted members in the relevant Service;

(h) the career advancement needs of officers and enlisted members in the relevant Service.

(3) If the decision or determination relates to an individual, the person must consider whether, having regard to the individual's past and present conduct, the individual is of good character.

53 Those matters were all addressed also in the Termination Decision made by CDF on 10 December 2013.

54 In *Buck v Bavone* (1976) 135 CLR 110, Gibbs J said (at 118-119):

... It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts. ...

55 Similar considerations apply to the “satisfaction” referred to in reg 85(1)(d) and (1A) and to the opinion referred to in reg 85(4).

56 In *Shand v Chief of the Army* [1998] FCA 265, Burchett J dealt with the circumstance of a soldier whose enlistment was terminated under a similar, earlier, regime. His Honour described the regime as follows (at 1):

Section 44(1) of the *Defence Act* 1903 provides for the discharge of soldiers by decision of the Chief of the Army (previously the Chief of the General Staff) for prescribed reasons. Reasons are prescribed by regulation 176(1) of the *Australian Military Regulations*, the making of which was empowered by s 124 of the *Defence Act*. Many reasons are prescribed, of which only that contained in paragraph (n) is directly in question in the present matter:

“The Chief of the Army is satisfied that the retention of the soldier in the Army is not in the interest of Australia or of the Army.”

57 Burchett J said (at 6):

Given the material before him, it was for the delegate to decide whether he was satisfied of the matter upon which a decision under the regulation had to turn, that is, “that the retention of the soldier in the Army is not in the interest of Australia or of the Army.” It is not, of course, any part of the Court’s function to reach that decision. Provided the decision was open to be made upon the material, the making of it was for the delegate. In my opinion, the decision was plainly open.

The regulation is framed in terms which make the test the satisfaction of the Chief of the Army, or of his delegate. Cf. *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 275-277.

The issue upon which satisfaction must be attained by the decision-maker is whether the retention of the soldier in the Army is not in the interest of Australia or of the Army. That raises broad questions of fact and of evaluation of the facts. Necessarily, there is a wide ambit within which the decision-maker was entitled to come to a personal view. Provided a soldier’s actions or attributes are capable of being seen as imposing an undesirable burden on the Army, or are capable of being seen as affecting the morale or well-being of other service personnel, or as in other ways affecting adversely the efficiency or the reputation of the Army, it would not be possible for the Court to find an error of law merely because (if it were the case) the Court might not itself have reached the same conclusion.

58 To similar effect, dealing with the regime established by the present Personnel Regulations, in *Graham v Deputy Chief of Air Force* [2004] FCA 1377, Heerey J said (at [39]):

39 ... The power to terminate when the Chief of Service is satisfied that the retention of the enlisted member is not in the interests of the Service is expressed in quite general terms. While sub-regs (2), (3) and (4) require the enlisted member to be given a fair opportunity to answer the alleged facts and circumstance which might

give rise to the requisite satisfaction, the regulations say nothing of the kind of facts and circumstances which might exist in any particular case.

and (at [40]):

40 ... The Chief of Service or his or her delegate is in the best position to decide whether retention of a member is in the interests of that Service, especially having regard to the elements of trust, loyalty and confidence which are fundamental to military service. It would be quite impossible to specify in advance the infinite variety of circumstances which might cause the Chief to reach that state of satisfaction in relation to a particular individual. ...

59 More recently, in *Millar v Bornholt* (2009) 177 FCR 67, Logan J referred to the need for:

73 ... a principled restraint on a court conducting judicial review lest the appearance be given that, in respect of this aspect of the making of value judgments in relation to the Defence Force, command has impermissibly passed from those to whom that task has been consigned by the Governor-General under parliamentary authority to the Judiciary.

60 The last three judgments to which I have just referred concerned enlisted men or women, rather than officers. However, the principles referred to and applied in those three cases are no less important when the service of an officer has been terminated; indeed on one view, it is more important for the courts to show restraint in such a case.

61 In the present case, those statements of principle bind me as a matter of comity.

Command of the ADF

62 CDF is appointed under s 9 of the Defence Act and has command of the ADF. The Chief of Army is also appointed under s 9 of the Defence Act.

63 Sections 8 and 9(2) of the Defence Act provide:

8 Powers of Minister in relation to Defence Force

The Minister shall have the general control and administration of the Defence Force, and the powers vested in the Chief of the Defence Force, the Chief of Navy, the Chief of Army and the Chief of Air Force by virtue of section 9, and the powers vested jointly in the Secretary and the Chief of the Defence Force by virtue of section 9A, shall be exercised subject to and in accordance with any directions of the Minister.

9 Command of Defence Force and arms of Defence Force

...

(2) Subject to section 8, the Chief of the Defence Force shall command the Defence Force, and the service chief of an arm of the Defence Force shall, under the

Chief of the Defence Force, command the arm of the Defence Force of which he or she is service chief.

64 Section 9A of the Defence Act deals with “Administration of Defence Force” and specifies a role for the Secretary of the Department of Defence. Section 9A(1) and (2) provide:

9A Administration of Defence Force

(1) Subject to section 8, the Secretary and the Chief of the Defence Force shall jointly have the administration of the Defence Force except with respect to:

(a) matters falling within the command of the Defence Force by the Chief of the Defence Force or the command of an arm of the Defence Force by the service chief of that arm of the Defence Force; or

(b) any other matter specified by the Minister.

(2) Instructions issued by or with the authority of the Secretary and the Chief of the Defence Force in pursuance of the powers vested in them jointly by virtue of subsection (1) shall be known as Defence Instructions (General).

65 In the present case it will be necessary to consider the terms and effect of some Defence Instructions (General) (“DI(G)”).

66 The ADF is a disciplined force. Commands (i.e. lawful commands) must be obeyed. There is separate mechanism for enforcement of those matters contained in the *Defence Force Discipline Act 1982* (Cth) (“the Defence Discipline Act”) which creates a number of “service offences”, which are criminal in character. Section 14 of the Defence Discipline Act provides:

14 Act or omission in execution of law etc.

A person is not liable to be convicted of a service offence by reason of an act or omission that:

(a) was in execution of the law; or

(b) was in obedience to:

(i) a lawful order; or

(ii) an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful.

67 Amongst the service offences created are disobeying a lawful command and failing to comply with a general order. Sections 27 and 29 provide:

27 Disobeying a lawful command

- (1) A defence member is guilty of an offence if:
 - (a) a person gives the member a lawful command; and
 - (b) the person giving the command is a superior officer; and
 - (c) the member disobeys the command.

Maximum punishment: Imprisonment for 2 years.

- (2) Strict liability applies to paragraphs (1)(b) and (c).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) It is a defence if the member proves that he or she neither knew, nor could reasonably be expected to have known, that the person who gave the command was a superior officer.

Note: The defendant bears a legal burden in relation to the matter in subsection (3). See section 13.4 of the *Criminal Code*.

(Emphasis in original.)

...

29 Failing to comply with a general order

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:

- (a) a lawful general order applies to the person; and
- (b) the person does not comply with the order.

Maximum punishment: Imprisonment for 12 months.

- (2) An offence under subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) It is a defence if the member proves that he or she neither knew, nor could reasonably be expected to have known, of the order.

Note: The defendant bears a legal burden in relation to the matter in subsection (3). See section 13.4 of the *Criminal Code*.

(Emphasis in original.)

68 The term “general order” is defined by s 3, as follows:

general order means:

- (a) a Defence Instruction (General), a Defence Instruction (Navy), a Defence Instruction (Army) or a Defence Instruction (Air Force);
- (b) any other order, instruction or directive issued by, or under the authority of, the Chief of the Defence Force or a service chief; or
- (c) a general, standing, routine or daily order in force with respect to a part of the Defence Force.

69 However, there are important limits on the application of the Defence Discipline Act to members of the various Reserves which it is necessary to identify.

70 Members of the Army Reserve are not obliged to render continuous full time service except in certain circumstances referred to in s 50 of the Defence Act, none of which applied to the applicant at the relevant time.

71 The Defence Discipline Act applies to defence members and defence civilians. Section 27 (set out above) applies to a defence member and s 29 (also set out) applies to a defence member or a defence civilian. At the relevant times (i.e. when he published the various statements to which exception was taken), the applicant was neither a defence member nor a defence civilian. Section 3 of the Defence Discipline Act defines each of those terms as follows:

defence civilian means a person (other than a defence member) who:

- (a) with the authority of an authorized officer, accompanies a part of the Defence Force that is:
 - (i) outside Australia; or
 - (ii) on operations against the enemy; and
- (b) has consented, in writing, to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force.

...

defence member means:

- (a) a member of the Permanent Navy, the Regular Army or the Permanent Air Force; or
- (b) a member of the Reserves who:
 - (i) is rendering continuous full-time service; or
 - (ii) is on duty or in uniform.

72 In particular, when he did each of the things which, in combination, led to the termination of his commission the applicant was not “on duty or in uniform”.

73 At one point in time, the applicant was charged with a service offence in relation to some of the public statements which were later taken into account when deciding to terminate his commission, but the charge did not proceed and it is clear that he had a good defence to it. Part of the applicant's case is that similar immunity applied so far as reg 85 is concerned but that proposition is, so far as it goes in that simple form, untenable. Regulation 85 is not confined in its potential operation to consideration only of conduct whilst on duty or in uniform.

74 The fact that the applicant was not liable to criminal prosecution or punishment for his behaviour under the Defence Discipline Act has no bearing on the availability of the procedures under reg 85. If he had been convicted of a service offence that is a matter which might be taken into account under reg 85(1A)(c) but the absence or unavailability of such a conviction is otherwise beside the point.

Redress of Grievance procedures

75 Regulation 75 of the *Defence Force Regulations 1952* (Cth) provides a detailed procedure for complaints by members of the ADF about certain decisions which affect them. The procedure extends to complaints about a termination *decision* under reg 85(4) of the Personnel Regulations, but not to a termination *notice* under reg 85(2) of the Personnel Regulations. A complaint must be made in writing and, in the first instance, to a member's commanding officer. If not satisfied with the decision of a commanding officer, the member may refer it to the Chief of the relevant service under reg 82 of the Defence Force Regulations and then, if again not satisfied, to CDF under reg 87 of the Defence Force Regulations. Some delegations are permitted (reg 93 of the Defence Force Regulations).

76 In the present case, the applicant made such a complaint against the Termination Decision to his Commanding Officer, and then referred it to the Chief of Army (where it was considered by a delegate) and then to CDF. CDF's rejection of the complaint on 30 June 2014 is the Redress Decision I referred to earlier.

77 Logan J examined the historical origins of the ROG procedure in *Millar v Bornholt*. His Honour described it (at [32]) as "one of the checks and balances within a disciplined armed force". The applicant showed a propensity to use the procedure to make complaints about a variety of matters with which he was dissatisfied, but there is no doubt that it was a specific, and important, source of review in relation to the Termination Decision even if it resulted, finally, in further consideration of that issue by CDF himself. The importance of the separate existence of this right of review is the reason why I am satisfied I should not impose the time limit in the ADJR Act against the Termination Decision. I am a little surprised that the point was taken at all.

78 When the ROG against the Termination Decision reached CDF, at the applicant's instigation, the applicant suggested that CDF was disqualified from dealing with the ROG and that it should be referred to the Governor-General for consideration. I am satisfied that this suggestion was misconceived. The procedure is an entirely statutory one. Although some limited delegations are possible they would not permit the ROG to be referred by CDF to the Governor-General. The only consequence of CDF refusing to deal with the ROG would have been delegation to an officer of the Army

not below the rank of Brigadier. The delegate of the Chief of Army held that rank. Consideration of the ROG at this level in the ADF and Army hierarchy had, therefore, already occurred.

Defence Instructions and policies

79 Gay and lesbian members of the ADF have been permitted to serve openly for over 20 years, since 1992. DI(G) PERS 50-1 is a DI(G) made on 18 October 2001 which states the policy for the ADF about “Equity and Diversity in the Australian Defence Force”. Some of the statements within it are the following:

EQUITY AND DIVERSITY IN THE AUSTRALIAN DEFENCE FORCE

PURPOSE

1. The purpose of this instruction is to state the Defence policy on equity and diversity. All personnel are to comply with the principles of equity and diversity.

...

POLICY

3. The Australian Defence Force (ADF) has made a commitment to promote equity and diversity in the workplace and in its management practices. The aim of promoting equity and diversity is to enhance operational capability and effectiveness in order to achieve the Defence mission through the development of fair and inclusive workplaces.

...

5. Equity and diversity apply to all personnel, ADF and APS, as good management practice and Government policy.

...

PRINCIPLES OF EQUITY AND DIVERSITY

7. Equity and diversity encompass the concept of fair treatment and that everyone should be given the opportunity to make the most of their talents and abilities. An equitable and diverse environment will be achieved through the application of the following basic principles:

- a. treating each other with respect and dignity;
- b. recognising that all people are different and valuing differences;
- c. using the different contributions that people can make to the team;
- d. making judgments genuinely based on fairness and merit;

- e. eliminating artificial, unfair and inappropriate barriers to workplace participation;
- f. providing appropriate means to monitor and address discrimination and harassment;
- g. providing opportunities for flexibility when meeting organisational requirements; and
- h. consulting people on policies and decisions that affect them.

EQUITY AND DIVERSITY IN THE AUSTRALIAN DEFENCE FORCE

...

9. Diversity in the workplace means creating an inclusive environment that respects, values and utilises the contributions of people of different backgrounds, experiences and perspectives. Diversity relates to gender, age, language, ethnicity, cultural background, sexual orientation, religious belief and family responsibility. Diversity also refers to the ways we are different in other respects such as educational level, work experience, socio-economic background, personality profile, geographic location, marital status and whether or not one has carer responsibilities. Diversity seeks to capitalise on the diverse talents and skills of all personnel.

EQUITY AND LEADERSHIP

10. Equity is an important element of operational capability and good leadership practice. The Defence Personnel Executive has published guidance in the form of instructions and booklets for commanders, leaders, managers and policy makers. They provide the background information necessary to support a pro-active approach to the pursuit of equity in Defence.

...

ROLES AND RESPONSIBILITIES

...

17. Everyone in Defence has a right to be treated with respect, courtesy and without harassment. It is the responsibility of all personnel to provide a work environment free from unacceptable behaviour and to report equity and diversity issues to their immediate supervisor so that corrective action can be taken.

...

80 Whatever personal views may be held by individual members of the ADF it is apparent that this policy states a standard of behaviour which is expected from all those members.

81 DI(G) ADMIN 08-1 was issued on 5 October 2007. It deals with “Public comment and dissemination of official information by Defence personnel”. It states that it applies to “all Defence personnel”, a term which is defined to include all ADF members. In a summary caption prominently displayed before the particular, detailed, instructions are set out, there appears the following:

**PUBLIC COMMENT AND DISSEMINATION OF OFFICIAL
INFORMATION BY DEFENCE PERSONNEL**

Defence personnel must treat official information as confidential. Defence personnel must not provide public comment, official information or images to individuals or organisations external to Defence without adhering to the procedures detailed in this Instruction. Public comment and dissemination of official information includes, but is not limited to, media releases, interviews, briefings, speeches, comments at seminars and conferences, letters to editors, articles in journals or magazines, publication of books or papers and imagery as original self-contained works, video newsletters, ‘home videos’, documentaries, publication of information and imagery on the internet, mobile networks including SMS, email and attachments, and other electronic media, ‘blogs’, ‘chat rooms’, podcasts, text messaging and all forms of ‘new media’. It also includes discussion, personal opinion or correspondence with members of the public on official information. Official information is defined in annex A to this Instruction.

(Emphasis in original.)

82 The detailed instructions include:

SCOPE

1. **This Instruction applies to all Defence personnel.** For the purpose of this Instruction, this includes all Australian Defence Force (ADF) members, ...

...

3. **Defence personnel must comply with this Instruction.** ...

...

INTRODUCTION

...

8. While Defence encourages Defence personnel to engage with the public, the information they provide must be coordinated, agreed and authorised. ...

9. To ensure that Defence’s reputation is not damaged by well-intentioned but ill-timed comments that disregard wider Defence issues, all public engagement is to be carefully managed. ...

10. ... Comments and communication that might once have been regarded as private or personal increasingly find their way into the public domain via media such as emails and blogs. Understanding this shift is critical if Defence personnel are to play a role in promoting and protecting the organisation.

11. ... Defence personnel must remain aware of their obligations to protect sensitive and classified information and their responsibilities to promote and protect Defence, in both their official and their unofficial communication. ...

...

PRINCIPLES

...

18. When making public or media comment, Defence personnel must distinguish carefully between personal and official views in order to avoid any mistaken perception that personal comment is in fact an official comment. In particular, Defence personnel must ensure that they preserve the apolitical standing of the Defence organisation and do nothing which might place in doubt the role of Defence in effectively implementing Australian Government policy.

...

20. ... When engaging in private comment, online or electronic discourse and transmitting information or imagery either in Australia or overseas, all Defence personnel must consider the potential impact of that information reaching the public domain.

...

(Emphasis in original.)

83 It is well known that a series of public scandals over recent years have assailed the reputation of the ADF. Investigations ensued. Some were carried out by external enquirers; some were the subject of enquiry and report within the ADF and the Department of Defence. On 10 April 2012, CDF and the Secretary of the Department of Defence jointly published a document entitled “Pathway to Change: Evolving Defence Culture”. This document was described as a strategy for realising a programme of cultural change within the overall Australian Defence Organisation. Although not having the legal status of a DI(G), this document may be understood as an important, and public, statement of Defence policy. A few selected passages will sufficiently illustrate the tone:

Pathway to Change:

Evolving Defence Culture

...

2 Defence's rich history is a well from which we continue to draw

...

2.2 Retaining our pride and our standing means making some fundamental changes

The first step to solving the problem is to accept that there is a problem.

In 2011 the Government called for, and Defence initiated, several independent Reviews to answer questions about the attitudes towards and treatment of women in Defence; our systems of accountability; grave misconduct perpetrated by some and implicitly condoned by others; and the causes of such behaviour.

The Reviews point to opportunities to improve our systems and processes and also evolve our cultures. These Reviews remind us that the Australian public has high expectations of our behaviour.

There are those who would say, 'those incidents are about a few bad apples'. But we cannot afford to subscribe to such a view; for that would imply that they are unsurprising – even routine.

It is not an acceptable state for actions that affect the safety and wellbeing of our people, and compromise our capability, to be in anyway regarded as 'normal'. We should be surprised, angered, embarrassed and saddened – every time there is a revelation about unconscionable behaviour by a member of the Defence community.

Our reaction should be, 'how could that have happened?' and not, 'of course these things happen'.

We need to develop the instincts within Defence that always lead us towards the right judgements. Systems, processes and rules help, but we need to develop good habits of thinking and good reflexes in our actions so that we default to the most appropriate way of working with others and dealing with challenges.

...

3 Leadership and accountability: change starts with leadership from the top and throughout

...

The *Pathway to Change* speaks to all in the organisation, and asks each individual to hold him or herself to account for their actions. However it has a particular message for anyone in any type of leadership position: you have a particular responsibility to model agreed values and behaviours, to do your utmost to ensure that those in your charge do likewise, and to take seriously any signs that there are problems that need to be addressed. Leaders will be held especially accountable for how they exercise their authority in this respect.

...

3.2 Defence's leadership will be more inclusive than in the past

Defence has made good progress in bringing more women into our organisation and providing opportunities to serve and progress in a variety of roles. Noticeable gaps remain however, in the representation of women across senior leadership positions. This has important implications for both our culture and our capability.

...

4 Values and behaviours: Defence will re-consider its respective values and behaviours and draw together those we should hold in common

...

4.3 Defence's values and behaviours will infuse our education and training programs

...

Understanding of equity and diversity in our organisation requires special attention. The nature of warfare and its physiological demands in the past, has meant that men predominated in the armed forces. But we know that despite some physiological demands remaining constant, the character of warfare has changed and, as importantly, social norms have evolved dramatically.

The Review findings reveal worrying attitudes that we must reshape. First, we sometimes take group identity and loyalty too far so that it translates into an 'us' and 'them' mentality. Defence must be inclusive, we must recognise the strength that comes from collaboration and teamwork, and not division and exclusion. Second, evidence from the *Review of the Treatment of Women at ADFA* finds that a significant minority of people interviewed wrongly believe that Defence operates on a quota system for women, and this affects how they regard and relate to their peers in a negative way.

We need to be absolutely unambiguous: inclusivity and diversity are crucial to Defence's ability to operate at peak performance and demonstrate maximum capability. The *Pathway to Change* will tackle unfair treatment. For example, in line with Review recommendations we will deliver unconscious bias training to the Senior Leadership Group. In responding to the particular concerns about incidents at ADFA, we will do a much better job of educating staff deployed there on how to support women and minorities better, including by identifying and addressing any issues speedily and appropriately.

...

9 Implementation will be led from the top, with the cultural result being realised over five years

...

9.2 Implementation will require up to three years of dedicated work, and we will feel the cultural effects over one to five years

Implementation will commence immediately, and where possible will be front-loaded so that we can achieve greater change sooner.

...

84 There seems little doubt that the authors of the document (who included CDF, General Hurley who terminated the applicant's commission) were striving for a paradigm shift in attitudes. This was a clear example of a deliberate policy initiative which had moved beyond any question of debate about its essential premises and had entered an implementation stage. The applicant's behaviour was, in due course, assessed for his co-operation with initiatives of this sort. Those are quintessentially policy questions where the principles to which I referred earlier must be applied. The assessments of compatibility with the interest of the Army which were brought to bear on the applicant's conduct were judgments for the delegates of the Governor-General to make, not the courts.

85 Shortly after the publication of the Pathway to Change policy, on 23 July 2012, the Chief of Army published CA Directive 15/12 "Army Implementation Plan for the Removal of Gender Restrictions", which commenced as follows:

1. Army's combat capability and ability to meet Government directed outcomes is enhanced by the diversity of its people. A robust and agile Army therefore relies on every one of its people having the opportunity to contribute to their full potential. Gender diversity across all employment categories is therefore essential to maintain a competitive advantage now and into the future.

2. Current Government policy precludes the employment of women in Army roles that involve 'direct combat duties'. On 27 Sep 11, the Minister for Defence announced that all roles would be open to women within five years. In order to implement this change, Army will establish a framework for the graduated integration of women into combat roles that nests with the Government's five year plan ...

and concluded:

19. Enabling the integration of women into combat roles is a positive step towards improving Army capability. Integrating women into combat roles will require cultural reform and strong leadership to ensure that women are afforded the opportunity to perform within those roles. Army is very proud of the contribution women provide, and removing gender restrictions will enhance the diversity of Army's workforce, inherently increasing our competitive advantage and combat effectiveness.

86 DI(G) ADMIN 08-2 was issued on 16 January 2013, shortly before the first of the applicant's publications. It dealt with "Use of social media by Defence personnel". I am satisfied that this DI(G) applied to members of the Army Reserve when not on duty. So far as members of the ADF were concerned (i.e. apart from Defence civilians

and others) the DI(G) was addressed to “Defence personnel”, a term defined, in part, to include “all Australian Defence Force members”.

87 Separately, the term “Defence member” was defined by reference to s 3 of the Defence Discipline Act, but that was clearly for a different purpose and was referable to those parts of the DI(G) where the term “Defence member” was used – e.g.:

POLICY STATEMENT

6. ... it should be noted that section 60 of the DFDA provides that a Defence member is guilty of an offence if the member does an act, or omits to perform an act, that is likely to prejudice the, discipline of, or bring discredit on, the Defence Force.

88 More relevantly for present purposes, this DI(G) ADMIN 08-2 stated:

USE OF SOCIAL MEDIA BY DEFENCE PERSONNEL

INTRODUCTION

1. This policy provides guidance on the use of social media by Defence personnel for the purpose of public engagement and to regulate the use of social media by Defence personnel where such use poses a reputational risk to Defence.

Within the Defence context, social media is defined as:

Digital tools that enable communication and sharing across the internet and that allow for the creation of user-generated content.

...

POLICY STATEMENT

...

9. This policy covers all official communication using social media, as well as private activities in social media where an individual can be identified as being a Defence employee or member of the ADF.

10. All Defence personnel must comply with the mandatory requirements of this policy. A mandatory requirement of this policy is identified through the use of the word **must**.

11. The mandatory requirements of this Instruction constitute a general order to Defence members for the purposes of the DFDA. Non-compliance with any mandatory requirement may result in disciplinary action being taken in accordance with the DFDA.

...

COMPLIANCE

19. In line with section 60 of the DFDA and the Public Service provisions referred to in paragraphs 5., 6. and 7. above, Defence personnel **must not** post material that is offensive towards any group or person based on any personal traits, attributes, beliefs or practices that exploit, objectify or are derogatory of gender, ethnicity or religion. Such behaviour involving social media may amount to conduct that could constitute an offence against provisions of the DFDA, the *Public Service Act 1999* or amount to a breach of the APS Code of Conduct.

...

(Emphasis in original.)

89 Although the last of these instructions refers to s 60 of the Defence Discipline Act, I am satisfied that it was not intended simply to engage, or repeat, those provisions. Section 60(1) of the Defence Discipline Act provides:

60 Prejudicial conduct

(1) A defence member is guilty of an offence if the member does an act that is likely to prejudice the discipline of, or bring discredit on, the Defence Force.

Maximum punishment: Imprisonment for 3 months.

90 The instruction in [19] of DI(G) ADMIN 08-2 was clearly intended to operate consistently with this prohibition but not to be similarly confined. That is clear from [9] in the DI(G). As will be seen shortly, the applicant's publications were immediately thought to infringe this DI(G), and he was instructed to desist, but to little avail.

91 Finally, after some of the applicant's publications, but before others, on 13 March 2013 CDF and the Secretary of the Department of Defence jointly published "A Message from the Secretary and the Chief of the Defence Force", which included the following:

...

'Diversity' is broader than the labels of gender, age, language, ethnicity, cultural background, disability, sexual orientation and religious beliefs; it is a way of thinking and an approach to delivering the best results. Through diversity we gain the varied perspectives needed to tackle complex problems and come up with innovative solutions. Recognising this Defence is committed to creating an inclusive environment which values, respects and draws on the diverse backgrounds, experiences, knowledge and skills of our people.

A robust and agile Defence organisation depends on every person in it having the opportunity to contribute fully. Everyone within Defence has a role to play in making this a reality. We must walk the talk and ensure that we encourage diversity at every level, every day.

Our day to day activities must promote a fair, equitable, supportive and inclusive working environment that enables all Defence people to perform at a high level and encourages them to stay with us longer.

...

It is expected that all leaders in Defence will champion diversity. To be champions for diversity, all leaders, commanders and managers will:

- advocate the important role of gender diversity in helping to increase organisational performance;
- be an exemplar of positive and visible change by acting as a role model for all staff in regard to diversity;
- regularly communicate the benefits of diversity and its role in organisational success across Defence;
- support initiatives that increase the representation of, and career pathways for, women in the Defence organisation; and
- assist in identifying and implementing targeted diversity initiatives.

92 In the context set by the regulatory framework, including the relevant instructions, and having regard to the published policies of the commanders of the ADF, and the Army, greater and more detailed attention can now be given to the course of events which led to the termination notice.

The applicant's first publications – January 2013

93 I earlier set out a tweet by the applicant on 23 January 2013 and his media release on 24 January 2013. The applicant's position about those matters involves a number of propositions, which were maintained, in large part, in relation to the events which followed.

94 One argument, with which I will deal later, is that these and other public comments were protected from any form of restriction because they were constitutionally protected. That is, either they amounted to the exercise of the applicant's religion which was protected by s 116 of the Constitution or they were an exercise of a "right" to freedom of political communication which was protected by an implication arising from the Constitution (see e.g. *Coleman v Power* (2004) 220 CLR 1 ("*Coleman*").

95 Contentions of this kind were relied on, expressly or impliedly, over the course of events to bolster an argument by the applicant, which was put to his superiors and repeated in this Court, that instructions that he should refrain from public comment

were themselves unlawful, as was the permission granted by CDF for members of the ADF to march in the Sydney Mardi Gras.

96 A defence of this kind involves a high risk strategy. I assume it to have been a calculated course of defiance. A challenge to the lawfulness of the conduct of CDF, and those who gave direct instructions to the applicant about his conduct, leaves little room for misunderstanding about the level of co-operation of the applicant with the cultural changes announced over the previous few years. He commenced to openly and publically challenge and ridicule those changes, asserting a moral and legal right to do so, regardless of any instruction to the contrary.

97 In relation to the two publications, on 23 and 24 January 2013, the applicant also protested in the present proceedings that it was not he who published his ongoing connection with the ADF; rather it was the ADF itself in a comment about his publications with which I am concerned. His thesis was that as he was not on duty, not in uniform and had not mentioned his current status with the ADF, he could say what he wished and any instruction to the contrary was unlawful.

98 Part of this reasoning was mixed with a proposition that the applicant's conduct whilst not on duty and not in uniform was not liable to prosecution under the Defence Discipline Act. That may be accepted for present purposes, but the present case is not concerned with matters arising under the Defence Discipline Act. As I earlier explained, the field of operation of the Defence Discipline Act does not exhaust or constrain the matters which may arise under reg 85 of the Personnel Regulations, or the grounds upon which an officer's commission may be terminated by reason of reg 85(1)(d).

99 The only response to the first two publications was that the applicant was interviewed and counselled. Whatever validity the protest by the applicant (that it was not he who published his current ADF status) may initially have had, he abandoned any such restraint shortly afterwards. That attempted line of defence quickly receded into the background. It has no relevance to the present proceedings except to illustrate that the applicant rapidly gave up any attempt to obscure the fact that he was a serving member of the ADF.

100 Another issue may also be put aside at this point. When the comments on 23 and 24 January 2013 were made, the applicant was seeking endorsement as a political candidate for the Senate. When his conduct was repudiated by suspension of his party membership that possibility, as he acknowledged in his evidence, was immediately and conclusively withdrawn from him. No argument is available in the present case that the applicant's public statements were made with an eye to promoting his prospects for election.

101 After the two publications on 23 and 24 January 2013, an officer at the "Logistics Information Warehouse" (to which the applicant was formally posted), Captain Dunbar, was directed by his superior, Major Hewerdine, to complete a "Quick Assessment" for Lt. Col. Buxton, the Commanding Officer of DINTTC (or DIntTc – Defence Intelligence Training Centre).

102 The Quick Assessment procedure (“the Quick Assessment Procedure”) is directed by DI(G) ADMIN 67-2, “Quick Assessment”. The following aspects of the DI(G) should be noted:

QUICK ASSESSMENT

AIM

1. The aim of this Instruction is to provide guidance to commanders/supervisors on the circumstances and procedures for conducting a Quick Assessment (QA).

PURPOSE

2. A QA is not an investigation. The purpose of a QA is to quickly assess the known facts, and to identify what is not known about an occurrence, so that a decision can be made about the most appropriate course of action to be taken in response to it. A QA is not a precursor to a service or civilian police investigation.

3. A QA is made up of two parts:

a. a short brief which identifies the facts, and if so directed, makes recommendations for a way ahead; and

b. a commander’s/supervisor’s decision, in the form of written endorsement or a separate document.

4. The QA must not to be used as the basis for adverse findings, or to replace the need for a separate inquiry or investigation where such action would otherwise be necessary.

...

WHEN TO CONDUCT A QUICK ASSESSMENT

8. Following an occurrence, which can be any significant incident, allegation or problem, which comes to the attention of the commander/supervisor, the commander/supervisor, using common sense and sound judgement, must decide whether a QA is required. Should the commander/supervisor be of the opinion that subsequent investigation or inquiry of the occurrence may be required, a QA must be conducted. A QA must be conducted prior to instigating a formal inquiry, unless the focus of the proposed formal inquiry is not on the conduct of any Defence member. Even if no formal inquiry is instigated or no further action is taken, the conduct of a QA provides a valuable record of the factors considered by a commander/supervisor and the decision taken and the reasons for that decision. ...

Directing a Quick Assessment Officer

9. The commander/supervisor may direct any ADF member or a Defence APS employee to conduct a QA. A formal direction for the QAO is not required. A direction can be given in writing and/or verbally. Telephone instruction, a Minute,

email or note may be sufficient. Notwithstanding the form, it is important for the QAO to keep a record of being directed to conduct a QA, for example, in the background section of the brief, stating the direction received, when direction was received and how long the QA took to complete.

...

DECISIONS UPON RECEIPT OF QUICK ASSESSMENT

23. Upon receipt of the QA, the commander/supervisor must make a decision on the way ahead, which may include a decision that no further action is required. ...

...

103 Capt. Dunbar recorded the following:

BACKGROUND

5. MAJ Gaynor is an ARES [Army Reserves] member posted to LIW [Logistics Information Warehouse] who has provided limited service to DIntTC [Defence Intelligence Training Centre]. During 2012 MAJ Gaynor only attended his promotion parade and his last contribution to training within DIntTC was one week during the ROBC in Nov 2011.

6. As an RTI trained member MAJ Gaynor provides limited instructor value to LIW. Given the expense of employing a MAJ on ARTS it is unlikely that MAJ Gaynor would be used to provide training support to future activities.

ASSESSMENT OF THE OCCURRENCE

7. The comments were made by MAJ Gaynor in his civilian role as a Queensland Senate nominee for the Katter's Australia Party, however MAJ Gaynor's website at ref A identifies him as an ADF and AUST INT member. This affiliation and associated imagery has been used by various media outlets.

8. While MAJ Gaynor was not on duty at the time, his personal website and Twitter profile both identify him as an ADF member. ...

...

Other issues

10. The statements come in the week following the CDF statement on the participation of ADF members in the Gay and Lesbian Mardi Gras at ref D. MAJ Gaynor's comments may undermine this CDF statement and cause perceptions of homophobia within the ADF.

104 Lt. Col. Buxton endorsed Capt. Dunbar's report with the following comments:

I accept this QA. Maj Gaynor's Twitter comment from 23 Jan 12 [sic: 13] was inappropriate and homophobic. Although this comment was not made in his capacity as a defence member, his Army service is readily apparent on-line making his actions damaging to the ADF's reputation.

My intent is to formally counsel the member concerning the inappropriateness of his actions while serving as an Army officer. Given his political activity and limited recent GRES [General Army Reserves] service. I also question his commitment to Army and agree that he should consider transferring to inactive reserve service. I await legal and chain of command advice before taking this and / or further administrative action against the member.

105 The Quick Assessment Report was nominated as "Decision 3" under challenge in the present proceedings. DI(G) ADMIN 67-2 makes clear that a Quick Assessment Procedure has two parts: facts and recommendations; and a "decision". Here, the recommendations are not directly relevant, although they included a recommendation for counselling. The "decision" took the form of an endorsement and a statement of intent to counsel the applicant. Decisions to which the ADJR Act applies are (for present purposes) decisions of an administrative character under certain enactments. Section 3(3) of the ADJR Act provides:

3 Interpretation

...

(3) Where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation shall itself be deemed, for the purposes of this Act, to be the making of a decision.

106 Despite the width of the reach of the ADJR Act I doubt that the report made by Capt. Dunbar, and the endorsement by Lt. Col. Buxton with a statement of future intent, is in either aspect a "decision" to which the ADJR Act applies. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, Mason CJ pointed out at 337:

... A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.

107 However, it is not necessary to analyse that question in this case in greater detail for a number of reasons. First, there would be no practical consequence of any kind if the "decision" was either set aside, or not set aside, in the present proceedings. As a matter of historical fact, the Quick Assessment Report was made but what followed does not depend for its validity on whether the Quick Assessment Report survives later judicial review. Secondly, I may for convenience assume that a challenge may be made to the Quick Assessment Report under the ADJR Act because I propose not to extend the time limited by s 11 of the ADJR Act (28 days) for bringing a challenge. It would serve no useful purpose to do so. The time had long expired before the

proceedings were commenced and, for some time, the applicant made no real attempt to use the internal methods of review open to him, such as a ROG.

108 The absence of a separate legal challenge to the Quick Assessment Report will have no effect one way or the other on the outcome of the proceedings. I am bound to say, moreover, that there does not appear to me to be any reasonably arguable basis upon which a legal challenge to a preliminary report of this kind could possibly succeed. The inclusion of this aspect of the proceedings, which was retained to the very end of the case, says little about any attempt to identify, and focus upon, the issues likely to be determinative.

109 On 6 February 2013, Lt. Col. Buxton interviewed the applicant. The “Record of Conversation” produced to record the effect of the discussion (and countersigned by the applicant) touched upon the applicant’s political aspirations, as well as the content of his public statements. No attention is required to the first aspect. As to the second aspect, the following was recorded:

...

LTCOL Buxton acknowledged that while the statement posted by MAJ Gaynor on Twitter on 23 Jan 13 was made in a private capacity and not in uniform, it was very easy for the media to determine MAJ Gaynor’s Defence affiliation from his personal web page and Twitter account. LTCOL Buxton advised that the Twitter comment and subsequent reporting of it gained the attention of Chief of Army, and this it was imperative that the ADF’s reputation not be damaged by ill-considered social media activity.

LTCOL Buxton added that Maj Gaynor’s comment was seen to be offensive to the gay and wider community and that regardless of his personal views, while serving as an Army Officer, he needed to understand that such remarks were unacceptable. LTCOL Buxton also pointed out that his comments were out-of-step with culture reforms underway in the ADF, including the CDF’s recent approval for gay Defence members to wear their uniform while marching in the Gay and Lesbian Mardi Gras.

...

LTCOL Buxton’s advised that while MAJ Gaynor remained an active reservist and particularly while he was posted to DIntTC, under his command, he was to make no further intemperate or inflammatory remarks on social media.

LTCOL Buxton added that even if MAJ Gaynor did not think his remarks to be inflammatory or inappropriate, the broader community had a different view. ...

...

In concluding, LTCOL Buxton advised MAJ Gaynor that provided he complied with policy and acted professionally, he would consider the issue closed. MAJ Gaynor acknowledged this.

...

(Emphasis added.)

110 The applicant was given a copy of DI(G) ADMIN 08-2 (the social media instruction) at the interview and instructed to read it before leaving.

111 It is pertinent to point out that the existence of a lawful command in a military structure, such as the ADF, does not depend upon establishing a prior general instruction which it reflects. Orders are no less orders in such a hierarchy, even if they do not repeat an earlier published instruction, such as a DI(G).

112 Subject to a consideration of the constitutional arguments, I see no reason to doubt the lawfulness of the instructions to which the applicant was subject, or the direct orders he was given.

113 In *King v Chief of Army* [2012] ADFDAT 4; (2012) 269 FLR 452, the Defence Force Discipline Appeal Tribunal, constituted by Tracey, Mildren and Cowdroy JJ, dealt with an argument that a charge of disobeying an order “not to discuss [a] matter directly with [an identified officer]” during the course of an enquiry was not based on a lawful order. Their Honours said (at [9]):

9 It was submitted that there was no power within the *Defence Act 1903* (Cth) (the Act) or other legislation for the IGADF or anyone appointed by him to issue such a command. It was not contended by the respondent that the power to issue such a command could be found by reference to any specific legislative source of power, such as Defence Instructions to the Australian Defence Force (the ADF) other than the power to issue a command through the rank structure. Counsel for the respondent distinguished General Orders from lawful commands via the rank structure, pointing out that the failure to comply with a General Order is a separate offence under s 29(1) of the DFDA from the offence of disobeying a lawful command contrary to s 27(1) of the DFDA. This is clearly correct. In *Bromet v Oddie* (2002) 78 ALD 320 at 331, Finn J held that the power of a superior officer to command a person lower in rank derived from the common law, citing inter alia *Commonwealth v Quince* (1944) 68 CLR 227 at 254-255 per Williams J. In the latter case, Williams J said (at 255):

Service in the Air Force, as in the naval or military forces, involves in its most absolute form the right of a member superior in rank to give lawful orders to a member inferior in rank, and the obligation of the member inferior in rank to obey those orders.

Finn J’s view was upheld on appeal: *Bromet v Oddie* [2003] FCAFC 213 at [110]-[114] per Dowsett J (Spender J concurring). Madgwick J, although in dissent, also recognised the power to give lawful orders through the command structure at [46]. Of course, not all commands given by a superior officer are lawful, especially in peace time. For example, it would not be a lawful command for a superior officer to order the execution of a prisoner of war, absent some lawful authority.

114 There is no reason to doubt, therefore, that Lt. Col. Buxton’s instruction was a lawful order. The more direct and explicit order issued to the applicant by the Deputy Chief of Army on 22 March 2013 (to which I have already referred and will refer again) must also be taken to have been a lawful order in the same sense.

115 It appears to me to be beyond argument, therefore, that the applicant was given a direct and lawful instruction by his Commanding Officer not to make further contentious statements on social media, whether or not on duty or in uniform, while he remained a member of the ADF. The instruction was in line with the relevant DI(G), which was itself made under the authority of the Defence Act. No remonstrance or protest was made by the applicant in response. I reject any suggestion that DI(G) ADMIN 08-2 was inapplicable because the applicant was not on duty and not in uniform.

116 There, the matter may have rested, but it did not.

The applicant's publications – March and April 2013

117 On 6 March 2013, the applicant published statements on his webpage under the heading "Domestic betrayal a waste of soldiers' sacrifices". The article was openly critical of Government defence policy in Afghanistan. It included the following:

The war in Afghanistan has been an utter failure but it is the government's domestic policies which have completely betrayed the efforts of soldiers serving on operations.

...

The truth is that the Islamic religion was blooded in battle and grew strong on the spoils of war.

Mohammad was a great historical figure because he built an army, conquered and gained enormous wealth and political power as the captured pledged allegiance, were marched into slavery or off to their executions. It is easy to see why some Muslims today, who venerate Mohammad's example, resort to the same violent actions he did. But political correctness blinds policy makers and commanders.

This is where the Australian Government's domestic policy settings have failed the efforts of Australian soldiers, 39 of whom have died in Afghanistan.

In the time our Army has been in Afghanistan the number of Muslims in Australia has increased from around 280,000 to 476,000. Anyone who thinks Australia is safer as a result is deluded. The sacrifices made by Defence personnel on operations to provide security against an Islamist threat to this nation have been scandalously wasted.

...

The truth is that while our soldiers have been fighting, taking casualties and dying in Afghanistan to protect Australia's interests and values from violent Islamists our own government has allowed them to take root inside our borders.

...

118 On 8 March 2013, on Facebook, the applicant posted a comment about a homosexual officer who had been interviewed on television and had complained about treatment of minority groups. I set out most of the contents of a press release

issued on that day earlier in this judgment. The applicant's comments in that press release, and on Facebook, also complained that he was treated differently, in an apparent reference to his interview with Lt. Col. Buxton. On Facebook, the applicant said:

The Australian Defence Force has offered protection for a gay officer who spoke out against Defence policy yet it hypocritically has told me to cease political activity if I wish to remain in the Army Reserve. This is despite the fact that Defence policy explicitly allows Defence members to engage in political activity.

Seems the Defence Force is comfortable protecting the gay agenda but won't allow a Christian soldier to publicly defend his faith.

My latest press release is attached - As a reservist I am against the military paying for sex-changer operations, women serving on the front-line or the belief by Defence that Islam is the religion of peace.

<http://bernardgaynor.com/#/home/4572900784/Press-release-Defence-shows-hypocrisy-with-gay-officer/5098811>

If Defence will allow one officer protection to comment on Defence policy because he is gay, then I should also be able to speak.

119 In both the press release, and in the post on Facebook, the applicant identified himself as a Reservist.

120 I also set out earlier the applicant's further press release on 14 March 2013, and the letter to him by the Deputy Chief of Army on 22 March 2013 which referred to his publications on 23 January 2013, 8 March 2013 and 14 March 2013 and instructed him to desist.

121 The applicant did not do so.

122 On 25 March 2013, he posted on Facebook:

At what point does the ADF become complicit in child abuse?

Should children be exposed to nudity and sexually explicit behaviour at the Mardi Gras?

123 On 10 April 2013, referring again to the Mardi Gras, the applicant posted on Facebook:

On March 2, the proud Australian Army marched at a political rally alongside supporters of Julian Assange - who has released hundreds of thousands of classified documents relating to military operations Australian soldiers are deployed on.

This post is dedicated to MAJGEN Angus Campbell, Deputy Chief of the Australian Army, and an avid reader of my blog.

...

124 On the same day, the applicant tweeted:

Latest post dedication to Dep Chief of the Australian Army – MAJGEN Angus Campbell.

He's an avid reader – bit.ly/149UIAA #auspol

125 The references to the Deputy Chief of Army were obviously intended to ridicule and mock that officer and to make it apparent that his written instruction on 22 March 2013 would not be observed. It is not possible to see this as other than a deliberate and calculated course of open defiance by the applicant of his superior officer, of the Army and of the ADF.

126 On 19 April 2013, the applicant was charged under the Defence Discipline Act with a number of offences arising from his media releases on 8 and 14 March 2013. The charges were misconceived and they were later abandoned. As I earlier pointed out, s 3 of the Defence Discipline Act confines the operation of that Act in ways which made it inapplicable to the particular conduct. The applicant apparently sees in the abandonment of the charges some vindication for his contention that it was unlawful to attempt to restrain him, or discipline him in any other way, but that aspect of his argument is itself misconceived.

The applicant's publications – May 2013

127 On 16 May 2013, the applicant turned his specific attention to a transgender officer on the staff of the Chief of Army. His comments were personal and offensive. They included the following:

...

Furthermore, it means that while a bunch of troubled men are rummaging around in your wallet looking for loose change so they can botox their lips and sculpt their adams apples, they are also compromising the nation's ability to defend itself.

The good news is that I'm not sure if they are entitled to Defence funded stockings post their appointment with the clacker. So maybe we can at least be thankful for this small grace.

I am, however, guessing that this will be offset by the fact that the Army is now the employer of choice for those who want to take their cross-dressing career a little further. The Army is so generous, it even offers men unfettered and free access to the ladies' showers while they contemplate the best way to fulfil their sexual identity.

...

He thinks that because he has had a nip here, a tuck there and popped a bunch of pills that he is now a woman.

I don't like to speak on behalf of women, so I'll let them describe how they feel about his analysis that femininity consists of the sum result of a bunch of cosmetic surgery and hormones stuffed in a bottle.

While they consider their response, it might be worthwhile for them to remember that [...] has publicly stated that he is still attracted to the ladies. And when he puts on his Army skirt and lipstick, he is allowed to hang out with them in the bathroom.

...

128 As I mentioned earlier, the other officer also published personally demeaning public statements about the applicant and, in due course, that officer was counselled.

Complaints by the applicant

129 On 15 April 2013, the applicant lodged a complaint (in the form of an "Harrasment [sic] Brief") against ADF involvement in the Sydney Mardi Gras. It contended that "CDF is guilty of gross and condemnable unacceptable behaviour" and suggested that "the only acceptable course of action" was for CDF to resign immediately. Various other propositions were advanced which took strong issue with current instructions and policies within the ADF concerning gender equity.

130 On 21 May 2013, the applicant lodged ROG complaints against his Commanding Officer, Lt. Col. Buxton (for alleged denial of "parade" opportunities), against CDF for approving ADF involvement in the Sydney Mardi Gras, against ADF members who marched in the Sydney Mardi Gras (naming 10 such officers) and against DEFGLIS which sought approval for ADF members to march in the Sydney Mardi Gras and made administrative arrangements in relation to it. The applicant also lodged two belated complaints against Lt. Col. Buxton for "unacceptable behaviour and abuse of power" in directing him to refrain from public statements and for "denigration of my personal religious, political and sexual views". Finally, on the same date, he lodged a complaint against the Deputy Chief of Army arising from his instruction of 22 March 2013, on the basis also of "denigration of my personal religious, political and sexual views". It is not necessary to refer further to any of those matters. They have no significance for any issue in the present proceedings.

A further publication

131 On 23 May 2013, the applicant issued a further press release entitled "Government and Defence blinded on Islam" which included the following:

Three-time Iraq veteran, Bernard Gaynor, says that the Australian Government and Defence Force urgently need to open their eyes to the dangers of Islam.

...

"It is clear that Aussie Diggers – just like their counterparts in the USA and Great Britain – are a target at home. The threat is home grown and its core motivation stems from Islamic beliefs."

“The motivation for these attacks is perfectly logical under Islamic law. Mohammad had his enemies murdered, so it is no surprise that his followers believe that attacking non-Muslim soldiers is also perfectly legitimate.

...

“The Australian Defence Force is protecting Islam, rather than examining what it stands for. If an Australian soldier makes a statement linking Islam with violence then they will be charged.”

“I know this because I am currently facing disciplinary action for that reason.”

“It is time for the Australian Government and the Australian Defence Force to take the blinkers off to Islam.”

Notice to show cause for termination

132 On 30 May 2013, the Chief of Army, acting on a recommendation that he should do so, issued to the applicant a termination notice pursuant to reg 85(2) of the Personnel Regulations. In order that its full context and content may be appreciated it is attached to this judgment as Annexure A. Other documents representing important stages in the matter will also be annexed in due course.

133 The purpose of a notice of this kind, as is apparent from the terms of reg 85(2), is to provide adequate information about the reasons why termination is proposed to enable an officer to respond and mount a case why the termination should not be carried into effect. In the present case, in my view, the various facts and circumstances were clearly disclosed and particularised. The conduct in question was identified. It was made clear to the applicant that the Chief of Army viewed the conduct as “below that expected of an Army Officer” as well as in likely conflict with various, identified instructions and requirements. A failure to comply with the order of the Deputy Chief of Army was also identified. Copies of the publications which constituted the applicant’s conduct, and the relevant instructions, were enclosed.

134 In my view, there is no reason to doubt that the termination notice complied with the requirements of reg 85(2).

The applicant’s response

135 The applicant responded to the termination notice with a “Statement of Reasons” dated 27 June 2013. It commenced with a “statement”, apparently intended to challenge the underlying premise that disciplinary action against him was appropriate or necessary. I shall set the commencing statement out in full:

2. Prior to detailing the legal and policy flaws WRT to ref A, I make the following statement:

I note that the ADF had no problems with my personal political activity until I said that I would not allow homosexuals to teach my children. I made this statement on the basis of my Catholic faith.

I note that the ADF has punished me for this statement.

I note that the ADF can tell me my views about my children's education are offensive to the homosexual community and are unacceptable.

I note that this also means the ADF believes homosexuals have a right to teach my children.

I note that when I pointed out the offensive and unacceptable nature of the ADF's interference in my children's education that the ADF investigation found that my complaint was rejected.

I note, consequently, that the ADF is more interested in the views of the homosexual community than mine when it comes to my children's education.

I note that I cannot conduct political activity that opposes homosexual activism, even if it is not in uniform.

I note that homosexual officers can conduct political activity in uniform, link Defence to their cause and will be rewarded for doing so.

I note that these officers can use Defence to campaign against the rights and freedoms of religious organisations.

I note that I cannot criticise ADF policy or the hierarchy, even as a private citizen.

I note that homosexual officers can, while in uniform.

I note that I cannot refer to my service to this nation or publish anywhere photos of me in uniform.

I note that homosexual ADF members can freely publish photos of themselves in uniform and, in doing so, identify themselves with lewd and pornographic activities and radical political causes.

I note that when I notified the ADF about these contradictions that the evidence was ignored and my complaint was rejected.

I note that I would be punished for communicating offensive sexually-explicit imagery of the Mardi Gras on Defence computer systems.

But I note that other ADF members are permitted to parade in the Mardi Gras and give public uniformed support to the offensive activities conducted there.

I note that the Chief of Army has said the standard you walk past is the standard you accept, and I note that the Mardi Gras is the new standard of acceptable public sexual behaviour and political activity, but only for homosexual members.

I note that the ADF will punish those members who state publicly their Catholic belief that homosexuality is immoral.

I note that homosexual members can freely state that those who hold alternative views to them are hate-filled and immoral.

I note that the ADF will punish soldiers for 'liking' a Facebook page that mocks Islam but will allow uniformed, formed bodies of homosexual members to march with those who insult Christianity publicly.

I note that this is hypocritical, immoral and unjust.

I note that logically this means the ADF has a hierarchy of members and that homosexual and Islamic members have more right to be offended than Catholics.

I note that our soldiers can die fighting an enemy who acts to a large degree, if not entirely, on the basis of Islamic beliefs.

Yet I note that I cannot link the Islamic religion with the actions of the enemy we fight.

I note that this means the enemy's ideology is more sacred than mine, because it places Islam in a protected category above question, while Catholicism is freely allowed to be denigrated and rejected.

I note that I cannot question the merits of Islamic immigration, even while we fight those who act on Islamic beliefs.

And I also note that I can be investigated for racism for discussing Islam. I note that if the ADF believes that Islam is a race then it has gone to war without understanding who the enemy is.

I note that I cannot question the merits of front-line combat roles for women.

I note that I cannot raise the possibility that this will result in greater tension in family lives, greater risk of sexual misconduct and greater risk of battlefield pregnancy and abortion.

And I note that it is totally unacceptable to question how women, who cannot compete against men on the sporting field, will do so on the battlefield, the ultimate physical endeavour.

I note that I cannot question the merits of taxpayer funded sex-change operations. Nor can I question why men who believe themselves to be lesbian can have access to female change rooms and showers.

I note that the Army can charge me for disobeying a lawful command. I note that when I question the legality of the command, I can be told that it was not unlawful because no command was given. And I note that despite this finding, charges against me can still proceed.

I note that I can be told that I have not had my rights to engage in political debate curtailed because I am entitled to an opinion. But I also note that because I express my opinion I can be charged and administratively discharged from service.

I note that while training as an officer at the Royal Military College, Duntroon, I was taught that moral courage was as important as physical courage and often more difficult to attain.

I note, despite this emphasis on moral courage, that Defence leadership no longer supports it and cannot identify it in subordinates, presumably due to a collective lack of the virtue within the senior hierarchy.

I note that these contradictions are hypocritical and unjust.

Finally, I note that while they remain in place, I will not be allowed to continue serving in the ADF.

136 No comment is needed about this statement, except to say that logical connections for some of the assertions made are neither self-evident nor easy to find on closer examination. The statement as a whole does not really address the matters in the termination notice. Rather, it appears to be a general complaint that the applicant was badly treated. At that level of generality it is not useful to discuss it further.

137 The Statement of Reasons goes on to address particular aspects of the termination notice. One issue addressed was whether the applicant had a right to express private views in the manner he did. As to his first publication on 23 January 2013, he denied that he had sufficiently (or at all) identified himself as a member of the ADF. Then he complained that other ADF members were permitted to make public comments, or excused if they did so.

138 Then, the argument was mounted more broadly – e.g.:

18. ...

d. The requirement for authorisation [for public comment] as alleged is therefore both wrong in law, and inconsistent with extant policy. To seek to prohibit a member expressing a view in relation to the member's political or religious beliefs is a breach of that person's constitutional right to freedom of religion and free speech as well as a breach of Article 19(2) of the International Covenant on Civil and Political Rights as referred to in paragraph 15 of ref B.

...

19. ... in relation to Defence's reputation it is the decision of the CDF to allow members to march in a formed body in the Mardi Gras that has attracted much public debate and adversely affected the wider reputation of Defence (outside that of the gay community which recognised Defence with a Gold Award for the "Show Stopping Parade Entry") ...

(Footnote omitted.)

...

29. ... The purported order issued by DCA [Deputy Chief of Army] is an unlawful order which effectively seeks to prevent me engaging in legitimate public policy debate as a civilian. It is an attempt at censorship to prevent adverse comments in relation to Defence policy being made. I have not breached the “order” as the order was not a lawful general order or command and I have been charged with no such offence.

139 Then the applicant advanced an argument that DI(G) ADMIN 08-1 and DI(G) ADMIN 08-2 were confined in their application within the limits set by s 3 of the Defence Discipline Act, so that those instructions did not apply to him at the relevant times, and added:

42. **Ref A contains prejudicial material.** Ref A alleges a number of matters which are without legal or factual foundations including, inter alia, that I have breached the privacy of another member, and that I am subject to DFDA proceedings which has not been finalised and no finding of guilt has been made.

(Emphasis in original.)

and:

46. ... Engaging in political debate and public exchange of information on current issues is a permissible activity and to seek to prevent adverse criticism is a breach of my rights and a form of unlawful censorship.

140 He also said:

49. I do disagree with the inconsistent application of various aspects of Defence policies relating to the denigration of religious beliefs, particularly Christian beliefs. I also note that this difficulty with accepting the beliefs of Christian members is not limited to the Army but is also relevant to Australian society generally.

50. While those personal views may be different to those held by the chain of command, public debate is healthy and should be encouraged, not prohibited. I have not, and do not seek to exploit, objectify, or make derogatory comments relating to any group or person. My engagement in public debate on social issues is in relation to broader policy and social issues and information within the public domain. No comments were made as representing the views of the ADF. The CA’s public statements that “[T]he Army has to be an inclusive organisation, where every soldier, man and women can reach their full potential, and is encouraged to do so” is inconsistent with the treatment of Christian members of the ADF whose views and beliefs are degraded by the conduct of other members who are not subject to the same standards, discipline, and policies in which the CA seeks to rely to terminate my commission.

51. The ADF’s response generally, and in this administrative action, demonstrates its discriminatory treatment of members on the basis of sexuality and religious belief. While equality is espoused by the ADF as a core value, current policy allows particular segments of the ADF, in particular DEFGLIS and its membership, to engage in critical public political debate and activity in uniform and on duty without

regard to Defence policy (or by apparent exception to it). At the same time the ADF is seeking to actively censor and punish individuals who conduct similar activity (while not in uniform or on duty) on the basis that those members with Catholic values and beliefs are either irrelevant or inconsistent with the current social engineering and affirmative action within Defence apparently condoned by the senior leadership.

52. Hypocrisy, through the selective application of policy to certain individuals and not others on the basis of their beliefs is unjust, divisive, and contrary to the values the ADF seeks to espouse. Commending individuals for their advocacy of a political agenda on the one hand and punishing others for engaging in the same debate on the other at the very least undermines discipline. Further, attempts to censor the views of individuals considered to be inconsistent with the prevailing view of the senior leadership of the ADF through unlawful commands, DFDA proceedings, and administrative action challenges the basic freedoms of citizens and the foundations of our democracy.

141 He sought, finally, that no further action be taken with respect to the termination notice.

A Minute from CDF

142 On 22 August 2013, CDF wrote a Minute to the applicant. It is attached as Annexure B.

143 One aspect of this Minute requires immediate, and separate, attention. In the course of argument it was submitted that the heading of the Minute (“Notice to Show Cause for Termination of Appointment”) betrayed the fact that it was, in reality, a termination notice served under reg 85(2) of the Personnel Regulations. If the contention was sound it would strike fatally at the Termination Decision because it would be contrary to reg 85(6) for the same delegate of the Governor-General to issue a termination notice under reg 85(2) and make a termination decision under reg 85(4).

144 However, I am satisfied that the contention should not be accepted. The heading is just that. It represents the subject matter of the Minute by reference to the termination notice dated 30 May 2013, which is identified in the Minute as Reference A.

145 The evident purpose of the Minute, which refers directly to the applicant’s Statement of Reasons dated 27 June 2013, is to disabuse the applicant of the idea that the question of termination (i.e. whether it should occur or not) was likely to be decided by reference to technical arguments of the kind he advanced. Accordingly, paragraph 7 advised the applicant that CDF was less interested in whether any “technical” breach of specific instructions had occurred (DI(G) ADMIN 08-1 and DI(G) ADMIN 08-2) and would place greater weight on whether the public comments revealed inappropriate attitudes and intolerance contrary to current ADF policies and demonstrated an irreconcilable conflict.

146 CDF was accused in argument of bias and prejudice, both by reference to this Minute and more generally. It was argued that the Minute of 22 August 2013 reflected an understanding that the contents of the termination notice given by the Chief of

Army were unsustainable, and the Minute was a consequent attempt by CDF to “move the goalposts” and to erect a new and different case against the applicant. The argument was based on the idea that abandonment of the (misconceived) criminal charges vindicated and exonerated the applicant. I do not accept any part of this analysis.

147 Abandonment of the service charges was irrelevant to the reg 85 procedure. The termination notice did not depend upon, or simply reflect, those charges. It was addressed to a much broader concern about the applicant’s conduct.

148 Far from attempting, as it were, to unconscientiously find a new and different basis upon which to deal with the applicant, the Minute from CDF on 22 August 2013 appears to me to have represented a fair attempt to ensure that the applicant did not misunderstand the true nature, or the seriousness, of the matters at issue. Far from supporting a charge of bias or procedural unfairness which was made against CDF, this Minute is cogent evidence against it.

149 The Minute of 22 August 2013 represented a further, focussed, opportunity for the applicant to address the concerns expressed as a matter of substance. The possibility for him to resign was also expressly left open. The applicant chose to persevere with his resistance to the steps being taken against him.

150 He asked for further time (until 23 September 2013) to respond, which he was given.

151 On 23 September 2013, the applicant provided a further response to the termination notice, together with an “Executive Summary”. Those documents were sent to CDF, Chief of Army, four other officers and the Minister for Defence. The applicant decided, evidently, to leave no doubt about his position. The Executive Summary stated:

3. This NTSC [Notice to Show Cause] is based on empty accusations that boil down to one thing: my chain of command and Defence hierarchy disagree with my Catholic religious beliefs and political opinion supporting current Australian laws and my expression of both. It would be perfectly acceptable to support both in uniform. However, I am defending statements that I have made while I was not in uniform or on duty. This action must be seen for what it is: an attack by Defence on my personal beliefs.

4. This attack has occurred even though Defence policy explicitly states that Defence members are freely able to practice their religious beliefs and engage in personal political activity. It has come despite the fact that you and the former Deputy Chief of the Army have written to me and explicitly stated that I am entitled to my own opinion.

5. Consequently, this entire farcical process is a gross abuse of power. It is a miscarriage of justice and a breach of procedural fairness of the highest order.

...

7. This attack by Defence on me has occurred despite, or perhaps because of, the clear evidence I have shown that Defence itself is in breach of its policies. ...

8. If my commission is terminated, it will be because I have defended Catholic beliefs from public attack. I will not be the first person to suffer for doing so, nor will I be the last. It will be an unjust punishment that will become a badge of honour. I will proudly take it to my grave and fearlessly wear it when I face my God and Eternal King.

9. My defence against this unjust NTSC is outlined in detail with the enclosure to this document, which I submit for your consideration.

152 The enclosed document was a further 52 page response to the termination notice and the Minute of 22 August 2013. The applicant, in effect, accused CDF of bias and predetermination and threatened to “pursue all avenues of legal recourse available” if terminated.

153 The applicant asserted, variously:

7. ... I am not intolerant or demeaning of homosexuals, transgender persons or women and I refute this suggestion in the strongest possible terms. ...

8. ... I have made no public comment whatsoever about the ability of homosexuals to serve within Defence. ...

...

b. It is not demeaning or demonstrating intolerance of homosexuals to comment on their public behaviour at the Mardi Gras. Their actions show complete intolerance and hate of Catholicism and they demean themselves with their public displays of lewd and unacceptable behaviour. Defence demeans itself when it directly supports this overtly political, anti-religious and sexually-explicit event.

c. To assert that I am demeaning and intolerant of homosexuals because I am prepared to publically defend my Catholic religious beliefs shows intolerance of Catholicism and demeans the right of serving personnel to freely practice their faith.

9. ... I have made comments about one certain transsexual officer in the ADF, ...

...

11. ...

...

c. I will also point out that the Catholic Church teaches that it is immoral to abuse one’s body through procedures such as ‘sex-change’ operations or to deform it by taking unnatural hormone therapy. Consequently, Defence cannot force its Catholic members to accept the morality of transsexual activities without preventing them from freely practicing their faith.

...

e. To assert that I am demeaning and intolerant of transsexuals because I publically defend my Catholic religious beliefs shows intolerance of Catholicism and demeans the right of serving personnel to freely practice their faith.

...

154 The applicant argued that termination action against him was rendered “unlawful” by DI(G) PERS 50-1, “Equity and Diversity in the Australian Defence Force”. He contended that the decision not to proceed with charges against him under the Defence Discipline Act rendered claims, that he had breached Defence policy, “baseless”.

155 Over about 40 pages thereafter the applicant detailed, and sought to justify, his public statements and the reasons for them. It is fair to say that his response contains no concession of any error on his part; the contrary is the case. He also sought to re-agitate the content of various complaints made earlier by him.

156 The further response concluded as follows:

122. The administrative and disciplinary actions that I have faced this year rest on a series of complete absurdities. None of them have anything to do with a supposed lack of performance or failure of duty on my part. None of them have anything to do with a failure to provide service. All of them are focused on my beliefs. Adverse administrative and disciplinary actions taken against me must be seen for exactly what they are: attacks on my personal religious, political and sexual beliefs. No more, no less.

123. This means that administrative action is not only unlawful, but shameful. The Australian Army, of which I have so proudly served for over 16 years, brings great discredit upon itself by so willingly becoming an enforcer of today’s militant and intolerant ‘thought police’. It brings me no joy to highlight this fact.

124. The administrative action against me is fatally flawed and baseless. Every charge and accusation made against me has been dismissed – even those you now bring against me. It would be an enormous breach of natural justice and procedural fairness if my commission was terminated by you because of considerations you have decided to consider more relevant than actual evidence, at the very last moment.

a. The NTSC brought against me rests on baseless allegations and the ODMP [Office of the Director of Military Prosecutions] have cleared me of wrongdoing.

b. You have acknowledged this stating you will place little significance on whether I breached Defence policy and have instead outlined new reasons to terminate my service. This is procedurally unfair and breaches natural justice.

c. The proposed new reasons for termination are also baseless and an IOI investigation has already cleared me of these allegations.

d. Defence's interference in my personal activity and beliefs has led to ongoing harassment and discrimination throughout 2013.

e. Multiple complaints that I have lodged about this process and about harassment of my beliefs have been rejected without any adequate reason provided.

f. I have been forced to defend myself from public harassment from Defence, causing serving soldiers and the Australian community – especially Catholics – to lose faith in Defence. This is a very sad thing.

125. Finally, considering all of this and the nature of the multiple administrative actions taken against me, I will have no choice but to carefully consider my further legal options in the event you decide to terminate my commission.

126. I therefore respectfully request that you take no further action in this matter and allow me the honour of continuing to serve as one of Australia's good uniformed servants – but God's first.

157 The applicant's responses to CDF on 27 June 2013 and 23 September 2013 show that he had no real appreciation of (and he refused to acknowledge) the character of the conduct which had brought him to that point. I must say, his pleas that it was he who was truly tolerant sit uneasily with the objective record which is constituted by his public statements.

158 There was no indication available from the applicant's responses that he accepted the authority of the orders he had been given, that he would obey those orders, or orders of a similar kind in the future or that he would pay any greater regard to the official instructions than he had to that point. He must have seemed to his superiors to be intent upon a course of self-promotion based on his own stated convictions that was unlikely to change.

159 I can well imagine that the prospect of further conduct by the applicant of a similar kind, marked by overt disobedience of orders and public ridicule of his senior officers, might have been seen as an intolerable and unacceptable one.

Termination Decision

160 A copy of the Termination Decision (10 December 2013) is attached as Annexure C. Critical findings in this decision appear to me to particularly include:

Findings of material fact

...

6. I am satisfied that a significant amount of the material enclosed with the Termination Notice, being material from your personal web blog, twitter and facebook posts, is critical of the ADF and government policy and decisions, particularly the support offered to homosexual and transgender members of the ADF and the decision to permit women to serve in combat roles. I am satisfied that the manner in which your disagreement with those policy decisions is publicly expressed

is generally intemperate, disrespectful and does not accord with the standard of behaviour expected of any Defence member, and particularly an Officer of your rank and experience.

7. I accept that you were not on duty, in uniform or performing any service for the Army at the time of your comments on these matters, however you were an active Army Reserve member, and on several occasions clearly identified yourself as such in the online material including in enclosures 2, 3 and 4 of the Termination Notice. I note that your duty status is significant for purposes such as consideration of proceedings under the *Defence Force Discipline Act 1982*, as you identify in your submissions to me. However, for the purposes of this decision pursuant to the *Defence (Personnel) Regulations 2002*, it is your behaviour generally which is at issue in deciding whether your retention is in the interests of the Australian Army.

8. The content of your online posts regarding these issues, as enclosed with the Termination Notice, is contrary to the policies and cultural change initiatives currently being implemented within Army and Defence and is inconsistent with the standards or behaviour expected of all Defence members. Your opinions are expressed in a way that is contrary to the standards of online public commentary expected of a serving ADF member, regardless of duty status. The manner in which you have publicly articulated your views on the support offered to homosexual and transgender members of the ADF and the decision to permit women to serve in combat roles demonstrates intolerance and disrespect for particular individuals and for ADF and government policy.

9. In making these findings, I distinguish between your holding of a personal opinion, the mere fact of which I do not consider necessarily inconsistent with the standards required of Defence members, and your conduct in expressing personal opinions publicly in an inappropriate and disrespectful manner, in circumstances that identify you as a member of the Australian Army Reserve. I consider that conduct in expressing personal opinions is inconsistent with expected standards of behaviour, particularly where it takes place in the public domain. I accept your submission that your statements are informed by your personal beliefs and your faith. However I do not accept your submission that administrative (and disciplinary) action commenced against you shows intolerance of your opinions and demeans the right of ADF members to practice their faith because such action is directed to your behaviour and the manner in which you have publicly expressed your beliefs, rather than the beliefs themselves.

10. I emphasise that this decision is not about beliefs or faith. It is about your personal conduct whilst a member of the Army Reserve. Defence recognises that different views exist, but demands tolerance and respect in order to preserve ADF capability. This includes the manner in which alternative views to existing ADF and government policy is expressed. Defence Instruction (General) 50-1 *Equity and Diversity in the Australian Defence Force* (reference C in reference C of this Statement of Reasons) establishes this as the standard of behaviour for all Defence members, notwithstanding duty status, as does the Diversity and Inclusion statement and current cultural reform initiatives. It is expected that leaders in the ADF support and implement this approach and that all members behave according to these standards.

11. I note the appropriateness of the manner in which you had publicly expressed views was brought to your attention by your Commanding Officer in his conversation with you on 6 February 2013 (see enclosure 3, attached to enclosure 1 to reference B). I also note that the former Deputy Chief of Army brought this standard and the responsibility of Officers to uphold Army values and ethos in their behaviour specifically to your attention on 22 March 2013 (enclosure 9 to reference C). I am satisfied that you did not subsequently modify your behaviour to reflect the standard of public behaviour expected of members of the Australian Army and especially of Officers, including by removing the online material as directed by the former Deputy Chief of Army.

...

Reasons for decision

16. I have concluded that your retention is not in the interests of the Australian Army. In particular:

a. your conduct as set out in the enclosures to the Termination Notice demonstrates behaviour repeatedly inconsistent with the standard set out in DI(G) PERS 50-1 *Equity and Diversity in the Australian Defence Force*, my Diversity and Inclusion statement, and current cultural reform initiatives;

b. the manner in which you publicly expressed your personal disagreement with Defence policy, particularly the support offered to homosexual and transgender members of the ADF and the decision to permit women to serve in combat roles, is significantly below that expected of an Officer in the Army, including a member of the Army Reserve;

c. you failed to modify your online behaviour when the inconsistency of your behaviour expressed in online postings with the standard expected of an Officer in the Australian Army was brought specifically to your attention;

d. the persistence of your conduct and your submissions in references A and B, demonstrate that you do not understand or are unable to exercise your responsibilities as an Officer and leader in the Australian Army, notwithstanding your rank and experience and the bringing of expected standards of behaviour to your attention by your chain of command on two separate occasions; and

e. your online conduct and behaviour, which you have refused to modify, is inconsistent with your continued service as a Major in the Army Reserve.

I have placed significant weight on these facts.

161 As will be apparent from a study of the full terms of the Termination Decision, a more extended explanation was provided for those conclusions. In addition, CDF went on to address the particular matters required by reg 7 of the Personnel Regulations.

162 The Termination Decision is the first of the challenged decisions which will require assessment against the requirements of the ADJR Act.

Redress Decision

163 On 5 February 2014, the applicant lodged the ROG for the Termination Decision with his Commanding Officer, Lt. Col. Buxton, which was rejected on 21 February 2014. The applicant then escalated the ROG to the Chief of Army on 14 March 2014 but it was rejected by a delegate of the Chief of Army on 31 May 2014. On 16 June 2014, the applicant escalated the ROG to CDF. Rejection of this ROG on 30 June 2014 is the second decision with which the present proceedings are concerned. Again, I annex a copy of this decision to the judgment, rather than only quote selectively from it (attached as Annexure D).

164 Although the applicant escalated the ROG to CDF, he then submitted to him, as I said earlier, that CDF should not deal with it, on the grounds of bias, but should refer it to the Governor-General. CDF referred, in substance, to the doctrine of necessity as he rejected both the submission and the request for reconsideration of his earlier decision.

165 In practical terms, there is little point in giving separate attention to the Redress Decision of 30 June 2014. The crucial decision is the decision to terminate on 10 December 2013, and the reasons for it. If a challenge to that decision is rejected, any complaint about the later decision on 30 June 2014 would be ineffective. If the decision of 10 December 2013 is set aside it would be unnecessary to deal separately with the decision of 30 June 2014.

166 In either case, little further attention to the Redress Decision of 30 June 2014 in this judgment is necessary. I shall deal with it to the extent necessary in due course.

167 It should be noted that the termination of the applicant's service was delayed from the foreshadowed date of 13 January 2014 to 11 July 2014 while the applicant pursued the various ROG procedures.

The ADJR Act case

168 The challenges to the decisions rely upon s 5 of the ADJR Act. In addition, as I mentioned earlier, there are constitutional arguments which were advanced to support those challenges. In an unfocussed, and unhelpful, way the applicant invoked virtually all of the wide range of potential challenges made available by s 5 of the ADJR Act.

169 Section 13 of the ADJR Act provides a means (if necessary) by which a person affected by an administrative decision made under an enactment may obtain a statement of the reasons for the decision. Section 13(1) provides:

13 Reasons for decision may be obtained

(1) Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Circuit Court under section 5 in relation to the decision may, by notice in writing given to the

person who made the decision, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

170 The applicant did not need to make a special request for statements of reasons of this kind; they were provided to him as part of the Termination Decision and the Redress Decision.

171 The provision of a statement of reasons fulfils an important purpose. Subject to any contrary finding of fact, written reasons of a decision-maker will generally be regarded as a statement of the matters considered and taken into account (see Allsop CJ and Katzmann J in *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1).

172 In relation to proceedings under the ADJR Act, Woodward J captured the essence of the position in *Ansett Transport Industries (Operations) Pty Ltd v Wraith* [1983] FCA 187; (1983) 48 ALR 500 when he said (FCA at 13-14; ALR at 507-508):

... s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect, “Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging”.

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.

and:

... the general policy of the Judicial Review Act ... clearly intends that persons aggrieved by administrative decisions which adversely affect them should have full opportunity to show, if they can, that such decisions, have been improperly reached. They can only do this if they know how the decisions were in fact reached.

173 A similar approach is taken when questions arise about the width or extent of permissible discovery in judicial review proceedings about administrative decisions (see *Canwest Global Communications Corp v Australian Broadcasting Authority* [1997] FCA 540 and (on appeal) *Treasurer of the Commonwealth of Australia v Canwest Global Communications Corp* [1997] FCA 578).

174 The statement of reasons, therefore, normally provides the touchstone against which to evaluate challenges to the decision made under the ADJR Act. It will always be an important matter to consider. In some cases that statement will set the limits of the debate. Although, in an appropriate case, it will be possible to challenge the

reasons given by reference to other material, it remains important to identify the nature and character of the challenge and precisely the basis upon which the decision is claimed to be reviewable and why.

175 The grounds upon which a decision may be challenged are set out in s 5 of the ADJR Act, as follows:

5 Applications for review of decisions

(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(j) that the decision was otherwise contrary to law.

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

- (e) an exercise of a personal discretionary power at the direction or behest of another person;
- (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
- (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
- (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
- (j) any other exercise of a power in a way that constitutes abuse of the power.

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

176 In his pleaded case, the applicant attempted to engage the full range of those potential challenges but he made no attempt to do so there by reference to the matters referred to in s 13(1) – i.e. by reference to the findings on material questions of fact or by reference to the evidence or other material identified by the decision-maker (CDF in each case) or by reference to the stated reasons for decision or by reference to other material. In my view, it is wholly insufficient to merely repeat or paraphrase the grounds of potential challenge allowed by s 5 coupled with general assertions of the kind found in the amended statement of claim.

177 In the originating application the “Details of claim” appeared as follows:

The Applicant is aggrieved by the decisions because of the following section 5 ADJR criteria:

- | | | |
|----|----------------|---|
| 1. | s.5(a): | That a breach of the rules of natural justice occurred in connection with the making of each decision; |
| 2. | s.5(b): | That procedures that were required by law to be observed in connection with the making of the decisions were not observed; |
| 3. | s.5(d): | That each decision was not authorized by the enactment or power in pursuance of which it was purported to be made; |
| 4. | s.5(e): | That the making of the decisions was an improper exercise of the power conferred by the enactment or power in pursuance of which each was purported to be made on the more specific grounds referred to in Grounds 8 to 17 below; |
| 5. | s.5(f): | That the decisions involved an error of law, whether or not the error appears on the record of the decision; |
| 6. | s.5(h): | That there was no evidence or other material to justify the making of the decisions; |
| 7. | s.5(j): | That the decisions were otherwise contrary to law. |

8. **s.5(2):** For the purpose of subsection 5(1)(e) ADJR, Ground 4 above, the applicant provides the following grounds:
9. **s.5(2)(a):** Taking an irrelevant consideration into account in the exercise of a power;
10. **s.5(2)(b):** Failing to take a relevant consideration into account in the exercise of a power;
11. **s.5(2)(c):** An exercise of a power for a purpose other than a purpose for which the power is conferred;
12. **s.5(2)(d):** An exercise of a discretionary power in bad faith; For the purpose of FCR 31.01(2) the following particulars are provided: prior to the decisions the applicant was charged with 12 Defence discipline matters by the Chief of Army in substance the same or apparently the same as the matters taken into account by the Respondent in dismissing the Applicant or which were considerations that comprised an ulterior motive of the Respondent with respect to making the decisions challenged herein in circumstances where each such discipline charge against the Applicant was dismissed by the Director of Military Prosecutions to the knowledge of the Respondent; the Applicant contends it was bad faith to have regard to such considerations in the said circumstances or that the Respondent proceeded upon a fixed view that the Applicant be dismissed or failed in the circumstances described herein to give genuine consideration to the exercise of his powers under Defence (Personnel) Regulations 2002 Reg. 85(1)(e) and/or DI(G) Pers 50-1;
13. **s.5(2)(e):** An exercise of a personal discretionary power at the direction or behest of another person;
14. **s.5(2)(f):** An exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
15. **s.5(2)(g):** An exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
16. **s.5(2)(h):** An exercise of a power in such a way that the result of the exercise of the power is uncertain; and
17. **s.5(2)(j):** Any other exercise of a power in a way that constitutes abuse of the power.
18. The decisions involved or included an exercise of the executive power of the Commonwealth or of the prerogative comprising the command power which restricted or was in conflict with the implied freedom of the Applicant to communicate with respect to public affairs and political discussion and was accordingly void and of no effect.
19. The decisions involved or included an exercise of the executive power of the Commonwealth or of the prerogative comprising the command power which was in conflict with the fourth clause of section 116 of the Constitution and was accordingly void, namely that no religious test shall be required as a qualification for any office or public trust under the Commonwealth in that the Respondent dismissed the Applicant because of or influenced by his strong religious views.
20. The Applicant pursuant to FCR 31.01(3) also relies on relief of a kind mentioned in section 39B of the *Judiciary Act 1903* that arises out of, relates to or is connected with the same subject matter as the foregoing.

178 In only one place (item 12) was there any attempt to identify a matter which referred in any way to the facts of the case or the character of a challenged decision. I shall deal with it directly a little later.

179 I will, however, deal immediately with item 20. As I mentioned earlier in this judgement, the case went to trial upon the basis that the applicant relied on, and only on, the ADJR Act, as assisted where relevant by his constitutional arguments. No separate reliance was, thereafter, placed on s 39B of the *Judiciary Act 1903* (Cth). In any event, no further or better relief would be available (and none was suggested) if the proceedings extended so far. In the circumstances, no further attention is required to this aspect of the originating application.

180 At the commencement of the trial, reliance on s 5(2)(e) and (h) was abandoned, but that did little to add focus to the proceedings.

181 As I said earlier, it is not satisfactory to simply paraphrase the available grounds of review under the ADJR Act when relying on the rights which it gives to challenge an administrative decision. Yet, that is what the applicant's case amounted to. It involved a series of assertions, insufficiently connected with the terms of the decisions which I must consider.

182 The applicant's affidavit, filed with the initial statement of claim, gave no direct support at all for any of his claims. It referred to background circumstances and sought to emphasise the applicant's personal views and sense of grievance. I do not regard the applicant's beliefs or religious convictions, or the reasons he has ascribed to the public statements he made, to be relevant to a determination of any of the challenges he has made to the decision to terminate his services.

183 A later amended statement of claim did nothing to advance matters. The central contention in that document (variously expressed as a breach of natural justice, not observing the requirements of the law, lack of jurisdiction, lack of authorisation, improper exercise of power, error of law, lack of evidence, contrary to law, irrelevant considerations, bad faith, unreasonable, abuse of power, etc) was based on a single set of circumstances which was simply repeated many times. It was that the decision of CDF on 10 December 2013 to terminate the applicant's service was based on the Quick Assessment Report, with the result that (the Quick Assessment Report itself being flawed, improper and unauthorised) CDF's decision was itself bad in law.

184 This contention simply does not come to grips with the facts. It is a distraction, at best. It certainly provides no useful or legitimate basis upon which to invoke the provisions of the ADJR Act, or to attack the decision of 10 December 2013.

185 A convenient summary of the pleaded allegations (i.e. in the amended statement of claim) about the ways in which the Termination Decision infringed s 5 of the ADJR Act was provided by the respondent in written submissions, as follows:

161. [The applicant's] pleaded complaints about the Termination Decision concern both procedure and substance, and are as follows:

(a) The Notice to Show Cause issued by the Chief of Army on 30 May 2013 ("**the Termination Notice**") breached the rules of natural justice because it did not provide particulars regarding Mr Gaynor's alleged breach of DI(G) PERS 50-1 *Equity and diversity in the Australian Defence Force* ("**the Equity Instruction**"), and so Mr Gaynor was denied a right to be heard and denied a right to respond (ASOC [8(e), 8(f)]).

(b) The decision-maker (presumably, the CDF) breached the rules of natural justice by demonstrating predetermination and bias prior to, during and after making the Termination Decision, and because the CDF had a conflict of interest in making the Termination Decision when Mr Gaynor had made complaints against the CDF (ASOC [9(b), 9(c), 9(d)]).

(c) The CDF relied on "unlawful commands" and the CDF's personal assessment that Mr Gaynor's failure to comply with those commands constituted a failure on his part (ASOC [9(e)]).

(d) The Minute dated 22 August 2013 from the CDF (“**the 22 August Minute**”) to Mr Gaynor constituted the CDF impermissibly amending the grounds on which the Termination Decision was made (ASOC [9(f)]).

(e) The CDF did not have jurisdiction or “powers of command” to make the Termination Decision on the basis of Mr Gaynor’s lawful expression of political and religious views and the personal educational choices for his children (ASOC [11(c), 11(d), 12(c), 12(d), 12(e), 12(f), 18(d), 18(e)]).

(f) The CDF “relied on” the Quick Assessment in making the Termination Decision, and so the Termination Decision is infected with all of the same deficiencies as the Quick Assessment (ASOC [8(a), 8(b), 8(c), 8(d), 9(a), 10(a), 10(b), 11(a), 11(b), 12(a), 12(b), 13(a), 14(a), 14(b), 15(a), 15(b), 15(c), 16, 18(a), 18(b), 18(c), 19(a), 20(a), 20(b), 22(a), 24(a), 25(a), 25(b)]).

(g) The CDF failed to take into account relevant considerations in making the Termination Decision (ASOC [19]).

(h) The CDF made the Termination Decision at the behest of other officers “with vested personal interests” in silencing Mr Gaynor (ASOC [22(b), 22(c)]).

(i) The CDF made the Termination Decision in accordance with a rule or policy without regard to the merits of the particular case (ASOC [23]).

(j) The Termination Decision was so unreasonable that no reasonable person could have made it (ASOC [24]).

(k) The Termination Decision was an abuse of power (ASOC [26]).

(l) The CDF had no evidence to justify the making of the Termination Decision, in particular no evidence that Mr Gaynor had: failed to comply with any orders, by-laws or policies; conducted himself at a standard below that required of an officer; received “lawful” direction that his activity was inconsistent with Defence by-laws or policy; or failed to modify his behaviour after receiving “lawful” direction (ASOC [15(d), 15(e), 15(f), 15(g)]).

186 The essence of the applicant’s case, as presented in argument, was that the applicant’s commission was terminated only because he did not subscribe to, or support, the new ADF “culture”, that the attempts to constrain his public resistance to that culture were unlawful and that the decision to terminate his commission was the outcome of predetermination, bias and predisposition against him, and (I infer) Catholics generally.

187 As it was put in some written submissions in reply:

13. ... in reality, a pre-determined decision to terminate his commission had been made on the basis that his beliefs were unacceptable and that evidence to support this decision was sought simply as a ‘box ticking’ exercise. ...

188 One reflection of this argument may be found in the only item in the originating application where any particulars were provided – item 12, relying on s 5(2)(d) of the ADJR Act and alleging bad faith.

189 Allegations of bad faith should not be made by legal practitioners unless there is a respectable foundation for the allegation. None emerged in the present case. Indeed, any such characterisation of the decision was expressly disclaimed during interlocutory proceedings when I explored the possible justification for compelling the production (as the applicant had sought) of a wide range of documents of no apparent relevance to the actual reasons for decision.

190 It is trite to say that the applicant bore the onus (both legal and practical) of making good his challenges to the decisions. In the present case it was fundamentally necessary to come to grips, at least in the first instance, with the expressed basis for the two decisions, rather than attempt a general excursus into the moral probity of the applicant's beliefs or any contrary views.

191 The real issues for attention in the present case concern the disclosed reasons (fundamentally, the disclosed reasons for termination) tested against the respectably available grounds for review under the ADJR Act. The case legitimately available to the applicant is a much more confined one than the originating application and the attempted pleadings suggested.

Conclusions about the ADJR Act case

192 As I earlier discussed, the question of satisfaction of an officer issuing a termination notice such as the Chief of Army, or the satisfaction of a decision-maker such as CDF, is not one to which any independent opinion of this Court may be applied. As Logan J observed in *Millar v Bornholt* at [73], that would impermissibly pass that responsibility from the Governor-General's delegates to the judiciary.

193 It is not the function of the Court to substitute any view about the applicant's conduct for the assessment made by CDF. The matters for consideration in this Court fall within a much narrower compass and attention must remain focussed upon circumstances relevant to judicial review, not merits review.

194 The policies to be adopted by the ADF to sustain its reputation in the community, or to address problems of attraction and retention of serving members are not matters for the courts either.

195 They, and the general administration and management of the ADF, are assigned under the Defence Act to the Minister, with the assistance of CDF and the Secretary of the Department of Defence. No argument is available to the applicant in the present proceeding that it was wrong, unlawful or even undesirable to attempt to bring about a cultural shift in the ADF. Subject to any constitutional protection, that was not a matter about which the applicant had a particular right to contribute, or to veto, or to publicly and immoderately oppose. He was not a free agent simply because he was not on duty or in uniform. His service obligation (i.e. as a serving member of the ADF) was to obey the instructions and orders he was given and to respect the disciplined nature of the service in which he had chosen to serve.

196 The lawful consequences for disobedience included resort to reg 85 of the Personnel Regulations, as well as any other possibility of a charge of committing a service offence, if that was applicable.

197 In earlier parts of this judgment I have dealt with propositions that the instructions in DI(G) ADMIN 08-2 and DI(G) PERS 50-1 (to take the two most directly relevant examples), did not apply to the applicant when he was not on duty and not in uniform. I have rejected that contention, and the accompanying argument that the only remedy for failure to follow such an instruction was a criminal prosecution under the Defence Discipline Act.

198 Furthermore, there is in my view no substance at all in the propositions that any part of the DI(G)'s were themselves unlawful or that the decision of CDF to permit members of the ADF to march in the Sydney Mardi Gras, constrained by the conditions imposed, was unlawful. The applicant's attempts to promote his own views were in no sense assisted by his attempts to stigmatise as illegal the things he opposed.

199 It follows that (subject to the constitutional arguments) I reject the applicant's repeated contention that he was immune from any form of discipline or order to desist if not charged, and the repeated contention that the orders to him to desist were unlawful. That disposes of a great number of the arguments he put on his own behalf before termination. It also disposes of a large body of the challenges made under the ADJR Act.

200 Finally, I see no support in the evidence for any charge of bias, prejudgement or predetermination by CDF.

201 I can, therefore, see no substance in any of the challenges to the Termination Decision which depend on the ADJR Act.

202 Nor can I see any substance in the challenge under the ADJR Act to the Redress Decision.

203 The central complaint there was that CDF was disqualified from finally reaching that decision because he made the Termination Decision and could not properly review it "on the merits". As I have already explained, the ROG was referred to CDF by the applicant. He did not need to do so, but when he did he could not insist on an alternative decision-maker. There was no alternative. If CDF had declined to deal with the matter it would have remained unaddressed.

204 It can make no difference, in any event, to the outcome of the present case. If the Termination Decision was set aside there would be no need to address the Redress Decision.

The constitutional arguments

205 In written submissions filed to support the contention of infringement of an express or implied constitutionally protected freedom, arguments were advanced for the applicant that attempted to portray some generalised suppression of legitimate

speech or religious belief, but no account can be taken of matters argued at this level of generality.

206 As the respondent pointed out, in a case of the present kind where specific decisions are under challenge, any challenge founded on constitutional considerations must be a challenge based on the proposition that the decisions were *ultra vires* – i.e. made without power or authority.

207 In the immediate sense, each of the Termination Decision and the Redress Decision was directly authorised (by reg 85 of the Personnel Regulations and reg 91 of the Defence Force Regulations respectively) and I have found that neither decision should be struck down for patent unlawfulness. Neither reg 85 nor reg 91 directly contravene any suggested constitutional limitation.

208 The applicant’s proposition must, therefore, be that the exercise of the statutory discretion in each case was in excess of a statutory grant of power properly construed as not authorising infringement of constitutional requirements or boundaries.

209 The provisions of the ADJR Act, s 5(1)(d), (e) and (j), operate readily in such a context. I do not doubt that a decision under an enactment which can be shown to infringe a constitutional freedom or prohibition may be described as one “not authorized by the enactment” or “an improper exercise of the power conferred by the enactment” or “otherwise contrary to law”.

210 The respondent did not submit that such an argument was unavailable but pointed out that it could not be based on some notion of personal rights or freedom. The constitutional tests are concerned with the validity of laws and executive action, not as such with vindication or authorisation of personal expressions of opinion.

211 That may be accepted. However, the constitutional restrictions operate in the fashion indicated by the High Court in *Wotton v State of Queensland* (2012) 246 CLR 1 (“*Wotton*”) at [21]:

21 ... while the exercise of legislative power may involve the conferral of authority upon an administrative body such as the Parole Board, the conferral by statute of a power or discretion upon such a body will be constrained by the constitutional restrictions upon the legislative power, with the result that in this particular respect the administrative body must not act *ultra vires*.

Section 116 of the Constitution

212 Section 116 of the Constitution provides as follows:

116 Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

213 As finally formulated, the applicant's argument was that the applicant was prevented from the free exercise of his religion and a religious test was imposed upon him for holding his commission to the effect that he forgo his own beliefs. At least, that is how I understood the argument.

214 Neither proposition can be accepted on the facts.

215 Neither the Termination Decision nor the Redress Decision required of the applicant that he refrain from the exercise of his religion, nor required that to remain a commissioned officer he satisfy a religious test of any kind. The applicant was instructed, generally and specifically, to refrain from public statements contrary to ADF policy while he remained a member of the ADF. I am satisfied that the applicant acted by choice to make the statements which he did. I do not accept that even as a matter of conscience, he felt he had no choice but to defy the instructions and orders given to him.

216 The better view is that the applicant chose to defy those orders and instructions based upon some notion of what his *legal* rights were, coupled with a desire to vent his personal opinions. I would dismiss this argument on those conclusions alone.

217 A consideration of the limited authority on the point does not assist the applicant, in any event.

218 In *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, Mason ACJ and Brennan J, in their joint judgement, observed (at 130):

Hitherto the concept of religion has received little judicial exegesis in Australia, whether under s. 116 or otherwise. In *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth*, only Latham C.J. and McTiernan J. found it necessary to state a view as to the connotation of the term. Since then, the concept has been considered by the courts of the United States and England. The opinions of those courts are helpful, but it is time for this Court to grapple with the concept and to consider whether the notions adopted in other places are valid in Australian law. ...

(Footnote omitted.)

219 The case was not one about s 116 of the Constitution, but Mason ACJ and Brennan J went on to say (at 135-136):

... the area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them: ... Religious conviction is not a solvent of legal obligation. ... Conduct in which a person engages in giving effect to his faith in the supernatural is religious, but it is excluded from the area of legal immunity marked out by the concept of religion if it offends against the ordinary laws, i.e. if it offends against laws which do not discriminate against religion generally or against particular religions or against conduct of a kind which is characteristic only of a religion.

(Footnote omitted.)

220 Applying this test, the applicant cannot succeed on an argument based on s 116 of the Constitution. None of the instructions which were involved infringe the test. None of the specific orders the applicant was given infringe the test. Neither the Termination Decision nor the Redress Decision incorporate a requirement which infringes the test.

221 This constitutional argument should be rejected.

Implied freedom of political communication

222 Before turning to the law to be applied to the second constitutional argument it is worth noting the boundaries set in the arguments of the parties.

223 On the applicant's side, he has not argued that he had an absolute right of public comment which would extend to full time service in the Regular Army, or to service as a Reservist whilst on duty or whilst in uniform. Those are the circumstances in which the provisions, prohibitions and procedures prescribed by the Defence Discipline Act apply. The applicant accepted that in any of those circumstances he was directly subject to military discipline. It is unnecessary in the present case to say anything about the potential interaction of those provisions, prohibitions and procedures with the claimed implied freedom.

224 Conversely, although the respondent did not accept that all of the comments could be covered by the implied freedom it was accepted that some might be, although it was argued that the applicant's ability to make the comments was not "burdened" by the termination of his commission. The respondent submitted:

25. As to the first limb of the *Lange* test, the three "decisions" the subject of Mr Gaynor's application for judicial review were based largely on Mr Gaynor's expression of intemperate views which were not of a political character. Even insofar as the views related to political or government matters, the Respondent does not concede that the constitutional freedom is burdened in any material way. As discussed below, it was open to Mr Gaynor to express his views so long as he did so in a manner divorced from a connection with his role in the Defence Force. Given he could still then express views, there was no impact on the ability of members of the community to gain the benefit of his views in order to inform their choices, thus no burden on the constitutionally protected freedom. As noted above, the central question is not how an individual might want to construct a particular communication.

225 Thereafter, the respondent's argument focussed on the "second limb" of the test stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ("*Lange*"). In that discussion, the respondent emphasised two matters.

226 One matter concerned when a claimed burden on political communication met the second *Lange* test. The respondent argued:

32. Here, the Court should find that the military, like government agencies and employers generally, may direct an officer (or employee) not to publicly criticise their

chain of command or to act in a deleterious manner which would interfere with the military's operation, reputation and ability to function.

33. In the present case, the following considerations militate in favour of a finding that any burden on free communication by such a restriction (as imposed here) is reasonably appropriate and adapted, or proportionate, to the legitimate ends of maintaining efficacy, efficiency and morale of, and confidence in, the Defence Force:

(i) Defence personnel are required to serve the Government of the day without question (see eg ss 8, 9 and 9A of the *Defence Act 1903* (Cth), and DIG(G) PERS 21-1 *Political activities of Defence personnel*). Whilst such personnel are entitled to hold, and no doubt do hold, their own political views, nothing they do should undermine the confidence of the Government of the day in their loyalty and willingness to obey (lawful) directions and orders.

(ii) The maintenance of discipline and the chain of command is essential to the ability of the Defence Force to operate. There have to be limits on the level of criticism officers can make of other members of the Defence Force, particular more senior officers – cf for example Mr Gaynor specifically responding to the Deputy Chief of Army's 22 March 2013 letter directly in press releases: Gaynor Annexure A124.

(iii) Defence Force personnel must not do anything which would bring the Defence Force and its members into disrepute or danger. For example, Mr Gaynor made comments regarding Australia's involvement in Afghanistan and Iraq to the effect that the Defence Force's missions have been hampered by its failure to understand that Islam is a violent religion (CDF, Document 31). Such comments – when understood to be made by a current officer of the Australian Army Reserve – could provoke, or be employed to justify, attacks on Australian personnel involved in those operations.

(iv) The repeated intemperate online comments critical of Defence Force and government policies, and on decisions of individual Defence Force officers, as well as comments about particular homosexual and transgender Defence Force members, have the capacity to affect "recruitment and retention, and affect morale and discipline, because of the divisive and disrespectful nature of the comments" (as stated at [20] of the Termination Decision).

227 The second matter was that one vice in the applicant's comments, and the particular circumstance that took them beyond any constitutional protection, was that when making the comments he identified himself as a member of the ADF. Thus, the respondent argued:

34. Furthermore, any burdens placed on Mr Gaynor's freedom to communicate about political and governmental matters was not very restrictive relative to Mr Gaynor's position as an officer of the Defence Force. At no time did any Defence Force policy or any discretionary decision or order by a Defence Force officer prohibit Mr Gaynor from expressing opinions publicly, or restrict him from expressing opinions about a particular subject-matter publicly. Rather, the following restrictions applied:

(i) Clause 10 of DI(G) PERS 21-1 *Political activities of Defence personnel* permitted Defence personnel to engage in a wide range of political activities, provided that the person did not identify themselves as part of Defence or identify any part of Defence with any particular activity.

(ii) In the counselling session following the Quick Assessment, LTCOL Buxton requested that Mr Gaynor comply with DI(G) ADMIN 08-2 *Use of social media by Defence personnel*, to refrain from posting offensive material. LTCOL Buxton did *not* order Mr Gaynor to refrain from all public communications or refrain from communications about particular subject-matter.

(iii) Similarly, in his 22 March 2013 letter to Mr Gaynor, MAJGEN Campbell directed Mr Gaynor to cease posting material, and to remove any material already posted, that identified Mr Gaynor as an Army officer.

(iv) In the Termination Decision, the CDF expressly acknowledged Mr Gaynor's right to hold and express opinions, but found that Mr Gaynor had expressed "personal opinions publicly in an inappropriate and disrespectful manner, in circumstances that identify you as a member of the Australian Army Reserves" (at [9]).

35. The sanctions imposed upon Mr Gaynor were by reason of the tone of the public comments (intemperate and disrespectful), and the fact that Mr Gaynor identified himself as an officer in the Army Reserve when making the public comments, combined with his disobedience of directions. They were not imposed because of the subject matter of the comments.

36. Furthermore, if Mr Gaynor wished to communicate in any way that he saw fit, he could avoid the restrictions placed on him by the Defence Force by not identifying himself as a member of the Defence Force in his public comments and publications (including on his website). If he was unable to do so, then it was open to him to resign his commission as an officer; upon the acceptance of his resignation, he would have enjoyed the same liberties to communicate on political and governmental matters as civilians. He had been given clear warning and directions. He chose to ignore them.

228 I shall return to those issues, but first the legal framework in which to assess them must be identified.

229 The Constitution does not state any protection for political, or any other, communication. Freedom of political communication is an implication which the High Court has drawn from the terms and structure of the Constitution. The limits of the implication are as important as its existence in many cases.

230 In *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 ("ACTV"), Mason CJ (at 139) referred to an implied "freedom of communication in relation to public affairs and political discussion" which was not confined to "communications between elected representatives and candidates for election on the one hand and the electorate on the other".

231 Brennan J (at 149) spoke of "that freedom of discussion of political and economic matters which is essential to sustain the system of representative

government prescribed by the Constitution”. His Honour explained (at 150) that the freedom was not a “personal right”; rather it was “an immunity consequent on a limitation of legislative power”.

232 Gaudron J (at 212) said:

The notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps, freedom of speech generally. But, so far as free elections are an indispensable feature of a society of that kind, it necessarily entails, at the very least, freedom of political discourse. And that discourse is not limited to communication between candidates and electors, but extends to communication between the members of society generally.

(Footnotes omitted.)

233 Her Honour went on (Deane and Toohey JJ agreeing at 169) to hold that the freedom extends to all political matters. Her Honour said (at 215):

... subject to what is said as to regulation, the power conferred by s. 51 does not extend to the making of laws that impair the free flow of information and ideas on matters falling within the area of political discourse.

234 In *Lange*, referring to what Mason CJ had said in *ACTV*, the High Court said (at 561-562):

However, the freedom of communication which the Constitution protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. The freedom of communication required by ss 7 and 24 and reinforced by the sections concerning responsible government and the amendment of the Constitution operates as a restriction on legislative power. However, the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end. Different formulae have been used by members of this Court in other cases to express the test whether the freedom provided by the Constitution has been infringed. Some judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose. Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts. For ease of expression, throughout these reasons we have used the formulation of reasonably appropriate and adapted.

(Footnote omitted.)

and (at 567-568) said:

When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively “the system of government prescribed by the Constitution”). If the first question is answered “yes” and the second is answered “no”, the law is invalid. ...

(Footnotes omitted.)

235 Those passages state the two limbs of the “*Lange* test”, which has been the subject of elaboration in later cases.

236 In *Wotton*, the High Court said (at [25]):

25 Two questions (the *Lange* questions) arise with respect to each statutory provision which the plaintiff puts in contention. The terms of the questions are settled. They were recently stated, and applied, by the whole Court in *Hogan v Hinch* as follows. The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government described in the passage from *Aid/Watch* set out above.

(Footnotes omitted.)

237 Another important statement was made in *Lange* which was referred to recently by the High Court. In *Lange*, the High Court said (at 571):

... this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. ...

238 This statement was referred to as authoritative by the majority of the High Court in *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at [26] (“*Unions NSW*”). That judgment went on (at [27]-[30]):

27 The statement in *Lange* set out above not only recognises that, generally speaking, political communication cannot be compartmentalised to either that respecting State or that respecting federal issues. It also implies that a free flow of communication between all interested persons is necessary to the maintenance of representative government.

28 In *ACTV*, Brennan J spoke of the need for there to be a free flow of political communication in order that electors can form judgments. Mason CJ observed that freedom of communication could not be understood as confined to communications between electors and elected representatives, candidates or parties. It cannot be so confined because the efficacy of representative government depends upon free communication between all persons and groups in the community. An elector's judgment on many issues will turn upon free public discussion, often in the media, of the views of all those interested.

29 In a passage from Archibald Cox's text, to which Mason CJ referred in *ACTV*, it was said that:

“Only by uninhibited publication can the flow of information be secured and the people informed ... Only by freedom of speech ... and of association can people build and assert political power.”

Likewise, in *Buckley v Valeo* the United States Supreme Court spoke of the need to ensure the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people”.

30 Political communication may be undertaken legitimately to influence others to a political viewpoint. It is not simply a two-way affair between electors and government or candidates. There are many in the community who are not electors but who are governed and are affected by decisions of government. Whilst not suggesting that the freedom of political communication is a personal right or freedom, which it is not, it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy. The point to be made is that they, as well as electors, may seek to influence the ultimate choice of the people as to who should govern. They may do so directly or indirectly through the support of a party or a candidate who they consider best represents or expresses their viewpoint. In turn, political parties and candidates may seek to influence such persons or entities because it is understood that they will in turn contribute to the discourse about matters of politics and government.

(Footnotes omitted.)

239 Those statements must be seen and applied in the constitutional context referred to at [35]-[36]:

35 The first question posed by *Lange* is whether s 96D effectively burdens the freedom of political communication either in its terms, operation or effect. It requires consideration as to how the section affects the freedom generally.

36 In addressing this question, it is important to bear in mind that what the *Constitution* protects is not a personal right. A legislative prohibition or restriction on the freedom is not to be understood as affecting a person's right or freedom to engage in political communication, but as affecting communication on those subjects more generally. The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can express himself or herself, although

identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?

(Footnotes omitted.)

240 Most recently, the majority judgment in the High Court in *McCloy v State of New South Wales* [2015] HCA 34; (2015) 89 ALJR 857 (“*McCloy*”), provided the following distillation of the *Lange* tests at [2]:

[2] As explained in the reasons that follow, the question whether an impugned law infringes the freedom requires application of the following propositions derived from previous decisions of this Court and particularly *Lange v Australian Broadcasting Corporation* and *Coleman v Power*:

A. The freedom under the *Australian Constitution* is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may “exercise a free and informed choice as electors”. It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the *Constitution* provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.

B. The question whether a law exceeds the implied limitation depends upon the answers to the following questions, reflecting those propounded in *Lange* as modified in *Coleman v Power*:

1. Does the law effectively burden the freedom in its terms, operation or effect?

If “no”, then the law does not exceed the implied limitation and the inquiry as to validity ends.

2. If “yes” to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as “compatibility testing”.

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.

If the answer to question 2 is “no”, then the law exceeds the implied limitation and the inquiry as to validity ends.

3. If “yes” to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as “proportionality testing” to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the inquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

suitable – as having a rational connection to the purpose of the provision;

necessary – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

adequate in its balance – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be “no” and the measure will exceed the implied limitation on legislative power.

(Emphasis in original.) (Footnotes omitted.)

241 The judgment emphasised (at [30]) that “the freedom is not a personal right” and (at [69]) that “the freedom is not absolute”. It went on (at [79]-[83] and [87]):

[79] It is generally accepted that there are at least three stages to a test of proportionality. As stated in the introduction to these reasons, they are whether the statute is suitable, necessary, and adequate in its balance.

[80] Suitability is also referred to as “appropriateness” or “fit”. Despite this language, it does not involve a value judgment about whether the legislature could have approached the matter in a different way. If the measure cannot contribute to the realisation of the statute’s legitimate purpose, its use cannot be said to be reasonable. This stage of the test requires that there be a rational connection between the provision in question and the statute’s legitimate purpose, such that the statute’s purpose can be furthered. This was the approach followed in *Unions NSW*. It is an inquiry which logic requires.

[81] The second stage of the test – necessity – generally accords with the inquiry identified in *Unions NSW* as to the availability of other, equally effective, means of achieving the legislative object which have a less restrictive effect on the freedom and which are obvious and compelling. If such measures are available, the use of more restrictive measures is not reasonable and cannot be justified.

[82] It is important to recognise that the question of necessity does not deny that it is the role of the legislature to select the means by which a legitimate statutory purpose may be achieved. It is the role of the Court to ensure that the freedom is not burdened when it need not be. Once within the domain of selections which fulfil the legislative purpose with the least harm to the freedom, the decision to select the preferred means is the legislature’s.

[83] The first two stages of the test for the proportionality, or reasonableness, of a legislative measure concern the relationship between the legitimate legislative purpose (ends) and the means employed to achieve it (means). Neither the importance of the legislative purpose nor the extent of the effect on the freedom are examined at these stages. The *Lange* test identifies the extent of the effect on the freedom as relevant, but does not say what, if anything, is to be balanced against the effect on the freedom in order to determine whether the measure is justified. The *Lange* test does not expressly identify assessment of the importance of the legislative purpose as a relevant factor.

...

[87] The purpose of and benefit sought to be achieved by legislative provisions assume relevance in the third stage of the test for proportionality. This stage, that of strict proportionality or balancing, is regarded by the courts of some legal systems as most important. It compares the positive effect of realising the law's proper purpose with the negative effect of the limits on constitutional rights or freedoms. It requires an "adequate congruence between the benefits gained by the law's policy and the harm it may cause", which is to say, a balance. Balancing is required because it is rare that the exercise of a right or freedom will be prohibited altogether. Only aspects of it will be restricted, so what is needed, to determine whether the extent of this restriction is reasonable, is a consideration of the importance of the purpose and the benefit sought to be achieved. ...

242 In the present case, those concepts must be accommodated to the fact that reliance on the implied freedom arises principally as a suggested limitation on the extent of the legitimate discretion available under reg 85 of the Personnel Regulations.

243 Accordingly, in the present case, the question for examination is whether the authority exercised by CDF to terminate the applicant's commission was limited so as to avoid the instructions, policies and orders upon which CDF relied burdening the right of the applicant to communicate on political matters. The related question is whether any propensity to burden that right was reasonably appropriate and adapted to serve a legitimate end. In the present case that can be tested by examining the effect or outcomes of the exercise of power, namely, by considering whether termination of the applicant's commission gave effect to a legitimate end of the relevant kind.

244 In particular, it now needs to be considered whether the exercise of power gave effect to a legitimate end in the sense that the legitimate end was suitable, necessary and adequate in its balance.

245 Some of the features which might be examined in a legislative context are less easily applied in a case such as the present. Nevertheless, I will take it that the matter may be tested by examining the challenged decisions to see whether they are authorised by laws confined in their operation within the constitutional limits.

246 The first question is whether the statements and communications by the applicant were political in nature and part of political discourse. In my view they were.

247 Within the ADF, and publically, the applicant's published statements were described as "inappropriate", "offensive", "unacceptable", "disrespectful", "intemperate", "anti-transgender", "anti-women", "homophobic", "inflammatory", "intolerant", "divisive" and "demeaning". However, as was pointed out in *Coleman*, the fact that statements are offensive or insulting does not take them outside the field of political discourse, which is frequently marked by offence or insult (see e.g. per McHugh J at [81]-[82], per Gummow and Hayne JJ at [197], per Kirby J at [239]).

248 The subject matter of the applicant's comments are ones upon which many people may differ for reasons of religion, morality, social conscience or practical politics. I do not accept the suggestion in the respondent's submissions that some matters fell outside the field of political discourse. They cannot be seen as falling outside, or even at the fringe of, political discourse. The better view, it seems to me, is that they were all within that field of discourse, even when directed at personal insult or condemnation, as in the case of the transgender officer. Even in that case, it appears to me that the applicant was attempting to make a public statement of a political kind.

249 It is then necessary to pay regard to the practical consequence, or effect, of the Termination Decision (see *Lange* at 567; *Unions NSW* at [36]).

250 The Termination Decision had the effect of sanctioning the applicant for his conduct. There can be no doubt that it was a disciplinary outcome, even if not one imposed under the regime in the Defence Discipline Act. It represented an adverse consequence for the applicant. That consequence was, in large part, the result of his refusal to desist from publishing comments of the kind identified above. The fact that the conduct also involved direct disobedience of orders does not sufficiently change matters, because the orders themselves were directed to the same end, namely to prevent further communications of the same kind. In my view, freedom of political communication was burdened by the imposition of the consequence for the applicant that his commission as an officer was terminated.

251 I am satisfied, therefore, that the first *Lange* test is satisfied and that the real focus of attention should be, as the respondent submitted, on the second limb of that test.

252 The respondent's argument involved two themes (reflected in paragraph 33 and paragraphs 34-36 set out earlier).

253 They were, first, that any burden imposed by CDF through reg 85 upon the applicant's freedom of communication was within the second *Lange* test because it was directed to the maintenance of discipline and the chain of command, the avoidance of danger to military personnel and the capacity to recruit and retain personnel.

254 In my respectful view, little weight can be given to those matters. They rested upon assumptions which were essentially speculative. There was no evidence that the applicant's comments had any effect contrary to those objectives, or that it was likely that they would do so. More importantly, the same may be said of any comment of the same kind from any source. It cannot seriously be suggested that a law would be valid if it prohibited public comment for that reason.

255 Therefore, the fact of the applicant's own membership of the ADF must be the element which would justify a restriction on his right of public comment. That is what the second line of argument was addressed to.

256 The second line of argument was that the only restriction imposed upon the applicant was that he not identify himself as a member of the ADF. To address this contention it will be necessary to return to the facts, to the various instructions and orders and to the Termination Decision.

257 One matter, however, should be addressed at the outset. The applicant always maintained that it was not he who published his current serving status at the time of his first tweet on 23 January 2013. I think that should be accepted, although it makes no difference to the strength of the respondent's argument because, shortly thereafter, any such reticence by the applicant was abandoned and he frequently referred to his connection with the ADF.

258 The contention is important for the applicant's argument because it provided the foundation for a suggestion that Lt. Col. Buxton's initial direction was misconceived and excessive and that (so it was argued) because the Quick Assessment Report and the resulting instruction was foundational to everything which followed, the Termination Decision could not be independently sustained.

259 I reject this argument. It ignores the facts. There is no doubt that the applicant, from early March 2013, abandoned any restraint on making known his connection with the ADF and his conduct must be assessed in that light.

260 Lt. Col. Buxton's instructions were based upon DI(G) ADMIN 08-2. As earlier discussed, that instruction under s 9A of the Defence Act, applies by its terms to all ADF personnel. Lt. Col. Buxton's instruction was that while the applicant remained an active Reservist "he was to make no further intemperate or inflammatory remarks on social media".

261 The order by the Deputy Chief of Army on 22 March 2013 was in part more limited and in part less restricted. The applicant was ordered to "cease posting material in the public domain that identifies you as an Army Officer" and "to remove any such material from your website and social media sites insofar as it can be linked, *in any way*, to your military service" (my emphasis).

262 The termination notice referred to:

3. ...

a. your conduct in making public comment and provision of official information whilst a member of the Army and/or was not in compliance with Defence Policy;

b. your conduct did not cease after being ordered to do so on the basis that your public comment was inconsistent with Defence Policies; and

c. you have not removed material from social media sites and your website that links your comments to the Australian Army and Defence Force.

263 The termination notice referred to material which identified the applicant as a member of the ADF, to him being an officer of field rank and to his published material being below the standard expected of an Army officer.

264 Paragraph 11 of the termination notice said, referring both to identification as a member of the ADF and to the applicant's personal contravention of ADF values:

11. You have continued to make public comment identifying yourself as an Army Officer or have purported to act in your capacity as a member of the Army Reserve which is reinforced by your photograph in Army uniform on your website and repeated public comments referring to your military service. After being ordered by the Deputy Chief of Army in writing to do so, you have failed to remove material from your website and social media sites that links your comments to your military service and which seeks to, or can be reasonably expected to breach Defence policy, contravene ADF values or which is otherwise not in the interests of Army. You have therefore failed to comply with the above order.

265 Importantly, paragraph 12 said:

12. Based on the above evidence, your retention as an officer is not in the interests of the Army.

266 The Termination Decision was clearly, and directly, based on the matters referred to in the termination notice. In addition, however, it was based also on the Minute from CDF of 22 August 2013. Paragraphs 4, 5, 7 and 8 of the Minute said:

4. It is not unlawful, in breach of Defence policy or unethical for you to simply publically refer to your service in the Army, nor for you to have opinions contrary to ADF or government policy. It does, however become inappropriate and objectionable in my view when as an Army Reserve member you make comments critical of Army and ADF policy, which are divisive and opposed to the culture that the Army, and the ADF, is striving to achieve.

5. You are a member of the Australian Army and the ADF. By virtue of your status as an Army Reserve member, whether or not you are actually on duty or in uniform, you are expected to adhere to professional standards of behaviour and conduct, such that when you are called upon to perform reserve service you are able to carry out your duties without interference. To that end you are expected to display behaviour and conduct consistent with any obligations you may have to the Army and to service in an organisation where equity, diversity, fairness and tolerance are absolute requirements.

...

7. Therefore I advise you that in considering reference A, rather than placing significant weight on whether or not you have technically breached references E and F, I intend to place greater weight on my view that:

a. your public comments (evidenced in reference A) demonstrate attitudes that are demeaning and demonstrate intolerance of homosexual persons, transgender persons,

and women, and are contrary to the policies and cultural change currently being undertaken within the Army and Defence; and

b. your comments critical of ADF and Government policy (evidenced in reference A) demonstrate a conflict of interest between your personal interests and your obligations to serve the Army that cannot be reconciled.

8. I respect your religious beliefs and your right to have, and express, opinions contrary to ADF and Government policy. However your public articulation of these matters whilst a member of the Army Reserve, whether or not you are on duty, or in uniform, undermine my confidence in your ability to uphold the values of the Australian Army and your effectiveness as a leader in today's Army.

267 Those matters were not confined to statements by which the applicant identified himself as an ADF member. They were matters which proposed for the applicant's attention and response the contention that his public comments as such and his membership of the ADF as such were incompatible.

268 The Termination Decision proceeded upon the same general footing. That may be seen from the statements in paragraph 4 that "your comments critical of ADF and government policy demonstrate a conflict of interest between your personal interests and your obligations to serve the Army that cannot be reconciled" and in paragraph 7 that "it is your behaviour generally which is at issue in deciding whether your retention is in the interests of the Army". Paragraph 8 stated, without qualification:

8. The content of your online posts regarding these issues, as enclosed with the Termination Notice, is contrary to the policies and cultural change initiatives currently being implemented within Army and Defence and is inconsistent with the standards of behaviour expected of all Defence members. Your opinions are expressed in a way that is contrary to the standards of online public commentary expected of a serving ADF member, regardless of duty status. The manner in which you have publicly articulated your views on the support offered to homosexual and transgender members of the ADF and the decision to permit women to serve in combat roles demonstrates intolerance and disrespect for particular individuals and for ADF and government policy.

269 It is true that there are passages in the Termination Decision which refer to identification by the applicant as a member of the ADF, but the position is, in those instances, often mixed with a more general statement. Examples may be found in paragraphs 9, 11 and 18 as follows:

9. In making these findings, I distinguish between your holding of a personal opinion, the mere fact of which I do not consider necessarily inconsistent with the standards required of Defence members, and your conduct in expressing personal opinions publicly in an inappropriate and disrespectful manner, in circumstances that identify you as a member of the Australian Army Reserve. I consider that conduct in expressing personal opinions is inconsistent with expected standards of behaviour, particularly where it takes place in the public domain. ...

...

11. I note the appropriateness of the manner in which you had publicly expressed views was brought to your attention by your Commanding Officer in his conversation with you on 6 February 2013 (see enclosure 3, attached to enclosure 1 to reference B). I also note that the former Deputy Chief of Army brought this standard and the responsibility of Officers to uphold Army values and ethos in their behaviour specifically to your attention on 22 March 2013 (enclosure 9 to reference C). I am satisfied that you did not subsequently modify your behaviour to reflect the standard of public behaviour expected of members of the Australian Army and especially of Officers, **including** by removing the online material as directed by the former Deputy Chief of Army. (my emphasis)

...

18. ... It is the manner and tone of your public comments that is affecting your ability to serve, particularly because some of your comments have been linked to your Reserve service. ...

270 The reasons for decision in paragraph 16 appear to me to proceed, substantially, upon the same general basis of disapproval of the applicant's conduct as below the standard expected of him (whether he identified himself as an ADF member or not) and as impermissibly at variance with ADF policies and cultural reform initiatives – e.g.:

16. I have concluded that your retention is not in the interests of the Australian Army. In particular:

a. your conduct as set out in the enclosures to the Termination Notice demonstrates behaviour repeatedly inconsistent with the standard set out in DI(G) PERS 50-1 *Equity and Diversity in the Australian Defence Force*, my Diversity and Inclusion statement, and current cultural reform initiatives;

b. the manner in which you publicly expressed your personal disagreement with Defence policy, particularly the support offered to homosexual and transgender members of the ADF and the decision to permit women to serve in combat roles, is significantly below that expected of an Officer in the Army, including a member of the Army Reserve;

...

e. your online conduct and behaviour, which you have refused to modify, is inconsistent with your continued service as a Major in the Army Reserve.

...

271 The statement by CDF in paragraph 18 that:

18. ... The result of your behaviour is an irreparable undermining of my confidence in your ability to uphold Army values and to be a leader in an organisation in which everyone is expected to respect diversity and demonstrate tolerance and respect, notwithstanding your personal beliefs.

does not appear to me to be one referring to, or referable to, the fact that the applicant identified himself at particular times and in particular ways as a member of the ADF.

272 Rather, it seems to me that the decision to terminate was based on the fact that the applicant expressed his views publicly while he was still a member of the ADF. That conclusion is reinforced by CDF's substantive concluding paragraph:

25. I have also given some weight to the additional information you have provided in your submissions relating to the impact of the termination of your service on your employment prospects and your desire to continue serving in the Australian Army. However, I do not consider that these factors constitute a change in circumstance that would affect my conclusion that your retention is not in the interest of the Australian Army. In particular, they do not excuse your behaviour, nor do they diminish the seriousness of your behavioural shortcomings having regard to the standard of behaviour expected of members of the Army both permanent and Reserve.

273 This appears to me to postulate (I intend no criticism) a standard of behaviour involving conformity and compliance with stated ADF values and philosophies which did not depend on the terms of particular publications and statements. Although the applicant's public statements were the reason for consideration of his conduct, the expected standards of behaviour against which his conduct was measured did not turn on whether at particular times he had identified himself as a member of the ADF, but rather whether he was at those times a member of the ADF.

274 I, therefore, do not accept the respondent's second line of argument, or that termination of the applicant's commission turned on his identification of himself as a member of the Army Reserve.

275 There is no suggestion that the applicant published any official information in his public statements. However, there is no real doubt that his published statements infringed the prohibition in item 19 of DI(G) ADMIN 08-2, even if not s 60 of the Defence Discipline Act. But this was not the basis (certainly not the only basis) of the termination of his commission; it was just one element of the matters under consideration and, as CDF emphasised in his Minute of 22 August 2013, questions of "technical" breach of this DI(G), and of DI(G) ADMIN 08-1, were to be given less weight than CDF's conclusions that:

7. ...

a. your public comments (evidenced in reference A) demonstrate attitudes that are demeaning and demonstrate intolerance of homosexual persons, transgender persons, and women, and are contrary to the policies and cultural change currently being undertaken within the Army and Defence; and

b. your comments critical of ADF and Government policy (evidenced in reference A) demonstrate a conflict of interest between your personal interests and your obligations to serve the Army that cannot be reconciled.

276 All of his comments were made while the applicant was not on duty, not in uniform and not doing anything connected with the ADF except criticising it and

certain of its members. It is clear from the Quick Assessment Report that the applicant had made no particular contribution to his unit since November 2011 and was not really expected to do so again.

277 In my view, the applicant's commission was, in substance, terminated for two reasons. The first was that he made public comments critical of the ADF while a member of the ADF. Those comments were in contravention of Defence instructions but much more important to their assessment was their tone and content, which was viewed within the ADF, and by CDF, as wholly unacceptable. The second reason was the applicant's defiance of direct orders by his superiors, a circumstance which is anathema in military service.

278 I am not to be taken as indicating any criticism of either of those judgements, the persons who made them, the persons who share them or the military standards which sustain them.

279 However, in my view the circumstance that the comments were made in a personal capacity, unconnected with the ADF except by the ongoing formal circumstance of ADF membership, and that the comments were made in the form of communications about political matters which satisfy the first limb of the *Lange* test, raises for resolution whether the decision to terminate the applicant's commission exceeded the statutory authority under reg 85(4) of the Personnel Regulations because it was, in its effect, not reasonably appropriate and adapted to the legitimate end served by reg 85.

280 Consideration of that issue, against the facts which I have discussed, requires attention to the explanation given in *McCloy* of the stages of consideration of proportionality. I regard it as appropriate to ask whether a regulation (or other legislation or legislative instrument), which directly prohibited the applicant's conduct, would be valid if it was based on the same matters as the findings of CDF in the Termination Decision. In my view it would not.

281 That conclusion turns on the third element of the test distilled in *McCloy*.

282 I accept that there is a need for discipline, obedience to orders and adherence to standards in the ADF by its members. A restriction on public comment of the kind I am considering (i.e. termination of a commission) was a "suitable" response to infringement of those requirements.

283 I cannot conceive of another obvious and compelling means of achieving the objective in the face of conduct such as that of the applicant, which was defiant and intractable. I will accept that the response was therefore "necessary" in that sense.

284 However, in my view the response did not meet the third element of the test of proportionality stated in *McCloy*. It was not "adequate in its balance" having regard to the fact that the applicant's conduct involved the expression of political opinion, effectively as a private citizen. A contrary view would accept that ADF members have lost that freedom of political expression, even when not serving in any active capacity, nor likely to do so again.

285 In my view, the burden on the exercise by the applicant of his freedom of political communication was considerable by reason of its consequence, whatever might be said against the manner of its expression or its content. I cannot accept that the right to exercise that freedom was lost only because the applicant remained a member of the ADF.

286 I should add, for completeness, that my view about the second limb of the *Lange* test is the same, with or without the application of the refinements discussed in *McCloy*.

287 Membership of the ADF, while on service in one form or another, undoubtedly carries with it obligations of obedience to lawful commands, and all the rigour and restrictions of military service but it does not seem to me that it extinguishes either freedom of belief or, while free from military discipline, freedom of expression. It may be the case that members of a full time regular service are rarely (if ever) free to publicly express opinions against the policies of the ADF or the decisions of their superiors but the same cannot always be said about members of Reserves. Such persons are often not on duty. They are private citizens, in substance, when not on duty and not in uniform. Military discipline under the Defence Discipline Act does not apply to them. In my view, their freedom of political communication cannot be burdened at those times.

288 There may be other grounds upon which the applicant's commission may have been terminated. It does not appear as though the applicant was making a useful contribution to the ADF in other respects, or was likely to in the future. Termination may have been justified on some only of the grounds which CDF considered. I say nothing about those possibilities. My task is to review the grounds which were used, paying particular regard to the reasons for decision published on 10 December 2013.

289 When I do that, I conclude that the applicant's commission was terminated because of the publication of his private views about political matters. The fact that those publications were at variance with ADF or government policy, or were in terms of which some may strongly disapprove, or were critical of ADF policies or instructions, does not appear to me to be sufficiently connected with any legitimate legislative aim to displace the freedom of political communication implied in the Constitution.

Relief

290 For those reasons, the Termination Decision will be set aside under s 5(1)(d), (e) and (j) of the ADJR Act.

291 It seems unnecessary to deal separately with the Redress Decision although the same considerations no doubt apply to it also.

Costs

292 I am inclined to think that the applicant would ordinarily be entitled to an order for his costs but the respondent has sought an opportunity to be heard on that question. Any application for costs by the respondent is to be made on or before 15 December

2015, failing which the applicant will have his costs. Any application for costs will be listed for directions on Friday 18 December 2015.

I certify that the preceding two hundred and ninety-two (292) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 4 December 2015

Annexure A

**NOTICE TO SHOW CAUSE FOR TERMINATION OF APPOINTMENT AS
AN OFFICER IN THE AUSTRALIAN ARMY**

TO: ... MAJOR B.W. GAYNOR

TAKE NOTICE that I, ... Lieutenant General David Lindsay Morrison, Chief of Army, as a delegate of the Governor-General pursuant to regulation 85(2) of the Defence (Personnel) Regulations 2002, **PROPOSE** to recommend the termination of your appointment as an officer in the Australian Army.

Reason

1. The reason for the **PROPOSED** termination is that pursuant to regulation 85(1)(d)(ii) of the Defence (Personnel) Regulations 2002, your retention as an officer is not in the interests of the Army.
2. It has been brought to my attention that your conduct while posted as an instructor at the Defence Intelligence Training Centre has been unsatisfactory and unacceptable and your retention is not in the interests of the Army. The details of the facts and circumstances as well as the evidence on which this is based are provided below. You are invited to show cause:
 - a. why the imposing authority, Chief of the Defence Force, General David Hurley AC, DSC should not be satisfied that the facts and circumstances, as alleged, occurred; and
 - b. why the imposing authority should not terminate your appointment in the Australian Army.

Circumstances

3. The particulars of the facts and circumstances relating to the reason for terminating your appointment are as follows:
 - a. your conduct in making public comment and provision of official information whilst a member of the Army and/or was not in compliance with Defence Policy;

- b. your conduct did not cease after being ordered to do so on the basis that your public comment was inconsistent with Defence Policies; and
- c. you have not removed material from social media sites and your website that links your comments to the Australian Army and Defence Force.

Evidence

4. The evidence to support the termination of your appointment are contained within the enclosures and includes screen shots of your social media accounts for Twitter, Facebook and your website. They could also reasonably be considered to be in breach of Defence Instruction (General) Administrative 08-1 *Public Comment and Dissemination of Official Information by Defence Personnel* (DI(G) ADMIN 08-1), Defence Instruction (General) Administrative 08-2 *Use of Social Media by Defence Personnel* (DI(G) ADMIN 08-2) Defence Instruction (General) Personnel 50-1 *Equity and Diversity in the Australian Defence Force* (DI(G) PERS 50-1), CA Directive 15/12 Army Implementation Plan for the Removal of Gender Restrictions, Defence's Pathway to Change Cultural Reform Strategy and the Defence Diversity and Inclusion Statement signed by CDF and Secretary on 13 Mar 13. A copy of the relevant web pages, containing appropriate privacy deletions, and a copy of the letter to you from the Deputy Chief of Army dated 22 Mar 13 are enclosed.

Evidence

5. Your website, <http://bernardgaynor.com.au> identifies you as a member of the Australian Defence Force, and in particular, the Australian Army. It identifies that you have a background in military intelligence, and that you have deployed to Iraq on three occasions. The website contains a photo of you in Army uniform. This material identifies you as part of the Army and Australian Defence Force. You are a Reserve Army officer of field rank.

6. You have not sought the approval required under DI(G) ADMIN 8-1 to make public comment or disclose official information.

7. You can reasonably be considered not to have complied with the requirements of DI(G) ADMIN 8-1 or DI(G) ADMIN 8-2 on the following occasions in relation to your website. Also, the material contained in the following extracts is below that expected of an Army officer:

- a. Your post titled 'Domestic betrayal a waste of soldiers' sacrifices' of 6 Mar 13 canvassed Australian government policy on Afghanistan. This post included political comment and reference to deployed forces and ongoing operations.

- b. Your Press Release titled 'Defence shows hypocrisy with gay officer' of 8 Mar 13 directly links you with the Australian Defence Force, and your status as a Reserve Army Officer.

- c. Your post titled 'Defence's gender-bending preoccupation comes at the cost of a real equity issue: fair indexation' of 14 Mar 13 canvassed a range of defence issues.

This post makes particular reference to your ongoing service as a Reserve Army officer.

d. Your Press Release titled 'Australian Defence Force disciplines Reserve Intelligence Officer for discussing Islam' of 22 Apr 13 directly links you to the Australian Defence Force, the Army, your Corps and your ongoing service. This post also refers to the internal disciplinary process and the nature of the charges preferred against you.

e. Your post titled 'Malcolm can't be a Cate' of 16 May 13 canvasses Defence policy on transgender. This makes direct references to your ongoing service, disciplinary proceedings, breaches the privacy of a currently serving Army officer and contravenes your ability to make public comment in accordance with the above policies.

f. Your Press release titled 'Government and Defence blinded on Islam' of 23 Mar 13 describes you as a 'Three-time Iraq veteran' and states that 'the Australian Government and Defence Force urgently need to open their eyes to the dangers of Islam...The Australian Defence Force is protecting Islam...It is time for the Australian Government and the Australian Defence Force to take the blinkers off to Islam'. This post again refers to the internal disciplinary process and the nature of the DFDA charges preferred against you.

8. Your Twitter account denotes that you are an 'Iraq vet', presumably referring to your deployments to Iraq, and links to your website. The following Twitter messages, highlighted with a red box on the enclosure, are public comment which could reasonably be expected not to comply with DI(G) ADMIN 8-1 and DI(G) ADMIN 8-2. Once again, this material generated by you is below my expectations of an Army officer:

a. On 8 Mar 13 commencing 'As a serving ARes officer, the ADF is wrong to pay for sex change ops. No soldier wants to serve someone with their balls cut off.' 'Press release: Defence shows hypocrisy with gay officer' and 'Lots of ridicule but still no one has said they would be willing to serve under a bloke who has had his ball cut off. I must be right.'

b. On 13 Mar 13 commencing 'Funny u campaign to stop violence against women but want them on the front line' and 'Who's better at rugby?...?'

c. On 14 Mar 13 commencing 'Can @DavidHurley_CDF confirm whether any female officer trainees at ADFA passed the new fitness test last year...', 'I've been told that not a single female Army officer trainee at ADFA passed the new fitness test last year' and 'Latest blog post: Defence's gender bending preoccupation comes at cost of real equity issues: fair indexation'.

d. On 15 Mar 13 commencing 'Better ADF stopped wasting money trying 2 recruit women 4 front line combat duties & focus on target audience: young blokes' and 'I suggest ADF sticks to its policy & if CDF is going to give one officer protection to speak then all deserve that protection'.

- e. On 18 Mar 13 commencing ‘As an Iraq vet & military officer that originally supported invasion, my views have changed. The war achieved very little’.
- f. On 19 Mar 13, eight posts relating to Afghanistan and commencing ‘A public display of overt sexual perversion that routinely ridicules Christianity is disgusting - & this year it had ADF Support.’ Then a further seven posts criticizing Army and the ADF’s role in Afghanistan and Iraq.
- g. On 24 Mar 13 commencing ‘Catholic Church condemns child abuse – it does not march, like the ADF, with kids in a sexually explicit parade’ and ‘@DavidHurley_CDF U allowed ADF to spt event where children saw this bit?’
- h. On 25 Mar 13 - 10 posts directed at @DavidHurley_CDF relating to the Mardi Gras with a further ‘Latest post: At what point does the @DeptDefence become complicit in child abuse?’ and ‘I fail to see how ADF participation in an offensive, sexually explicit parade sends msg that sexual harassment is wrong’.
- i. On 8 Apr 13 with three posts criticizing Army’s policy on employment of women in combat in contravention of CA Directive 15/12 Army Implementation Plan for the Removal of Gender Restrictions dated 23 Jul 12.
- j. On 10 Apr 13 commencing “Thank you @AustralianArmy Deputy Chief, MAJGEN Angus Campbell for your kind words regarding my blog’, ‘Should @AustralianArmy march with those who describe themselves as sexual perverts? I say no but it did.’, ‘Should @AustralianArmy march with @Assange supporters, whose release of classified docs risked Diggers’ lives?, ‘Should @AustralianArmy march with groups that expose themselves in front of kids? I say no but it did on 2 Mar 13’, ‘Should @AustralianArmy march with groups that ridicule Christianity? I say no but it did on 2 Mar 13’, ‘Should @AustralianArmy march with group promoting spanking, bondage & flogging? I say no but it did on 2 Mar 13’, ‘Should @AustralianArmy take part in political rallies? I say no but it did on 2 Mar 13’, ‘The roll call of shame for @AustralianArmy’, ‘On March 2 the proud Australian Army marched at a political rally alongside supporters of Julian Assange...’, ‘Latest post dedicated to the Dep Chief of the Australian Army – MAJGEN Angus Campbell. He is an avid reader’ and ‘Latest post: Roll call of organisations the proud Australian Army marched with on 2 Mar 13’.
- k. On 23 April 13 commencing ‘Thanks for spt... against ADF spt to Mardi Gras/sex change ops & know female front-line roles will fail’.
- l. On 6 May 13 commencing ‘The ADF’s problem with Islam is not that it is the ideology of a violent enemy, but the ADF Instead believes...’, ‘The ADF assumes Mo was an awesome dude who wandered the land doing good, like some new-age communal hippie’, ‘The Australian Defence Force wilfully does not understand anything about Islam...’ and ‘Latest Post: The Australian Defence Force’s problem with Islam...’.
- m. On 23 May 13 commencing ‘The Australian Defence Force is charging me for stating there is a link between Islam & violence. Hearing’s in June’ and a further 14 posts relating to the internal DFDA charges preferred against you and comments in

contravention of Defence policy that precludes reference to material that is derogatory to religion.

9. Your Facebook account denotes that you are an 'Iraq vet', presumably referring to your deployments to Iraq, and links to your website with a photo of you in Army uniform. The following Facebook posts, also highlighted with a red box (extracted as one enclosure) are again below what I expect from an Army officer. They are also public comments that could reasonably be considered not to comply with DI(G) ADMIN 8-1 and DI(G) ADMIN 8-2. :

a. On 6 Mar 13 commencing 'Latest post: Domestic betrayal a waste of soldier's sacrifices...'

b. On 8 Mar 13 commencing 'The Australian Defence Force has offered protection for a gay officer who spoke out against Defence policy yet it hypocritically has told me to cease political activity if I wish to remain in the Army Reserve...'

c. On 15 Mar 13 commencing 'Defence's gender-bending preoccupation comes at the expense of a real equity issue: fair indexation for military pensions...'

d. On 25 Mar 13 commencing "At what point does the ADF become complicit in child abuse?...".

e. On 10 Apr 13 commencing "On March 2, the proud Australian Army marched at a political rally alongside supporters of Julian Assange...This post is dedicated to MAJGEN Angus Campbell, Deputy Chief of the Australian Army, and an avid reader of my blog...".

f. On 6 May 13 commencing "The ADF's problem with Islam is not that it is the ideology of a violent enemy, but that the ADF instead believes it was founded by a perfect man...".

g. On 16 May 13 commencing "LTCOL Malcolm McGregor thinks he's Cate...".

10. By letter dated 22 Mar 13, you were ordered by the Deputy Chief of Army that:

Effective immediately, you are to cease posting material in the public domain that identifies you as an Army Officer and which directly seeks to, or can be reasonably expected to, breach Defence policy, contravene ADF values, or which is otherwise not in the interests of Army. Further, you are to remove any such material from your website and social media sites insofar as it can be linked, in any way, to your military service.

11. You have continued to make public comment identifying yourself as an Army Officer or have purported to act in your capacity as a member of the Army Reserve which is reinforced by your photograph in Army uniform on your website and repeated public comments referring to your military service. After being ordered by the Deputy Chief of Army in writing to do so, you have failed to remove material from your website and social media sites that links your comments to your military service and which seeks to, or can be reasonably expected to breach Defence

policy, contravene ADF values or which is otherwise not in the interests of Army. You have therefore failed to comply with the above order.

12. Based on the above evidence, your retention as an officer is not in the interests of the Army.

General

13. Subject to any response you may wish to submit, I will be recommending to the imposing authority that your appointment in the Army is terminated.

14. In making a decision whether to terminate your appointment, the imposing authority will consider the following material:

a. this Notice to Show Cause for Termination, including all material previously provided to you as a result of the issue of the Notice to Show Cause;

b. any reply and relevant material you submit in response to this Notice to Show Cause for Termination, including all material attached to this notice and your response;

c. relevant Defence policies and procedures; and

d. your service record.

15. You have 28 days from the date this Notice to Show Cause for Termination is delivered to you to show cause as to why the imposing authority should not terminate your appointment. Your response is to be in writing and any relevant evidence or other information that you wish the imposing authority to consider is to be attached to your response. In your response, you may address the facts, conclusions to be drawn from them and what action, if any, the imposing officer should take.

16. If you do not provide a statement of reasons within the specified period and the delegate of the Governor-General for termination is of the opinion that the reason for terminating your appointment as an officer has been established and has not been affected by a change in circumstances since this Notice to Show Cause for Termination was given to you, the delegate must terminate your appointment in the Defence Force.

17. If you wish to have an extension of time for submitting your response to me, you are to apply to me or my nominated representative, in writing, with the reason you are requesting an extension.

18. You may consult a Service legal officer, if one is available, or may have another person assist you in preparing your response.

19. If after receiving your response I decide not to refer the matter to the imposing authority, I may decide that other less severe forms of administrative sanction are to be taken against you or that no action is to be taken. Some of these other forms of administrative sanction are detailed in DI(G) PERS 35-6—*Formal Warnings and*

Censures in the Australian Defence Force. As a result, you should consider addressing alternate forms of administrative sanction in any response you submit.

20. If after receiving your response I decide to refer the matter to the imposing authority, the imposing authority may direct that other less severe forms of administrative sanction are to be taken against you. For similar reasons you should address alternate forms of administrative sanction in any response you submit.

21. You are to sign the acknowledgement when you have read and understood this Notice to Show Cause for Termination. The original copy is for your retention and a copy will be placed on file.

[Signature]

D.L. MORRISON, AO

LTGEN

CA

30 May 13

Enclosures:

1. Website Post 'Domestic betrayal a waste of soldiers' sacrifices' of 6 Mar 13
2. Press release titled 'Defence shows hypocrisy with gay officer' of 8 Mar 13
3. Website Post 'Defence's gender-bending preoccupation comes at the cost of a real equity issue : fair indexation' of 14 Mar 13
4. Press release titled 'Australian Defence Force disciplines Reserve Intelligence Officer for discussing Islam' of 22 Apr 13
5. Website Post 'Malcolm can't be a Cate' of 16 May 13
6. Press release titled 'Government and Defence blinded on Islam dated 23 May 13
7. Twitter messages (extracted) Bernard Gaynor: 8 Mar – 6 May 13
8. Facebook Posts (extracted) Bernard Gaynor: 8 Mar – 16 May 13
9. Letter from Deputy Chief of Army to Major Gaynor dated 22 Mar 13
10. bernardgaynor.com.au website – About link as at 24 May 13

[Acknowledgement omitted.]

Annexure B

Minute

Chief of the Defence Force

CDF/OUT/2013/1142

MAJ B.W. GAYNOR

NOTICE TO SHOW CAUSE FOR TERMINATION OF APPOINTMENT

References:

- A. Notice to Show Cause for Termination of Appointment of 30 May 13
- B. Statement of Reasons of 27 Jun 13
- C. DI(G) PERS 50-1 *Equity and Diversity on the Australian Defence Force*
- D. Diversity and Inclusion Statement of 13 Mar 13
- E. DI(G) ADMIN 08-1 *Public Comment and Dissemination of Information by Defence Personnel*
- F. DI(G) ADMIN 08-2 *Use of Social Media by Defence Personnel*
- G. OCA/OUT/2013/R14080167 of 22 Mar 13

1. At reference A, the Chief of Army issued you a Termination Notice advising that he proposed to recommend the termination of your appointment. The reason for the termination was stated to be that your retention was not in the interests of the Army, with the circumstances more fully stated in paragraph 3 of reference A. Essentially, it was based on your conduct in making public comment and providing official information.
2. Evidence provided to support the Termination Notice included excerpts from your social media presence on Twitter, Facebook and from your website. Your attention was also drawn to certain Defence Instructions and other Defence documents.
3. In reference B, you argue that you have been denied natural justice through failure to particularise the relevant provisions of the instructions and policies referred to, and failure to identify how your conduct breached the policies. You also submit that reference G cannot have retrospective application and apply to all of the evidence cited in reference A.
4. It is not unlawful, in breach of Defence policy or unethical for you to simply publically refer to your service in the Army, nor for you to have opinions contrary to ADF or government policy. It does, however become inappropriate and objectionable in my view when as an Army Reserve member you make comments critical of Army

and ADF policy, which are divisive and opposed to the culture that the Army, and the ADF, is striving to achieve.

5. You are a member of the Australian Army and the ADF. By virtue of your status as an Army Reserve member, whether or not you are actually on duty or in uniform, you are expected to adhere to professional standards of behaviour and conduct, such that when you are called upon to perform reserve service you are able to carry out your duties without interference. To that end you are expected to display behaviour and conduct consistent with any obligations you may have to the Army and to service in an organisation where equity, diversity, fairness and tolerance are absolute requirements.

6. The obligations that you have to the Army include those espoused in reference C; in particular the adherence to principles articulated in paragraph 7, and the roles and responsibilities articulated in paragraphs 15 – 18. These matters are not new and are matters that you would already have been aware of through your previous service. I accept that reference D may post-date some of the public comments on which reference A is based, however reference D essentially reiterates principles outlined in reference C. Your public comments do not evidence your acceptance of equity and diversity in the ADF.

7. Therefore I advise you that in considering reference A, rather than placing significant weight on whether or not you have technically breached references E and F, I intend to place greater weight on my view that:

a. your public comments (evidenced in reference A) demonstrate attitudes that are demeaning and demonstrate intolerance of homosexual persons, transgender persons, and women, and are contrary to the policies and cultural change currently being undertaken within the Army and Defence; and

b. your comments critical of ADF and Government policy (evidenced in reference A) demonstrate a conflict of interest between your personal interests and your obligations to serve the Army that cannot be reconciled.

8. I respect your religious beliefs and your right to have, and express, opinions contrary to ADF and Government policy. However your public articulation of these matters whilst a member of the Army Reserve, whether or not you are on duty, or in uniform, undermine my confidence in your ability to uphold the values of the Australian Army and your effectiveness as a leader in today's Army.

9. Before I make my final determination on the matter of your termination of appointment, and in order to ensure procedural fairness, I draw to your attention the matters above, in particular paragraphs 4 - 8. You have 14 days from the date of receipt of this minute for you to provide to me any additional material in response to the proposal to terminate your service. If you do not submit any additional material, then I will proceed to make my termination decision.

10. I am cognisant of the significant commitment you have given to the Army over your years of service. At reference G, DCA offered to you that an appropriate course

of action may be for you to tender your resignation. You may wish to reconsider his advice during the 14 days from receipt of this notice.

[Signature]

D.J. HURLEY, AC, DSC

GEN

CDF

22 Aug 13

Enclosures:

1. DI(G) PERS 50-1 Equity and Diversity on the Australian Defence Force
2. Diversity and Inclusion Statement of 13 Mar 13

[Annexures omitted.]

Annexure C

Minute

Chief of the Defence Force

CDF/OUT/2013/1566

MAJ B.W GAYNOR

TERMINATION OF SERVICE DECISION

References:

- A. Statement of Reasons – ... MAJ B.W. Gaynor of dated 27 June 2013 with enclosures
 - B. Executive Summary to Response to CDF Minute Regarding NTSC of 22 September 2013 with enclosure
 - C. Notice to Show Cause for Termination of Appointment as an Officer in the Australian Army of 30 May 2013 with enclosures
 - D. Minute CDF/OUT/20131142 Notice to Show Cause for Termination of Appointment of 22 August 13 with enclosures
1. I have decided that your service in the Defence Force is to be terminated with effect 13 Jan 14, pursuant to Regulation 85(1)(d)(ii) of the *Defence (Personnel) Regulations 2002* (the Regulations).

2. I have considered your Statement of Reasons of 27 Jun 13 (reference A) and subsequent additional material you provided on 22 Sep 13 (reference B). I am satisfied that the reason for terminating your service (that your retention is not in the interests of the Australian Army):

a. has been established, based on the facts and information contained in the termination notice issued by Chief of Army and dated 30 May 13 (reference C), and

b. has not been affected by a change in circumstances since that notice was given to you.

Findings of material fact

3. The Notice to Show Cause for Termination of Appointment as an Officer in the Australian Army ('Termination Notice') issued to you by the Chief of Army on 30 May 13 (reference C) alleged that your conduct while posted as an Instructor at the Defence Intelligence Training Centre has been unsatisfactory and unacceptable, in particular:

a. your conduct in making public comment and providing official information whilst a member of the Army was not in compliance with Defence policy;

b. your conduct did not cease after being ordered to do so on the basis that your public comment was inconsistent with Defence Policies; and

c. you did not remove material from social media sites and your website that links your comments to the Australian Army and Defence.

4. After receiving your response to reference A, I advised you (at reference D) that I intended to give greater weight to my view that your public comments demonstrate attitudes that are demeaning of, and demonstrate intolerance of, homosexual, transgender persons and women, and are contrary to the policies and cultural change currently being undertaken in the Australian Army and Australian Defence Force (ADF). Further, that your comments critical of ADF and government policy demonstrate a conflict of interest between your personal interests and your obligations to serve the Army that cannot be reconciled. I gave you an opportunity to address these matters in an additional submission to me, and you did so in reference B.

5. My letter to you conveyed that my concern was with the way you expressed your personal interests, and should not be interpreted, as you appear to intimate in your response, that Christian beliefs and military service are incompatible. I have carefully considered the facts and circumstances identified in the Termination Notice and its enclosures, and both of your submissions in response and have assessed your behaviour, not your religious beliefs.

6. I am satisfied that a significant amount of the material enclosed with the Termination Notice, being material from your personal web blog, twitter and facebook posts, is critical of the ADF and government policy and decisions, particularly the support offered to homosexual and transgender members of the ADF and the decision to permit women to serve in combat roles. I am satisfied that the

manner in which your disagreement with those policy decisions is publicly expressed is generally intemperate, disrespectful and does not accord with the standard of behaviour expected of any Defence member, and particularly an Officer of your rank and experience.

7. I accept that you were not on duty, in uniform or performing any service for the Army at the time of your comments on these matters, however you were an active Army Reserve member, and on several occasions clearly identified yourself as such in the online material including in enclosures 2, 3 and 4 of the Termination Notice. I note that your duty status is significant for purposes such as consideration of proceedings under the *Defence Force Discipline Act 1982*, as you identify in your submissions to me. However, for the purposes of this decision pursuant to the *Defence (Personnel) Regulations 2002*, it is your behaviour generally which is at issue in deciding whether your retention is in the interests of the Australian Army.

8. The content of your online posts regarding these issues, as enclosed with the Termination Notice, is contrary to the policies and cultural change initiatives currently being implemented within Army and Defence and is inconsistent with the standards of behaviour expected of all Defence members. Your opinions are expressed in a way that is contrary to the standards of online public commentary expected of a serving ADF member, regardless of duty status. The manner in which you have publicly articulated your views on the support offered to homosexual and transgender members of the ADF and the decision to permit women to serve in combat roles demonstrates intolerance and disrespect for particular individuals and for ADF and government policy.

9. In making these findings, I distinguish between your holding of a personal opinion, the mere fact of which I do not consider necessarily inconsistent with the standards required of Defence members, and your conduct in expressing personal opinions publicly in an inappropriate and disrespectful manner, in circumstances that identify you as a member of the Australian Army Reserve. I consider that conduct in expressing personal opinions is inconsistent with expected standards of behaviour, particularly where it takes place in the public domain. I accept your submission that your statements are informed by your personal beliefs and your faith. However I do not accept your submission that administrative (and disciplinary) action commenced against you shows intolerance of your opinions and demeans the right of ADF members to practice their faith because such action is directed to your behaviour and the manner in which you have publicly expressed your beliefs, rather than the beliefs themselves.

10. I emphasise that this decision is not about beliefs or faith. It is about your personal conduct whilst a member of the Army Reserve. Defence recognises that different views exist, but demands tolerance and respect in order to preserve ADF capability. This includes the manner in which alternative views to existing ADF and government policy is expressed. Defence Instruction (General) 50-1 *Equity and Diversity in the Australian Defence Force* (reference C in reference C of this Statement of Reasons) establishes this as the standard of behaviour for all Defence members, notwithstanding duty status, as does the Diversity and Inclusion statement and current cultural reform initiatives. It is expected that leaders in the ADF support

and implement this approach and that all members behave according to these standards.

11. I note the appropriateness of the manner in which you had publicly expressed views was brought to your attention by your Commanding Officer in his conversation with you on 6 February 2013 (see enclosure 3, attached to enclosure 1 to reference B). I also note that the former Deputy Chief of Army brought this standard and the responsibility of Officers to uphold Army values and ethos in their behaviour specifically to your attention on 22 March 2013 (enclosure 9 to reference C). I am satisfied that you did not subsequently modify your behaviour to reflect the standard of public behaviour expected of members of the Australian Army and especially of Officers, including by removing the online material as directed by the former Deputy Chief of Army.

12. You have raised concerns of double standards being applied in that a homosexual member of the ADF spoke publicly, and critically, of his treatment by Army without being punished. My decision in relation to that matter was made on information pertinent to the particular individual's circumstances and it is not relevant to your case. Similarly, my decision with respect to your continued service in the Defence Force is made on the basis of the facts and circumstances particular to your conduct.

13. I accept that you have served in the Army since 1997 in both permanent and reserve capacities, have performed well on overseas deployments and at home and have been awarded the US Meritorious Service Medal. I have also considered additional factors that you have raised in references A and B. In particular, I accept that:

- a. you are a competent officer in the Intelligence Corps and have particular skills in a language other than English (Arabic);
- b. you have been reported well as an Intelligence Officer and you are currently posted to the Defence Intelligence Training Centre as an Army Reserve Officer;
- c. you have interacted with male and female Defence members in a cordial and respectful manner in the workplace;
- d. you have not, previously to the matters disclosed in the Termination Notice, been subject to an 'equity and diversity complaint' in the ADF;
- e. you have not disclosed 'official information' in contravention of extant Defence instructions;
- f. disciplinary action against you on the basis of the online material enclosed with the Termination Notice was discontinued by the Director of Military Prosecutions;
- g. an Inquiry Officer appointed under the *Defence (Inquiry) Regulations 1985* did not find that your conduct was in breach of DI(G)PERS 35-3 *Reporting and Management of Unacceptable Behaviour*;

h. the termination of your Reserve service in the Defence Force may have consequences for your future employment; and

i. you sincerely hope to continue your service.

14. I accept your submissions that disciplinary action against you on the basis of the material set out in the Termination Notice was discontinued and that an Inquiry Officer appointed to determine whether you had contravened DI(G) PERS 35-3 did not find that you had done so. However, I also note that, from the information you have placed before me, that the disciplinary proceedings were directed to your alleged contravention of the *Defence Force Discipline Act 1982* and the Inquiry Officer inquiry to your formal compliance with DI(G) PERS 35-3 as a Defence member in the workplace. Both of these matters depended on your duty status at the time of your conduct. Neither was directed to the effect of your conduct holistically in terms of your obligations to serve and of the reputation of the Army and ADF. That, however, is the focus of the Termination Notice and the matter to which I directed your attention in my letter of 22 August. Therefore, I do not consider the outcomes of the disciplinary action or administrative inquiry relevant to my decision on your service.

15. I have considered your submissions regarding flaws in the Termination Notice and in relation to matters expressed in my subsequent letter to you. I have reviewed these carefully and am satisfied that the matters were sufficiently particularised so as to enable you to address adequately the allegations against you and that I am not compromised in making this decision.

Reasons for decision

16. I have concluded that your retention is not in the interests of the Australian Army. In particular:

a. your conduct as set out in the enclosures to the Termination Notice demonstrates behaviour repeatedly inconsistent with the standard set out in DI(G) PERS 50-1 *Equity and Diversity in the Australian Defence Force*, my Diversity and Inclusion statement, and current cultural reform initiatives;

b. the manner in which you publicly expressed your personal disagreement with Defence policy, particularly the support offered to homosexual and transgender members of the ADF and the decision to permit women to serve in combat roles, is significantly below that expected of an Officer in the Army, including a member of the Army Reserve;

c. you failed to modify your online behaviour when the inconsistency of your behaviour expressed in online postings with the standard expected of an Officer in the Australian Army was brought specifically to your attention;

d. the persistence of your conduct and your submissions in references A and B, demonstrate that you do not understand or are unable to exercise your responsibilities as an Officer and leader in the Australian Army, notwithstanding your rank and

experience and the bringing of expected standards of behaviour to your attention by your chain of command on two separate occasions; and

e. your online conduct and behaviour, which you have refused to modify, is inconsistent with your continued service as a Major in the Army Reserve.

I have placed significant weight on these facts.

17. I have given weight to your status as a Reserve member. I note your view that you posted the material in a personal and civilian capacity, while you were not on duty, in uniform or performing any Reserve service, and that as a result you did not transgress Defence policy with respect to public comment or political activity. I accept you did not contravene extant instructions due to your duty status, but I have considered your submission from the point of view of the standards of behaviour expected of Defence members generally. On this basis, I consider your view outweighed by the fact that several of your posted comments critical of Defence and government policy, particularly regarding the support offered to homosexual and transgender members of the ADF and the decision to permit women to serve in combat roles, made mention of your service as a Reserve officer (Termination Notice enclosures 2, 3, 4, 7 – including entry of 8 Mar; and 8 – including entry of 22 Apr and 8 Mar). Once informed that the manner in which you had expressed your personal views did not accord with Army values, in particular by the former Deputy Chief of Army, you did not modify your behaviour.

18. I have considered your submission that the criticism of your conduct and the statements you have posted online about homosexuals shows intolerance of Catholicism, but as stated above, I do not consider this a question of faith. There is no evidence of direct or indirect discrimination against you on the basis of your religious beliefs. I note that you served in the Australian Regular Army for many years prior to your transfer to the Army Reserve and there is no evidence that your faith affected your ability to serve during this time, nor does it now. It is the manner and tone of your public comments that is affecting your ability to serve, particularly because some of your comments have been linked to your Reserve service. The result of your behaviour is an irreparable undermining of my confidence in your ability to uphold Army values and to be a leader in an organisation in which everyone is expected to respect diversity and demonstrate tolerance and respect, notwithstanding your personal beliefs.

19. I have given significant weight to your service history including your operational deployments and award of the US Meritorious Service Medal, and to your desire to continue your Army service. However the significance of this as a factor in determining whether your retention is in the interests of the Army is outweighed by your conduct in making repeated and intemperate online public comments critical of Defence and government policies and decisions, and of individual Defence members, including after being instructed on the standard of behaviour expected of you if you wished to continue as an Officer in the Army Reserve.

20. Pursuant to Regulation 7(2) of the Regulations, I do not consider that termination of your service will adversely affect the ability of the Army to carry out its operations, or its size and composition, notwithstanding that you are a well-trained

and competent officer. However I do consider that your online behaviour while an ADF member has the capacity to affect recruitment and retention, and affect morale and discipline, because of the divisive and disrespectful nature of your comments regarding other serving members individually and as groups. I have given medium weight to this factor.

21. Given the size and scale of the Army, I do not consider that terminating your service will adversely affect the Army's organisational effectiveness, personnel management or career advancement of other members. I have given little weight to these factors.

22. I accept that you have the skills and experience required for the proper performance of duties in the Army; however your behaviour as evidenced in the Termination Notice, particularly enclosures 1-8, is inconsistent with the standards of behaviour and conduct required for the proper performance of duty. I have given considerable weight to this factor.

23. Regulation 7(3) of the Regulations provides that I must also consider whether having regard to past and present conduct, you are of good character. In support of your good character I have taken into account your length of service, your service record, the fact that you have previously interacted in the workplace in a respectful and cordial manner and your submission that your comments are based on your strong Catholic faith and your view of its tenets. I consider that the tone and style of your public comments, and your failure to modify your public conduct when your shortcomings against expected standards of behaviour were brought specifically to your attention, as matters weighing against your good character.

24. Whilst your conduct is incompatible with continued service in the Defence Force, I have refrained from concluding that you are not of good character. This consideration on its own is not determinative of my overall finding, in which I consider the weight of evidence regarding your behaviour and the seriousness of your shortcomings against expected standards of behaviour to support my view that your retention is not in the interest of the Australian Army.

25. I have also given some weight to that additional information you have provided in your submissions relating to the impact of the termination of your service on your employment prospects and your desire to continue serving in the Australian Army. However, I do not consider that these factors constitute a change in circumstance that would affect my conclusion that your retention is not in the interest of the Australian Army. In particular, they do not excuse your behaviour, nor do they diminish the seriousness of your behavioural shortcomings having regard to the standard of behaviour expected of members of the Army both permanent and Reserve.

Conclusion

26. I have determined that your termination date will be 13 Jan 14. You are required to acknowledge this determination below. Should you not acknowledge the decision your appointment as an Officer in the Australian Army will be terminated on that date.

27. The Directorate of Reserve Officer Career Management – Army will administer the termination of your service.

[Signature]

D.J. HURLEY, AC, DSC

GEN

CDF

10 Dec 13

[Acknowledgement omitted.]

Annexure D

[Department of Defence

Address]

CHIEF OF THE

DEFENCE FORCE

2014/1126066/1

DPG-VBR/OUT/2014/541

CDF/OUT/2014/714

Major B. Gaynor

[Address]

Dear Major Gaynor,

REDRESS OF GRIEVANCE—DETERMINATION

1. Your application for redress of grievance (ROG) concerning my decision to terminate your service in the Defence Force has been reviewed. I have determined that your application for redress should not be upheld. My reasons are explained in this letter.
2. I have considered your submissions regarding bias affecting my decision to terminate your service in the Defence Force, and affecting the processing of your application for redress of grievance regarding that decision. In particular, I have taken into account your request that, as a result of your submissions that I am tainted by actual or apprehended bias, I refer your application for redress of grievance to the Governor-General of Australia for decision, or else stay the termination of your service. I do not agree with your contention that I am unable to consider your

application for redress of grievance with an open mind on the basis of previous engagement in policy decisions affecting the whole of the Australian Defence Force, noting that the termination decision of which you seek review is based only on your own behaviour.

3. I also note your submission that my correspondence with you on 22 August 2013 should be characterised as a new termination notice pursuant to regulation 85 of the *Defence (Personnel) Regulations 2002*, with the effect that my making a decision in the same matter breached the regulatory procedure. I do not agree that this is the proper characterisation of that correspondence, in which I invited you to make such further comment as you wished on the reasoning on which I proposed to rely in making a decision on your service, as a matter of ordinary construction. I am cognisant of the fact that this submission is unchanged from that made to the Chief of Army and that his delegate considered the submission unsubstantiated. Your referral to me raises no relevant and significant new information which would, in my view, justify revisiting that determination.

4. It is necessary that a decision be made on your application for redress of grievance regarding my decision to terminate your service. You have submitted that I am *'so prejudiced in favour of that conclusion [termination] that [you] will not have been afforded a proper hearing in relation to all the evidence present here and elsewhere'*. You add that, in your view, no reasonable observer can have confidence that I possess the ability to consider your application for redress objectively. You have contended that other senior Australian Defence Force (ADF) officers to whom I might refer your redress for review are also tainted by bias arising from the decision to permit uniformed personnel to march in the Sydney Gay and Lesbian Mardi Gras ('the Mardi Gras'). You have also contended that other decision-makers, who have been called upon to review my decision on the termination of your service, are also tainted by bias. This is addressed by your referral to me.

5. Your proposed solution is that I recuse myself from determining your redress of grievance and refer it to the Governor-General for decision. I note that I am the final repository of authority to determine applications for redress of grievance for ADF officers concerning decisions affecting their military service prescribed in Part 15 of the *Defence Force Regulations 1952*. I do not agree that referral of a redress of grievance to the Governor-General is the appropriate solution, and further note that, even if such a referral were made, the Governor-General, by convention, acts on the advice of the executive. Such a referral would not therefore answer the objections you have raised to my determination of your redress of grievance. In the absence of a reasonable, alternative decision-maker untainted by the allegations you have raised, it is necessary that I proceed to determine your redress and therefore finalise the decision on your continued service in the Defence Force.

Review of decision to terminate your service in the Defence Force

6. You have raised a number of matters which you contend warrant revisiting my decision to terminate your service in the Defence Force. To the extent that your submissions concern generally applicable matters of policy, such as the appropriateness or otherwise of the participation of uniformed personnel in the Mardi Gras, they are beyond the scope of redress of grievance as prescribed in

regulation 75 of the *Defence Force Regulations 1952*. Although outside the legislative framework for redress of grievance, I have noted your complaints about the lawfulness of this decision, and its allegedly discriminatory effect, have not been properly addressed.

7. I have considered the submissions you have made which are particular to the decision to terminate your service in the Defence Force on the basis of your behaviour in *'expressing personal opinions publicly in an inappropriate and disrespectful manner, in circumstances that identify you as a member of the Australian Army Reserve'* (paragraph 9, Termination of Service Decision, 10 December 2013). In summary, you have submitted that my decision 'ignores' the fact that Defence policy applies to you only when in uniform or on duty; that it is based on conclusions that your views are 'anti-homosexual,' 'anti-women' and 'anti-transgender;' and that it is based on a discriminatory approach to the public expression of your Catholic beliefs in Defence.

8. I note that these submissions were made in similar form in your responses to Chief of Army's termination notice, dated 30 May 2013, and my correspondence with you on 22 August 2013. At that time, as set out in my Termination of Service Decision dated 10 December 2013, I decided that your service would be terminated not on the basis of your beliefs, but because of the manner in which you had publicly expressed them and the inconsistency of that behaviour with the standards expected of all Defence members, notwithstanding duty status (paragraphs 9-10).

9. Your submissions in the application for redress of grievance you have referred to me do not identify any credible, relevant and significant new information which would suggest that my decision that the reason for terminating your service in the Defence Force has been established, and that the reason had or has not been affected by a change in circumstances since the termination notice was issued by Chief of Army on 30 May 2013, is no longer sustainable. Therefore, there are no reasonable grounds raised in your referred redress of grievance to revisit my decision that your service be terminated because your retention is not in the interest of the Australian Army.

Other matters raised in your application for redress of grievance

10. You have submitted in the course of your application for redress of grievance that the issues and complaints you have raised have not been addressed, including through formal inquiry, and that 'a Quick Assessment' into Mardi Gras participation by ADF personnel found that Christianity had been vilified in the course of the event.

11. A Quick Assessment was conducted for the Commandant of the Defence Command Support Training Centre during April 2013 into a number of complaints you had raised regarding unacceptable behaviour, including by me, associated with ADF participation in the Mardi Gras. I am also cognisant of the fact that, in the course of his earlier determination of your redress of grievance, Brigadier Bornholt decided, at paragraphs 4-7 of his decision dated 31 May 2014, to refer nine complaints of unacceptable behaviour you had made to your Commanding Officer 'to determine which have not been previously considered'. I am satisfied on this basis that there has

been an adequate administrative response to the specific complaints of unacceptable behaviour you have raised. This aspect of your redress cannot be substantiated.

Conclusion

12. I have determined that the substantive aspects of your application for redress of grievance concerning my decision to terminate your service in the Defence Force, and other matters, cannot be substantiated. As a result, I have requested the Director of Reserve Officers Career Management give effect to my Termination of Service Decision of 10 December 2013 at the first available opportunity.

13. If you have a complaint about the associated administrative processes, the handling of your application for redress of grievance, or if you consider the process has been too slow, you can request the Defence Force Ombudsman (DFO) to investigate the matter. If you decide to pursue this option, you should contact the DFO and inform your Commanding Officer in writing of your actions.

Yours sincerely,

[Signature]

D.J. HURLEY, AC, DSC

General

Chief of the Defence Force

30 June 2014

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