

Chapter 4

Reparation and compensation

Introduction

4.1 The framework of responses available to the Defence Abuse Response Taskforce broadly reflects the recommendation made by the DLA Piper Review that a 'suite of options should be adopted to provide means for affording reparation to persons affected by abuse in Defence'.¹ However, witnesses and submitters raised several concerns with the specifics of the Defence Abuse Reparation Payment Scheme (Reparation Scheme) which was subsequently announced as part of the government's response and other related compensation issues.

4.2 The *Interim report* of the Defence Abuse Response Taskforce provided additional detail regarding the Reparation Scheme. The stated purpose of the scheme is to provide recognition that abuse in Defence is 'unacceptable and wrong'. The reparation payments would be provided to victims who have made plausible allegations of being subjected to sexual or other forms of abuse in Defence as a 'broader acknowledgement that such abuse should never have occurred'.² This would include individuals who reported abuse and whose cases were mishandled by Defence management. The Taskforce's report clarified:

Reparation payments are not intended as compensation. They are a way of enabling people to move forward. Payments to individuals will be capped at \$50,000, with the amount provided to each complainant determined on a case by case basis taking into account the individual circumstances of the case.³

4.3 The *Interim report* noted the Taskforce had provided detailed advice to assist ministers to settle on an approved scheme and that the proposed scheme was now 'with the Government for consideration and approval'.⁴ On 10 April 2013, the proposed Reparation Scheme was officially approved by the Prime Minister.⁵

4.4 Under the Reparation Scheme, a number of categories of Reparation Payment are specified:

1 DLA Piper Review, *Volume 1*, p. 194.

2 Defence Abuse Response Taskforce, *Interim Report to the Attorney-General and Minister for Defence*, March 2013, p. 15.

3 Defence Abuse Response Taskforce, *Interim Report to the Attorney-General and Minister for Defence*, March 2013, p. 15.

4 Defence Abuse Response Taskforce, *Interim Report to the Attorney-General and Minister for Defence*, March 2013, p. 15.

5 Defence Abuse Response Taskforce, *answers to questions on notice*, 12 April 2013, p. 1.

- Category 1 (Abuse): \$5,000;
- Category 2 (Abuse): \$15,000;
- Category 3 (Abuse): \$30,000;
- Category 4 (Abuse): \$45,000; and
- Category 5 (Mismanagement by Defence): \$5,000.⁶

4.5 The Scheme Guidelines provide that a Reparation Payment may only consist of one the amounts under Categories 1 to 4, or the amount available under Category 5 (Mismanagement by Defence), or one of the amount under Categories 1 to 4 and the amount under Category 5.⁷ The Scheme Guidelines note Category 4 (Abuse) is intended to provide reparation for the most serious forms of alleged individual or collective abuse.⁸ Effectively, this means the maximum Reparation Payment under the Scheme Guidelines is \$50,000 (\$45,000 plus \$5,000), in instances where a person in Defence has suffered the most serious forms of abuse and Defence has mismanaged this abuse.

4.6 The *Interim report* noted that the making of a Reparation Payment to a person under the Scheme is not intended to affect the statutory, common law or other legal rights of the person; however, a court or tribunal may, if it thinks fit, take the making of a Reparation Payment into account in assessing the amount of any damages or compensation otherwise payable to a person under common law or statute.⁹

4.7 On 12 April 2013, the Chair of the Taskforce provided further details on the eligibility of claims of abuse under the Scheme Guidelines:

Under the Guidelines if a complainant makes an allegation to either DLA Piper or the Taskforce, prior to 31 May 2013, that they allegedly suffered abuse in Defence which occurred before 11 April 2011, they may receive a reparation payment of up to \$45,000.

A separate additional reparation payment of \$5,000 may be available under clause 3.1.4(d)(ii) of the Guidelines to a complainant who alleges (prior to 31 May 2013) (i) that they made a verbal or written report or complaint about the alleged abuse to Defence or otherwise prior to 11 April 2011 (notwithstanding that the mismanagement by Defence may have occurred after 11 April 2011), and (ii) that the verbal or written report or complaint that the person made was then allegedly mismanaged by Defence.¹⁰

6 Defence Abuse Response Taskforce, *Defence Abuse Reparation Scheme Guidelines*, p. 11.

7 Defence Abuse Response Taskforce, *Defence Abuse Reparation Scheme Guidelines*, p. 6.

8 Defence Abuse Response Taskforce, *Defence Abuse Reparation Scheme Guidelines*, p. 11.

9 Defence Abuse Response Taskforce, *Interim Report to the Attorney-General and Minister for Defence*, March 2013, p. 15.

10 Defence Abuse Response Taskforce, answer to questions on notice, p. 1.

Compensation issues

4.8 A number of compensation issues were raised in relation to the Reparation Scheme as well as broader compensation issues for victims of abuse in Defence.

4.9 Prior to the announcement of the Taskforce and the Reparation Scheme, Ms Jennifer Jacomb outlined a number of problems she argued existed with the current avenues for compensation through common law actions including: the hurdles of producing corroborating evidence; the misleading nature of service records; the distress of coming forward as a victim; and the difficulties of funding litigation for compensation. She proposed a new compensation system should have a number of key elements:

- not be time limited;
- recognise the hurdles that confront the victims;
- recognise the trauma of the victim and the reasons for delay;
- take account of the misleading nature of service records;
- not affect any pension paid for by the DVA;
- take account of income foregone; and
- not worry about any income that the victim has made in the interim.

4.10 Ms Jacomb calculated a fair figure for compensation to victims of abuse in Defence would be 'at a bare minimum' around \$3.7 million.¹¹ In her supplementary submission, Ms Jacomb was highly critical of the \$50,000 cap on reparations through the Defence Abuse Response Taskforce process.¹²

4.11 While based in the Attorney-General's Department, the estimated \$37.1 million cost of the Taskforce over two years will be met from within the existing resources of the Department of Defence.¹³ Mr Peter Goon questioned the approach taken by the Minister in drawing the cost of the Taskforce and the Reparation Scheme from the Defence budget:

Paying the costs out of the Defence Budget, as proposed by the Defence Minister, is a triple jeopardy and detriment on the people of Australia.

Firstly, there are all the costs associated with the perpetration and perpetuation of the abuses, in the first place, combined with the costs of the moribund and dysfunctional way the resulting complaints were mishandled. Secondly, there will be the costs associated with the DART's and Department of Attorney General activities and all that will entail. Finally, if these costs are to come out of the Defence Budget, only, then there is the

11 *Submission 10*, p. 28.

12 *Supplementary Submission 10A*, pp. 8–9.

13 Attorney-General's Department, *Portfolio Budget Statement 2013–14*, p. 14.

commensurate reduction in the Defence Department funding for ensuring and assuring the defence and security of our sovereign nation and its people.¹⁴

4.12 Shine Lawyers provided the committee with general commentary on an appropriate compensation framework for victims of abuse. It highlighted that traditional compensation structures are generally not appropriate for victims of sexual abuse and focused on the need for flexible compensation structures and frameworks. For example, it noted:

In compensation claims for physiological injuries, assessment is a reasonably standard process whether it be via a statutory framework or a common law framework. In the case of sexual abuse claims, we would suggest that the same standardization simply does not exist given the nature of the claims. It has been our experience that in the area of assessment, flexibility and agility is indeed the most significant criteria required in a compensation framework of this type.¹⁵

4.13 Shine Lawyers made a number of recommendations for the characteristics of an appropriate compensation framework. These included:

- independent representation of claimants;
- a simple lodgement process;
- a process for parties to agree to a single medical expert; and
- settlement of compensation through a negotiated process.¹⁶

4.14 Shine Lawyers noted that 'existing statutory frameworks included in the *Military Rehabilitation and Compensation Act 2004*, are limited in their scope to allow for a flexible model' of compensation:

Alternatives available to government would be amendment of existing legislation to provide appropriate statutory power to develop such structures, or alternatively to call on ministerial powers to effect ex gratia payments to claimants with appropriate processing models to be determined thereafter.¹⁷

A capped reparation scheme

4.15 At the public hearing, Mr Stephen Roche for Shine Lawyers expanded on a number of the above arguments noting that victims of abuse have been 'unrepresented'. He considered that 'no input from any victim in relation to this as a

14 *Supplementary Submission 12A*, p. 2.

15 *Submission 11*, p. 6.

16 *Submission 11*, pp. 7–8.

17 *Submission 11*, p. 9.

stakeholder has been sought'.¹⁸ He highlighted that, while the DLA Piper Review report had recommended 'a capped compensation scheme' which was agreed as part of the government's response, the Taskforce was implementing a reparation scheme and '[r]eparation payments are not intended as compensation per se'.¹⁹

4.16 He also opposed a capped scheme 'because of the specific nature and features of these types of claims': Mr Roche did not consider the compensation for victims of abuse in Defence should be open ended but 'it should be adequate'. He argued that the 'scheme proposed will be inadequate for the upper end of those more serious cases'.²⁰ He stated:

In my experience, these types of schemes result in a much lower payment of around \$5,000 to \$10,000. What you will have is DLA Piper having been paid more money to produce to the report than you will pay out to victims.

4.17 The Chair of the Taskforce, the Hon Len Roberts-Smith QC also commented on the Reparation Scheme:

These are reparation payments; they are not intended to be compensation. Quite clearly, we would have to accept the proposition that, for example, somebody whose allegation involved, perhaps, being pack raped on more than one occasion and suffering all of the consequences that one would expect from that, would, in some other legal environment, be looking a significantly greater sum by way of damages than the maximum of \$50,000.²¹

Time limitation issues

4.18 Mr Roche listed time limitations as a potential obstacle for victims of abuse pursuing common law claims for compensation. He was unaware of any communication from Defence which indicated that the limitation period on claims would be waived. He noted:

The problem with a victims of crime type capped scheme that purports to leave open other options is that it does not bring finality to the victims. It is an attempt to get a quick result for perhaps the department but not the victims. To say that the victim can then go and exercise their legal rights elsewhere is, with respect, trite.²²

4.19 In a response to a question on notice the Department of Defence noted it was bound to comply with *Legal Services Directions 2005* in relation to time limitation periods. Under these rules 'Defence would be required to plead a defence based on the

18 *Committee Hansard*, 14 March 2013, pp. 1 and 3.

19 *Committee Hansard*, 14 March 2013, p. 3.

20 *Committee Hansard*, 14 March 2013, p. 4.

21 *Committee Hansard*, 14 March 2013, p. 16.

22 *Committee Hansard*, 14 March 2013, p. 3.

expiry of an applicable limitation period unless exceptional circumstances existed and the Attorney-General consented'. These exceptional circumstances 'would include where Defence has through its own conduct contributed to the delay in the claimant bringing the claim'.²³ Similarly, consent from the Attorney-General, where there was a claim for an extension to the limitation period, would normally only be given in exceptional circumstances which would justify not pleading a limitation defence or where it was expected that the application would succeed.²⁴

Legal representation

4.20 The Reparation Scheme Guidelines provides that legal or any other costs will not be paid under the Scheme 'in respect of any costs associated with preparing, or pursuing, an Application for Reparation Payment, under the Guidelines, nor in relation to the making of a complaint in relation to the handling of an Application for Reparation Payment under the Guidelines'.²⁵ The importance of independent legal representation of claimants was highlighted by Mr Roche at the public hearing:

You cannot have a situation where the victim has to go to the boss's lawyer. DLA [Piper] are conflicted. They act for the Department of Defence; they do not act for victims. This is an emerging issue. Forms have been filled in and information has been collected, but no independent advice about what their rights are, what their options are, have been provided. Neither, as I understand it, have they ever been warned or advised to get their own independent advice.²⁶

Compensation for abuse in Defence

4.21 The limited options for compensation for abuse in Defence (outside of the Taskforce process) were also highlighted in submissions. DVA outlined that all claims for compensation relating to service in the ADF will be assessed under one of a number of different statutory compensation schemes, 'depending on the time and/or the type of the service, with different liability tests applying'. It noted that '[t]hese statutory compensation schemes will not provide equal access and outcomes for victims of alleged abuse'.²⁷ It noted:

The long period of time over which allegations have been made means that claims lodged with DVA will be subject to the [*Veterans' Entitlement Act 1986*, the *Safety Rehabilitation and Compensation Act 1988* or the *Military Rehabilitation and Compensation Act 2004*]. Different tests for liability and

23 Department of Defence, answer to questions on notice, Question 3.

24 Department of Defence, answer to questions on notice, Question 3.

25 Defence Abuse Response Taskforce, *Defence Abuse Reparation Scheme Guidelines*, p. 13.

26 *Committee Hansard*, 14 March 2013, p. 2.

27 *Submission 18*, p. 4. The three schemes under which claims would be assessed are: the *Military Rehabilitation and Compensation Act 2004*; the *Safety Rehabilitation and Compensation Act 1988*; and the *Veterans' Entitlement Act 1986*.

assessment apply, but each Act requires that there is sufficient evidence that a particular incident occurred and that the incident resulted in a diagnosed condition. The passing of time means that this evidence may not be available and claims may be unsuccessful. Further, claims will result in different compensation outcomes, even in claims where there are similar medical conditions.²⁸

4.22 The Inspector-General ADF also pointed out that the only 'in-house' avenues for victim compensation presently available to ADF members are through the Compensation for Detriment caused by Defective Administration (CDDA) scheme and mechanisms for ex gratia payments under the Chief Executive Instructions. He considered these schemes were not appropriate for compensating an ADF member in relation to sexual or other abuse in Defence, as the CDDA scheme in particular relies on administrative error as a prerequisite for the scheme to apply.²⁹

4.23 The Inspector-General ADF noted that the establishment of a new compensation avenue, specific to the military environment had been recommended by a review of the military justice reforms in 2009.³⁰ He supported the establishment of 'a purpose-designed compensation scheme for the ADF which clearly sets out the circumstances in which it would have application'. He suggested the financial compensation arrangement announced as part of the government's response to the DLA Piper Review report 'could be adapted for ongoing use'.³¹

4.24 LtCol Paul Morgan argued that it was essential that 'the system for support rehabilitation, treatment and compensation for victims in Defence be reconsidered'. He stated:

Victims cannot be seen to seek any kind of compensation for career detriment or career problems caused by their abuse, because to do so [would] lead to derogatory characterisations of their motives. Compensation planning need[s] to be actively managed by an agency external to Defence.

Moreover, government often only changes when it is force[d] to recognise the monetary cost of its actions. It is clear that were an independent agency to actively manage the costs of abuse, and were these costs to be public and affect Defence, that stopping abuse would be a higher priority for ADF commanders. Where the career and health costs are borne by victims of Defence abuse, little intrinsic motivation has been shown by ADF commanders.³²

28 *Submission 18*, pp. 2–3.

29 *Submission 19*, p. 5.

30 *Submission 19*, p. 5, referring to recommendation 48 of the Independent Review on the Health of the Reformed Military Justice System conducted by Sir Lawrence Street and Air Marshal Les Fisher (Rtd) in 2009.

31 *Submission 19*, p. 5.

32 *Submission 22*, pp 3–4.

4.25 The Alliance of Defence Service Organisation (ADSO) highlighted the difficulties for victims of abuse in Defence could have in making a claim for compensation under the *Military Compensation and Rehabilitation Act 2004*.

In order to achieve any rehabilitation, support or treatment or compensation for sexual abuse whilst serving, the claimant will need to firstly, make a claim. After the claim is made, a reasonably lengthy investigation of the claim will take place involving administrative, medical, psychological and other examinations together with the compilation of all the 'evidence' to support a claim.

This process can take several months and may take a very long time depending on where the claim is assessed. In some cases the assessor in the Department of Veterans' Affairs, responsible for its progress, may simply be slow or the quantity of claims being dealt with at any given time may slow down determination of a particular claim. No rehabilitation or compensation will be provided unless the claim is accepted.³³

4.26 The ADSO considered that a parallel system should be established within DVA to deal exclusively and specifically with sexual abuse claim cases due to the personal nature of claims and the need to reduce stress on victims. In view of ADSO, the specialised unit created by DVA to process claims from the DLA Piper Review should be established as a specialised area to 'to enable it to respond to any sexually related claim for compensation, rehabilitation or treatment in an expeditious manner'. It strongly recommended that DVA be solely responsible for administering claims received in respect of Defence personnel.³⁴

33 *Submission 8*, p. 6.

34 *Submission 8*, p. 6.