

Additional comments by Senator Nick Xenophon

1.1 For the thousands of current and former serving members in the Australian Defence Force (ADF) who alleged they have been sexually, physically or mentally abused, the announcement by Defence Minister the Hon Stephen Smith MP to establish the DLA Piper Review of Allegations of Sexual and Other Forms of Abuse ('the DLA Piper Review') was long overdue. The subsequent establishment of the Defence Abuse Response Taskforce ('the Taskforce') was a further welcome development, however as noted by the committee, there are several issues regarding how the DLA Piper Review was conducted, as well as issues with the operation of the Taskforce which need to be resolved in order for the needs of victims to be appropriately addressed.

The DLA Piper Review

1.2 The DLA Piper Review was an opportunity for victims to report abuse and, as many thought, finally obtain some form of justice for what they endured. Sadly this was not the case for some ADF members who courageously spoke up, often for the first time.

1.3 One such victim is Neil Batten. Neil was a 15 year old junior recruit at the HMAS Leeuwin training base in Western Australia in 1971 where he was violently and repeatedly raped. Neil made a submission to the DLA Piper Review but was never contacted afterwards. As it remains unclear why Mr Batten was not contacted I will be seeking an explanation from the DLA Piper Review team. I am concerned the absence of follow-up in Mr Batten's case may not be an isolated incident. However, of further concern are the number of current and former ADF members who have not made a submission to the DLA Piper Review or the Taskforce and are still dealing with the aftermath of the abuse suffered on their own.

Appointment of DLA Piper – conflict of interest concerns

1.4 DLA Piper and its predecessor Phillips Fox have long been a preferred supplier of legal services to the ADF. It has been reported in the 2010-11 financial year that DLA Piper received in the vicinity of \$20 million in fees from the ADF. Furthermore, DLA Piper is a member of all 15 legal panels relied on by the ADF. DLA Piper also regularly acts for the ADF in compensation claims where the ADF seeks to challenge applicants making claims for compensation.

1.5 Dr Ben Wadham explained the impact the perception of a conflict of interest could have on complainants:

Given the DLA Piper (previously DLA Phillips Fox) has legally represented the DoD in the past in this domain, some victims felt they were

reporting to the institution of complaint. I argue that claims were not submitted because of that relationship.¹

1.6 It is therefore understandable that many current and former serving member of the ADF hold serious concerns about the appropriateness of utilising DLA Piper as the firm to advance the rights of victims. I note the committee did not accept that the appointment of DLA Piper to conduct the DLA Piper Review presented a conflict of interest in these circumstances. While I still hold concerns regarding this matter I am pleased the committee has recognised that potential claimants may have been reluctant to come forward due to a perception of bias. I therefore share the committee's view that it would be helpful for the Taskforce to highlight its independent character and its arms-length relationship with Defence in its communications with claimants and stakeholders.

Defence's apology to victims

1.7 I share the committee's view that the formal apology to victims of abuse in Defence by the Minister and the Chief of the Defence Force went some way to providing a sense of closure for victims. It is disappointing however that no notice was given to the victims that the apology was forthcoming, resulting in victims not being present for the apology. Many victims felt insulted by that. I only hope the same mistake is not made again in the future.

Access to Volume 2 of the DLA Piper Review

1.8 The committee considered the differing opinions as to the way in which Volume 2 of the DLA Piper Review to be a 'vexed' issue. It is obvious the Taskforce needed Volume 2 of the Review in order to carry out its functions, therefore the delay on the part of the Minister in providing the Taskforce with these documents is a matter for serious concern. This delay has resulted in victims waiting longer for their claims to be assessed and left the door open for further abuses to occur where the alleged offender has been allowed to continue serving.

1.9 The Secretary of the Department of Defence was of the view that the Minister made the right decision in withholding Volume 2 from the Department due to the potential for duplication of work that could occur if the Department and the Taskforce were both required to investigate claims.²

1.10 However, the following interchange I had with the Chief of the Defence Force, General David Hurley, at the committee's public hearing revealed that he did not necessarily agree with this position:

1 Dr Ben Wadham, *Submission 16*, p. 2.

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

Senator XENOPHON:...What I am trying to nail down is that the DLA Piper review a process in itself. It was an extensive process; it cost \$10 million or thereabouts. Should that in itself, should the DLA Piper review, if it contains information of allegations about current members of the Defence Force – is that something you ought to be cognisant of as a matter of some urgency?

Gen. Hurley: I would like to know if there are currently serving members who have serious allegations being made against them that need to be dealt with.³

1.11 Dr Gary Rumble, one of the heads of the DLA Piper Review expressed his concerns in relation to Volume 2 not being shared with the Secretary of Defence of the Chief of the Defence Force in no uncertain terms:

Obviously, that represents a very significant shift away from our terms of reference, which required us to report to and make recommendations to the secretary as well as to the minister. I am, frankly, astonished that the government considers that it is not appropriate for the secretary, the CDF and the service chief to be provided with details of allegations of abuse in Defence.⁴

1.12 Dr Rumble continued:

Further, people came to the review because they wanted action and/or because they wanted their stories heard. Most of them consented to disclosure to Defence so that there could be action and so their stories could be heard. Further, even where there was no consent to disclosure, or limited consent to disclosure, there were still aspects of the redacted report which we recommend be drawn to the attention of service chiefs in some instances. The fact that the working version of volume 2 did not go the secretary has prevented the secretary, the CDF and the service chiefs from being informed about situations needed response and about the individual matters underpinning the findings, issues, option and recommendations in volume 1.⁵

1.13 Dr Rumble also explained the effect of the delay on victims, witnesses and perpetrators:

Furthermore, I am deeply concerned that the government's lack of action and decision last year may have distressed these individuals who were hoping for some response to their issues, worn down the willingness of those who told their stories to the review in phase 1 to hang on and participate further in phase 2, discouraged others who were watching to see whether there would be any effective action from now coming forward and possibly encouraged perpetrators and (potential) witnesses to think that they

3 *Committee Hansard*, 14 March 2013, p. 32.

4 *Committee Hansard*, 14 March 2013, p. 8.

5 *Committee Hansard*, 14 March 2013, p. 8.

can just wait out the current attention on abuse issues. So, I would see value, even now, in letting the working version of volume 2 go to the secretary.⁶

1.14 While the contents of Volume 2 are now being examined by the Taskforce, unfortunately the impact of the confusion and the delay in disseminating this material cannot be undone. It is vital that lines of communication between the Federal Government and the Taskforce are improved in order for any deeper systemic issues identified as part of the Taskforce's work to be acted on quickly and effectively. This is particularly so given Dr Rumble's warning that there is potential for some of these issues to 'fall through the cracks and not be considered because the entities involved in carrying out consideration of some issues will assume that some particular issues are being considered by other entities and/or do not fall within their area of responsibility'.⁷

Recommendation

In the interests of transparency, Volume 2 of the DLA Piper Review be released publicly with the appropriate redactions at this stage to avoid compromising any likely future action.

The Defence Abuse Response Taskforce

Communication

1.15 Victims of abuse can often be vulnerable and deserve to know that when they make a complaint, this complaint is being investigated and taken seriously. I acknowledge the Taskforce is handling approximately 2410 complaints and that with such a high number of cases there will be challenges in terms of communicating effectively. However I support the committee's suggestion that the Taskforce could take steps to refine and enhance its communication with complainants, especially by providing updates as to the status of their claims.

The Repatriation Scheme

1.16 The Taskforce has been clear that payments made through their process are to be characterised as repatriation payments rather than compensation:

Repatriation 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.⁸

6 *Committee Hansard*, 14 March 2013, p. 8.

7 Dr Gary Rumble, *Submission 24*, p. 9.

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

1.17 Some submitters were concerned by the payment cap being set at \$50,000. For example, Ms Jennifer Jacomb compared this amount with compensation that has been awarded to prisoners in Victorian jails for injuries they suffered while incarcerated. Ms Jacomb noted that some of these prisoners received in excess of \$100,000.⁹ It is understandable that victims of abuse feel aggrieved by the payment cap, particularly when comparisons such as the one above are made.

1.18 Shine Lawyers also expressed to the committee their view that:

Given the sensitivities of abuse claims, we strongly recommend a process that allows negotiated rather than arbitrary decisions to bring about the conclusion of claims.¹⁰

1.19 It is therefore vital that the Taskforce is clear as to how they have determined the amount of compensation payable in each instance so that victims are not left with any doubt as to how their particular payment amount was arrived at.

Previously settled matters

1.20 I share the committee's view that the Repatriation Scheme should be considered an entirely separate process from any other mechanism in Defence through which compensation can be obtained. The Taskforce has stated they will ask the 'Commonwealth to grant a limited waiver of confidentiality obligations and/or deeds of release and indemnity to complainants who wish to report allegations about abuse to the Taskforce'.¹¹ The Commonwealth should confirm as a matter of urgency that they will provide such a waiver in order to give complainants confidence their matters can be investigated by the Taskforce.

Lack of legal advice to claimants

1.21 Victims and advocates were dismayed to learn that claimants would not be entitled to legal advice to assist them prepare their claims for the Taskforce. This is particularly concerning given the legal resources available to Defence. Mr Roche, Executive Director of Shine Lawyers told the committee:

Victims are significant stakeholders in this, and they are the only stakeholders who have been unrepresented.¹²

1.22 Mr Roche further explained the importance that victims received legal advice:

First and foremost, victims must be given access to their own independent legal advice. You cannot have a situation where the victim has to go to the boss's lawyer. DLA are conflicted. They act for the Department of Defence;

9 Ms Jennifer Jacomb, *Submission 10*, p. 4.

10 Shine Lawyers, *Submission 11*, p. 8.

11 Defence Abuse Response Taskforce, answers to question on notice, Question 2.

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

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.¹³

1.23 As the cut-off date for receiving complaints has been passed it is too late for complainants to seek legal advice in relation to claims they have already submitted. I am deeply concerned by this absence of legal advice. For many victims the Taskforce process may be the only viable way for them to seek redress for the abuse they endured, particularly if it occurred decades ago. There will inevitably be difficulties for such claimants making out the required evidentiary standard of proof in order to bring a claim through Defence's other compensation mechanisms.

'Out of scope' claims

1.24 I note that some submitters considered the scope of the terms of reference for the DLA Piper Review and for the Taskforce to be too narrow and as a result, did not take into account other unacceptable behaviour. For example, Mr Peter Goon told the committee that the focus on sexual abuses 'distracts from and diminishes the importance of "the other abuses"... The perpetration of abuses through the misuse and abuse of power, authority and trust as well as their perpetuation through the same means, along with the abuses of "denial of a fair go" and "ignoring the message and shooting the messenger" are the engines that drive inappropriate behaviours in Defence...'.¹⁴

1.25 Despite the prevailing view these 'other abuses' fall outside the terms of reference for the DLA Piper Review and the Taskforce, consideration should be given to establishing a similar process through which victims of other abuses can have their claims investigated, assessed and addressed. Such a process would address the serious claims that there are 'engines that drive inappropriate behaviours in Defence'.

Conclusion

1.26 Unfortunately there is a long history of abuse in the Australian Defence Force, with some cases occurring over 50 years ago. Recent reports in the media that inappropriate material was disseminated by members of Defence using Defence communication systems demonstrates how despite numerous reviews, findings and reforms, a culture still exists today whereby inappropriate behaviour continues to occur.

1.27 The Taskforce presents an opportunity for those who suffered abuse prior to 11 April 2011 to achieve some form of closure for what has occurred. However, consideration should be given to establishing a permanent mechanism with similar

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

14 *Submission 12*, p. 8.

functions and powers as the Taskforce so that those who have suffered abuse after 11 April 2011 are provided with the same opportunity for closure. I fully support the committee's recommendation in that respect.

1.28 In closing I wish to acknowledge the tireless work and dedication of Mr Barry Heffernan, Welfare Coordinator for the South Australian branch of the Vietnam Veterans' Association. It was through Mr Heffernan's selfless work and the cases that he brought to me that I was prompted to move for this inquiry. For that, I and many victims of abuse are most grateful.

1.29 Mr Heffernan has spent the past two years speaking with victims of abuse, often taking the time to visit them face to face because he recognises conversations over the phone or via letters is not enough. Mr Heffernan has performed these duties on an entirely voluntary basis, funding his trips himself. He should be applauded for his selfless and invaluable work.

Senator Nick Xenophon
Independent Senator for South Australia

