

16 November 2015

Senator Chris Back
Chair
Foreign Affairs, Defence and Trade Legislation Committee
Senate
Parliament House
CANBERRA ACT 2600

Cc Senator Alex Gallacher
Chair
Foreign Affairs, Defence and Trade References Committee
Senate
Parliament House
CANBERRA ACT 2600

Cc Air Chief Marshal Mark Binskin, AC
Chief of the Defence Force
PO Box 7900 CANBERRA BC
ACT 2610

Dear Senator Back

Access to “DLA Piper” Report Volume 2: Statement made by CDF in Supplementary Estimates

I am writing to correct a statement about Volume 2 of the Report of the *Review of allegations of sexual and other abuse in Defence* which the Chief of the Defence Force ACM Binskin AC made to the Legislation Committee during Supplementary Estimates on 21 October 2015.

I am providing a copy of this letter to Senator Gallacher as Chair of the References Committee because it seems that Defence made a similar incorrect statement to the References Committee during its 2014 *Inquiry into processes to assist victims of abuse in Defence*.

I am providing a copy of this letter to ACM Binskin so that he may respond to this letter if he considers it appropriate to do so.

I was the leader of the *Review of allegations of sexual and other abuse in Defence* in 2011-2012. The Report from the Review is commonly referred to as the DLA Piper Report. However, the Report set out only opinions and findings of myself and the other two Review leaders - Ms Melanie McKean and – until his withdrawal on account of ill-health in February 2012 - Professor Dennis Pearce. It did not report any views of DLA Piper.

I write to you on my own behalf. I do not represent the other Review leaders, DLA Piper or the other law firm which employed me during the conduct of our Review.

The CDF made the statement in issue in the following exchange with Senator Lambie (21 October 2015 – Supplementary Estimates, Hansard page 32):

Senator LAMBIE: What has been brought to my attention is that this is still ongoing in Defence. There is no doubt about that. I still find it disturbing that you cannot look at the DLA Piper volume 2 and put the pieces together. Is it that Defence will still not show you those volumes—those 33 volumes?

Air Chief Marshal Binskin: It is not Defence.

Senator LAMBIE: Sorry, the DART will not show Defence those volumes.

Air Chief Marshal Binskin: It is protected under privacy. I can quote you the part that protects that. That is why I do not get access to it. The way it was collected by DLA Piper guaranteed privacy to those people that brought that information forward.

The CDF's statement of the reason why he has not had access to Volume 2 of the Report from our Review – '*That is why I do not get access to it. The way it was collected by DLA Piper guaranteed privacy to those people who brought information forward*' - is not correct.

I do not know what was the source of CDF Binskin's misunderstanding.

However, I note that in the October 2014 Report of the References Committee – chaired by Senator Gallacher – on the *Inquiry into processes to assist victims of abuse in Defence* there is a reference (at para 5.38) to Defence having informed the Committee that:

... as the information in Volume 2 had been provided by victims of abuse to the DLA Piper Review on the strict condition of confidentiality, 'Defence has not been provided a copy of the Volume Two report'

This is not correct either. It was not the case that 'victims of abuse' had routinely provided information to our Review 'on a strict condition of confidentiality'. And that was not and is not the reason why Defence has not been provided with a copy of the Volume Two report.

Our Terms of Reference required us to report to the Secretary of Defence as well as to the Minister for Defence. We prepared our Report including Volume 2 of our Report on that basis.

We expected that a 'working version' of Volume 2 of our Report – with redactions as required to meet any restrictions on disclosure requested by victims and witnesses who had provided information - would go to the Secretary of Defence.

We expected that the CDF and Service Chiefs would have access to most of what we called the working version of Volume 2.

At the start of our Review, the process for taking statements from people who had allegations before the Review was developed and signed off by me and the other Review leaders in consultation with other senior DLA Piper lawyers who were involved in coordinating support for the Review in 2011.

We developed a form for people making statements. The Review leaders and DLA Piper lawyers and other lawyers supporting the Review used this form when taking

statements. That form asked for an indication of what restrictions if any the source – victim or witness – put on disclosure to Defence.

The approach which we took to redaction and preparation of the working version of Volume 2 for Defence is explained in:

- the Explanatory Material for Volume 2 – which is Appendix 2 to the Supplement to Volume 1. (The Supplement to Volume 1 – including the Explanatory Material for Volume 2 - has been on the public record since the middle of 2012 and is available through Defence's *Pathway to Change* site - <http://www.defence.gov.au/pathwaytochange/>).
- The letter of 17 December 2012 which I sent to Minister Smith on behalf of myself and Ms McKean, the other leader of the Review at that time. (A copy of the 17 December 2012 letter was provided to the References Committee as Annexure 1 to Part I of my 2 June 2014 written submission to the Committee for its *Inquiry into processes to support victims of abuse*.)
- In Part I pages 28-31 of my Submission of 2 June 2014 to the References Committee.

When Ms McKean and I considered each specific allegation reported on in Volume 2 we assessed the extent to which redaction was required in the working version being prepared for Defence.

We took into account each source's indications – if any - about the extent to which they did or did not require confidentiality. We took a conservative approach when there was uncertainty about the source's position in relation to disclosure to Defence.

In carrying out our assessments of what redactions were required we were assisted by lawyers provided by DLA Piper.

Volume 2 consisted of 30 large ring binder folders.

It is my recollection that in the vast majority of cases we formed the view that no redaction was required in the working version of Volume 2 to go to Defence.

There did not need to be extensive redactions in the version of Volume 2 which we had prepared to go to Defence because:

First - Volume 2 included four folders dealing with our audit of Defence file material in relation to what were then current Fairness and Resolution Branch and ADFIS matters.

The information in those folders had come to us from Defence and some of it was de-identified before it came to us. There was, accordingly, no condition of 'confidentiality' preventing those four folders going to Defence.

It is my understanding that the Defence Force Abuse Response Taskforce belatedly took steps to allow those four folders to go to Defence this year.

Second - Volume 2 also included our assessments and recommendations on media allegations.

There was no confidentiality issue preventing those parts of Volume 2 going to Defence either. Mr Roberts-Smith decided that the Defence Abuse Response Taskforce would only consider allegations where the victim of the alleged abuse wanted the DART to consider their matter.

It is likely that some of the media allegations on which we reported in Volume 2 of our Report were not considered at all by the DART.

I am not aware of any reason why Defence could not see those aspects of Volume 2 of our Report even now.

Third - in relation to the aspects of Volume 2 which reported on information which had been provided to us by victims or witnesses, there were some instances where the source of the information had imposed a confidentiality condition preventing full or any disclosure to Defence.

It is my recollection that very few of the victims who provided information about abuse expressly required 'strict confidentiality'. The overwhelming majority of victims who gave information to our Review wanted some action to be taken and accepted that this would require disclosure at least to some areas within Defence.

For many of the allegations, we made recommendations that the allegation and our initial assessments and recommendations be referred to a Service Chief or to the CDF.

Even for those sources who did not want disclosure to Defence - or where there was uncertainty about the extent to which they consented to disclosure to Defence - we were usually able to make specific recommendations in the working version of Volume 2 for action. Some of those recommendations included recommendations to Defence for action based on a redacted version of the information provided to us.

We also recommended that a Phase 2 body independent of Defence maintain oversight of Defence's implementation of these recommendations and – where there was uncertainty about the source's (victim's or witness's) consent to disclosure to Defence – to contact the source to clarify their position.

When we delivered Volume 2 of our Report to the Minister in April 2012 we held back the working version of Volume 2 prepared to go to Defence. We waited through most of 2012 for the Minister to give clearance for us to deliver that version to Defence.

However, the Government eventually decided that – contrary to the express requirement in our Terms of Reference for us to report to Defence as well as the Minister - the working version of Volume 2 would not go to Defence at all.

Minister Smith informed me at page 2 of his letter of 8 March 2013 (replying to my letter of 17 December 2012):

You state that as the working version of Volume 2 did not go to the Secretary, that prevented the Secretary, the Chief of the Defence Force and the Service Chiefs from being informed about what allegations have been raised with the Review, the initial assessments and recommendations made and the bases for those assessments and recommendations.

It is the Government's strong view that an independent process was the most appropriate way forward for responding to individual allegations of abuse in Defence.

It would not have been appropriate for the Secretary, the Chief of the Defence Force and the Service Chiefs to be provided with details of allegations of abuse in Defence.

(A copy of the Minister's letter is at Annexure 2 to Part 1 of my submission to the Reference Committee for its *Inquiry into processes to assist victims of abuse in Defence*. The Minister was replying to my letter of 17 December 2012 – see Annexure 1 to Part 1 of my submission to References Committee.)

Accordingly Defence's statement to the References Committee and the CDF's statement to the Legislation Committee in Supplementary Estimates of the reason why the CDF and Defence have not seen Volume 2 was incorrect.

It does not follow that Defence could now see the working version of Volume 2 in the form in which Ms McKean and I had signed off on it in 2012.

As mentioned above, the four folders of Volume 2 which reported on our desktop audit of Defence file material has already gone to Defence. Furthermore, as has also been mentioned above, there is no apparent reason why the aspects of our Volume 2 report which reported on media allegations could not be provided to Defence.

However, in relation to the aspects of Volume 2 of our Report which reported on allegations provided or referred to our Review, the position in relation to disclosure to Defence which applied when we signed off on redactions in April 2012 may now have been affected by the following.

After we had delivered our Report in April 2012 and the Government had established the Defence Abuse Response Taskforce in November 2012, DLA Piper carried out a process of making contact with individuals who had made statements about allegations to our Review about transfer of their information to the DART.

Furthermore, there have been other communications between the DART and individual victims since then.

Accordingly, whatever certainty there was about the contents of the working version of Volume 2 to Defence in April 2012 when Ms McKean and I signed off on the redactions required for the working version of Volume 2, it is quite possible that individuals have changed their positions in relation to disclosure of information to Defence.

Accordingly, there may now be reasons why some of the material in Volume 2 of our April 2012 Report cannot be disclosed to any part of Defence.

However, it was never the case – contrary to what Defence told the References Committee in 2014 and contrary to what CDF Binskin told Senator Lambie in the Legislation Committee's 21 October 2015 hearing – that DLA Piper had routinely guaranteed privacy to those 'people that brought that information forward to' the *Review of allegations of sexual and other abuse in Defence* which I led.

Yours sincerely

Dr Gary A Rumble