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Submission to the Department of Senate, Foreign Affairs, Defence and Trade References Committee: The Australian Government's Response to the Defence Abuse Response Taskforce (DART)

Adair Donaldson

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1. Introduction

1.1 This submission relates to the response by the Australian Government to the work and achievements of the Defence Abuse Response Taskforce ("**DART**") in dealing with claims from survivors of abuse received during time in the defence force.

2. Background

2.1 Over the past three years the author has been involved in assisting survivors of sexual abuse and harassment in the Australian Defence Force. In relation to the DART process the writer interviewed survivors and prepared applications to DART on their behalf. As a result of lodging these applications the writer has had cause to deal with representatives of DART at all levels. In particular, the assessment and compliance team, the reparation assessment team and the restorative/counselling team.

2.2 The writer also has significant experience in developing resources that deal with the consequences of sexual assaults and sexual harassment in the workplace. He works closely with the NRL and its affiliated clubs who employ 1800 young men in the at-risk category. He is also appointed to the Australian Rugby Leagues Commission's respectful relationships committee which focuses on respect for women.

2.3 It is based on this experience from dealing with survivors of abuse, DART and his work in the preventative legal education sphere that the writer makes this submission

3. Submission to Royal Commission in relation to Institutional response to child sexual abuse that occurred at HMAS Leeuwin.

3.1 Attached and marked with Appendix "A" is the writer's submission to the Royal Commission into Institutional Response to Child Sexual Abuse - The Australian Government's response to the child sexual abuse at HMAS Leeuwin dated 31 March 2014.

3.2 In this submission the writer addressed the following issues that are relevant to this inquiry:

(i) Legal strategy that the Australian Government used to prevent child abuse survivors accessing pension entitlements and compensation.

(ii) Findings of the DLA Piper Review and the interim Reports of DART.

(iii) The Independence of the DLA Piper Review.

(iv) The role of DART.

(v) What the Australian Government can do to address, or alleviate the impact on the survivors of HMAS Leeuwin to ensure justice.

3.3 The writer emphasises that it is not the individual circumstances of the abuse that should be the subject of the Royal Commission as they have been thoroughly investigated by DART, rather it is the manner in which the ADF and other Government Departments managed the allegations of child abuse. This does not fall within the Terms of Reference of DART.

Response to the Inquiries Terms of Reference

4. The Defence Abuse Response Taskforce (DART) process to date.

4.1 Based on the writer's experience the appointment of the Honourable Len Roberts-Smith RFD, QC and the creation of the DART has been an overwhelming success. What sets DART apart from other attempts by the Australian Government to deal with abuse in the Australian Defence Force has been the proactive manner in which his Honour's team has been able to deal with survivors with great empathy, understanding and most importantly independence. It was vital for survivors of abuse to know that their claims would be reviewed independently free of any perceived bias. Without this independence the success of DART would have been compromised.

4.2 In relation to applications that were lodged with DART, there was a great deal of genuineness and empathy shown by the representatives of DART in contacting

each claimant, providing them with reassurance and assistance. On a number of occasions the writer had concerns in relation to the psychological wellbeing of a claimant and as a result DART was contacted. On each occasion DART's response was measured, prompt and gratefully received by the claimant.

4.3 The writer believes that the committee should also appreciate the expertise that has been gathered by DART to address the Terms of Reference. By assembling a team of well qualified and independent professionals it has reassured complainants.

4.4 One of the issues with DART has been the two time limits that survivors had to comply with to fall within the Terms of Reference. To reiterate an already laboured point, many victims of abuse in the defence force are wary of coming forward. It is therefore unfortunate that in light of the positive feedback from claimants that at the outset of the process DART was constrained by two limitation dates being:

(i) DART was only able to assess claims in relation to abuse that occurred prior to 11 April 2011. The reason for this was that DART was a result of the DLA Piper Review. The writer can see no impediment as to why this date existed. That is survivors that were abused between 11 April 2011 and 30 November 2013 should have been entitled to lodge claims with DART.

(ii) That survivors of abuse had until 30 November 2013 to lodge their claim. For many of the claimants this was their first time reliving the horrors of their past. It took great courage for them to come forward. Further, based on experience with survivors from other institutions the writer believes that there would still be a large number who have not come forward. For example the writer has on more than 10 occasions been contacted by survivors of HMAS Leeuwin who did not lodge claims with DART. They simply did not have the strength to tell their stories. However given the publicity and the fact that survivors are speaking positively about their experiences with DART they are now ready to engage with the process and tell their stories.

5. Defences response to the DLA Piper Review and the work of DART

5.1 The Department of Defence's response has been appropriate.

6. Successive Government's responses to the DLA Piper Review and the work of DART

6.1 The writer is not aware of any way in which the previous Government or the current Government has restricted the work of DART.

7. Desirability of release Volume 2 of the DLA Piper Report in a redacted form or by way or summary

7.1 Volume 1 effectively provides a summary of the contents of the Volume 2. Whilst it would be desirable for this information to be released the paramount concern should be the protection of an individual's privacy

8. Any related matters

8.1 **Requirement for a Permanent Organisation to assess claims of sexual abuse in the Australian Defence Force**

8.2 DART has provided survivors with an avenue of support where they are comfortable to share what has happened to them without the fear of someone dismissing their claims. What is of great concern is the expertise and outcomes that DART have achieved to date will be lost when DART have finalised their investigations. What needs to occur is that DART should form the basis of a permanent independent body to investigate and deal with all allegations of sexual abuse and sexual harassment in the Australian Defence Force.

8.3 In this regard, the writer acknowledges the significance of the appointment of Air Commodore Kathryn Dunn AM to head the Sexual Misconduct and Prevention Office ("**SeMPRO**"). However it remains to be seen whether SeMPRO will be provided with the necessary resources and authority to achieve its goals.

8.4 In comparison with SeMPRO, we would draw the committee's attention to the United States of America where they have established a permanent body in the Department of Defence Sexual Assault Prevention and Response Office ("**SAPRO**")

8.5 This office, similar to SeMPRO, was established in October 2005 following the recommendations of the former Secretary of Defence and the recommendations of the Care for Victims of Sexual Assault Task Force and the actions of the Joint Task Force for Sexual Assault Prevention and Response.

8.6 Since the establishment of SAPRO figures from the United States showed that in 2013 alone, there was an increase by 50% of reports of sexual assault filed by members of the military forces which translated into 5,061 reports.[1] Rather than this being viewed as a negative it is being viewed as a success. That is, it is unlikely that this figure represents an increase in sexual assault occurring in the military services by 50% and instead is a response to the committed effort of various advocacy organisations, Congress and to the support provided by organisations like SAPRO that have made victims feel safe and comfortable to report the abuse suffered.[2]

8.7 It is submitted that, there is much that the Australian Government could learn from its American Counter-part in relation to:

(a) Resources and Staff;

(b) Streamlined Process; and

(c) Focus on Prevention.

8.8 For instance whilst SAPRO is a branch of the Department of Defence its sole focus is the *'Department's single point of authority for sexual assault policy and provides oversight to ensure that each of the Service's programs complies with DoD policy.'*[3]

8.9 SAPRO appears to have an autonomous nature in that there is a greater influence of and reliance on the recommendations and findings of SAPRO by the Department of Defence. In comparison, whilst still in its infancy SeMPRO does not appear to have the same influence.

8.10 For example, since its establishment when there has been an allegation of sexual assault or inappropriate behaviour it should have been Air Commodore Dunn, the head of SeMPRO who was making public comment. Defence members need to know of her position, her power and her department's ability to assist.

8.11 **Focus on Prevention**

8.12 Generally speaking there appears to be a reluctance to accept that sexual assaults and harassment will continue to occur in the Australian Defence Force.

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[1] See, K, McVeigh, 'US Military Sexual Assault Reports Soared 50% in 2013, says Pentagon' (The Guardian, 2 May 2014) (Last accessed 30 May 2014)

[2] See, K, McVeigh, 'US Military Sexual Assault Reports Soared 50% in 2013, says Pentagon' (The Guardian, 2 May 2014) (Last accessed 30 May 2014)

[3] Sexual Assault Prevention and Response Office (SAPRO) website under Mission and History: http://www.sapr.mil/index.php/about/mission-and-history (last accessed 30 May 2014)

It should be appreciated that no matter how much training and preventative work that is done there will always be a small minority of employees who will do the wrong thing. The public will accept this. What will not be accepted is if the ADF does not have in place best practice work systems to deal with and to investigate the complaints and interactive training to reduce the likelihood of assaults and harassment occurring.

8.13 This leads to another important distinction between the positions in the United States compared with Australia in relation to preventative work.

8.14 SAPRO have focussed their sights on providing training around preventing sexual abuse to a number of different areas not solely within the Department of Defence but stretching to society as a whole.[4]

8.15 This is encouraging as not only is the American Department of Defence investing time, effort, resources and money into assisting victims of sexual abuse and ensuring that they feel safe and able to come forward when they suffer sexual abuse, they are also trying to prevent the abuse from happening in the first place.[5]

8.16 For example, one of the aspects of the prevention program is focussing on the accountability of individuals within the military and using this to make the unit safer, create more trust between individuals and to provide the members with a greater encouragement to report abuse.[6]

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[4] U.S. Department of Defence, '2014-2016 Sexual Assault Prevention Strategy' (30 April 2014) at p. [8]
[5] See, Department of Defence, '2014-2016 Sexual Assault Prevention Strategy' (30 April 2014)
[6] See, Department of Defence, '2014-2016 Sexual Assault Prevention Strategy' (30 April 2014) at p. [10]

Appendix "A"

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Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: The Australian Government's response to child sexual abuse at HMAS Leeuwin

Adair Donaldson
Partner, Shine Lawyers

1 Introduction

1.1. The submission relates to the response by the Australian Government to the systemic institutional sexual and physical abuse of junior recruits, boys aged 15 and 16 years, posted to the Royal Australian Navy (RAN) training base, HMAS Leeuwin.

1.2. Predominantly, the physical and sexual abuse occurred during the 1960's and early 1970's amidst a culture of silence and inaction by the Australian Defence Force (ADF) and successive Governments.

1.3. The nature of the abuse and the response by the Australian Government falls within the terms of reference of the Royal Commission into Institutional Responses to Child Sexual Abuse ("the Commission").

1.4. The purpose of this submission is to call upon the Commission to inquire into primarily:

(a) the knowledge of the child abuse ("The Rapke Review");

(b) the legal strategy that the Australian Government used to prevent child abuse survivors accessing pension entitlements and compensation;

(c) the findings of the DLA Piper Review and the Interim reports of the Defence Abuse Response Taskforce;

(d) the independence the DLA Piper Review;

(e) the Role of the Defence Abuse Response Taskforce ("DART"); and

(f) what the Australian Government can do to address, or alleviate, the impact on the survivors of HMAS Leeuwin to ensure justice.

2. BACKGROUND

2.1. Between January 1960 and December 1984 nearly 13,000 15 and 16 year old boys joined the RAN as junior recruits (JRs). The majority commenced their first year of training at HMAS Leeuwin Naval base in Freemantle, Western Australia.[1]

2.2. According to Rear Admiral Adams (retired):

> "The junior recruit education and training process had two main components: schoolwork and naval training both theoretical and practical in nature. Schoolwork was to develop the boys' ability to better comprehend technology and cope with the demands of their employment category training post-Leeuwin. Naval training was to prepare them for life and work in the RAN..."[2]

3. The Knowledge of the Child Abuse ("The Rapke Review")

3.1. On 27 April 1971, *The Canberra Times* printed a story detailing allegations by a former JR, Shane Connolly, about the "bastardisation" of JRs at Leeuwin.[3] In a later story, Connolly's mother outlined that boys at Leeuwin were prey for homosexuals.[4] On 28 April 1971 the then Minister for Defence, Dr Mackay, announced that Judge Trevor Rapke of the Victorian County Court and an Honorary Judge Advocate of the RAN, had been appointed to investigate media claims ("The Rapke Review").[5]

3.2. Judge Rapke's terms of reference were to report to the Minister on:

(a) Whether there is evidence of the existence of any form of initiation or similar practices in HMAS Leeuwin which involve organised physical violence, degrading or bullying behaviour.

(b) Whether there is evidence over recent years of any pattern of undue physical violence or bullying among JRs.[6]

3.3. Initially, Judge Rapke attended Leeuwin where he conducted private interviews with JRs about the allegations of Connolly.

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[1] Brian Adams, *HMAS Leeuwin: The Story of the RAN's Junior Recruits* (Australia, Department of Defence 2009) at p. [vi].
[2] ibid at p. [31].
[3] Trevor Rapke and Australia. Dept. of the Navy, 'Part 2 Report of an investigation into allegations of initiation practices, physical violence and bullying at HMAS Leeuwin' (3 July 1971) at p. [3].
[4] ibid at p. [92].
[5] ibid at p. [90].
[6] Trevor Rapke, and Australia. Dept. of the Navy, 'Part 1 Report of an investigation into allegations of initiation practices, physical violence and bullying at HMAS Leeuwin' (6 May 1971) at p. [1].

3.4. Judge Rapke's investigation was extended after further JRs approached the media reporting similar abuse at Leeuwin and on board HMAS Sydney. In total, Judge Rapke interviewed 467 witnesses across Australia.[7]

3.5. In his report, Judge Rapke outlined he interviewed witnesses privately and informally.[8] In contrast, a survivor in his statutory declaration outlines that on 7 June 1971 he was summonsed to appear before Judge Rapke as a witness. He states:

> "I was dressed in uniform and was escorted to chambers by a Lieutenant. I remember this day vividly. I was extremely scared. I was only 17 years old...
>
> I was considered as "whistle blower" and was not received with a warm welcome.
>
> I felt extremely pressured. The Lieutenant who accompanied me to the interview was made to come into the inquiry... I knew that anything I said...would get straight back to the Navy through the Lieutenant... [That] I would be punished for being a whistle blower or giving the Navy a bad name.
>
> From the moment I stepped before him Rapke was dismissive. He did not care what I had to say. It seemed to me that he had already made up his mind. He was interrogating me and I felt like he didn't believe a word I was telling him. I don't even think he was really listening to me." [9]

3.6. In his final report, Judge Rapke advised the Minister:

> "In the light of the large body of evidence which I accept of bullying and violence, it is necessary to stress that LEEUWIN has been the scene for unorganised and repetitive acts of bullying, violence, degradation and petty crime during most of the years of its existence. 1970 was the peak year as my statistical survey hereafter will show. The condemnation which you gave expression to is in my opinion well-justified and the warnings of the action to be taken were necessary. The disgraceful outbursts of rabid behaviour are pernicious in their deep effect on the young sailor at an early and impressionable time in his naval career. The physical and mental damage to the victims was and is deplorable. The intimidatory effect of potential victims who escaped physical violence by "going along with" the bullies was upsetting, and may have led these types to join even victims in their senior days in copying the antics of their former

[7] ibid at p. [2].
[8] Rapke, supra n.6 at p. [108].
[9] Complainant JW, 'Statutory Declaration' (Shine Lawyers, October 2013).

> seniors and reviving the will to do surreptitious mischief when they reached the seniority to participate. Youngsters are great copiers. Fashions and tones are set and to eradicate them requires more character, strength and independence of thought and action than the average youth possesses... The losses by discharge are greater than normal because of bullying etc. and in some cases the formal reason for discharge reflects on the J.R. discharged when the fault is not his creation."[10]

3.7. On 28 October 1971, when Dr Mackay (the then Minister) was questioned in Parliament about Judge Rapke's findings, he quoted the following extract from the report:

> "Organised initiation ceremonies, a formal pattern of bastardisation, or any form of patterned violence or misbehaviour have never been a part of the programme, official or otherwise, at Leeuwin. The strict answer to the 2 questions which are contained in my terms of reference should therefore be no." [11]

3.8. A full copy of the Rapke Report has never been released. According to the then Minister, it *'contained the names of children and events and times and places which in my view should not be made public'*.[12] Only a copy with significant redactions claimed under section 33(1)(g) of the *Archives Act* 1983 (Cth) to prevent unreasonable disclosure of information relating to the personal affairs of a person has been released. The redactions include full paragraphs and nowhere is there any reference to the sexual assaults and rapes committed upon JRs. From what is now known, it may reasonably be concluded that details of sexual abuse were included in the redactions. Curiously, Rapke outlines that *'degrading behaviour did occur at odd times'*[13] at Leeuwin stating that *'these perpetrators were just dirty schoolboys – neither they nor their victims [homosexual]'*. [14] He diminished the seriousness of sexual assaults committed on boys stating *'Such crudities as I heard of following a pattern well known to any pedagogue or person in charge of teenage schoolboys'*. [15] He concluded that *'My view is, ...homosexual behaviour in the Navy at Leeuwin... is negligible'*. [16]

3.9. The Importance of the Rapke Report cannot be underestimated. The Report placed the ADF and the Government on notice that recruits had been and were being abused at HMAS Leeuwin. It is submitted that from this time on, since 1971, the ADF, the Government and their legal advisors fall into the same category as

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[10] Rapke, supra n.6 at p. [74].
[11] Adams, supra n.1 at p. [91] (citing) House of Representatives Hansard, Volume II of R. 73, 74 & 75, 17 Aug-9 Dec 1971 at pp. [2674-2681].
[12] 'Royal Australian Navy News' volume 14, Number 10 (14 may 1971) at p. [1]
[13] Rapke, supra n.6 at p. [19].
[14] ibid.
[15] ibid.
[16] ibid.

institutions, where knowledge of the abuse existed but where the Institution fails to put in place preventative measures and support for the victims.

4. The Legal Strategy that the Australian Government Used to Prevent Child Abuse Survivors Accessing Pension Entitlements and Compensation

4.1. Many of the survivors at HMAS Leeuwin suffer mental illness and substance abuse. As a result, survivors of HMAS Leeuwin have made applications under the Military Rehabilitation and Compensation Scheme that is administered by the Department of Veterans' Affairs for entitlements to pension and medical benefits.

4.2. It will be appreciated that the majority of survivors of sexual abuse do not report the abuse. Indeed, in the writer's experience in dealing with victims of sexual abuse, invariably, it is not until later in life that a link is made between the abuse and the mental illness.

4.3. The Department of Veterans' Affairs' 'policy' (the word is used loosely as the writer is only able to rely upon anecdotal evidence and does not have access to documents) when dealing with these Applications was to reject the claim firstly if a complaint had not been made at the time that the alleged assault had occurred and secondly if there were no Defence medical records in relation to the alleged abuse.

4.4. Attached and marked with the letter "A" is the affidavit of Mr Barry Heffernan, who is a Pension and Welfare Advocate with the William Kibby VC Veterans Shed. Mr Heffernan has dealt with more than 150 survivors of abuse during their employment with the Australian Defence Force. About a third of these survivors were minors at the time the abuse occurred. Mr Heffernan has been advised by the Department of Veterans' Affairs representatives that any claims relating to sexual abuse would be rejected if;

(a) it was not reported at the time the assault occurred; and/or

(b) there is no record of the abuse in the medical records

4.5. Mr Heffernan was advised by DVA representatives that this has always been the "policy of the DVA".

4.6. Mr Heffernan also refers to the case of Mr [redacted] who was subjected to the most horrendous form of abuse when he was a minor at HMAS Leeuwin. When Mr Heffernan lodged Mr [redacted] claim in or about 2009 he was advised that it would be rejected as Mr [redacted] had not reported it, nor was it documented in his military medical records. This is despite a plethora of medical evidence after he was discharged in relation to the abuse and his mental illness as a result.

4.7. It should be noted that in Mr [redacted] case, the DVA representative simply refused to accept the claim form as it had not been reported. This meant that there was

no record kept of the attendance and but for Mr Heffernan's diligence we would be none the wiser.

4.8. This response to an allegation of child sexual abuse is alarming. The question has to be asked, who gave the direction for this approach to be taken in relation to claims involving alleged child abuse. At best, the approach taken was for ease of administration; at worst, it was designed to deny survivors access to pension entitlements and compensation.

4.9 Whatever the reason behind the approach, it effectively prevented survivors pursuing their entitlements. Further, it also meant that if they approached RSL and pension advocates, they were told of the DVA attitude and, as a result, were dissuaded from pursuing it further.

4.10 It would seem that in the majority of cases the DVA's approach prevented claims being lodged. Fortunately, there were a number of courageous Applicants that chose to challenge the decision, which we shall now explore.

4.11 The Matter of Frazer

4.11.1 In *Frazer,* the Applicant sought compensation for psychological injury sustained whilst a JR (aged 16) at Leeuwin in 1967. The Applicant alleged his injuries were the result of:

> "...a culture, of "bastardisation" or malicious brutality [that] had become entrenched whereby the more senior recruits would coerce and physically assault members of the more recently arrived intakes."[17]

4.11.2 The Applicant alleged the abuse included sexual assaults, whereby he was stripped of his clothing and boot polish was applied to his genitals.[18] *'He was subsequently paraded before other recruits with the aim of his humiliation'*.[19] According to the Applicant, this common practice was known as "Nuggetting".

4.11.3 To establish the existence of such culture at Leeuwin, the Applicant sought a copy of the Rapke Report from the RAN. During the proceedings, the Commonwealth Attorney General intervened to deny the Applicant access to the report. Solicitors for the Applicant were eventually successful in obtaining a redacted copy of the report.[20] The Attorney General's Department then unsuccessfully attempted to deny a précis of the redacted report being admitted into evidence.[21] The accuracy of the précis was not in issue. Of note, Wright DP stated that he had "reservations" about the Rapke Report and the Judge's views on several issues,

[17] *Frazer and Military Rehabilitation and Compensation Commission* [2004] AATA 1403 at para [2].
[18] ibid at para [15].
[19] ibid.
[20] *Frazer and Military Rehabilitation and Compensation Commission* [2004] AATA 731 at para [4].
[21] ibid at paras [10-12].

but, noted that vicarious liability was not an issue in the proceedings.[22] Wright DP, held:

> "At best the précis of evidence tended to establish that the culture of bastardisation portrayed by these witnesses had been a feature of recruit training at Leeuwin over a number of years... However the culture complained of was sufficiently well established for certain unacceptable practices to have been followed by successive intakes."[23]

4.11.4 It is submitted that the attempts to deny the applicant, Frazer, access to its content can be likened to the concealment of child abuse records by religious institutions. Of further concern is that although the Attorney General and the ADF were well aware of the abhorrent abuse, detailed by the applicant and witnesses, they unsuccessfully attempted to destroy his credit.

4.11.5 In finding for the applicant, Wright DP made the following comments concerning the testimony of the applicant and other former JRs:

> "The evidence generally leaves me in no doubt that there was a culture of "bullying, harassment, intimidation, bastardisation, victimisation and violence" at Leeuwin ... and that the applicant was frequently upon the receiving end of such disgraceful conduct. It is also a clear inference to be drawn from the evidence that such activity was either effectively condoned by the officers in control of the facility, or that no effective steps were taken to wipe out or minimise these practices, at least while the applicant was in residence at Leeuwin....
>
> I am satisfied he was nuggetted on at least 2 separate occasions and that he was required to run several gauntlets. These were not, as suggested, simple initiation rites for new chums. They were opportunities for sadistic violence by a small but vicious group of senior recruits.
>
> I think it may have been seen by senior officers as less pervasive and serious than it was, and I am also suspect that such conduct was viewed by them as a not wholly undesirable practice which "toughened up" the recruits..."[24]

4.11.6 The Commission will appreciate just how hard-fought this matter was. On 24 September 2001, Mr Frazer's application for compensation was initially rejected by Veterans' Affairs. On 4 March 2002, the Military Compensation and Review

[22] Ibid at para [13].
[23] *Frazer*, supra n.17 at para [10].
[24] Ibid at paras [17-21].

Service affirmed that decision. Eventually, after 3 years and two hearings in the AAT, the Veterans' Affairs decision to deny him compensation was overturned.

4.11.7 It would be of interest to the Commission as to whom within the Australian Government was instructing the solicitor and in turn what legal advice they were relying on. Bearing in mind that the Australian Government is at all times required by statute to act as Model Litigant,[25] this obligation, amongst others, stipulates the Commonwealth should not put claimants to proof on matters it knows to be true and not to rely on technical defences. The duty to act as a Model Litigant goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Put bluntly, the Government and its legal advisors had a higher duty than religious or private organisations and accordingly should be held to higher account.

4.11.8 After the *Frazer* decision the Government was again on notice about the abuse. It had a chance to proactively address the abuse and to support the survivors that they knew existed. *Frazer* was a well published decision and the Government were well aware of the large number of other survivors. Attached and marked with the letter "B" is a copy of a media article, "Former sailor wins abuse compensation", dated 24 December 2004.

4.11.9 A reasonable decision maker would have thought that this would be a pertinent time to address all other survivors. Certainly as a Model Litigant you would expect the Commonwealth would change its approach and would not put applicants to proof in relation to the abuse that occurred at HMAS Leeuwin. Unfortunately this was not to be.

4.12 <u>The Matter of Farnaby</u>

4.12.1 In 2007 a claim was made by Farnaby for benefits alleging abuse at HMAS Leeuwin. Again the matter was hard-fought. It included unsuccessful interlocutory proceedings where the Australian Government argued that proceedings before the AAT did not attract common law privilege regarding *'communications between a lawyer and client or third party for the dominant purpose of providing legal services in connection with pending or anticipated proceedings'*.[26] In the subsequent hearing the Australian Government argued that:

a) Farnaby, without reasonable cause, failed to report his injury/disease as soon as practicable or within six months after he first became aware of it as required under governing legislation;[27]

b) The respondent was prejudiced by the delay in reporting.[28]

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[25] See, Legal Services Directions 2005 at s. [4.2] and Appendix B.
[26] *Farnaby and Military Rehabilitation and Compensation Commission* [2007] AATA 1792 (21 September 2007) at para [8].
[27] *Farnaby and Military Rehabilitation and Compensation Commission* [2008] AATA 603 (11 July 2008) at paras [15].

4.12.2 The Commonwealth was unsuccessful on these grounds however the Tribunal found that the applicant's mental illness was not attributable to the sexual abuse that occurred during his time at HMAS Leeuwin.

4.12.3 Significantly, *Farnaby* was mentioned in the DLA Piper Review. The Report states:

> "In *Farnaby and MRCC* the applicant, although abused in 1968/1969, did not lodge a claim for compensation until 2002. The Tribunal held that the applicant's failure to promptly report the incidents of physical and sexual abuse while at HMAS Leeuwin were explained to the Tribunal's satisfaction in the evidence it had heard. One important factor was that the prevailing culture at HMAS Leeuwin clearly discouraged the reporting of mistreatment such as the applicant was subjected to. The Tribunal also stated that there are well recognised and complex reasons for a young person not reporting sexual abuse."[29]

4.12.4 Further, the Review also acknowledges that it is widely accepted that in many cases where an individual has suffered a form of sexual abuse that they may not report the incident promptly and that this is particularly well known in respect of survivors of abuse from the ADF due to the general culture of discouraging *'...both victims and witnesses of abuse from reporting at the time'*.[30] Surprisingly the Review did not acknowledge that it was the ADF that was seeking to rely upon the failure to report to deny entitlements to survivors.

4.12.5 In both *Frazer* and *Farnaby* the Australian Government solicitor was retained. What these two cases reflect is a legal strategy designed to prevent successful claims arising from the abuse that occurred at Leeuwin. In both cases they put the claimants through the stress, anguish and significant legal expense proving that the abuse occurred.

5. The Findings of the DLA Piper Review and the Interim Reports of the Defence Abuse Response Taskforce

5.1 The sexual abuse and other abuse of boys at Leeuwin is acknowledged in the 'Report of the Review of allegations of sexual and other abuse in Defence' compiled by law firm DLA Piper (DLA Piper Report).[31] The Review stopped taking complaints on 30 September 2011.[32] The DLA Piper's Report outlined:

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[28] ibid at para [23].
[29] Gary Rumble, Melanie McKean & Dennis Pearce (DLA Piper) 'Report of the Review of allegations of sexual and other abuse in Defence' (October 2011) Supplement to Chapter 7 at p. [71]
[30] ibid.
[31] See, Gary Rumble, Melanie McKean & Dennis Pearce (DLA Piper) 'Report of the Review of allegations of sexual and other abuse in Defence' (October 2011) at p. [XXVII], and chs 4-5.
[32] ibid at p. [6].

"On the material before it, including the complaints that it received, the Review concluded in relation to boys:[33]

- During the years from the 1950s through to the early 1980s, the ADF and successive Australian Governments failed to put in place adequate protections to take into account the special needs and vulnerability of boys of 13, 14, 15 and 16 years of age to protect them from other boys and from adults in the ADF and to protect them from being drawn into participating in inflicting similar abuse on other children.

- It is certain that many boys were subjected to serious sexual and physical assault and other serious abuse while they were in the ADF from the 1950s through to the 1970s—and possibly into the 1980s.

- Many of the boys who suffered such abuse later participated in inflicting similar abuse on other children in the ADF.

- Many of the boys who endured and/or participated in inflicting such abuse may have suffered, or be at risk of suffering, mental health, alcohol and drug problems and associated physical health problems affecting not only them but their families.

5.2 The DLA Piper Review considered a Royal Commission, Judicial Inquiry, or Parliamentary Inquiry *'to be too formal and cumbersome for the task of identifying persons who might be deserving of reparation'*.[34] Instead, it recommended:

> "...an external review body is best suited to continuing the investigations commenced by this Review because it is independent of Defence, it can proceed quickly and informally and it can follow on the experience gained by this Review."[35]

5.3 In contrast, the terms of reference of the Royal Commission into Institutional Responses to Child Sexual Abuse acknowledge:

> "...it is important that those sexually abused as a child in an Australian institution can share their experiences to assist with healing and to inform the development of strategies and reforms..."[36]

5.4 In November 2012 in response to the DLA Piper Report the Australian Government established the Defence Abuse Response Taskforce (DART). The systemic abuse at

[33] ibid at p. [XXXVIII].
[34] ibid at p. [XXXIV].
[35] ibid at p. [168].
[36] ibid.

HMAS Leeuwin has also been corroborated within ministerial reports by DART.[37] The sexual abuse inflicted ranges from sexual degradation to sodomy.[38] As of the cut-off date for receiving complaints, 30 November 2013, DART received 227 individual complaints alleging abuse at HMAS Leeuwin.[39] DART's 'Fourth Interim Report to the Minister and Attorney General', dated 12 December 2013, outlines:

> "Of these complaints, to date approximately 120 have been assessed as including one or more plausible allegations of abuse of Junior Recruits at HMAS Leeuwin, all of whom were under the age of 18 years at the time."[40]

5.5 In its first interim report DART outlined:

> "Based on an analysis of the material currently available to it about the events which are alleged to have taken place at HMAS Leeuwin in the 1960s and 1970s, the Taskforce has noted that:
>
> - There is a consistency between material available on the public record regarding events at HMAS Leeuwin in the 1960s and 1970s and the substance of the individual complaints made to the Taskforce;
>
> - It appears that bullying and violence of a widespread and serious nature occurred at HMAS Leeuwin during the 1960s and 1970s;
>
> - Much of the alleged bullying and violence appears to have been unreported;
>
> - Abuse alleged to have occurred at HMAS Leeuwin during this time period included:
>
>   - Abuse alleged to have been perpetrated by peers, including numerous allegations of physical assault and frequent allegations of sexual assault;
>
>   - Abuse alleged to have been perpetrated by staff, including some allegations of serious sexual assault and several allegations of physical assault;
>
>   - Allegations that some training practices were carried out in a manner that was perceived as abusive, including for example, requiring recruits to run holding rifles over their heads, or to

[37] See, The Hon Len Roberts-Smith and Defence Abuse Response Taskforce, 'Fourth Interim Report to the Attorney-General And Minister for Defence (12 December 2013) at p. [24].
[38] See supra n.3 at chs 4-5.
[39] See, ibid at p. [24].
[40] ibid.

'bunny hop' while holding rifles over their heads for long periods of time, beyond any reasonable training purposes; and

- Some allegations of sexual assault perpetrated by 'sponsors', who accommodated recruits in family homes on weekends.

- Many of those who allege that they suffered abuse at HMAS Leeuwin during this time period also describe significant detrimental long-term impacts such as Post-Traumatic Stress Disorder or serious depression, which they attribute to their experiences at HMAS Leeuwin."[41]

5.6 Relative to the Royal Commission into Institutional Responses to Child Sexual Abuse is the following conclusion in DART's third Interim Report:

> "It appears that for significant periods of time in HMAS Leeuwin's operation, staff did not take appropriate steps to stop abuse from occurring, to respond to it appropriately or to prevent further abuse from occurring.
>
> Many complainants have reported that they did not make formal reports of the abuse they experienced because of threats, or a perceived risk, of violence. Where abuse was reported, a small number of cases appear to have been appropriately managed. However, in many cases reports of abuse appear to have been ignored or staff appear to have dissuaded Junior Recruits from reporting."[42]

5.7 This is corroborated in detailed statutory declarations provided to Shine Lawyers independently by twenty-two HMAS Leeuwin survivors. It is clear that the abuse was systemic and arose out of a culture of bastardisation and silence. Commonly held was a fear of retribution should survivors report the abuse or that they would be accused of being homosexual. Homosexuality was not tolerated by the ADF at the time.

5.8 The general apprehension of reporting abuse was compounded by RAN's dismissal of complaints. As an example, in one survivor's statutory declaration, provided to Shine Lawyers, he swears he was bashed and sodomised by the same senior recruit on three separate occasions when aged 15. Upon reporting the first rape to his Lieutenant, he was told "Grow up. You're in the Navy now...move on". After the second rape, he ran to his Lieutenant's residence crying for assistance only to be told he was out of bounds and to return to his barracks. He absconded from

[41] The Hon Len Roberts-Smith and Defence Abuse Response Taskforce, 'First Interim Report to the Attorney-General And Minister for Defence (8 March 2013) at p. [22].
[42] The Hon Len Roberts-Smith and Defence Abuse Response Taskforce, 'Third Interim Report to the Attorney-General And Minister for Defence (19 September 2013) at p. [24].

the base to escape the abuse each time. After the third occasion, he was discharged as a result of three counts of Absence Without Leave (AWOL). He states he had also told the base chaplain but no one did anything to help.

6. The Independence of the DLA Piper Review

6.1 Following the 'Skype Incident' at ADFA, the Minister for Defence, Mr Stephen Smith, received hundreds of communications concerning abuse in the ADF.[43] As a result, the Minister established an 'independent' Review to investigate the reported abuse in April 2011.[44] The subject matter for the Review's consideration was *'sexual and other abuse—such as bullying, harassment or intimidation—(and related matters) in Defence'*.[45] The Law firm, DLA Phillips Fox, was appointed to conduct the Review.[46] Soon after the commencement of the Inquiry, DLA Phillips Fox was taken over by DLA Piper Australia.[47]

6.2 At the outset, it must be acknowledged that the DLA Piper Review provides a detailed study of the abuse suffered by many JRs in the ADF and certainly raises the profile of what has occurred in the past and a need for a response to be made in relation to those who suffered many forms of abuse during their time as JRs in the ADF.[48]

6.3 Interestingly, apart from the reference in paragraph 4.12.3, there is no other mention of any previous court proceedings where the ADF defended applications where entitlements had been sought as a result of abuse suffered during employment. The report highlights that the report writers relied upon the complaints that they received but much of the information particularly concerning Leeuwin had already been in the ADF's possession since 1971 and more recently in 2004 with the *Frazer* decision.

6.4 Of concern is that DLA Phillips Fox had been retained by the ADF since at least 2004[49] to defend injury compensation claims which continued after the DLA Piper takeover and as a result they should have been aware of the extent of claims that had been brought against the ADF by survivors of abuse. A query has to be made as to why the law firm DLA Piper did not disclose all documents that it had in its possession. This also calls into question as to whether DLA Piper placed itself in a position of conflict that impacted upon the integrity of the Review. The writer suspects that it will be argued by the Commonwealth that this is a "perceived conflict" rather than an "actual conflict".

[43] Rumble, supra n.31 at p. [XXI].
[44] ibid.
[45] Ibid at p. [2].
[46] Rumble, supra n.43.
[47] ibid.
[48] See, ibid at ch. 5.
[49] See, *Russell and Military Rehabilitation and Compensation Commission* [2004] AATA 1367.

6.5 To highlight this issue I refer to the matter of Mr [redacted] By way of background, [redacted] brought a claim for mental illness that he suffered as a result of abuse when he was 16 years of age and posted to HMAS Duchess. He brought his claim in January 2002. Due to financial constraints, [redacted] was self-represented. The ADF appointed DLA Phillips Fox to defend the matter. A copy of the submissions by DLA Phillips Fox is attached and marked with the letter "C". The date of this document is 22 February 2010 some 14 months before DLA Piper's appointment to conduct the independent inquiry. Again the Government relies on an administrative Defence to defend the claim and in particular:

> "The facts outlined above highlight some significant discrepancies in the applicant's version of events particularly in relation to the contemporaneous records. In the circumstances, given the amount of time that has elapsed between the incidents complained of and the date of the applicant's claim, the respondent contends that the provisions of section 53 and section 54 of the Compensation (Commonwealth Government Employees) Act 1971 have not been complied with [relating to reporting an injury when first aware] and there is no reasonable excuse for the applicant's delay in notifying the relevant authority earlier.
>
> The respondent contends that the 35 year time gap is so significant that the Commonwealth is constructively prejudiced by the delay such that it is not reasonably possible to investigate and obtain information and evidence about the applicant's claims"[50]

6.6 I am instructed by [redacted] that he chose to discontinue his claim after a telephone conversation with the DLA Phillips Fox lawyer who had carriage of the matter. The lawyer advised him that if he lost he would be liable for the Commonwealth's costs. Interestingly, in the AAT, each party bears their own costs. If [redacted]'s instructions are accepted then the Commonwealth, through its lawyers, have taken advantage of a claimant who lacked resources to litigate a legitimate claim.

6.7 We are fortunate that [redacted] happened to retain our firm however we would submit the only way to gain a true appreciation of the extent of claims that were denied is through the records of the Government's lawyers.

7. The Role of the Defence Abuse Response Taskforce ("DART")

7.1 It may be argued by the Australian Government that the issues raised in this submission are more appropriately dealt with by DART.

[50] DLA Phillips Fox, 'Respondents Statement of Facts, Issues and Contentions (22 February 2010) at [38].

7.2 The writer acknowledges the significant contributions that his Honour Len Robert Smith[51] and his team have made in dealing with the survivors of abuse. Based on the writer's personal experience, the genuine understanding by DART has helped start to rebuild survivors' lives. The Leeuwin survivors are, at last, getting recognition for the horrendous conditions that existed and allowed the abuse to occur.

7.3 However, DART was not set up to address the failings of the ADF that allowed the child abuse to occur nor as to how the survivors have been dealt with subsequently by the ADF. Significantly, Its terms of reference include:

> (i) "assess the findings of the DLA Piper review and the material gathered by that review, and any additional material available to the Taskforce concerning complaints of sexual and other forms of abuse by Defence personnel alleged to have occurred prior to 11 April 2011,the date of the announcement of the DLA Piper Review; ..."[52]

7.4 Article (iii) requires DART to *'determine, in close consultation with those who have made complaints, appropriate actions in response to those complaints'*.[53] Possible outcomes include:

- a referral to counselling under the nationwide Defence Abuse Counselling Program;
- a Reparation Payment of up to $50,000 under the Defence Abuse Reparation Scheme;
- referral of appropriate matters to police or military justice authorities for formal criminal investigation and assessment for prosecution;
- referral to the Chief of the Defence Force for administrative sanction or management action; and
- restorative engagement, possibly including apologies from senior Defence officers under the Defence Abuse Restorative Engagement Program.[54]

7.5 Nowhere in DART's terms of reference are there any specific provisions addressing institutional response to sexual and other abuse of children. Its terms fall well short of the Royal Commission into Institutional Responses to Child Sexual Abuse's reference that:

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[51] Australian Government, Defence Abuse Response Taskforce, 'About us' (2012) <http://www.defenceabusetaskforce.gov.au/Aboutus/Pages/default.aspx>.
[52] ibid.
[53] ibid.
[54] Roberts-Smith, supra n.37 at p. [1].

> "... it is important that claims of systemic failures by institutions in relation to allegations and incidents of child sexual abuse and any related unlawful or improper treatment of children be fully explored, and that best practice is identified so that it may be followed in the future both to protect against the occurrence of child sexual abuse and to respond appropriately when any allegations and incidents of child sexual abuse occur, including holding perpetrators to account and providing justice to victims."[55]

7.6 Instead, as stated in DART's fourth interim report:

> "The scope of the work of the Taskforce is guided by the Government Response to the DLA Piper Recommendations... The Taskforce is a unique response to complaints of sexual and other abuse in an organisation or institution. Unlike a Royal Commission, the Taskforce's primary focus is to assess and respond to individual complaints of abuse."[56]

7.7 This is no criticism of his Honour Len Roberts Smith and his team. Essentially, DART was never vested with the necessary powers or resources to conduct a full and meaningful review into the Government's response to child abuse, namely, powers under the *Royal Commissions Act 1902* (Cth). At best, it may afford victims an "apology", "counselling" and/or a modest capped sum of "reparations" akin to the Catholic Church's "Towards Healing" scheme.

8. What the Australian Government can do to Address, or Alleviate, the Impact on the Survivors of HMAS Leeuwin to Ensure Justice.

8.1 Attached and marked with the letter "D" is a copy of Shine Lawyers submission to the Standing Committee on Foreign Affairs and Trade in response to the Senate's "Enquiry into DLA Piper's Report of the Review of Allegations of Sexual and Other Abuses in Defence, and the Government's Response to the Report". The submission provides a proposed structure to determine compensation for Abuse Victims.

8.2 What has occurred to date is that the ADF has been able to defend claims based on Statutory Defences in relation to time limitations and other procedural issues. It is acknowledged that it is the ADF's right to put an Applicant's case to proof. However, what has prevented claimants complying with legislation is the systemic failures that firstly allowed the abuse to occur and secondly prevented timely reporting. This is grossly unfair. To address this issue the ADF should waive any entitlement to rely upon a statutory time limitation defence.

8.3 In the case of survivors of abuse at HMAS Leeuwin, in addition to any compensation payments, the manner in which their claims are being handled by

[55] Royal Commission Into Institutional Responses to Child Sexual Abuse, Parliament of Australia, 'Terms of Reference, <http://www.childabuseroyalcommission.gov.au/our-work/terms-of-reference/>.
[56] Roberts-Smith, supra n.37 at p. [4].

the Department of Veterans' Affairs needs to be addressed. Presently, despite the plausibility test that DART is applying when considering statutory declarations of abuse victims, the findings of DART are deemed irrelevant for the purpose of a Military Compensation Scheme Application (MCRS) application.

8.4 In relation to child abuse survivors it is submitted that they are a special category and can be distinguished from all other ADF abuse claims. Accordingly, in relation to their Applications under MCRS there should be a Directive that there will be a relaxation of the procedure to allow survivors to receive a pension and medical support. It may be that if there was a relaxation of the rules, in this regard, it would limit the need for survivors to be seeking civil relief in all but the most severe of cases.

9. Conclusion

9.1 The distinguishing feature about the sexual abuse at HMAS Leeuwin from other ADF abuse claims is that all the survivors were children (boys 15 and 16 years of age).

9.2 The sexual abuse and other abuse perpetrated was systemic.

9.3 The Australian Defence Force was an institution within the Royal Commission's terms of reference.

9.4 It is clear that an overarching culture of bastardisation suppressed victims from reporting the abuse. This was compounded by a realisation that no appropriate action would follow should the victim complain. The ADF was, at best, wilfully blind to its occurrence.

9.5 When the abuse was reported to the media in 1971, the Government relied on semantics in parliament to dismiss public and media concerns.

9.6 There have been applications pursuant to the Military Compensation and Rehabilitation Scheme made by survivors for entitlements through DVA, however claims have been rejected on the basis that the abuse was not reported at the time of the incident or there was no medical records.

9.7 The DLA Piper Review failed to disclose the level of knowledge that the ADF had of claims, legal advice or DVA policies regarding the rejection of complaints.

9.8 The Government and the ADF to date have circumvented any inquiry under the principal term of reference of the Royal Commission into Institutional Responses to Child Sexual Abuse, namely, into '*what institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future*'.[57]

[57] Royal Commission, supra n.55

9.9 Religious and other institutions have been held to account for their response to allegations of abuse of minors. The ADF should likewise be held to account but to a higher standard to reflect that the Government should at all times act as a model litigant.

9.10 The ADF should waive any statutory time limitation defence to allow survivors to pursue civil compensation should they so choose.

9.11 The Department of Veterans affairs should provide a Directive to its staff that there will be a relaxation of procedures to allow child abuse survivors to receive a pension and medical support.

Signed: _____

Adair Angus Donaldson, Partner, Shine Lawyers

Date: 31st March 2014