

**SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES
COMMITTEE: INQUIRY RELATING TO ALLEGATIONS OF SEXUAL
AND OTHER ABUSE IN DEFENCE**

DR GARY A RUMBLE

13 October 2014

**RESPONSE TO STATEMENTS MADE BY MR ROBERTS-SMITH AT
HEARING ON 26 SEPTEMBER 2014**

I am grateful for the opportunities which the Committee has already given me to address the concerns which I have. I have lodged detailed written submissions with the Committee and I appeared before the Committee on 13 August 2014 and 26 September 2014.

However, after I had left the table on 26 September 2014, Mr Roberts-Smith appeared before the Committee. During the course of his appearance, Mr Roberts-Smith made a number of references to my submissions to the Committee and to issues raised by my submissions.

I appreciate that the Committee will not want me to revisit all of these issues.

However, I believe one important thing that Mr Roberts-Smith said about the *Royal Commissions Act 1902* was an incorrect statement of law.

Furthermore, what I heard from Mr Roberts-Smith on 26 September 2014 about how the DART is dealing with media, third party and anonymous allegations:

- did not appear in the DART's written submission
- is difficult to reconcile with my own recollection of my discussion with him in October 2013
- is not reflected in any of the seven Interim Reports which the DART has issued; and
- leaves uncertainty about whether such matters will be dealt with substantively two and a half years after we reported on them in the *Report of the Review of allegations of sexual and other abuse in Defence*.

Accordingly, I seek the indulgence of the Committee to receive and consider this Response which addresses these two aspects of statements made by Mr Roberts-Smith's in his 26 September 2014 appearance.

Dr Gary A Rumble

CLOSED HEARINGS UNDER THE *ROYAL COMMISSIONS ACT 1902*

1. In Mr Roberts-Smith's appearance before the Committee on 26 September 2014 the following exchange took place:

(Proof Hansard 26 September 2014 at pages 23-24)

Mr Roberts-Smith: ...

In relation to getting names, getting people identified in a royal commission, I honestly would like Dr Rumble or somebody else to explain—and I am receptive to understanding—how this would practically work. What actual, practical outcome is going to be achieved and how will it be achieved? For example, there seems to be an implicit suggestion that people may be named publicly as alleged abusers in a public hearing in a royal commission. I have considerable doubt as to whether that would occur.

Senator LAMBIE: Is it not true that you can actually have closed hearings in these royal commissions?

Mr Roberts-Smith: It is possible to have closed hearings at the moment in relation to the investigation into child abuse because the Royal Commissions Act was specifically amended to allow that. Those provisions do not apply generally to royal commissions.

2. I will respond to Mr Roberts-Smith's invitation for some comments on how a Royal Commission could practically work. I will provide a copy of my response to this Committee.
3. However, at this point I just wish to draw to the attention of the Committee that I believe:
 - Senator Lambie was correct that Commonwealth Royal Commissions operating under the Commonwealth *Royal Commissions Act 1902* can have closed hearings.
 - If Mr Roberts-Smith's response to Senator Lambie indicated that closed hearings could only occur if there were amendments of the *Royal Commissions Act 1902* to bring in provisions like those which are specific to the Child Abuse Royal Commission, Mr Roberts-Smith was incorrect.
4. It is common for Royal Commission hearings to be open.
5. However, there is no provision in the Commonwealth *Royal Commissions Act* which expressly requires that hearings be held in public. It is my understanding that any Commission operating under the Royal Commissions Act has power to control its procedures and that power includes power to direct that some evidence be taken in closed hearings.
6. The power of a Commission to take evidence in private is confirmed by s6D(5)

This section shall be read as in aid of and not as in derogation of the Commission's general powers to order that any evidence may be taken in private.

7. In its 2009 Discussion Paper 75 *Royal Commissions and Official Inquiries* (page 59) the Australian Law Reform Commission (ALRC) had no doubt that ‘Royal Commissions have a general discretion to determine whether to conduct their hearings in public or in private’ (with a footnote referring to s6D(5)).
8. The Discussion Paper continued – ‘When exercising its discretion a Royal Commission will consider a number of factors, including, for example, whether the risk that a person’s reputation will be unfairly damaged outweighs the public interest in conducting a Royal Commission openly’ (with a footnote reference to the T.Cole – *Final Report of the Royal Commission into the Building and Construction Industry* (2003) Vol 2, 29).
9. In the ALRC Discussion Paper, the ALRC also expressed the view that ‘The *Royal Commissions Act* does not preclude the taking of evidence otherwise than by oath or affirmation’.

Amendments of the *Royal Commissions Act 1902* which are specific to the Child Abuse Royal Commission

10. Mr Roberts-Smith was correct to say that there are amendments of the Royal Commissions Act which are specific to the Child Abuse Royal Commission.
11. These amendments are contained in sections 6OB-6OM. I attach those provisions. Of particular relevance are the following provisions:

6OC Status of private session

- (1) A person who appears at a private session:
 - (a) is not a witness before the Commission; and
 - (b) does not give evidence to the Commission.
- (2) A private session is not a hearing of the Commission.

...

6OJ Inclusion of information in reports and recommendations

Information that relates to a natural person that has been obtained at a private session may be included in a report or recommendation of the Child Sexual Abuse Royal Commission only if:

- (a) the information is also given as evidence to the Commission or under a summons, requirement or notice under section 2; or
- (b) the information is de-identified.

12. As noted above, the ALRC was of the view that ‘the *Royal Commissions Act* does not preclude the taking of evidence otherwise than by oath or affirmation’. It may be that the Child Abuse Royal Commission could have conducted very informal sessions even without the amendments which were brought into the Act which are specific to that Commission.

13. The detailed specific Child Abuse Commission amendments may give victims the re-assurance that they can be heard in private without the pressure of giving 'evidence' and without the risk of being identified.
14. If there were to be a Royal Commission into aspects of abuse in Defence, then it may be appropriate for there to be similar amendments to the Royal Commissions Act for that Commission.
15. If there were to be consideration of making amendments to the Royal Commissions Act, it would be desirable to consult with the Child Abuse Commissioners to see if they have any comments on the working of the provisions and to see if they can suggest any improvements of the provisions.
16. However, the fact that there are not yet any specific amendments in the Royal Commissions Act specific to a Defence Abuse Royal Commission should not be relied on as a reason not to support there being such a Royal Commission because:
 - It is clear that the general provisions of the Act allow for the taking of evidence in closed hearings and already allow for informality in proceedings.
 - A Royal Commission could still be conducted fairly, effectively and with sensitivity to the suffering and fragility of abuse victims within the framework of the existing provisions of the Royal Commissions Act.
 - No doubt if this Committee of the Senate or Mr Roberts-Smith were to recommend that there be a Royal Commission into aspects of abuse in Defence and that there be amendments to the Royal Commissions Act similar to those for the Child Abuse Royal Commission that would carry weight with the Government and – for amendments to the Royal Commissions Act – the Parliament.

MEDIA, THIRD PARTY AND ANONYMOUS ALLEGATIONS

17. In Part 1 of my written submissions to the Committee I outlined my concerns about what I understood to be Mr Roberts-Smith's decision – confirmed to me in a meeting in October last year – that the DART would not consider media or other third party allegations unless the alleged victim had opted into the DART processes as a complainant.
18. The inference was that anonymous allegations on which we had reported would not be considered by the DART either.
19. I put my understanding of Mr Roberts-Smith's position back to him in writing in October 2013. Later I informed him that I would be taking my concerns to the Minister and again requested his response to the letter. He did not reply.
20. As Mr Roberts-Smith has been aware, because of my concerns based on my understanding from that meeting I have taken up a lot of time of the Minister and this Committee. If I had misunderstood Mr Roberts-Smith's position he could have corrected my misunderstanding a long time ago.
21. There has not been anything in any of the seven DART Interim Reports – including the 7th DART Interim Report published in September 2014 - to indicate that Mr Roberts-Smith had shifted from the position which I understood him to have confirmed to me in our meeting in October 2013.
22. In particular, there is nothing in the DART Interim Reports to indicate that the DART has been, or would be, taking any action on allegations – including media, third party and anonymous allegations – where the alleged victim has not come into the DART processes as a complainant.
23. Accordingly I was very surprised to hear the following exchanges at the Committee hearing on 26 September 2014:

(Proof Hansard 26 September 2014, page 27)

Senator LAMBIE: According to Dr Rumble, in written submissions to the committee, you were asked by him why you were refusing to follow the former defence minister's instructions to assess the findings of the DLA Piper review with no restrictions. Can you explain to the committee the ramifications of DART failing to look at the whole of the DLA Piper review, including volume 2, of anonymous complaint and media reports?

Mr Roberts-Smith: No, I cannot because I do not accept the premise. That is just not correct. As I said to you earlier, volume 2 is in fact the very basis of the DLA Piper material which we have been working on since the inception of the task force.

24. And later at page 31:

Senator XENOPHON: ... My final question is that in a letter from the then minister, Stephen Smith to Dr Rumble, dated 8 March 2013—which I understand you have seen—the minister states, 'In the course of its work the task force will consider all of the specific allegations reported on in volume 2, including the allegations made

in the Four Corners program 'Culture of Silence' from June 2011.' Has the task force considered all of the allegations from this program?

Mr Roberts-Smith: Yes.

Senator XENOPHON: Are you able to outline the outcome of that or is that something that would be a subject of your November report?

Mr Roberts-Smith: Hopefully, it may be the subject of something prior to that. But I can say that it is what I might describe as an 'active operational matter' at the moment which it would be inappropriate for me to make any public comment about.

25. When I met with Mr Roberts-Smith in October 2013, he expressly confirmed that the DART was not considering the 2011 Four Corners '*Culture of Silence*' allegations relating to 'John the Barrister' because that alleged victim had not opted into the DART processes.
26. It is possible that after I met with Mr Roberts-Smith in October 2014, that 'John the Barrister' had opted into the DART processes.
27. However, it is particularly difficult to reconcile what Mr Roberts-Smith said in his short answer to Senator Lambie at the hearing on 26 September 2014 with the position Mr Roberts-Smith had confirmed to me in a meeting with him in October 2013 last year.
 - It is very unlikely that all of the alleged victims referred to in the media allegations, third party and anonymous allegations on which we reported came into the DART processes as complainants.
 - It is even more unlikely that all of the alleged victims referred to in media, third party and anonymous allegations on which we reported came into the DART processes as complainants – as Mr Roberts-Smith put it in his answer to Senator Lambie - at '*the inception of the task force*'.
 - There has not been anything in the DART's written submissions to this Committee to indicate that the understanding which I had taken from my October 2013 meeting was incorrect.
 - As noted above, there has not been anything in the DART's seven Interim Reports to indicate that the DART is looking at any allegations unless the alleged victim is a complainant in the DART's processes.
28. It is possible that Mr Roberts-Smith's answer to Senator Lambie meant no more than that all of Volume 2 of our Report – including those parts of it providing our assessments and recommendations on media, third party and anonymous allegations – had been '*looked at*' in the DART processes.
29. This leaves the possibility that – consistently with the position which Mr Roberts-Smith had confirmed to me in October 2013 – having *looked at* a media, third party or anonymous allegation, the DART would then only actually *deal with* the allegation if the alleged victim had opted into the DART's processes as a complainant.

30. Clarification of how media, other third party and anonymous allegations on which we reported in April 2012 – two and a half years ago - have been dealt with is important for community and ADF personnel confidence in Government and ADF commitment to proper responses to issues of abuse and mismanagement of abuse.
31. These are important matters.
32. I recommend that the Committee seek further clarification and explanation from Mr Roberts-Smith to expand on his answer to Senator Lambie in relation to media, other third party and anonymous allegations to explain whether any substantive action has been taken by the DART on these allegations.
33. In particular - noting that there has not been any reference in any of the DART Interim Reports to the DART taking any action on allegations without a complainant who has come into the DART processes - I recommend that the Committee ask Mr Roberts-Smith:
 - to explain whether – apart from ‘looking at’ the parts of Volume 2 of the *Report of the Review of allegations of sexual and other abuse in Defence* (the ‘DLA Piper Report’) which reported on media, other third party and anonymous allegations - has the DART been taking substantive action on such allegations even if the alleged victim has not opted into the DART processes as a complainant; and
 - to explain how the DART has been dealing with allegations from media, third party or anonymous sources without an alleged victim who has opted into the DART processes as a complainant;
 - to explain why did he not respond to my (Dr Rumble’s) correspondence of 29 October 2013.

Dr Gary A Rumble

- **Part 4—Private sessions for the Child Sexual Abuse Royal Commission**
- **Division 1—Definitions**
- **60A Definitions**
- In this Part:
- *Child Sexual Abuse Royal Commission* means the Royal Commission into Institutional Responses to Child Sexual Abuse issued by the Governor-General by Letters Patent on 11 January 2013 (and including any later variations of those Letters Patent).
- *private session* means a private session held under section 6OB.

Division 2—Private sessions

60B Power to hold private sessions

- (1) Any of the following members of the Child Sexual Abuse Royal Commission may hold a private session to obtain information in relation to matters into which the Commission is inquiring:
 - (a) the Chair of the Commission;
 - (b) a member who is authorised in writing by the Chair of the Commission.
- (2) A private session may be held only by one or 2 members referred to in subsection (1).
- (3) Any member of the Commission holding a private session may (subject to the Letters Patent establishing the Commission and Division 3) determine any matters relating to the conduct of the private session, having regard to any directions given by the Chair of the Commission.

60C Status of private session

- (1) A person who appears at a private session:
 - (a) is not a witness before the Commission; and
 - (b) does not give evidence to the Commission.
- (2) A private session is not a hearing of the Commission.
- *Powers of Commission and custody and use of records*
- (3) The following provisions apply as if information, a document, record or other thing obtained by one or 2 members of the Child Sexual Abuse Royal Commission at a private session were produced before, delivered or given to, or otherwise obtained or received by, the Commission:
 - (a) section 6F (power of Commission in relation to documents and other things);
 - (b) section 6P (Commission may communicate information);
 - (c) section 9 (custody and use of records of Royal Commission).
- (4) Section 9 (custody and use of records of Royal Commission) also applies as if a record produced by one or 2 members of the Child Sexual Abuse Royal Commission at a private session were produced by the Commission.
- *Application of Part 4 (offences)*
- (5) Sections 6H (false or misleading evidence), 6I (bribery of witness), 6J (fraud on witness), 6L (preventing witness from attending), 6M (injury to witness) and 6N (dismissal by employers of witness) apply as if:
 - (a) a person who appears, or intends to appear, at a private session were called or summoned, or appeared, as a witness before the Child Sexual Abuse Royal Commission; and
 - (b) any information provided, or that a person intends to provide, at a private session were testimony or evidence given at a hearing before the Commission; and

- (c) any document or other thing that a person produces, or intends to produce, at a private session was produced or would have been produced because the person was required to do so under a summons, requirement or notice under section 2.
- (6) Section 6O (contempt of Royal Commission) applies in relation to a private session as if:
 - (a) the member or members of the Child Sexual Abuse Royal Commission holding the private session were the Commission; and
 - (b) the private session were proceedings of the Commission.
- **6OE Statements made and documents produced etc. at a private session are not admissible in evidence**
 - (1) The following are not admissible in evidence against a natural person in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory:
 - (a) a statement or disclosure made by the person at a private session;
 - (b) the production of a document or other thing by the person at a private session.
 - (2) Subsection (1) does not apply to the admissibility of evidence in proceedings for an offence against this Act.
- **6OF Protection of those who appear, or are authorised to be present, at a private session**
 - (1) Any person who appears, or is authorised to be present, at a private session has the same protection and, in addition to the penalties provided by this Act, is to be subject to the same liabilities in any civil or criminal proceeding, as a witness in any case tried in the High Court.
 - (2) A legal practitioner who appears on behalf of a person at a private session has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

- **Division 3—Privacy of private sessions**

- **6OG Privacy of private sessions**

- A private session must be held in private, and only persons who are authorised by a member of the Child Sexual Abuse Royal Commission holding the private session may be present during the private session.

- **6OH Offence for unauthorised use or disclosure of information given at a private session**

- A person commits an offence if:
 - (a) the person obtains information:
 - (i) at a private session; or
 - (ii) that was given at a private session; and
 - (b) the person makes a record of, uses or discloses the information; and
 - (c) none of the following applies:
 - (i) the record, use or disclosure is for the purposes of performing functions or duties or exercising powers in relation to the Child Sexual Abuse Royal Commission;
 - (ii) the person is authorised to make the record of, or use, disclose or publish, the information in accordance with section 6OJ (inclusion of information in reports and recommendations), 6P (Commission may communicate information) or 9 (custody and use of records of Commission);
 - (iii) the person gave the information at the private session;
 - (iv) the person makes the record of, uses or discloses the information with the consent of the person who gave the information at the private session.
- Penalty: 20 penalty units or imprisonment for 12 months or both.
- Note: For a defence to this offence, see section 6OK.

- **6OJ Inclusion of information in reports and recommendations**

- Information that relates to a natural person that has been obtained at a private session may be included in a report or recommendation of the Child Sexual Abuse Royal Commission only if:
 - (a) the information is also given as evidence to the Commission or under a summons, requirement or notice under section 2; or
 - (b) the information is de-identified.

- **6OK Defence for disclosure to person who provided the information**

- Section 6OH does not apply to a disclosure of information to the person who gave the information at a private session.
- Note: A defendant bears an evidential burden in relation to the matter in this section (see subsection 13.3(3) of the *Criminal Code*).

- **60L No other exceptions under other laws**
- (1) A provision of a law of the Commonwealth, a State or a Territory has no effect to the extent that it would otherwise require or authorise a person to make a record of, use or disclose information obtained at a private session if the record, use or disclosure:
 - (a) would contravene a provision of this Division; or
 - (b) would not be permitted by a provision of this Division.
- (2) Subsection (1) has effect whether the provision concerned is made before or after the commencement of this section.
- **60M Relationship with the *Archives Act 1983***
- (1) For the purposes of the *Archives Act 1983*, a record:
 - (a) that contains information obtained at a private session; or
 - (b) that relates to a private session and identifies a natural person who appeared at a private session;
- is in the open access period on and after 1 January in the year that is 99 years after the calendar year that the record came into existence.
- (2) To avoid doubt, subsection (1) applies in relation to a record even if the record came into existence after the private session.
- (3) Subsection 3(7) and section 56 of the *Archives Act 1983* do not apply to a record referred to in subsection (1).