

## Additional comments by Senator Xenophon

1.1 While I support recommendations 1 to 7 in the committee's report, I cannot support recommendation 8. It is important to set out how successive governments, parliaments, and our Defence Force have, over half a century, abysmally failed - boys and girls, men and women who have suffered horrendous abuse while serving their country. The failure of the committee to call for a Royal Commission into defence abuse is a chasm that cannot be ignored.

1.2 In relation to the *Pathway to Change* strategy released by Defence in March 2012 as to the response to the Culture Reviews, it should be noted that Volume 1 of the DLA Piper Review report<sup>1</sup> appears not have been considered in the formulation of this strategy, notwithstanding that Volume 1 was available at the time. This is a glaring omission.<sup>2</sup>

1.3 Further to 2.51 of the committee's report related to CDF General David Hurley's apology to the victims, it should be noted that the CDF's comments were high-level general statements, and failed to be an adequately powerful statement. The fact that General Hurley had not seen, at the time of the apology, the detailed accounts in Volume 2 of the DLA Piper Review report may explain the lack of force in his apology. General Hurley had not seen Volume 2 because the Government decided that Volume 2 not go to Defence, contrary to DLA Piper's terms of reference.<sup>3</sup> This too is most unsatisfactory.

1.4 In relation to the ADFA 24, I am concerned that the Taskforce has yet to provide a report on this, almost two years since the Taskforce was established. Given the gravity of the issues raised - the alleged rape of 26 female cadets by 24 male cadets - and recognition that there were many more similar incidents in the years preceding 1998, this is simply unacceptable.

1.5 I am also concerned that this drawn out process in respect of the ADFA 24 will discourage victims of abuse from participating in any investigation and may dissuade other victims from coming forward.

1.6 Further on the ADFA 24, I note that the Taskforce in its 7th report (page 26) in September 2014, stated that in October 2013 Mr Roberts-Smith had made recommendations to the CDF to take action in relation to at least 12 still serving members of the ADF, and to consider further action in another 13 cases. These are matters of great national importance, that go to the heart of the integrity of the processes that are meant to protect ADF personnel. The fact the outcomes of those

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1 <http://www.defence.gov.au/pathwaytochange/docs/DLAPiper/Background.asp>

2 Department of Defence, responses to questions on notice from the hearing on 13 August 2014.

3 *Submission 8*, Supplementary 1, Annexure 2.

recommendations are not yet known to the committee is indicative of deep systemic failures within Defence and government.

1.7 In relation to the report on HMAS Leeuwin, I note that although the Taskforce delivered a lengthy 98 page report, the Taskforce did not offer any detailed recommendations to respond to the ongoing aspects of the abuse.

1.8 I would also note that the Taskforce acknowledged that that Defence training establishments like HMAS Leeuwin may still have a high risk of abuse occurring, and flagged there would be recommendations in later reports. However, it is extraordinary that not even basic or preliminary recommendations were included in that report, given such establishments are high risk for abuse of the most vulnerable members of the ADF. The lack of any recommendations on the part of the Taskforce shows an appalling lack of urgency on its part.

1.9 One of the ten recommendations set out by the 2013 Senate committee inquiry was a recommendation that Defence should formally report on each response to all of the systemic issues identified in the DLA Piper Review report.<sup>4</sup> When again asked to provide a response at the 13 August 2014 hearing, the ADF provided a written response which was general, without stating what actual decisions have been made. Frankly, I find this to be offensive to the Senate and the victims of abuse.

1.10 On the topic of whether there was sufficient publicity for the Taskforce, I note that many of the victims of abuse are so socially isolated and marginalised that they would be unlikely to see conventional newspaper advertising of the Taskforce.<sup>5</sup>

1.11 Further I also query whether the Taskforce could have used other forms of media including talkback radio, breakfast TV, and social media to raise the profile of its important work and reach out to victims.

1.12 In addition, the Taskforce appears to have done nothing to inform victims of sexual assault in the ADF, who previously were told that Defence would do nothing with their complaints because of the former flawed DI(G)<sup>6</sup>, that Defence could now consider action.<sup>7</sup>

1.13 On the issue of the rank of ADF personnel participating in the restorative engagement program, I note that Dr Rumble in his evidence raised the legitimate concern that the program only involved senior officers and therefore would not bring

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4 *Report of the DLA Piper Review and the Government's Response*, June 2013, p. xii.

5 Mr Barry Heffernan, *Committee Hansard*, 26 September 2014, p. 8

6 Dr Rumble, *Committee Hansard*, 13 August 2014, p.17. Dr Rumble, responses to questions on notice from hearing 26 September 2014 – Answer to Question 1. DLA Piper Review, *Volume 1*, pp 139-145; DLA Piper Review, *Supplement to Volume 1*, pp 67-70.

7 *Submission 8*, Supplementary 4, p. 35.

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understanding of abuse impacts across the ADF ranks generally.<sup>8</sup> Limiting the restorative engagement program to senior officer limits its capacity to effect cultural change.

1.14 In relation to access to counselling services and other support for victims of abuse in the ADF - the Taskforce Chair's comments beg the broader question of the role of the Department of Veterans Affairs (DVA) in providing ongoing support to victims of abuse.

1.15 In relation to whether Taskforce consideration of media allegations should be dependent on a complainant opting in to the Taskforce process, I am concerned that the narrow construction the Taskforce has taken of its role may mean, for instance, the lack of a public Government response to unsubstantiated allegations of a cover-up which can be republished at any time may discourage other victims from coming forward. The fact that such allegations have been published in the media should have triggered action from the Taskforce - and ultimately the Government - irrespective of the specific consent of a victim. Furthermore, some of the allegations involved allegations of Defence mismanagement which could and should be investigated, reported on and publicly responded to by Defence without any need to involve a victim.

1.16 It is not clear to me why the ADF have not committed to zero incidence of sexual assault and abuse, when employers generally commit to zero incidence of workplace injury.<sup>9</sup>

1.17 I am concerned at the apparent lack of urgency in Defence introducing the new DI(G) to replace the flawed DI(G) dealing with management of allegations of sexual assault. The flawed DI(G) directed that if there was an allegation of sexual assault against an ADF member no administrative or disciplinary action should be taken. Defence had been alerted to the problems with the DI(G) by the DLA Piper Review report of October 2011.<sup>10</sup> Vice Admiral Griggs acknowledged in his appearance before the committee that there had been problems with the DI(G):

I would say it was fair to say that there was a period there where we gave primacy to the investigative process, the formal police investigative process, and there was a reluctance to take administrative action because there was a fear that this was some sort of double-jeopardy thing. Now it

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8 *Submission 8*, Supplementary 4, pp 43-44.

9 Vice Admiral Ray Griggs, *Committee Hansard*, 13 August 2014, p.60.

10 <http://www.defence.gov.au/pathwaytochange/docs/DLAPiper/Background.asp>. DLA Piper Review, Volume 1, pp.139-145. Dr Gary Rumble, *Committee Hansard*, 13 August 2014, p. 17. Dr Gary Rumble responses to questions on hearing 26 September 2014 – Answer to Question 1. DLA Piper Review, *Volume 1*, pp 139-145.; DLA Piper Review, *Supplement to Volume 1*, pp 67-70.

actually is not...there was a policy statement earlier this year to reinforce that.<sup>11</sup>

1.18 The fact that it took from 2011 to 2014 for there to be any Defence response to this disastrous DI(G) which in effect protected abusers, including perpetrators of rape, is shameful.

1.19 I also note with concern that it seems the replacement DI(G) - DI(G) PERS 35-4 - which was provided to the committee by Defence after the 13 August 2014 hearing, appears not to have come into force until 19 August 2014.

1.20 The committee's report has noted that in its first year of operation, SeMPRO has not had a single report of sexual assault within 72 hours of the incident.<sup>12</sup> I am concerned that victims therefore have not been getting prompt assistance from SeMPRO. Further, as no forensic evidence has been collected this has minimised the chance of effective action against perpetrators. SeMPRO has also not been able to alert the ADF promptly of risks to serving ADF personnel.

1.21 The new DI(G) PRS 35-4 which came into effect on 19 August 2014, sets out the basis upon which SeMPRO will refuse to accept a disclosure on a restricted basis. Dr Rumble raised a pertinent question as to whether those grounds of refusal are actually required by law as asserted by Defence. This assertion based on Dr Rumble's detailed analysis is dubious at best.<sup>13</sup> If the law does prevent Defence from being able to offer victims genuine restricted reporting then a real question is raised as to whether the law should be changed.

1.22 The 35 systemic issues identified in the DLA Piper Review report over two years ago are wide-ranging. It is not acceptable that all that the ADF has told the committee is that they are taking those issues 'into account'. For example, surely the ADF has had enough time to make a decision about Issue 16, as set out in October 2011 in Volume 1 of the DLA Piper Review report:

The ADF should consider establishing a system for liaison with local civilian police forces similar to the US Military's Sexual Assault Regional Team, either dealing with ADF/civilian police interactions generally or limited to sexual assault issues.

1.23 Surely Defence could have reached a prompt conclusion one way or the other over such an unambiguous recommendation.

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11 Vice Admiral Ray Griggs, *Committee Hansard*, 13 August 2014, p. 57.

12 Department of Defence, responses to questions on notice from the hearing on 13 August 2014.

13 *Submission 8*, Supplementary 4, pp.30-34.

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## Recommendation

**The Minister of Defence should direct Defence to report to the committee on what specific decisions have been made by the ADF and the Government about each of the 35 systemic issues identified in the DLA Piper Review report within 30 days of tabling of this report.**

1.24 Further to the committee's recommendation 6 in this report I make the following comments:

1.25 Over the course of this reference the Committee has heard some very disturbing accounts of abuse, and of ADF mismanagement of abuse and abuse allegations. Many of these accounts relate to incidents from many years back. However, some of the accounts relate to quite recent events.<sup>14</sup>

1.26 Volume 1 of the DLA Piper Report summarised many previous reports identifying cultural pressures which have discouraged reporting in the ADF (Chapters 4 and 5).

1.27 The committee heard consistent evidence from many witnesses to the effect that there are still very strong cultural factors discouraging current ADF personnel from reporting abuse.<sup>15</sup> That indicates a very serious systemic issue.

1.28 I note further that Mr Roberts-Smith has explained to the Committee that only a small minority of individuals who have come into the Taskforce's processes have agreed to have their matters referred to the ADF for possible disciplinary or administrative action against the perpetrators.<sup>16</sup> This indicates a very concerning lack of confidence and trust in ADF processes. That lack of confidence signals an underlying major systemic issue.

1.29 If ADF personnel do not report abuse and do not want to participate in disciplinary or administrative processes to deal with perpetrators, then it must follow that there are still perpetrators in the ADF who represent risks to other ADF personnel. The Taskforce itself has not carried out any investigation.<sup>17</sup>

1.30 It must also follow that many of these perpetrators will still be amongst the ranks of the officers and NCOs. Officers and NCOs are the very people who should be role models and who should be driving and entrenching positive cultural change.

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14 Ms Rachael James and Mr Adair Donaldson, *Committee Hansard*, 13 August 2014, p. 3.

15 Ms Rachael James and Mr Adair Donaldson, *Committee Hansard*, 13 August 2014, pp 3, 5; Mr Barry Heffernan, *Committee Hansard*, 26 September 2014, p. 3; Dr Gary Rumble, *Committee Hansard*, 26 September 2014, pp 13, 16-17.

16 Mr Barry Heffernan, *Committee Hansard*, 13 August 2014, p. 3.

17 The Hon Len Roberts-Smith, *Committee Hansard*, 26 September 2014, p. 21.

Having any perpetrators serving in Defence, particularly in these roles, is a cancer on the ADF.

1.31 This must represent a threat to the culture of the ADF and has the potential to undermine the *Pathway to Change* strategy for cultural change. That signals another underlying major systemic issue.

1.32 I note that Mr Roberts-Smith in his recent appearance before this Committee on 26 September 2014 stated that:

We have seen so many cases where it would have taken just one person in the chain of command to do the right thing to either stop an incident of abuse or at least deal with it and hold the abuser to account immediately.

1.33 That raises very serious issues about the adequacy of ADF's response to abuse over time.

1.34 That is yet another major systemic issue.

1.35 There is no doubt - over the last few years - the ADF has moved to change culture at many levels. However, the ADF has shown a reluctance to change in some other ways which are directly relevant to the welfare and safety of ADF personnel. For instance:

- In its first year of operations, the version of 'restricted reporting' which Defence has introduced through SeMPRO failed to attract a single report of sexual assault within the first 72 hours after an incident.
- The Vice Chief of the Defence Force told the Committee that the ADF refuses to commit to zero incidence of abuse in the ADF 'because 'We will never get to zero incidence'.<sup>18</sup>
- Defence has refused to seek to identify areas where unreported abuse may be occurring.<sup>19</sup>
- It took Defence three years to amend the defective DI(G) which told Commanding Officers that they should not take any administrative action on allegations of sexual assault. That signals a breathtaking complacency and lack of urgency on the part of Defence to deal with sexual assault issues.

1.36 These failures approach culpable negligence in relation to the safety and welfare of ADF personnel.

1.37 These decisions are very bad news for individual ADF members affected by abuse. These decisions also very bad news for the integrity of the ADF.

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18 Vice Admiral Ray Griggs, *Committee Hansard*, 13 August 2014, p. 61.

19 *Submission 8*, Part II, Annexures 1-5.

1.38 We have also seen that individuals who were damaged by abuse in the ADF face considerable barriers to making out their eligibility for DVA benefits and support.<sup>20</sup>

1.39 Serious questions have been raised about whether the Commonwealth through Defence and DVA has fulfilled its model litigant and moral obligations to these individuals and their families.<sup>21</sup>

1.40 The fact that there is this institutional resistance to change demonstrates why the important systemic issues can only be attacked effectively by a well-resourced body with authority and standing to apply rigour and intensive investigation. Only a Royal Commission can do this.

### **Recommendation**

**That there be a Royal Commission to inquire into:**

- **the adequacy of Defence and Government responses to abuse in the ADF;**
- **the adequacy of Defence and Government responses to support all victims of abuse in the ADF – not just those who have come into the Taskforce's processes;**
- **what can be done to improve rates of reporting of abuse in the ADF;**
- **what can be done to improve confidence of ADF personnel in ADF processes for responding to allegations of abuse; and**
- **whether there are still perpetrators of abuse in the ADF and if so what to do about that.**

1.41 It has been suggested that a Royal Commission would in some way be unfair to suspected perpetrators. To this I say:

- ADF personnel are used to requirements of vetting for national security and other issues. There are some roles for which people need to be beyond suspicion.
- No doubt a Royal Commission would be sensitive to the need to provide procedural fairness in the conduct of its investigations.

1.42 A Royal Commission need not be and should not be the only response. There should also be assistance for victims – such as the assistance which has been offered by the Taskforce and DVA – in parallel with the Royal Commission's work. There is no reason why a Royal Commission could not coordinate its work with processes providing such assistance.

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20 Department of Veterans' Affairs, *Committee Hansard*, 14 August 2014, pp 40-50.

21 *Submission 8*, Attachment 2, Annexure 3.

1.43 An appropriately commissioned and resourced Royal Commission would be best placed to encourage individuals who have relevant information – including victims who have not yet spoken about their experience to anyone and/or victims who had no interest in the range of outcomes for complainants which the Taskforce offered – to come forward and to enable informed and convincing resolutions on the systemic issues.

1.44 The Royal Commission into Institutional Response to Child Sexual Abuse provides a model of how a Royal Commission can be conducted in a manner which takes into account the sensitivities and needs of victims of abuse and which actually empowers and assists victims of abuse including many who had not previously told their story to anyone.

1.45 The Royal Commission into Institutional Response to Child Sexual Abuse is demonstrating the impact which contemporaneous media reporting of real people's stories told to the Commission can have in raising understanding of the issues amongst the institutions and amongst the general community.

1.46 I note there have not been many voices to date calling for such a Royal Commission.

1.47 Given the strong cultural factors which discourage members of the ADF from reporting even within ADF processes it is not surprising that members of the ADF have not been stepping out of the ranks to make that call.

1.48 However, there have been two individuals who have deep knowledge of these issues who have supported the establishment of a Royal Commission.

1.49 One of these individuals is Colonel (ret) Ken Northwood who conducted the investigations of the ADFA 24 in 1998 and who worked with the Taskforce on these issues again in 2013. On a recent Four Corners program, Colonel Northwood called for a Royal Commission.<sup>22</sup>

1.50 Dr Gary Rumble who led the DLA Piper Review has also called for a Royal Commission and has supported that call with his detailed submissions to the Committee.

1.51 I give weight to the fact that these two individuals who have deep knowledge of the issues and of the ADF's and successive Governments' responses to these issues have supported a Royal Commission.

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22 Australian Broadcasting Corporation, Chamber of Horrors, Four Corners, 9 June 2014, available at: <http://www.abc.net.au/4corners/stories/2014/06/09/4019501.htm> (accessed 30 October 2014). Transcript tabled by Dr Gary Rumble at public hearing 13 August 2014.



1.52 I also give weight to the submission to this committee of Mr Neil Stuart who went through a Restorative Engagement session. His submission includes these powerful perspectives:

I have been reflecting on my perspective since approaching DLA Piper and what I've heard of abuse experience of other people in Defence. As I'm seeing it, the Response (the institutional response) has been to focus on the individuals who've told their stories and to offer some balm and quieten them down. So all my energy and input has been contained and channelled into the four sets of responses determined by DART. It is as if I am one of a list of cases and one by one they are being methodically ticked off. Now I've been ticked off.

...I submit what we are faced with is an institution which has systematically insulated itself from knowing about the intentional sexual abuse which has happened and is happening. The silence, the failure to talk openly about what happens or might (page 5) happen fosters secrecy, putting it out of sight or hearing. Men do rape men, soldiers rape fellow-soldiers – that has to be said, not just in counselling, not just in the CO's office, not just in the restorative engagement conferences but out there in the public arena.

The DART processes have placed much emphasis on confidentiality. For instance, at the end of the Restorative Engagement Conference, I was asked to sign an agreement that I would not disclose what took place in that Conference. Perhaps there are times for confidentiality. My sense is that what happened is that I have become confined and isolated. My sense is that the practices of secrecy and silence are being reinforced. I have nothing to hide. Does DART? Does Defence?

Restorative Engagement hasn't changed/restored what happened and can't change/restore what's happened. That's an illusion. I haven't (page 6) bought into that illusion. Nothing makes up for what has been broken... My life, the lives of others abused, aren't going to be restored. The main good thing, I was thinking, is that my story had been truly listened to and seems to have been believed. Now, having read about the experience of Aaron Frazer...I wonder just how fair dinkum is the statement that my story is believed. If it is to be fair dinkum there's got to be more than individual solace. That listening has to come out of the confessional/clinical reporting process, the Restorative Engagement Conference, into which it's been channelled and into the wider culture of Defence which permits these abuses.

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There has to be more than treating the hurt of the injured individuals – which is akin to keeping everything within the confessional or within the treatment room or within the family, which is the way the DART casework approach has been shaped. I'm not a case – it's bigger than me or any other individuals...

I challenge the Committee to understand Defence's responsibility for an institutional culture which permits, maintains and maybe even rewards silence around rape and other sexual abuses within Defence. I challenge (page 7) the Committee to understand how stigma works as a tool of

silencing and of removal of freedoms, especially freedom to speak. I challenge the Committee to break open the culture of silence. I don't need pity. I have never needed pity. What I need is to see emerge a culture which permits, even celebrates, my right and the rights of others to speak of what we have experienced. I need an end of silence. If the Committee does not understand these things, then it understands very little.

I need for there to be a process which enables me, as a person who has experienced sexual abuse within Defence, to make a common cause with others who have experienced like abuse.

Maybe the process needs to be widened to provide for something like a Royal Commission so that the secrecy and the silence are blown away and Defence is held accountable for how it must change.

1.53 Another victim – a woman who experienced two years of abuse and bullying at ADFA pre-1998 – told Dr Rumble:

It is time that the ADF was held to account. A Royal commission would be the most powerful statement that this is not an acceptable part of Australian society. I feel also feel that ADF needs to weed out the bad eggs, if for no other reason than that the decent people of the ADF do not have a shadow cast over their careers. They should also ensure that people who have been abused are cared for, as not everyone is OK.

1.54 I agree. If a Royal Commission is not established, I fear this Parliament may well revisit these issues again in the next few years, when the next scandal of abuse in Defence surfaces.

1.55 I acknowledge that the Government and the Opposition do not support calls for a Royal Commission - yet my plea to any member or former member of the ADF reading this who has experienced or knowledge of abuse, particularly victims of the ADFA 24, to speak out in support of such a Royal Commission. I understand that survivors of abuse may not wish to speak out publicly. However, if survivors wish to meet with members of the Government and Opposition to tell them face-to-face of what happened to them, I am prepared to assist personally to facilitate any such private and confidential meeting. To para-phrase Edmund Burke:

All that is necessary for the triumph of evil is that good men, and women do nothing.

I can be contacted at [Senator.Xenophon@aph.gov.au](mailto:Senator.Xenophon@aph.gov.au) or on 08 8232 1144.

1.56 Finally, I dedicate these additional comments to Neil Batten who had the enormous courage to come and see me over three and half years ago (with the tremendous assistance and advocacy of Barry Heffernan from COMBADAS). His recounting of the abuse he suffered over 40 years ago as a 15 year old naval junior recruit at HMAS Leeuwin still shocks and appals me. The dreams of a boy wanting to proudly serve his country were destroyed in a disgusting and brutal manner. However, what is even worse is that the perpetrators went on to pursue successful careers in the

Navy, whilst Neil's life was deeply traumatised. This is for you Neil, and so many others like you.

**Senator Nick Xenophon**

