

ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

CASE STUDY 40
Australian Defence Force

STATEMENT OF MICHAEL LYSEWYCZ

On 23 June 2016 I, Michael Lysewycz, care of the Australian Government Solicitor, 4 National Circuit, BARTON in the Australian Capital Territory, say as follows:

1. I am Defence Special Counsel, Defence Legal Division, Department of Defence (**Defence**). I have held this position since 1 December 2014. Prior to this, from 2009, I held the position of Assistant Secretary, Legal Services in the Defence Legal Division of the Department.

Background

2. I first joined Defence in February 2003 as a Legal Officer in the Directorate of Litigation in the Defence Legal Service. My responsibilities in this role covered various case files that included claims for compensation and judicial review matters in Federal, State and Territory jurisdictions.
3. In about 2004, the Defence Legal Service was reorganised into the Defence Legal Division. My duties as Legal Officer were not changed until 2007 when I was appointed Director, Directorate of Litigation. In that role I had responsibility for management of Defence's team and the processes, procedures and financial aspects of Defence's litigation caseload.
4. In 2008, I assumed Branch Head responsibilities of the Defence Legal Division's Legal Service Branch, first in an acting capacity, and then on substantive promotion from May 2009. My title was then Assistant Secretary, Legal Services and my responsibilities included membership of the Defence Legal Executive. My immediate areas of work covered management and leadership of four of Defence's Directorates: Litigation, Special Financial Claims, Freedom of Information and Classified Archives Records Review. I exercised various delegations that included the settlement of financial claims against the Commonwealth, defective administration claims and legal assistance at Commonwealth expense.
5. My areas of responsibility varied according to Divisional and Departmental requirements. For example, I assumed responsibility for Defence's procurement of external legal services, for a time, after the Directorates of Freedom of Information and Classified Archives Records Review were relocated in another Departmental Division.
6. On 1 December 2014, I commenced duties as Defence Special Counsel in a newly created Office of Defence Special Counsel (**ODSC**) in the Defence Legal Division. The

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Office was established to focus exclusively on a limited number of issues identified by the Defence Legal Executive as being of particular significance and having strategic importance to Defence. The management and resolution of civil claims related to abuse is one of the matters with which ODSC has been tasked. Additionally, I have a Departmental representative role in relation to the formulation of various all-of-Government policies. For example, I am one of Defence's representatives to the Commonwealth Task Force that is examining policy options for the implementation of this Royal Commission's recommendations contained in its report entitled 'Redress and Civil Litigation Report'.

Defence response to Common Law Claims

7. An overview of Defence's approach and response to claims made by survivors of abuse, including child sexual abuse, within Defence and the Australian Defence Force (**ADF**) is set out in the statement of Rear Admiral Ray Griggs [STAT.1005.001.0001] dated 9 June 2016 at paragraphs 196 to 220.
8. I participated in the formulation and ongoing development of the response that is described in the Rear Admiral's statement. The overarching aspiration behind the processes devised is to avoid doing any further harm to survivors. For example, claimants are only required to attend an independent medical examination (paid for by the Commonwealth) if the existing medical evidence does not inform adequately in light of the scope of the claim. In another example, ODSC requested that a mediation be adjourned, after it had commenced, to permit the parties to approach the Department of Veterans' Affairs (**DVA**) with more evidence to add to the claimant's prospects of having liability accepted by DVA.
9. I would describe the overall Defence response as a continuing 'work in progress' in the sense that ODSC strives to adapt collaborative responses that are relevant to a survivor's claim. The scope of the response varies according to each personal circumstance and seeks, to the extent possible, to accommodate a survivor's preferences so far as processes are concerned. There is less scope for adaptation where claims are litigated. At this time, however, litigated claims are not numerous and ODSC continues to encourage survivors and their legal representatives to pursue non-litigated processes.
10. In the broader context of the outlined Defence response, I and my colleagues in ODSC had various discussions with, and continue to maintain links with, other Federal agencies with related responsibilities – such as the Attorney-General's Department, the Office of Legal Services Coordination within that Department, DVA, the Defence Abuse Response Task Force and other Federal agencies who are dealing with survivor claims in other portfolios. I have familiarity with the work of the DLA Piper Review. A number of law firms with experience in the resolution of abuse-related claims have been engaged to assist Defence at both the strategic and case management levels. Consultations with relevant medical professionals are also undertaken.
11. ODSC has engaged with plaintiff law firms which have indicated that they have clients who wish to make common law compensation claims or seek remedies consequent on

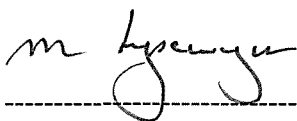
their having suffered abuse in connection with Defence. One such firm has been Shine Lawyers which, to date, has had the largest portfolio of Defence abuse-related claims.

An overview of my involvement in the civil claim brought against the Commonwealth by claimant – known in the Royal Commission as CJI.

12. A claimant known as CJI in this Royal Commission case study was represented by Shine Lawyers (**Shine**). His claim was identified by Shine, from the outset, as one of the more complex claims in its portfolio. Preliminary discussions and a review of the claim confirmed this complexity. We were aware from the outset that settlement of a common law damages claim would potentially affect CJI's statutory entitlements from DVA.
13. On 22 January 2015, Shine provided ODSC with CJI's particulars of loss and damage (DEF.02.0010.005.2740_R at page DEF.02.0010.005.2749_R). These indicated that he had been receiving a special rate disability pension (formerly known as a total permanent impairment or TPI pension) since 2000. This was an issue that would have to be considered in any potential settlement of the common law damages claim that was with ODSC.
14. The most significant issue that arose in CJI's case which made it complex was that DVA compensates him for his Post Traumatic Stress Disorder (**PTSD**), which DVA understood to be caused only by his experiences in Vietnam. The first mention of CJI's experiences at HMAS Leeuwin contributing to his PTSD was made after the DVA decisions had concluded. Any compensation offered by the Commonwealth for PTSD as a result of abuse at HMAS Leeuwin would inevitably affect his statutory compensation by DVA for the same condition.
15. ODSC held several meetings with Shine Lawyers in 2015 to discuss how best to progress their client's claims. One of those meetings was at the offices of Henry Davis York in Sydney on 16 June 2015. ODSC arranged the attendance of a senior policy officer, Mr Frank White, from DVA to attend this meeting. The intent was to discuss, in detail, with Shine Lawyers the implications and possible effects of common law settlements on DVA entitlements. Ms Lisa Kinder, a partner in Shine Lawyers attended, as did the Commonwealth's solicitor, Ms Kerry Stewart from Henry Davis York and senior Counsel for the Commonwealth, Mr Michael Fordham SC. There were also subject matter experts from DVA on a teleconference to discuss the implications of various possible outcomes. The session progressed as a 'work shop' and issues were discussed over several hours.
16. On 22 June 2015, Ms Kinder emailed to Frank White (**Annexure A**) setting out her understanding of what was discussed at the meeting on 16 June 2015.
17. In the months after that meeting, I am aware that Ms Kinder was in touch with DVA periodically by email and telephone to discuss the effect of settlement on DVA entitlements generally and also with regards to specific claimant's circumstances. I do not have knowledge of all exchanges between Shine and DVA.

18. On 22 June 2015, Kerry Stewart of Henry Davis York emailed DVA (DEF.02.0010.005.0996_R at page DEF.02.0002.001.0999_R), at Shine's request, to find out the potential effect on claimants' DVA entitlements if a claim were to settle for \$250,000, \$500,000, \$750,000 or \$1 million.
19. On 22 September 2015, Henry Davis York wrote to Shine (DEF.02.0010.005.0992) setting out the legislation potentially relevant to CJI's claim.
20. There was email correspondence and telephone discussion between DVA, Henry Davis York and Shine in October 2015 to discuss what effect a financial settlement would have on CJI's special rate disability pension. The email correspondence canvassed the potential impact of various settlement amounts ranging between \$250,000 and \$1 million. (DEF.02.0010.005.0996_R, DEF.02.0010.005.0433_R, DEF.02.0010.005.0721_R, DEF.02.0010.005.2776_R, DEF.02.0010.005.1043_R, DEF.02.0010.005.1116_R).
21. A mediation conference to consider CJI's claim was scheduled for 24 November 2015. This was arranged following discussion between Henry Davis York and Shine Lawyers in August 2015 in which they concluded that a mediation conference was the best mechanism to explore possible resolution of the claim. Defence paid for CJI and his wife to fly to Sydney and stay overnight to attend the mediation. Defence paid for the mediator.
22. The mediation on 24 November 2015 commenced with an open session of the parties at which it was agreed that before any settlement negotiations commenced, CJI would have a direct personal engagement with Captain Neville Teague, so they could talk about what happened to him and Captain Teague could offer an apology on behalf of the Navy. This happened immediately after the opening session and lasted approximately one hour. The reason for proceeding with the direct personal engagement early in the process was to separate that aspect of the mediation process from the financial settlement negotiations. The intent was to make it apparent that the Navy's direct personal engagement and apology and the subsequent settlement negotiations were not contingent upon each other.
23. I attended and participated in the mediation. My principal role was that of the person authorised to make a decision, on behalf of the Commonwealth, to make a financial settlement of CJI's claim. The scope of my authority covered the sum that was being sought. To my knowledge, there is no provision permitting waiver of pay-backs under the relevant veterans' compensation and entitlements legislation.
24. It was also agreed at the opening session that discussions between the parties' lawyers about the legal issues arising would take place without CJI's presence, in order to minimise potential for his distress.
25. Following the direct personal engagement, the parties discussed at length whether it was possible to find a way to compensate CJI financially without affecting his DVA entitlements. It was made clear to the Defence team by CJI's lawyers throughout the mediation that he did not want a financial settlement if it would compromise his DVA entitlements.

26. We discussed using the Commonwealth's compensation for detriment caused by defective administration (known as CDDA) arrangements and discussed the prospect of approaching the Commonwealth Department of Finance for an act of grace payment. However, those avenues are available only where no other legal or statutory remedy is available. In any case, the parties concluded that the mechanism by which compensation is paid does not alter the character or intent of the payment (ie to compensate CJI for injury and loss arising from PTSD as a result of being abused) and there was no way apparent to the parties at the mediation, or subsequently, to arrive at a financial settlement that would not affect CJI's DVA entitlements.
27. We also discussed paying compensation only for general damages and not paying compensation for economic loss or medical expenses, but concluded that such would not have had the effect of quarantining the financial settlement for DVA purposes.
28. By the afternoon of the mediation, the parties' lawyers informed the Defence team that they had reached the conclusion there was no way to pay compensation for the damages claim without having an impact on CJI's DVA entitlements and that CJI had instructed them to discontinue his claim for financial compensation.
29. Shine Lawyers informed the Defence team that it had incurred costs to bring this matter to a mediation. The claim was a test case to see if there was any way of achieving a financial outcome without compromising their client's DVA entitlements. I agreed that the work undertaken by Shine in bringing this matter to mediation had broader implications for the cohort of abuse claims under consideration and went beyond the settlement of CJI's claim. Shine had worked collaboratively with Defence throughout this process. I was of the view that those circumstances warranted a departure from the normal rule that costs should follow the event and that fairness required that the Commonwealth pay a contribution to Shine's costs. On that basis, I offered \$70,000 for CJI's costs and disbursements. This was accepted. A deed was executed to give effect to that agreement.
30. At the conclusion of the mediation, the parties (including CJI and his wife) convened in group session again briefly and discussed the outcome. CJI led me to understand that he was disappointed by the outcome but understood why compensation could not be paid to him without affecting his DVA entitlements and he was grateful that Defence had done its best to find a way forward.
31. The outcome of the mediation is noted in the email by Kerry Stewart of Henry Davis York dated 25 November 2015 (DEF.02.0010.005.1379_R)
32. Defence does not have power to make survivor reparation payments of the kind that the Federal Executive approved for the Defence Abuse Response Task Force.



Michael Lysewycz

" Annexure A "

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: Kerry Stewart [<mailto:Kerry.Stewart@hdy.com.au>]
Sent: Monday, 22 June 2015 15:43
To: Sanders, Lauren MAJ; Reilly, Anthony MR 1
Cc: Lysewycz, Michael MR; Rebecca Whittle; Jane Favretto
Subject: FW: Shine/Defence/DVA meeting 16 June 2015 [HDY-SYD.FID532417]

Dear Lauren & Tony

Please see below for an email that Lisa Kinder sent to Frank White this morning and onto us.

The material contained in the email to Frank is, in my view, an accurate summary. I didn't realise Lisa would be sending this although given the amount of information imparted last week I can understand why would seek confirmation that her understanding is correct. I don't per se see any issue with this as long as she doesn't keep sending him emails. Perhaps we can discuss briefly when we next speak?


Regards

Kerry

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Special Counsel

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From: Lisa Kinder [<mailto:lkinder@shine.com.au>]
Sent: Monday, 22 June 2015 9:26 AM
To: Kerry Stewart
Subject: FW: Shine/Defence/DVA meeting 16 June 2015

Hi Kerry,

Thank you for arranging for Frank White of the Department of Veterans Affairs to attend our meeting last week.

There was a lot of discussion, and it was very helpful to have him act in a coordinating role in relation to the various DVA personnel who also participated by teleconference. The discussions certainly demonstrated the complexity of the issues that we will all have to navigate our way through to determine our respective clients' statutory obligations should our negotiations be successful. It will be very helpful to have a single point of contact from the Department of Veterans Affairs moving forward.

We have received your emails concerning the draft lists to be provided to Frank, and we'll revert to you about those proposed lists in the near future.

In the meantime, please find attached below a copy of an email I have forwarded to Frank seeking advice from him as to whether the understanding I have been left with following last week's meeting is correct.

Kind regards,

Lisa

Lisa Kinder | Partner



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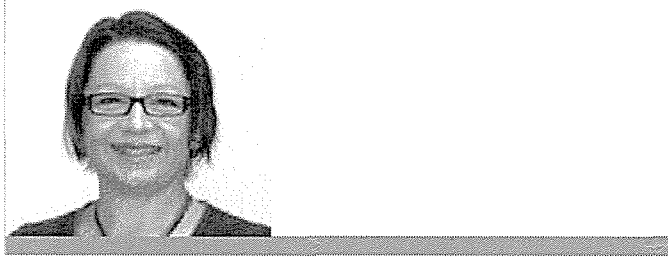
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From: Lisa Kinder
Sent: Monday, 22 June 2015 9:14 AM
To: frank.white@dva.gov.au
Subject: Shine/Defence/DVA meeting 16 June 2015

Dear Frank,

I refer to the meeting which you attended in Sydney on 16 June 2015 with:

- (a) Myself (Lisa Kinder of Shine Lawyers);
- (b) Three representatives from Messrs Henry Davis York Solicitors;
- (c) Four representatives from the Department of Defence;
- (d) Sandro Cardinali from the Department of Veterans Affairs (Melbourne) and some of his colleagues from that office (by teleconference), and
- (e) Sarah Nunan from the Department of Veterans Affairs (Adelaide) and some of her colleagues from that office (by teleconference).

The Shine/Defence claims:

As you are aware we represent a number of clients who allege they are survivors of abuse of varying degrees of severity whilst they were employed by the Department of Defence as Junior Recruits at HMAS Leeuwin over the 1960s and 1970s.

We are involved in confidential without prejudice discussions with the Department of Defence concerning our clients' potential rights to bring claims for common law damages for injuries suffered by them as a consequence of that abuse. In the main, the injuries they have suffered are of a psychiatric nature. The Department of Defence has engaged Messrs Henry Davis York to provide them with independent advice in relation to these potential claims.

The likely quantum of the claims will vary considerably depending upon the particular circumstances of each claimant. There is a proportion of claimants who will not be making any claim at all for economic loss or special damages, ie will limit the extent of their claims to general damages only. Other claims will seek damages across all the conventional heads of damage including general damages, special damages and economic loss.

Claimants' past DVA history:

There is wide variety of circumstances applying to our clients in relation to their relationship or connection with the Department of Veterans Affairs (DVA) in the past:

- Some clients have never applied for or received any payments and/or treatment funded by the DVA;
- Some have applied to DVA for payments/treatment for psychiatric injuries they say are related to the abuse, but their applications have been rejected;
- Some have applied to DVA for payments/treatment for psychiatric injuries

they say are related to the abuse, but their applications are currently being held in abeyance;

- Some have made successful application to DVA for payments/treatment for psychiatric injuries which were caused by other incidents during their service (ie not abuse related);
- Some have never received any payments or treatment from DVA concerning psychiatric injuries, but have received DVA entitlements for physical injuries/conditions unrelated to the abuse;
- Some are receiving entitlements from DVA for a combination of physical injuries and psychiatric injuries;
- Some are receiving DVA benefits only in relation to treatment for psychiatric injuries, but no pension or disability support entitlements.

There was considerable discussion held over which individual or combination of legislative regimes might be likely to apply to our claimants, and I believe the conclusion was that it could be one or several concurrently, once again depending upon the individual circumstances.

Statutory military compensation/DVA complexity:

It appears to be the case that the DVA administers a complex statutory regime, including decisions concerning veterans' entitlements under several different pieces of legislation. Further, it appears to be the case that different employees within your Department have targeted expertise/knowledge in relation to the application of the different legislative schemes administered by the DVA as a whole, thus making it necessary for such a large group to participate in our meeting.

The purpose of your participation, and that of your colleagues, at the meeting was to assist our firm and the defendant and their representatives to develop an understanding of the ramifications of any potential payments of common law damages to individual claimants, insofar as it relates to:

- Any obligation each claimant may have to repay to DVA from their common law damages payment any sums paid by DVA either to the claimant (pensions or incapacity payments) or on their behalf (treatment) in the past;
- If they are currently receiving DVA entitlements by way of pension or treatment, any impact a common law damages payment would have on the continued receipt of that benefit in the future;
- If they are not currently receiving any DVA entitlement, any impact a common law damages payment may have in relation to any future entitlements they might otherwise have had to receive statutory benefits from DVA in the future;
- Any other risk of detrimental impact on their past or future DVA entitlements about which claimants should be informed prior to accepting a common law damages payment;
- The statutory basis supporting each of these potential outcomes.

We are grateful to you and your colleagues for making yourselves available, and there was much discussion held. We appreciate that you have agreed to act as a liaison/contact on behalf of your Department to assist us further in relation to these issues.

The outcome of the meeting:

As discussed, in consultation with us Messrs Henry Davis York will supply you shortly with a preliminary list of claimants in respect of whom we require information in the near future concerning DVA implications of any common law damages payment.

In the meantime though, given the large amount of discussion and the complexity of the issues, we should be grateful if you could confirm to us in writing that the following overview is an accurate summary in laymans' terms of the position as it was discussed at the 16 June meeting.

If a claimant has received DVA entitlements in the past (either as a pension or

regular payment of some description or in relation to funding for treatment, or a combination of both) in relation to a psychiatric condition and that person were now to receive common law damages for the same (or similar) psychiatric condition:

- *The statutory offset/payback provisions are extremely easily activated;*
- *They are retrospective (ie payback obligations will go back to when the claimant started receiving benefits/treatment even if that date was decades ago);*
- *DVA offsets/paybacks are likely from a common law damages payment regardless of whether the accepted pension/treatment for psychiatric injury was related to abuse or not (eg if the claimant received DVA entitlements for PTSD caused by some other traumatic incident during their service);*
- *DVA offsets/paybacks will be applicable regardless of whether the common law damages included a claim for economic loss or not (because the DVA entitlement does not reflect economic loss, it is a payment to reflect incapacity ie injury);*
- *DVA paybacks in relation to past treatment will be applicable regardless of whether or not the claimant has included a claim for past special damages in their common law damages claim;*
- *The claimant will be prevented from receiving future funding for treatment from DVA for the psychiatric condition (where applicable they could still use their Gold Card for treatment for other conditions, but not for the psych condition), and this is the case regardless of whether they have received any payment for future special damages as part of their common law damages;*
- *If they are currently receiving a statutory pension for the psych condition, they will be barred from continuing to receive it (they could continue to receive that part of their pension entitlements which does not relate to psychiatric injury);*
- *DVA may wish to investigate whether the past entitlements were legitimately paid, if there is now a suggestion that there may have been a different cause for the psychiatric condition for which liability might not be accepted;*
- *If clients have been in receipt of Centrelink/Department of Human Services disability support payments at some stage, DVA may also want to obtain those records to assist in their investigations.*

As you can appreciate, there was a large volume of information provided on 16 June, and we are at this stage trying to ensure that the understanding we have been left with is accurate, until such time as specific information is available on a case-by-case basis. If we have misunderstood the information provided, we'd be grateful if you could correct our understanding.

These are clearly matters of some importance to our clients, as well as ourselves and the Department of Defence. The outcome of these inquiries may lead some of our clients to the conclusion that the potential payback to your Department exceeds the entirety of their entitlement to common law damages. In addition, the future loss of their existing benefits and entitlements would make proceeding further with their claim disadvantageous.

I should be grateful for your early response.

Yours faithfully

Lisa Kinder

Lisa Kinder | Partner



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