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AUSTRALIAN DEFENCE FORCE

Afghanistan Inquiry Response Task Force

BN60986042

Hon Martin Hamilton-Smith

Chairman

The Australian Special Air Service Association

[REDACTED]

Dear Hon Hamilton-Smith

Thank you for your letter of 8 February 2023, requesting reconsideration of aspects of Defence's response to allegations of war crimes in Afghanistan contained in the Inspector General of the Australian Defence Force (IGADF) Afghanistan Inquiry Report (the Afghanistan Report). I note the Australian Special Air Service Association's (Association) concerns and I am responding on the Chief of the Defence Force's (CDF's) behalf.

The Afghanistan Report was undertaken by Major General the Honourable Justice Paul Brereton AM RFD, a judge of the Supreme Court of New South Wales and Assistant IGADF. The Inquiry's terms were confined to considering whether there was substance to rumours of serious misconduct by Australia's Special Forces in Afghanistan and was conducted so as not to prejudice any possible future criminal investigations and prosecutions. After more than four years of work by highly qualified individuals involving 423 witnesses and over 20,000 documents, the Inquiry found credible information to substantiate the alleged unlawful killings of 39 individuals involving members of the Special Operations Task Group. Your letter correctly highlights that the Afghanistan Report does not determine whether criminal actions or war crimes have occurred.

Criminal investigations are now being conducted by the Office of the Special Investigator (OSI). This is an independent Executive Agency within the Attorney-General's portfolio, completely separate from Defence. The OSI's specific role and the reason for its establishment is to investigate allegations of criminal offences under Australian law, from or related to breaches of the Laws of Armed Conflict, by members of the ADF in Afghanistan from 2005 to 2016. All investigations and decisions on any potential criminal prosecutions sit outside Defence. Details about the work of the OSI and indeed how to contact them should any of your members have any further information, are available at <https://www.osi.gov.au/> Any potential prosecutions are a matter for the Commonwealth Director of Public Prosecutions.

I understand from your letter regarding the presumption of innocence and the proper process inherent in a criminal trial that the Association will support any legal process which follows the OSI investigations. Chapter 1.08 the Inquiry Report provides a detailed outline of allegations and indicators of war crimes in Australian history, and the corrosive effect of not dealing with such allegations, the impact of which can last decades. This is a lesser known part of our history but provides a valuable backdrop to the importance of following the legal process, whatever the outcome. A copy of the public version of the Report is available at <https://www.defence.gov.au/sites/default/files/2021-10/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>

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While there has been a great deal of focus on criminal investigations, the Afghanistan Report also identified a number of other matters not relating to allegations of criminal behaviour which could be addressed within Defence. As a consequence, Defence established the Afghanistan Inquiry Reform Program (Reform Program) to coordinate implementation of these recommendations. The Reform Program allows Defence to consider and address organisational, collective, and individual responsibility for past failures and wrongdoing. This is being undertaken through four Work Packages which roughly align with the general areas of concern raised in your letter:

1. Work Package 1: address recommendations regarding individuals
2. Work Package 2: undertake additional workforce management action
3. Work Package 3: address recommendations regarding compensation
4. Work Package 4: transformational reform.

Details of this Reform Plan are publically available at <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/defence-response> I commend them to the Association to inform understanding and commentary about how Defence is addressing these concerns.

I would also emphasise that many of the reforms from the Afghanistan Inquiry will improve the Special Forces work environment. Increasing diversity, improving workforce management, and ongoing capability modernisation are a small part of these reforms which will maintain Special Operations Command as a world-leading force. Similarly, work in the culture, leadership, and ethics spheres will embed the high professional and ethical standards we expect of all members of the ADF.

Your letter also raises concerns about the punishment or dismissal of soldiers from the ADF. As outlined above, Work Package 1 addresses recommendations regarding individuals. As part of this Work Package, Army initiated administrative action against 17 individuals where there was an alleged failure to meet ADF expectations and values identified in the Afghanistan Report. All these members were afforded due process and legal support. Each matter was considered on an individual basis, in accordance with administrative law requirements. Of the 17, some were separated on medical grounds, others continued to serve. No members were administratively dismissed. Further information can be found at <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/frequently-asked-questions/workforce-and-administrative-action-faq>

I would highlight that administrative action such as this differs from criminal action. There is no requirement for a member to be found guilty of a disciplinary or criminal offence before administrative action can be taken against them. Rather, administrative action such as this has a protective purpose for the organisation. It is used to ensure organisational effectiveness and may be undertaken against individuals whose conduct, performance, or standards are unsatisfactory or whose actions or behaviour have adversely impacted, or are likely to impact, the efficiency, reputation or operational effectiveness of the ADF.

Actions currently being considered in relation to command accountability of officers are similarly administrative actions. Chapter 3.03 the Inquiry Report stated that commanders must bear moral and legal responsibility for what happened under their command and control. It highlighted that commanders are both recognised and accountable for what happens 'on their watch', regardless of their personal knowledge, contribution or fault. While the previous government had suspended consideration of command accountability, the current government has directed that Defence recommence consideration of this issue.

While Defence is initiating this consideration, any decision sits with the Governor-General, based on a recommendation by the Minister for Defence. This process involves the provision of procedural fairness and legal support to all involved. If additional information should emerge from the work of the OSI, further actions to hold commanders to account may be considered.

Administrative actions which flow from the Afghanistan Report have been taken in accordance with the command responsibilities which sit with CDF and the Service Chiefs. They are required to maintain the 'good order and military discipline' of the ADF. This includes the requirement to deal with allegations of deviations from professional standards. The ADF leadership would be doing a disservice to all members of the ADF, and the Australian public, if they did not act to maintain high standards. I acknowledge that your letter recognises this responsibility and the right to act to rectify such behaviours, separate from any criminal matters.

Separately, the previous government determined that the Meritorious Unit Citation (MUC) awarded to the Special Operations Task Group (Task Force 66) would be retained despite the recommendation in the Afghanistan Inquiry that it be cancelled. This decision has not been changed by the current government.

Your letter also raised CDF's apology to the people of Afghanistan, made on behalf of the Defence Force. I invite your members to read the full wording at <https://www.defence.gov.au/news-events/releases/2020-11-19/chief-defence-force-statement-igadf-afghanistan-inquiry>

CDF's apology was for any wrongdoing by Australian soldiers and was made against a background of findings which allege the most serious breaches of military conduct and professional values. This included allegations of the unlawful killing of civilians and prisoners. This apology acknowledged and took ownership of the allegations while still highlighting the enormous amount of good work done by the vast majority of our people. At no point did CDF assert that this was more than allegations. Rather, the apology marked the difficult step of informing the Australian people of alleged actions by some members of the ADF and reassuring both the public and the ADF about the measures to be taken in response. There was no assumption of guilt.

You raised the topic of compensation to Afghan victims in your letter. The issue of compensation stems from 15 recommendations in the Afghanistan Report. The Inquiry recommended that in cases where there was credible information that an identified or identifiable Afghan national was unlawfully killed, property damaged, or injuries inflicted, Australia should provide compensation. This recommendation was based upon this being the morally right thing to do and not contingent on establishing criminal liability.

The issue of compensation has been accepted by the Australian Government. Defence is working with the Department of Foreign Affairs and Trade, the Department of Finance, the Department of Prime Minister and Cabinet and the Attorney-General's Department to explore options to give effect to these recommendations. The question of compensation is, of course, complex and comes with a number of legal, practical, and logistical issues due to the ongoing situation in Afghanistan. I would, however, highlight the whole of government involvement in the work to complete these recommendations.

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Your letter indicates that the concerns you highlight regarding multiple deployments, under resourcing of Special Forces on deployment, and the tempo and design of units on operations will be raised with the Royal Commission into Defence and Veteran Suicide (Royal Commission). Defence welcomes and supports any discussions which will assist the Royal Commission in conducting their inquiry. The CDF has reassured serving and ex-serving members there will be no consequences for those sharing their personal experiences of serving in the ADF. Details are available at <https://defenceveteransuicide.royalcommission.gov.au/share-your-story/protections>

For awareness, the Royal Commission is accepting submissions until 13 October 2023. Details of how to engage with the Royal Commission are available on the Royal Commission website at <https://defenceveteransuicide.royalcommission.gov.au/share-your-story#make-a-submission>

Defence absolutely acknowledges and appreciates the current and former ADF personnel who have already contributed to the Royal Commission and the courage and generosity they have shown in sharing their stories. I also highlight that if any members of the Association require support with issues raised by their engagement with the Royal Commission, there are a range of services available at <https://defenceveteransuicide.royalcommission.gov.au/counselling-support>

There have been a number of assumptions and misunderstandings regarding the Afghanistan Report and subsequent work by Defence. This has caused concern and distress for some people. I would, therefore, commend to your members the publically available information on the Afghanistan Inquiry which can be found at <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry>

This information includes details of welfare support options, copies of the redacted Inquiry Report, details of Defence's response to the recommendations, and answers to Frequently Asked Questions. These source documents may inform an understanding of both the nature of the allegations raised in the Afghanistan Report, how they are being addressed, and provide reassurance to Association members that the work being undertaken will ensure the SASR is best placed to continue serving our country.

The Afghanistan Inquiry has been a challenging but necessary process. While holding our organisation to account, it has identified lessons for our future and the importance of focusing on, and adhering to, Defence values.

In the spirit of transparency, it would be extremely helpful if you could publish both your letter to the CDF of 8 February 2023 and this response on the Association's website. Your members, and the Australian public, have a legitimate interest in both the concerns raised and Defence's response.

Yours sincerely



Brett Wolski, AM, RAN
Rear Admiral
Head Afghanistan Inquiry Response Task Force

08 March 2023

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