



DEFENCE FORCE WELFARE ASSOCIATION

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UPDATE is a monthly news sheet produced by the Defence Force Welfare Association containing current items of interest to the Service and ex-Service community. It is widely distributed to Members of Parliament, media outlets, senior Service and Public Service Officers and DFWA members.

DFWA EXPRESSES SUPPORT FOR THREE FORMER MEMBERS OF AUSTRALIA'S SPECIAL OPERATIONS TASK GROUP FACING CHARGES

The Association is profoundly concerned that three former members of Australia's Special Operations Task Group are being charged with criminal offences including one of manslaughter following an incident last year which resulted in the death of a number of Afghanistan civilians including some children.

We believe the Government has a responsibility to promote a military justice system that facilitates a high standard of discipline in the ADF, provides justice for the individual members of the ADF and is transparent in its application. The way this current matter has been handled by both the Government and the Defence Department raises questions about the structure of the military justice system and the processes used to arrive at the laying of charges against ADF members. We call on the Government on behalf of the Nation, to accept responsibility for the actions of the ADF in Afghanistan and provide all the support needed to assist the defence of those members charged.

The Association notes that if there is anything positive to be found in this unhappy matter it is that (we assume) the three members charged will be tried by general court martial, where they will be judged by a panel of serving military officers, and not by the proposed Military Court of Australia (where their innocence or guilt would be determined by a judge alone, who is most unlikely to have had any personal experience of the type of operation in which the members were involved in February 2009, or the conditions in which such operations are conducted).

Finally, we also have an underlying concern that the forum and the jurisdiction of the International Criminal Court (ICC) might be abused by some member states for political or other purposes. The Australian Government must ensure that the operations of the ICC are kept under continuous scrutiny so that there is no risk of that body instituting proceedings against ADF personnel and that ADF personnel deployed overseas are at all times under Australian national sovereignty.

The Association gives unqualified support to all members of the ADF and offers the following contribution to the discussion penned by Professor David Flint:

“There can be no more important duty for the government than the defence of the realm. This means ensuring the Army, the Royal Australian Navy and the Royal Australian Air Force are able to do their duty. This of course includes financing and equipping them – a matter of some debate at the moment. It also involves ensuring a structure which allows them to function in the preparation for and in actual combat. This necessarily involves a certain separation from civilian life, of which there is no better demonstration than that while they are under ministerial direction, the armed forces owe their loyalty to the Australian Crown and not the politicians.

It is timely now for the government, and indeed the nation, to recognize once more the extraordinary degree of patriotism demonstrated by the armed forces. This is not the easy patriotism of words or flag waving. It is an overwhelming love of country, a love of country as it has been understood from the age of Athenian democracy down to our involvement in the world wars. In Pericles words in his celebrated Funeral Oration, soldiers have “joyfully determined to accept the risk”. Australians have recognized this in the memorials to those who made the supreme sacrifice.

In all of this the purpose of the armed forces must never be lost sight of. I recall that in my brief experience of the army, the aim was made clear. It is brutal, and necessarily so. It is to kill the enemy. It is a sad fact of life that in doing his duty a soldier may well unintentionally injure or kill civilians.

It is hardly surprising then that the decision of the Director of Military Prosecutions (DMP) Brigadier Lyn McDade to charge three Australian special force soldiers has been received with surprise, incredulity and outrage. It is assumed that the DMP understands that an enemy does not always play according to the Marquess of Queensbury rules. The terrible experience of our armed forces in saving this country from invasion in the Second World War demonstrates that.

The Taliban do not of course observe international conventions. They do not have rules of engagement which seek to honour their non-existent international obligations. They are well known for using innocent civilians, women and children, their own people, as shields.

What is clear in this case is that the soldiers being prosecuted in no way intended to kill those unfortunate civilians. It was an unfortunate accident, possibly compounded deliberately by the Taliban willingness to trade on our soldiers' decency.

Surely the DMP understands that her decision must affect morale and therefore the ability of our loyal armed forces to perform their role. Indeed they may well risk their own lives and those of their comrades in the unnecessary hesitation which her decision must cause.

Military justice must necessarily differ from civilian process. For most of the life of our armed forces, prosecutions were conducted before courts martial.

But after a Senate Report which was highly critical of the process, an Australian Military Court was created in 2007. This was found to be unconstitutional in 2009, so courts martial were reinstated temporarily until a constitutionally valid military court under the Federal Court could be established.

But what remained of the 2007 bundle of changes was a separate and independent Director of Military Prosecutions (DMP), one so designed that it is more powerful than the high command.

It is being said that the reason for the prosecutions has been to pre-empt a threat a prosecution before an international tribunal, the International Criminal Court (ICC). If this is so, there would be a good argument to withdraw from the Rome Convention which established the ICC. Indeed many people were strongly opposed to subscribing to the Convention as it was designed for fear that political prosecutions would be launched against Western soldiers and also leaders. The US refuses to join. It is unlikely to do so.

The sense of outrage about this case demonstrates is that in the ultimate analysis, no prosecution should be launched unless this course is approved by the soldiers' peers – those who have combat experience.

It is completely unacceptable that the DMP should have the sole discretion to launch a prosecution. Just imagine if such a position had existed in the Second World War. Had prosecutions been launched whenever civilians were inadvertently killed, the AIF, the RAN and the RAAF would have been rendered impotent.

The Menzies and Curtin governments would never have proposed such a position over the armed forces as the DMP. United in their allegiance to King and Country, acknowledging the terrible sacrifices that the soldiers, sailors, airmen and nurses were making, they also had more common sense.

If there is to be a central Office of Military Prosecutions, and not a personal supremo, any proposed prosecution should have the support of the relevant commanding officer. This could be reviewable at the next level and/or by a committee of serving officers.

It is equally important that the question of guilt should also only be determined by the soldiers' peers – those who have served or are serving in fighting units.

The soldiers charged are at least fortunate that their cases will be heard before courts martial. In the meantime the Parliament should immediately reform or abolish the office of the DMP before more damage is done.

This time they must exercise extreme caution in creating a replacement to courts martial. They made a mess of it on the last occasion. Indeed with some changes, why not let the courts martial continue?

But if there must be a replacement court, it should not in any way reduce the obvious requirement that service personnel must be judged by their peers."

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