

Defence Honours and Awards System

My name is Dr Paul Taucher, a lecturer in History and Humanities at Murdoch University. My research covers international humanitarian law, the laws of war and war crimes prosecutions. I have particular expertise in the doctrine of command responsibility. Command responsibility holds military officers liable for their failure to prevent, halt or punish the commission of war crimes by their subordinates, in circumstances where the officer knew, or ought to have known, about the potential or actual commission of crimes. Command responsibility is codified in the Rome Statute of the International Criminal Court, which Australia ratified and is a party to as of September 2002. Further, the principles of command responsibility are part of Australian law, under the *Criminal Code Act 1995* (Cth).

This submission directly addresses the integrity of awards to senior officers for conduct in the Afghanistan Conflict.

1. Summary

The *Afghanistan Inquiry Report* (the Report) disclosed 39 allegations of unlawful killings involving members of the Australian Defence Force (ADF), as well as allegations of the cruel treatment of prisoners under ADF control, during the period from 2005-2016.¹ The Report held that while military commanders did not hold legal command responsibility for these alleged crimes, it held that some commanders did hold a form of moral command responsibility. Senior officers, however, were absolved of all responsibility and accountability.² On the basis of the Report, subsequent public reporting on the issue of awards, and my own expertise in command responsibility, I submit that;

1. The integrity of awards for command and leadership of units whose members allegedly committed war crimes in Afghanistan during the period 2005-2016 cannot be assured (Category A awards). Commanders are both recognised and accountable for what happens on their watch, regardless of personal contribution or fault. Until it is publicly clear to what extent Australian forces committed war crimes in Afghanistan, and to what extent commanders knew or ought to have known of these crimes, awards for senior officers cannot be assured of their integrity.
2. Awards that were given to senior officers outside of Category A awards can be assured of their integrity (Category B awards), provided that the integrity of Category A Awards is adequately addressed.
3. The handling of the awards given to senior officers has exacerbated questions about the integrity of the awards.
 - A) Those officers who attempted to return their Category A awards were denied their request by the Australian government. The government's refusal to allow senior officers to exercise moral command responsibility marked the integrity of both the awards, the officers, and the ADF.
 - B) The wording of this inquiry's term of reference (C) regarding the integrity of the awards is a continuation of the government's inability to deal with moral command responsibility. Rather than seeking a fair and impartial judgment on the integrity of the awards, the term of reference requests assurances.

2. Category A Awards

There will be lingering questions over the integrity of Category A Awards because the particular details of the evidence exonerating troop, squadron and task group officers of

¹ Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (Commonwealth of Australia 2020), p. 1.

² *Ibid.*, pp. 31-32.

legal command responsibility for war crimes has not been made public. There will thus be lingering questions that extend up the chain of command to senior officers, regardless of whether they had operational command or not.

The exact level of command and control over those who allegedly committed war crimes is unclear. The Report outlined that the commanders in Afghanistan faced significant command and control issues, particularly with respect to special forces, who appear to be responsible for the majority of the alleged war crimes. The Report's conclusion on command responsibility was that there was no reasonable way for commanders to have knowledge, either real or assumed, that war crimes were occurring or that war crimes were being covered up, and that therefore, the problem of legal command responsibility did not arise.

There is limited explanation in the Report for why legal command responsibility did not arise, beyond broad generalisations: there are no explicit examples in the Report. The lack of clear detail is no doubt due to reasons of national, operational and personal safety: identifying particular examples, particular soldiers, or the details of procedure in a public report may cause undue risk to former or current ADF personnel. However, without further detail and without a clearer and more public exoneration, the integrity of awards given to senior officers who were in command of subordinates who allegedly committed war crimes will remain questionable. When soldiers receive awards for service, explicit examples are often provided. The fact that particular examples of senior officers' meritorious service has been made public, but the exonerating evidence has not, means that questions about the integrity of Category A Awards will remain.

Further questions about integrity of Category A Awards will linger while there is no information made available on investigations, and potential prosecutions, into those alleged to have committed substantive war crimes in Afghanistan. Though legal command responsibility is a relatively complex doctrine, the idea of moral command responsibility is not. How senior officers can retain Category A Awards while subordinates that they had control over are investigated and prosecuted, is a difficult question to answer: in the past, lack of operational command and lack of knowledge has not prevented Australia from prosecuting and convicting senior officers under command responsibility.³ While understandings of command responsibility have certainly evolved since Australia's last war crimes prosecutions, the way in which it operates with respect to the relatively widespread commission of war crimes in Afghanistan remains unanswered. Until there is a clear answer to the problems of command, accountability and responsibility, the integrity of these awards cannot be assured.

For the integrity of the awards to senior officers to be assured, a much more public and much more detailed explanation of the awards, tied directly to the investigation and potential prosecution of those alleged to have committed war crimes must occur.

3. Category B Awards

Awards given to senior officers for individual meritorious service can be assured of their integrity when the integrity of Category A awards is addressed. Many senior officers received awards for their meritorious command and leadership of professional and disciplined ADF members. Other senior officers may have won awards for individual acts unconnected to their command and control of subordinates. Nonetheless, if the ADF and Australian government do not address the lingering questions of the

³ See, Gideon Boas and Lisa Lee, "Command Responsibility and Other Grounds of Criminal Responsibility", in Georgina Fitzpatrick, Timothy McCormack and Narrelle Morris, *Australia's War Crimes Trials 1945-51* (Leiden: Brill, 2016), pp. 134-173.

Category A Awards, the integrity of the entire military award system will be brought into at least questioning, at worst disrepute.

4. Failure of the Australian Government to Reckon with Integrity and the Awards

The Australian government has exacerbated questions about the integrity of not only the awards system for senior officers in the Afghanistan Conflict, but the integrity of senior officers themselves.

Media reports in the aftermath of the Report's released highlighted that several senior officers from the Afghanistan Conflict, including then General Angus Taylor, Brigadier Ian Langford and Lieutenant-Colonel Jon Hawkins, attempted to return awards given for leadership and command.⁴ The attempt to hand back the medals can be understood to serve two purposes. First, to set a relevant standard for meritorious command and leadership to the award itself. Second, for the senior officers to demonstrate a level of reckoning with moral command responsibility. Denying the return of the medals leaves lingering questions about the integrity of the awards, as outlined in Section 1 above. Denying the return of the medals denies senior officers the chance to exercise their own moral judgment about their conduct, and the conduct of their subordinates.

The wording of the terms of references is a further continuation of the Australian government's inability to reckon with the alleged crimes in Afghanistan. In support of this point, I turn to the Report, which among other things, highlighted that officers in Afghanistan "proactively took steps to portray events in a way that would minimise the likelihood of attracting appropriate command scrutiny", and to "collect evidence to refute a complaint, rather than to present a fair and balanced assessment of the evidence".⁵ The term of reference addressed in this submission requests "assurance of the integrity of awards to senior officers in the Afghanistan conflict." From the wording, it appears that the Senate Inquiry is more interested in minimising scrutiny of the awards system and refuting complaints of integrity issues.

5. Conclusion

Reckoning with war crimes is a complicated, messy and fraught affair. The stain that breaches of war crimes law impart on an organisation is not easily dealt with. The Australian Defence Force's values and behaviours prioritise accountability, courage, respect, integrity, and the ability to reflect, learn and improve. Without a transparent investigation, and if necessary, prosecution, of war crimes in Afghanistan, and what role operational officers and senior officers had in the culture and command of ADF units, the integrity of awards will never be assured.

⁴ <https://insidestory.org.au/brereton-unfinished-business/>.

⁵ IGDAF, *Afghanistan Inquiry Report*, pp. 34-35.