A Disconnect between Policy and Practice: Defence Transparency in Australia

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In a bureaucracy as large as the Australian Defence Organisation (ADO) attributing the cause of policy failure is a difficult task. I've previously highlighted societal and parliamentary factors that hamper transparency and the scrutiny of defence policy in Australia.[1] This commentary will more deeply consider bureaucratic, legal, and cultural traits within the ADO that militate against the organisation's own stated policy of a "pro-disclosure" culture, as well as Defence's legislated requirement to be open and accountable to the Australian public. Analysing the ADO's information disclosure policy with regard to an operational incident that took place in Afghanistan nearly two years ago, shows that a particularly toxic combination of deliberate opaqueness, stalled process, and capacity constraints have served to create a roadblock to defence transparency and public accountability. The case study examined is one in which Australian soldiers were originally accused of having committed war crimes: a grisly incident where Special Forces personnel decided to sever the hands of dead Afghans for tactical reasons. To be sure it is not an incident of which Defence is particularly proud, but as will be argued the ADO's policy response contravenes its own stated policy, weakens the public reputation of the Australian Defence Force, does not serve the ADF members involved well, and undermines the important need within a parliamentary democracy for military forces to be both transparent and accountable. Of course, there are many pressures on the defence establishment at the moment, and providing information to the general public about a sensitive operational incident might seem an annoyance. But the true test of an organisation's character is best measured at such pressure points. This incident suggests a serious need for renewed efforts to ensure the ADO complies with its need to be transparent.

The Zabul Incident

On the evening of 28 May 2013 a contingent of the ADF's Special Operations Task Group conducted a joint night raid with Afghan National Security Forces in Zabul. The target was reportedly Mullah Bakht Mohammad, a key commander for the Taliban in Southern Afghanistan though subsequent

[1] James Brown, *Anzac's Long Shadow: The Cost of our National Obsession* (Collingwood: Black Inc, 2014); James Brown, 'Politics Rules and Scandals Blow Up in Public but Defence just Ignores the Indefensible', *Sydney Morning Herald*, 15 April 2011.

International Security Assistance Force (ISAF) mentions referred to him only as an "IED facilitator".[2] During the mission four insurgents were killed and a small quantity of weapons and explosives were recovered. Nine days later, the ISAF Public Affairs Office announced an investigation into an internal report of misconduct by ISAF personnel during the mission.[3] The ADO subsequently issued a 170-word media release confirming an investigation into the incident was underway and declining to comment until it was complete.[4] The then Defence Minister Stephen Smith incorporated this media release verbatim into a parliamentary statement on Afghanistan delivered on 16 May 2013, but provided no additional detail clarifying what was alleged to have taken place.[5]

Three months later ABC television reported that during the Zabul incident Special Forces personnel had severed hands from corpses in order to confirm insurgent identities through biometric testing, concluding "The mutilation or mistreatment of the bodies of the dead is a violation of the laws of war."[6] In response, the ADO issued a 280-word media release that detailed the dangers faced by Australian personnel during the Zabul mission and asserted the ADF's general compliance with international law—though with no further detail on the incident or investigation.[7] Allegations that Australian soldiers had committed a war crime by desecrating the body of an adversary were reported widely in international media. NATO commanders were concerned about a possible tactical backlash against ISAF troops because of the allegations and the Australian Ambassador in Kabul met with Afghan officials to discuss the incident.[8] Defence Minister Smith publicly concluded "It's difficult for me to prejudge but the available evidence suggest that what is essentially asserted

[2] Xinhua-ANI, 'Taliban Key Commander, 3 Others Killed in Southern Afghanistan Town', Yahoo! News India, 29 April 2013, <in.news.yahoo.com/taliban-key-commander-3-others-killed-southern-afghan-083833642.html> [Accessed 19 February 2015]; ISAF Joint Command Public Affairs Office, 'ISAF Joint Command Operational Update April 29th', Resolute Support Mission, 2013, <www.isaf.nato.int/article/isaf-releases/isaf-joint-command-operational-update-april-29th.html> [Accessed 19 February 2015].

[3] ISAF Public Affairs Office, 'ISAF Announces Investigation', <www.isaf.nato.int/article/isaf-releases/isaf-announces-investigation.html> [Accessed 19 February 2015].

[4] Department of Defence, 'Media Release Review into Special Operations Task Group', 8 May 2013, <news.defence.gov.au/2013/05/08/review-into-special-operations-task-group-operation/> [Accessed 19 February 2015].

[5] Minister for Defence, 'Paper presented by the Minister for Defence Stephen Smith MP on Afghanistan—Detainee Management', 16 May 2013, <www.minister.defence.gov.au/2013/05/16/minister-for-defence-paper-presented-on-afghanistan-detainee-management/> [Accessed 19 February 2015].

[6] Michael Brissenden, 'Australian Special Forces Troops under Investigation for Cutting Off Hands of Dead Afghan Insurgent', Radio Australia, 30 August 2013, <www.radioaustralia.net.au/international/2013-08-30/australian-special-forces-troops-under-investigation-for-cutting-off-hands-of-dead-afghan-insurgent/1183684> [Accessed 19 February 2015].

[7] Department of Defence, 'Media Release Update—Review into Special Operations Task Group Operation', 30 August 2013, <news.defence.gov.au/2013/08/30/update-review-into-special-operations-task-group-operation/> [Accessed 19 February 2015].

[8] David Wroe and Bianca Hall, 'Soldiers Alleged To Have Cut Off Dead Insurgent's Hand', *Sydney Morning Herald*, 31 August 2013; Jeremy Kelly and Brendan Nicholson, 'Diggers face backlash over mutilation', *The Australian*, 31 August 2013.

occurred, we now have to try to work out what were the facts and circumstances associated with that."[9]

A survey of non-official information on the Zabul incident suggests that during this mission, and possibly others in 2013, Special Operations Task Group soldiers severed hands from dead insurgents for the purposes of biometric identification. This practice appears to have been institutionalised, recommended to soldiers by at least one member of the ADF Investigative Service (ADFIS) during pre-deployment training. But it was not conducted wantonly for revenge or souveniring. Instead it appears to have been driven by pragmatic tactical considerations: balancing the needs to identify targeted insurgents, allow burial within customary timelines, and reduce the exposure of Special Forces personnel in hostile territory.

Though a grisly practice, it would not appear to be a war crime under Australian law. The International Committee of the Red Cross's codification of international humanitarian law, based on Geneva Conventions and the customary practices of various legal bodies, prohibits the mutilation of dead bodies during a conflict.[10] Though Australian military doctrine acknowledges that this prohibition forms part of customary laws of armed conflict,[11] there is no specific crime for the mutilation of dead bodies within either defence legislation or the Commonwealth Criminal Code (which incorporates aspects of international humanitarian law into Australian domestic legislation).[12] At worst it seems the soldiers exercised questionable tactical judgement by risking the inflammation of the local population, and could be charged with prejudicial conduct under the *Defence Force Discipline Act 1982*. But this explanation has never been made to the public by the senior leadership of the ADF, the Minister of Defence, or indeed anyone within the ADO.

ADO Information Release Policy

Nearly two years have passed since the Zabul incident and the ADO has released little further information on what happened or how it is being investigated. There have been multiple and repeated requests to the ADO's media operations unit for updates on the incident and investigation. Information requests are met with laconic responses declining comment:

[9] Brissenden, 'Australian Special Forces Troops under Investigation for Cutting Off Hands of Dead Afghan Insurgent'.
[10] International Committee of the Red Cross, 'Rule 113. Treatment of the Dead', *Customary IHL*, <www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter35_rule113#Fn_3_10> [Accessed 19 February 2015].
[11] Commonwealth of Australia, *Australian Defence Doctrine Publication Executive Series ADDP 06.4 2006 Law of Armed Conflict* (Canberra: Defence Publishing Service, 2006), section 13.30 p. 13-11.
[12] The Commonwealth Criminal Code only lists as an offence the war crime of mutilation of a live person, see 'International Criminal Court (Consequential Amendments) Act 2002—Schedule 1', Section 268.47, <www.austlii.edu.au/au/legis/cth/consol_act/iccaa2002543/sch1.html> [Accessed 19 February 2015].

> Defence continues to investigate an incident of potential misconduct during a combined operation between Afghan National Security Forces and Australia's Special Operations Task Group in Zabul province, Afghanistan on 28 April 2013. Defence will not comment further on this matter while the investigation is underway.[13]

Similarly, information requests to other ADO departmental and ministerial staff have been unsuccessful. ADO staff cite that no aspects of the Zabul incident may be discussed whilst it is being investigated, including the procedural and administrative aspects of underway inquiries and investigations. This blanket ban on information release is justified by citing common law principles that apply when a matter is *sub judice*.[14] Yet at the time this justification was offered no charges had been laid over the Zabul incident, nor a service tribunal or court-martial convened. In any event *sub judice* considerations would only preclude a discussion that might prejudice the conduct of legal deliberations, not discussion of basic facts or administrative processes. FOI data shows that one information request (the author's) was circulated to more than thirty-two people within the Defence Department, Office of the Chief of the Defence Force, Headquarters Joint Operations Command, and two Minister's offices before the Director of Operations for Strategic Communications within the ADO's Military Strategic Commitments Branch determined that a deliberate policy of information refusal would apply.[15] An Australian Federal Police investigation into the ABC's investigative story on the Zabul incident was launched, and the journalist involved has been pressured to reveal his sources.

Parliamentary enquiries have been similarly unsuccessful in enforcing defence accountability on the Zabul incident. During the Department of Defence Budget Estimates hearing in June 2014 Senator Peter Whish-Wilson asked the then Chief of the Defence General David Hurley for an update on the status of the investigation, the date on which any Inquiry Officers report was originally completed, and whether the results would be publicly released. General Hurley declined to commit to publicly releasing the inquiry once completed, and in a question on notice answer provided to the Senate on 22 July 2014 the ADO provided the following additional information on the investigation:

> The Inquiry Officer's Inquiry Report was submitted to CJOPS on 26 July 2013. The related Australian Defence Force Investigative Service investigation continues.[16]

[13] Email from mediaops@defence.gov.au to author dated 24 April 2014.
[14] Email Minister of Defence office to author, 15 October 2014.
[15] Department of Defence, FOI 038/14/15, 'Media Ops inquiry dated 15 April 2014' Department of Defence FOI Disclosure Log, <www.defence.gov.au/FOI/Decisions/ DisclosureLog.asp> [Accessed 19 February 2015].
[16] Department of Defence, 2014, Budget Estimates Hearing—2 and 3 June 2014, Question on Notice No. 1—Special Operation Task Force, <www.aph.gov.au/~/media/Committees/fadt_ctte/ estimates/bud_1415/def/Defence_FINAL_Index.pdf> [Accessed 19 February 2015].

That question on notice response is the only additional information provided to the public record on the Zabul incident since Stephen Smith's comments of August 2013.

Of course some things in defence should remain secret—even if only temporarily to satisfy tactical or strategic military objectives. But confidence in public administration requires openness, and the public release of information is the currency by which government bureaucracies may be held accountable. For this reason Defence is legally required to be responsive to public requests for information, including requests on embarrassing and sensitive incidents like that in Zabul. The *Freedom of Information Act 1982* requires Defence to publish information it holds with the object of "increasing public participation in Government processes" and "increasing scrutiny, discussion, comment and review of the Government's activities".[17] Defence's own information publication policy in response to that Act urges that the policy "underpins a pro-disclosure culture across government, and transforms the freedom of information framework from one that is reactive to individual requests for documents, to one that also relies more heavily on agency driven publication of information".[18] The Australian Public Service Values, legislated in the *Public Service Act 1999*, require that "The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility." Despite being legislated to continuously and proactively disclose information to the public, and having a policy that requires uniformed and civilian ADO staff to meet this responsibility, the ADO is not practising this when it comes to the Zabul incident. Deliberately suppressing information is not the same as a cover-up: no false information has been presented by the ADO, nor has any apparent illegality occurred in responding to information requests from the parliament or public. But the impact on public confidence in defence accountability may well be much the same. It is worth considering why the ADO is not able to implement its own policies, nor comply with the law when it comes to transparency.

Defence Transparency Roadblocks

In this case defence transparency has been throttled by multiple factors: chiefly organisational capacity constraints, structural weaknesses, and cultural deficiencies. At the best of times, Defence is flooded with information and issues requiring attention. In 2008 Defence Ministers and Parliamentary Secretaries received 8944 pieces of correspondence, 3959 of which were briefs for action and 3041 were briefs for advice.[19] In 2013 then Defence Minister David Johnston alone received more than 130 briefs for action and

[17] *Freedom of Information Act 1982* (Cth), section 3, viewed at <www.comlaw.gov.au/Details/C2014C00673/Html/Text#_Toc400462391>.
[18] Defence Information Publication Scheme, viewed at <http://www.defence.gov.au/ips/>.
[19] John Faulkner, 'Governance and Defence, Some Early Impressions', speech to the Australia and New Zealand School of Government, Sydney, 13 August 2009, <www.defence.gov.au/minister/92tpl.cfm?CurrentId=9361> [Accessed 19 February 2015].

advice in his first ten days.[20] Whilst the Defence Abuse Reform Taskforce effort has also dwarfed recent incident investigations, in any event there are a large number of operational incidents and allegations to investigate. As an example, in the thirty-three months prior to the Zabul incident, 198 allegations of detainee mistreatment were made against Australian forces in Afghanistan of which 193 were found to be baseless.[21] Some of these have been high profile and flawed allegations made against Special Forces personnel by the media.[22] This information and investigatory overload has to date not been matched with the requisite departmental capacity—as a general rule scant resources and attention can be given to any one investigation. Some capacity constraints are fundamental: only one company is authorised to transcribe classified witness interviews during ADF inquiries for example, and of course funding for investigations and inquiries is limited.[23] There are also a limited number of ADFIS personnel able to investigate complex incidents like that in Zabul.

In fact, ADFIS itself remains a structural weakness in the process of publicly releasing investigation results. ADFIS has often struggled with complex investigations into operational incidents and military justice. A 2006 inquiry concluded, "that the ADF investigative capability is in serious decline and that remediation, even if approached with unremitting resolve and commitment, is likely to take no less than five years."[24] Sure enough, six years later the Inspector General of the ADF was tasked to investigate shortcomings in ADFIS operations in the Middle East.[25] The findings of that report have not been made public.[26] Complicating matters further, the Zabul incident involves alleged misconduct by an ADFIS officer. Other structural weaknesses further undermine defence transparency. Requests for information are highly bureaucratised—no single figure below the level of the Chief of the Defence Force appears to have authority and accountability for the release of official defence information. Most militaries resolve this problem by having an official spokesperson's office. The ADO does not and media responses are issued

[20] Department of Defence, FOI 008/14/15, 'Ministerial briefs prepared by the Department for Minister Johnston', <www.defence.gov.au/FOI/Decisions/DisclosureLog.asp> [Accessed 19 February 2015].
[21] Minister for Defence, 'Paper presented by the Minister for Defence Stephen Smith MP on Afghanistan—Detainee Management'.
[22] See for example Matthew Carney, Thom Cookes and Shoaib Sharifi, 'In Their Sights', Four Corners, ABC, 5 September 2011, <www.abc.net.au/4corners/stories/2011/09/01/3307694.htm> [Accessed 19 February 2015]; and SBS Dateline SBS, Dateline, 'Questions from Oruzgan', 7 March 2010. Both reports were awarded Walkley Awards despite inaccuracies.
[23] Sarah Elks, 'ADF Orders Cheap, Opaque Inquiry into Diggers' Deaths, Inquest Hears', *The Australian*, 14 October 2014.
[24] Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability* (Canberra: Commonwealth of Australia, July 2006).
[25] Minister for Defence, 'Paper presented by the Minister for Defence Stephen Smith MP on Afghanistan—Detainee Management'.
[26] Despite being established with the object of providing an "an avenue by which failures and flaws in the military justice system can be exposed and examined", the IGADF publishes none of its reports.

from an anonymous defence email address, with no officer or employee listed as accountable for the answer or as a point of contact.[27]

The ADO has previously acknowledged serious structural problems in the way it resolves inquiries into operational fatalities, yet bureaucratic delays still hamper the resolution of inquiries and investigations and their release to the public. The below timeline highlights the passage to public release of an inquiry into an operational incident in which a civilian was shot by ADF soldiers.[28] A three star general cleared the report for public release within two months of completion, yet it remained blocked for another nine months within Russell HQ. A Defence spokesperson's office, conscious of the need to meet public expectations for accountability and transparency, might have worked to overcome this bureaucratic inertia.

Operational incident occurs	1 May 2012
Inquiry Terms of Reference issued	25 May 2012
Inquiry interviews commence	5 June 2012
Inquiry completed	May 2013
Cleared for release and operational security by Chief of Joint Operations	29 July 2013
Cleared by International Policy Division	11 Oct 2013
Cleared by Military Strategic Commitments Legal and Stratcom	28 March 2014
Cleared by Office of CDF and released to public	11 April 2014

The most critical structural factor blocking defence transparency though is Regulation 63 of the Defence (Inquiry) Regulations 1985, which makes it a criminal offence for any person (other than the Defence Minister and his delegates) to disclose defence inquiry information even after that inquiry has been completed.[29] When introduced in 2007, both the Commonwealth Ombudsman and Administrative Review Council of the Attorney General's Department (a body mandated to examine government administration) warned that these regulations were "overly restrictive in their treatment of disclosure of the contents of reports, findings or recommendations," and noted:

> the disclosure of information may be appropriate where it is important to maintain public and employee confidence in defence procedures. The objective would be to strike a balance between the need to withhold certain sorts of information to ensure the maintenance of effective government and disclosure in the public interest… We have had the opportunity to read a draft

[27] This is likely because of negative experiences when the ADF last had an official spokesperson in the late 1990s.
[28] The timelines are from talking points and reports contained within Department of Defence, FOI 038/14/15, 'Media Ops inquiry dated 15 April 2014'.
[29] Defence (Inquiry) Regulations 1985 viewed at <www.comlaw.gov.au/Details/F2013C00477 /Html/Text#_Toc362350440>.

> submission prepared by the Commonwealth Ombudsman for this review and agree that Regulation 63 may lead to a culture of secrecy.[30]

The culture of secrecy within the ADO is the single most important factor obstructing defence transparency in Australia, and was described by a senior journalist as "a closed, defensive officiousness, where all official information is assumed to be confidential except when someone in authority deigns to release it".[31] This observation is not limited to journalists.[32] Of course, defence and national security matters require an extensive culture of secrecy but this must be balanced with the requirement for public administration to be open and transparent in a democracy. ADO cultural instincts on information release are intertwined with another factor which Chief of Army Lieutenant General David Morrison warned of in a 2013 speech: "I have been struck at how legalistic our culture has become. This of course reflects a wider societal trend. But we have reached the point where it may be about to seriously impede the effectiveness, cohesion and discipline of the Armed Forces."[33] Inquiries into operational incidents sometimes pass through four separate levels of legal review before being finalised, each with the potential to delay and obstruct public release of information. This overly legalistic culture manifests in the colossally wide definition of sub-judice relied upon by ADO personnel in denying information requests on the Zabul incident. A toxic culture of secrecy, over-legalism, and a lack of individual adherence to democratic principles and public service values all combine to militate against defence transparency.

Fixing the Problem

Reducing these roadblocks to transparency is possible with the right leadership and organisational commitment to reform. Changes to the Freedom of Information process in defence, chiefly led by former Defence Minister John Faulkner show how. Prior to 2009, there was little commitment to the duty of transparency in Defence's FOI process: only 15 per cent of 2008 FOI requests were met within legislated deadlines and the FOI directorate itself was dysfunctional. Defence was embarrassed when it was taken to the Administrative Appeals Tribunal by the NSW Public Interest Advocacy after an FOI request that took four years to release less than 10 per cent of

[30] Commonwealth of Australia, 'Supplement to 2007-8 Administrative Review Council Annual Report', 2008, <www.arc.ag.gov.au/Publications/Reports/Pages/Annualreports/32ndAnnualReportandSupplement.aspx> [Accessed 19 February 2015].
[31] Tom Hyland, 'The Worst-reported and Least-understood Foreign Conflict in Australian History', *Inside Story*, 22 January 2014, <insidestory.org.au/the-worst-reported-and-least-understood-foreign-conflict-in-australian-history> [Accessed 19 February 2015].
[32] See for example Josh Bavas and Leonie Mellor, 'Afghanistan Soldier Deaths: Coroner Made to Jump through Hoops by ADF, Inquest Hears', ABC News, 14 October 2014, <www.abc.net.au/news/2014-10-14/soldiers-inquest-coroner-yet-to-obtain-all-relevant-adf-document/5812988> [Accessed 19 February 2015].
[33] Lieutenant General David Morrison, Speech to the Australian Army Legal Corps Conference, 3 October 2013, <www.army.gov.au/Our-work/Speeches-and-transcripts/Chief-of-Army-address-to-the-Australian-Army-Legal-Corps-Conference> [Accessed 19 February 2015].

identified relevant documents.[34] A new FOI branch was created to coordinate requests with visibility and accountability at senior levels, enhanced training was delivered to FOI decision makers, a dedicated FOI database was established, and cultural shifts were pressed to encourage FOI staff to work proactively with the rest of the department to requests. Most importantly, this transparency reform was led from the top: the then Defence Minister clearly signalling in a headline speech "I have always held the view that transparency is crucial to good governance. Transparency is essential to accountability." Today the FOI Directorate runs an excellent process, which is fully accountable and executed by well-trained and helpful staff. Such a reform effort is now needed for the ADO's process of investigating incidents and releasing information about them to the public. A useful first step would be for the Defence Minister to order that all inquiries under the Defence Inquiry Regulations should be published automatically within three months of their resolution. In the longer term, responsibility for complex defence investigations should be transferred to the Australian Federal Police who now deploy internationally alongside the ADF.

In the time taken to resolve the Zabul incident for the public record the Australian Government has changed, a new Chief of Defence Force has been appointed, and Australian troops have transitioned home from combat operations in Afghanistan. The ADF personnel at the heart of the Zabul incident have languished without being convicted or cleared. The widespread coverage alleging that ADF soldiers committed war crimes has not been corrected. Journalists enquiring into the incident have been ignored, or worse investigated. Defence should be concerned that practice has not followed policy on this issue. The public and parliament should be concerned that they do not have an accountable defence force in this instance.

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[34] NSW Public Interest Advocacy Centre, 2014, viewed at <military.piac.asn.au/about>.