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CDF/OUT/2013/1622

Senator Alan Eggleston

Chair

Senate Foreign Affairs, Defence and Trade Legislation Committee

PO Box 6100

Parliament House

CANBERRA ACT 2600

Dear Chair,

I write to assure you and the Committee that the evidence I gave at the Estimates hearing of the Senate Foreign Affairs, Defence and Trade Legislation Committee on 28 May 2012 remains correct contrary to the recent allegation made by the ABC on its 7.30 program. In a story broadcast on Friday 13 December 2013 the ABC claimed that I misled the Committee over the circumstances surrounding the death of an insurgent who was shot and killed by an Australian soldier in Afghanistan.

On 13 December the 7.30 program stated that:

The Chief of the Australian Defence Force, General David Hurley, may have misled the Senate over the death of a handcuffed prisoner who was shot by an Australian Special Forces officer in Afghanistan. General Hurley told a Senate Estimates Hearing that it was a combat-related death, but a previously secret internal ADF report, obtained by 7:30 under Freedom of Information, tells a different story. It reveals the man was shot fatally in the chest while in detention, and raises serious questions over how the ADF deals with such incidents.

The ABC implied that I misled the Committee at the Estimates hearing of 28 May 2012 by stating:

- i) *that the death was regarded as combat related (Hansard, page 60); and*
- ii) *that the death did not occur while the insurgent was undergoing tactical questioning (Hansard, page 60).*

The ABC made this claim on the basis of a Defence document released under FOI on 2 December 2013 (FOI 165/13/14).

I categorically reject the claim that I misled the Committee. The advice I received prior to the Estimates hearing was that, at the time of the incident in 2010, the insurgent's death was regarded as a combat related death. This was and remains a statement of fact and was based on advice I had at the time.

During the same Estimates hearing I also stated that:

'Defence understands that the incident we are aware of did not occur during tactical questioning, but the Chief of Joint Operations, once this allegation was made known to me this week, has directed that the details of this incident be reviewed'.

The claim that I misled the Committee assumes that I must have been aware of the outcome of an investigation that was not completed until 2013. This was not the case, and it is illogical for the ABC

to imply that I misled the Committee on the basis of information that was not available to me until a date subsequent to the 28 May 2012 Estimates hearing.

An assessment completed after the hearing of 28 May 12, found that the shooting occurred following (not during) tactical questioning when the insurgent grabbed a sickle knife from a ledge just above the doorway and attacked the soldier as he was being led through a doorway. A subsequent Australian Defence Force Investigative Service (ADFIS) investigation, completed in October 2013, concluded that there was sufficient evidence to indicate the soldier acted lawfully.

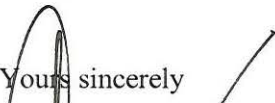
Following conclusion of investigations into the incident Air Marshal Mark Binskin, the Vice Chief of the Defence Force reported back to the Senate Committee on 20 November 2013 by making the following statement on my behalf:

The Chief of the Defence Force gave an undertaking to update the Committee on the progress of that investigation.

Senators I can advise that the Australian Defence Force Investigative Service (ADFIS) has completed the investigation and found that the insurgent attempted to attack an Australian soldier with a knife. Recognising the immediate threat to his own life, the Australian soldier engaged and killed the man. The ADFIS investigation concurred with the initial assessment in 2010; that the soldier acted lawfully in the circumstances and within the Rules of Engagement.

The unit involved was required to report operational incidents to the chain of command and in fact did so on this occasion. Nevertheless, following actions initiated after questions from News Limited drew this matter to attention, the content of initial reporting of the incident was found to be deficient.

Finally, I will be writing to Mr Mark Scott, Managing Director of the ABC, to express my disappointment over the program's misrepresentation of my evidence.

Yours sincerely 

D.J. HURLEY, AC, DSC
General
Chief of the Defence Force
20 December 2013

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Transcript

Station: **ABC1** Date: **13/12/2013**
 Program: **7:30** Time: **07:38 PM**
 Compere: **TRACY BOWDEN** Summary ID: **M00055612197**

Item: **DAVID HURLEY, CHIEF OF THE DEFENCE FORCE, MAY HAVE MISLED THE SENATE OVER THE DEATH OF A PRISONER WHO WAS SHOT IN AFGHANISTAN BY AN AUSTRALIAN SPECIAL FORCES OFFICER, WHEN HE TOLD A SENATE ESTIMATES HEARING IT WAS A COMBAT RELATED DEATH. 7.30 OBTAINED AN INTERNAL ADF REPORT UNDER FREEDOM OF INFORMATION REVEALS THE MAN WAS SHOT IN THE CHEST WHILE IN DETENTION. A GROUP OF AUSTRALIAN SPECIAL FORCES SOLDIERS AND THEIR AFGHAN COUNTERPARTS RAIDED A VILLAGE IN NORTHERN KANDAHAR IN OCTOBER 2010, HUNTING FOR INSURGENTS. THEY ROUNDED UP 30 LOCAL MEN AND QUESTIONED THEM IN A ROOMING HOUSE, WHERE ONE OF THE MEN WAS SHOT.**

INTERVIEWEES: DAVID HURLEY, CHIEF OF THE DEFENCE FORCE; DAVID LETTS, ASSOCIATE PROFESSOR, CENTRE FOR MILITARY AND SECURITY LAW, ANU

Audience:	Male 16+ 64000	Female 16+ 81000	All people 149000
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TRACY BOWDEN: The Chief of the Australian Defence Force, General David Hurley, may have misled the Senate over the death of a handcuffed prisoner who was shot by an Australian Special Forces officer in Afghanistan. General Hurley told a Senate Estimates Hearing that it was a combat-related death, but a previously secret internal ADF report, obtained by 7:30 under Freedom of Information, tells a different story. It reveals the man was shot fatally in the chest while in detention, and raises serious questions over how the ADF deals with such incidents.

Thom Cookes has this exclusive report.



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REPORTER:

In October 2010 a group of Australian Special Forces soldiers and their Afghan counterparts raided a village in Northern Kandahar, hunting for insurgents. They targeted a particular house in the village and rounded up 30 local men. They used a room in the house to question them. By the end of the day, one of those Afghan men was dead.

The incident was kept secret until May last year, when it leapt into the headlines of News Ltd papers. It was just one of a series of allegations made by whistleblowers from the Defence Investigative Service, known as ADFIS, that claimed an Australian Special Forces officer had shot dead a prisoner during questioning and that there had been no ADFIS investigation.

The same day the incident was raised with the Chief of the Defence Force, General David Hurley, during Senate Estimates Hearings.

DAVID HURLEY:

[Excerpt]

...Particularly in relation to some of the media coverage in today's newspapers...

[End of excerpt]

REPORTER:

General Hurley reassured the senators that there was no substance to the newspaper stories.

DAVID HURLEY:

[Excerpt]



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...and these claims come - allegations come from former members who were involved in operations in Afghanistan at the time, so we don't take them lightly. There were issues about - you would have seen in the paper today, allegations that an SATG Special Forces officer shot an insurgent during tactical questioning. That was examined at the time and found not to be so.

[End of excerpt]

REPORTER:

General Hurley denied that the man had been killed while under questioning by the Australians.

DAVID HURLEY:

[Excerpt]

In the matter that we are aware of the insurgent was killed - the insurgent killed was regarded as a combat-related death. Defence understands that the incident we are aware of did not occur during tactical questioning.

[End of excerpt]

REPORTER:

Defence ordered an investigation. The full report from ADFIS was finally completed in October this year, and classified secret. Now the *ABC* has obtained a copy of the report under Freedom of Information.

DAVID LETTS:

Anytime that somebody dies when they're in the custody or control of - or been detained by Australian forces, I think that is by its very nature, that's a serious event.



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REPORTER:

The ADFIS report is at odds with General Hurley's claim that it was a combat-related death and didn't happen during questioning. It states that the Afghan man was a detainee at the time that he was killed. It says that after the Afghan man was detained, an Australian officer was alone in the room with a handcuffed prisoner. His colleagues outside heard shouting and then a number of shots. When they rushed in the Afghan man's plastic cuffs had become separated and he was dead on the floor. He'd been shot in the chest, in the neck, and between the eyes. The Australian officer claimed that the prisoner attacked him with a knife and so he'd fired in self-defence, but there were no eyewitnesses.

The report states that there is sufficient evidence to conclude the soldier's actions were lawful in the circumstances. The ADFIS investigators stated that the investigation was problematic from the outset, due to the historic nature of the incident.

DAVID LETTS:

It's clearly not best practice to undertake the investigation that long after an event. Collecting the information as quickly as possible once the event has actually occurred, that's clearly preferable.

REPORTER:

The investigators complained bitterly that they were denied direct access to Special Forces records, that some records could not be located, and after exhausting all feasible lines of inquiries, ADFIS was unable to identify or confirm the location of the unit's Afghan interpreter, the last independent witness to see the victim alive.



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DAVID LETTS:

At the time that General Hurley made his comments in Senate Estimates, he would have based those comments on the information that had been provided to him at the time. It appears that that information wasn't as a result of adequate investigation or inquiry.

REPORTER:

General Hurley was unavailable to be interviewed by 7:30 for this story, but Defence provided this response to our questions.

VOICEOVER:

No investigation of the matter had occurred prior to 28 May 2012. The Chief of the Defence Force was advised on the basis of information available at the time that the insurgent was not shot during tactical questioning.

REPORTER:

Defence also stated that:

VOICEOVER:

The unit was required to report operational incidents to



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the chain of command.

REPORTER:

But that the content of the initial report was deficient.
It said that:

VOICEOVER:

Once the allegation was made in 2012 further inquiries
and investigations were conducted. Defence is satisfied
that the allegation has been properly investigated.

TRACY BOWDEN:

Thom Cookes with that report. And you can find the
full Defence statement on our website.

* * END * *

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