

DEFENCE LEGAL SERVICES
Assistant Director Legal Services Wellington Region
MINUTE

1455/DLS/1

31 May 17

OC NZDF MP SIB

For information: DLS

SIB INVESTIGATION: ALLEGED OFFENDING IN AFGHANISTAN

References:

- A. Crimes Act 1961 (CA)
- B. Armed Forces Discipline Act 1971 (AFDA)
- C. Criminal Procedure Act 2011 (CPA)
- D. Geneva Conventions Act 1958

1. You and WO1 ^{PSRICH, PSRSe} briefed me as to the current state of the investigation he is conducting on Tue 30 May 17. As I understand the allegations, they are to the effect that an unnamed NZDF person struck a named Afghani national who had been detained as a result of a combined NZDF and Afghan Police operation in Jan 2011. The allegation also asserts that the alleged incident has not been reported or acted upon.

2. As you are aware, CA ss 5 and 6 provide that the CA applies only to offences in New Zealand, unless it specifically provides otherwise. Given that the alleged actions are ones in respect of which there is no provision extending the application of the CA extra-territorially, it follows that the only jurisdiction applicable in respect of the alleged events is that provided for by the AFDA. AFDA s 4 provides that the AFDA has extra-territorial effect in respect of all persons who are subject to the AFDA.

3. AFDA s 74 makes all offences against other New Zealand statutes offences against the AFDA, wherever those offences are committed. Any offence against NZ law is therefore capable of being proceeded with under AFDA s 74, subject to the other provisions of the AFDA.

4. Provisions of the AFDA impose limitation periods in respect of offences which can be proceeded with under the Act. Outside those prescribed limitation periods offences cannot be proceeded against. AFDA ss 20(3) and 20(5)(b)(vii), make the time limit in respect of civil offences committed whilst subject to the AFDA the same as those applicable under the civil law. The limitation periods under civil law in respect of each potential offence are described in paragraphs 6 – 9 below.

Potential offences

5. As noted, the allegation is of the deliberate striking, by an unnamed NZDF member in an NZDF-operated vehicle, of an Afghani who at the time was detained. Accordingly, the following potential offences might have occurred.

6. Assault.

- a. CA s 196 provides that it is an offence punishable by imprisonment for up to one year to assault anyone. Assault is defined in CA s 2(1), and includes any intentional application of force to the person of another. The events outlined in the allegation are of an intentional application of force.
- b. The offence of assault is, in terms of CPA s 6, a category 2 offence. AFDA s 20(3) provides that any period of limitation for commencing proceedings applicable to civil offences is applicable to offences charged under AFDA s 74. Pursuant to CPA s 25(3)(c), the time limit for commencing proceedings in respect of a category 2 offence punishable by one year's imprisonment is five years; although it is possible for the Solicitor-General to give prior consent to late commencement of such proceedings. In the absence of such prior consent this offence would be out of time.

7. Assault with intent to injure.

- a. Although the allegation does not go so far as to assert what the intent of the unnamed NZDF member might have been, CA s 193 provides that the offence of assault with intent to injure carries a maximum penalty of three years imprisonment.
- b. Assault with intent to injure is, in terms of CPA s 6, a category 3 offence. AFDA s 20(3) provides that any period of limitation for commencing proceedings applicable to civil offences is applicable to offences charged under AFDA s 74. Pursuant to CPA s 25(2), the time limit for commencing proceedings in respect of a category 3 offence punishable by not more than three year's imprisonment is five years; although it is possible for the Solicitor-General to give prior consent to late commencement of such proceedings. In the absence of such prior consent this offence would be out of time.

8. Failure to comply with lawful command.

- a. AFDA s 38 provides that it is an offence for someone subject to the AFDA to fail to comply with a lawful command of a superior officer, however that was communicated to him.
- b. There were directions in place for operations in Afghanistan as to the treatment of detainees.¹ If those directions were in the form of orders from a superior, if they had been communicated to the alleged offender, and if

¹ NZFOR ISAF - Individual Guidance for the Detention of Non-ISAF Personnel dated 18 May 2007.

his alleged conduct breached them,² there might have been an offence of failing to comply with a lawful command. Investigation to establish those points would be necessary.

- c. However, AFDA s 20(1) provides a general limitation period in respect of AFDA offences of three years after the commission of the offence. That period has expired, and none of the exceptions to that general principle in the rest of s 20 appear applicable.

9. Grave breach of Geneva Convention.

- a. Ref D s 3 provides that grave breaches of the Geneva Conventions, including the First Protocol thereto, are indictable offences.
- b. The grave breaches are prescribed by the Conventions and First Protocol, which form part of the Geneva Conventions Act by being Schedules to the Act. The grave breaches which could have relevance are those covering:
 - (1) Under the Third Convention (Third Schedule to the Act) in respect of prisoners of war, Article 130, wilfully causing of great suffering or serious injury to body or health; or
 - (2) Under the Fourth Convention (Fourth Schedule to the Act) in respect of civilian persons in time of war, Article 147, wilfully causing great suffering or serious injury to body or health.
- c. Prosecutions under s 3 Geneva Conventions Act require the leave of the Attorney-General (s 3(5)).
- d. Grave breaches of the Geneva Conventions are, in terms of CPA s 6(1) and CPA First Schedule, a category 4 offence. As already noted, AFDA s 20(3) provides that any period of limitation for commencing proceedings applicable to civil offences is applicable to offences charged under AFDA s 74. Pursuant to CPA s 25(1), there is no time limit for commencing proceedings in respect of a category 4 offence.
- e. On their face, the allegations do not appear to reach the high threshold of seriousness for any action to amount to a grave breach, but investigation might shed further light on the seriousness of what is alleged to have occurred. Investigation would also be required to ascertain what status the alleged victim had at the time of the alleged event to determine if he was a person protected by any of the Conventions.

Subject to AFDA

10. It is necessary that the alleged offender was at the time of the alleged offending subject to the AFDA. The allegation is to the effect that the alleged offender was serving in the NZDF at the time. The AFDA applied to all NZDF personnel serving in Afghanistan at the time of the alleged incident.

² See para 5 of the Guidance card.

11. Although AFDA s 18 and 20 generally preclude persons who have ceased to be subject to the Act from being tried after six months from their release or discharge, that does not apply in the case of civil offences (ss 20(5) and 20(6)). For civil offences the limitation periods are as discussed above. A person who has been released or discharged is deemed to be subject to the AFDA for the purpose of trial and punishment (s 18) to the extent that trial and punishment are lawful under s 20.

Comment

12. If evidence to support the allegation is uncovered, and the alleged offender can be identified, the fact that offending contrary to the AFDA is out of time might be a factor which the Solicitor-General would consider in deciding if he should extend the time limit for dealing with civil offences. It therefore follows that investigation of such civil offences, even though apparently out of time, would be prudent to avoid further investigation possibly being directed at a later stage.

Summary of advice

13. Investigation would be required to determine what evidence there is in support of particular potential offences. Once it has been determined what potential offences could be proceeded with, it will then be possible to determine whether the potential offending is outside a statutory time bar for the potential offence; or whether there is a discretion on the part of the Solicitor-General to extend that time bar.

14. This advice is privileged, and is not to be disclosed without the prior approval of the Director of Defence Legal Services sought through me.

15. Should there be any other matters you wish to discuss, I am, of course, at your disposal.

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